

**PRESENTED AT**

**33<sup>rd</sup> Annual School Law Conference**

February 22-23, 2018  
Austin, Texas

## **Medical Privacy in the Workplace**

**Jennifer A. Powell**

Jennifer A. Powell  
Eichelbaum Wardell  
Hansen Powell & Mehl, PC  
Austin, Texas

[jpowell@edlaw.com](mailto:jpowell@edlaw.com)  
512.476.9944

School districts seek and obtain medical information about its employees for various reasons. Several statutes impose duties on school districts as employers to maintain the confidentiality of medical information. This paper will provide an overview of the reasons for obtaining such information and the related statutes and corresponding duties.

## I. Sources of Medical Information in School Districts

### A. Official requests for leave of absence

1. Leave under the Family Medical Leave Act (“FMLA”)
  - a. If leave is requested for the employee’s own serious health condition, the request should be supported by a medical certification. *See* 29 C.F.R § 825.305.
  - b. The Department of Labor prototype is WH-380-E.
2. Temporary Disability Leave (“TDL”)
  - a. Requests for TDL should be supported by a note from a physician establishing inability to work, date leave is to begin, and anticipated date of return to work. Tex. Educ. Code Ann. § 21.409 (West).  
  
Practice Pointer: Deny TDL if the return to work is open-ended.
  - b. Oftentimes the note will have more details about the condition, including diagnoses and limitation.
3. Leave pool/bank requests  
  
District policy should require proof of catastrophic illness or injury.
4. Requests for extended periods of state or local leave requiring medical documentation per policy.

Practice Pointer: You should consider having your policy provide for requiring medical documentation after three days to get closer to tracking the FMLA, but note that a request for leave could trigger rights under the FMLA even for shorter periods. In other words, serious health conditions can exist in other circumstances. E.g., any in-patient hospital stay is a trigger regardless of the

number of days of incapacity or days of worked missed. 29 C.F.R. § 825.114. Therefore, HR employees need to be trained to recognize leave requests that fall within these parameters and actually kick the absences into FMLA and not just state or local leave.

- B. “Calling in sick” or “calling out” to a supervisor even without an official request for a “leave of absence.” Oftentimes, employees will call their supervisors sporadically to report that they will be out sick for a day here and there. The employee may share basic information, like “I’m sick,” or they may be more specific, e.g., “I have another migraine,” or “I am having a fibromyalgia flareup.”

Practice Pointer: If the employee tries to provide actual medical information to the campus or department-level supervisor, train them to punt that immediately to whomever serves the Personnel/Human Resources function for the district. This is helpful for a couple of reasons, First, it is possible that the absences may qualify for FMLA protection as intermittent leave, which HR should be trained to spot. Second, those employees should also be trained in handling any of the medical information that is received.

- C. Disability-related inquiries and medical examinations under the Americans with Disabilities Act, as amended (“ADA”)

<https://www.eeoc.gov/policy/docs/guidance-inquiries.html>

1. *Pre-offer* - The ADA prohibits all *pre-offer* disability-related inquiries and medical examinations, *even if* they are related to the job.
2. *Post-offer* - An employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
3. *During employment* - An employer may make disability-related inquiries and conduct medical examinations under the following circumstances:
  - a. In response to requests for accommodation;
  - b. When job-related and consistent with business necessity.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Medical Privacy in the Workplace

Also available as part of the eCourse

[Medical Privacy in the Workplace](#)

First appeared as part of the conference materials for the  
33<sup>rd</sup> Annual School Law Conference session

"Medical Privacy in the Workplace"