Returning to Work: Employee Leaves and Other Considerations for the “New Normal”

OASBO Webinar
August 10, 2020

with Beverly Meyer
Agenda

• New Leave Provisions of the FFCRA (and Other Leaves, too!)
• Accommodating Employees During the Pandemic and Potential Pitfalls
• The New Work Environment
Disclaimers

I can’t help myself. I’m a lawyer.

• I am not giving you legal advice.

• Please consult with your Board’s legal counsel regarding how best to address a specific situation.

• This area of the law is rapidly changing, and these materials were last updated on August 9, 2020.

• I will take questions at the end as time permits.
The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.\[1\] The Department of Labor’s (Department) Wage and Hour Division (WHD) administers and enforces the new law’s paid leave requirements. These provisions will apply from the effective date through December 31, 2020.

Generally, the Act provides that covered employers must provide to all employees:\[2\]

- Two weeks (up to 80 hours) of **paid sick leave** at the employee’s regular rate of pay where the employee is unable to
Families First Coronavirus Response Act (FFCRA)

- Federal statute signed into law on March 18, 2020
- Applies to all public school districts, even if more than 500 employees
Families First Coronavirus Response Act (FFCRA)

• Provides two kinds of extra Coronavirus Leave to employees:

  1) Emergency Paid Sick Leave (Emergency Paid Sick Leave Act)
  2) Expanded FMLA Leave (Emergency Family Medical Leave Expansion Act)

• These paid leaves can be applied by employee to cover hours they are actually scheduled to work

• Use it by December 31, 2020 or lose it
Emergency Paid Sick Leave Under FFCRA
FFCRA

Emergency Paid Sick Leave

- Available to all full-time and part-time employees, regardless of how long they have worked for a school district
- Provides up to two weeks (up to 80 hours) of paid leave; prorated for part-time employees
- Is in addition to other accrued sick leave and accrued paid leave, such as personal days and compensatory time
- Is to be used in place of hours an employee is scheduled to work
- Available to employees who are unable to work or telework for the following reasons:
Emergency Paid Sick Leave

Full pay to maximum of $511/day and aggregate of $5,110

1) To comply with a governmental quarantine or isolation order related to the pandemic;

2) To comply with a health care provider’s recommendation to self-quarantine in relation to COVID-19;

3) To obtain a medical diagnosis when an employee is experiencing COVID-19 symptoms;
Emergency Paid Sick Leave

2/3 pay to maximum of $200/day and aggregate of $2,000

4. To care for or assist an individual who is subject to quarantine or has been advised to self-quarantine and they are unable to care for themselves;

5. To care for their child under age 18 where the child’s school or childcare provider is closed or unavailable due to the virus and the employee is needed to care for the child;

6. If the employee is experiencing any other substantially similar condition specified by the federal Dept. of Health and Human Services in consultation with the Dept. of the Treasury and the Dept. of Labor.
Emergency Paid Sick Leave

- Employee can choose to supplement with other paid leave to receive full pay
- Employer **cannot** require the supplementation of other leave
Medical Leave Request

Emergency Expanded FMLA under FFCRA
Expanded Emergency FMLA Leave

• Available to all full-time and part-time employees who have worked for a school district for 30 days
• Provides up to ten weeks of paid leave (12 weeks FMLA total leave), prorated for part-time employees
• Intended to work in conjunction with Emergency Paid Sick Leave; if employee used EPSLA for other reason, then first two weeks of this leave is unpaid
• Is part of an otherwise eligible employee’s regular 12 week FMLA entitlement
• Employer can require supplementation of other leave – look to FMLA policy and contract language
• To be used in place of hours an employee is scheduled to work
Expanded Emergency FMLA Leave

2/3 pay to maximum of $200/day and aggregate of $10,000

Available to employees who are unable to work or telework for the following reason:

• To care for their child under age 18 where the child’s school or childcare provider is closed or unavailable due to the virus and the employee is needed to care for the child
# Families First Coronavirus Response Act (FFCRA) At-A-Glance

<table>
<thead>
<tr>
<th>Type of Leave</th>
<th>Reason for Leave</th>
<th>Leave Benefit</th>
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| **EMERGENCY PAID SICK LEAVE** (available immediately upon employment) | • Governmental quarantine  
• Isolation order related to the pandemic  
• Shelter-in-place or stay-at-home order | • Up to 80 hours (2 weeks/10 days)  
• Full pay up to $511/day and an aggregate of $5,110 |
| | A health care provider’s recommendation to self-isolate because the employee has been exposed to COVID-19 or when an employee’s pre-existing health condition makes them particularly vulnerable to the virus. | • Up to 80 hours (2 weeks/10 days)  
• Full pay up to $511/day and an aggregate of $5,110 |
| | A medical diagnosis when an employee is experiencing COVID-19 symptoms, such as fever, chills, shortness of breath, cough, sore throat, or a new loss of taste or smell. | • Up to 80 hours (2 weeks/10 days)  
• Full pay up to $511/day and an aggregate of $5,110 |
| | To care for an individual who is subject to quarantine or has been advised to self-quarantine and is unable to care for themselves. | • Up to 80 hours (2 weeks/10 days)  
• 2/3 pay* up to $200/day and an aggregate of $2,000  
*The employee may choose to supplement with other applicable leave to receive full pay. |
| | To care for their child when the child’s school or childcare provider is closed due to the virus and the employee is needed to care for the child. | • Up to 80 hours (2 weeks/10 days)  
• 2/3 pay** up to $200/day and an aggregate of $2,000  
**See Expanded Emergency FMLA below.  
*The employee may choose to supplement with other applicable leave to receive full pay. |
| | When the employee is experiencing any other substantially similar condition specified by the Department of Health and Human Services in consultation with the Department of the Treasury and the Department of Labor. | • 2/3 pay* up to $200/day and an aggregate of $2,000  
*The employee may choose to supplement with other applicable leave to receive full pay. |
| **EXPANDED EMERGENCY FMLA** (available after 30 days of employment) | Available to an employee who is unable to work or telework because they are needed to care for their child whose school or childcare provider is closed due to the coronavirus. | • Up to 10 weeks, intended to be used in conjunction with the two weeks of Emergency Paid Leave, for a total of 12 weeks of leave.  
• 2/3 pay* up to $200/day and an aggregate of $10,000 (plus any amount available under Emergency Paid Leave).  
* An employer may require that an employee supplement with other accrued paid leave if required under a policy or CBA. |

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This information is not intended to constitute, and is not a substitute for, legal or other advice. Each circumstance should be considered and evaluated separately, and in consultation with your own legal counsel.

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What About Intermittent Leave?

**Employer consent needed for intermittent leave:**

Whether teleworking or working onsite, employees may only take leave intermittently if the employer agrees.

And, for employees reporting to a worksite, intermittent leave is only available when needed by the employee to care for a child whose school or day care is closed or care provider is unavailable.

**However:**

On August 3, 2020, a federal district judge in New York struck down parts of the DOL regulations, including:

The requirement of employer consent to take intermittent leave where the employee needs to care for a child whose school or place of care is closed or where child care is unavailable.

***unclear if this limited to NY area or Nationwide (stay tuned!)***
FFCRA Leave – Documentation, No Retaliation, and Right of Restoration
FFCRA Leave

Documentation; No Retaliation; Right of Restoration

- Documentation for leave -- School district can require some written documentation of leave request by employee. This documentation will look different than the “usual” FMLA documentation.
- Verbal notice that health care provider has been consulted is sufficient, but identifying information for the provider must be provided.
- No retaliation or discrimination allowed against those who ask for/use leave.
- Right of restoration to same/equivalent position.
What does FFCRA not do?
What does Families First Act not do?

1) Use of leave does not interfere with an employer’s ability to layoff or reduce hours of employee, if is a legitimate business decision

2) Does not apply to health care providers and emergency responders where their employers have affirmatively exempted them from the Act (but see State of New York v. U.S. Department of Labor, et al., No. 1:20-cv-03020 (S.D. N.Y. Aug. 3, 2020) regarding health care providers)

3) Provide leave to employees who, without more, are afraid to come to work
FMLA and Other Leaves

Family Medical Leave Act
FMLA
FMLA Leave Continues

- Up to 12 weeks of unpaid leave in a 12 month period
- Available to **eligible employees**:  
  - Employed 1 year  
  - 1250 hours worked  
- For **qualifying reasons**  
  - Employee’s own serious health condition (repeated treatment, any period of inpatient treatment, chronic condition)  
  - Care for spouse, parent, child with a serious health condition  
  - Birth/adoPTION of child  
  - Military exigency  
  - 26 week covered servicemember leave  
- Look to District policies and collective bargaining agreements for substitution of other paid leave  
- Right to be restored to same/equivalent position  
- No retaliation or discrimination
FMLA and Higher Risk Employees

• No guidance (yet) regarding new COVID-based qualifications
• Must have serious health condition making the employee unable to perform functions of the job (or the employee is needed to care for immediate family member with serious health condition)
• District may request further clarification from the health care provider under limited circumstances and may also seek a second opinion, paid for by the district, upon an employee’s initial certification
New FMLA Forms

• DOL issued new model FMLA notice and certification forms on July 20, 2020

• Expiration date of June 30, 2023

• https://www.dol.gov/agencies/whd/fmla/forms
Sick leave & unpaid leave of absence

Let’s not forget about these!

- Sick leave - O.R.C. 3319.141
  - 1.25 days/month
- Unpaid leave of absence – O.R.C. 3319.13
  - Not more than two consecutive school years
  - Board shall grant if illness or disability
  - Board may grant for other reasons (educational, professional, other purposes)
- Collective bargaining agreements may provide additional leave
Employees can also use...

Personal days and vacation leave

• Personal Leave
  • O.R.C. 3319.142 (nonteaching employees); minimum of three days/year
  • Boards can provide 32 hours to teachers pursuant to O.R.C. 124.386, 124.39(C), and 3319.08

• Vacation Leave
  • O.R.C. 3319.084
  • Vacation leave for eleven and twelve month employees after one full year of service
Accommodating Employees During the Pandemic: The ADA
The ADA

- Nondiscrimination prohibitions and reasonable accommodation requirements continue as to all employees.

- **Disability**: a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. 42 U.S.C. § 12102 (1)(A) and (B).

- No determination (yet) whether COVID-19 is a disability.

- School districts will have to deal with effects of employee’s pre-COVID disabilities that create new/different issues for them during this pandemic.
The ADA

- “Covid-related concerns” will arise under the ADA:
  - **Disabilities**: Immune system issues (Chron’s Disease, cancer treatments), diabetes, asthma; latex allergies; masks if respiratory issues
  - **Increased psychological issues as well** – anxiety/OCD/depression
  - **Accommodations**: Same process and considerations as you would make for “regular” disabilities – leave, alternate assignment, work from home, altered work environment (plexiglass barriers, measures to assure maintenance of minimum distance, masks/shields/gloves)
    - Be aware of need to accommodate employee’s ability to telework if that is their assigned worksite
People with Certain Medical Conditions

Summary of Recent Changes
Revisions were made on July 17, 2020 to reflect recent data supporting increased risk of severe COVID-19 among individuals with cancer. The listed underlying medical conditions in children were also revised to indicate that these conditions might increase risk to better reflect the quality of available data currently. We are learning more about COVID-19 every day; and as new information becomes available, CDC will update the information below.

People of any age with certain underlying medical conditions are at increased risk for severe illness from COVID-19:

- Cancer
- Chronic kidney disease
- COPD (chronic obstructive pulmonary disease)
- Immunosuppressed state (weakened immune system) from solid organ transplant
- Obesity (body mass index [BMI] of 30 or higher)
- Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies
- Sickle cell disease
- Type 2 diabetes mellitus

COVID-19 is a new disease. Currently there are limited data and information about the impact of underlying medical conditions and whether they increase the risk for severe illness from COVID-19. Based on what we know at this time, people with the following conditions might be at an increased risk for severe illness from COVID-19.
EEOC Guidance on Higher Risk Employees

- May be eligible for reasonable accommodation – not automatic; direct threat is difficult to prove; employees may come to employer with concerns
- Uses CDC’s list of medical conditions that puts persons at a higher risk for severe illness, including COVID-19
- School districts have no obligation under ADA to consider/protect an employee’s higher risk family member (EEOC What You Should Know at D.13)
Interactive Process

When engaging in the interactive process, ask questions to determine what accommodation(s), if any, are available to the employee. The EEOC suggests questions that address:

1) how the requested accommodation will effectively address the limitation that the disability places on the employee’s ability to perform his or her essential job functions;

2) whether another form of accommodation could effectively address the issue; and

3) how a proposed accommodation would enable the employee to continue performing the position’s essential function.

What You Should Know about COVID-19 and the ADA, the Rehabilitation Act and Other EEOC laws, Updated June 17, 2020 at D.6
Reasonable Accommodation

As in non-pandemic times, reasonable accommodation means the following:

- Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

- Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position; or

- Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

- 29 C.F.R. § 1630.2(o)(1) and (2)
Reasonable Accommodation and the Higher Risk Employee

• Simply put: job/process restructuring; part-time or modified work schedules; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies

• Also, leaves (but indefinite leaves are an undue burden under 2016 EEOC Guidance on Undue Hardship); telework; reassignment to a vacant position, especially if an employee’s disability poses a direct threat to own health and safety (EEOC What You Should Know at G.5)
What About Remote Work Requests?

A Reasonable Accommodation?

D.1. If a job may only be performed at the workplace, are there reasonable accommodations for individuals with disabilities, absent undue hardship, that could offer protection to an employee who, due to a preexisting disability, is at higher risk from COVID-19? (4/9/20)

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. Even with the constraints imposed by a pandemic, some accommodations may meet an employee’s needs on a temporary basis without causing undue hardship on the employer.

...If not already implemented for all employees, accommodations for those who request reduced contact with others due to a disability may include changes to the work environment such as designating one-way aisles; using plexiglass, tables, or other barriers to ensure minimum distances between customers and coworkers whenever feasible per CDC guidance or other accommodations that reduce chances of exposure....

What You Should Know about COVID-19 and the ADA, the Rehabilitation Act and Other EEOC laws, Updated June 17, 2020 at D.1
What About Remote Work Requests?

A Reasonable Accommodation?

https://askjan.org/topics/telework.cfm?#intro

- Are other employees in the same position permitted to work at home?
- How frequently will telework be needed, and for what duration?
- Can the essential job functions of the position be performed outside of the traditional work environment?
- Will the employee have access to the equipment needed to perform the essential duties of the position?
- How will the employee be supervised and performance be measured?
- Does the work require in-person interaction with colleagues, clients, or customers, and can communication occur in an alternative way?
- May an employer provide accommodations that enable an employee to work full-time in the workplace rather than granting a request to work at home?
The ADA

What should an employer do during the pandemic?

Same things it usually would:

• Verify existence of disability and limitations on performance of job duties

• Engage in interactive process with employee to determine what is a *reasonable* accommodation, and then provide it

• Employer gets to choose from among possible accommodations

• Accommodation is unreasonable if it poses an undue hardship on the employer (“significant difficulty or expense”)
Unemployment Compensation

Unemployment compensation benefits are available to those who cannot return to work

• June 18, 2020 Executive Order 020-24D by Governor DeWine: a medical provider’s “recommendation that an individual not return to work because he/she falls into a category that is considered ‘high risk’ for contracting COVID-19 by the Centers for Disease Control and Prevention and the employer cannot offer teleworking options” constitutes *good cause* for refusing suitable work and will entitle the employee to unemployment compensation benefits.
The Best Intentions May Violate Title VII and ADEA

• These statutes continue to apply as well and prohibit discrimination based on sex, pregnancy, race, religion, national origin and age
  ○ EEOC *What You Should Know* at G.4

• Employer cannot discriminate/make employment decisions based on these reasons and must prevent harassment on same basis
  ○ Do not assume an employee is a direct threat to self based on what the employer believes it knows about their risk factors
A Few Words About the Work Environment
Masks and Other PPE

Schools must provide written justification to local health officials, upon request, explaining why a staff member (student) is not required to wear a facial covering in the school. At minimum, facial coverings (masks) should be cloth/fabric and cover an individual’s nose, mouth, and chin.

Remain mindful that student mask-wearing protocols may impact an employee’s ability to return to work (at present, they are not State-mandated for students in Ohio).

Face shields may be an option where: communication with students would be impacted by masks; when teaching ESL; where cloth masks might present a safety hazard (science labs); for individuals who have difficulty wearing a cloth face covering.
Compulsory Testing and Employee Medical Information

The EEOC’s current position:

Employers cannot require antibody testing of employees prior to allowing them to enter the workplace because it does not demonstrate that an employee presently has COVID-19. COVID-19 viral tests, temperature taking and questions about current symptoms can be required, as they are “job related and consistent with business necessity.”

(EEOC What You Should Know at A.1, A.2, A.6, A.7)
### Screening, Isolating and Excluding Students & Staff During a Pandemic

#### Screening & Mitigation
- **District should consider providing written instructions to staff and families about when individuals should stay home and what information should be reported to school officials.**
- **District should consider whether and how it will conduct temperature checks:**
  - Rely on staff/parent to assess at home?
  - Take temperature at school?
- **If, under the District’s face covering policy, an individual who is required to wear a face covering arrives without one, one should be provided.**

#### Exposure to COVID+ or presumed COVID+ individual?
- Individual must stay home until 14 days after last exposure
- Individual should self-monitor for symptoms:
  - Check temperature twice a day
  - Watch for fever over 100°F, cough, or shortness of breath, or other symptoms of COVID
- If no symptoms after 14 days, individual may return to school

#### When an individual exhibits symptoms at school
- Student must be immediately separated from others; Staff must be immediately relieved of duties and sent home
- Student must be given a face covering
- District should designate an isolation room/area for students who exhibit symptoms to wait for parent/guardian transport:
  - Area should be separate from clinic/other areas students are likely to visit
  - Area should be supervised by school personnel maintaining social distance and wearing PPE
  - If symptoms intensify before parent/guardian transport, District may arrange for emergency medical transport
- District should consider establishing a transportation protocol for situations where parent/guardian has no transportation
- Close off and thoroughly sanitize any areas of the building occupied by individual exhibiting symptoms

#### When can an individual return after COVID illness?
- Individual may return to school after all of the following has occurred:
  - They are free of fever (without the use of medication) for at least 24 hours
  - Symptoms have improved
  - At least 10 days have passed since symptoms first appeared
- OR
  - If testing is readily available, individual with a COVID+ test but no symptoms may return to school after all of the following has occurred:
    - They continue to have no symptoms
    - 10 days have passed since positive test
    - They have 2 negative tests, at least 24 hours apart

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2. See, ODH/ODE’s COVID-19 Health and Prevention Guidance for Ohio K-12 School, p. 6, which provides: “Schools should take temperatures of student and staff as they enter the building.”
7. The information is based on guidance available as of July 24, 2020.
Thank you!

Find us on **Twitter** at **@BrickerEdLaw**

Find the **Bricker Covid-19 Resource Center** at **https://www.bricker.com/resource-center/COVID19**