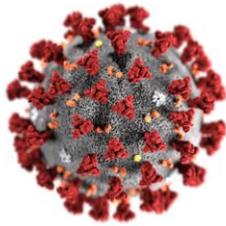




COVID-19 Legal Considerations for School Boards



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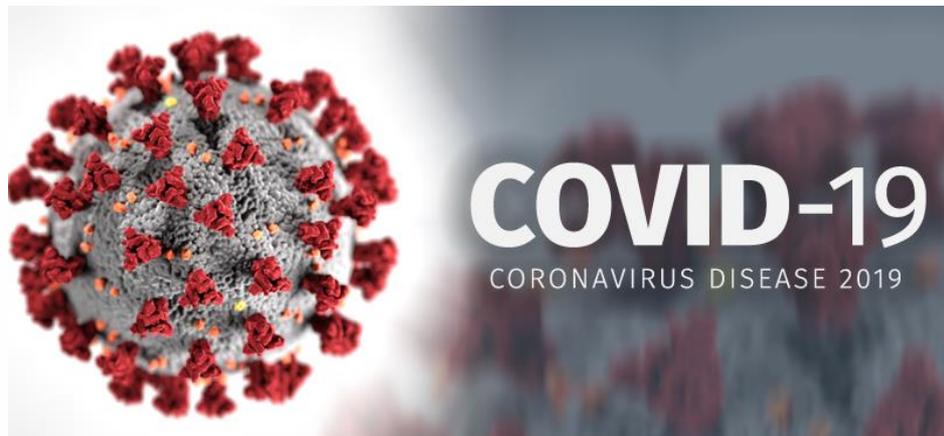
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- Shareholder – Vogel Law Firm
- Employment, Business & Education Law
- Families First Coronavirus Response Act (FFCRA)
- Discrimination, Title IX, Workplace Investigations
- Special Education
- Nonrenewal & Discharge Hearings
- Contract Drafting & Review
- Policy Review & Development
- Wage & Hour Compliance
- HR Counseling & Training
- Litigation / Administrative Complaints

Today's Agenda

- I. U.S. Dept. of Education & CDC guidance on masking and quarantine
- II. Masking Policies or Requirements – Considerations
- III. Mandatory Vaccination Policies, Incentive Plans & Testing
- IV. Accommodating “Long-Haulers”
- V. Paid Leave Considerations
- VI. Continued COVID-19 Safety, Planning & Final Tips





- **December 2019**: First identified in Wuhan City, China
- **January 21, 2020**: First identified U.S. case
- **January 30, 2020**: WHO declares global health emergency
- **February 26, 2020**: First suspected U.S. local transmission
- **March 13, 2020**: U.S. declares national emergency / N.D. declares state emergency
- **March 15, 2020**: N.D. closes schools for one week
- **March 17, 2020**: COVID present in all 50 states
- **August 2020**: Schools in hybrid instruction/learning, virtual options, etc.
- **August 2021**: Schools in full-time in-person instruction in N.D.
- **October 20, 2021**: Over 241MM confirmed cases, 4.9MM deaths, 6.6MM vaccine doses administered

Source: covid19.who.int



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I. U.S. Department of Education & CDC Guidance on Masking and Quarantine



Start of School Year

- CDC updated its **Guidance for COVID-19 Prevention in K-12 Schools** in August:
(<https://www.cdc.gov/coronaviruses/2019-ncov/community/schools-childcare/k-12-guidance.html>)
- *“CDC recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status. Children should return to full-time in-person learning in the fall with layered prevention strategies in place.”*





- Surge of cases due to **Delta variant**
- US cases went from 12,000 cases/day to 60,000 cases/day
- Twice as contagious
- Causing more severe illness, hospitalizations, and deaths for unvaccinated

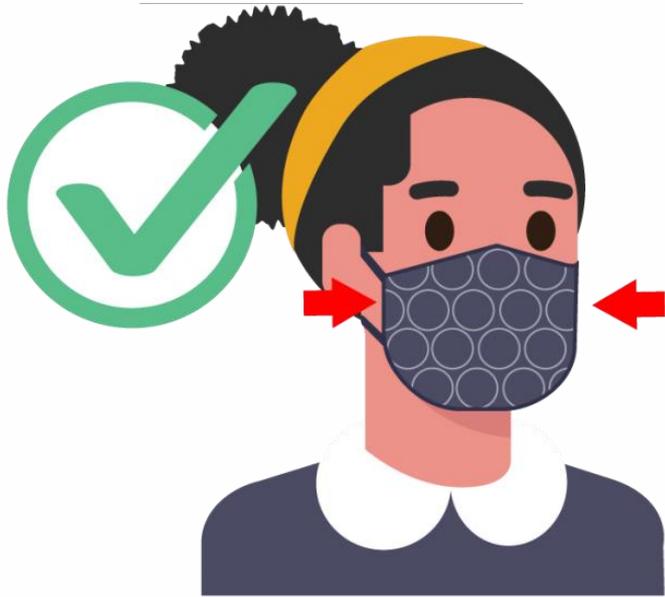
Has Delta affected CDC guidance?

YES



- Close contact guidance modified in Sept. 2021
 - Fully-vaccinated close contacts should be tested **3-5 days** after exposure, even without symptoms
 - Wear a mask indoors for 14 days or until test is negative
 - No quarantine unless positive or symptomatic
- Close contact = 6 feet of infected person for cumulative total 15 minutes+ over 24 hours
- Exception = K-12 indoor classroom when students both wearing masks entire time. (Does not apply to teachers, staff, other adults.)

Anything else?



- In August, CDC also updated guidance on masking due to Delta
 - Recommends even fully vaccinated wear masks *indoors* in public in areas of *substantial* or *high* transmission
- Recently updated again
 - In areas of high numbers, consider wearing masks in *crowded outdoor settings* and *close contact* with unvaccinated

Is North Dakota Substantial or High?

- In many counties, **YES**
- Substantial means 50-99 new cases per 100,000 in past 7 days or percentage of positives between 8-9%
- High means 100 or more or 10+%
- As of October, Burleigh and Morton are HIGH



II. Masking Policies or Requirements – Considerations



Masking Requirements



- State of North Dakota prohibited from imposing another mask mandate
 - HB 1323 passed over Governor veto
- Localities ***not*** prohibited from imposing mandate

What about school districts specifically?

- Locally-elected school boards in N.D. have the power to determine mask use and strategies for reducing the rate of COVID-19 transmission.
- Only the Governor, state school superintendent, other state elected officials, and state health officer are barred by state law from imposing mask mandates.



Don't forget about potential reasonable accommodations . . .

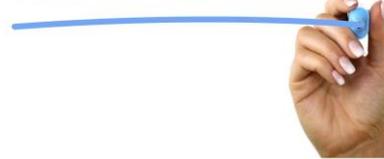
- **Mask Mandates:** those with a *disability* or *sincerely-held religious belief* may need a reasonable accommodation to not wear masks:
 - ADA & Section 504 of 1973 Rehabilitation Act - disability (*students*)
 - ADA & Title VII – disability & religious accommodation (*employees*)
- **Mask Recommendation (but not mandated):** schools will need to consider how to reasonably accommodate student or employee who, due to an underlying disability, at risk for serious complications from COVID-19



Reasonable Accommodation Steps

1. Does the individual (*student or employee*) have a **disability** or sincerely-held **religious** belief (*employee*)?
2. Is there a reasonable accommodation available?
3. Does this accommodation pose an **undue hardship** or **direct threat to health and safety** of others?

UNDUE HARDSHIP



- **ADA/disability**: significant difficulty or expense
- **Title VII/religious**: more than minimal cost/burden

DIRECT THREAT TO HEALTH & SAFETY

- EEOC has stated COVID-19 does meet this standard under the ADA
- **EEOC Enforcement Guidance**: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

ADA: What can a school district request?

- ADA & Section 504 = a school has a right to request **medical documentation** supporting a request for reasonable accommodation
- Reason under the law? To ensure the requester:
 1. Has a disability qualifying for reasonable accommodation
 2. To identify, based on medical diagnosis and judgment, whether reasonable accommodation requested is necessary and sufficient
- Accommodation/ exemption Forms = Consider working with legal counsel or other qualified expert in developing forms for students and employees to request the accommodation



The logo for the EEOC, featuring three stylized blue waves to the left of the text.

EEOC GUIDANCE

U.S. Equal Employment
Opportunity Commission

- EEOC guidelines addressing reasonable accommodation for employees specifically confirm that you can ask **relevant questions** regarding the **nature of a claimed disability** and a request for reasonable accommodation.
- You cannot ask for a person's complete medical record, as the scope of that request will yield information that is irrelevant to the request for reasonable accommodation.
- You can require that the documentation about the employee's disability and the functional limitations come from an **appropriate health care or rehabilitation professional**.
- See the **EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA** – question 6.
(<https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>)

Masks in Schools: OCR Investigations

- U.S. Dept. of Ed.'s Office of Civil Rights (OCR) has initiated investigations in at least five states that have prohibited mask rules in schools (not N.D.).
- OCR is asserting that a decision to prevent schools from implementing a mask rule may “discriminate against students with disabilities who are at heightened risk for severe illness from COVID-19 by preventing them from safely accessing in-person education.”
- Important to check in on OCR's position when working through these issues.



What about family members & ADA?

- Does a school have to offer accommodations based on family member at home with underlying health condition and risk of COVID-19?
- **EEOC Enforcement Guidance:** <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- D.13: **No.** *Although the ADA prohibits discrimination based on association with an individual with a disability, that protection is limited to disparate treatment or harassment. The ADA does not require that an employer accommodate an employee without a disability based on the disability-related needs of a family member or other person with whom she is associated. For example, an employee without a disability is not entitled under the ADA to telework as an accommodation in order to protect a family member with a disability from potential COVID-19 exposure. Of course, an employer is free to provide such flexibilities if it chooses to do so. An employer choosing to offer additional flexibilities beyond what the law requires should be careful not to engage in disparate treatment on a protected EEO basis.*



EEOC Interpretation of ADA

- Instructive Guidance Only (and *very good* guidance that courts often follow/adopt). BUT:
- EEOC's interpretation of ADA not binding on courts or plaintiffs who may be interested in seeking a court's interpretation of the law that would extend protections beyond those incorporated in the EEOC's interpretation.
- Multiple provisions in law could create potential for liability in cases where the existence of a disability is disregarded, including possibility of claims under:
 - 14th amendment of U.S. Constitution (guaranteeing equal protection under law),
 - the ADA,
 - Section 504 of the 1973 Rehabilitation Act, and
 - Possibly state human rights laws.



Addressing Religious Exemption Requests

- Address on **case-by-case basis** (just like medical accommodation)
- Potential accommodations – face shield as opposed to mask; possible off-site learning or working options
- **EEOC guidance**: Under Title VII, once an employer is on notice that an employee's **sincerely-held religious belief**, practice, or observance prevents the employee from complying with mask mandate/ testing/ getting a COVID-19 vaccine (whatever the policy in question), the employer must provide a reasonable accommodation unless it would pose an **undue hardship** (*aka, more than minimal cost/burden*).
- Process requests according to same standards that apply to other accommodation requests. Consider developing exemption/accommodation forms.
- **EEOC Enforcement Guidance – K12**: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



Masks on School Buses

- CDC issued Order in accordance with President Biden's **Executive Order 13998**, *Promoting COVID-19 Safety in Domestic and International Travel*, that **requires masks on public or private school buses**. This has been the case since **February 1, 2021**.
- The requirement of masks on school buses based on federal law and part of same requirement that CDC imposes on other forms of conveyances = commercial airplanes, trains, subways, intracity buses, school buses, etc. **CDC is requiring masks on school buses pursuant to its authority** granted by Congress under **42 U.S.C. Section 264**.
- Courts generally hold that any law on the books is presumed constitutional unless proven otherwise. **There has not yet been any successful challenge to the Order** requiring masks on public conveyances (including school buses) adopted by the CDC.



CDC School Bus Masking Exemptions

- CDC Order exempts the following **categories of persons**:
 - A child under the age of 2 years;
 - A person with a disability who cannot wear a mask, or cannot safely wear a mask, because of the disability as defined by the ADA (42 U.S.C. §12101 et seq.); and
 - A person for whom wearing a mask would create a risk to workplace health, safety, or job duty as determined by the relevant workplace safety guidelines or federal regulations.



EXEMPT

CDC School Bus Masking Exemptions

- CDC Order also exempts the following circumstances:
 - While **eating, drinking**, or taking **medication**, for brief periods;
 - While communicating with a person who is **hearing impaired** when the ability to see the mouth is essential for communication;
 - If **unconscious** (for reasons other than sleeping), incapacitated, unable to be awakened, or otherwise unable to remove the mask without assistance; or
 - When necessary to temporarily remove the mask to **verify one's identity**, such as when asked to do so by a ticket or gate agent or any law enforcement official.
 - persons experiencing **difficulty breathing** or shortness of breath or are feeling winded may remove mask temporarily until able to resume normal breathing with mask.
 - Persons who are **vomiting** should remove mask until vomiting ceases.
 - Persons with acute illness may remove the mask if it interferes with **necessary medical care** such as supplemental oxygen administered via an oxygen mask.

Failure to Comply?

- Is a **violation** of federal law;
- Could result in a loss of **federal funding**, including but not limited to ESSER, ESEA, the Individuals with Disabilities Education Act (IDEA), Adult Education and Family Literacy Act (AEFLA), or Carl D. Perkins Career and Technical Education Act of 2006 (Perkins CTE);
- Could impact state **Workers' Compensation** laws;
- Could exclude school officials from **liability insurance coverage**



III. Mandatory Vaccination Policies, Incentive Plans & Testing



Vaccinations & the 14th Amendment

- Vaccinations in U.S. pre-date first influenza pandemic and first required by some states in early 1900s in response to smallpox and other infectious outbreaks.
- *Jacobson v. Massachusetts*, U.S. Supreme Court (1905) = seminal case on states' public health authority and held that police power of a state embraces such reasonable regulations to protect public health and safety. The *"liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint, nor is it an element in such liberty that one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State. It is within the police power of a State to enact a compulsory vaccination law, and it is for the legislature, and not for the courts, to determine."*
- *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); see also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)(holding state legislatures have a wide field of discretion in order that there may be suitable protection of health and safety).

COVID-19 Vaccines

- Three are currently authorized and recommended in the U.S:
 - **Pfizer**
 - 2 shots, 3 weeks apart
 - Available to 12 years old+
 - **Moderna**
 - 2 shots, 4 weeks apart
 - Available to 18 years old+
 - **Johnson & Johnson**
 - 1 shot
 - Available to 18 years old+
- People are **fully-vaccinated** 2 weeks after the final shot



PFIZER VACCINE



- On August 23, received full FDA approval
- Now marketed as Comirnaty
- Full FDA approval for 16+, but still available for emergency use for 12-15-year-olds
- Submitted to FDA for 5-11-year-olds (approval expected soon!)
- Booster shots – 65+; or high-risk conditions; or frequent exposure (such as education staff under CDC recommendations)

Can employers ask employees if they are vaccinated under the law?

YES

- Any documentation or confirmation of vaccination status is not a disability-related inquiry
- BUT, it is confidential medical information under the ADA and should be stored separately from personnel files
- *(HIPAA Rules do not apply to employer or employment records. NOT a HIPAA violation to ask for proof of vaccination.)*



Can employers require vaccination under the law?

YES – no prohibition under N.D. or federal law



Biden Administration Announcements:

- August 18 – Nursing homes required to vaccinate staff or lose Medicaid/Medicare funding
- Sept. 9 - Federal Contractor/Subcontractor mandatory vaccination executive order (guidelines released Sept. 24 and 30)
- Sept. 9 – OSHA Emergency Temporary Standard (ETS) to require 100+ employer entities to require vaccination or weekly negative tests (only for those employers subject to federal OSHA – *not school districts in N.D.*).

EEOC Guidance



EEOC

Equal Employment Opportunity Commission

- Imposing a vaccine requirement can be a qualification standard if *job-related* and *consistent with business necessity*
- Employers must show those unable to meet the qualification because of a disability pose a *direct threat*

Remember those reasonable accommodations . . .

- Employees with a disability unable to meet the requirement may ask for an *exemption*
- Employer and employees should engage in an *interactive process* to determine a reasonable accommodation



Reasonable Accommodation

- Examples:

- Face mask
- Regular testing
- Telework
- Reassignment to another position (last resort)



- Accommodation need not be granted if it's an ***undue hardship*** (Significant burden/expense) or ***direct threat to health and safety***



Religious Exemptions

- Same exemption process may be needed for someone with a sincerely-held religious belief
- **Step 1**: Does the person have a sincerely-held religious belief?
 - EEOC encourages employers to *assume* a religious request is sincerely-held, but if there is an objective basis to question, can *request supporting info*



Reasonable Accommodation

- Same examples may apply
- Remember that *undue hardship* means more than a minimal cost
 - Easier for employers to satisfy

Reasonable Accommodations during COVID-19



- Employers *may not* disclose if someone is receiving a reasonable accommodation
- Employers are also *prohibited* from retaliating against an employee for requesting an accommodation



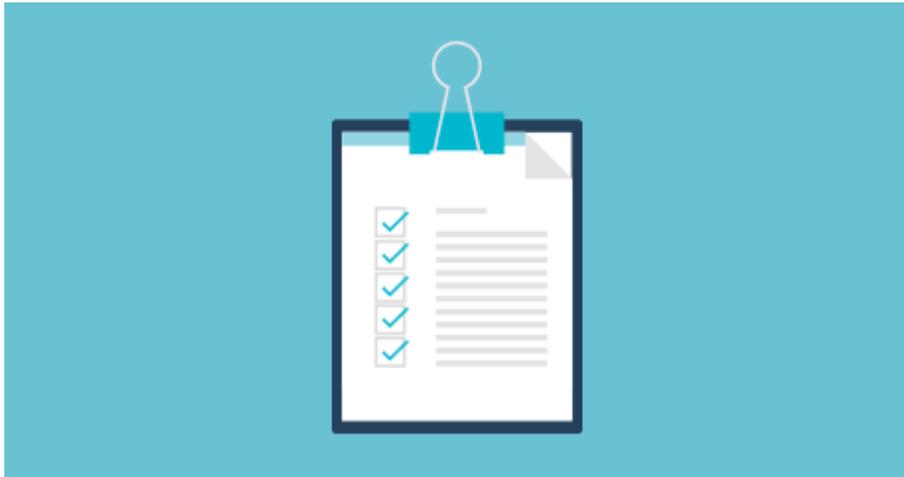
Should a school district mandate vaccines?

- Practical considerations

- Capacity and willingness to handle exen requests
- Understanding how school will handle those refusing based on general objections
- Readiness to implement consistently
- Collective bargaining requirements - Objections for union? Negotiated agreement language? Is it a material change and condition of employment?



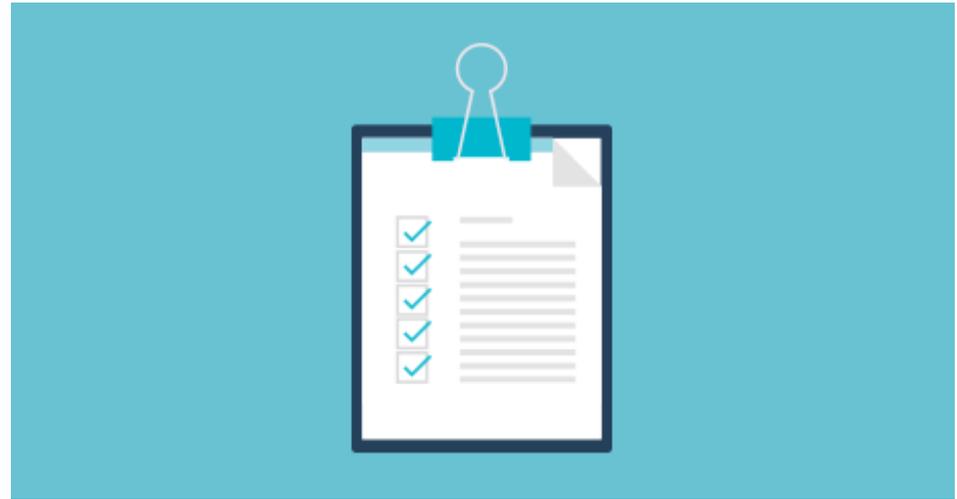
Developing a Policy



- ✓ Define what constitutes being vaccinated
- ✓ Provide a clear deadline
- ✓ The availability and process for requesting a disability or religious exemption
- ✓ Whether PTO will be allowed for time spent to get the vaccine or recover
- ✓ Disciplinary action for failure to comply

Implementing a Policy

- ✓ Develop the exemption forms in advance
- ✓ Train those involved in the process
- ✓ Communicate the policy to all employees
- ✓ Implement the policy consistently to avoid discrimination claims



What about booster shots?

- FDA approval first received for Pfizer – recommended for eligible individuals 6 months after full vaccination
- FDA approval just received Oct. 20 for Moderna (6 months after) & J&J (2 months after)
- Updated CDC recommendation pending



Booster Shots

- Employers with mandatory policies must decide if booster shots will be required
 - If so, include in the policy
- Question as to whether individuals will eventually need booster to be considered “fully vaccinated”



In General – Can employers incentivize the vaccine?

YES

- As an alternative to mandatory vaccination policies, employers can have a voluntary vaccination policy that includes incentives
- Type of incentive depends on whether employer administers vaccine or asks for documentation from a third party



EEOC Guidance on Incentives

- **Option 1**

- If employees voluntarily provide documentation confirming vaccination from third-party, ***employers can offer any incentive with no apparent limitation***

- **Option 2**

- If employer (or its agent) administers the vaccine, ***incentive cannot be so substantial in value to be considered coercive***

EEOC Guidance

- EEOC wellness program rules require employers not force employees to make medical-related decisions using incentives
- Must be genuinely voluntary



- Because **Option 2** involves disability-related screening questions, large incentives could pressure employees

What is “substantial?”

- EEOC does not define
- Higher the value, greater risk of being unnecessarily coercive
- Common incentives:
 - Cash
 - Gifts
 - Additional paid time off
 - **BUT** – red flag for school districts!!



CAUTION: N.D.C.C. § 15.1-16-21

- Teachers and administrators subject to negotiated agreements generally have uniform pay and benefit requirements that must be followed
- **NDCC sec. 15.1-16-21:**
 - If an individual has taught in this state during the preceding twelve months, the individual is not eligible to receive a level of compensation greater than that provided for in the district's negotiated agreement.
- This means = incentive bonuses generally only allowed if *all* teachers receive them *or* if incentive pay provisions are carefully outlined in the negotiated agreement.



Incentives – **ALSO** remember those reasonable accommodations!

- Individuals with disabilities or religious beliefs may need to be offered alternative means to earn an incentive
- Possible accommodations:
 - Requiring regular testing
 - Reviewing CDC literature on mitigating spread of COVID
 - Watching COVID safety video



COVID-19 Testing

- FOR EMPLOYEES

- EEOC states: *“ADA requires that any mandatory medical test of employees be job related and consistent with business necessity. This means employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. An employer may choose to administer COVID-19 testing to all employees before work or periodically to determine if their presence in the workplace poses a direct threat to others.”*

- FOR PARTICULAR EMPLOYEE

- EEOC states: *“ADA requires the employer to have a reasonable belief based on objective evidence that this person might have the disease. So, it is important for the employer to consider why it wishes to take these actions regarding this particular employee, such as a display of COVID-19 symptoms.”*

- FOR STUDENTS

- Schools should get parental consent before administering COVID-19 tests.

IV. Accommodating COVID-19 “Long-Haulers”



“Long Haul” COVID

- President Biden also announced “long haul” COVID may qualify for protection under ADA (*students and employees*) and FMLA (*for students*)



ADA2021

CELEBRATING **31** YEARS OF THE
AMERICANS WITH DISABILITIES ACT

Family and Medical Leave Act: The Basics

- Applies to private sector employers (50+ employees) *and* all public agencies, including local, State, and Federal employers, and local education agencies (schools).



FMLA FAQs, U.S. Dept. of Labor: <https://www.dol.gov/agencies/whd/fmla/faq>

FMLA: The Basics

- Employee may be eligible for FMLA leave for “long haul” COVID if certified by healthcare provider as serious health condition (or that of a qualifying family member)
 - Unable to perform functions of job
 - Involves inpatient care or continuing treatment by provider



- May be intermittent or in one block of time

ADA Obligations

1. Determine *whether* there is a disability
2. Engage in *interactive process* to determine limitations and requested accommodations
3. Assess what is *reasonable* and any *undue hardship*



V. Paid Leave Considerations



History Lesson – Paid Leave & COVID-19

- **March 18, 2020** – Families First Coronavirus Response Act (FFCRA) signed into law
- **April 1, 2020** – Effective date FFCRA
- **December 31, 2020** – expiration of FFCRA
- **Jan.1 – March 31, 2021** – Consolidated Appropriations Act: employers could *voluntarily* extend FFCRA benefits
- **March 31 – Sept. 30, 2021** – American Rescue Plan Act: another *voluntary* extension
- **April – Sept. 30, 2021** – Treasury Dept. & IRS: *voluntary* option to provide leave for employees to receive vaccine / recover from vaccine.
- ***July 29, 2021** – Treasury Dept. & IRS announced *voluntary* option for employees to accompany family/household member to obtain vaccine and care for such person during recovery from vaccine

Where are we now?

- FFCRA (and extensions) have expired.
- Employees still contracting COVID-19 and needing time off (and/or suffering from “long-haul” effects or susceptible health conditions.
- School Districts may review:
 - vacation and sick leave policies and practices & negotiated agreements
 - hybrid or remoting teaching accommodations/ options
 - time off to get vaccinated / on-site vaccination options
 - other options/ support systems available



FMLA: Employee Reminders

- Some confusion may exist among employees as to their rights under the FMLA due to the extended rights that previously had been provided (and have expired).
- May need to remind employees =
 - FMLA does not provide a right to accommodations, such as working from home.
 - FMLA only provides a right to an unpaid leave of absence and job protection if cannot work due to a serious health condition.
- Employees who are quarantined due to a serious health condition (which *could* include contraction of COVID) may be entitled to a leave under FMLA IF symptoms are significant enough to qualify as serious health condition.
- Yet, the right to leave still does not entitle an employee to work from home, either full-time or part-time, unless agreed to by the employer.



BUT ADA again...

ADA AND REMOTE WORKING

- Simply contracting COVID-19 may not constitute a disability as generally **short-term illnesses do not meet the ADA disability standard**.
- IF employee suffers from significant symptoms or side effects of contracting the virus or has underlying health condition affected by COVID, employee *may* qualify.
- **What does the school do?**
 - Ask for supportive **medical documentation**
 - **Interactive process** to determine most appropriate, reasonable accommodation (*does not* have to allow remote work/teaching).
 - **Choice of accommodation** – **belongs to employer**, as long as request from employee is not unreasonably denied.
 - If it is an **essential function** of employee's position is to be **on-site to perform duties**, the school district is not required to eliminate an essential function or hire another employee to perform this function.



VI. Continued COVID-19 Safety, Planning & Final Tips



Review Available Guidance

- **U.S. Department of Education** –

“COVID-19 Resources for Schools, Students, and Families”

- <https://www.ed.gov/Coronavirus>

All Education Levels

- [Long COVID under Section 504 and the IDEA: A Resource to Support Children, Students, Educators, Schools, Service Providers, and Families](#) (July 26, 2021)
- [Improving Ventilation in Schools, Colleges, and Universities to Prevent COVID-19](#)
- [American Rescue Plan \(ARP\)](#)
- [Questions and Answers on Civil Rights and School Reopening in the COVID-19 Environment](#) (May 13, 2021)

Review Available Guidance

Elementary and Secondary Education

- [Supporting Child and Student Social, Emotional, Behavioral, and Mental Health Needs](#) (October 19, 2021)
- [Supporting Students During the COVID-19 Pandemic: Maximizing In-Person Learning and Implementing Effective Practices for Students in Quarantine and Isolation](#) (September 17, 2021)
- [Strategies for Using American Rescue Plan Funding to Address the Impact of Lost Instructional Time](#) (August 31, 2021)
- [How to Use this Guidance: Strategies for Using American Rescue Plan Funding to Address the Impact of Lost Instructional Time](#) (August 31, 2021)
- [Return to School Roadmap: A Guide for K-12 Schools and Communities](#)
- [ED COVID-19 Handbook, Volume 2: Reopening and Meeting Students' Needs](#) ([Español](#)) (April 9, 2021)
- [ED COVID-19 Handbook, Volume 1: Safely Reopening Elementary and Secondary Schools](#) ([Español](#)) (February 12, 2021)
- [Elementary and Secondary School Emergency Relief \(ESSER\) Fund](#)
- [Governors' Emergency Education Relief \(GEER\) Fund](#)

Review Available Guidance

- EEOC Guidance – “What you should know about COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws”
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

- A. Disability-Related Inquiries & Medical exams
- B. Confidentiality of Medical Information
- C. Hiring and Onboarding
- D. Reasonable Accommodation
- E. Pandemic-Related Harassment due to national origin, race, or other protected characteristics
- F. Furloughs and Layoffs
- G. Return to Work
- H. Age
- I. Caregivers/Family Responsibilities
- J. Pregnancy
- K. Vaccinations

Review Available Guidance

- State Guidance –

- (1) WSI benefits

- Prior Feb. 22, 2021: only frontline healthcare workers, first responders, funeral service personnel & care providers for those w/ intellectual & developmental disabilities qualified when contracted COVID-19 when working – via Governor Executive Orders
 - After Feb. 22, 2021: No coverage. Diseases to which general public outside of employment are exposed = specifically excluded from workers' comp. coverage in ND

Review Available Guidance

- (2) Business Immunity
 - **HB 1175** (businesses): broad immunity from civil liability from COVID-19 exposure as long as act was in compliance with law and regulations and absent actual malice
 - **SB 2278** (education): provides school districts, boards, employees immunity from civil liability from students' contracting or exposure to COVID-19 while at school or on a school bus, except for gross negligence or willful misconduct.
- (3) State Orders & Recommendations –
 - Governor's executive orders rescinded February 22, 2021 (but always be on the alert for future orders)
 - ND Department of Health recommendations

Consider Your School Culture

- Poll employees about how they feel (which gives the employer some data)
- Consider the culture your organization values – e.g., priority safety and health (food industries); priority on autonomy and accountability (industries that don't require in-office work)
- Consider your geographic location
- Amount of contact with the public
- Amount of spacing available and contact with co-workers
- Ability to work remotely
- Whatever the conclusion on COVID-19 Plan/ Policies = communicate the reasoning, be transparent, provide education, provide support, be a role model (and comply with your own policy), etc.

Consider Privacy & Reporting COVID-19

- Students: FERPA requires that a student provide written consent prior to any disclosure from the student's education record.
 - U.S. Department of Education has provided a summary of FERPA-related issues during a health emergency: https://studentprivacy.ed.gov/sites/default/files/resource_document/file/FERPA%20and%20Coronavirus%20Frequently%20Asked%20Questions.pdf
 - Exception: *“The District may release student records or information in connection with an emergency, without parental consent, if the knowledge of such information is necessary to protect the health or safety of the student or other persons.”* 34 CFR §99.36.
- Staff: HIPAA Privacy Rule does not always apply because the school either: (1) is not a HIPAA-covered entity or (2) is a HIPAA-covered entity but maintains health information only on students in records that are by definition “education records” under FERPA and, therefore, is not subject to the HIPAA Privacy Rule.

COVID-Related Litigation Impacting Public Schools

- This is a **moving target** as litigation on all sides of this issue are being brought daily.
- In many instances, litigation **state-specific** depending upon mandates, no mandates, state laws, etc.
- COVID-19 Pandemic will likely be in rearview mirror **long before** many of these cases finally **decided**.
- Stay tuned!!!

Questions & Answers



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