Connecticut Association of Public School Superintendents
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ROUNDING THE CORNER?
Vaccinations, Post-FFCRA Leaves and Life after COVID

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The ongoing COVID-19 pandemic continues to pose unprecedented and significant challenges for schools. The latest wave of illnesses only serves to complicate decisions for school superintendents, who have had to make the best out of difficult decisions. However, the increasing availability of safe and effective vaccines gives us cause for hope that the end of the pandemic is coming -- though certainly not as quickly as we would like. We cannot say when that end will be or what it will look like, but we can address some of the key questions that school superintendents are asking in the interim.

QUESTION ONE

What are the legal issues presented by vaccination programs?

ANSWER to QUESTION ONE

Q: *Can we mandate that our employees get vaccinated?*

On Wednesday, December 16, 2020, the Equal Employment Opportunity Commission started to answer some of the emerging questions with an update to its "What You Should Know…" about COVID-19 website. In doing so, it provided new guidance on how employers can implement vaccination programs without running afoul of existing laws. Although the EEOC guidance does not explicitly answer of whether employers CAN mandate a vaccination, it is clear from the guidance that mandatory vaccination programs are permissible under federal law. We haven't seen anything from the state that would run contrary to that either.

BUT, when and how employers can mandate vaccinations will depend on a variety of factors, including the availability of the vaccine. Employers should be mindful that the current COVID-19 vaccine is approved for emergency use; full approval is expected in early 2021.

Q: *If we mandate vaccinations, what things should we consider?*

We'll talk about this in more detail in the next issue but employers must be aware that there are numerous legal issues that can arise through a mandatory vaccination program, and precautions employers should take. For example,

- If an employer requires the vaccine, it must ensure that pre-screening questions are "job-related and consistent with business necessity." If an employer has a voluntary vaccination program, any answers to pre-screening, disability-related questions must also be voluntary.
- The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential, and employers must be mindful of other relevant laws, such as Genetic Information Nondiscrimination Act.
- Whether to use a third party to administer the vaccine within the workplace, or whether employees will be allowed to obtain it on their own and then provide proof of vaccination. There may be legal and practical considerations for each approach.

Q: *What if an employee refuses to get vaccinated?*

The EEOC guidance makes clear that employers must discuss whether reasonable accommodations are available to employees who cannot get the vaccine due to a disability or due to religious beliefs.

Employers must also determine if a disabled individual who cannot be vaccinated would be a "direct threat" to the workplace by assessing (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. For schools, this need not be a complicated analysis, but it should be done nonetheless.

If an employer determines that an individual who cannot be vaccinated due to disability poses a "direct threat" at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

Ultimately, if no reasonable accommodation is available (e.g. remote work), and the individual's presence would constitute a "direct threat" to the workplace, the EEOC guidance states that the individual's employment can be terminated.

Such decisions can be complicated, however, and employers may want to consult their legal counsel before taking such action.

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

Q: *Given those considerations, should we mandate vaccinations for employees?*

Not all employers are alike and not all positions within employers are alike, and the answer to this question may be a judgment that turns on a number of factors. In general, we have said that it depends on the type of industry the company is in, whether employees can work remotely, whether the employer is unionized, whether the employer is prepared to manage such a program, and how such policy will be received by employees. For schools, this presents additional challenges given the different constituencies. (This calculus may also be in flux given the potential for the UK Variant (B117) to be more contagious, particularly among children.) Ultimately, some may decide to implement the same approach that they use for seasonal flu — strong encouragement, but no mandates. Other employers have already decided that the time is now right, and the risk is too great, not to require employees to take preventative measures such as getting a flu or COVID-19 vaccine. Note that mandatory vaccination programs can sometimes negatively impact employee morale; education to employees is key to managing that risk.

Note: While the Governor may have the power, during this Public Health Emergency, to mandate vaccines, he is extremely unlikely to do so; the hope is to get approximately 75 percent of the population to take the vaccine without a government mandate.

Q: How do we figure out who should get vaccines and when?

In Connecticut we are still in Phase 1a:

- Healthcare Personnel
- Long-Term Care Facility Residents
- Medical First Responders at risk of exposure to COVID-19

The Vaccine Advisory Group is meeting on January 14, 2021 to try to finalize Phase 1b. Three primary groups will be eligible for the vaccine in Phase 1b:

- Front line essential workers
- Individuals and staff in congregate settings
- Individuals 75 years of and older

According to allocation subcommittee, teachers and staff would be considered among that group; it’s a category that has 210,000 people

- Education and Childcare Administrators,
- Post-Secondary, Pre-K, Elementary, and Secondary School Teachers,
- Special Education Teachers,
- Tutors,
- Childcare Workers,
- School Bus Drivers,
- School Psychologists,
- Other School Staff

For Phase 1a, the state has required a three step process, which is likely to be followed in Phase 1b. These steps are as follows:

“Step 1: Fill Out the Employer Coordinator Survey

If you are representing your business or organization as the person enrolling your employees, then you'll need to complete the Employer Coordinator survey here.

Please be sure that you first have a roster of eligible personnel that qualify for the vaccine.

Step 2: Register with the Vaccine Administration Management System (VAMS)
After you complete the survey in Step 1, you will receive an email from VAMS within 24-48 hours. This email will guide you through registering your business or organization so your employees can access the vaccine.

Step 3: Upload your Roster of Eligible Employees
Once you have registered in Step 2, you can upload your list of eligible employees. This will allow your employees to schedule a vaccination appointment, based on supply.

Also, as the Employer Coordinator, you will be invited to a virtual training which covers the VAMS process and details how your workforce can access the vaccine.”

Expect further details later this week but schools may want to start thinking about who it may designate an employer coordinator.

Q: Can employers be held liable for mandating a vaccine program?

It is unclear at this time whether and how employers might be held liable for an adverse issues that may arise from a mandatory vaccination program.

First a reality check. The vaccines from Moderna and Pfizer have had very mild side effects with the most common reports being redness, swelling and soreness. Severe allergic reactions are exceedingly rare - 11 cases out of a million, with most of those cases being treated thereafter. It's clear thus far from the scientific data that the vaccines are safe, according to the CDC.

What we can say is that it's probable that an injury arising from an employee that is harmed by the vaccine would likely be covered by the state workers' compensation program. This would limit a school's liability. But we do anticipate that there may be lawsuits challenging this. We'll see if the state passes legislation to further encourage employers to do these types of programs without unnecessary risk to the employers.

QUESTION TWO

What are the practical issues presented by vaccination programs?

ANSWER TO QUESTION TWO

- In our response to Question One, we discussed the threshold question of whether employees can require their employees be vaccinated against COVID-19.

- In addition to the general question of whether vaccination programs are authorized, we want to remind school districts that there are labor relations implications to implementing such programs.

Collective Bargaining Implications

- For example, a board decision to require mandatory vaccination of all employees would be a change in working conditions. Any such changes in working conditions would typically require notice to the affected unions and an opportunity to negotiate.
  We believe that the scope of the negotiations would be over the impact of the decision and not the decision itself, because addressing health and safety concerns is a management right (and obligation).

- However, we note that the COVID-19 vaccine is approved for emergency use only at this time and that full approval is expected at some point in 2021.

Administration

- A voluntary vaccination program, however, does not carry such stringent collective bargaining implications. Notwithstanding, once the Board has made a decision to administer the vaccine (whether through a mandatory or voluntary vaccination program), the next step is to ensure that the implementation of the vaccination program does not violate employee

rights. Moreover, even a voluntary vaccination program may be considered a change in working conditions, through it is hard to know what the unions would want to bargain, perhaps paid time off to be vaccinated.

- As mentioned above, the Equal Employment Opportunity Commission updated its website on December 16, 2020 to address some of the questions employers have raised regarding COVID-19 vaccinations generally. *See* What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and other EEOC Laws. Technical Assistance Questions and Answers - Updated on Dec. 16, 2020.

1. What questions to ask?

- In the December 16, 2020 guidance, the EEOC generally warns employers against violating the ADA and other relevant laws, such as the Genetic Information Nondiscrimination Act as follows:

> Although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. . . . .
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> [Similarly]... if the administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical histories, may violate [Title II of the Genetic Information Nondiscrimination Act].
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> **K.2. According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If the employer requires an employee to receive the vaccination from the employer (or a third party with whom the employer contracts to administer a vaccine) and asks these screening questions, are these questions subject to the ADA standards for disability-related inquiries?** *(12/16/20)*
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> Pre-vaccination medical screening questions are likely to elicit information about a disability. This means that such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." **To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others**. See Question K.5. for a discussion of direct threat.

By contrast, there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement. **First, if an employer has offered a vaccination to employees on a voluntary basis (i.e. employees choose whether to be vaccinated), the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary**. 42 U.S.C. 12112(d)(4)(B); 29 C.F.R. 1630.14(d). If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.

2. **If the employee refuses to participate in the voluntary vaccination program, can we ask for proof of receipt of the COVID-19 vaccination?**

   The December 16, 2020 EEOC guidance specifically addresses this question as follows:

   K.3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry? *(12/16/20)*

   No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. **Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry**. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." **If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.**

   Confidentiality

- As is always the case, all employee medical information obtained in the course of the vaccination program is confidential, even if that information is not about a disability.

  Who pays for the COVID-19 vaccine?

- Vaccines will be The CDC website indicates "Vaccine doses purchased with U.S. taxpayer dollars will be given to the American people at no cost. However, vaccination providers will be able to charge an administration fee for giving the shot to someone. Vaccine providers can get this fee reimbursed by the patient's public or private insurance company or, for uninsured patients, by the Health Resources and Services Administration's Provider Relief Fund."

QUESTION THREE:

We were surprised when Congress passed the Coronavirus Response and Relief Supplemental Appropriations Act and did not mandate an extension of the FFCRA? My unions are asking for us to extend the benefits anyway. What are my obligations?

ANSWER TO QUESTION THREE:

To determine district obligations, we must start with some threshold questions:

- What does my COVID MOA say?
  - Some COVID MOAs provide for "revisiting" the terms of the MOA upon changed circumstances. QUERY: Is "revisiting' the same as "negotiating"?
  - Some COVID MOAs provide for reopeners upon changed circumstances.
  - Some COVID MOAs are silent.

NOTE: Agreeing to "negotiate" has significant legal consequences. Conn. Gen. Stat. § 10-153f(e) governs situations in which the parties are required to or have agreed to negotiate during the term of an agreement. The statute requires that the parties notify the Commissioner of Education of any such negotiations within five (5) days of the commencement of such negotiation, and the parties have twenty-five (25) days to negotiate, followed by twenty-five (25) days for mediation, if the parties have not reached agreement. If the parties do not reach agreement during the mediation period, the Commissioner imposes binding arbitration to resolve the negotiations.

- Has the employer changed working conditions?

NOTE: The duty to negotiate arises when an employer proposes to change working conditions. Some changes are subject to decisional bargaining, and other changes are subject to impact bargaining. Health and safety issues or changes in educational methodology will generally be considered management prerogatives, and the duty to negotiate will be limited to negotiations over the impact of the change on employees, not the decision itself.

NOTE: The affected union(s) must generally have an opportunity to negotiate before the change is made. The State Board of Labor Relations has ruled that negotiations after the change has been made is prejudicial to the union, and post hoc negotiations may not satisfy an employer's obligation to negotiate.

NOTE: If the union is clearly on notice of an impending change, and neither the employer nor the union initiates negotiations, the union may not be able to initiate bargaining after the fact. The State Board of Labor Relations has ruled that a failure to make a timely request for negotiations may constitute a waiver of the right to insist upon negotiations over a change in working conditions:

> [A]lthough the employer has an initial duty to propose bargaining about a change he wishes to make (concerning a mandatory subject of bargaining) his conduct is to be judged in its entirety and in context as of the time the complaint is filed. If the employer announces the change without proposing it for negotiation at the onset, this does not free the union of a duty on its part to propose bargaining where there is full notice and a reasonable opportunity to do so. And if thereafter the change is implemented without bargaining neither party can fault the other for the lack of negotiation.

City of New Haven, Decision No. 1558 (1977), *aff'd*, *New Haven Police Local 530 et al v. Board of Labor Relations*, Superior Court, judicial district of New Haven, Dkt. No. 114240L (October 2, 1978)

In any such discussions, there are definitional issues.

- Is the request to extend the deadline by which employees may avail themselves of the benefits that were available under the Families First Coronavirus Response Act?
- Is the request for a new "bank" of leave benefits?

What practices for special leave benefits are emerging after EPSLA and FMLA+ benefits expired?

NOTE: Absent an employer-initiated change in working conditions, there is no duty to negotiate. If the district has not changed its practices, whether to make special leave arrangements due to COVID is a business judgment for the school district.

NOTE: Any such discussions should be held informally to prevent inadvertently commencing negotiations governed by Conn. Gen. Stat. § 10-153f(e).

NOTE: The emerging trends are as follows:

- Few districts are simply extending FFCRA leave benefits. The challenges of having adequate staff members available to teach have caused school districts to be cautious in extending leave benefits.

- When employees are sick, whether from COVID or otherwise, they are usually expected to use sick leave. Some special arrangements continue whereby teachers who are sick with COVID are on paid leave without charge to sick leave.

- When employees must quarantine, most districts are permitting them to teach remotely, with paraprofessionals or substitute teachers providing for the physical supervision of the students.

- If teachers or other school employees cannot work remotely during quarantine, most districts are drawing a distinction between work-related quarantine and other quarantine. If the quarantine is related to an exposure at work, employees are generally given paid leave without charge to sick leave. By contrast, if the quarantine is related to some other exposure, such as travel or family gatherings, the approach is more varied. Some districts are permitting employees to take paid sick leave to the extent accrued. However, other districts are not permitting employees to use sick leave (because the employees are not sick), but rather they are requiring employees to treat such time as personal time away from work without pay except for any available personal leave.

NOTE: FMLA remains available for employees for the reasons specified in the law prior to the FFCRA. With limited exceptions, those reasons do not include child care. FMLA does remain available for pregnancy, child birth, adoption or foster care, one's own serious health condition or to provide care to a family member with a serious health condition.

FMLA+ augmented FMLA, but all such leave is limited to the twelve weeks available in any twelve-month period. Depending on the "FMLA year" of the district, there may be a reset effective January 1, 2021 for employees who worked the qualifying number of hours in the previous "FMLA year" -- 1,250 hours.

QUESTION FOUR

Do I have any new obligations as an employer when I direct employees to work remotely?

ANSWER TO QUESTION FOUR

Prior to the pandemic, remote work or "telework" was an exception to the general consensus that in-person work was a preferable model. The pandemic has forced employers to reconsider its notions and in many businesses, remote work has become an essential part of its workforce. Remote work is deemed to be a preferable way to work to reduce the changes for a widespread outbreak that could impact a substantial portion of the workforce

But remote work has its own set of issues, the scope of which we are only beginning to grasp. For example, suppose an employee is living in Massachusetts and teaching her remote classes in Enfield full-time at home.

What laws apply to cover that employee? Is that employee a Connecticut employee or a Massachusetts employee? Suppose the employee doesn't teach but is rather an office worker and the office is deemed closed? What then? Is the office still in Enfield?

These are challenging issues that need to be examined on a case-by-case basis. While in many instances, schools would likely argue (successfully) that those workers are still Connecticut-based employees, when does that line get crossed? 3 months? 6 months? Some remote workers in other industries are approaching nearly a year out of the office. What then?

Among the issues employers should consider:

- Do those employees still report to a Connecticut-based office or school?
- What taxes should be withheld when the employee is performing services in another state?
- Is the employee eligible for paid leave under a different state? (Connecticut excludes schools for now).
- What workers compensation laws should apply if an employee gets injured while working remotely?
- What obligations are there for employers to provide the tools for remote access? Should employers be required to pay for an upgrade to an employee's home internet?
- How do you track hours of a remote worker?

In August 2020, the Department of Labor issued guidance regarding an employer's obligations to follow the Fair Labor Standards Act regarding tracking of hours of compensable work for employees who are working remotely. While the standard may not directly apply, the principles in Field Assistance Bulletin No. 5 are helpful to understand.

As background, the USDOL noted:

> The FLSA generally requires employers to compensate their employees for all hours worked, including overtime hours. As the Department's interpretive rules explain, "[w]ork not requested but suffered or permitted is work time" that must be compensated. 29 C.F.R. § 785.11. This principle applies equally to work performed away from the employer's worksite or premises, such as telework performed at the employee's home. Id. § 785.12. "If the employer knows or has reason to believe that the work is being performed, he must count the time as hours worked." Id. Employers are required to exercise control to ensure that work is not performed that they do notwish to be performed. Id. § 785.13.
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> While it may be easy to define what an employer actually knows, it may not always be clear when an employer "has reason to believe that work is being performed," particularly when employees telework or otherwise work remotely at locations that the employer does not control or monitor. This confusion may be exacerbated by the increasing frequency of telework and remote work arrangements since the Department issued the above interpretive rules in 1961. The Bureau of Labor Statistics estimated in 2019 that roughly 24 percent of working Americans performed some work at home on an average day (https://www.bls.gov/news.release/atus.t06.htm). And these arrangements have expanded even further in 2020 in response to the COVID-19 pandemic.

For employers, that means that it's obligation to compensate employees for hours worked can be based on actual knowledge <u>or</u> constructive knowledge:

> For telework and remote work employees, the employer has actual knowledge of the employees' regularly scheduled hours; it may also have actual knowledge of hours worked through employee reports or other notifications. The FLSA's standard for constructive knowledge in the overtime context is whether an employer has reason to believe work is being performed. An employer may have constructive knowledge of additional unscheduled hours worked by their employees if the employer should have acquired knowledge of such hours through reasonable diligence. Importantly, "[t]he reasonable diligence standard asks what the employer should have known, not what 'it could have known.'" One way an employer generally may satisfy its obligation to exercise reasonable diligence to acquire knowledge regarding employees' unscheduled hours of work is "by establishing a reasonable process for an employee to report uncompensated work time." Id. at 938. But the employer cannot implicitly or overtly discourage or impede accurate reporting, and the employer must compensate employees for all reported hours of work.

Employers should be reminding all employees to record and submit their time. If the employer has reason to believe that employees are working more than they are recording, the employers

should inquire further and remind employees of their obligation to report all time. Meal and rest breaks should also be recorded and tracked.

Employers should also review any expense reimbursement policies and determine what, if any, expenses the employer will cover and when. Currently, Connecticut does not have a statute requiring employers to indemnify employees for all necessary expenses incurred as a direct result of performing the duties of the job (but some states, like California and Illinois, do).

To recap, the biggest issues to consider with a remote workforce fall into these topics:

- Tax - What payroll taxes to consider?
- Workers compensation - What state and what rules cover injuries at home?
- Wage & Hour - How are employees tracking time?
- Health and safety laws - How do employers provide a safe workplace….at home?
- Privacy - How do you protect confidential student information?
- Accommodations - The ADA and state law equivalent likely still applies. What accommodations might be needed for remote work?

Re-look at your remote work policy and procedures. Determine what has worked and consider updating it as needed.

QUESTION FIVE

How has our experience this year affected our obligations under the ADA?

ANSWER TO QUESTION FIVE

- If this pandemic has taught us anything, it is that we must remain nimble if we are to survive it.

- School districts have experienced an overwhelming number of accommodation requests over the last 9-10 months ranging from requests for extra PPE to requests for remote learning opportunities.

- For employees who are claiming that they have a medically-based concern, the district should request medical verification concerning the employee's disability, along with documentation regarding the specific restrictions that apply to the employee. The EEOC has stated that, during the pandemic, employers may ask questions to determine whether an employee's condition is a disability and request medical documentation if needed (*e.g.,* if the disability is not obvious or already known); discuss with the employee how the requested accommodation would assist the employee and enable him or her to keep working; and explore alternative accommodations that may effectively meet the employee's needs.

- While some employees may request leave, in the first instance district officials should exercise their rights to determine whether accommodations can be made that would enable the employee to perform the essential functions of the employee's position. Consistent with the requirements of the ADA, employers will need to engage employees claiming a disability in an informal, interactive process to determine whether the individual in fact has a disability under the ADA, and, if so, what accommodation(s) would be appropriate. That individualized analysis will turn on both the employee's disability and related restrictions, as well as the essential functions of the employee's position.

- The key is to carefully assess whether accommodations can be made that would permit an employee to perform the essential functions of the position, such that placing an employee on leave may not be necessary.

- In response to the COVID-19 pandemic and in accordance with state rules for reopening, in the fall school districts implemented changes that reduced contact with others for all employees (*e.g.,* physical distancing and personal protective equipment, one-way hallways or plexi-glass barriers around an employee's desk).

- To accommodate employees' ADA requests, the EEOC offers suggestions such as "[t]emporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment [to] permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting."[1] However, transfers to different positions, such as a remote learning assignment, may be reasonable only if such positions exist.

- As a result of personnel shortage and mandatory quarantines during the last few months, many school districts have been forced to change their position regarding remote learning. While it remains true that if ultimately the employer determines that no accommodations can be made for the employee to return to work, it may be necessary to place the employee on leave as a temporary measure, the fall has taught us that we must remain flexible as we evaluate employee requests for accommodations.

- If no accommodation other than leave is possible, some employees may request to use accrued sick leave during a period of temporary leave. In that regard, in Advance, Adapt, Achieve: Connecticut' Plan to Learn and Grow Together (August 3, 2020), we read at page 44 that districts should "[p]lan to support staff health [and implement] *flexible sick leave policies* and practices that enable staff to stay home when sick, have

[1] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (May 7, 2020), *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

been exposed, or are caring for the sick." (Emphasis added). Generally, employees who are concerned because of underlying health conditions do not fall into these categories. They are not sick, and accordingly they are not eligible to take sick leave. However, many districts have implemented flexible sick leave policies to permit

- It is important to note that if a school district has granted remote learning accommodations to some employees it must be careful not to discriminate against other employees if a similar request for accommodations under the ADA is made. Of course, each ADA accommodation request is fact specific and the reasonableness of the request will differ depending on the underlying disability; however, flexibility will be the norm as we embark deeper into the winter months.

QUESTION SIX

What can I tell staff and parents when an employee or a student tests positive for COVID?

- As to students, the normal FERPA rules apply. Status of a student as COVID-19 positive is, of course, personally-identifiable student information that you cannot release without an exemption under FERPA, such as consent. There is a special provision in the FERPA regulations that addresses this situation. 34 C.F.R. § 99.31(10) provides that school officials may release personally-identifiable student information in a "health or safety emergency." 34 C.F.R. § 99.36 elaborates on this provision, stating in relevant part that:

  (a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

- If school officials learn that a student has tested positive for COVID-19, they may disclose that information to the appropriate public health officials, and in consultation with those officials, the school district can take appropriate remedial measures, such as quarantining of those exposed and additional cleaning measures. While parents and others may try to guess the identity of the student who tested positive, generally the order of quarantine should simply inform the person that he or she was exposed, and not disclose the identity of the student or students who tested positive. Public health officials will provide the appropriate protocol for such situations.

- District obligations are similar as to employees who test positive for COVID-19. The Americans with Disabilities Act provides that medical information about employees must be kept confidential. If an employee tests positive for COVID-19 or has

symptoms of COVID-19, however, employers must take remedial steps to reduce the likelihood that the virus will be spread. Reconciling these two competing concerns can be challenging.

- The Equal Employment Opportunities Commission has provided guidance on this subject: "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," (EEOC, Updated September 8, 2020). This guidance affirms that a COVID-19 diagnosis or information that an employee has symptoms of COVID-19 is medical information that must be maintained as confidential. However, the guidance also states that employers may interview the employee to determine which other persons may have been exposed and then reach out to those employees to inform them of the exposure. Whom to notify should be determined in consultation with public health officials.

- The notification must maintain the confidentiality of the medical information to the extent possible. Notifying public health authorities is expressly authorized, and otherwise the identity of the employee with symptoms or a positive COVID-19 diagnosis must be limited to those with an actual need to know, and those persons must be informed that the information is confidential and must not be shared further. Accordingly, school districts must notify employees and other persons when they have been exposed to COVID-19, but only in general terms without revealing the identity of the person with symptoms or a positive COVID-19 diagnosis. The guidance acknowledges that the employees notified may well guess as to the identity of the person with COVID, but employers are still admonished not to confirm that information:

- The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity.

FURTHER QUESTIONS AND ANSWERS?