

WASB Legal and Legislative Video Update, October 21, 2020, 12 pm

WASB Staff Counsel will address the following topics:

- Paid leave under the FFCRA.
- Securing and maintaining staff during the pandemic.
- New DHS guidance for K-12 schools updated October 2020.
- May employers require that employees be vaccinated?
- What information may school administrators share with the board regarding students or staff testing positive for COVID-19?

WASB Government Relations staff will address the following:

- New notice requirement related to unemployment insurance takes effect on November 2.
- OCI Bulletin: Telemedicine coverage related to COVID-19.
- Annual Wisconsin Fiscal Report.
- Four reasons why the Legislature seems done for the year and two reasons it might not be.

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

Family First Coronavirus Response Act (FFCRA)

Federal rules, including September 16, 2020 revisions:

<https://ecfr.federalregister.gov/current/title-29/subtitle-B/chapter-V/subchapter-C/part-826>

The U.S. Department of Labor's "[Families First Coronavirus Response Act: Questions and Answers](#)"

DHS Guidelines for the Prevention, Investigation, and Control of COVID-19 Outbreaks in K-12 Schools (updated in 10/2020). This guidance document was issued to be a "resource for local and tribal health departments as they investigate and control cases and outbreaks of COVID-19 in schools (grades K-12) in their jurisdictions." It also contains useful information for schools themselves. The guidance addresses a number of topics including: (1) physical distancing, (2) wearing face coverings, (3) absence policies, (4) information on how to identify cases and close contact among students, (5) information on when to exclude students from in-person instruction, (6) how to best isolate and quarantine, and (7) effective cleaning and disinfecting practices. It also includes template letters for schools to use in the situation of confirmed cases or close contact. This guidance builds on existing guidance provided by the DPI in [Education Forward](#).

Highlights:

- **Both suspected and confirmed outbreaks of COVID-19 in a school must be reported to the local health department by law as soon as they are recognized** (see Wisconsin Administrative Code Ch. s. DHS 145.04 (1)). For reporting purposes, a **suspected outbreak** of COVID-19 in a school is defined as the presence of at least two laboratory-confirmed cases of COVID-19 in the same school building, with onset dates within 28 days of each other. (page 9)

- **Moving Between Different Learning Environments During an Outbreak**
 - Generally, school and district administrators should consider temporary classroom, school, or districtwide closures or dismissals linked to cases in the school when:
 - Other outbreak mitigation measures were implemented and ineffectual at halting outbreak transmission.
 - Logistics of in-person instruction have been seriously impacted due to staff and/or student absences.
 - Classroom or school wide cleaning and disinfection needs to be completed.
 - Extensive contact tracing is needed to identify all contacts (for example, in response to a case that attended a large school event).
 - School and district administrators should work closely with their local health department to determine the least disruptive level of temporary closure or dismissal needed, or transition to virtual learning, to halt outbreak transmission. The scope of the temporary closure/dismissal should be limited to the smallest unit affected (for example, a cohort, or a classroom). Instruction should continue through all virtual learning methods, and can resume in-person (but socially distanced) instruction as soon as safely feasible. (page 21)
 - Separate guidance is provided for temporarily halting instruction in classrooms and cohorts, in individual schools and school districts. (page 22)

May employers require that employees be vaccinated?

[EEOC Guidance: Pandemic Preparedness in the Workplace and the ADA:](#)

13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).⁽³⁶⁾

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. ***As of the date this document is being issued, there is no vaccine available for COVID-19.**

What information may school administrators share with the board regarding students or staff testing positive for COVID-19?

U.S. Department of Education, Student Privacy Policy Office [FERPA and the Coronavirus Disease 2019 \(COVID-19\) Resources:](#)

- Parents or eligible students must provide written consent for the release of pupil records, including health records, in most instances.

- FERPA permits educational agencies and institutions to disclose, without prior written consent, personally identifiable information (PII) from student education records to appropriate parties in connection with an emergency, if knowledge of that information is necessary to protect the health or safety of a student or other individuals.
- Typically, law enforcement officials, public health officials, trained medical personnel, and parents (including parents of an eligible student) are the types of appropriate parties to whom PII from education records may be disclosed under this FERPA exception.
- If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of the student or another individual and that certain parties need the PII from education records, to protect the health or safety of the student or another individual, it may disclose that information to such parties without consent.
- Schools may inform others such as other students and parents, 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.

Section 118.125:

(1) Definitions. In this section:

(cm) "Pupil physical health records" means those pupil records that include basic health information about a pupil, including the pupil's immunization records, an emergency medical card, a log of first aid and medicine administered to the pupil, an athletic permit card, a record concerning the pupil's ability to participate in an education program, any lead screening records required under s. [254.162](#), the results of any routine screening test, such as for hearing, vision or scoliosis, and any follow-up to such test, and any other basic health information, as determined by the state superintendent.

(2m) 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](#).

Section [146.82](#) Confidentiality of patient health care records.

(1) Confidentiality. All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient. This subsection does not prohibit reports made in compliance with s. [253.12 \(2\)](#), [255.40](#), or [979.01](#); records generated and disclosed to the controlled substances board pursuant to s. [961.385](#); testimony authorized under s. [905.04 \(4\) \(h\)](#); or releases made for purposes of health care operations, as defined in [45 CFR 164.501](#), and as authorized under [45 CFR 164](#), subpart E.

EEOC Guidance regarding release of employee medical records, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)

- 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.

New notice requirement related to unemployment insurance takes effect on Nov. 2:

Effective November 2, 2020, all employers (including school districts) are required to provide each employee who separates from employment, for any reason, a new notice regarding the availability of unemployment insurance benefits. The new requirement was established in an [Emergency Rule](#) of the Department of Workforce Development (DWD).

The notice is to be provided to the employee “immediately” at the time of separation. It can be provided by letter, email, text message, flyer/poster, or any other DWD-approved method. Simply adding the notice to the district’s employee handbook would **not** be sufficient.

A sample notice and additional information about the new requirement can be found on [the DWD’s website](#). Providing this notice does not necessarily mean that the employee will meet the requirements of Wisconsin UI eligibility laws. However, the notice must be given regardless of whether the employee could ultimately qualify for benefits.

School districts may wish to add the following statement to the DWD’s suggested notice language:

“Pursuant to Section DWD 120.02 of the Wisconsin Administrative Code, the School District is required to provide this notice regarding unemployment benefits to any employee who separates from employment for any reason. This notice is not a determination of your eligibility for unemployment insurance benefits. The Wisconsin Department of Workforce Development is responsible for making decisions regarding eligibility.”

As indicated on the DWD website, state law continues to separately require all employers covered by Wisconsin’s Unemployment Insurance (UI) law to post a general notice about applying for unemployment benefits in each workplace (in suitable location where all employees will readily see them).

OCI Bulletin: Telemedicine coverage related to COVID-19

On October 1, 2020, Governor Tony Evers and Department of Health Services Secretary-designee Andrea Palm issued [Emergency Order #2](#) regarding aid to healthcare facilities providing treatment for COVID-19. In that order, the Office of the Commissioner of Insurance (OCI) was directed to “continue working with health insurers to minimize out-of-network barriers for insured patients seeking telemedicine services.”

In response, the OCI strongly encouraged Health Plan Issuers once again to remove any barriers to their insureds utilizing telemedicine services, issuing a bulletin stating:

“Where appropriate, Health Plan Issuers are strongly encouraged to not deny coverage for a treatment or service provided through telehealth if that treatment or service is covered under the policy or plan when provided in person by a health care provider.

(“Telehealth” is defined as the practice of health care delivery, diagnosis, consultation, treatment, or transfer of medically relevant data by means of audio, video, or data communications that are used either during a patient visit or a consultation or are used to transfer medically relevant data about a patient.)

Annual Wisconsin Fiscal Report

Last week, the state released its [Annual Fiscal Report](#) covering the 2019-20 fiscal year that ended on June 30, 2020. This report, the official balance sheet for last year, details actual state spending and tax collections compared to budgeted spending and tax collections. The *fiscal* report is not intended to display accounting information in accordance with Generally Accepted Accounting Principles (GAAP). (The state’s annual *financial* report (Comprehensive Annual Financial Report or CAFR), is prepared in accordance with GAAP and is issued under a separate cover.)

The report was a bit of positive news in the midst of the pandemic. The state of Wisconsin ended the year with a \$1.172 billion balance—that is the largest ending balance for a fiscal year in at least two decades—and the balance in the state’s budget stabilization fund (a/k/a rainy day fund) grew to \$761.8 million.

The report is the most recent sign that the state's general fund was largely able to weather the impact of the COVID-19 pandemic, including a drop in economic activity due in part to “stay-at-home” orders and school closures.

The next big clue we’ll get about the state’s fiscal picture heading into the 2021-23 state budget debate will come on November 20 when the state Department of Administration provides new revenue estimates for 2020-21. That report also will pair up state agency budget requests with tax collection projections for the 2021-23 budget, which covers the period from July 2021 through June 2023.

In their budget requests submitted so far, state agencies have reportedly already requested a net increase of \$755 million in additional spending. That \$755 million figure doesn't include the DPI's request for K-12 aids, which will be submitted in early November and will likely add substantially to that total.

The WASB GR Team has recently had a couple of meetings with the DPI in which we have argued for increased spending for schools: 1) to provide an increase in spendable resources for schools that matches inflation; and 2) to provide a significant increase in special education categorical aid that places the state on a path toward providing 60 percent reimbursement to local school districts for their aidable special education costs.

Four reasons why the Legislature seems done for the year and two reasons it might not be.

1) No need to vote on a budget-repair bill.

For many reasons, including the veto by Democratic Gov. Tony Evers of a GOP tax-cut bill before the pandemic locked down the state's economy, state government began the current fiscal year on July 1 with a surplus of about \$760 million.

That is partly because tax collections, despite the pandemic, actually increased by 1% in the fiscal year ending on June 30. That's about \$190 million more than the state took in during the previous year. In addition, in mid-July, Gov. Evers directed the state Department of Administration (DOA) to identify an [additional \\$250 million in cost savings at state agencies](#) for the current fiscal year. That came on top of a 5% (\$70 million) cut to state agency operations the governor had [previously ordered](#) in late April. .

Adding together a surplus of \$760 million and \$320 in unspent funds translates into a nearly \$1.1 billion cushion against an expected downturn in state tax collections in the current fiscal year, which ends on June 30, 2021.

"I don't think we'll have to pass a budget-repair bill this year," Assembly Speaker Robin Vos said in a recent WisconsinEye interview.

2) Senate Republican leaders haven't decided to act.

Roughly 150 Assembly-passed bills and resolutions died when legislators went home without acting on them after a one-day April session. Many members of the Senate Republican caucus are said to be skeptical of passing any spending bills in the midst of the pandemic and its impact on the economy. With no signal from Senate leaders that they want to negotiate deals on any of those 150 items, Assembly Speaker Robin Vos has said there is no reason for the Assembly to reconvene this year.

- 1) ***On the other hand, Senate President Roger Roth (R-Appleton) recently said he could envision lawmakers returning to Madison for a "lame duck" session in December, ahead of the new legislative session in January. He's like to see some bills passed, including one that would target high prescription drug costs.***

"If it were up to me, I'd like to see a way where we could come in and do some of those bills prior to the start of the next session," he told a WisPolitics.com luncheon. "And I think it's important to do so because the hardworking people of Wisconsin took the time to testify on these bills. It'd be nice to get them over the finish line."

- 2) ***In addition, in the wake of a Wisconsin judge's decision declining a request from a conservative legal group to block the statewide mask mandate ordered by the Evers administration, pressure may be building within the Senate Republican caucus to return to Madison to vote on overturning the Governor's face covering order.***

In issuing his ruling upholding the order, the judge noted, "the Legislature has the power to terminate Evers' order but has declined to do so."

The circuit court judge who issued the decision noted that State law allows governors to declare public health emergencies for up to 60 days unless extended by the Legislature. In bringing the lawsuit challenging the order, the Wisconsin Institute for Law and Liberty (WILL) and GOP lawmakers argued the three public health emergencies Evers called each relate to the same crisis and thus are beyond his powers. He ruled that "The 60-day limit provides an important check against run-away executive power, but it does not prevent the governor from issuing a new executive order when the emergency conditions continue to exist."

Whether GOP lawmakers will appeal the court decision or convene in session to take action themselves to amend or rescind the order remains to be seen. At the time Gov. Evers issued his first face coverings order, Sen. Fitzgerald said he had the votes to overturn (rescind) the order, but lawmakers did not call themselves back into session either then or since.

3) Bills dealing with policing reforms and racial disparities are not yet ready to be debated.

Those bills won't be ready until next year, according to predictions from Assembly Speaker Vos and Sen. Van Wanggaard, a Republican and retired Racine police officer, who has authored several of the proposals likely to be taken up.

After a white Kenosha police officer shot a black man seven times in the back on Aug. 23, prompting protests and violence, Gov. Evers called the Legislature into a special session requesting that they take up nine bills. In response—and on the very same day the governor called the special session—Assembly Speaker Vos announced he was creating a task force to study "racial disparities, educational opportunities, public safety, and police policies and standards in Wisconsin."

However, members of that task force, cochaired by Assembly Majority Jim Steineke and Madison Democratic Rep. Shelia Stubbs, still haven't been announced. Persons interested in serving on the task force were asked to submit their names by Sept. 18.

4) At this point, Senate Republican leaders are focused on their own political futures.

Senate Majority Leader Scott Fitzgerald is running for the U.S. House seat of retiring Rep. James Sensenbrenner. And two GOP senators — Senate President Roger Roth, of Appleton, and **Devin LaMahieu**, of Oostburg — are trying to line up support to be the next Senate majority leader, assuming Republicans maintain control of the upper house, a virtual certainty. Republicans currently hold a 19-14 edge.