**Legal Guidance from the law offices of Anderson, Julian & Hull**

DATE: Thursday, March 26, 2020

RE: ISBA COVID-19 Coronavirus issues/Fair Labor Laws/FMLA – H.R. 6201

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The "Families First Coronavirus Response Act" ("FFCRA") was signed into law on March 18, 2020.[1] It provides for the *Emergency Family and Medical Leave Expansion Act* and the *Emergency Paid Sick Leave Act*. These two Acts are effective no later than 15 days after enactment, or no later than April 2, 2020; the effective end date (for now) is December 31, 2020. The FFCRA requires certain employers to provide their employees with expanded family and medical leave for specified reasons "related to COVID-19."[2]

This act mandates that all public and private employers with fewer than 500 employees provide emergency paid family leave. In addition, it requires private sector employers with fewer than 500 employees; government employers; and all other non-private entity employers with more than one employee, to provide eligible employees with emergency paid sick leave. Thus, "Covered Employers" will for the most part be employers with fewer than 500 employees.

Workers who are independent contractors under the Fair Labor Standards Act ("FLSA"), rather than employees, are not considered employees for purposes of the 500-employee threshold.

**FMLA Expansion –Applies to School Districts and Charter Schools with 500 or less Employees**

Per the United States Department of Labor:

> Generally, the Act provides that covered employers must provide to all employees:
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> - Two weeks (up to 80 hours) of expanded family and medical leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
> - Two weeks (up to 80 hours) of expanded family and medical leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or

1 https://www.congress.gov/bill/116th-congress/house-bill/6201/text
2 U.S. Dept. of Labor information for employers

the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

A covered employer must provide to employees that it has employed for at least 30 days:

- Up to an additional 10 weeks of expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Qualifying Reasons for Leave:

Under the FFCRA, an employee qualifies for expanded family and medical leave 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;
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.

Under the FFCRA, an employee qualifies for expanded family and medical leave 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.

**Sick Leave – Applies to all School Districts/Charter Schools**

The *Emergency Paid Sick Leave Act* requires certain employers to provide to employees up to 80 hours (or the equivalent for part-time employees) of paid sick time because the individual is unable to work due to a need for leave for any of the following COVID-19-related reasons:

1. The employee is subject to a federal, state, or local quarantine or isolation order relating to COVID-19;

2. A health care provider advised the employee to self-quarantine due to concerns relating to COVID-19;
3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
4. The employee is caring for an individual who is subject to an order described in the first category above, or has been advised by a health care provider as described in the second category above;
5. The employee is caring for a son or daughter of such employee if the school or place of care of the child is closed due to COVID-19 precautions; or
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretaries of Treasury and Labor.

The sick leave provided for under the Act is in addition to any regularly-provided annual sick leave.[3]

An employer may not change its current paid leave policy after enactment, to avoid the obligations of the additional leave mandated by the Act.

**Specific Questions and Concerns of Districts and Charter Schools in Idaho**

Several Districts, Charter Districts, and other groups have provided specific questions about the FFCRA, and its interplay with the Fair Labor Standards Act ("FLSA"), as well as how the FFCRA extends the Family and Medical Leave Act ("FMLA").

The questions and suggested responses are below:

Is the leave provided by the Act in addition to what we already provide?

Yes, the leave allowed under the Act is in addition to what the Districts/Charters already provide. The Act grants eligible employees paid sick leave in addition to any preexisting leave accrued or banked. So if a District/Charter previously provided two weeks of sick paid leave, eligible employees would be entitled under the Act to a total of four weeks of paid sick leave.

Is this for everyone or only those that have run out of sick leave?

The FFCRA is not just for those who have run out of sick leave and, in fact, eligible employees may utilize the leave provided under the *Emergency Paid Sick Leave Act* before using their other sick leave or PTO.[4]

[3] § 5102, Emergency Paid Sick Leave Act

[4] *Emergency Paid Sick Leave Act* at § 5102(e) (Paid Sick Time Requirement; Use of Paid Sick Time)

Is this to leave their current sick leave untouched unless they go beyond the 2-weeks?

Yes, in effect; eligible employees may use the leave provided under the *Emergency Paid Sick Leave Act* before utilizing their other sick leave. Therefore, if an affected employee used two weeks or less of the emergency leave, he or she would still have left their preexisting sick leave.

How does this affect PERSI?

PERSI has indicated to employers that "The Families First Coronavirus Response Act, phase II," which is the *Emergency Paid Sick Leave Act*, may require some PERSI employers to change their sick leave and payroll codes in the short term. Employers have further been notified that emergency paid sick leave under the Act should still be recorded as PERSI-eligible, and has explicitly stated, "Just like regular sick leave, PERSI contributions will still need to be made."

What is best practice for employees (teachers) to record time worked at home if a district/charter school allows them to work from home?

Teachers are certificated, salaried employees who are paid under their contracts, not on an hourly basis. To the extent a District/Charter may want a teacher to keep track of what days are worked for contract purposes, to ensure they have worked their contracted days, the best manner for employees to record time/days worked may be to simply write down the hours worked and scan and email the hours worked.

What are our legal considerations to requiring employees to be on site?

There are many legal considerations that may arise when requiring employees to be on site, and they will vary depending upon whether the employee is has been diagnosed with coronavirus; is under quarantine; or has a qualifying family member who has been diagnosed. The various considerations are discussed at pp. 3-6 of the March 16, 2020, Anderson, Julian & Hull memo to ISBA re: Coronavirus issue and Impact on personnel issue.

In general, if the specific question here is "can we require employees to be on-site," the answer is "likely yes." Guidance from the Department of Labor states that an employee may not stay home on FMLA leave to avoid getting the coronavirus, and leave taken to avoid getting sick is not protected.[5]

"Of course, employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the EEO laws."[6]

[5] https://www.dol.gov/agencies/whd/fmla/pandemic

[6] https://www.dol.gov/agencies/whd/flsa/pandemic

If a teacher goes to Washington for spring break and must quarantine, can we require them to use sick or personal leave?

No; the paid sick time provided for by the *Emergency Paid Sick Leave Act* at § 5102(a) can be used first, and an employee cannot be required to use sick or personal leave instead. The *Emergency Paid Sick Leave Act* at § 5102(e) (Paid Sick Time Requirement; Use of Paid Sick Time) provides:

> (2) SEQUENCING.—
>
> (A) IN GENERAL.—An employee may first use the paid sick time under subsection (a) for the purposes described in such subsection.
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> (B) PROHIBITION.—An employer may not require an employee to use other paid leave provided by the employer to the employee before the employee uses the paid sick time under subsection (a).

What do we use to determine or sort employees into considered at risk groups? Can we deny them returning to work?

While a District or charter school cannot compel an employee with coronavirus or under quarantine to first use other sick time or paid time off before using emergency sick leave allowed by the Act, the District/Charter can keep certain employees from being on campus, i.e., can require them to take leave of some type. This would apply to employees who, e.g., are diagnosed with coronavirus, or are in quarantine or have returned from a quarantined area.

I.C. § 33-513, "Professional personnel," provides in part:

> The board of trustees of each school district, including any specially chartered district, shall have the following powers and duties:
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> 7. To delegate to the superintendent or other designee the ongoing authority to place any employee on a period of involuntary leave of absence should the superintendent or designee believe that such action is in the best interest of the district. Upon the superintendent or designee's action to place a certificated employee on a period of involuntary leave of absence, the board shall ratify or nullify the action of the superintendent or designee at the next regularly scheduled meeting of the board or at a special meeting of the board should the next regularly scheduled meeting of the board not be within a period of twenty-one (21) days from the date of the action.

If the employee's presence at school would not be in the best interests of the District/Charter, i.e., if it would potentially expose others to coronavirus, the

District/Charter can take steps to keep the employee off-campus. If the employee is placed on leave of absence, it should be with pay.

District/Charter "policies on sick leave, and any applicable employment contracts or collective bargaining agreements would determine whether you should provide paid leave to employees who are not at work."[7] However, as noted, it is advisable to provide pay if the leave is involuntary.

Alternatively, "[a]n employer may encourage or require employees to telework as an infection-control or prevention strategy, including based on timely information from public health authorities about pandemics, public health emergencies, or other similar conditions."[8]

Whether the decision is to require the teacher to take leave, or to telework, the decision must be made in manner that does not discriminate against employees because of race, color, sex, national origin, religion, age (40 and over), disability, or veteran status.

A District/Charter should not get involved with attempting to determine who may be in an "at risk group" or "high risk group" as defined by the CDC. (Per the centers for Disease Control and Prevention, "Older adults and people who have severe underlying chronic medical conditions like heart or lung disease or diabetes seem to be at higher risk for developing more serious complications from COVID-19 illness.") Attempting to determine which employees are "older" or who may suffer from chronic medical conditions—some of which may be ADA-recognized disabling conditions—is not a position the Districts/Charters should place themselves in. Districts/Charters should be advised to be flexible when approached by employees who self-identify as "at risk" for coronavirus infection or complications.

<u>If Districts/Charters bring teachers back to work on site, whether students are remote or present, how do apply that to an employee that may be in a compromised category (at risk group, medically fragile, possible exposure, etc.) In other words, how do we determine medical excuse vs fear?</u>

As noted above, it is not recommended that a District/Charter attempt to determine which employees may be in a "compromised category." If there has been possible exposure to a particular employee, a District/Charter may deal with that by placing the employee on temporary leave, or having the employee telework. However, as noted at p. 3 of the March 16, 2020, Anderson, Julian & Hull memo to ISBA re: Coronavirus issue and Impact on personnel issue, if the District/Charter were to attempt to determine which teachers had possible coronavirus exposure, "the administration would likewise have to consider the travel and risks of every employee and student. This could be a daunting task and there would be concern about the uniformity and equity in application."

[7] https://www.dol.gov/agencies/whd/fmla/pandemic

[8] https://www.dol.gov/agencies/whd/flsa/pandemic

Then we have the ACLU considerations of student access to consider with devices, internet, instructional materials and district/charter websites.

The State Board of Education has issued its "COVID-19 School Operations Guidance (Approved 3/23/20)." The Guidance states, in part, "The school districts and charter schools are asked to focus on the following:

2. Implement and/or develop remote learning strategies that will benefit all K-12 students in school districts and charter schools. These plans should be designed in the event that a community needs to maintain closures for an extended period or the remainder of the school year.

It is not required that remote learning be provided via Internet. However, typically that will be the most direct and easily-disseminated way of implementing remote learning. Districts/Charters may need to provide laptops or Chromebooks to some students, which can be checked out for the duration of the school year, to ensure equal access to education is provided to all students regardless of economic status. Districts/Charters should consider contacting Internet service providers about the ISPs providing free or low-cost connectivity to long-distance learners.

District/Charters can also consider providing, e.g., printed take-home instructional packets, in place of web-based learning. One difficulty with this is how such printed materials would be returned to be assessed, and how new printed materials could be disseminated if school closures continue past April 20, 2020. The U.S. Mail may provide one non-Internet method, but that presents the issue of how and when postage could be obtained.