

WASB Legal and Legislative Video Update, Sept. 16, 12 pm

WASB Staff Counsel will review revisions to the Department of Labor temporary rules on the Family First Coronavirus Response Act and discuss some of the questions we have received relating to face coverings, political activities and speech at school and disclosure of information about students and staff testing positive for COVID-19. WASB Government Relations Staff will discuss recent developments at the state and national government level relating to schools.

Here are a few notes and links relevant to those topics:

Family First Coronavirus Response Act (FFCRA)

The Department of Labor will publish revisions to the temporary rule on paid leave under the FFCRA on September 16, 2020. Those rules can be found here (Note that the above link is to the unpublished document, it is possible that the link may change following publication.):

<https://www.federalregister.gov/documents/2020/09/16/2020-20351/paid-leave-under-the-families-first-coronavirus-response-act>

The Wage and Hour Division of the U.S. Department of Labor said the following about the revisions:

The revisions made by the new rule clarify workers' rights and employers' responsibilities under the FFCRA's paid leave provisions, in light of the U.S. District Court for the Southern District of New York's August 3, 2020 decision that found portions of the regulations invalid.

The revisions do the following:

- *Reaffirm and provide additional explanation for the requirement that employees may take FFCRA leave only if work would otherwise be available to them.*
- *Reaffirm and provide additional explanation for the requirement that an employee must have employer approval to take FFCRA leave intermittently.*
- *Revise the definition of "health care provider" to include only employees who meet the definition of that term under the Family and Medical Leave Act regulations or who are employed to provide diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care which, if not provided, would adversely impact patient care.*
- *Clarify that employees must provide required documentation supporting their need for FFCRA leave to their employers as soon as practicable.*
Correct an inconsistency regarding when employees may be required to provide notice of a need to take expanded family and medical leave to their employers.

Face Coverings

EEOC guidance on employer face covering requirements:

During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA

(e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

DPI and other guidance:

https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/PPE_Considerations_for_Schools_docx.pdf

https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Education_Forward_web.pdf

<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/diy-cloth-face-coverings.html>

<https://www.dhs.wisconsin.gov/covid-19/protect.htm>

Political Activities and Speech at School

The Legal Comment by Boardman Clark LLC in the October 2020 Wisconsin School News, titled “Free Speech in the BLM Era” will explore First Amendment issues related to student expression on racial equity and justice. Several other recent Legal Comments address student and employee speech at schools:

[Employees’ Lawful Concerted Activity and First Amendment Protections](#), June 2020

[Free Speech and Student Clothing](#), April 2020

Employee and student free speech rights at school:

Employees:

- Public employee speech about a matter of public concern at a public forum is usually protected speech under the First Amendment.
- Public employee speech about a personal employment concern is under most circumstances not protected speech under the First Amendment.
 - Such speech may be protected concerted activity under section 111.70(2) Wis. Stat.
 - “Municipal employees” engage in concerted activity when two or more employees work together to address matters involving wages, hours or working conditions or where an employee acts to encourage or induce a group action regarding wages, hours or working conditions.
- Public employees making statements pursuant to their official duties are not engaged in protected speech.
 - School boards may adopt policies that govern the district’s curriculum and put teachers on notice to adhere to established curriculum when teaching.
 - Teacher attire, buttons and signs in the classroom supporting a political candidate or making a social statement may be subject to district curriculum policies.

Students:

- Student speech at school is protected by the First Amendment. There are constitutional limits on a school district’s ability to restrict student speech.
- Circumstances under which student speech may be regulated:
 - Speech that is part of the curriculum or a district sponsored event or activity.
 - Speech promoting illegal drug, alcohol or tobacco use.
 - Speech that is a true threat and intimidation.
 - Obscene, vulgar, lewd, indecent or plainly offensive speech.
 - School districts may restrict student expression that substantially disrupts or materially interferes with district operations.

- Student speech is not limited to the written and spoken word, it also includes visual expressions such as clothing.
 - Clothing promoting alcohol or other drugs may be prohibited.
 - Clothing with a political or social message (Confederate flag, Black Lives Matter, support for a political candidate) may be regulated only where not doing so would substantially disrupt or materially interfere with district operations.
- School districts that allow some types of political expression must be cautious in restricting other political expression – unless the district can defend the argument that one political expression substantially disrupts school operations while the other does not, the restriction is likely viewpoint discrimination.

Disclosing information about positive COVID-19 test results

WASB staff counsel have received several inquiries about releasing information about positive student and staff COVID-19 test results. Several resources provide useful guidance. Regarding students, the U.S. Department of Education released an FAQ on FERPA and COVID-19 that can be found here:

<https://studentprivacy.ed.gov/resources/ferpa-and-coronavirus-disease-2019-covid-19>

FAQ 4 covers the release of information about students testing positive for COVID-19:

4. If an educational agency or institution learns that student(s) in attendance at the school are out sick due to COVID-19, may it disclose information about the student's illness under FERPA to other students and their parents in the school community without prior written parental or eligible student consent?

It depends, but generally yes, but only if that information is in a non-personally identifiable form. Specifically, the educational agency or institution must make a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. See 34 C.F.R. § 99.31(b)(1). If an educational agency or institution discloses information about students in non-personally identifiable form, then consent by the parents or eligible students is not needed under FERPA. For example, if an educational agency or institution releases the fact that individuals are absent due to COVID-19 (but does not disclose their identities), this would generally not be considered personally identifiable to the absent students under FERPA as long as there are other individuals at the educational agency or institution who are absent for other reasons. However, we caution educational agencies or institutions to ensure that in releasing such facts, they do so in a manner that does not disclose other information that, alone or in combination, would allow a reasonable person in the school community to identify the students who are absent due to COVID-19 with reasonable certainty.

Section 118.125 Confidentiality of pupil physical health records.

(a) Except as provided in par. **(b)**, any pupil record that relates to a pupil's physical health and that is not a pupil physical health record shall be treated as a patient health care record under ss. [146.81](#) to [146.84](#).

(b) Any pupil record that concerns the results of an HIV test, as defined in s. [252.01 \(2m\)](#), shall be treated as provided under s. [252.15](#).

Regarding school employees, the EEOC has provided guidance that can be found here:

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

General guidance on the confidentiality of employee medical information is discussed in FAQ B.1. through B.8. Disclosure of information that an employee has tested positive for COVID-19 is addressed in FAQ B.3 through B.5.:

B.3. May an employer disclose the name of an employee to a public health agency when it learns that the employee has COVID-19? (4/9/20)

Yes.

B.4. May a temporary staffing agency or a contractor that places an employee in an employer's workplace notify the employer if it learns the employee has COVID-19? (4/9/20)

Yes. The staffing agency or contractor may notify the employer and disclose the name of the employee, because the employer may need to determine if this employee had contact with anyone in the workplace.

B.5. Suppose a manager learns that an employee has COVID-19, or has symptoms associated with the disease. The manager knows she must report it but is worried about violating ADA confidentiality. What should she do? (9/8/20; adapted from 3/27/20 Webinar Question 5)

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. Clearly, the information that an employee has symptoms of, or a diagnosis of, COVID-19, is medical information. But the fact that this is medical information does not prevent the manager from reporting to appropriate employer officials so that they can take actions consistent with guidance from the CDC and other public health authorities.

The question is really what information to report: is it the fact that an employee—unnamed—has symptoms of COVID-19 or a diagnosis, or is it the identity of that employee? Who in the organization needs to know the identity of the employee will depend on each workplace and why a specific official needs this information. Employers should make every effort to limit the number of people who get to know the name of the employee.

The ADA does not interfere with a designated representative of the employer interviewing the employee to get a list of people with whom the employee possibly had contact through the workplace, so that the employer can then take action to notify those who may have come into contact with the employee, without revealing the employee's identity. For example, using a generic descriptor, such as telling employees that "someone at this location" or "someone on the fourth floor" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information. For small employers, coworkers might be able to figure out who the employee is, but employers in that situation are still prohibited from confirming or revealing the employee's identity. Also, all employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information. Employers may want to plan in advance what supervisors and managers should do if this situation arises and determine who will be responsible for receiving information and taking next steps.

Note that confidentiality of medical information requirements under HIPAA are generally not relevant to questions about release of COVID-19 information for students and in most cases for employees. Student education records are excluded from the definition of protected health information and are not governed by HIPAA privacy rules. Employers who do nothing more than enroll employees and pay premiums to a

health care insurer are health plan sponsors and not responsible for complying with HIPAA privacy rules. For more information see the following Legal Comment:

[The HIPAA privacy rule](#), March 2003