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School Board Meetings During a Pandemic

On March 11, 2020, the World Health Organization officially declared that COVID-19, a novel coronavirus, has become a pandemic. We anticipate that this virus will pose many challenges to school districts and communities in the coming weeks and months. It is important for public school district boards of education to understand state laws regarding board meetings so that you have a plan in place to effectively maintain operations during this and future pandemics.

How frequently is a board of education required to meet?

Board of education must meet at least once every two months. Regular meetings are scheduled at the organizational meeting in January. A board of education may convene a special meeting by providing proper notice to the board members and the public. Board members must be notified of the special meeting at least two days prior to the event. Additionally, the board must announce special meetings at least 24 hours ahead of time to the public. With this said, the board of education may cancel meetings in its discretion. Notice of meeting cancellation should be provided as soon as possible.

May the Board of Education conduct a remote meeting online or by telephone?

Ohio's Open Meetings Act, R.C. §121.22, requires a board of education to conduct meetings that are open to the public. Prior to the COVID-19 pandemic, a member of a public body was required to attend meetings in person even during a health emergency. The Ohio attorney general declared as much in an opinion published in 2009, and concluded that a township could not meet remotely during a pandemic or other public health emergency, even to provide needed response services because this would interfere with the public's ability to attend. Click here to access 2009 OAG 034. Rather, the Attorney General recognized that a public entity was not permitted to conduct a public meeting remotely unless the General Assembly had authorized it to do so through legislative action.

However, as a sign of the truly unique and unprecedented times we are living in, on March 25th, 2020 the Ohio General Assembly passed an emergency measure through House Bill 197 which temporarily authorizes boards of

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education and other local government agencies to hold public meetings by teleconference or video conference while the health threat continues.

This law permits members of a school board to participate from a remote location while the emergency is ongoing. Members will be considered present regardless of whether they attend in person or remotely, and their votes will be counted for the purpose of determining quorum. The law declares that any resolution, rule, or formal action taken shall have the same effect as if it had occurred during a typical in-person meeting.

The law also permits a board to fulfill the public access requirement for open meetings by providing members of the public with remote access to the meeting. Examples of acceptable remote access technologies include live-streaming by means of the internet, local radio, television, cable, or public access channels, call in information for a teleconference, or by means of similar electronic technology. The public must be able to observe and hear all discussions and deliberations regardless of whether the board member participates.

If the meetings are streamed over some type of technology, boards must publish information about how the public can access the meetings at least twenty-four hours in advance, unless the board convenes an emergency meeting. Notice should be sent to all members of the media and public who have requested to be notified, and by other means that will reasonably provide notice to the public.

School boards must comply with all other Open Meetings requirements such as quorum and executive sessions. The provisions of HB 197 will remain in effect until December 1, 2020 or until the COVID-19 emergency ceases, whichever comes first.

Prior to HB 197's passage, the Ohio Attorney General issued a letter on March 13, 2020 shortly following official orders issued by both the Ohio Governor Mike DeWine and the Ohio Department of Health Director Dr. Amy Acton which prohibited mass gatherings and also urged individuals to maintain adequate personal space. The Attorney General emphasized that public business must be allowed to continue in times such as these, but also clearly stated that this opportunity would apply in very narrow circumstances and only while the orders remained in effect. The AG cautions public bodies that they may want to refrain from making decisions that are unrelated to the current health emergency, including examples such as passing a new tax or enacting a new regulatory scheme.

Districts should pay careful attention to the provisions of HB 197 as well as comments included in the Attorney General's letter and should contact legal counsel for advice before conducting remote meetings. Click here to access the letter and click here to review HB 197.

What happens if a majority of board members are unable or unwilling to attend meetings due to personal choice, a quarantine or government order?

A board of education must have a quorum in order to properly conduct school business. A majority of all members of the board constitutes a quorum, and a majority of the quorum is typically sufficient to approve a motion or resolution. Some actions require a special voting majority (a majority of the full board or more) under state law. These include adoption of a resolution to purchase or sell real or personal property, employ a staff member, appoint a public official, pay a debt or claim, and adopt a textbook.

Without having the required voting majorities, the actions may not legally be accomplished. As a result, a board of education may need to consider postponing certain actions and should attempt to reschedule meetings if an insufficient number of members are able to attend. In accordance with HB 197, boards may be able to host remote meetings under certain narrow circumstances during a health emergency. Boards of education may be able to delegate certain decisions to a superintendent, and also may be able to take certain actions retroactively in an emergency.

Will the General Assembly make further changes in the law to respond to the COVID-19 pandemic?

It is likely that local, state and federal governments will work diligently with school districts and communities to address the many challenges that COVID-19 has caused and is likely to cause in the future. Therefore, it is possible that legislative measures will be taken that will allow public bodies to operate differently than before in response to the public health needs of the community. It is not yet certain how serious the pandemic will become, how long it will last, and what short and long-term impacts it will have on school operations. In the meantime, boards should regularly consult trusted sources and with legal counsel to explore options and weigh risks during this novel pandemic situation.

Services for Special Education Students

Since IDEA first became law (as the Education for all Children Act) in the 1970s, there has never been a period of more change and questions than the past two weeks. With closures extended at least through the end of this month, we will be working with a set of laws and regulations that simply do not account for the unprecedented situation we find ourselves in. While the US Department of Education and ODE have offered "guidance" during this period, it is important to keep in mind that the underlying law and regulations have not changed. In light of that, focusing on the bigger picture offers a more practical approach than getting lost in the myriad technical requirements of IDEA.

What flexibility can we expect in meeting federal requirements for education?

Over a decade ago a different flu threatened to result in students being excluded from the regular school setting. On December 1, 2009, the US Department of Education (ED) issued a memo titled "Guidance on Flexibility and Waivers for SEAs, LEAs, Postsecondary Institutions, on other Grantee and Program Participants in Responding to Pandemic Influenza H1N1 Virus" ("SEA" refers to State Education Agencies like ODE, and "LEA" refers to Local Education Agencies like individual school districts). The guidance document discussed in generalities the willingness of the US Department of Education to offer flexibility regarding the requirements of the Elementary and Secondary Education Act (now referred to as ESSA). On March 12, 2020, ED effectively reissued the 2009 guidance and replaced "H1N1" with "COVID-19." Since then, ED Secretary DeVos has stated that some regulatory relief may be forthcoming. We will continue to update clients as specific guidance and regulatory relief is issued.

Specifically, regarding students on IEPs and 504 plans, what services must we provide during a closure?

We are receiving many calls related to the delivery of instruction during possible closures, and specifically regarding the delivery of instruction to students with IEPs and 504 Plans. Here is what ED said on this topic in 2009 regarding H1N1:

Is an LEA required to continue to provide a free appropriate public education (FAPE) to students with disabilities during a school closure caused by a COVID-19 outbreak?

If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) or, for students entitled to FAPE under Section 504, consistent with a plan developed to meet the requirements of Section 504. The Department understands there may be exceptional circumstances that could affect how a particular service is provided. In addition, an IEP Team and, as appropriate to an individual student with a disability, the personnel responsible for ensuring FAPE to a student for the purposes of Section 504, would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements.

In short, it is important to comply both with the anti-discrimination protections of Section 504 and the more affirmative education duties of IDEA.

What are the special education implications of providing online instruction during a closure?

It is notable that the approach that creates the most risk for a school district is to offer online instruction during a closure. The reason this can become a problem is that students with disabilities will need to be offered accessible instruction that meets their unique needs. It is difficult to imagine how a district might provide "regular prompting," a common accommodation, to a child who is sitting alone at a computer. And what of the child who does not have a computer or internet access? At least in relation to Section 504's anti-discrimination and accessibility requirements, it would be more legally compliant to not offer any instruction at all than to offer online instruction without an adequate plan for students with special needs.

This does not mean that online instruction should be ruled out. Given the Governor's recent order for school facilities to remain closed to students at least through the end of April, and the General Assembly's action requiring minimum hours to be met with distance learning plans, all Ohio schools will be offering instruction for at least a portion of this month. Once online instruction is used there will need to be a plan for how this will serve students with disabilities. You should also consider the possibility of taking a pause from implementing online instruction to allow adequate planning (if this was not already done). Given the mild winter and the fact that most schools significantly exceed minimum hours of instruction on their regular calendars, it is likely that a few days of closure (without online instruction) will not violate state minimum hours law. Pausing online instruction could provide important breathing room for student services to plan for serving students with disabilities and to communicate with families.

Will we be required to provide compensatory education to students on IEPs and 504 plans following a closure?

In short, maybe. Both the 2009 H1N1 guidance and the COVID-9 guidance include requirements for discussions of whether compensatory education is needed following any period of closure regardless of what services were provided during the closure. Unless a child is already assigned to home instruction at the time of the closure, any set of services during a closure will in some ways not be in compliance with the child's IEP. Both ODE and ED have been clear that they do not expect IEP teams to amend IEPs to account for changes in services during COVID-9 closures. However, once regular operations resume after a closure you can revisit whether compensatory services are appropriate.

What About Required 504 or IEP Meetings?

It should come to no one's surprise that the state and federal laws do not allow for exceptions to the required timelines for ETRs, IEPs, etc. As discussed in other posts, in December 2009, in response to the H1N1 pandemic, the U.S. Department of Education issued a memo titled "Guidance on Flexibility and Waivers for SEAs, LEAs, Postsecondary Institutions, and other Grantee and Program Participants in Responding to Pandemic Influenza (H1N1 Virus)" which plainly stated that the U.S. Department of Education would not waive the requirements for school districts to evaluate and assess during school closures. While the U.S. Department of Education issued a "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," the Department did not issue any comments regarding IEP and 504 timelines at this time.

The Ohio Department of Education has issued its own Considerations for Students with Disabilities During Ohio's Ordered School-Building Closure originally on March 17th, and updated on March 27th.

Proper planning on your school district's and case manager's part will be essential in determining how your school district needs to act as schools are currently (as of March 30, 2020) closed until May 1st during which you would may be required to have an ETR or IEP meeting.

My school district is in the middle of conducting an ETR on a student. Do we continue with this evaluation?

Based on the Guidance and Considerations, you continue with the evaluation of the student. Your district may want to consider how much of the evaluation and assessments can be held remotely. If you can hold the ETR evaluations remotely, then you can hold the ETR meeting during the time of the closure via telephonic or video conference means. If pieces of the evaluation cannot be conducted because school is closed, the evaluation would need to be delayed and a prior written notice for the same should be sent. If you have not yet conducted the evaluation and assessments, another option to consider is waiving the reevaluation and delaying it until return to the in-person education with parental consent or to conduct a records review. The guidance from the Ohio Department of Education indicates that all services should still be provided if parents consent to waive reevaluation.

Are we required to hold in-person meetings for ETRs and IEPs during a school closure?

If school closes, IEP teams are not required to meet in person. However, according to the Guidance, schools must continue working with parents and students with disabilities, to develop required documents – ETRs, IEPs, 504s, etc. If a plan or evaluation for a student expires during the time of school closure due to COVID-19, IEP/504 teams should offer to meet via telephone conference or videoconference with the parents. School personnel should attempt to determine the specific services that can be provided during the ordered school-building closure period. If the parent does not agree with meeting via telephone or video conference, then the meeting should be delayed until school reopens according to the Guidance.

What about evaluations and plans developed under Section 504?

The same principles apply as discussed above for ETRs and IEPs to those activities conducted by schools for a student with a disability under Section 504 according to the Guidance. You will want to review your school district's 504 polices to determine 504 plan review and reevaluation timelines, as there is no requirement in federal law for how often must occur.

How do we help our staff in planning for this potential?

School district personnel should look at their evaluation and IEP timelines to determine which items may expire during the next few weeks/months of the 2019/2020 school year. It would be prudent to plan how items may be advanced or to begin discussions now with parents on what the plan will be in the event of a school closure.

Public and Student Records Requests During a Pandemic

Your school district may be getting public records requests, and/or requests for health information concerning students, and you may have questions about how your school district may share information with parents, with public health authorities, and the media.

The Student Privacy Policy Office of U.S. Department of Education has recently (March 2020) issued guidance in the form of a Frequently Asked Questions (FAQ) that provides some answers about student records disclosures during the pandemic.

Let's break it down in understandable bytes. The federal law on the confidentiality of student records is the Family Educational Rights and Privacy Act (FERPA) and Ohio's student confidentiality law is found at Ohio Revised Code 3319.321. The issues that may come up during this pandemic are what records may be shared, with whom, when you may have students, staff, and their family members who may be affected by the COVID-19 virus.

FERPA generally protects the confidentiality of personally identifiable student information. That means schools must not release personally identifiable information about students without the consent of the parents of students under 18 years of age, and of students themselves who are over 18 and a legal adult. Directory information may be released if the student/parent has not opted out of such disclosures.

There are exceptions to FERPA. One of these is the "health and safety emergency" exception, which allows certain disclosures of personally identifiable information under certain circumstances to certain individuals or entities that are relevant during this pandemic.

If a school district determines there is a health and safety emergency; that is, an emergency in which it is necessary to protect the health or safety of students or other individuals, that requires the release of personally identifiable student information without consent, it may make disclosures of the personally-identifiable information of those students to address the emergency on a case-specific basis. The district must evaluate the need for such disclosures and to whom such disclosures should be made.

There are some important considerations in the guidance. The first thing to remember is that the health and safety exception to FERPA is a limited exception and when using it, schools need to decide whether a release of normally-confidential information is warranted on a case-by-case basis.

Another way of saying this is that if there is a health and safety emergency (which the school district may determine in its reasonable discretion), FERPA allows disclosures to persons or entities that need that information for the purpose of protecting health and safety of a student or another individual. It is not, however, a blanket release of information to all entities or persons equally. The guidance also states that these disclosures are "…limited in time to the period of the emergency and generally does not allow for a blanket release of PII from student education records."

To whom may we disclose information during a health and safety emergency?

There are some different ways this may come up. The first and probably easiest issue is the public health authority asking the school district for disclosures of personally identifiable information of students to track exposure and possibly for the purpose of notifying people who need to self-quarantine or who may have been exposed.

May the District disclose personally-identifiable information if the health department asks for it?

The guidance says generally, yes. The guidance states "Public health officials may be considered 'appropriate parties' by an educational agency or institution under FERPA's health or safety emergency exception, even in the absence of a formally declared health emergency. Typically, public health officials and trained medical personnel are among the types of appropriate parties to whom PII from education records, may be non-consensually disclosed under FERPA's health or safety emergency exception."

May the District release contact information for students and their parents to the public health department if asked by the health department to do so?

Yes, if that information is needed and the district has made a determination that there is a health and safety emergency that requires such disclosure.

What about the media requesting lists of how many students are affected by the illness or the numbers of absences the district may have been seeing prior to schools being closed?

The guidance generally says no. Disclosures to the media of personally-identifiable information of students affected by COVID-19 are not appropriate under this limited exception. It describes the media as not generally an "appropriate party" under FERPA's health and safety exception. "Appropriate parties" are those who provide "…specific medical or safety attention, such as public health or law enforcement officials." If all identifying information has been removed (and disclosure would not allow a person to determine individual students affected) and the district has such a record, it may be able to comply with some requests for information. Consult counsel if you receive such requests.

If students are affected by COVID-19 and are out sick, may the District disclose information to parents of other students?

The Department answered that some information could be disclosed only if the information was not personally identifiable. Consent would not be needed to disclose information that is not personally identifiable (although the district should make a case-by-case determination that disclosing the information will not allow people to identify the student who is absent due to COVID-19.)

The Department does state in the FAQ that in "rare situations during a health and safety emergency" that disclosure of the identifiable information about a specific student may be warranted. The FAQ uses an example of a wrestler who had close contact with other students, school officials might determine it was necessary to disclose the student's identity to the parents of other students. This determination of whether the disclosure is "absolutely necessary" is made on a case-by-case basis dependent upon the situation.

The Department suggests making consent forms available to parents that specifically allow such disclosures to obtain consent to release personally-identifiable information in these circumstances. In a health and safety emergency as determined by the District, the exception would allow non-consensual disclosures of personally identifiable information. During these times, obtaining such consent may not be a priority crisis response. These consent forms could be implemented as part of emergency planning in the future, however. A sample form is available with the guidance should districts choose to attempt to obtain consent from parents.

If a school employee has the illness, could the district notify parents and students or the media?

The Department notes that FERPA applies only to student records. Other state privacy laws may impact this issue, however, so a release of a school official or employee's name to the public or the media should be made only in consultation with board counsel. Please note that the health department is not releasing personal information about people affected in its reports, only their general geographic area and sometimes their age.

However, disclosures of the identity of school employees affected to the health department would generally be authorized so that the health department may track contacts and notify those who may need to self-quarantine or be tested. The district itself also may communicate with parents and students about possible exposure to an individual affected by COVID-19 but should protect the privacy of the individual's identity to the extent possible.

Does the District need to document when these disclosures are made and to whom?

Yes. School districts that make such disclosures of personally identifiable information are required to make and maintain records of the disclosures that are made and the reasons for such disclosures. Schools must record the reason for the basis of the disclosure (i.e., "the articulable and significant threat to the health or safety of a student or other individual that formed the basis for the disclosure and the parties to whom the agency or institution disclosed the information") and to whom the disclosures were made in the student's record, for each student for whom information was disclosed.

These disclosures must be retained in the education record as long as the records are maintained. Parents and eligible students (over 18) may view the educational records so they would see if such disclosures were documented.

Public records requests will need to be handled generally in the same way as would be ordinary for your office. You will still need to respond to records requests within a reasonable time, but what is reasonable under these circumstances may vary based on the ability of the district to have adequate staff available during this crisis to respond. Please call to discuss these issues with our office. All of our attorneys are well-versed in public records law.

COVID-19 and Schools: Frequently Asked Questions

As we continue to receive updates and navigate the changing circumstances day-to-day, we would like to brief you about some of the questions we have been receiving from schools around the State:

Can we continue to pay hourly staff members if on extended closure?

R.C. 3319.081 provides that "All nonteaching employees…shall be paid for all time lost when the schools in which they are employed are closed owing to an epidemic or other public calamity. Nothing in this division shall be construed as requiring payment in excess of an employee's regular wage rate or salary for any time worked while the school in which the employee is employed is officially closed for the reasons set forth in this division."

Accordingly, those non-teaching employees covered by R.C. 3319.081 can and should be paid for "all time lost due to the closure of school" under the current circumstances.

R.C. 3319.08 provides the same rights for teaching employees. Keep in mind that neither statute provides a premium rate of pay. Only regular wages are required by the statutes. However, some collective bargaining agreements provide for premium pay for work performed during "calamity days." Unions are likely to assert that premium pay should be provided for employees who report to work during the time that the schools are closed to students. You should consult with legal counsel about how to proceed if the union demands premium pay.

Can I require self-reporting of staff?

You can request staff self-report if they are ill, under self-quarantine, or mandated quarantine.

Employers must generally be careful in inquiring about medical conditions of employees. The ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. One condition under which an employer may ask such questions is where the employee constitutes a "direct threat" to the health and safety of other employees. A "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

The EEOC has previously opined during the H1/N1 pandemic that where the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries (e.g., Do you have a compromised immune system?) and medical examinations (e.g., temperature readings). However, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. COVID-19 appears to be more severe than previous influenza pandemics and outbreaks both in terms of the rate of infection and the number of deaths and critical cases. Therefore, you are permitted to make inquiries about symptoms and susceptibility and to require self-reporting of employees.

Can I require self-reporting of students?

Since students have been ordered home, it is likely not necessary to issue a directive to families at this time.

Can employees use sick leave if self-quarantined?

It is understandable that employees would request sick leave while under self-quarantine. The sick leave statute, R.C. 3319.141, provides that employees "may use sick leave for absence due to personal illness, pregnancy, injury, exposure to contagious disease which could be communicated to others, and for absence due to illness, injury, or death in the employee's immediate family." A strict reading of the statute could be interpreted to mean that the employee was actually exposed, and not just avoiding the possibility of being exposed. Therefore, sick leave could be denied to an employee who has not actually been exposed to the disease. Also note that FMLA is not available for employees who fear being exposed to a virus, as such fear does not constitute a serious health condition.

Additionally, employees not reporting to work due to the closure to students will receive pay for all time lost due to the closure as discussed above. Such employees would not need sick leave.

Employers are permitted to be more generous than the law permits so there is a basis to allow the use of sick leave in these circumstances. You should check your policy manual and the collective bargaining agreement to see if there is any language that differs from the statute. It is not clear whether the auditor follows a strict reading of the statute due to the unique nature of this situation. If you wish to grant sick leave for employees who wish to stay home as a matter of self-quarantine who are otherwise not exhibiting any symptoms, you should discuss it with your legal counsel before proceeding.

Can I discourage international travel … or ask about international travel?

You can both inquire about and discourage international travel, but any directives regarding those matters would not necessarily have a lot of weight from an enforcement standpoint. You can also inquire with families of whom you know have traveled internationally recently. However, in light of the closure of school to students, and its potential extension to the end of the school year, this is likely not necessary in most circumstances.

Employees returning from international travel may be subjected to mandatory quarantine. Under these circumstances, sick leave would be appropriate.

Can I restrict an employee who appears sick/has a fever or wants to wear a mask? I have an employee with a weak immune system, can they wear a mask?

R.C. 3313.71 provides the authority to send home an employee or student who is suffering from a communicable disease. The statute provides that the school physician is to order such employees to be sent home. There are not any court interpretations determining whether it must be a "school physician" which makes the call. However, the Board has the authority to protect the health and safety of persons coming on to its premises and can, therefore, exercise such authority in these circumstances. Employees should be permitted, within reason, to wear appropriate safety equipment such as masks and gloves if they desire to. You should not send an employee home simply because the employee wishes to wear a mask or because an employee is of an age that is more susceptible to the disease.

Keep in mind that discrimination laws regarding ADA accommodations are still in effect during this time. During a pandemic, especially one which constitutes a direct threat, as COVID-19 likely does, certain ADA protections are relaxed in order to balance public health and safety with individual rights.

During a pandemic such as this one, employers may:

1. Send employees home if they display influenza-like symptoms.
2. Inquire about the exact symptoms an employee is experiencing who reports feeling ill.
3. Check employees' temperatures (keep in mind that some people infected with COVID-19 may not have a fever).
4. Inquire about potential exposure to persons returning from business or personal travel.
5. If the employer has sufficient objective information from public health authorities to conclude that employees will face a direct threat if they contract COVID-19, the employer may ask an employee, without having exhibited any symptoms, whether the employee has a medical condition that the CDC says could make them especially vulnerable to influenza complications.
6. Encourage remote working (where possible) as a prevention strategy.

7. Require the adoption of infection control practices at work including hand washing, handling practices, and wearing masks and gloves.

Remember that other ADA requirements are still in place. Accommodations that are already being provided unrelated to the pandemic must continue. For example, an accountant with low vision has a screen-reader on her office computer as a reasonable accommodation. In preparation for telework during a pandemic or other emergency event, the employer issues notebook computers to all similar employees. In accordance with the ADA, the employer must provide the employee with a notebook computer that has a screen-reader installed.

FMLA Leave Expansion and Emergency Paid Sick Leave

The pandemic has resulted in the enactment of emergency federal legislation providing additional the amendments are part of the Families First Coronavirus Response Act (H.R. 6201), and the FMLA expansion portion is called the Emergency Family and Medical Leave Expansion Act. Additional provisions of the law that provide employer-paid sick leave are called the Emergency Paid Sick Leave Act.

These laws take effect fifteen days from the enactment of the law (March 18), which will be April 1st. Both of these provisions will be temporary, ending on December 31, 2020.

FMLA Leave Expansion

To be eligible for this type of FMLA leave, employees must have been employed only for thirty days (not the usual eligibility criteria of 1,250 hours in the preceding year). The thirty days mean on the payroll for the 30 calendar days immediately prior to when the leave would begin.

Reasons for Leave

If a child's school or place of care is closed, or the childcare provider is not available, and the employee is unable to work or telework because they must care for the minor child, the employee may use leave.

Pay for leave after first ten days

The first ten days of this FMLA leave is unpaid, although the employee may elect to substitute vacation, sick, personal or medical leave for unpaid leave. They also may use the Emergency Paid Sick Leave Act described below. After that, the leave will be paid for up to twelve weeks.

After the first ten days, employees are to be paid at a rate of 2/3rds their regular rate of pay for the number of hours they normally work. The amount of pay for this sick leave is capped at not more than $200 per day, and continues up to a maximum of $12,000 (this is for the entire 12-week period, including the two weeks of leave which may be the emergency paid sick leave provided in the Act.

There is an averaging process provided in the law to determine the amount to be paid to an employee who works a varying number of hours.

Documentation

Employers may require documentation in support of expanded family medical leave just as you would for other FMLA requests.

Intermittent leave

The expanded FMLA leave for childcare does not require that employers permit the leave to be taken intermittently. However, if the employer agrees to do so, the leave may be taken intermittently.

Insurance benefits

Employers must maintain health insurance during the period of expanded FMLA leave for childcare.

Right of restoration

Employers must restore the employee to an equivalent position unless the position has been eliminated or reduced due to economic reasons or other operating conditions that affect employment as a result of the public health emergency.

An "equivalent position" is one that provides equivalent benefits, pay, and other terms and conditions of employment. If the efforts of the employer to do so are unsuccessful, employers must contact them if such a position does become available for a period of one year.

Paid Sick Leave

Another part of the Families First Coronavirus Response Act is the Emergency Paid Sick Leave Act. This leave applies to school districts and, like the expanded FMLA provisions, it expires December 31, 2020.

Employers must immediately provide, as needed, eighty hours of paid sick leave to full time employees (regardless of the length of their employment) or an average of hours worked over a two-week period for part-time employees who meet the following criteria:

1. Unable to work (or telework) due to an isolation or quarantine order related to COVID-19 (federal, state or local order);
2. Has been ordered by a health care professional to self-quarantine due to concerns related to COVID-19;
3. The employee is seeking medical diagnosis and is having symptoms of COVID-19;
4. The employee is caring for an individual (law does not specify that it has to be a family member) subject to such an order;
5. The employee's child's school or place of care is closed, or childcare provider is unavailable (same reason as FMLA expansion); or
6. The employee is experiencing any substantially similar condition as identified by the Secretary of Labor or Treasury.

For the first three conditions, hourly pay is the greater of the employee's regular rate of pay, the federal minimum wage, or local/state minimum wage. This is subject to a maximum of $511/day, up to $5,110 for the entire paid emergency sick leave period.

For the conditions from 4-6 on the list, pay is capped at 2/3 of the greater of the amounts listed above. This is subject to a maximum of $200 per day, up to $2,000 over the two week period.

The leave is subject to a few conditions, including that:

- The employee may not be required to find another employee to cover the hours they are using for sick time.
- The employee may be required to return to work at the next scheduled shift after the need for sick leave ends.
- The leave does not carry over from one year to the next.
- The employer also may not require use of other paid leaves before using this emergency sick leave.

This leave is limited to two weeks for any combination of the reasons listed above. The leave is not retroactive (prior to April 1, the effective date) and the employee may still use the leave even if the employer gave the employee paid leave for similar reasons prior to April 1, 2020.

Employers must post a notice of the availability of this sick leave. This notice is available at: dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

Violation of the provisions of the emergency paid sick time would be a violation of the Fair Labor Standards Act for failure to provide minimum wage and subject to the penalties of the FLSA.

Stay tuned

More changes and new provisions are possible as lawmakers and federal and state agencies respond to this situation. There are issues of interpretation with this new law that may be dealt with in additional legislation, future regulations, or a FAQ from the Wage and Hour Division.

Unemployment Coverage for Public Entities

Many public employers are considering staffing adjustments in light of the coronavirus and its impact on available work. For those employees not covered under contracts that must be paid in the case of an "epidemic or other public calamity" pursuant to RC 3319.08(B) and 3319.081(G), layoffs are being contemplated. In order to have all the information on the financial impact of such a decision, the public employer should consider whether it is a "contributory employer" or a "reimbursing employer."

Generally speaking, public employers are reimbursing employers. Essentially, reimbursing employers are self-insured and will be billed dollar-for-dollar by the Ohio Department of Jobs and Family Services for claims paid. Public entity employers who have elected to become a contributory employer have paid unemployment tax. Contributory employers will have their claims mutualized with other employers in the state and will not have to reimburse on a dollar-for-dollar basis. Determining if the public entity is a contributory employer or a reimbursing employer will be necessary to determine how much will be saved via staffing reductions.

The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) provides that reimbursing employers may be reimbursed for one-half of the amounts paid into a state unemployment trust fund between March 13, 2020, and December 31, 2020.

If you have any questions regarding unemployment compensation issues, please reach out to any of the Ennis Britton attorneys.

Changes in Unemployment Law

Districts should expect to see a rise in unemployment claims due to the current pandemic. Ohio received 187,000 claims during the week of March 15-21. Substitutes, in particular, are likely to make claims during this time.

Governor DeWine has issued an order (EO 2020-03D) to ease the process of obtaining unemployment benefits. Employees who are ordered to stay home or isolated by an employer or public health authority, whether infected or not, will qualify for benefits so long as the employee is otherwise eligible. The basic requirements for eligibility for benefits are that a claimant has worked a sufficient number of hours and has earned a sufficient amount of pay during a period referred to as the "base period." The base period is the first four of the last five completed calendar quarters at the time the claim is filed. (Claims filed in March would be calculated on the four quarters beginning October 1, 2018, through September 30, 2019.) Individuals must have at least 20 weeks of employment and an average weekly wage of $269 during the base period of the claim.

ODJFS issued a mass-layoff number (2000180) that employees can use to expedite the handling of their claim. Employees subject to RIF due to COVID-19 can use this form and reference number. http://www.odjfs.state.oh.us/forms/num/JFS00671/pdf/.

Substitute employees may file claims for lack of work due to the ordered shutdown of the school to students. Outside of the context of a shutdown, districts may attempt to challenge lack of work claims by substitutes, due to the nature of the assignment not having guaranteed hours or days of work per year. Many substitutes pick and choose their own assignments. Those arguments will not be applicable, where, as here, there are no assignments for the substitute to choose from. Therefore, such employees are much more likely to receive benefits under these circumstances.

Additional benefits of the order are that certain benefit recipients will not be subject to the work search requirement during the period of the emergency. All claimants, however, will continue to be required to be "able and available for work," in order to receive benefits.

Finally, penalties against employers for failing to provide reports or make payments during the emergency declaration period.

The merits of each claim are fact dependent and may be subject to challenge even in light of the order. Please do not hesitate to contact an attorney at Ennis Britton to discuss your particular claim.

Doe v. Ohio Department of Education

The long-running Doe v. Ohio Department of Education litigation was back in the news earlier this month. The settlement became final and effective nearly three decades after the lawsuit was initially filed. Ennis Britton previously notified clients of the proposed settlement in December when the Ohio Department of Education's Chief Legal Counsel sent a notice to districts that a proposed settlement has been reached. To be clear, no individual school district was a defendant in this case. Defendants included the State of Ohio, the Governor, the State Superintendent of Public Instruction, and the Ohio Department of Education. The plaintiffs – parents of students with disabilities and the students themselves – alleged that the defendants failed to ensure that students with disabilities were adequately educated in compliance with the law.

A hearing was held on February 11, 2020, to determine whether final approval would be given to the proposed settlement that circulated in December 2019. The settlement has been approved and took effect earlier this month. The settlement covers a five year period and will focus on eleven priority districts (Canton City, Cleveland Metropolitan, Columbus City, Cincinnati Public, Toledo Public, Dayton Public, Akron Public, Youngstown City, Lima City, Zanesville City, and East Cleveland City School Districts). During the settlement period, ODE will develop a plan to improve inclusion and outcomes and will implement and monitor the implementation of the plan in the priority districts.

Ennis Britton's Special Education Team anticipates it is very likely that ideas and expectations from the plan for the eleven priority districts will have broader application in the long run. Thus, even districts that are not initially prioritized by the settlement are likely to feel the effects of the settlement. It will be important for all school districts to monitor the implementation of the settlement and to advocate for both reasonable expectations and appropriate additional funding to support whatever aspects of the settlement plan are given broader application to all of Ohio's school districts.

Relief for Student Loan Borrowers

On March 25, 2020, U.S. Secretary of Education Betsy DeVos announced efforts to increase flexibility regarding payments for student loan borrows. The efforts are to ensure that borrowers will not endure additional stress in making ends meet during the unprecedented and burdensome times we are in. The flexibility will be for no less

than 60 days from March 13, 2020, the date that President Donald Trump declared a national emergency relating to COVID-19.

DeVos' efforts include halting all of the requests made to the U.S. Treasury that comprise withholding money from defaulted borrowers, known as Treasury offsets. These are withholdings from remittances such as federal income tax refunds, Social Security payments, or other federal payments that are withheld at the direction of the Department or Education or another debt collection agency. Additionally, Devos directed the Department of Education to refund nearly $1.8 billion in offsets to over 830,000 borrowers.

DeVos' efforts include any wage garnishments. The Department of Education is relying on employers to make the change to borrowers' paychecks and halt wage garnishments and is directing employees to contact their employers' human resources department for assistance.

What This Means for Your District

Districts must be proactive in ensuring that employee wages are not continuing to be garnished during this time. Please reach out to any of the Ennis Britton attorneys with any questions. For more information, visit StudentAid.gov/coronavirus.

Upcoming Deadlines

As your school district prepares for the next couple of months, keep in mind the following upcoming deadlines.

- **April 27** – Deadline to submit August emergency or current operating expenses levy to county auditor for August election (RC 574802(A))
- **May 1** – Last day to submit August emergency or current operating expenses levy to county auditor for August election (RC 5748.02(A)) (100 days prior to the election).
- **May 5** – Last day for school districts to file resolution of necessity, resolution to proceed and auditor's certification for bond levy with board of elections for August election (RC 133.18(D)). Last day for county auditor to certify school district bond levy terms for August election (RC 133.18(C)). Last day to submit continuing replacement, permanent improvement, or operating levy for August election to board of elections (RC 5705.192, 5705.21, 5705.25). Last day to certify resolution for school district income tax levy for August election to board of elections (RC 5705.195). Last day to submit phased-in levy or current operating expenses levy for August election to board of elections (RC 5705.251(A)) (90 days prior to the election).
- **May 15** – Last day for certain board members and all administrators to file financial disclosure forms with the Ohio Ethics Commission (RC 102.02(A)(4)(a)).
- **June 1** – Last day to take action to nonrenew contracts of administrators other than superintendent and treasurer (RC 3319.02(C)). Last day to take action on and give written notice on intent not to re-employ teachers (RC 3319.11(D)). Last day to take action on and give written notice of intent not to re-employ nonteaching employees (RC 4141.29(I)(1)(f)) (Note: this requirement does not apply to municipal school district employees as defined in RC 3311071).
- **June 30** – 2019-20 school year ends (RC 3313.62). End of third ADM reporting period (RC 3317.03(A)).

Upcoming Presentations

2019–2020 Administrator's Academy Seminar Series

April 16, 2020: Student Discipline Primer

July 9, 2020: 2019–20120 Education Law Year in Review

Ennis Britton's Administrator's Academy Seminar Series is offered via a live video webinar professionally produced by the Ohio State Bar Association and is free of charge to clients.

Participants must be registered to attend each event. All three webinars will be archived for those who wish to access the event at a later time. You may register on our website or contact Kayla via email or phone at 513-674-3451.

April 3: West Central OASBO Chapter
Legal Update
Presented by Erin Wessendorf-Wortman

April 22: OASBO Annual Conference
"Wait, What? FMLA Traps for the Unwary"
Presented Remotely by Pamela Leist and Hollie Reedy

April 22: OASBO Annual Conference
"Avoiding Legal Pitfalls of Online Fundraising"
Presented Remotely by Pamela Leist and Hollie Reedy

April 28: State Support Team 12
Special Education Legal Update
Presented by Jeremy Neff & Erin Wessendorf-Wortman

Follow Us on Twitter: @EnnisBritton

Want to stay up to date about important topics in school law?
Check out Ennis Britton's Education Law Blog.

Webinar Archives

Did you miss a past webinar, or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, contact Kayla via email or phone at 513-674-3451. Archived topics include the following:

Labor and Employment

- School Employee Nonrenewal
- Employee Licensure
- School Employee Leave and Benefits
- Managing Workplace Injuries and Leaves of Absence
- Requirements for Medicaid Claims
- Discrimination: What Administrators Need to Know

Student Education and Discipline

- New Truancy and Discipline Laws – HB 410
- Transgender and Gender-Nonconforming Students
- Student Discipline
- Student Privacy

School Finance

- School Levy Campaign Compliance

School Board Policy

- What You Should Know about Guns in Schools
- Crisis, Media, and Public Relations
- Low-Stress Solutions to High-Tech Troubles
- Ohio Sunshine Laws

Special Education

- Three Hot Topics in Special Education
- Supreme Court Special Education Decisions
- Special Education Scramble (2018)
- Special Education Legal Update (2017)
- Special Education Legal Update (2016)
- Effective IEP Teams

Legal Updates

- 2017–2018 Education Law Year in Review
- 2016–2017 Education Law Year in Review
- 2015–2016 Education Law Year in Review

Ennis Britton Practice Teams

At Ennis Britton, we have assembled a team of attorneys whose collective expertise enables us to handle the wide variety of issues that currently challenge school districts and local municipalities. From sensitive labor negotiations to complex real estate transactions, our attorneys can provide sound legal guidance that will keep your organization in a secure position.

When you have questions in general areas of education law, our team of attorneys help you make competent decisions quickly and efficiently. These areas include:

Labor & Employment Law

Student Education & Discipline

Board Policy & Representation

There are times when you have a question in a more specialized area of education or public law. In order to help you obtain legal support quickly in one of these areas of law, we have created topic-specific practice teams. These teams comprise attorneys who already have experience in and currently practice in these specialized areas.

Construction & Real Estate
Construction Contracts • Easements • Land Purchases & Sales • Liens • Mediations • Litigation

Team Members:
Ryan LaFlamme
Robert J. McBride
Bronston McCord
Giselle Spencer
Gary Stedronsky

Workers' Compensation
Administrative Hearings • Court Appeals • Collaboration with TPAs • General Advice

Team Members:
Ryan LaFlamme
Pam Leist
Giselle Spencer
Erin Wessendorf-Wortman

Special Education
Due Process Claims • IEPs • Change of Placement • FAPE • IDEA • Section 504 • any other topic related to Special Education

Team Members:
John Britton
Bill Deters
Michael Fischer
Pam Leist
Jeremy Neff
Hollie Reedy
Giselle Spencer
Erin Wessendorf-Wortman

School Finance
Taxes • School Levies • Bonds • Board of Revision

Team Members:
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