IDAHO SBA
School Boards Association

Good afternoon everyone:

We know that all of you are currently making decisions related to school reopening. We also know that you have likely received some questions related to staff returning to work. Below is analysis from Anderson, Julian, and Hull that will likely answer many of the questions you have. We would recommend that you reach out directly to Anderson, Julian, and Hull should you have more questions.

As a reminder, as part of your membership in ISBA, your district or charter has four (4) free hours of legal service through Anderson, Julian, and Hull.

Please let us know if you have any other questions. Be well, *Karen*

MEMO

TO: ISBA

FROM: AJH

DATE: Monday, July 27, 2020

RE: COVID-19 and school reopening and employee concerns regarding returning to work in schools

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This is memo addresses school (K-12) reopening in Idaho for the 2020-2021 school year, and employee concerns regarding returning to work in schools.

As Idaho K-12 schools finalize reopening plans, several key questions appear to arise repeatedly. This memo addresses the subset of those questions which relate to employee concerns, employee questions, and employee trepidation concerning how school will be conducted for the 2020-2021 school year.

I. Employee Unwillingness to Be Physically Present in School or District Buildings

As various school Districts and Charter Schools gear up to return to school, a number are facing a situation where some employees (including teachers) either refuse to physically return to the work site (school); are fearful of returning to work at a physical work site (school building or District office); and/or employees who may be returning to work have underlying conditions putting them at risk, or share a household with persons who may have underlying risk factors.

A. Employees Who Are Merely Fearful/Reluctant Due to COVID

Simply stated, and in the absence of other facts, a generalized fear or reluctance regarding potential exposure to COVID infection does not excuse employees from work, nor entitle them to any pandemic-related leave.

If an employee refuses to return to work due to a generalized fear of contracting COVID, they may be in breach of their agreement to work (if they are certificated), or may be failing to perform the job duties required of their position (if they are classified), particularly where in-person attendance at the work site is an integral part of the job description. So, for instance, if the in-person provision of instruction in a classroom is part of the employee's job duties, refusing to be present at school may put them in breach of an agreement to perform those duties. Similarly, if assisting students as a 1:1 paraprofessional is the job description, refusal to be present to fulfill the job duty may be construed as a refusal to work.

If there are duties which can be undertaken as telework, that might be one option to offer such employees. However, if an employee is able to telework, Districts and Charter Schools should be aware that this likely disqualifies the employee for leave under the Families First Coronavirus Relief Act ("FFCRA"). (Expanded FMLA under the FFCRA may still be available to some employees who are offered an opportunity to telework, but are unable to complete their teleworking tasks or hours because of a need to care for a child whose school or place of care is closed, or child care provider is unavailable, because of COVID-related reasons.) For the most part, however, the ability to telework cuts of entitlement to leave under the FFCRA. "Ability" will have to be considered on a case-by-case basis.

Neither FFCRA's emergency paid sick leave, nor expanded family leave/EFMLEA, are available to an employee who simply refuses to work/come into work because he or she is fearful of catching COVID. As to the emergency paid sick leave provision, according to the U.S. Department of Labor ("DOL"), the "employee is quarantined" qualifying language for such leave requires the employee to have been directed or advised to stay home or otherwise quarantine because a healthcare provider believes him or her to be "particularly vulnerable to COVID-19," **and** requires that taking that advice prevents the employee from teleworking. Thus, self-protective self-quarantine will not entitle an employee to emergency paid sick leave under the FFCRA.

As to the expanded family leave provisions of the FFCRA, the U.S. DOL has specifically stated, "Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA."

Finally, the Idaho Dept. of Labor has indicated that some persons may qualify for unemployment benefits if they choose to quit their jobs due to "health reasons" related to COVID. Of course, in order to receive such benefits, they would actually have to quit. Per the Idaho DOL, eligibility for unemployment benefits would then be determined on a case-by-case basis.

B. Employees with Underlying Risk Conditions

Both the U.S. DOL and Idaho DOL COVID guidance make reference to concepts surrounding underlying health conditions ("particularly vulnerable to COVID-19," and "health reasons.") What of employees with underlying health conditions which either make it more likely they will contract COVID, or more likely they will suffer complications if they do? And what of employees who may be in other risk categories (i.e., increased age)?

1. Employees With Underlying Health Conditions

The Centers for Disease Control and Prevention ("CDC") has published a revised[1] list of certain medical conditions which do subject persons with those

[1] Revised July 17, 2020 (https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-

conditions to increased risk of severe illness from COVID-19, and a separate list of conditions which *might* subject persons to increased risk. In total, the CDC has listed at least 20 such conditions. Some have sub-categories, so they may in fact total more than 20. Many are relatively common in the United States population (asthma; obesity; smoking; high blood pressure; diabetes (Types I and II); pregnancy; cancer). Thus, there will likely be many employees at a given District or school who have underlying health conditions as that term is understood by the CDC.

Certainly, care should be taken to assure this population that the District/Charter School is taking steps to assist them in their own efforts to protect themselves. The CDC has cautioned this population that "there is no way to ensure you have zero risk of infection," but "everyone should take steps to prevent getting and spreading COVID-19 to protect themselves, their communities, and people who are at increased risk of severe illness." While no guarantees should be given that infection can be prevented, it may be reassuring to persons in this population to be kept appraised of efforts by the District/School to minimize infection transmission opportunities.

If an employee in a high-risk health group requests a reasonable accommodation pursuant to the Americans with Disabilities Act ("ADA"), to, for example, limit exposure, that request should be entertained. Such a request should be treated like any other request for reasonable accommodation based on disability, and the District and the Employee should enter into the interactive process. The typical information should be requested. The U.S. Equal Employment Opportunity Commission ("EEOC") has noted that:

> There may be reasonable accommodations that could offer protection to an individual whose disability puts him at greater risk from COVID-19 and who therefore requests such actions to eliminate possible exposure…. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also 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.

The EEOC has given the guidance that the employer may request to know (1) how the disability creates a limitation, (2) how the requested accommodation will effectively address the limitation, (3) whether another form of accommodation could effectively address the issue, and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (that is, the fundamental job duties). The employer may also request medical documentation concerning the above questions.

If an employee in a high-risk group simply refuses to work/report to work due to the risk, he or she may be in breach, and/or may be demonstrating an unwillingness to work with the District or School to continue performing his or her essential job functions.

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precautions%2Fgroups-at-higher-risk.html)

If it is a straightforward refusal to work and/or to participate in the interactive process, it is not legally justifiable.

An employee may opt not to return to work when the school reopens. Or he may quit his job due to a general concern over COVID. The Idaho DOL has stated that it may still find that unemployment compensation could be awarded to such an employee, depending upon the reasons given for refusing to return to work or quitting. Questions the DOL will ask include:

> Is this based on concern or fact (for example, do others in the workplace have COVID-19)? What does the employer have in place to keep them safe? What are the claimant's duties in relation to interacting with others? Could they telework?

As can be seen, the questions are fact-intensive and case specific. There is no one blanket answer for an employee refusing to return to work, because the permutations of possible underlying conditions, and job duties, and workplace safety measures, are nearly endless.

It should be noted, however, that the FFCRA does not provide leave for refusal to return to work, even for persons with underlying health conditions that put them at higher risk if they contract COVID. The qualifying reasons for leave under the FFCRA do not refer to high-risk status as a reason for leave. Further, the guidance given by the U.S. DOL has delved into this to the extent of explaining that persons cannot "self-quarantine" without medical advice and thereby qualify for pay under the Act.

However, individuals *are* eligible for up to 80 hours of paid emergency sick leave "if a health care provider directs or advises [them] to stay home or otherwise quarantine … because the health care provider believes that [they] may have COVID-19 or are particularly vulnerable to COVID-19, and quarantining … based upon that advice prevents [the employee] from working (or teleworking)." Thus, any potential FFCRA leave based on vulnerable health status is capped at 80 hours, and requires medical advice. A District/School may request medical documentation that such advice was given.

2. Employees Who Are Advanced In Age

The CDC has noted that risk for severe illness from COVID-19 increases with age, and the greatest risk is for those persons 85 or older. It has cautioned, though, that persons in their 50s are at higher risk than people in their 40s; people in their 60s are at higher risk than people in their 50s; and so on. Accordingly, the risk for individuals/employees is a continuum. There will not necessarily be a bright-line cutoff age under which it is "safe" to work and above which it is "unsafe" to work. Even so, the CDC has also noted that 8 out of 10 COVID-19-related deaths reported in the United States have been among adults aged 65 years and older.

Districts and Charter Schools should not take it upon themselves to determine an individual is "too old" to work, as this could expose employers to age bias/discrimination claims. However, if an employee expresses a concern or reluctance to be physically present in school or district offices due to the underlying risk factor of increased age, the response should be similar to the response that would be given regarding health considerations.

Further, while age *alone* is not a disability under the ADA, it is often accompanied by a "physical or mental impairment that substantially limits a major life activity," i.e., a disability. Thus, Districts and employees may choose to enter into an interactive dialogue about whether any reasonable accommodation could be made which would allow the individual to continue to perform her job functions.

Similarly, if the aged employee is given medical advice to self-quarantine because a medical care provider considers him or her to be "particularly vulnerable" on the basis of age, the employee would for that qualifying reason be eligible for up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at 100% of the rate of pay.

C. Employees with Family/Household Members with Underlying Risk Conditions

Typically, having a family member or household member with underlying risk conditions will not entitle an employee to special consideration, except for some situations which will allow the employee to take family leave, as discussed below.

An employee may qualify for two weeks (up to 80 hours) of emergency paid sick 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). This does not mean that anyone who is related to or lives with someone who is advanced in age or who, e.g., has high blood pressure can choose to telework or refuse to work.

If teleworking is available for a particular employee whose family member is either in a vulnerable population, or in quarantine, and the employee requests to telework, then the District or Charter School should consider agreeing to let the employee telework. However, many school-based positions are not amenable to telework when school is physically meeting for in-person classroom instruction.

Therefore, if telework is not available, the employee may qualify for (two weeks of) emergency paid sick leave, if the family member or household member needs the employee's care. Under the FFCRA, this means the other person must be in quarantine or self-quarantine. The household/family member must be unable to care for him or herself and depend on the employee for care because the family member is in

quarantine or self-quarantine. The other person must be an immediate family member or someone who resides in the employee's home, or someone in a similar relationship with the employee. The relationship must "create an expectation" of care. Finally, caring for the other person must prevent the employee from working and teleworking.

As can be seen, simply having a high-risk family or household member does not otherwise allow for leave or accommodations. It will be up to individual Districts and Charter Schools to determine whether they want to make accommodations or grant leave, even where it is not legally required.

II. Employee Requests for Information Regarding Interplay of FFCRA Leave and Other Types of Leave

Many employees want to know, if leave of either type or both types is available to them under the FFCRA (emergency paid sick leave and/or expanded FMLA ("EFMLEA")), how that leave interacts with PTO, accrued sick leave, and "regular" FMLA. Once again, there are a myriad of combinations of situations in which such questions may arise, and many will be fact-specific. However, the following general statements can be made:

- Employees are limited to a total of 80 hours of paid sick leave under the FFCRA.
- The total number of hours for which an employee may receive emergency paid sick leave is capped at 80 hours of paid sick leave for any combination of qualifying reasons.
- Employees are entitled to up to 12 weeks of expanded family and medical leave (EFMLEA) for qualifying reasons laid out in the act (childcare-related).
- An employee who is sick, or whose family members are sick, may be entitled to leave under the "regular" FMLA.
- Employees may take a total of 12 workweeks of leave during a 12-month period under the FMLA, including the EFMLEA.
- FFCRA emergency paid sick leave is in addition to any form of paid or unpaid leave provided by an employer, law, or an applicable collective bargaining agreement.
- Employers may not require employees to use provided or accrued paid vacation, personal, medical, or sick leave before FFCRA emergency paid sick leave.
- An employer may not require employer-provided paid leave to run

concurrently with (cover the same hours as) emergency paid sick leave.

- If an employee is provided with emergency paid sick leave or expanded family and medical leave, he is not concurrently eligible for unemployment insurance for the same time period (i.e., he would have to quit (for "good cause") or be terminated to receive unemployment benefits).

- District/Charter School policies on sick leave, and any applicable employment contracts or collective bargaining agreements would determine whether the District should provide paid leave—beyond emergency paid sick leave under the FFCRA—to employees who are not at work because they were sent home for showing symptoms of COVID.

- Under the ADA, qualified individuals with disabilities may be entitled to unscheduled leave, unpaid leave, or modifications to the employer sick leave policies as "reasonable accommodations." These accommodations would be reached via the typical interactive process.

III. Employee Questions Concerning the Possible Applicability of Workers' Compensation Law to the COVID Pandemic

The question of whether, and how, workers' compensation law will specifically apply to COVID infections is unsettled in Idaho at this point; however, the question of how community acquired diseases are treated under Idaho worker's compensation law does give some direction. Generally, community acquired communicable diseases are not compensable under Idaho law. The Idaho Legislature has not spoken on the specific issue of COVID, and there is no case law on the topic as of yet. The answer to the question will hinge on whether COVID can be considered to be a workplace injury or occupational disease, or is lumped together in the same category as other communicable diseases, such as the flu or common cold. This is because only illnesses, injuries, or exposures directly occurring at work are compensable under the workers' compensation statutes, I.C. § 72-201 *et seq*.

As a threshold matter, an employee would likely need to be able to trace his infection with COVID to a specific time, place, and cause at his workplace for the injury to be compensable. (The Idaho Supreme Court has noted that, "causation is at the root of all workers' compensation questions." *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 603, 272 P.3d 569, 575 (2012)). Nor is it likely that COVID could be considered to be a compensable "occupational disease." COVID is, unfortunately, a hazard that is common to the general public in the United States. Typically, occupational diseases for the purposes of Idaho Workers' Compensation law do not encompass "hazards that are common to the public in general." I.C. § 72-438; I.C. § 72-102(22). Without some direct, unique link to a source of exposure and the ability to rule out all other sources, the potential for compensability is extremely low.

Since community-acquired infection is widespread in many parts of Idaho, the requisite specific causation would be difficult, if not impossible, for many employees to prove. With Idaho having apparently failed to meet the criteria to exit Stage 4 again on July 23, 2020, it is clear that there are many avenues by which COVID infection is occurring in the state.

IV. Employee Concerns Regarding COVID Infections in the School Population, Testing, and Quarantine Issues, and Other Safety Matters

The Occupational Safety and Health Administration ("OSHA") has issued two publications, "Guidance on Preparing Workplaces for COVID-19" and "Guidance on Returning to Work." In the former, OSHA classified schools as presenting a "medium exposure risk," out of four categories ("very high," "high," "medium," and "lower (caution)." OSHA noted that most American workers will either fall into "medium" or "lower" risk levels. For persons in the "medium risk" workplace, such as schools, OSHA recommends masks or reusable face shields; limitation of the public's access to the worksite or at least restriction of the public's access to certain areas of the worksite; consideration of strategies to minimize face-to-face contact, such as phone-based communication and telework; and communication of the availability of medical screening and other work health resources.

OSHA explains that employers may conduct either work site COVID testing, or work site temperature checks and daily symptom screening. It further tells employers to "Consider implementing such programs in conjunction with sick leave policies that encourage sick workers, including those whose self-monitoring efforts reveal a fever or other signs or symptoms of illness, to stay at home."

This has raised the question of when employees, or students, who have COVID should stay home, and when they should return to school. OSHA has stated:

> The CDC provides guidance about the discontinuation of isolation for people with COVID-19 who are not in healthcare settings. This guidance may be adapted by state and local health departments to respond to rapidly changing local circumstances.

The CDC's guidance on this topic was updated on July 17, 2020, and now provides:

> Persons with COVID-19 who have symptoms[2] and were directed to care for themselves at home may discontinue isolation under the following conditions:
>
> - At least 10 days have passed since symptom onset and
> - At least 24 hours have passed since resolution of fever without the use of fever-reducing medications and

[2] The CDC notes that a test-based strategy for discontinuing isolation is no longer recommended, except to discontinue it sooner than 10 days.

- Other symptoms have improved.

Conversely, the CDC notes that some individuals who are exposed to persons with COVID, yet never develop symptoms, may need to quarantine for 14 days after exposure. The CDC states, "Thus, it is possible that a person *known* to be infected could leave isolation earlier than a person who is quarantined because of the *possibility* they are infected."

In either event, the question has arisen of how school employees might be paid if they are required to isolate/quarantine for 10-14 days. If a school employee must isolate/quarantine because they are subject to a local health district quarantine or isolation order related to COVID; they have been advised by a health care provider to self-quarantine related to COVID; or they are experiencing symptoms related to COVID and seeking a diagnosis, they qualify for two weeks of paid emergency sick leave under the FFCRA. This will likely apply to persons who never become symptomatic or infected, if they are quarantining because the local health district or a medical practitioner has told them to quarantine due to exposure to another, infected, individual.

Thus, persons who either become infected *or* are exposed to a co-employee or student with a COVID infection may be asked to isolate or self-quarantine. The criteria for self-quarantine for a particular District could be modeled upon that laid out by the CDC. (This is assuming the local health district has not already told potentially-exposed persons they must self-isolate at home.) The CDC says those who have been in "close contact with someone who has COVID-19" should quarantine. "Close contact" does not necessarily include everyone in a school or District building; it requires fairly significant interaction. Per the CDC, close contact means:

- You were within 6 feet of someone who has COVID-19 for at least 15 minutes
- You provided care at home to someone who is sick with COVID-19
- You had direct physical contact with the person (touched, hugged, or kissed them)
- You shared eating or drinking utensils
- They sneezed, coughed, or somehow got respiratory droplets on you

Thus, whether a given employee may need to quarantine due to close contact with an infected student or co-employee is once again going to be fact-dependent. If the employee does need to quarantine, he or she should qualify for emergency paid sick leave under the FFCRA. Please note that if the employee later becomes infected with COVID, he or she would not be entitled to additional emergency paid sick leave under the FFCRA. Therefore, leave in that instance (if FFCRA leave has already been used to quarantine) would have to be accrued leave, unpaid leave, or some other type of non-FFCRA leave the District may decide to provide.

CONCLUSION/SUMMARY

The potential questions which could be raised as a result of the COVID pandemic caused by the novel coronavirus are almost innumerable. Accordingly, the above-outlined areas discuss only some of the myriad of issues that may come up as the 2020-2021 school year rapidly approaches, and as it progresses. However, the above topics are the ones that at this point in late Summer 2020 are arising most consistently and often, and this memo is an attempt to answer in one place the questions most commonly seen from Districts and Charter Schools across the State.