



Hot Topics in Independent School Law

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Today's Agenda

- Political Speech on Campus
- Governing Outside Activities
- Employee Leave Issues
 - The Family and Medical Leave Act
 - The Families First Coronavirus Response Act
 - The Americans with Disabilities Act
- Contracts and COVID-19
- Immunizations
- Waivers and Releases of Liability
- Student Privacy
- Student Discipline



Political Speech

What About the First Amendment?

Politics at School

- First Amendment generally does not apply to private employers
- Tax-exempt status: 501(c)(3) organizations may not support or oppose a candidate for elective office
 - Could include endorsing a candidate, using school resources, campus or employee time to support a candidate
- Policy – Set the Ground Rules
 - Who can speak “on behalf” of the School as an institution
 - Allowed to engage in nonpartisan and unbiased election activities (i.e, voter registration drive, host debates, etc.)
 - Reminding community about civility, respectful discourse, and differing opinions
 - Teach students “how” to think, not “what” to think



COVID and Outside Activities

Keeping Your Community Safe

Governing Time Off Campus

- Travel Policy
 - Address travel for personal reasons
 - Do you require quarantine or testing upon return?
 - What if a family member travels?
 - Will employees be required to take leave during quarantine?
 - Can students opt in/out of remote learning due to travel?
 - Require employees to disclose travel plans or recent travel
- Other Outside Activities
 - Sports
 - Social gatherings
- Governing Documents
 - Community Pledge
 - Return to School Policy
 - Safety Protocols (Daily screening questions should include travel questions)



Employee Leave

When Must We Allow Leave?

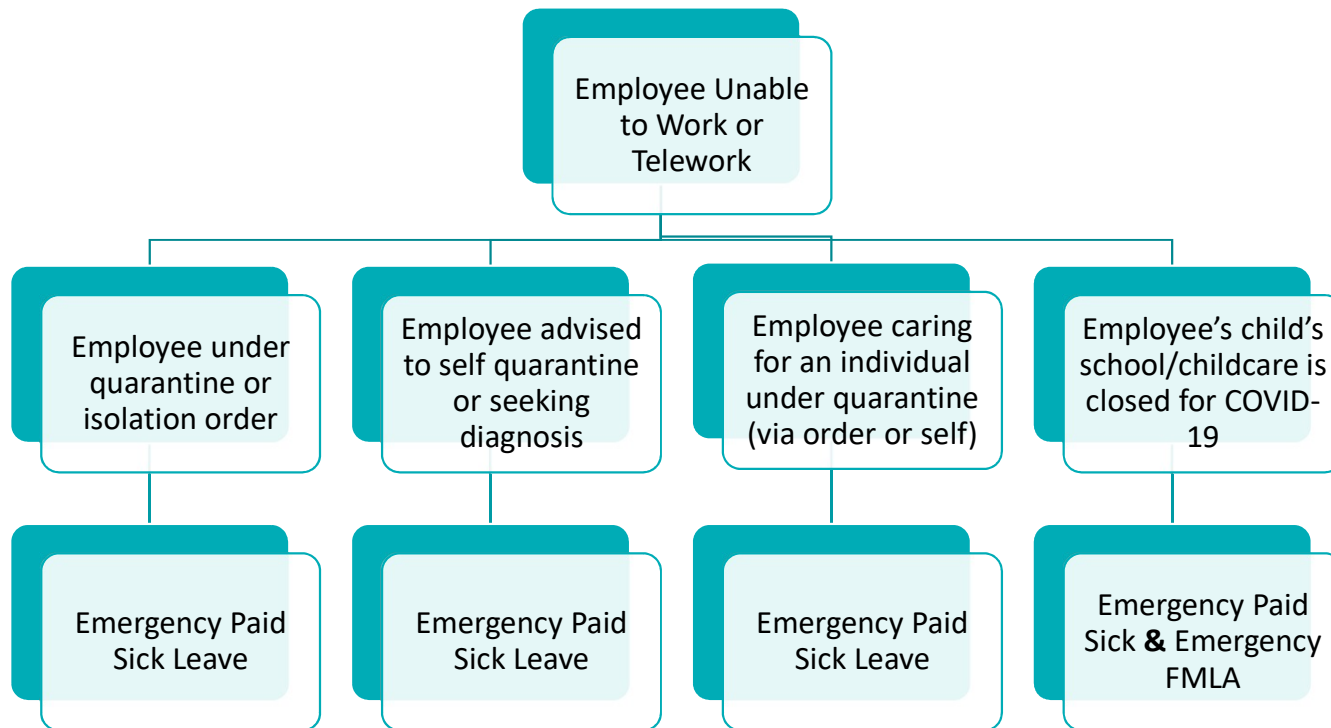
Family and Medical Leave Act

- Entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons.
 - FMLA leave is for “serious health condition”
- Having COVID-19 is not necessarily considered a “serious health condition” under the FMLA
 - *If complications arise* from having COVID-19, then the condition could be considered a serious health condition

Families First Coronavirus Response Act

- A **covered employer** is required to provide **emergency paid sick leave (EPSL)** and **emergency FMLA leave (EFMLA)**
 - covered employer: fewer than 500 employee as of the date the leave is to be taken
 - EPSL: to all employees regardless of time in service
 - EFMLA: On the payroll for at least 30 **calendar days** immediately prior to the day leave would begin
- Must provide to employees who are **unable to work or telework** due to specified reasons
- **FFCRA expires December 31, 2020**

FFCRA – Reasons for Leave



FFCRA – Amount of Leave and Rates of Pay

- **EPSL**

- 80 hours of leave (or PT employee two week equivalent)
- If the leave is taken for the employee's own illness:
 - 100% regular rate of pay, up to \$511 per day and \$5,110 total
- If the leave is taken to care for another illness or for childcare reasons:
 - 2/3 the regular rate of pay, up to \$200 per day and \$2,000 total

- **EFMLA**

- First ten days are unpaid
- Remaining 10 weeks
 - 2/3 the regular rate of pay, up to \$200 per day and \$10,000 total

FFCRA – Common Questions

- Isolation and Quarantine Orders for EPSL:
 - Shelter-in-place or stay-at-home orders issued by the federal, state, or local government **are** considered isolation or quarantine orders
 - What about travel isolation orders?
 - Only one two-week period of leave is FFCRA ESL
- What about Childcare Leave?
 - Fully Remote or Hybrid Schools – considered “closed” on the days of virtual instruction
 - each day of school closure constitutes a *separate reason* for FFCRA leave that ends when the school opens the next day, so not intermittent leave
 - Are there flexible solutions the school can provide (*i.e.* on site supervision//Section 139 of the Internal Revenue Code)

The Americans with Disabilities Act: Pandemic Considerations & The CDC High Risk Categories

- Individual with a Disability” means:
 - someone who has "a physical or mental impairment that substantially limits one or more major life activities or major life functions; has a record of such an impairment; or is regarded as having such an impairment."
 - Includes: immune disorders and any mental or psychological disorder, such as emotional or mental illness
- What about older employees?
 - Older employees are covered by the Age Discrimination in Employment Act
 - Unlike the ADA, no duty to accommodate (does not mean you *cannot*, just that you *don't have to*)
- What about pregnant employees?
 - Pregnancy is not a disability under the ADA, however...
 - If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy, she must be treated as any other temporarily disabled employee (*i.e.* lifting restrictions)
 - Impairments resulting from pregnancy (for example, gestational diabetes) may be disabilities under the ADA
- What about employees or students who cannot wear masks?
- **Remember, requesting an accommodation is a form of protected activity**



Contracts and COVID-19

Pandemic-Proofing Your Enrollment and Employment Contracts

Enrollment Contracts

Address lessons learned from the 2019-2020 School Year:

- Force Majeure Clauses
 - Review covered events
 - Ensure that the clause clearly describes its effect on the parties' contractual obligations
 - Address remote learning, partial / full closures, schedule changes, and changes to program
- Program Flexibility
 - Don't promise particular educational programs, activities, or curriculum
 - Address distance-learning
 - Cement the School's right to modify programming at its discretion
- Parental Cooperation
 - Clearly set forth the School's expectations regarding support for the School's policies and standards of conduct.
 - COVID-19 Safety Protocols
 - Consequences for behavior that is disruptive, overly aggressive, or that seriously undermines the School's policies or decisions
- Cancellation Provisions
 - Consider whether you will need to modify enrollment, cancellation deadlines
 - What are the eligibility guidelines around tuition refunds?
 - What does your state law say about excusing parties from contractual obligations?
- Tuition Refund Plans
 - Review plan information, eligibility requirements

Employment Contracts

Pandemic Proofing the Employment Relationship:

- Flexibility, Flexibility, Flexibility!
 - Ensure that employees agree to perform additional, different duties than those in their job description as requested by the School
 - Distance-learning
 - Incorporate the Employee Handbook by reference
 - Address possible modifications to the employment relationship
 - Compensation, schedule/working hours, termination
- Force Majeure Clauses
- Don't forget the basics!



Immunizations

Can Schools Require Flu, COVID-19 Vaccinations?

Can Schools Mandate Flu, COVID-19 Vaccinations?

▪ Students

- CDC strongly encourages families to receive flu shots each year
- As a general matter, nothing prohibits independent schools from requiring students to receive flu shots, COVID-19 vaccine as a condition of attendance
- Check **state** law for permitted exemptions to immunizations:
 - Religious
 - Medical

▪ Employees

- Generally permitted to impose vaccine mandates for employees, but must consider employees' requests for religious, disability accommodations

▪ Develop the School's Approach

- Consider community/culture concerns before cementing the School's stance on vaccinations
 - “Strongly encourage” or require vaccinations?
- Be prepared for religious, medical exemptions
- Update the School's health and safety protocols
- For COVID-19 vaccines, closely monitor new developments, vaccine availability



Waivers and Releases of Liability

Is COVID-19 a Risk That Can Be Waived?

Are COVID-19 Waivers Enforceable?

- Assumption of Risk or Waiver of Liability?
 - Consider your **audience**: students or employees?
 - Which activities are covered?
 - Participation in on-campus classes or “high risk” activities
- Other Considerations for Participation Waivers:
 - Ensure that individual’s participation is **voluntary**
 - Clearly describe the risks of participation and the safety measures the School is taking
 - Ensure that parents’ waiver covers their own claims and their child’s claims
 - Carefully identify the released parties



Student Privacy Concerns

Health and Digital Privacy Considerations

Student Personal and Health Information

- Increasing concerns related to student privacy during the 2020-2021 school year
 - Distance-learning, increased use of EdTech
 - Daily Health Screening
 - COVID-19 Test Results
- As a general matter, independent schools are **not covered** by HIPAA, FERPA, and COPPA
- Check **state** law
- Digital Privacy Best Practices:
 - Hardwire parental consent for students' use of EdTech into the enrollment contract
 - Limit the type, amount of student personal information provided to third-parties
 - Review contracts with third-party vendors to understand how student data is used
 - Ensure standard data security protocols are in place
 - E.g., privacy policy, data retention guidelines, encryption



Student Discipline Issues

Conduct and Behavior Policies

Student Conduct

- What is the School's policy about student conduct?
 - Does it address online interactions?
 - When does online or off-campus conduct become a policy violation?
- Examples:
 - BLM and social media posts
 - Participation at rallies / protests
 - Cyberbullying
- Consider:
 - Student conduct and discipline policies
 - Impact of conduct on other community members
 - Reputational harm
 - Enrollment contract



Q&A

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