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ATTORNEYS AND COUNSELORS FOR TEXAS PUBLIC SCHOOLS AND LOCAL GOVERNMENT

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RE: Employee Issues for Reopening School Worksites

Dear Charter School Leaders,

As you prepare to reopen your campuses, administrative offices, and other facilities for employee presence in the wake of COVID-19 closures and telework mandates, we anticipate an array of personnel issues and questions. In order to help you prepare to handle these matters, we have prepared this advisory to address some of the most common issues that have already come up and that we expect to arise in the coming weeks and months.

Of course, the coronavirus pandemic has created unprecedented situation and this advisory does not cover every scenario that may occur at your School. Moreover, the Texas Education Agency (“TEA”), Centers for Disease Control and Prevention (“CDC”), Equal Employment Opportunity Commission (“EEOC”), Department of Labor (“DOL”), and other governmental entities are frequently updating their COVID-19 guidance as new issues emerge. Accordingly, please understand that this is an evolving issue. If you have any questions at all (including with respect to topics covered in this advisory), please do not hesitate to contact us.

I. Staff Health and Safety

General health and safety will undoubtedly be a top concern for your School and its employees. Some of these issues may implicate requirements and prohibitions under the Americans with Disabilities Act (“ADA”), the Rehabilitation Act, and/or other anti-discrimination laws. Below, we summarize current guidance and issues for staff health and safety. This is a rapidly evolving situation, especially as we are experiencing the recent spikes of infection statewide. Further guidance will be made available as we are able, and also be sure to check with local health authorities for specific needs and guidelines.

A. *COVID-19 Screening*

TEA guidelines state that teachers and other School staff should self-screen for COVID-19 symptoms before coming on campus.¹ Your School should rely on the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with COVID-19.² For example, additional symptoms beyond fever or cough may include new loss of smell or taste as well as gastrointestinal problems, such as nausea, diarrhea, and vomiting.

As of June 26, 2020, CDC & TEA have identified the following symptoms of COVID-19:	
▪ Fever or chills	▪ New loss of taste or smell
▪ Cough	▪ Sore throat
▪ Shortness of breath or difficulty breathing	▪ Congestion or runny nose
▪ Fatigue	▪ Nausea or vomiting
▪ Muscle or body aches	▪ Diarrhea
▪ Headache	▪ Repeated shaking with chills
▪ Known close contact with a person who is lab confirmed to have COVID-19	

However, beyond self-screening, CDC guidelines encourage daily health checks (e.g., temperature screening and/or or symptom checking)³ and the EEOC has specifically stated that employers may measure employers’ body temperature.⁴ Thus, your School may decide to conduct daily temperature checks and/or symptom checks before allowing staff members onto campus. (However, be sure to comply with confidentiality requirements described in Section iii (page 3), below.)

Schools should keep in mind that some people with COVID-19 do not have a fever, and also take care not to engage in unlawful disparate treatment based on protected characteristics in decisions related to screening. Your School should also consider requiring employees who will be present at the workplace to sign an affirmation that they have not had symptoms or exposure prior to returning to School facilities, and that they will notify their supervisor immediately if they experience COVID-19 symptoms or have close contact with a person with COVID-19.

¹ TEA, Summer Instruction, Activities, and School Visits: Guidance for Reopening and Student Interaction, https://tea.texas.gov/sites/default/files/covid/covid19-summer_program_operational_considerations.pdf [hereinafter “TEA Guidance for Reopening”].

² CDC, Considerations for Schools, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> [hereinafter “CDC Considerations for Schools”].

³ CDC Considerations for Schools.

⁴ EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at A.3, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.2> [hereinafter “EEOC What You Should Know”].

Whatever screening choices your School makes, including with respect to COVID-19 testing as discussed below, be sure to implement screening policies uniformly without regard to race, national origin, sex, disability, or other protected status.

i. COVID-19 Testing

The EEOC has stated that an employer may choose to administer COVID-19 testing to employees before they enter the workplace.⁵ Consistent with the ADA standard, if you choose to administer these tests, your School should ensure that the tests are accurate and reliable.⁶ The EEOC also noted that employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test and noted that accurate testing only reveals if the virus is currently present; a negative test does not mean the employee will not acquire the virus later.⁷

Even if you choose to utilize COVID-19 testing, your School should still require employees observe infection control practices (such as social distancing, regular handwashing, and other measures) that are discussed in Section C, below, in the workplace as much as possible.

Some schools may not plan to administer COVID-19 but are considering requiring proof of a negative test for all employees before returning to the workplace. While this is legally permissible, keep in mind the availability and accessibility of testing in your area when making this decision.

ii. Screening Accommodations⁸

If an employee reporting to campus requests an alternative method of screening due to a medical condition, your School should treat it as a request for reasonable accommodation and proceed as you would for any accommodation request under the ADA or the Rehabilitation Act. If the requested change is easy to provide and inexpensive, you should consider voluntarily choosing to make it available to anyone who asks, without going through an interactive process.

Alternatively, if the disability is not obvious or already known, you may ask the employee for information to establish that the condition is a disability and what specific limitations require an accommodation. If necessary, you also may request medical documentation to support the employee's request, and then determine if that accommodation or an alternative effective accommodation can be provided, absent undue hardship.

Similarly, if an employee requested an alternative method of screening as a religious accommodation, you should determine if accommodation is available under Title VII.

iii. Confidentiality of Medical Information

If your School gathers self-reported information from staff members related to COVID-19 or creates of a log of temperature check results, these records should be treated as confidential

⁵ EEOC What You Should Know at A.6.

⁶ *Id.*

⁷ *Id.*

⁸ EEOC What You Should Know at G.7.

medical records.⁹ The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information.¹⁰ A School may store all medical information related to COVID-19 in existing medical files, including an employee's statement that s/he has the disease or suspects s/he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.¹¹

While your School must keep medical information confidential, you may disclose the name of an employee to a public health agency if you learn that the employee has COVID-19.¹²

B. Employees with COVID-19 Symptoms or Exposure

As an initial matter, your School may require employees to stay home if they have symptoms of COVID-19.¹³ If a symptomatic employee is in the workplace, they should be immediately separated until they can be safely transported home or to a healthcare facility.¹⁴ Moreover, if an employee calls in sick, you may ask employees if they are experiencing symptoms of COVID-19.¹⁵ Again, your School must maintain all information about employee illness as a confidential medical record in compliance with the ADA.¹⁶

If an employee is suspected/confirmed to have COVID-19 and has been in a School facility within the past seven (7) days, your School should follow CDC guidelines, including closing off the areas used by the sick person and not using those areas until they have been cleaned and disinfected.¹⁷

Your School should also direct staff members to stay home if they have been diagnosed with COVID-19 (with or without symptoms), are waiting for COVID-19 test results (with or without symptoms), are asymptomatic but recently had close contact with a person with COVID-19, or have recently traveled from somewhere outside the United States (or on a cruise ship or river boat).¹⁸ These employees will likely be entitled to emergency paid sick leave under the Families First Coronavirus Response Act ("FFCRA"). Employees may return to campus in accordance with the CDC guidelines on the following page.

When an employee returns to work, you may require a doctor's note certifying fitness for duty.¹⁹ As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation.²⁰

⁹ EEOC What You Should Know at B.1, B.3.

¹⁰ EEOC What You Should Know at B.1.

¹¹ *Id.*

¹² EEOC What You Should Know at B.3.

¹³ EEOC What You Should Know at A.4.

¹⁴ CDC Considerations for Schools.

¹⁵ EEOC What You Should Know at A.1.

¹⁶ *Id.*

¹⁷ CDC Considerations for Schools.

¹⁸ CDC, Quarantine and Isolation, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine-isolation.html>; CDC, Returning from International Travel, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/after-travel-precautions.html>.

¹⁹ EEOC What You Should Know at A.5.

²⁰ *Id.*

Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the coronavirus.²¹

Staff should stay home if they:	Staff may return when:
<p>Have been diagnosed with COVID-19 <i>OR</i> Are waiting for COVID-19 test results <i>OR</i> Have symptoms of COVID-19</p>	<p>Testing available: <u>Symptomatic</u>: if they think or know they had COVID-19, had symptoms, and testing is available, they may return when:</p> <ul style="list-style-type: none"> ▪ No fever; and ▪ Symptoms have improved; and ▪ Received two (2) negative test results in a row, at least 24 hours apart. <p><u>Asymptomatic</u>: if they tested positive for COVID-19, but had no symptoms, and testing is available, they may return after: two (2) negative test results in a row, at least 24 hours apart.</p> <p>Testing unavailable: <u>Symptomatic</u>: If they think or know they had COVID-19, and had symptoms, they may return without testing after:</p> <ul style="list-style-type: none"> ▪ Three (3) days with no fever; and ▪ Symptoms improved; and ▪ Ten (10) days since symptoms first appeared <p><u>Asymptomatic</u>: if they had no symptoms, they may return without testing after ten (10) days have passed since the positive test.</p>
<p>Are asymptomatic but recently had close contact with a person with COVID-19</p>	<p>Fourteen (14) days have passed since their last exposure.</p>
<p>Recently traveled from somewhere outside the U.S. or on a cruise ship or river boat</p>	<p>Fourteen (14) days have passed since they returned home</p>

²¹ *Id.*

C. *Infection Control Practices*

Both the TEA and the CDC recommend that school staff wear cloth face coverings.²² If available, employees should consider wearing non-medical grade face masks.²³ These face coverings are most important in times when physical distancing is difficult, such as in hallways, between classes, and at the beginning or end of the school day.²⁴ **Keep in mind that your city or county may require cloth face coverings under a local order.** Both TEA and the CDC also recommend that staff be encouraged to sanitize and/or wash hands frequently, cover coughs and sneezes with a tissue, throw used tissues in the trash and wash hands immediately for at least 20 seconds.²⁵

The EEOC has clarified that employers may require employees to wear personal protective equipment (“PPE”) during a pandemic.²⁶ If an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, modified face masks for interpreters or others who communicate with an employee who uses lip reading, or gowns designed for individuals who use wheelchairs), or a religious accommodation under Title VII (such as modified equipment due to religious garb), your School should discuss the request and provide the modification or an alternative if feasible and not an undue hardship on the operation of the School under the ADA or Title VII.²⁷ Similarly, an employer may require its employees to adopt infection-control practices at the workplace.²⁸ These include regular hand washing, coughing and sneezing etiquette, proper tissue usage and disposal, and social distancing.²⁹

Thus, your School may choose to require employees to wear PPE and utilize other infection control practices. If you require staff to use PPE and other infection control practices, we recommend making the expectations clear to all staff members in writing, for example when PPE must be worn, when employees must wash and/or sanitize their hands, and social distancing expectations. Also consider providing staff members with literature concerning best practices for wearing PPE, handwashing and sanitization, respiratory etiquette, etc. The CDC website has many resources available that may be printed and provided to staff members.³⁰

The TEA, the Governor’s Strike Force, and the Texas Department of Emergency Management, procured PPE to help school systems reopen for the 2019-2021 school year, including masks, gloves, thermometers, and hand sanitizer.³¹ PPE allotments were calculated by using 2019-2020

²² TEA Guidance for Reopening; CDC Considerations for Schools.

²³ *Id.*

²⁴ TEA Guidance for Reopening.

²⁵ TEA Guidance for Reopening; CDC Considerations for Schools.

²⁶ EEOC What You Should Know at G.2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; CDC Considerations for Schools.

³⁰ General infection control: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>; Handwashing resources: <https://www.cdc.gov/handwashing/when-how-handwashing.html>; Cloth face covering resources: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>; Social distancing resources: <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>; Print resources (including printable posters): <https://www.cdc.gov/coronavirus/2019-ncov/communication/print-resources.html>; Communications resources generally: <https://www.cdc.gov/coronavirus/2019-ncov/communication/index.html>.

³¹ <https://tea.texas.gov/sites/default/files/covid/covid19-ppe-update-for-leas.pdf>.

student and on-campus staff counts and were allotted on a per pupil, district basis, and PPE is expected to arrive between mid-July and early August. Districts maintain the discretion and responsibility for distributing the PPE according to their local context.

As part of your infection control practices, your School should also develop and implement a plan for cleaning and disinfecting, in accordance with CDC guidance.³² The plan should be provided to employees charged with implementing it, and training should be provided as necessary.

II. Reasonable Accommodations

The COVID-19 pandemic may create a need for new and/or different reasonable accommodations for employees and we expect this to be a common issue, particularly with respect to employees with underlying conditions that make them vulnerable to severe illness from COVID-19.

As a preliminary matter, if an employee requests an accommodation for a medical condition either at home or in the workplace during the coronavirus pandemic, an employer may still request information to determine if the condition is a disability³³ and may still engage in the interactive process and request information from an employee about why an accommodation is need.³⁴

Also keep in mind that your School is always free to provide additional flexibilities to employees who are not entitled to reasonable accommodations by law, but take care to do so without engaging in disparate treatment based on race, national origin, sex, disability, or another protected characteristic.

The EEOC has provided further guidance on reasonable accommodations issues, consolidated and summarized below.

A. *Requests for Reasonable Accommodations for High-Risk Employees*

An employee who has one of the medical conditions that the CDC has said may put him or her at a higher risk for severe illness from COVID-19³⁵ may request reasonable accommodations.³⁶ In order to do so, the employee—or a third party, such as an employee’s doctor—must let the School know that s/he needs a change for a reason related to the underlying condition.³⁷ Employees may

³² CDC, Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes, <https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html>; CDC, Guidance for Cleaning and Disinfecting, <https://www.cdc.gov/coronavirus/2019-ncov/community/cleaning-disinfecting-decision-tool.html>.

³³ EEOC What You Should Know at D.5.

³⁴ EEOC What You Should Know at D.6.

³⁵ These employees may include people with chronic lung disease or moderate to severe asthma, people who have serious heart conditions, people who are immunocompromised, people with severe obesity, people with diabetes, people with chronic kidney disease undergoing dialysis, and people with liver disease. CDC, People Who Are at Higher Risk for Severe Illness, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>.

³⁶ EEOC What You Should Know at G.3.

³⁷ *Id.*

request accommodation orally or in writing,³⁸ and while the employee (or third party) does not need to use the term “reasonable accommodation” or reference the ADA, s/he may do so.³⁹

The employee or third-party representative should communicate that s/he has a medical condition that necessitates a change to meet a medical need.⁴⁰ After receiving a request, the School may ask questions or seek medical documentation to help decide if the individual has a disability and if there is a reasonable accommodation, barring undue hardship, that can be provided.⁴¹ While the EEOC has not

Your School does not have to provide a particular reasonable accommodation if it poses an “undue hardship,” which means “significant difficulty or expense.”⁴² Your School may consider the COVID-19 pandemic in this assessment and, in some instances, an accommodation that would not have posed an undue hardship prior to the pandemic may pose one now.⁴³

i. Special Circumstance: Age⁴⁴

Although the CDC has explained that individuals age 65 and over are at higher risk for a severe case of COVID-19 if they contract the coronavirus, the Age Discrimination in Employment Act (“ADEA”) prohibits employment discrimination against individuals age 40 and older, but does not include a right to reasonable accommodation for older workers due to age.

However, the CDC has encouraged employers to offer maximum flexibilities to this group and your School is free to provide flexibility to workers age 65 and older; the ADEA does not prohibit this, even if it results in younger workers ages 40-64 being treated less favorably based on age in comparison. Your School may not, however, involuntarily exclude an individual from the workplace based on his or her being 65 or older, even if acting for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19.

Workers age 65 and older also may have medical conditions that bring them under the protection of the ADA as individuals with disabilities. As such, they may request reasonable accommodation for their disability as opposed to their age.

ii. Special Circumstance: Pregnancy⁴⁵

Similarly, your School may not exclude an employee from the workplace involuntarily due to pregnancy. Sex discrimination under Title VII of the Civil Rights Act includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff, or furlough.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² EEOC What You Should Know at D.9.

⁴³ EEOC What You Should Know at D.9–D.11.

⁴⁴ EEOC What You Should Know at H.1.

⁴⁵ EEOC What You Should Know at J.1–J.2.

However, there may be a right to accommodation based on pregnancy during the coronavirus pandemic. There are two federal employment discrimination laws that may trigger accommodation for employees based on pregnancy. First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, you must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. Your School should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

B. Employees Already Receiving Reasonable Accommodations⁴⁶

An employee who was already receiving a reasonable accommodation prior to the COVID-19 pandemic may be entitled to an additional or altered accommodation, absent undue hardship. For example, an employee who is teleworking because of the pandemic may need a different type of accommodation than what he uses in the workplace. Your School may discuss with the employee whether the same or a different disability is the basis for this new request and why an additional or altered accommodation is needed.

C. Timing of Request

If your employees are currently teleworking, you do not need to postpone discussing a request from an employee with a disability for an accommodation that will not be needed until s/he returns to the workplace. Indeed, the EEOC has specified that employers may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens and begin the “interactive process.”⁴⁷

Your School may give higher priority to discussing requests for reasonable accommodations that are needed while teleworking, but you may begin discussing other requests as soon as they are made.⁴⁸ If a reasonable accommodation is granted, your School also may be able to make some arrangements for the accommodation in advance.⁴⁹

⁴⁶ EEOC What You Should Know at D.4.

⁴⁷ EEOC What You Should Know at D.8.

⁴⁸ EEOC What You Should Know at D.3.

⁴⁹ *Id.*

*D. High-Risk Employees Who Have Not Requested Accommodations*⁵⁰

If you know that an employee has an underlying condition placing him or her at higher risk for severe illness from COVID-19, you may be concerned about their health even if the person has not requested a reasonable accommodation. As an initial matter, if the employee does not request a reasonable accommodation, the ADA does not mandate that the employer take action.

Even if you are concerned about the employee's health being jeopardized upon returning to the workplace, the ADA does not allow you to exclude the employee—or take any other adverse action—solely because the employee has a disability that the CDC identifies as potentially placing him or her at “higher risk for severe illness” from COVID-19. Under the ADA, such action is not allowed **unless** the employee's disability poses a “direct threat” to his health that cannot be eliminated or reduced by reasonable accommodation.

The ADA direct threat requirement is a high standard that, if challenged, would require an employer to show that the individual has a disability that poses a “significant risk of substantial harm” to his or her own health. A direct threat assessment cannot be based solely on the condition being on the CDC's list; the determination must be an individualized assessment based on a reasonable medical judgment about the particular employee's disability—not the disability in general—using the most current medical knowledge and/or on the best available objective evidence. The ADA regulation requires an employer to consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.

Analysis of these factors will likely include considerations based on the severity of the COVID-19 pandemic in a particular area and the employee's own health (for example, whether the employee's disability is well-controlled), and his particular job duties. A determination of direct threat also would include the likelihood that an individual will be exposed to the coronavirus at the worksite. Measures that an employer may be taking in general to protect all workers, such as mandatory social distancing, also would be relevant.

Even if you determine that an employee's disability poses a direct threat to his or her own health, you are still prohibited from excluding the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship). The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This can involve an interactive process with the employee.

If there are not accommodations that permit this, then you must consider accommodations such as telework, leave, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation.

⁵⁰ EEOC What You Should Know at G.4.

*E. Potential Accommodations*⁵¹

The EEOC provided examples of accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self. Accommodations may include additional or enhanced protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to employees returning to its workplace. Accommodations also may include additional or enhanced protective measures, for example, erecting a barrier that provides separation between an employee with a disability and coworkers/the public or increasing the space between an employee with a disability and others.

Another possible reasonable accommodation may be elimination or substitution of particular “marginal” functions (less critical or incidental job duties as distinguished from the “essential” functions of a particular position). In addition, accommodations may include temporary modification of work schedules (if that decreases contact with coworkers and/or the public when on duty or commuting) or moving the location of where one performs work (for example, moving a person to the end of a production line rather than in the middle of it if that provides more social distancing).

The EEOC emphasized that these are only a few ideas and that identifying an effective accommodation depends, among other things, on an employee’s job duties and the design of the workspace. An employer and employee should discuss possible ideas; the Job Accommodation Network (www.askjan.org) also may be able to assist in helping identify possible accommodations. The EEOC also made a point to note that, as with all discussions of reasonable accommodation during this pandemic, employers and employees are encouraged to be creative and flexible.

*F. Inviting Employees to Request Flexibility*⁵²

The EEOC has addressed best practices for an employer to invite employees to request flexibility in work arrangements prior to returning to the workplace. According to the EEOC, the ADA and the Rehabilitation Act permit employers to make information available in advance to **all** employees about who to contact—if they wish—to request accommodation for a disability that they may need upon return to the workplace, even if no date has been announced for their return. If requests are received in advance, you may begin the interactive process. You may choose to include in such a notice all the CDC-listed medical conditions that may place people at higher risk of serious illness if they contract COVID-19, provide instructions about who to contact, and explain that the employer is willing to consider on a case-by-case basis any requests from employees who have these or other medical conditions.

Your School also may send a general notice to all employees who are designated for returning to the workplace, noting that you are willing to consider requests for accommodation or flexibilities on an individualized basis. You should specify if the contacts differ depending on the reason for the request, for example if the office or person to contact is different for employees with disabilities

⁵¹ EEOC What You Should Know at G.5.

⁵² EEOC What You Should Know at G.6.

or pregnant workers than for employees whose request is based on age or child-care responsibilities.

Either approach is consistent with the ADEA, the ADA, and CDC guidance that emphasizes the importance of employers providing accommodations or flexibilities to employees who, due to age or certain medical conditions, are at higher risk for severe illness. Regardless of the approach, however, you should ensure that whoever receives inquiries knows how to handle them consistent with the different federal employment nondiscrimination laws that may apply, for instance, with respect to accommodations due to a medical condition, a religious belief, or pregnancy.

*G. Employees with High-Risk Family Members*⁵³

An employee is not entitled to an accommodation under the ADA in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition. Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated. For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure.

III. Employee Leave

The COVID-19 pandemic will likely cause some increased employee absence. As you may be aware, the federal government enacted the FFCRA to provide new paid leave entitlements for coronavirus-related employee absences. Employees who have COVID-19 or family members with COVID-19 may also be entitled to Family and Medical Leave Act (“FMLA”) leave. A broad overview of these federal leave entitlements, as well as other employee leave issues, are addressed below.

*A. Federal Leave Entitlements: FFCRA*⁵⁴

Some employees may be entitled to emergency paid sick leave (“EPSL”) under the Emergency Paid Sick Leave Act (“EPSLA”) and/or expanded family leave (“EFMLA”) under the Emergency Family and Medical Leave Expansion Act. (“EFMLEA”), both passed as part of the FFCRA. Under the FFCRA, an employee qualifies for EPSL if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;

⁵³ EEOC What You Should Know at D.13.

⁵⁴ DOL, Families First Coronavirus Response Act: Employer Paid Leave Requirements, <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Of particular note, an employee is eligible for ESPL if they cannot work because a health care provider directed or advised them to stay home or otherwise quarantine because the health care provider believes that the employee may have COVID-19 **or is particularly vulnerable to COVID-19**.⁵⁵

Under the FFCRA, an employee qualifies for EFMLA leave **only** if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

An employee may be entitled to two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work due to reasons 1, 2, or 3, or two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay where the employee is unable to work due to reasons 4, 5, or 6. An employee may be entitled to up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee is unable to work for reason 5. Paid leave is capped at specific maximum amounts per worker.

Administrators at your School should also keep in mind the particular rules and restrictions the FFCRA sets forth regarding use of accrued vacation leave, personal leave, or medical or sick leave (*i.e.* employees may not be required to take existing leave before EPSL, employees may be required to take existing leave concurrently with final 10 weeks of EFMLA, and other scenarios based on employee agreement). Please contact us if you have any questions regarding how the FFCRA applies to a scenario at your School.

B. Federal Leave Entitlements: FMLA

An employee who is sick or whose family members are sick from COVID-19 may also be entitled to leave under the FMLA under certain circumstances. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons.⁵⁶ This may include COVID-19 where complications arise that create a "serious health condition" as defined by the FMLA.⁵⁷

⁵⁵ DOL, Families First Coronavirus Response Act: Questions and Answers at 61, <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions> [hereinafter DOL Q&A].

⁵⁶ DOL, COVID-19 and the Family and Medical Leave Act Questions and Answers, <https://www.dol.gov/agencies/whd/fmla/pandemic>.

⁵⁷ *Id.*

Keep in mind that an employee is only entitled to **total** of 12 workweeks for FMLA or EFMLA reasons during a 12-month period.⁵⁸ For example, if an employee takes four weeks of expanded family and medical leave in April 2020 to care for her child whose school is closed due to a COVID-19 related reason, those four weeks count against the employee's entitlement to 12 weeks of FMLA leave in a 12-month period (even if the regular FMLA leave is for a COVID-related illness).⁵⁹

However, an employee is entitled to paid sick leave under the EPSL regardless of how much leave they have taken under the FMLA.⁶⁰ Paid sick leave is not a form of FMLA leave and therefore does not count toward the 12 workweeks in the 12-month period cap.⁶¹ But if an employee takes paid sick leave concurrently with the first two weeks of expanded family and medical leave, which may otherwise be unpaid, then those two weeks do count towards the 12 workweeks in the 12-month period.⁶²

C. *Directing Employees to Stay Home*⁶³

In some situations, your School may need to direct employees to stay home due to reasons related to COVID-19 but those employees may not qualify for federal leave entitlements or may have exhausted federal leave entitlements. Under these circumstances, if the employees are unable to telework, your School may direct employees to take vacation, leave bank deductions, or leave without pay so long as it is consistent with local policy. However, keep in mind that you still comply with Fair Labor Standards Act ("Fair Labor Standards Act") requirements.

For non-exempt employees, your School generally does not have to pay employees for hours not worked, including when they are at home (and not working) due to COVID-19, regardless of whether the employee chose to stay home or you instructed the employee to stay home. Exempt, salaried employees generally must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions. However, an employee will not be considered paid "on a salary basis" if deductions from the predetermined compensation are made for absences during a week in which the employee performs any work. Exempt salaried employees are not required to be paid their salary in weeks in which they perform no work.

Therefore, your School may direct exempt staff to take vacation or debit their leave bank account in the case of an office closure or if they are directed to stay home, whether for a full or partial day, provided the employees receive in payment an amount equal to their guaranteed salary. In the same scenario, an exempt employee who has no accrued benefits in the leave bank account, or has limited accrued leave and the reduction would result in a negative balance in the leave bank account, still must receive the employee's guaranteed salary for any absence(s) occasioned by a School closure or directive to stay home in order to remain exempt. Of course, if the employee is able to telework, this will resolve the issue.

⁵⁸ DOL Q&A at 44–45.

⁵⁹ DOL Q&A at 45

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ DOL, COVID-19 and the Fair Labor Standards Act Questions and Answers, <https://www.dol.gov/agencies/whd/flsa/pandemic>.

D. Employee Refusal to Report

Some employees may be unwilling to report to work because they are afraid of becoming infected with the coronavirus. An employee who refuses to work due to a general fear of contracting COVID-19 is likely not protected from adverse employment action under federal law. Under the Occupational Safety and Health Act (“OSH Act”), employees are protected from retaliation for refusing to work under certain dangerous circumstances. As described by the Occupational Safety and Health Administration (“OSHA”), an employee has a legal right to refuse to work if **all** of the following conditions are met:

- Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
- The employee refused to work in “good faith.” This means that the employee must genuinely believe that an imminent danger exists; and
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn’t enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels, such as requesting an OSHA inspection.⁶⁴

The criteria must be assessed on a case-by-case basis, and a generalized fear of COVID-19 is unlikely to qualify. However, the situation may be different if your community is a COVID-19 outbreak hotspot or if a student or staff member has a confirmed or presumed COVID-19 case.

Absent particularized circumstances, it is likely your School may issue directives to employees that they must report to work and notify them that refusal to report will result in consequences, up to and including termination. Carefully document all communications with and to employees, including documenting the current risk level for COVID-19, to support any future employment action. As a practical matter, you School should to work with employees to determine whether any changes to the work environment may be implemented to make them more comfortable without materially affecting the job or consider reassigning duties where possible. Even if the employee’s refusal is deemed justified, the OSH Act does not require that the employee be paid for any time he or she is not at work due to his or her refusal.

Keep in mind, however, that if your employee cites a health issue in their refusal to work, for example an anxiety disorder or an underlying health condition rendering them more vulnerable to COVID-19 infection, this should trigger to interactive process to determine whether the employee is entitled to reasonable accommodations under the ADA.

IV. Conclusion


While it is likely that the coming weeks and months will bring many unexpected personnel scenarios and questions, we hope this advisory serves as a reference point for common issues and allows you to identify legal areas where extra care may be warranted.

⁶⁴ OSHA, Workers’ Right to Refuse Dangerous Work, <https://www.osha.gov/right-to-refuse.html>.

Of course, please do not hesitate to contact us if you would like to discuss further or if you have questions regarding a particular situation at your School.

Cordially,

**SCHULMAN, LOPEZ,
HOFFER & ADELSTEIN, LLP**



Joseph E. Hoffer