CAPSS
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COUNSELORS AT LAW

WHO WILL TEACH THE CHILDREN?

STAFFING CHALLENGES IN THE TIME OF COVID-19

A Legal Webinar

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Personnel issues present some of the most significant challenges in reopening our schools for the new school year. For the next hour, we will pose and answer (as best we can) twelve questions that superintendents face. We will then take another thirty minutes to answer other questions you may have.

QUESTION ONE

1. Our HR Department is getting slammed with questions about employees who are indicating their doctors have advised them not to return work indefinitely because of their "high risk" status. Do I need to let them use their sick leave even though they aren't sick?

ANSWER TO QUESTION ONE

- Under the law as we know it today, the answer is no. Should such employees have a qualifying disability, that status triggers the obligation to enter into an interactive dialog with such employees over whether and how their disability can be accommodated. However, if they are not ill, we do not believe that they are entitled to take sick leave unless a district policy or practice would indicate otherwise.

- School districts have already received a number of requests for remote learning assignments from employees with preexisting conditions that have been recognized as "high risk" by the Centers for Disease Control and

Prevention (CDC).[1] Prior to addressing such requests, it will be important for districts to finalize their school reopening plans, as those plans will drive school district decisions regarding their staffing needs (including what specific positions will be needed) for the coming school year.

- Next, school districts must distinguish between employees who have a generalized fear about returning to work during the COVID-19 pandemic and those employees who have legally protected disabilities and/or serious health conditions that may entitle them to the protections of the ADA, FMLA and/or other statutory provisions. While school districts will of course want to be sensitive to all employees' concerns, a generalized fear of contracting COVID-19, without an underlying health condition, will not provide a basis for leave or other accommodations under the applicable statutes.

- For employees who are claiming that they have a medically-based concern, the district should request medical verification concerning the employee's disability, along with documentation regarding the specific restrictions that apply to the employee. 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.

- While some employees may request to take leave, in the first instance district officials should exercise their rights, consistent with the statutory provisions referenced above, to determine whether accommodations can be made that would enable the employee to perform the essential functions of the employee's position. Consistent with the requirements of the ADA, employers will need to engage employees claiming a disability in an informal, interactive process to determine whether the individual in fact has a disability under the ADA, and, if so, what accommodation(s) would be appropriate. That individualized analysis will turn on both the employee's disability and related restrictions, as well as the essential functions of the employee's position.

- The key here is to carefully assess whether accommodations can be made that would permit an employee to perform the essential functions of the position, such that placing an employee on leave may not be necessary. In response to the COVID-19 pandemic and in accordance with state rules for reopening, school districts will be implementing changes that reduce contact with others for all employees (*e.g.,* physical distancing and personal protective

[1] https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-increased-risk.html

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."[2] However, transfers to different positions, such as a remote learning assignment, may be reasonable only if such positions exist.

- If ultimately the employer determines that no accommodations can be made for the employee to return to work, it may be necessary to place the employee on leave as a temporary measure. The EEOC has made clear that providing an employee with temporary leave can constitute a reasonable accommodation under the ADA. If the FMLA applies, the district will want to designate the leave as FMLA leave and proceed in accordance with the FMLA.

- If no accommodation other than leave is possible, some employees may request to use accrued sick leave during a period of temporary leave. In that regard, in Advance, Adapt, Achieve: Connecticut' Plan to Learn and Grow Together (Updated August 3, 2020), we read at page 44 that districts should "[p]lan to support staff health [and implement] *flexible sick leave policies* and practices that enable staff to stay home when sick, have been exposed, or are caring for the sick." (Emphasis added). However, employees who are concerned because of underlying health conditions do not fall into these categories. They are not sick, and accordingly they are not eligible to take sick leave.

QUESTION TWO

2. Will employees still be able to claim special leave rights this fall as provided last spring by the Families First Coronavirus Response Act (FFCRA)?

ANSWER TO QUESTION TWO

It depends on the situation.

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

[2] 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.

- 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, relevant collective bargaining agreement, or under the American with Disabilities Act.

- 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 Response 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 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.

- Additionally, 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 who 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 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.

- 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+.

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 two-thirds FMLA+ pay provision in order to receive full pay.

- Lastly, districts may wish to explore practical alternatives as they discuss available leaves with employees. For example, in responding to employee requests for federal leave ***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, districts may want to explore options offered by the Office of Early Childhood, such as their recently published Child Care Referral Support for Teachers and Board of Education Employees.

QUESTION THREE

3. The State Plan provides that parents "may also voluntarily choose for students to temporarily engage in learning from home for a variety of other reasons." What is "temporary" and what educational services do we have to provide? What we have to provide has profound implications for our staffing needs.

ANSWER TO QUESTION THREE

Overview

- Addendum 1 to Advance, Adapt, Achieve: Connecticut' Plan to Learn and Grow Together (Updated August 3, 2020) (the "State Plan") outlines the requirements for voluntary remote learning (Addendum 1 begins on page 48).

- The State Plan now requires that school districts provide temporary remote learning opportunities for those parents and students voluntarily opting into remote learning programming while other students attend in-person instruction.

- Addendum 1 to the State Plan emphasizes that the voluntary remote learning option is not the same as, and must be considered separately from, both homebound/hospitalization instruction and home instruction obligations under other applicable laws.

- The voluntary remote learning option "is not intended to be the same as the opportunities provided when classes are cancelled for a broader population, should public health data require it."

"Temporary"

- Temporary refers to the option being available to families on a temporary basis due to the public health circumstances. School districts are expected to advise families that the voluntary remote learning option may not be available for the whole school year, and Addendum 1 (at page 49) states, "Should public health data support a changed approach, the policy directives from CSDE related to the provision of this option may change to determine there is no longer a need for this temporary option."

Attendance and Parental Supervision Requirements

- Students remain enrolled in their local public school under the voluntary remote learning option. These students are not homeschooled students.

- Schools must take attendance to ensure that students attend for at least half of the regular school day.

- The State Plan indicates that there will be future guidance to school districts on how to take/measure attendance -- stay tuned!

- The State Plan explains that "parents who decide to opt into voluntary remote learning will also be expected to supervise and engage their children to fully and effectively access the remote learning programming that is offered through the public school district."

Educational opportunities/Curriculum

- School districts must continue to provide students with the opportunity to access 177 days of school and 900 hours of instruction should be fulfilled.

- School districts are expected to offer remote learning educational opportunities "in line with the district expectations, because students will transition back into in-person classes after this temporary option is no longer available."

- The State Plan advises districts "[t]o the extent possible, curriculum and grade progression should be made accessible."

- There is not any waiver of requirements under Conn. Gen. Stat. Sections 10-16b (prescribed courses of study) and 10-221a (high school graduation requirements).

- The SDE will be issuing further guidance regarding the implementation of IEP services and supports to students with IEPs who opt into voluntary remote learning instruction.

- Districts are not required to offer an "a la carte" model. This means that districts may require students to attend in-person instruction to access extracurricular activities, electives and other non-core curriculum opportunities.

- The State Plan also explains that "while the curriculum and instructional practices are unique to each elective and extracurricular activity, some methods will be able to be delivered in remote, virtual settings. School districts should determine the level of availability and notify parents and students of these options when they make their choice to opt into remote learning."

Assessments

- Students participating in voluntary remote learning are expected to access statewide assessments in-person, unless the assessments are available remotely.

- Other district assessments that are not mandated by federal or state laws/regulations are subject to local decision, depending upon whether those assessments are available online and can be administered remotely

Transitioning to In-Person Instruction

- The State Plan explains that school districts may "request" notice for reasonable preparation time before students change from remote learning to in-person learning. Such notice ensures that districts have adequate time to plan for the student's return to the school building (for example, cohort placement).

Required Notice to Families/Students

- The State Plan outlines the importance of providing families with notifications of the right to choose voluntary remote instruction as well as the implications of such a choice.

QUESTION FOUR

4. Given all the safety protocols that we will have to have in place under the SDE guidance, I am sure that some employees will not comply. What authority do I have to discipline them?

ANSWER TO QUESTION FOUR

- In developing plans to reopen the schools, school districts have adopted safety protocols as prescribed or recommended by public health officials and/or through Advance, Adapt, Achieve: Connecticut' Plan to Learn and Grow Together (Updated August 3, 2020). The protocols are in place in order to protect the health and safety of students, employees and others in school

buildings. Given the critical importance of the protocols, and given the potential liability considerations for school districts, following the protocols will not be a matter of choice, but rather of duty.

- All district employees will be expected to comply with all established rules. In that regard, three 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 potential disciplinary issue, it will be important to provide employees with due process, including an opportunity to be heard (with a right to union representation), prior to taking any disciplinary action. For example, both the CDC and the CSDE have recognized that for some individuals, the wearing of a face mask may be unsafe based on preexisting medical conditions. If an employee were to assert such a potential exemption from the requirement to wear a face mask, it would be important to assess that potential exemption in addressing the employee's action in not wearing a mask, rather than imposing discipline without considering the employee's circumstances.

- A fundamental labor relations principle is "work now, grieve later." That means that employees have a duty to follow directives with which they disagree ("work") even though they retain the right to challenge the directive at the appropriate time in the appropriate forum ("grieve"). There is an exception to this rule when following a directive would put an employee at risk of injury. But such situations are uncommon in the school setting. As a more likely example, a teacher may claim that disinfecting certain materials are not his/her job. However, that teacher is required to follow the directive unless and until there is a finding that the directive was somehow inappropriate.

- While hopefully corrective measures short of discipline will be sufficient to address any failure to comply with health and safety protocols, school districts do ultimately have the authority to take appropriate disciplinary action in connection with the enforcement of these important protocols.

QUESTION FIVE

5. If an employee comes back from a vacation in Florida, can I dock his or her pay during their fourteen days of quarantine?

ANSWER TO QUESTION FIVE

- Effective July 14, 2020, Executive Order No. 7III mandates that all travelers entering Connecticut from states with a high COVID-19 infection rate to **self-quarantine for** a period of 14 days. At present, the list includes 34 states, but it is sure to be updated **as the situation develops.**

- Employees who are subject to a federal, state or local quarantine order may be entitled to emergency paid sick leave as provided in the Emergency Paid Sick Leave Act (EPSLA). A shelter-in-place or stay-at-home order issued by any state government authority that causes the employee to miss work qualifies as a quarantine order under the EPSLA. If an employee subject to such a stay-at-home order has not already exhausted leave under the EPSLA and there is no telework available for the employee, such employee is entitled to up to eighty hours of EPSLA leave (or a part-time employee's two week equivalent) and must be paid his or her regular rate of pay up to payment caps of $511/day and $5,110 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.

- Thus, if an employee who returned from a vacation in Florida yesterday has not already used their EPSLA leave and the district has no telework available for them, he or she is entitled to EPSLA leave because he or she is subject to a state quarantine order.

- The district cannot require such employees to use their sick time and must, instead, pay them at their regular rate of pay.

- One thing to note is that, if these employees have exhausted their EPSLA leave and later present another qualifying reason for EPSLA leave, they will not be entitled to such emergency paid leave again, whether it is for the same or a different qualifying reason.

- On Tuesday, Rhode Island was added to the list of Affected States, which will surely restrict employees living in Rhode Island and working in districts across the eastern part of the Connecticut (among others, of course).

- Interestingly, Executive Order 7-III exempts certain individuals as follows:

> Exempted Travel. Workers traveling from Affected States to Connecticut who work in critical infrastructure as designated by the Cybersecurity and Infrastructure Security Agency, including students in exempt health care

professions, are exempted from this self-quarantine requirement when such travel is related to their work in Connecticut. This includes any state, local, and federal officials and employees traveling in their official capacities on government business. ***If such worker was in an Affected State for a reason other than Connecticut-related work (e.g., vacation), such worker shall self-quarantine and complete the Travel Health Form in accordance with this subsection***. (Emphasis added).

Among those individuals exempted from mandatory self-quarantine are ***educators supporting public and private K-12 schools, colleges, and universities for purposes of facilitating distance learning or performing other essential functions,*** but only when such travel is related to the employee's official capacities on government business.

QUESTION SIX

6. As we struggle to match up teachers who are coming back with the positions we have available in our reopening plan, some leeway on certification requirements will be very helpful. What are our options for assigning teachers to positions for which they are not certified?

ANSWER TO QUESTION SIX

We had hoped for greater flexibility in this regard in the State Plan, but no such luck. On page 44 of the Plan, we read:

The employment of appropriately certified, authorized and/or permitted educators remains crucial to the success of all students. To assist this goal, all LEA-based forms have been adopted to accommodate the timely processing of temporary authorizations and requests including Durational Shortage Area Permits (DSAPs), 90-Day Initial Certificates, Charter School Educator Permits (CSEPs), Long Term Substitute Authorizations, Emergency Coaching Certificates and Resident Educator Certificates. For additional information about processing these forms remotely, please see the following .CSDE educator certification newsletter.

* * *

Requirements:

• Prepare with school human resources and board counsel to comply with legal and regulatory requirements related to personnel, including but not limited to the EEOC guidance related to the ADA and the COVID-19 pandemic.

• Assess how to engage a full roster of staff, including potential substitute plan, and whether stipends or changes in substitute pay is required to support the needs of the school.

The certification regulations define the circumstances when appropriate certification is required. In defining "teaching" duties (vs. paraprofessional or tutor duties), the certification regulations provide that 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 or teachers certified in other subjects to cover groups of students, these requirements must be kept in mind.

That all said, school districts will need teachers in the classroom, one way or the others. Accordingly, depending on the circumstances personnel administrators confront in the coming school year, we may hope for and expect greater flexibility in considering applications for DSAPs and other authorizations.

QUESTION SEVEN

7. The teachers' union just sent me a demand to negotiate because we decided to reopen this fall. We have a contract in place. Why would we have to negotiate with the teachers? What about the other unions?

ANSWER TO QUESTION SEVEN

Employers must negotiate with bargaining representatives over proposed changes in working conditions, and we may anticipate that there will be a number of changes in working conditions as school districts reopen for the fall. Those bargaining obligations apply to any union that demands negotiations over changes in working conditions. In any such negotiations, superintendents will want to keep the following in mind:

- We must maintain the distinction between decisional bargaining (negotiations over what will be done) and impact bargaining (negotiations over how it will be done). The design of the local reopening plan involves management decisions over the

instructional delivery model and the like, and boards of education need not (and should not) negotiate over such issues. Once the school district has made these decisions in establishing the school reopening plan, the district is obligated to negotiate with unions over the impact of substantial changes in working conditions, as they may request. Absent a request to negotiate, the district can simply proceed with its plan. Moreover, given the exigent circumstances, districts can proceed with the reopening plan even if negotiations are ongoing.

- School districts should rely on their existing contract provisions to the greatest extent possible in connection with the reopening of schools (*e.g.*, length of the work day, work year, number of classes). The duty to negotiate is limited to changes in working conditions.

- In assessing impact bargaining claims, each school district should be sure to limit any impact discussions to the negotiable impacts of changes being made by the district. The reopening of schools is not an opportunity for the union to renegotiate the contract in the absence of actual changes in working conditions.

- Districts should be clear on when they are talking to unions and when they are negotiating. As noted above, the Teacher Negotiation Act has specific procedures for mid-term negotiations, including notification to the Commissioner and a timeline providing twenty-five days to negotiate and then twenty-five days to mediate. Binding arbitration is then imposed if there is no agreement, though the parties can continue to negotiate. Conn. Gen. Stat. § 10-153f(e). It may make good sense to talk informally first before triggering the timeline to see if the parties can address impact issues amicably without the need for formal negotiations. However, many CEA units are triggering the timeline with the first meeting.

- Last March, CAPSS distributed guidance that we provided concerning the duty to negotiate over changes in working conditions, and that guidance includes a description of the difference between impact and decisional bargaining. That Guidance is available here: Mooney and Sieira Millan, Memorandum to CAPSS, "Clarification of Impact Bargaining Obligations" (March 26, 2020).

QUESTION EIGHT

8. Other employees have notified our HR Department that they live with people who are at "high risk" for COVID, and that they will need to teach remotely for the foreseeable future. Do we need to provide remote teaching positions for all of them?

ANSWER TO QUESTION EIGHT

- **As a general matter, we are not required to provide an accommodation to an individual that does not have a disability. However, the decision of whether or not a teacher will teach remotely will depend on the specific circumstances presented by the employee and the positions available.**

- As we navigate these employment questions in coming months, it will be important to first clarify what the employee is requesting. It will also be important to clarify the terminology involved in each request.

- **Not every employee will require an "accommodation" under ADA.** The 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.

- In this question, the employee is asking for an accommodation (working remotely), but has not presented medical documentation. Because the employee is not entitled to a reasonable accommodation under the ADA, we move on to the second part of the analysis.

- **Is the employee eligible for some type of leave pursuant to their collective bargaining agreement, FMLA or under FFCRA (not an accommodation)?**

- In this instance, the teacher is requesting to work remotely out of fear of potential exposure to COVID-19 because they live with a family member who is particularly vulnerable to the disease.

- Districts must consider whether the employee would be entitled to leave of any kind. In the first instance, we note that employees that exhibit a generalized fear of potential exposure to COVID-19 are not generally entitled to paid or unpaid federal leave (nor are they entitled to an accommodation based solely on the disability-related needs of a family member).

ACCRUED 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.

EPSLA

- In addition, an employee who is unable to work or telework 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 FFCRA.

  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 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.

  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.

- Notably, the individual requiring care must actually depend on the employee for care and could be an immediate family member, an 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.

TRADITIONAL FMLA

- The last option for this teacher is traditional FMLA.

- 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.

  Applicability of the FMLA to COVID-19 Related Absences

  - Leave under the traditional FMLA continues to be available to qualifying employees.

  - Qualifying employees are entitled to receive up to twelve weeks of unpaid, job-protected leave for several reasons, including: (1) to care for the employee's spouse, child or parent who has a serious health condition; and (2) to care for the employee's own serious health condition that renders the employee unable to perform the functions of his or her position.

  - Employees who have exhausted their EPSLA leave may request FMLA leave to care for themselves or immediate family members afflicted with COVID-19. In these circumstances, the normal FMLA rules regarding the length, type, conditions of leave, documentation and reinstatement continue to apply.

  CAUTION

  Interaction between FMLA and FMLA+ Leave

  - Because the FMLA+ amends the FMLA, an employee's eligibility for FMLA+ leave depends on how much FMLA leave the employee has already taken during the twelve-month FMLA leave year for a reason unrelated to COVID-19. **If an employee has already taken such leave, the employee may take up to the remaining portion of the twelve workweek leave for expanded family and medical leave.**

- In addition, any FMLA+ leave taken by an eligible employee counts toward the twelve workweeks of FMLA leave to which the employee is otherwise entitled. For example, if an employee takes eight weeks of leave pursuant to FMLA+, he or she could take up to four workweeks of unpaid FMLA leave for his or her own serious health condition later in the twelve-month period.

Notwithstanding the foregoing, districts will have a business judgment to make and some may wish to permit individuals who reside with an individual that is "high risk" to work remotely if they are able to telework.

QUESTION NINE

9. The bus company has notified me that there is no way on God's green earth that a bus driver can safely drive a bus and enforce the distancing and mask wearing rules at the same time. I have notified the paraprofessionals union that we will be assigning a number of paraprofessionals to ride the buses to enforce those rules. The union president politely told me that's "not their work" and they won't do it. Now what?

ANSWER TO QUESTION NINE

Collective bargaining rights are important protections for unionized employees, and as we have mentioned repeatedly, employers are not generally able to make unilateral changes in working conditions. Working conditions clearly includes one's job duties, and the objection the union made here is not surprising. However, these are exigent circumstances, and it may be necessary to make such assignments.

- In this case, district administrators have the right to determine that it is essential that someone ride the bus to enforce social distancing and mask rules as a matter of student health and safety.

- In exigent circumstances, it may be necessary to assign such duties to employee groups that would not typically perform such duties. Given that paraprofessionals support student needs, they are a logical group to perform such work.

- Such assignments may even be permitted by the management rights provision (if any) in the collective bargaining agreement.

- Even if the school district can assign such duties to paraprofessionals in exigent circumstances, the district will be obligated to negotiate over the impact of such assignments. Negotiable impacts could include requests for additional compensation, training, or even a request that the district hire bus monitors to

perform this work on a permanent basis.

- Even if the Union president believes that such assignments are not appropriate, employees can be required to perform the assigned duties until the dispute is adjudicated. An important principle of labor relations is the "work now, grieve" later" rule, *i.e.*, if an employee thinks that such an assignment violates his or her rights, he or she must do the assigned work until the matter is resolved. An employee who refuses the assignment in such a situation would be insubordinate.

QUESTION TEN

10. With all of these health and safety protocols in place, we need to provide additional training and professional development to all district employees, so I sent a notice out advising all employees directing them to report back to work one day earlier than scheduled. But several of our union presidents have written me, insisting that we can't require such additional work without their agreement. Do I really need to bargain with the respective unions before I can call all employees back a day early to give them training?

ANSWER TO QUESTION TEN

- Training and additional professional development are critically important this year. District reopening plans include a number of safety protocols, and teachers will be expected to undertake new approaches to teaching, often working with children who are in-person and others who are remote.

- Advance, Adapt, Achieve: Connecticut' Plan to Learn and Grow Together (Updated August 3, 2020) now includes a significant number of training requirements concerning safety protocols. Table 2, "Training Plan" following Addendum 3, "Fall Reopening Resource Document for Students with High Needs" (July 28, 2020), sets out the various trainings that are advisable, and these training requirements apply more generally to school district personnel who have contact with students. Districts must carefully consider the trainings listed in Table 2 to determine which staff members must attend which trainings.

- While additional training professional development will be necessary, that fact does not absolve the district of its duty to bargain. The work year for employees constitutes a mandatory subject of bargaining. For certified employees, while the district has the right to determine the student school year (subject to impact bargaining), the non-instructional portion of the work year is subject to collective bargaining.

- In each case, it will be important to first review the collective bargaining agreements for each of the affected bargaining units. Many contracts identify the specific number of days in the work year. In those cases, unless the contract expressly permits the district to lengthen the work year, the district will be required to negotiate over the extension of the work year with the union. In the rare case in which the contract grants the district the right to increase the work year without bargaining, the employer will be able to do so, but we caution that the district should be certain of its rights in that regard before unilaterally implementing a change in the work year.

- We also note that at its meeting on July 14, 2020, the State Board of Education adopted the following resolution:

  ***RESOLVED**, that the State Board of Education temporarily authorizes for Local and Regional Boards of Education, the Connecticut Technical Education Career System, approved state charter schools, and other similarly situated districts ("School District" or "School Districts"), a waiver of up to a maximum of 3 days from the 180-day requirement set forth in C.G.S. Section 10-15 for unavoidable emergency, limited to instances where the School District uses the days prior to the beginning of the 2020-2021 school year to provide staff and families with additional time to build capacity to safely transition back to in-person services, including but not limited to for the following: (1) additional training and professional development days, beyond any typically scheduled days, to adjust to and educate on new requirements or policies related to health and safety in the context of the COVID-19 pandemic; (2) time for educators and staff to plan classroom set-up and consider changes to facilities required to maximize safety measures; and/or (3) provision of social-emotional services to staff, and training to prepare them to provide that support to students as the community transitions back into school buildings.*

  Further guidance concerning such training and professional development may be forthcoming from the State Department of Education.

QUESTION ELEVEN

11. As If I didn't have enough to worry about, the teachers and secretaries are threatening not to return in the fall if I don't provide them with masks. Are they serious? I say they can get their own masks! I can do that, right?

ANSWER TO QUESTION ELEVEN

- Advance, Adapt, Achieve: Connecticut' Plan to Learn and Grow Together (Updated August 3, 2020) (the "State Plan") requires school districts to ***"adopt policies requiring use of face coverings for all students and staff when they are inside the school building, with certain exceptions listed below."*** Interestingly, while the Plan does not formally require that school districts provide masks to staff in the first instance, school districts are required to "***be prepared to provide a mask to any student or staff member who does not have one.***"

- Along with that requirement, the State Plan further suggests that school districts provide training to reinforce the use of cloth face coverings and on the removal and washing of cloth face coverings.

- While it may be tempting to dismiss concerns about mask in light of the many other things to worry about and to tell those teachers and secretaries to buy their own masks and leave you alone, failure to provide masks to staff members (or students) who do not have one may find themselves in violation of the State Plan. Moreover, unions can raise the questions of who provides the masks as an impact bargaining issue.

QUESTION TWELVE

12. Some children with disabilities cannot tolerate masks and will not be able to social distance, but they are particularly in need of direct instruction and related services. Should I provide special PPE or special training for such teachers and other employees?

ANSWER TO QUESTION TWELVE

- Addendum 3 (Fall Reopening Resource Document for Students with High Needs) to Advance, Adapt, Achieve: Connecticut' Plan to Learn and Grow Together (Updated August 3, 2020) (the State Plan) outlines health and safety planning and training for staff members working with students with intensive needs. Districts should consider specialized training, protocols and PPE for school operations, including activities related to students with intensive service needs (examples include, but are not limited to, transportation, feeding/swallowing/mealtime, toileting, behavioral intervention, and nursing supports).

- Addendum 3 includes two important tables related to personal protective equipment (PPE) and training requirements.

- Table 1 outlines the required PPE needed for specific settings and/or tasks ("PPE Table"). Pupil personnel staff, crisis intervention teams, and nursing staff are expected to need additional PPE. In addition, Dr. Anthony Fauci recently suggested during a fireside chat with the AFT that teachers should wear face shields or goggles, if available, to protect their eyes from COVID-19 infection. (August 3, 2020 Podcasts with Journal of American Medicine, available at https://www.niaid.nih.gov/news-events/director-in-the-news)

- In addition to the PPE requirements set forth in Table 1, school districts should plan with their medical advisor(s) and local health departments for the PPE needs of staff and students, particularly for additional PPE and training required when social distancing and/or face coverings cannot be maintained.

- Table 2, entitled Professional Development Training Template Adapt, Advance, Achieve Section 13: Staffing and Personnel, outlines at least fourteen areas of required training for staff, including PPE requirements per task as well as donning, doffing and disposing of soiled PPE.

- Table 2 applies across school district operations and it does not appear to be limited to services and supports for students with intensive needs.

ADDITIONAL QUESTIONS AND ANSWERS?