

Pennsylvania Coalition of Public Charter Schools

Employment and Labor Considerations During and Post-COVID-19 Pandemic



Learn More at
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My employee....

- Is asking for an accommodation because she lives with her parents who are over 65 and are at high risk for serious illness if exposed to COVID-19
- Tested positive for COVID-19, has been advised to quarantine by a medical professional, but is asymptomatic
- Has a child whose school is reopening in a hybrid model and she will need to care for her child on the remote learning days
- Is going to Disney World!



Today's Topics...

- Americans with Disabilities Act (ADA)
- Families First Coronavirus Response Act (FFCRA)
- Occupational Safety and Health Act (OSHA)
- Workers' Compensation
- Unemployment Compensation
- Labor Considerations
- Employer Actions to Limit Liability



Americans with Disabilities Act

- Applies to employers with 15 or more employees
- Protects applicants and employees from disability discrimination

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Americans with Disabilities Act

ADA is relevant to reopening preparation in at least 3 major ways:

- 1) it regulates employers' **disability-related inquiries and medical examinations** for all employees, including those who do not have ADA disabilities;
- 2) It prohibits covered employers from **excluding individuals with disabilities from the workplace** for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation);
- 3) it requires **reasonable accommodations** for individuals with disabilities (absent undue hardship) during a pandemic.



Americans with Disabilities Act

Disability-related inquiries and medical examinations

- Disability-related inquiries elicit information about a disability (i.e. asking an individual if his immune system is compromised)
 - OK to ask an individual about seasonal flu or cold symptoms
 - COVID-19 symptoms inquiries may be disability-related
- Medical exams are defined as a procedure or test that seeks information about an employee's physical or mental impairments or health
 - Taking an employee's temperature
 - COVID-19 (viral) and antibody testing



Americans with Disabilities Act

Disability-related inquiries and medical examinations

Prohibited EXCEPT when the inquiry is *job-related and consistent with a business necessity* when an employer has a reasonable belief, based on objective evidence, that:

- An employee's ability to perform essential job functions will be impaired by a medical condition; or
- An employee will pose a direct threat due to medical condition



Americans with Disabilities Act

Disability-related inquiries and medical examinations

“Direct threat” is defined as “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r).

COVID-19 meets the direct threat standard based upon CDC and public health authorities’ guidance.

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Americans with Disabilities Act

During COVID-19, employers may:

- Ask an employee if he/she is experiencing COVID-19 symptoms (identified by CDC or health dept. officials)
- Take employees' temperatures before entering the building
- Administer COVID-19 (viral) tests

To determine if the employee will pose a direct threat to the health of others.



Americans with Disabilities Act

During COVID-19, employers may NOT require antibody testing because it does not determine whether an employee has an active case of COVID-19 and, therefore, does not meet the ADA's job related and consistent with business necessity standard.

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Americans with Disabilities Act

Excluding employees from the workplace

- An employer may exclude an individual with a disability from the workplace if it determines that he/she would pose a direct threat to the health of others that cannot be eliminated or reduced by reasonable accommodation
- Exclusion may be based upon CDC and public health guidance (i.e. manifesting COVID-19 symptoms)



Americans with Disabilities Act

Excluding employees from the workplace

Generally, an employer may NOT exclude a “higher risk” employee solely because of the employee’s disability, even if the employer is concerned about the employee’s health being jeopardized by returning to work, **unless** the employer believed that the employee posed a direct threat to his health.

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Americans with Disabilities Act

Reasonable accommodations

If an employee with a disability requests an accommodation (i.e. telework) due to COVID-19, then an employer must begin the interactive process to:

- ✓ Determine whether the requested accommodation is reasonable and would assist and enable the employee to keep working;
- ✓ Explore alternative accommodations that may effectively meet employee's needs;



Americans with Disabilities Act

Reasonable accommodations

If an employee with a known disability requests an accommodation (i.e. telework) due to COVID-19, then an employer must begin the interactive process to (con't):

- ✓ Request medical documentation (if disability is not already known or apparent) to determine if employee's medical condition qualifies as a disability
- ✓ Determine if the accommodation poses an undue hardship to the employer



Americans with Disabilities Act

Reasonable accommodations

EEOC guidance related to COVID-19 states that “[e]mployers may ask employees with disabilities to request accommodations that they believe they may need when the workplace re-opens,” so that the employer may begin the interactive process.

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

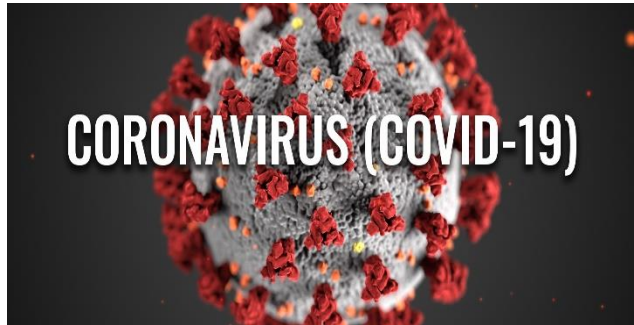
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Families First Coronavirus Response Act



Requires Employers with fewer than 500 employees to provide eligible employees with expanded paid sick leave (ESPL) and expanded family and medical leave (EFMLA) for limited reasons related to COVID-19 through **December 31, 2020.**

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Families First Coronavirus Response Act

An employee qualifies for EPSL if he/she is unable to work (or telework, if applicable) because he/she:

- 1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- 2) has been advised by a health care provider to self-quarantine related to COVID-19;
- 3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;



Families First Coronavirus Response Act

(con't):

- 4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- 5) is caring for his or her child whose school or place of care is closed (or childcare provider is unavailable) due to COVID-19 related reasons; or
- 6) is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services (HHS).*

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Families First Coronavirus Response Act

#4 Caregiver:

A bona fide need to care for an individual means caring for an immediate family member or someone who regularly resides in the employee's home, or caring for an individual where your relationship creates an expectation that you care for the person in a quarantine or self-quarantine situation, and that individual depends on you for care during the quarantine or self-quarantine.

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Families First Coronavirus Response Act

#5 Caregiver for his or her child:

- "Place of care" is a physical location where care is provided for the employee's child, and can include day care facilities, preschools, before and after school programs, summer camps or enrichment programs, respite care programs, schools or homes.
- Childcare provider as a "provider who receives compensation for providing child care services on a regular basis"
- A childcare provider need not be licensed or compensated if the provider is a family member, friend or neighbor who regularly cares for the employee's child.



Families First Coronavirus Response Act

EFMLA

- Applies only to #5 (Caregiver for his or her child)
- Applies only to employees who have been employed for at least 30 days prior to their leave request
- Provides up to an additional 10 weeks of partially paid leave



Families First Coronavirus Response Act

FFCRA PAID LEAVE ENTITLEMENTS

- Up to **2 weeks** (80 hours, or a part-time employee's two-week equivalent) of EPSL, paid at:
 - 100% for qualifying reasons #1-3, up to \$511 daily and \$5,110 total;
 - 2/3 for qualifying reasons #4 and 6, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and EFMLA paid at 2/3 for qualifying reason #5 for up to \$200 daily and \$12,000 total.



Families First Coronavirus Response Act

Exemption

- Applies only to an employer with fewer than 50 employees
- Applies only to leave requested based upon reason #5 (Caregiver for his or her child)
- Applies only if an “authorized officer” of employer determines:
 - ✓ Leave would result in expenses and financial obligations exceeding revenues and cause the employer to cease operating at a minimal capacity;
 - ✓ Absence of employee would entail a substantial risk to the financial health or operational capabilities of school
 - ✓ There are not sufficient workers to perform the labor services provided by employee



Families First Coronavirus Response Act

FFCRA Leave Documentation: When an employee requests ESPL for reasons #1-#4, employer should request and document the following:

- ✓ Employee name and, if applicable, the name of the individual for whom the employee is caring and the employee's relationship to that individual;
- ✓ Date(s) for which he/she requests leave
- ✓ The reason(s) for leave;
- ✓ A statement that employee is unable to work because of the above reason; and
- ✓ The name of the health care provider who gave the advice OR the name of the government entity that issued the order.



Families First Coronavirus Response Act

FFCRA Leave Documentation: When an employee requests ESPL and/or EFMLA for reason #5, employer should request and document the following:

- ✓ Employee name and the name of the child for whom the employee is caring;
- ✓ Date(s) for which he/she requests leave
- ✓ A statement that employee is unable to work because of the above reason and no other suitable person is available to care for the child. ; and
- ✓ The name of the school, place of care, or childcare provider that has closed or become unavailable; and



Employees Who Are Not Disabled

- The ADA does not require that an employer accommodate (including telework) an employee without a disability based upon the disability-related needs of a family member or other person with whom he/she is associated.
- The FFCRA and local laws do not provide leave or accommodations for employees simply for an employee to avoid exposing a family or household member who is at higher risk.



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Going to Disney World!

As of July, 24, 2020

The Pennsylvania State Health Department issued an advisory recommending that people who travel to a designated state should self-quarantine for fourteen (14) days upon return to Pennsylvania. The states included in the advisory are:

- Alabama
- Arizona
- Arkansas
- California
- **Florida**
- Georgia
- Idaho
- Iowa
- Kansas
- Louisiana
- Mississippi
- Missouri
- Nevada
- North Carolina
- Oklahoma
- South Carolina
- Tennessee
- Texas
- Utah
- Wyoming

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Occupational Safety and Health Act's (OSHA)

OSHA places a general duty on employers to provide employees with "a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

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Occupational Safety and Health Act's (OSHA)

“OSHA understands that some employers may face difficulties complying with OSHA standards due to the ongoing health emergency... [alleged violations or inspections will be evaluated based on] whether the employer made *good faith efforts to comply* with applicable OSHA standards and, in situations where compliance was not possible, to ensure that employees were not exposed to hazards from tasks, processes, or equipment for which they were not prepared or trained. ”

<https://www.osha.gov/memos/2020-04-16/discretion-enforcement-when-considering-employers-good-faith-efforts-during>

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Occupational Safety and Health Act's (OSHA)

The Charter School's CEO or his/her designee must ensure Charter School staff and vendors are trained on the hazards of the cleaning chemicals used in the workplace in accordance with Occupational Safety and Health Act's (OSHA) Hazard Communication standard (29 CFR 1910.1200).

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Workers' Compensation

- Employer takes the employee as is and is responsible for medical conditions caused or made worse by employment
- Employee bears the burden to prove all elements of WC claim



Workers' Compensation

- An employee may be eligible for WC benefits due to exposure to COVID-19 in the workplace, if he/she:
 - Provides **medical evidence** that he/she was exposed to COVID-19 in the workplace (and not a general public area); or

See, Lewis v. Commonwealth of Pennsylvania (Pa. 1985) (unequivocal medical testimony is necessary to establish a causal relationship).



Workers' Compensation

- An employee may be eligible for WC benefits due to exposure to COVID-19 in the workplace, if he/she (con't):
 - Shows that COVID-19 is an “**occupational disease**”:
 - The employee is exposed to the disease by reason of his/her employment.
 - The disease is causally related to the employee's industry or occupation.
 - The occurrence of the disease is substantially greater in that industry or occupation than it is in the general population.



Unemployment Compensation

An employee may be eligible if:

- Employer temporarily closes or goes out of business because of COVID-19
- Employer reduces an employee's hours
- Furlough or lay off because of COVID-19
- He/she has been told to quarantine or self-isolate, or live/work in a county under government-recommended mitigation efforts (also may be eligible for EPSL)



Unemployment Compensation

Pandemic Unemployment Assistance (PUA) under the federal Coronavirus, Relief, and Economic Security Act (CARES) Act

- Additional \$600 weekly benefit under federal pandemic unemployment compensation
- Ended **July 25, 2020**

Pandemic Emergency Unemployment Compensation (PEUC) also under the CARES Act

- Provides 13 weeks of additional unemployment benefits to individuals whose regular benefits were exhausted on or after July 6, 2019
- Available until **December 26, 2020**



Labor Considerations

- At-will Employee: Refusal to work may be grounds for termination
- Union Employee: Refusal to work due to a good-faith belief that working conditions are abnormally dangerous may be seen as concerted activity under the NLRA.
 - Belief must be based on “ascertainable, objective evidence”
 - NLRA extends protection even if belief is ultimately mistaken



Labor Considerations

- Changes to working conditions to maintain safe work environment (i.e. use of PPE, staggered work shifts) may be subjects of mandatory bargaining (require notice to union and opportunity to bargain)
- Consider partnering with the union to inform employees that the employer is maintaining a safe work environment in accordance with relevant federal, state and local guidelines.



Labor Considerations

- Examine CBA language closely:
 - If the CBA: 1) grants the employer broad management rights, 2) explicitly permits the employer to unilaterally implement protocols related to operations and worksite safety, or 3) provides that the union waives the right to bargain regarding changes to such protocols, then employer likely will not need to bargain new safety protocols.
 - If the CBA does not contain the above language, then employer will likely need notice/bargain changes



Actions to Limit Liability

- Liability waivers
 - May not be enforceable if school is not following CDC and PDE guidance.
 - Tort Immunity, 42 Pa. C.S. § 8542 (b), may protect charter schools from general negligence claims for COVID-related exposure, but not gross negligence or intentional torts.



Actions to Limit Liability

- Acknowledgments of the Health and Safety Plan and COVID-19 Policies acknowledging that:
 - ✓ Employees wish to continue employment and that it may require return to the school's campus
 - ✓ Employer cannot guarantee employee will not be exposed to COVID-19
 - ✓ Employee understands Plan and Policies and will comply
 - ✓ Failure to comply may result in discipline



Actions to Limit Liability

- COVID-19 Screening Questionnaires verifying:
 - ✓ No COVID-19 symptoms in past 72 hours
 - ✓ No close contact with anyone who has exhibited COVID-19 symptoms or tested positive for COVID-19 in past 14 days
 - ✓ No travel to areas where there are high amounts of COVID-19 symptoms in past 14 days (provide examples)



Questions?

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