

REMEMBER
WHY YOU
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kriha kb boucek

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April 2, 2020

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COVID-19 UPDATE EMPLOYMENT LAW GUIDANCE

As we enter into our first “official” week of remote learning days as directed by the State, we stand in awe of the leadership and flexibility demonstrated by school administrators, teachers, and all staff and they shift to providing a new platform for learning. At Kriha Boucek, as we watch you lead through this pandemic, we are reminded of one of our firm’s guiding principles: *we believe in a servant leadership approach to ensuring all students have a high quality education.* We have seen this guiding principle in action over the last weeks and we are incredibly proud to be in service to the education field while all of you navigate these difficult waters. It is an honor to be a small part of what you are doing to help kids and families across the state. Thank you for that privilege.

This Frequently Asked Questions (FAQ) document is an update to the Employment FAQ’s we published on March 11, 2020. Many things have changed for school districts and employers in the last 20 days. We have gone from anticipating the impact of spring break trips to figuring out what to do on Act of God days to navigating a “shelter at home” order. As with all employment issues, the answers to these questions will depend on the unique circumstances of each situation as well as any specific language in collective bargaining agreements, employment manuals and the like. Be sure to refer to your specific board policies, collective bargaining agreements and district attorney before acting on any issue below.

ISBE Emergency Rule [23 Ill. Adm. Code § 5.10](#) [Remote Learning Days](#) – Issued on March 27, 2020

Local control carries the day. The emergency ISBE rule allows school districts that implement e-learning programs to make modifications to their plans. School districts without approved e-learning programs must adopt ‘Remote Learning Day Plans’. Districts may use five ‘remote learning planning days’ to develop, review and amend their plans, the terms of which must be mutually agreed with their respective bargaining units.

A Few Disclaimers

As with any newly emerging issue, our collective knowledge will evolve over time. We fully expect additional ISBE (perhaps even national) guidance along with insights from you that will change our thinking and advice. As the landscape develops and changes, we will send updates accordingly.

This newsletter is intended for general information purposes only and does not, nor is it intended to, constitute legal advice. Contact your board's attorney for advice on specific legal issues.

WAGES, HOURS, AND TERMS AND CONDITIONS OF EMPLOYMENT

Q1. *Can District administration continue to expect its employees to work?*

Yes. Pursuant to the Governor's press conference on March 31, 2020, the Governor's emergency proclamation and statewide stay at home order issued pursuant to [Executive Order 2020-10](#) will be extended through April 30, 2020. On March 27, 2020, ISBE issued [emergency regulations](#) that require school districts to provide educational opportunities via "remote learning days" for the duration of the Gubernatorial Disaster Proclamation. Additionally, the Governor's Office and ISBE joined the Illinois Education Association, the Illinois Federation of Teachers, the Illinois Association of School Administrators, and the Illinois Principals' Association in issuing a joint [statement](#) on behalf of all of their memberships during the period of remote learning, which requires that employees work during this time.

Q2. *Do School Districts have the obligation to bargain with unions regarding work during remote learning days?*

Yes. The emergency regulations require school districts to bargain regarding the work to be done during remote learning days, stating that "[w]ork connected to Remote Learning Plans shall be mutually agreed upon between employers and any collective bargaining entity." Like other midterm bargaining obligations, we believe school districts can meet this obligation by bargaining in good faith to an impasse and then implementing their remote learning plans. However, a litigious Union could argue that you must bargain to agreement based on the regulatory language. While we believe the Illinois Education Labor Relations Act would supercede ISBE's emergency regulations, we suggest you tread lightly in bargaining and attempt to reach an agreement prior to any implementation.

Q3. *Does bargaining over these issues have to be formal and result in a Memorandum of Understanding?*

No. We are hearing from many of our clients that they are in ongoing collaborative discussions with their Unions regarding the implementation of remote learning plans and see no need to create more than a handshake agreement. Other school districts express the need or desire to memorialize the agreements they reach with their Unions. Your bargaining relationship with your Union will drive the formality and outcome of the required bargaining. If you do not already have a collaborative bargaining relationship with your Union, this may be an opportunity to establish one as an effort to provide the best opportunities for students during this challenging time. At a minimum, we would recommend confirming in writing (or email) the basis of the agreement between the Parties to avoid any miscommunication or misunderstanding.

Q4. *Should Districts continue to pay employees during school closure?*

Yes. Both ISBE and the Governor's office have advised school districts to continue to pay employees. In return, school districts will continue to receive all state funding allotted to them during the closure period. This includes all wages, stipends, and benefits. Employees will continue to accrue service credit for state pensions as well as other benefits and rights pursuant to a collective bargaining agreement he/she would have otherwise been entitled.

Q5. *Can Districts discipline employees that refuse to work?*

As long as a District provides a safe working environment and the employee is not suspected of having COVID-19, employees may be required to work; and, their refusal may result in discipline. Employees should be disciplined subject to their applicable collective bargaining agreement. We recommend working with employees and providing more notice to return to work before engaging in the disciplinary process. During these uncertain times, we recommend discipline as the last resort when all other collaborative measures have been exhausted.

Q6. *Can School Districts require employees to report to a building or other physical work site for work?*

Subject to bargaining obligations, if applicable, school districts can require employees to report to school buildings to perform essential functions related to remote learning or school district operations. Examples of essential functions include activities that can only take place within the school building and include, but are not limited to: cleaning and required maintenance projects; providing food service to children in the community; producing the materials necessary for students to participate in remote learning; managing the business functions of the school district like payroll, bill payment, technology, and operations; and conducting remote learning programming. If school districts do require employees to report to work, they should be careful to ensure that the employees can adhere to proper social distancing protocols. Further, school districts should not allow employees to congregate in groups at any time while they are in school buildings. Notwithstanding a school district's ability to request employees to be present, we strongly recommend that any work that can be done remotely be allowed to be done remotely. The risk of spreading the virus is too high when people are required to leave their homes anytime they do not have to.

Q7. *Do School Districts have to reimburse employees for the use of their personal devices or data when they are working from home?*

It is possible that school districts could have to reimburse employees for personal use of data or phone service. Under the Wage Payment and Collection Act, expenses directly related to work are reimbursable. School Districts should bargain this issue with Unions or pay expenses pursuant to the collective bargaining agreement or Board policy. As an option to reimbursing expenses for phone or data service, many school districts are making data service available outside of their buildings and in their parking lots to allow teachers and students to access free data throughout the day from their vehicles.

Q8. *Should Districts continue paying substitute teachers?*

In general, paying substitute teachers is a local decision left to the discretion of individual school districts. For substitute teachers that were not guaranteed work, the District has a strong legal argument to discontinue payment. For long term substitute teachers that were working prior to school closure, the teacher has a strong legal argument to expect payment. Notwithstanding, given the gravity of the situation, Districts may consider paying long and short-term substitute teachers in order to maintain its pool of substitute teachers when the pandemic is over or to avoid unemployment claims. If Districts decide to pay substitutes, we recommend communication that indicates that the pay is not precedential but instead is due to the worldwide pandemic.

Q9: *Should Districts contest unemployment claims filed by substitute teachers?*

Districts should continue to handle these claims as they did prior to the COVID-19 pandemic. If the District makes the decision not to contest such claims, it would be important, again, to make known that it is due to the COVID-19 pandemic to avoid setting a negative precedent. The District should consider this issue holistically and engage in a cost benefit analysis and consider factors such as (1) how many claims the District expects to receive; (2) the cost of paying substitute teachers in full; (3) the cost of contesting claims; (4) the cost of paying unemployment; and/or (5) the impact of contesting unemployment claims on the District's ability to get substitute teachers in the future.

Q10. *Is there a number of hours per day that School District employees are required to work in order to receive their pay?*

No. There is no minimum or maximum number of hours per day that a school district employee is required to work. If requested, school districts should bargain issues regarding the length of the employees' work day with the appropriate union.

Q11. *Can we investigate employee misconduct while under the shelter at home order?*

Yes, school administrators can investigate employee misconduct while employees are telecommuting unless a collective bargaining agreement requires otherwise. Administrators who are investigating misconduct at this time should remember that employee rights to representation remain intact.

Q12. *Can we discipline school staff for misconduct that occurs during remote learning days while they are telecommuting?*

Yes, if school employees demonstrate misconduct during remote learning, they can be disciplined for such misconduct. We caution you, however, that the lines between work and nonwork hours will be blurred and it may be more difficult to demonstrate that the misconduct occurred while a staff member was working. We recommend you speak with your school district attorney before issuing discipline and ensure that all discipline is in line with your collective bargaining agreement.

FEDERAL FAMILIES CORONAVIRUS RESPONSE ACT

Q13. *What is the Federal Families Coronavirus Response Act?*

The Federal Families Coronavirus Response Act (“FFCRA”) was passed to provide sick leave for employees affected by COVID-19. It consists of the Emergency Paid Sick Leave Act and amends the existing Family and Medical Leave Act by expanding leave for those dealing with COVID-19. The law takes effect on April 1, 2020 and is applicable to public employers.

Q14. *What are the qualifying reasons for leave related to COVID-19 under the FFCRA and what leave is available?*

A school district employee is entitled to take leave related to COVID 19 if the employee is unable to work, including telework, because the employee:

- (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) has been advised by a health care provider to self-quarantine related to COVID-19;
- (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- (5) is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or
- (6) is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.

TYPE OF LEAVE AVAILABLE	QUALIFYING CONDITIONS	RATE OF PAY	MAXIMUM PAY
2 weeks paid sick leave to all employees	1, 2, 3	Full Rate of Pay	\$511 per day \$5110 in the aggregate
2 weeks paid sick leave to all employees	4, 5 above	$\frac{2}{3}$ rate of pay	\$200 per day \$2,000 in the aggregate
12 weeks of leave, 10 of which are paid, to employees who have worked at least 30 days	5	$\frac{2}{3}$ rate of pay	\$200 per day \$10,000 in the aggregate

Q15. *Is there a waiting period for employees to access emergency leave under the FFCRA?*

Employees are entitled to emergency sick leave if they qualify without a waiting period. However, under the expanded family leave provisions, employees the first 2 weeks of the 12 week leave are unpaid. Employees can choose to substitute other accrued leave for the 2 weeks of unpaid leave, if it is available.

Q16. *Should school districts provide notice to employees about the FFCRA?*

Yes. The U.S. Department of Labor published a [poster](#) that should be posted in a conspicuous place on the premises of every employer. Because the majority of school district employees are working remotely at this time, the Department of Labor suggests that employers email or direct mail copies of the poster to employees and/or post the poster on a website accessible to all employees.

Q17. *Is an employee entitled to emergency sick leave if he/she self-quarantines?*

No. The FFCRA allows paid leave when dealing with COVID-19 pursuant to an order from a governmental authority, or at the minimum a health care provider. An employee that cannot produce documentation of quarantine or an inability to work is not entitled to sick leave.

Q18. *Can the District require an employee to produce documentation to take paid sick leave under the FFCRA?*

Yes. The FFCRA does not prohibit employers from mandating that employees provide documentation of their qualifying reasons prior to accessing leave under the law.

Q19. *Are there any resources to help administer sick leave under the FFCRA?*

As expected, the FFCRA has caused confusion and the Department of Labor has published resources to help employers get a handle on leave issues related to COVID-19.

1. [Families First Coronavirus Response Act: Employer Paid Leave Requirements](#)
2. [Families First Coronavirus Response Act: Questions and Answers](#)
3. [Families First Coronavirus Response Act Notice – Frequently Asked Questions](#)

OTHER FMLA AND SICK LEAVE ISSUES

Q20. *What if an employee would like to return to work early from FMLA leave since they are able to teach from home?*

To the extent that the employee is able and willing to work, there is no legal reason prohibiting a District from allowing the employee to return to work. Districts should consider the effects of such a decision on a long-term substitute teacher as well as on the employee. If school buildings are reopened, the employee would then have to report to school for work, unless they can demonstrate another qualifying event. We recommend discussing this possibility and working collaboratively with the employee prior to making an official decision.

Q21. *Can a school district take the temperature of an employee to determine if s/he has a fever?*

Yes. During a pandemic, employers may take the temperature of an employee to determine if s/he has a fever and is on premise reporting to work. The health of our employees, students and families are our first priority during these times. However, prior to implementing this procedure, we recommend you discuss these steps with your Union and prepare employees that you may require them to prove they are fever-free when reporting to work.

Q22. *Can a school district ask an employee who reports feeling ill at work or calls in sick about their symptoms?*

Yes. Employers are permitted to ask an employee if s/he is experiencing influenza-like symptoms, which include fever, chills, shortness of breath, cough, or sore throat. Any information provided by the employee must be maintained as a confidential medical records under the ADA, unless the employee consents to release his/her medical information.

Q23. *The School Code (105 ILCS 5/24-6) allows the use of sick leave for school employees who are quarantined at home. What does “quarantine” under this section mean?*

Unfortunately, quarantine is not defined in the School Code, therefore, we must look to the plain meaning of the word. Based on the definitions of quarantine, defined generally as a “state of enforced isolation,” we believe sick leave is triggered when a person is instructed to stay home by a health care provider or State or local government, including the county health department, IDPH, ISBE, or a school district. Therefore, if a school district requires an employee to stay home, sick leave can be used.

Q24. *If an employee has been exposed to COVID-19 but shows no symptoms, should the school district require that the employee remain home?*

Currently, the IDPH is not recommending that people exposed to the virus *automatically* be quarantined. If an employee is exposed to COVID-19, we recommend that the school district be in close communication with the IDPH and the local county health department to determine whether it is acceptable for the employee to report to work.

Q25. *Can an employer require an employee who reports to work with a fever to go home?*

Yes. During a pandemic, an employer may require an employee displaying influenza—like symptoms to go home.

Q26. *Should an employee who stays home because of exposure or infection of COVID-19 be required to use sick leave for the period of quarantine or illness?*

There are several different scenarios that may arise involving the use of sick leave and the answer to each scenario may be impacted by a collective bargaining agreement or the FFCRA. Without reviewing collective

bargaining language, we anticipate the following scenarios for those employees that do not access leave under the FFCRA:

- An employee self-quarantines because of exposure to the virus or symptoms of COVID-19: If the self-quarantine is due to exposure of the virus, it would be up to the school district to allow or disallow the use of sick leave as self-quarantine does not fall within the statutory use of sick leave. An employee who shows symptoms of the virus can elect to use sick leave as they would for any illness and remain home for the duration of the illness.
- An employee is quarantined by the CDC, the IDPH, or the county health department for exposure to, symptoms of, or a diagnosis of COVID-19: The employee can use sick leave for the duration of the quarantine and is eligible for an additional 2 weeks of paid leave under the FFRCA. Whether the school district requires the use of sick leave under this circumstance is a local decision currently.
- An employee is sick with typical respiratory symptoms and is awaiting medical testing for COVID-19: The employee can use sick leave for the duration of the illness and is eligible for up to 2 weeks of paid leave under the FFCRA until the employee receives the results of medical testing.
- A school district requires the employee to remain out of school because of reported exposure to or symptoms of COVID-19: This question should be bargained with the employee's local bargaining unit, but one possibility is to treat this situation as a paid administrative leave instead of sick leave because the school district is requiring the leave. There is an argument to the contrary, particularly for non-certified staff employed on an hourly basis. We recommend speaking to the board's attorney about various options based on the type of employee involved and the district's collective bargaining agreement.

Q27. *Can an employee under quarantine because of exposure to COVID-19 use unpaid FMLA leave instead of sick leave?*

No. The Family and Medical Leave Act (FMLA) does not include a provision for quarantine. Instead, employees have to demonstrate that they (or their immediate family members) have a qualifying condition requiring FMLA leave. If employees have a diagnosis of COVID-19 or need to care for a qualified family member who has a diagnosis, they may be eligible for FMLA leave, but the mere exposure to COVID-19 does not constitute a qualifying condition at this time.

Q28. *Can an employee choose to “self-quarantine” in order to avoid spreading or contracting COVID-19?*

We have received questions from clients regarding self-quarantine that either involve an employee who has been exposed to COVID-19 or an employee who is at high risk of contracting the dangerous symptoms of the virus and wants to stay home to avoid any potential exposure to COVID-19. School districts should check their collective bargaining agreements to determine if self-quarantine would qualify for other leave(s). If no leave is available, school boards may grant the employee leave for self-quarantine at their discretion and/or allow the use of paid or unpaid leave.

Q29. *What if an employee chooses to “self-quarantine” without any legitimate cause to do so?*

“Quarantine” must be due to Federal, State, or local quarantine or isolation order, or advised by a health care provider. If an employee has not been exposed to COVID-19 or does not have legitimate concerns related to the virus, the school district can instruct the employee to return to work or face discipline. If the employee refuses to return to work without medical certification to the contrary, the school district may treat the employee as absent without cause and institute discipline accordingly, up to and including dismissal depending upon the category of employee and discipline provisions in the district’s collective bargaining agreement.

EVALUATION, REDUCTION IN FORCE, AND TEACHER DISMISSAL

Q30. *Have timelines for teacher evaluations and Reduction in Force been extended or waived?*

No. All statutory timelines related to teacher evaluations and reductions in force remain in effect. The most recent [Joint Statement by IASA, IPA, ISBE, IEA and IFT](#) provides good guidance as to completing these timelines. We recommend working with your unions to accomplish these tasks. Remember, if an evaluation of a teacher is not completed, by law it defaults to a “Proficient” rating. Most Districts are working on much more pressing issues at this point, so the failure to complete an evaluation and giving an employee a “Proficient” rating may be a feasible alternative. If your District is issuing reduction in force and/or non-renewal notices, all timelines must be strictly followed. To do otherwise could jeopardize the legality of the action.

ISSUES FOR SPECIFIC EMPLOYEES

Q31. *What are the obligations of a District when its employee is called to military service, for example the National Guard?*

The [Illinois Service Member Employment and Reemployment Rights Act](#) and the [Uniformed Services Employment and Reemployment Rights Act](#) govern a District’s obligations in relation to employees in the military. In general, an employee need only provide advance notice to the District before taking military leave. Districts cannot impose conditions on an employee’s military leave and must provide the employee with differential compensation for the military leave period. Differential compensation is the daily rate a public employee receives minus the daily rate of compensation for military service.

Q32. *Are school nurses considered health care workers that are exempt from receiving additional sick leave through the FFCRA?*

School nurses do not fit the definition of health care workers under the FFCRA and, therefore, are eligible for additional sick leave through the FFCRA.

Q33. *What should a School District do to ensure school staff have the social and emotional supports they need during this time?*

As with students, one of the most difficult parts of the shelter at home order is the social isolation. For many adults and children, the lack of connectivity to others will create mental health issues that may interfere with their functioning. School employees are also providing learning opportunities on a new platform, which can be stressful for those who are completely comfortable with technology let alone those who are not. It is really important for school districts to be cognizant of these issues and to have patience and compassion for staff as they navigate this new normal. If administrators notice that particular employees seem to be struggling more than would be expected, they should refer employees to any available Employee Assistance Plan that can provide mental health resources to the employee.

PUBLIC HEALTH OBLIGATIONS

Q34. *Are school staff required to report confirmed diagnoses of COVID-19 to public health officials?*

Yes. The IDPH has classified COVID-19 as an “unusual case/cluster of cases that may indicate a public health hazard.” As such, school personnel are required to report a COVID-19 diagnosis to the IDPH within 3 hours of receiving notice of the diagnosis. School officials must make the report to ensure monitoring and support for school officials and students. Note that reporting a diagnosis is not the same as conducting screenings for the virus. School districts should contact the local health department and IDPH regarding suspected cases as well, but they do not have an obligation to screen staff or students for the disease and should not undertake that responsibility. [Reports](#) can be made to the Illinois Department of Public Health Division of Infectious Disease at 217-785-7165 or the Illinois Emergency Management Agency at 800-782-7860 (Illinois only) or 217-782-7860.

Q35. *Must public health officials notify schools if a staff member is diagnosed with COVID-19?*

Yes. In situations where an illness is considered an outbreak or pandemic, the IDPH and the CDC are responsible for monitoring and notifying personnel in areas that the individual has frequented so as to alert the public. Public school officials typically receive the information directly from the family, physician and IDPH or some combination of the three. If a staff member is diagnosed with COVID-19, the school district should work directly with the IDPH and the CDC to notify staff, students and community members. If needed, the notification protocol will be similar to the 2009 H1N1 Influenza outbreak and 2018-2019 measles outbreaks.

- Mandated Employer Fitness for Duty Exams, including situations to which employees are mandated, cost of said exams, discipline in case of refusal and sharing of information regarding fitness for duty.
- School closures, including the impact of closure on employee salaries and benefits, extension of school term, use of available leave, etc.

Remember that while you have an obligation to bargain, school districts can bargain and implement the decision simultaneously in the interest of the health and safety of students and staff.

Q36. School districts have been inundated with resources from governmental agencies and vendors regarding COVID-19. Can you provide a list of the highest priority resources that we can review?

There are a number of websites that contain comprehensive information. The following list includes all of the websites we have cited above. School administrators should be following the CDC, IDPH, and ISBE guidance closely.

[CDC Guidance for Schools](#)

[IDPH Guidance for Schools](#)

[ISBE COVID-19 Guidance](#)

[Department of Education COVID-19 Guidance](#)

[OSHA Guidance](#)

[EEOC Fact Sheet on Pandemics](#)

[WHO COVID-19 General Guidance](#)

the  **friday recap**
WEEK ENDING
April 3, 2020

Join us each Friday at 1:30 PM as we slow the pace of information on COVID-19 issues affecting public schools in Illinois



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