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Issues with COVID-19 and Schools

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Disclaimer:

The information in this presentation is provided for training and educational purposes only and should not be considered legal advice.

Families First Coronavirus Response Act

- On March 18, 2020, President Trump approved House Bill 6201, titled the “Families First Coronavirus Response Act” or “FFCRA”.
- The law has two new acts providing leave time:
 - “Emergency Family and Medical Leave Expansion Act”.
 - “Emergency Paid Sick Leave Act”.
- The law provides leave benefits for employees who cannot work or telework/remote work because of certain conditions associated with COVID-19.
- This law applies to School Districts.

FFCRA Benefits

- Benefits under the FFCRA expire on **December 31, 2020**, unless extended by law.

The FFCRA Excludes Employees Who Have Been Designated as Emergency Responders

Emergency Responders include “an employee who is necessary for the provision of transport, care, health care, comfort, and nutrition of such patients, or whose services are otherwise needed to limit the spread of COVID-19. This includes but is not limited to military or national guard, law enforcement officers, correctional institution personnel, fire fighters, emergency medical services personnel, physicians, nurses, public health personnel, emergency medical technicians, paramedics, emergency management personnel, 911 operators, public works personnel, and persons with skills or training in operating specialized equipment or other skills needed to provide aid in a declared emergency as well as individuals who work for such facilities employing these individuals and whose work is necessary to maintain the operation of the facility.”

The FFCRA Excludes Health Care Providers

Health Care Providers include “anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.”

Who Can Be At Work During the School Closure?*

For example, employees involved in:

- Functions to facilitate distance learning.
- Food/nutrition services.
- Facility maintenance operations to verify integrity of building.
- Emergency building repairs.
- Field maintenance if critical.
- School construction programs in progress by a contractor.

** From Governor Baker's list of essential services.*

Who Can Not Be At Work During the School Closure?

For example, employees involved in:

- Non-emergency building repairs.
- Landscape and field maintenance not required for continuity of building function.
- School sports and practices.

Emergency Paid Sick Leave Act (“EPSLA”)

All employees are eligible for EPSLA without regard to length of service.

The EPSLA requires Districts to provide paid sick time to employees unable to work or telework because of one or more of the following six purposes:

1. The employee is subject to a quarantine or isolation order related to COVID-19.
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

EPSLA (cont.)

4. The employee is caring for an individual who is subject to an order as described in Purpose 1 (quarantine or isolation order related to COVID-19) or has been advised as described in Purpose 2 (advised by a health care provider to self-quarantine due to concerns related to COVID-19).
5. The employee is caring for the employee's son or daughter whose school, place of care, or childcare provider is closed/unavailable due to COVID-19 precautions.
6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

EPSLA (cont.)

- Each eligible employee is entitled to paid sick time for the amount of hours that the employee works on average over a two (2) week period up to a maximum of eighty (80) hours.
- Compensation for the paid sick time is full pay, capped at \$511 per day and \$5,110 in the aggregate for leave under Purposes 1, 2, or 3.
- Compensation for the paid sick time is 2/3 pay, capped at \$200 per day and \$2,000 in the aggregate for leave under Purposes 4, 5, or 6.

EPSLA (cont.)

- Employers cannot require employees to exhaust other paid leaves before accessing leave under the EPSLA.
- Employers may not require employees to use other paid leave concurrently with the EPSLA.
- Employers may, but are not required to, permit employees to take leave on an intermittent basis under the EPSLA. *(If permitted, there should be a written/ email approval of the specific intermittent leave that is authorized.)*

Emergency Family and Medical Leave Expansion Act (“EFMLA”)

- To be eligible an employee must have been employed by the District for at least 30 calendar days.
- Requires Districts to provide up to twelve (12) weeks of job-protected leave where an employee is unable to work or telework (remote work) due to a need to care for a minor child if that minor child’s school, daycare, or care provider has been closed due to a public health emergency with respect to COVID-19 as declared by a federal, state or local authority.

EFMLA (cont.)

- The first 10 days of leave under the EFMLA may be unpaid.
- An employee may elect to utilize accrued paid leave time during the period of time that the employee would otherwise be unpaid including leave under the EPSLA Purpose 5.
- The remaining leave time after the first 10 days shall be paid:
 - at 2/3 the employee's regular rate of pay up to a maximum of \$200 per day and \$10,000 in the aggregate; and
 - for the number of hours the employee would otherwise be normally scheduled to work.

EFMLA (cont.)

- If an employee's work hours tend to vary from week to week, the employer shall use a number equal to the average number of hours that the employee was scheduled per day over the 6-month period ending on the date on which the employee takes such leave, including hours for which the employee took leave of any type.
- If the employee did not work over the 6-month period, the employer shall use the employee's reasonable expectation at the time of hiring of the average number of hours per day that the employee would normally be scheduled to work.

EFMLA (cont.)

- Employees may take a total of twelve (12) workweeks for FMLA and/or EFMLA during the twelve (12) month period an Employer uses to measure FMLA.
- If an employee has taken some, but not all of the twelve (12) workweeks of leave under FMLA during such twelve (12) month period, the employee may take the remaining workweeks as EFMLA.
- However, if the employee has already taken twelve (12) workweeks of FMLA leave during such twelve (12) month period, the employee is not eligible for any additional leave under FMLA or the EFMLA.

Intermittent Leave

- Intermittent leave is leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include periods from an hour or more to several weeks.
- Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread out over a period of six months, such as physical therapy, chemotherapy, etc.
- Employers may, **but are not required to**, permit employees to take Emergency Family and Medical Leave intermittently. *(If permitted, there should be a written/email approval of the specific intermittent leave that is authorized.)*

Concurrent Leave

- FMLA is unpaid leave. However, an employer may require an employee to substitute the unpaid leave with accrued paid leave, as appropriate, to run concurrently with the unpaid FMLA leave.
- **The current EFMLA regulations permit an employer to run accrued paid leave concurrently with the EFMLA.**
- The employer must inform the employee of this requirement to substitute appropriate and available paid leave in advance.

FLSA & Pay Deductions

- Leave under the FFCRA does not change an employee's FLSA exempt/nonexempt status.
- Districts should continue to make regular withholdings/deductions on pay while an employee is on leave under the EPSLA and EFMLA.
- Exception: Garnishments to the U.S. Department of Education (“DOE”).
 - The CARES Act temporarily suspended student loan garnishments for at least sixty (60) days. Districts should receive a letter from the DOE with instructions to stop wage garnishments for student loans.

Paying Hourly Employees

DESE has urged Districts across the state to continue to pay their hourly employees during the school closure period because:

- Districts have already budgeted for this cost in FY 2020.
- These employees will be available to return to work when schools reopen.

Furloughs and Layoffs

What's the Difference Between Furlough and a Layoff

FURLOUGH

Employees remain employees of the District during the furlough period.

Eligible for unemployment during the furlough period.

LAYOFF

Employees are separated from employment and are no longer employees of the District.

Eligible for unemployment.

Furloughs

- Furloughs are a mandatory subject of bargaining. *Districts must satisfy their bargaining obligations.*
- When employees are furloughed for a specified period of time, Districts are **not** required to pay employees for their accrued vacation leave because they have not been separated from employment.
- Employees who are furloughed are eligible for unemployment benefits through the Department of Unemployment Assistance.

Layoffs

- Check the CBA to see if there is a notification provision. Often, there will be a requirement to notify employees prior to a layoff.
- Follow layoff procedures in the CBA.
- If the CBA is silent regarding layoffs, the District has a bargaining obligation.

If the District is Considering Layoffs

- The unions may work with the District to offer concessions in lieu of layoffs or to reduce the number of layoffs.
- Some concessions may include:
 - Freezing steps and/or lane advancements.
 - Temporary moratorium on:
 - Negotiated raise increase(s).
 - Payment of certain benefits (tuition reimbursement, stipends, etc.).
 - Reduction in required Planning/Prep Periods.
 - Reduction of hours.

Non-Renewal

- Due to the anticipated reductions in funding due to the COVID-19 pandemic, Districts may want to consider staffing needs and future available resources.
- Districts are required by statute to non-renew educators in writing on or before June 15th. However, check the CBA for a possible earlier non-renewal date.
- Check the CBA to determine if there are substantive requirements for the non-renewal letter. Some CBAs require notice that the Superintendent is considering nonrenewal prior to the nonrenewal notice being issued.
- Non-renewal letters should be sent by first-class mail and email but check the CBA which may have different or additional requirements.

Summer Programming and Unemployment

- If summer programming is cancelled this year, employees may inquire about their rights to collect benefits through the Department of Unemployment Assistance (DUA).
- Districts should not opine on an individual's eligibility for unemployment benefits.
- The DUA has relaxed eligibility criteria to support individuals affected by the COVID-19 crisis.
- Generally, an individual who is laid off, furloughed or had hours cut would be likely to obtain some DUA benefits.
- If an employee was hired to perform work in the summer consistent with their school year responsibilities and the summer program has been cancelled the District should provide the employee with a DUA notice.

Leaves of Absence

MPLA and FMLA Leaves

MPLA

- Up to 8 weeks of leave for:
 - The birth, adoption, or placement of a child.
- Applies to male **and** female employees.
- Begins to run immediately when the child is born/adopted/placed.

FMLA

- Up to 12 weeks of job-protected leave for various reasons including:
 - The birth, adoption, or placement of a child.
- Must be taken consecutively; cannot be taken intermittently.
- May be taken at any time in the first 12 month after the birth/adoption/placement of the child.

**Leave under the MPLA and FMLA run concurrently.*

Employees Requesting to Return to Work During the School Closure

- Districts may have employees who were on approved leaves of absences prior to the school closure.
- Leaves could have included MPLA or FMLA.

Transportation Issues

Transportation Issues – First Steps

- Districts should:
 - Review the Transportation contract with the District.
 - Consult school legal counsel.

Transportation

- DESE guidance states: “. . . we expect school districts to continue payments for outsourced operational services that are needed to ensure continuity of essential services when schools reopen. Such payments may be conditioned on negotiated changes to contracts in order to address unanticipated service needs during the state of emergency.” These services include transportation. *See* Jeffery C. Reilly memorandum of March 27, 2020.

Transportation (cont.)

- DESE recognizes that payments for transportation services should be appropriately discounted so School Districts are not paying unreasonable support to their transportation companies. DESE has circulated lists to Business Managers indicating which School Districts share transportation companies and has encouraged those Districts to work together to negotiate amended transportation contracts with their shared providers which are equitable.

Transportation (cont.)

- Important factors to consider in negotiating a revised transportation contract include:
 - The extent to which the transportation company has reduced its labor cost. A company that has laid off or furloughed its drivers, mechanics and other employees will have a more substantial decrease in operating cost than those who retain their employees.
 - The extent to which the transportation company has reduced its other operating costs, such as fuel and maintenance cost.
- School Districts should recognize that transportation companies have legitimate operating costs which they will incur during a shutdown. These include capital costs (leases or loans on vehicles); occupancy costs for their property and garages; insurance and other costs. The companies will need to meet these expenses in order to remain in business.

Transportation (cont.)

- An agreement between a School District or group of Districts should include provisions that revisit the price term in the event the transportation company receives federal or state aid.

School Trips

School Approved Trips

- Many Districts have engaged third-party travel companies to coordinate domestic and foreign travel for students.
- Given the international crisis, domestic and foreign travel was prohibited or not advisable.
- In many instances, students and families seeking refunds have been offered vouchers by the travel companies for future years.
- Some travel companies have offered limited refunds.
- Ask your legal counsel to speak with the company's legal department to negotiate terms of the refund or future voucher.
- Receive the negotiated terms in writing.

Educator Misconduct During School Closure

Educator Misconduct During Stay At Home Order

- The Governor of Massachusetts has issued a stay at home order banning gatherings of ten (10) or more people, athletic events of any population, etc.
- If during this time, an educator engages in misconduct the educator may be disciplined. For example:
 - If the educator/coach decides to hold practice with his team in violation of the Governor's order to social distance, the educator may be disciplined for insubordination and conduct unbecoming.

Educator Compliance with Remote or Distance Learning Plans

- Educators are expected to adhere to the same standards and conduct they would if they were in the classroom.
- The discipline provisions of the CBA and MGL c. 71 apply to educator conduct during school closure. For example, an educator who uses profanity during his on-line class, may be disciplined for engaging in conduct unbecoming a teacher.

Educator Evaluations

Educator Evaluations

- **DESE is expected to issue guidance regarding teacher evaluations during school closure.**
 - Review the applicable CBA; the CBA may prohibit observations without the knowledge of the educator. Evaluators should not be observing/evaluating on-line instruction of educators without their knowledge.
 - If evaluators or educators have not completed portions of the evaluation process that should have occurred prior to closure (i.e., uploaded comments from an observation), those portions still must be completed. Evaluators and teachers may continue to do so remotely.
 - Meet (remotely) with the union to discuss educator evaluations for 2019-2020. Review the educator evaluation agreement to determine how to address educators:
 - on improvement plans;
 - moving to directed growth plans; and
 - without PTS.

Q&A

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