Advisory No. 2020-07-01

Legal Tools & Rights to Limit the Risk of Returning to Work

OEA Legal Department

For Distribution to OEA Staff, Local Leaders, & Members.

Introduction.
In an effort to ensure that local associations and members of the Ohio Education Association ("OEA") are aware of their legal rights as schools begin in-person instruction for the 2020-21 school year in the midst of the global COVID-19 pandemic, this Advisory will summarize federal and state laws that may be utilized by affiliates and members to help ensure member safety. Importantly, this Advisory does not address additional benefits or provisions that may be found in collective bargaining agreements. Members and local presidents should consult with their Labor Relations Consultant ("LRC") to determine if any such additional benefits or provisions can be found in their collective bargaining agreement.

This Advisory will go through the main federal and state laws that can used to assist members anxious about returning to work in the Fall due to concerns about their health or the health of someone they live with or care for. At the end of this Advisory, charts summarize the laws that apply to specific situations.

The Americans With Disabilities Act ("ADA").

The federal ADA prohibits discrimination against disabled employees. An employee is disabled if they have a physical or mental impairment that substantially limits one or more major life activities. "Major life activities" include, but are not limited to, performing manual tasks, breathing, writing, sleeping, learning, writing, sitting, sleeping, and the operation of major bodily functions. The impairment of the major life activity need not be permanent, it can be transitory (less than six (6) months) and minor. Conditions that can substantially impair major life activities that are relevant in the COVID-19 environment include, but are not limited to, diabetes, cancer, heart conditions, major depressive disorder, post-traumatic stress disorder, anxiety, HIV infection, obesity, kidney disease, liver disease, and any condition that results in the person being immunocompromised. It is unclear if contracting COVID-19 would result in an employee being considered "disabled" under the ADA.

The ADA requires employers to provide reasonable accommodations in the workplace for disabled employees who can perform the essential functions of the job with or without such accommodations. An accommodation is a modification or adjustment to a job or work environment that will enable an employee with a disability to continue to perform the essential functions of their job and enjoy equal benefits and privileges of employment. Accommodations must be provided unless doing so would pose an "undue hardship." Factors that are considered in determining if a proposed workplace accommodation presents an "undue hardship" on the employer include the following: its nature and cost; the overall financial resources of the building; the structure and function of the

workforce; available resources; documented good faith efforts to explore less restrictive or less expensive alternatives; the availability of necessary equipment and technology; whether the accommodation would result in a fundamental change in the nature of a public accommodation; efforts to minimize costs by spreading them out over time; and the extent to which resources saved by failing to make an accommodation for persons who have disabilities could have been saved by cutting costs in equipment or services for the general public.

Generally, it is the employee who begins the process of requesting an accommodation, though the local Association can ask on their behalf. Discrimination laws make it difficult for employers to initiate the process on their own, however employers are permitted to send out general notices to employees that they are willing to consider accommodations and who to contact to initiate the process. There are no "magic words" for employees or their advocates to use in requesting a workplace accommodation and the request need not be in writing, though placing it in writing is a best practice. Once the employer receives the request, it must consider it and engage in an interactive process to try to find a suitable reasonable accommodation. Employees are not guaranteed to receive their specific requested accommodation, but they may. The employer may ask for medical documentation to support the accommodation request and if they do, the requesting employee must provide such documentation to prove their condition and justify the accommodation. If an employer denies a requested accommodation, the employee should ask why it was denied and try to cure any problem, if possible. For example, if the employer claims "under hardship" (described above), the employer or their representative should push the employer to justify its claim of undue hardship and discuss alternative accommodations. The ADA requires employers to engage in an interactive process with employees once an accommodation has been requested.

Workplace accommodations relating to returning to school in the Fall during the COVID-19 pandemic generally come in two forms: (1) requesting the use or increased use of personal protective equipment ("PPE") or telework for individuals in CDC-identified high-risk populations or (2) a different form of PPE than used by the general employee population due to a specific condition of the employee requesting the accommodation (for example, using an alternative to latex gloves for an individual allergic to latex or members with a breathing issue that are unable to properly breath with a facemask on). As to the former, the CDC has identified the following populations as being at a higher risk for serious complications from COVID-19: people age 65+ (however, please note that age alone without any health condition that qualifies as a "disability" is not the basis for an accommodation), those with moderate to severe asthma, hypertension, chronic lung disease, serious heart conditions, diabetes, chronic kidney disease undergoing dialysis, liver disease, severe obesity (body mass index of 40 or higher), or anyone who is immunocompromised (which can be caused by cancer treatments, smoking, bone marrow or organ transplants, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications).[1] Members with these conditions, again, excluding those over 65 without any other health condition, can be eligible for workplace accommodations to help ensure their safety. Accommodations for this group can include increased use of PPE by other employees, mandatory social distancing, transfer to a different work location with fewer employees, medical leave (which could be paid or unpaid) or teleworking/working remotely.

In addition, employees with certain mental health conditions like anxiety, obsessive-compulsive disorder, and post-traumatic stress disorder may have more difficulty coping with the stress and disruption caused by the pandemic. These individuals may be entitled to reasonable accommodations, just as with any other condition that qualifies as

[1] Please note that although pregnancy is not identified as a vulnerable population or considered a "disability" under the ADA, pregnancy can *result* in conditions that qualify as a "disability," such as preeclampsia, morning sickness, and gestational diabetes. Members suffering from those conditions may be entitled to workplace accommodations.

a disability under the ADA. Accommodations for these individuals would include those identified in the previous paragraph.

If an employee lives with a person who is in one of the higher risk categories described above, the ADA generally does not apply and as such does not require the employer to provide a workplace accommodation based on an employee's family member having a disability. The ADA does prohibit an employer from treating employees who need an accommodation because of a family member's disability less favorably than employees who need accommodations for other reasons.

OEA LRCs and plan attorneys are available to assist local Associations in crafting reasonable workplace accommodations for members. It is strongly advised that members who believe they may be disabled under the ADA and desire a workplace accommodation begin the process of requesting one sooner rather than later. The ADA prohibits employers from retaliating against employees for requesting a reasonable accommodation.

The Family Medical Leave Act ("FMLA").

Traditionally, the FMLA allows up to 12-weeks of unpaid leave per year to employees with serious health conditions of their own or of a spouse, child, or parent. FMLA leave is also available for the birth, adoption, or placement of a foster child. Employers can require that this 12-weeks of leave be used concurrently with available paid leaves. FMLA can be used consecutively or intermittently, depending on the medical condition. Employers cannot retaliate against an employee for asserting their rights under the FMLA. Employers may require doctor's verification of the need for FMLA-qualifying leave. Employees must be returned to the same or similar position following the end of their FMLA leave, unless their position was abolished for reasons unrelated to their taking of FMLA (i.e., if they would have lost their job regardless, such as in a layoff situation).

The FFCRA, discussed in the next section, included updates to the FMLA that are specific to COVID-19 situations.

Additional FMLA and Sick Leave Under the Families First Coronavirus Response Act ("FFCRA").

The FFCRA, passed by Congress following the COVID-19 outbreak, requires public employers to provide employees, who are unable to work and <u>for whom teleworking is unavailable</u>[2], with additional paid sick leave and expanded and partially paid FMLA leave for specific reasons related to COVID-19. Generally, the FFCRA requires public employers to provide two (2) weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay (maximum of $511 per day) when the employee is quarantined (pursuant to federal, state, or local government order or under the advice of a health care provider), is under an isolation order, or is experiencing COVID-19 symptoms and currently seeking a medical diagnosis.

The two (2) weeks paid sick leave is also available, <u>but at 2/3 the employee's regular rate of pay</u>, (maximum of $200 per day) if the employee is unable to work because of a need to care for an individual (who does not necessarily have to be a family member) subject to quarantine (again, pursuant to Federal, State, or local government order or under the advice of a health care provider) or isolation order, or to care for a child (defined as an actual child under 18 years of age or that is incapable of self-care due to a disability) whose school or care provider is closed or unavailable for reasons related to COVID-19. All employees of public employers are eligible for the two (2) situations described above.

---

[2] Remember that teleworking could be a reasonable accommodation under the ADA. If the employer allows teleworking under the ADA, the provisions of the FFCRA would not apply for times that the employee is able to telework.

In addition to the potential two (2) weeks of paid sick leave, the FFCRA also provides up to an additional ten (10) weeks of paid expanded FMLA leave at 2/3 the employee's regular rate of pay (maximum of $200 per day) where an employee, who has been employed for at least thirty (30) calendar days or who was laid off after March 1, 2020, and rehired prior to December 31, 2020, is unable to work due to a need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19. The first ten (10) days of this period may be unpaid, but the employee can elect to use, or the employer can require the use of, available paid leaves to cover this ten-day period. The employee still has FMLA rights (discussed in the above section) for their own or their family's serious health condition if they or a member of their family contracts COVID-19 or is placed under a quarantine order.

Due to the complexity of the FFCRA's provisions related to paid leave, a table at the end of this document summarizes the benefits it mandates relative to the employee's situation.

The FFCRA does require that when the need for leave is foreseeable, an employee should provide notice of leave to the employer as is practicable. Employers may require employees to follow reasonable notice procedures to continue receiving paid sick time. Any FMLA leave time the employee has already utilized during the applicable FMLA year will be deducted from expanded FMLA described above; therefore, if the employee has exhausted their entire FMLA leave, this expanded leave will be unavailable to them.

Importantly, the paid leave described above is <u>in addition to</u> any paid leave normally available to the employee. The employee may supplement the 2/3 pay with their "normal" allotment of available paid leave in order to get to their full pay, so long as the applicable collective bargaining agreement and school board policy permit the use of paid leave under the circumstances.

The FFCRA's provisions are set to expire on December 31, 2020. Due to the requirement that telework be unavailable for provisions of the FFCRA to apply, the FFCRA will generally be more useful to ESP members than teacher members.

Sick or Personal Leave.

Depending on the collective bargaining agreement and school board policy, members may have paid sick or personal leave available to them if they feel returning to work is unsafe. Members should consult with their local leadership and Labor Relations Consultant to determine if either of these paid leaves is available in their specific situation.

State-Level Workplace Safety and Labor Laws.

Public employers in Ohio are under a general duty to provide safe places of work to their employees. In addition, Ohio Revised Code § 4167.06 states that a public employee may, in good faith, refuse to work under conditions that the employee reasonably believes present an "imminent danger of death or serious bodily harm." § 4167.06 represents Ohio's state-level whistleblower protection for public employees that takes the place of the federal Occupational Safety and Health Act ("OSHA") whistleblower protection. OSHA does not apply to Ohio public sector employees, but the federal OSHA guidelines can be instructive as to what constitutes a "safe" workplace. The standard established by § 4167.06 is very high and will be dependent on the specific workplace's circumstances and take into consideration an employee's particular health conditions and susceptibility to COVID-

19. In addition, precautions the employer takes to disinfect the workplace, enforce social distancing, require employees, volunteers, visitors, and students to wear masks, etc. will affect whether or not a refusal to work is based on a reasonable belief that the workplace presents an imminent danger of death or serious bodily harm. In addition, the "harm" required for this law's protections to apply must be one that does not normally occur in the occupation. Public employers may not retaliate against an employee for exercising their right to refuse work under this section.

§ 4167.06 requires an employee, upon exercising their right to refuse to work, to notify the administrator of the Bureau of Workers' Compensation in writing, as soon as possible. The administrator must then immediately inspect the premises. Importantly, if the employee's refusal to work is not "reasonable in light of the circumstances," as determined by the administrator, the employee will be subject to disciplinary action by the employer for refusal to work.

There is very little interpretive caselaw regarding § 4167.06. The statute is also very situation specific. In addition, due to the fact that if the refusal to work is deemed "not reasonable," utilizing this law on an individual basis is extremely risky, especially compared to exercising an individual's rights under the ADA, FMLA, or FFCRA. If this law were utilized collectively, rather than individually, it is reasonable to assume that the finding that the refusal to work is "reasonable" is increased and the risk of employer retaliation is decreased.

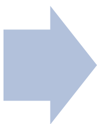
In addition to § 4167.06, the Ohio Public Employees Collective Bargaining Act (Chapter 4117 of the Ohio Revised Code) may be utilized in a good faith collective work stoppage due to dangerous or unhealthful working conditions abnormal to the place of employment.

Unpaid Medical Leave Under State Law

Finally, O.R.C. § 3319.13 requires a board of education to allow an employee up to two (2) years of unpaid medical leave upon the employee's written request. The board of education can renew this leave upon request.

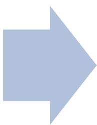
Visual Guide to the Legal Framework

Member has a physical or mental condition that makes them particularly vulnerable to COVID-19, or they otherwise feel unsafe to return to work (this can be a condition that the CDC has identified as placing individuals in vulnerable populations, but need not be).



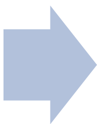
Member may be entitled to a reasonable workplace accommodation under the ADA. An employee representative should assist the member with beginning the ADA interactive process of crafting a workplace accommodation as soon as possible by contacting the employer.

Member is subject to a federal, state, or local quarantine order (likely what will occur if they are diagnosed with COVID-19); has been advised to self-quarantine by a healthcare provider; or the member is awaiting a medical diagnosis after experiencing symptoms of COVID-19.



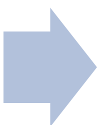
Member is entitled to up to 80 hours of Emergency Paid Sick Leave at their regular rate of pay (max of $511/day) until December 31, 2020. This leave is in addition to any paid leaves they normally have available to them.

Member is caring for an individual who: is subject to a federal, state, or local quarantine order; has been advised to self-quarantine by a healthcare provider; or the member is caring for their child whose school or place of care is closed or is unavailable or a child care provider is unavailable due to a public health emergency.



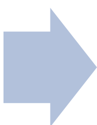
Member is entitled to up to 80 hours of Emergency Paid Sick Leave at 2/3 their regular rate of pay (max of $200/day) until December 31, 2020. This leave is in addition to any paid leaves they normally have available to them. If the employee is caring for their child whose school or place of care is closed or unavailable and they have been on payroll for 30 or more days, they are entitled to additional Emergeny Family Medical Leave at 2/3 pay, beginning on the third week of this period, unless they have already exhausted their FMLA leave.

Member is unwilling to return to work, but cannot identify a physical or mental condition that would justify a workplace accommodation and their situation does not otherwise fit in the above situations.



If the member has a serious health condition of their own or of a spouse, child, or parent, or they have just had a child born, adopted, or placed a foster child, they are eligible for FMLA. Otherwise, review the collective bargaining agreement to see if any paid leave is available to them. Finally, they can request an unpaid leave of absence of up to two years from the Board of Education (if the reasons for this leave are medical or related to a disability, the request must be granted).

A large number of members do not feel safe returning to the school building and not all of them have physical or mental conditions that may qualify them for workplace accommodations, their accommodations present undue hardships, the employer refuses to grant a large number of accommodation requests, or any other situation which does not fit into the above.



Consult with your Labor Relations Consultant and OEA attorneys regarding the possibility of a collective action under state workplace safety or collective bargaining laws.

How the FFCRA Works:
Employee is unable to work or telework and…

Qualifying Reason(s) for Emergency Paid Sick Leave	Weeks 1 & 2 (80 Hours)	Weeks 3-12
Subject to federal, state, or local quarantine or isolation order related to COVID-19	Paid Emergency Paid Sick Leave at regular rate, no Emergency Family Medical Leave	No Emergency Family Medical Leave
Advised by a health care provider to self-quarantine related to COVID-19	Paid Emergency Paid Sick Leave at regular rate, no Emergency Family Medical Leave	No Emergency Family Medical Leave
Experiencing COVID-19 symptoms and is seeking/waiting for a medical diagnosis	Paid Emergency Paid Sick Leave at regular rate, no Emergency Family Medical Leave	No Emergency Family Medical Leave
Caring for an individual subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to COVID-19	Emergency Paid Sick Leave at 2/3 regular rate of pay, no Emergency Family Medical Leave	No Emergency Family Medical Leave
Caring for their child whose school or place of care is closed or childcare provider is unavailable due to COVID-19 related reasons	Emergency Paid Sick Leave at 2/3 regular rate of pay, no Emergency Family Medical Leave	Paid Emergency Family Medical Leave at 2/3 regular rate of pay