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SCHOOL CLOSURE, REOPENING, AND BEYOND

A Legal Webinar

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Educators in Connecticut, the United States and throughout the world faced unprecedented challenges this spring in transitioning to remote instruction, and the even greater challenges of reopening this fall loom before us. For the next hour, we will pose and answer (as best we can) ten common questions educators have about reopening school as to (1) district operation, (2) employee issues, and (3) student issues. We then hope to answer other questions that you may have.

QUESTION ONE:

If the guidelines for reopening in the fall are anything like the guidelines for summer school, good luck to us. How much should I worry if we don't follow all of the guidelines and a student claims he contracted COVID-19 from another student?

ANSWER TO QUESTION ONE

- Anyone can sue anyone else for anything. But liability should not be a major concern.

- First, any discussion of liability must focus on school district liability. Educators are protected from personal liability by the indemnity statute, Conn. Gen. Stat. § 10-235 when they act in good faith.

- Second, school districts will only be liable in limited circumstances when school officials fail to act reasonably and such unreasonable action causes an injury.

- State and district operational guidelines will define what is reasonable, and a failure to adhere to such guidelines will open the door to a liability claim.

- There is more to the story. Presumably, any such claim would be negligence, and in such cases the plaintiff must establish that the unreasonable action caused the injury, here the infection. Establishing causation will be difficult.

QUESTION TWO

We can't imagine how we can get enough buses operating to follow social distancing guidelines. Can we require that parents drive their children to school when school reopens?

If not, can we at least encourage parents to drive their children to school and plan routes accordingly?

ANSWER TO QUESTION TWO

No and Yes.

- Social distancing during transportation is one of the greatest challenges educators will have the in fall, and the fewer students districts must transport, the better.

- Under Connecticut law, "each local or regional board of education shall furnish, by transportation or otherwise, school accommodations" to resident children. Conn. Gen. Stat. § 10-186(a). Indeed, parents can claim a denial of school accommodations based on transportation issues, even bus stop placement.

- Conn. Gen. Stat. § 10-220(a) states that school districts must "make such provisions as will enable each child of school age residing in the district to attend some public day school for the period required by law and provide for the transportation of children ***wherever transportation is reasonable and desirable***" (emphasis added).

- Thus, the key to the duty to provide transportation is that it must be a necessary part of school accommodations. If a student does not need transportation in order to have reasonable access to school, there is no duty to provide it.

- That said, parents may (and often do) voluntarily drive their children to and from school.

- School officials may poll parents and obtain commitments from some parents that they will drive their children to school, and they may then plan bus routes accordingly.

- Situations change, however, and parents will be able to rescind their agreement to be responsible for transportation.

- Suspension of transportation privileges? Enforcement should not be the name of the game. Consider the implications before reacting. Some students may have no other means of getting to school and by suspending their transportation services for not wearing a mask (or not being socially distant), school districts will risk exacerbating the education gap.

QUESTION THREE

Whatever the guidelines will be, I am sure that there will be safety protocols. Do we have the authority to discipline students and staff who don't comply? How about parents?

ANSWER TO QUESTION THREE

- School officials have the right to enforce reasonable school rules, and one of their basic responsibilities is to maintain a safe school environment. The courts generally defer to the decisions of school officials in establishing rules.

- Here, some or all of the safety protocols may well be prescribed by public health officials and/or through the fall reopening guidelines. Given the liability issues referenced above, for those protocols, it will not be a matter of choice, but rather of duty.

- That said, school officials will be challenged to strike the right balance between enforcing safety protocols and rules, on the one hand, and providing effective education, on the other. As to students, teachers and others should not spend all their time focused on compliance. In that regard, it will be important that the guidelines for reopening in the fall be realistic in their terms.

- As to staff, the situation is more straight-forward, and teachers and others will be expected to comply with all established rules. In that regard, two points should be noted. First, though we expect that unions will be fully supportive of safety protocols and rules, any rules that change working conditions may result in a union demand to negotiate over that change. In such matters, school districts should be careful to distinguish decisional bargaining from impact bargaining.

- Second, as with any other disciplinary issue, school officials must be sure to have the full story, including giving the employee a chance to explain, before imposing discipline.

- Finally, parents may be required to comply with all protocols. In that regard, it will be important for school officials to enforce the rules consistently.

QUESTION FOUR

I presume that we are going to have to reduce class sizes to maintain social distancing. Will we be able to assign teachers or paraprofessionals without proper certification to teach groups of students independently?

ANSWER TO QUESTION FOUR

We may hope for some flexibility in this regard in the guidelines for reopening. Without such relief, school districts will have to abide by the following certification regulations:

Appropriate certification is required for any person in the employ of a board of education who:

- is not directly supervised in the delivery of instructional services by a certified professional; or
- is responsible for the planning of the instructional program for a student; or
- evaluates student progress; or
- does not receive specific directions from his/her supervising teacher or administrator that constitute a lesson plan for each lesson.

Regs., Conn. State Agencies § 10-145d-401(b).

In assigning paraprofessionals to cover groups of students, these requirements must be kept in mind.

QUESTION FIVE

Can an employee go out on sick leave in the fall because of fear of contracting COVID-19?

ANSWER TO QUESTION FIVE

- As employees are integrated back into the workplace, there may be employees who feel uncomfortable returning to district buildings.

- Generally, employees who do not want to return to work due to a generalized fear of exposure to COVID-19 will not be entitled to paid or unpaid federal leave.

- However, while an employee may not be eligible for leave under federal law, an employee exhibiting generalized fear may be entitled to use any accrued leave that is otherwise available to him or her, if it is available for such purposes under the District's leave policies and/or relevant collective bargaining agreement.

- Additionally, qualifying employees with disabilities may be entitled to receive reasonable accommodation(s) under the American with Disabilities Act ("ADA").

    - The Americans with Disabilities Act ("ADA") requires employers to provide reasonable accommodations to qualified employees and applicants with disabilities unless doing so would cause undue hardship. In general, an employee must request an adjustment or change at work due to his or her medical condition.

    - The EEOC has stated that, during the pandemic, employers may ask questions to determine whether an employee's condition is a disability and request medical documentation if needed (*e.g.,* if the disability is not obvious or already known); discuss with the employee how the requested accommodation would assist the employee and enable him or her to keep working; and explore alternative accommodations that may effectively meet the employee's needs.

    - The EEOC notes that employees whose disabilities put them at greater risk from COVID-19 may request an accommodation to reduce or eliminate the risk of possible exposure. In response to the COVID-19 pandemic and in accordance with the Summer School Rules, some

changes that reduce contact with others will likely be implemented for all employees (*e.g.,* physical distancing and personal protective equipment). Additional accommodations that may be considered include one-way hallways or plexi-glass barriers around an employee's desk.

- In addition, the EEOC offers suggestions such as "[t]emporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment [to] 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."[1] If possible, allowing an employee to telework could also be a reasonable accommodation in some circumstances.

- In sum, school officials must evaluate the situation of each employee on an individual basis.

QUESTION SIX

How about employees who want to care for a loved one? Can they go out on sick leave?

ANSWER TO QUESTION SIX

- As explained above, employees exhibiting a generalized fear or anxiety about returning to work and potential exposure to COVID-19, perhaps because they live with a family member who is particularly vulnerable to the disease, are not generally entitled to paid or unpaid federal leave.

- However, an employee may be entitled to use any accrued leave that is otherwise available to him or her, under the district's leave policies and/or relevant collective bargaining agreement.

- In addition, an employee who is unable to work because he or she *is caring for* an individual who has been subject to a federal, state, or local quarantine or isolation order or advised by a healthcare provider to self-quarantine may be entitled to up to eighty hours of paid sick leave under the Families First Coronavirus Act.

- It is important to remember that the individual requiring care *must actually depend on the employee for care* and could be an immediate family member, an

[1] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (May 7, 2020), *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

individual who regularly resides in the employee's home, or an individual for whom the employee's relationship creates an expectation that the employee would care for the individual in a quarantine or self-quarantine situation, when the individual actually depends on the employee for care during quarantine or self-quarantine.

- Finally, if an employee needs to care for his or her spouse, child or parent who has a serious health condition, as defined under the Family and Medical Leave Act ("FMLA"), the employee may be entitled to leave under the traditional FMLA.

- Districts will also have to consider whether leave is available under the Families First Coronavirus Response Act ("FFCRA"), which provides for emergency paid leave in certain circumstances from April 1, 2020 through December 31, 2020. The two types of leave available under the FFCRA are leave provided by (1) the Emergency Paid Sick Leave Act ("EPSLA") and (2) the Emergency Family and Medical Leave Expansion Act ("FMLA+). Both leave provisions are available to employees unable to work or telework for a specific qualifying reason.

    - The EPSLA applies to employees regardless of the duration of their employment. Under the EPSLA, full-time employees that are unable to work or telework for the following coronavirus-related reasons are entitled to eighty (80) hours of paid sick leave (or a part-time employee's two-week equivalent):
        1. The employee is subject to federal, state or local quarantine or isolation order;
        2. The employee has been advised by a healthcare provider to self-quarantine;
        3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
        4. The employee is caring for an individual[1] quarantined as described in (1) or (2);
        5. The employee is caring for his or her child whose school or place of care has been closed (or child care provider is unavailable) for reasons related to COVID-19; or
        6. The employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.[3]

[3] To date, the Department of Health and Human Services has not provided guidance regarding the substantially similar conditions that satisfy this requirement.

- The EPSLA caps the daily and total amount of compensation available, depending on the reason for the leave. It is important to note the distinction between Reasons 1-3, which relate to self-care, and Reasons 4-6, which concern the care of others. If an employee is eligible for EPSLA leave under Reasons 1-3, the employee must be paid one hundred percent (100%) of the employee's regular rate of pay or the state minimum wage up to payment caps of $511/day and $5,110 in total. If an employee is eligible for EPSLA leave under Reasons 4-6, an employee must be paid two-thirds (2/3) the employee's regular rate of pay or the state minimum wage up to payment caps of $200/day and $2,000 in total. Importantly, if an employee is eligible for EPSLA, an employer *may not require* that an employee use other paid leave before the employee uses his or her EPSLA leave.

- The second element of the FFCRA, the FMLA+, expands portions of the traditional Family Medical Leave Act for employees who have been employed for at least thirty calendar days. While traditional qualifying reasons for FMLA remain unpaid, paid FMLA+ is available to employees for the following qualifying reason (only Reason 5 of the EPSLA):

  leave taken because the employee cannot work, or telework, because he or she needs to care for a minor child due to closure of the child's school or place of care (or unavailability of child care provider) due to COVID-19.

- The first ten days of leave taken for this qualifying reason are unpaid; the next ten weeks are paid out at two-thirds (2/3) of the eligible employee's regular rate of pay. There is a payment cap of $200 per day and $10,000 in the aggregate for emergency family and medical leave.

Interaction Between FMLA+, EPSLA, and Otherwise Available Leave

The regulations implementing the FFCRA and corresponding guidance from the United States Department of Labor contain several inconsistencies. We note that one of the issues of particular controversy is the interplay of FMLA+ and leave otherwise available to employees.

The spirit of the FFCRA is to provide employees enough flexibility to comply with public health measures necessary to combat the COVID-19 public health emergency. Accordingly, it is currently our recommendation that employers allow employee discretion in whether to substitute or

supplement FMLA+ leave with accrued leave otherwise available for such purpose.

1. FMLA+: The First Two Weeks

As previously noted, the first two weeks of leave taken under the FMLA+ are unpaid and the subsequent ten weeks are paid at two-thirds (2/3) of the eligible employee's regular rate of pay up to the statutory caps. However, employees may choose to use EPSLA leave (if they have not already exhausted such leave for other reasons) during the first two weeks (up to eighty hours) of FMLA+ leave taken for the care of a child whose school or place of care has closed due to COVID-19 reasons. If an employee decides to do so, benefits under EPSLA must run concurrently with the unpaid leave provided under the FMLA+.[4]

An employee may also choose to use EPSLA leave (at two-thirds pay) and supplement such leave with leave the employee has otherwise accrued. The use of such leave must be consistent with the employer's leave policies and relevant collective bargaining agreement.

2. FMLA+: The Subsequent Weeks

After the first two weeks of FMLA+ leave, an employee may take up to ten additional weeks of FMLA+ leave and receive 2/3 pay up to the statutory caps. During this period, an employee may elect to have his or her accrued paid leave supplement the 2/3 FMLA+ pay provision in order to receive full pay.

QUESTION SEVEN

I have already heard that some teachers have decided not to come back in the fall, one way or the other. Can teachers insist on teaching remotely because of health concerns?

ANSWER TO QUESTION SEVEN

The answer, of course, is "it depends."

[4] *See* 29 CFR § 826.60(a)

- In general, teachers do not have the right to demand a particular assignment.

- Irrespective of the reopening guidelines, it is likely that school districts will want to establish remote learning positions because some students will not be able to return to school for health or other reasons.

- As a matter of collective bargaining, the assignment to such positions will typically be left to administration as a management right.

- That said, a teacher may present valid documentation that returning to school will expose the teacher to unreasonable risks because of a health condition.

- In such cases, school officials must decide whether to accept the documentation and engage in the ADA interactive dialog over reasonable accommodation or to seek an independent medical evaluation.

QUESTION EIGHT

Some parents are squirrely about the reopening in the fall as well. Can they insist on our continuing to provide remote instruction to their children instead of sending their children back to school in the fall?

ANSWER TO QUESTION EIGHT

No, except maybe.

- We will have to wait and see what instruction will look like in the fall; however, we anticipate that there will be a component of in-person learning.

- Generally, parents can't insist that the district provide remote instruction to their children instead of sending their children back to school; however, they could possibly insist if their doctor presents medical documentation.

- If a doctor attests that a student's medical condition prevents him or her from attending school, remote instruction for that student could be an accommodation for a medical condition functioning as homebound instruction.

- Generally, school districts must provide homebound instruction to students in public schools under their jurisdiction when students are unable to attend school due to a verified medical reason, which may include mental health issues.

- Under Conn. State Agencies Regulation § 10-76d-15, school districts are required to provide homebound instruction when a student's treating physician provides a written statement directly to the school district on the district's form, stating:

  (A) the student's treating physician has consulted with school health supervisory personnel and has determined that attendance at school with reasonable accommodations is not feasible;

  (B) the student is unable to attend school due to a verified medical reason;

  (C) the student's diagnosis with supporting documentation;

  (D) the student will be absent from school for at least ten consecutive school days or the student's condition is such that the student may be required to be absent from school for short, repeated periods of time during the school year; and

  (E) the expected date the student will be able to return to school.

- Provided that all applicable requirements have been met, homebound instruction must begin no later than the eleventh day of a student's absence; however, the school district may agree to begin instruction earlier.

QUESTION NINE

If a student shows up with an elevated temperature but says she feels fine, what authority do we have to tell the student to go home? How would that work anyway?

ANSWER TO QUESTION NINE

- One major takeaway from the COVID-19 health crisis is that the normal rules do not apply. Health concerns take precedence over normal access rules.

- An elevated temperature is a symptom of COVID-19, and temperature screening is a common test for access to places, such as work, the doctor's office, and school (per the summer school rules).

- We await guidance on whether temperature screening will be required in the fall. Given the risk of infection if a student has an elevated temperature, school officials will have the right and obligation not to permit the student to attend school.

- Given transportation issues and related safety concerns, we cannot simply tell students to leave. Rather, taking the summer school rules as a starting point, we note that "schools must identify an isolation room where students or staff who exhibit symptoms consistent with COVID-19 can wait for the parent/guardian or responsible party's arrival to pick them up from school."

QUESTION TEN

I have serious doubt that some children with disabilities will be able to follow safety protocols. Will we be able to tell parents that we will have to provide remote education to those children?

ANSWER TO QUESTION TEN

- Some special education students and elementary school kids will not be able to comply with safety protocols. Whether in the summer and fall, we will have students who will not be able to wear masks faithfully or to maintain social distance. Some special education students or young students will most likely share materials/take materials from each other. School officials will need to work with your local health director to decide on what is and what is not safe.

- If the local public health director determines that specific student's conduct is unsafe, remote instruction may be a reasonable alternative. However, if school is otherwise open, for children with disabilities the PPT must consider the issue, and change of placement rules may apply. It might be helpful to frame the message as follows: "On the recommendation of the health director, your child can't come for in-person instruction unless we can address these safety issues."

- Districts may want to consider creating videos for all families on how to get children to tolerate a mask. Perhaps it would be helpful to send home videos (summer activities) that helps build what you want your safety practices to be in the fall.

- We know of one health director who has recommended COVID-19 testing for every staff person who is going to work in and participate in and ESY program and then periodically throughout for kids who are in small self-contained programs (small environment - more significant disabilities).

- It might also be helpful to bring the health director in to see the physical space (it may be easier to plan in person).

Thank you for your good questions! Good luck with the reopening in the fall!