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## Return to Work in the COVID-19 World

June 29, 2020

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ISBE's back to school guidance strongly encourages school districts to return to in-person instruction. While we contemplate how to bring students back into school in a safe environment, we anticipate questions and requests from staff members that may be challenging. We encourage you to engage with your Unions prior to the start of school to discuss anticipated employment issues and your plan to address them. We believe collaboration with the Union is both your shield and sword when employment disputes arise over the next several months.

### **A Few Disclaimers**

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

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# COVID Symptoms and Absences

Despite the fact that cases of Illinois are decreasing, we expect that schools and districts will have students and staff that become ill upon opening of in-person instruction. School Districts must be prepared to monitor staff for COVID symptoms and illness. We also anticipate an increase in absences as staff that would have worked through a common cold in the past will be encouraged to stay home instead.

**Q: Can a District take employee temperatures to ensure that they do not have COVID-19?**

A: The ISBE guidance requires schools do symptom checks before allowing students and staff to enter a school building. This can be done by self-certification that a person is symptom free or temperature checks. Persons with a temperature over 100.4 should not be allowed in the building.

If Districts require temperature checks of their staff members instead of self-certification, they should be careful of the legal implications. These temperature checks are considered medical exams and have to be done in accordance with the ADA's privacy and confidentiality requirements.

Moreover, Districts may face requests for religious or medical accommodations for temperature screenings. Although Districts should comply with accommodations regarding the manner and location of screening, they should not waive the screening requirement altogether because doing so would represent a direct threat to workplace safety. For example, a woman that wears a scarf may request to have her temperature screening done in private or by a person of the same gender, which is a reasonable and de minimis accommodation, however, she cannot ask that she be exempt from temperature screening completely.

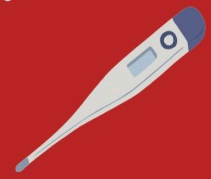
Districts should plan to pay employees for the time spent waiting and getting temperatures taken since that is likely to be compensable time. Districts should work with their unions to develop a plan that applies to all staff. In the plan, they should address where the temperature checks will take place, who will be responsible for taking temperatures, and whether the data received will be recorded by the District. Remember that, under the ADA, health information must be maintained in an employee specific file other than their regular employment file.

**Q: If temperature checks are instituted, which District employee should administer the temperature checks?**

A: At this time, there are no legal requirements regarding which employees within a District should administer temperature checks. A natural choice would be school nurses since they have training in this area. If there are not enough nurses to complete temperature checks, the District may assign any other staff member to complete this assignment, however, Districts should be prepared for push

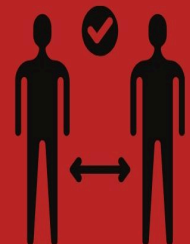
## Return to School Health Requirements

Take your temperature before or upon entering school. Stay home with a fever of more than 100.4 or with COVID Symptoms.



Wear a face covering at all times unless eating or drinking.

Maintain social distancing of 6 feet to the extent possible from students and colleagues.



back and should consult their unions before instituting any measures. We recommend that school nurses and administrators take on this role with proper training and the provision of PPE, however, the District is well within its rights to assign other employees to this responsibility.

**Q: If the District expects employees to self-certify that they are fit to work, can they discipline staff who report to work with COVID-19 or COVID symptoms?**

Many Districts are strongly considering asking employees to self-certify that they are free of COVID symptoms prior to entering a school building. Subject to collective bargaining agreements and board policies, it is permissible to discipline employees who lie about their symptoms and report to work anyway, but we recommend that Districts tread lightly when doing so. Be sure to discuss this possibility with the Union in advance and be prepared to implement discipline uniformly to avoid discrimination claims. We would also recommend training staff on the symptoms of COVID so that they cannot claim that they did not know that a particular symptom was a symptom that would exclude them from school.

***Covid Symptoms***

- \*Fever or chills
- \*Cough
- \*Shortness of Breath
- \*Fatigue
- \*Muscle or body aches
- \*Headache
- \*Loss of taste and smell
- \*Sore throat
- \*Congestion or runny nose
- \*Nausea or Vomiting
- \*Diarrhea

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

A. 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, or other documented COVID Symptoms. 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.

**Q: When should a District expect an employee to quarantine at home because of COVID symptoms or exposure to COVID?**

A: ISBE's return to school guidance suggests that someone who has tested positive of COVID-19, has had close contact with someone who has tested positive of COVID-19, or is suspected of having COVID-19 should quarantine at home and monitor for symptoms for 14 days. The guidance defines "close contact" as being within 6 feet of an individual with symptoms for more than 15 minutes.

**Q: How should sick leave be applied for those employees who quarantine at home because of exposure to COVID-19?**

A: 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 quarantines at home because of exposure to the virus or symptoms of COVID-19: Because ISBE's return to school guidance indicates that staff members should quarantine at home when in "close contact" to someone with COVID-19, we believe staff members who quarantine at home under these circumstances should be allowed to use sick leave as such quarantine is akin to a state order to quarantine at home. In the event an employee self-quarantines for reasons other than "close contact" to someone with COVID-19, a school district would have the option to deny sick leave because "self-quarantine" does not meet the definition of quarantine under the School Code.
- 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 FFCRA. 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.

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

A: 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.

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

A: 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.

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

A: “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.

**Q: What leave is available to staff under the Federal Families Coronavirus Response Act?**

A: The Federal Families Coronavirus Response Act (“FFCRA”) provides emergency sick leave and expanded FMLA leave for employees impacted by COVID-19. The law took effect on April 1, 2020 and is applicable to public employers.

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

A: Yes. Employers can require employees to take ten (10) days of unpaid leave prior to accessing the FFCRA's expanded FMLA leave allotment. In the event employers require employees to take ten (10) days of unpaid leave, employees may choose to substitute available accrued paid leave during those ten (10) days to ensure they receive pay.

**Q: Should school districts provide notice to employees about the FFCRA?**

A: 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.

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

A: 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.

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

A: 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
10 weeks of paid leave to employees who have worked at least 30 days	5	$\frac{2}{3}$ rate of pay	\$200 per day \$10,000 in the aggregate

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

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

**Q: Prior to return, can a District require employees to provide doctor’s notes certifying fitness to return to work?**

A: According to the EEOC, employers may require employees to take a medical examination or provide a doctor’s note certifying that they do not have COVID-19. An employer may require testing even if an employee does not show symptoms of COVID-19 as long as the required testing is done in a non-discriminatory manner. The best way to do so is to develop a policy creating uniform standards when



medical examinations or doctor's notes would be required. If Districts require medical examinations or certifications of fitness, they should be willing to pay for them.

**Q: What is the standard for an employee who has tested positive to return to work?**

A: The ISBE guidance states that staff and students should be fever-free for 72 hours without fever-reducing medication and allow 10 days to pass after symptoms first appeared before they return to a building.

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## COVID Work Refusals

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Requests for accommodations like work from home have begun to trickle into the inboxes of our human resources professionals. We expect a number of staff members to make these requests based on a bona fide disability, an issue with child or family care, or fear. Each request should be addressed based on individual facts and circumstances.

**Q: Can a District demand that teachers return to work?**

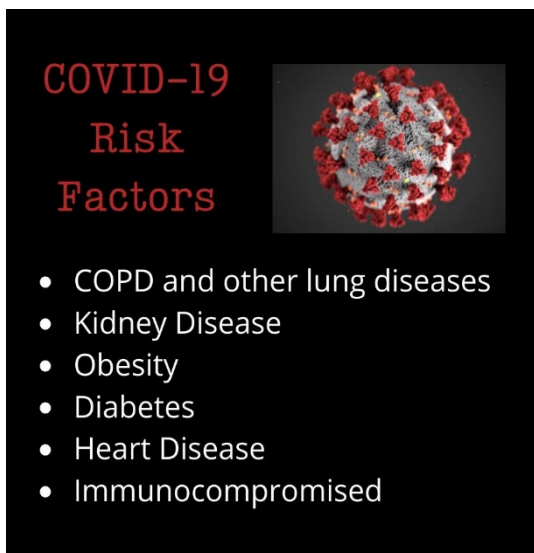
A: Yes. Schools may open for in-person instruction in accordance with any requirements imposed by the Governor or ISBE and may expect teachers to report for duty. We do anticipate that some teachers will refuse to return to work because of a legitimate disability or out of fear. Each situation will require an individual inquiry as to the basis of refusal. When a teacher asserts that s/he has a disability, the School District must inquire as to the nature of the disability and the limitation imposed thereby, and participate in the interactive process to determine reasonable accommodations. Teachers who are simply nervous in general, or because they are in an age range for increased risk, are not necessarily entitled to accommodations and may be directed to return to work. Teachers who refuse to return to work may be disciplined via the progressive discipline process of their respective CBA.

**Q: What should a District do with staff that refuse to return to work?**

A: School districts need to determine the legitimacy of a staff member's refusal on an individual basis. Staff members may have legitimate reasons for their refusal, including a disability or a lack of child care. A staff member that refuses to return to work without a disability or other bona fide reason is not legally entitled to disability leave and may be directed through their respective discipline process. However, we recommend Districts discuss the consequences of not returning to work with their unions and staff beforehand. In addition, we recommend providing staff with additional warnings during the discipline process noting that the additional progressive discipline is because of the COVID-19 pandemic.

**A: What if an employee fears returning to work or leaving their home because they are in a higher risk category for COVID-19?**

Q: Employees older than 65 and those with serious underlying medical conditions such as diabetes, kidney disease, serious heart conditions and any employee whose immune system is compromised fall with the high risk category for COVID-19. An employee that is considered "high risk" may be protected by the Americans with Disabilities Act ("ADA") and the Family Medical Leave Act ("FMLA"), therefore, Districts should take an individualized approach when "high risk" employees fear returning to work due to COVID-19.



**COVID-19 Risk Factors**

- COPD and other lung diseases
- Kidney Disease
- Obesity
- Diabetes
- Heart Disease
- Immunocompromised

If an employee fears returning to work because they fall in the “high risk” category, the Department of Labor (“DOL”) recommends treating that as a request for a reasonable accommodation under the ADA. For employment purposes, being in a high risk category means that an employee has an existing disability that increases their risk for contracting COVID-19.

It is important to note, for employment purposes, that age alone is not a disability and does not require accommodation. For those that fall within a “high risk” category and fear returning to work, Districts should engage in the interactive process to determine whether there are any reasonable accommodations that can be provided that allow the employee to perform the essential functions of his/her position. An employee, such as a teacher, seeking to work from home for fear of contracting COVID-19 is unlikely since regular attendance is an essential function of a teacher. However, can accommodations be made that would allow a teacher to maintain social distance with her students and provide personal protective equipment (“PPE”)? These are the types of accommodations that should be discussed with employees to quell their concerns.

**Q: What if an employee does not return to work or leave their home because they live with a family member that is in a higher risk category for COVID-19?**

A: In general, there are no statutes requiring employers to provide paid or unpaid leave to employees for fear that someone they live with may contract COVID-19. A District is not required to provide employees leave or provide an accommodation because they fear someone they live with may contract COVID-19. At the same time, we recommend Districts take precautions when opening their facilities and create plans which will minimize unnecessary risks in the workplace. These recommendations will be discussed later in this guidance.

**Q: Is the District required to accommodate an employee that has a doctor’s note stating that he/she needs to work from home to avoid contracting COVID-19?**

A: The ADA requires employers, including Districts, to provide reasonable accommodations to allow an individual with a disability to have an equal opportunity to perform the essential functions of his/her position. If an employee cannot perform the essential functions of a position or the accommodations required by the employee would pose an undue hardship, the District may decline to provide such accommodations.

It is foreseeable that employees will obtain doctors’ notes evidencing the need to telework for the foreseeable future because they have a health condition that puts them at an increased risk of contracting COVID-19. This would trigger a District’s ADA obligations and would require the District to engage in the “interactive process” to determine if there are any reasonable accommodations that could be provided that would allow the employee to perform the essential functions of their position. For example, a teacher that requests to work 100% remotely based on a medical condition that makes them immunodeficient would trigger a District’s ADA obligations. If schools are still engaging in e-learning at the time schools reopen, then the District must try to provide the teacher with a remote teaching position. However, if schools are back in session with no e-learning, then the District may be able to decline providing an accommodation since attendance is generally considered an essential function of a teacher’s position.

The main takeaway is for Districts to act compassionately and engage in the interactive process to develop a reasonable accommodation that would allow an employee to perform the essential functions of his/her position while not causing undue hardship.

**Q: What information can a District request to substantiate the need for an accommodation?**

A: Districts can follow their normal processes for requesting information relating to accommodation requests. To the extent an employee submits information and more is required, we recommend following your normal procedures to substantiate the employee’s requests. In instances where more information is needed, we recommend temporarily providing an employee their requested accommodation for one or two weeks so that the District does not place anyone at risk of harm.

**Q: Can an employee use FMLA leave to avoid returning to work because they fear exposure to COVID-19?**

A: The FMLA provides leave for employees that have a serious health condition or are caring for someone who has a serious health condition. A serious health condition is an illness, injury, impairment, or physical or mental condition that involves inpatient care, or continuing treatment by a health care provider. Employees that seek leave for fear of contracting COVID-19 are not covered by the FMLA.

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## Workplace Safety

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Workplace safety is now at the forefront of issues when Districts prepare to reopen their facilities. Workplace safety continues to be governed by the Occupational Safety and Health Act (“OSHA”), a federal statute that Illinois has adopted as applicable to school districts.

**Q: How should a District prepare its facilities for employees to return?**

A: The U.S. Department of Labor, Occupational Safety and Health Administration published a [Guidance on Preparing Workplaces for COVID-19](#) which classifies schools as a medium exposure risk. For such places, the DOL recommends physical barriers where feasible. In addition, employers should consider providing face masks to all employees but at least to those that are ill or have a higher risk of exposure. Districts should also consider strategies to minimize face-to-face contact or ensure socially distant interactions, where feasible.

The CDC has also published many resources on how specifically schools can address COVID-19 and most recently published the [Guidance for Cleaning and Disinfecting](#). This document encourages schools to develop and implement a plan for cleaning and disinfecting school facilities.

We believe there are several areas that should be of particular focus when addressing workplace safety:

- The provision and maintenance of Personal Protective Equipment
- Cleaning protocols for District facilities
- Employee monitoring and screening- ensuring employees are well, not experiencing any COVID-19 symptoms and plans for employees to stay home or be sent home due to risk of COVID-19.
- Social distancing plan- evaluation of employee duties and how social distancing can be implemented in light of those duties.
- Communications training and monitoring- communicate and train employees regarding District reopening plan and new protocols and procedures.
- Disaster plan- what a District must do in the event that a COVID-19 outbreak occurs during the school year.

**Q: Will schools be required to provide masks to employees?**

School district employees will be required to wear masks or face shields at all times in school when social distancing is not possible. The Illinois Department of Labor has already created a [poster](#) explaining requirements for public sector employees which includes providing face coverings, providing hand sanitizer and other sanitizing products and regular cleaning of high-touch services including doorknobs, light switches, toilet handles, etc. ISBE announced that it will be providing school districts with masks for students and staff, but we believe school districts also should plan to provide PPE when schools reopen.

**Q: What type of masks should Districts provide to employees?**



A: ISBE's recent back to school guidance indicates that cloth and medical masks or other face shields are all acceptable for use in schools. The CDC [recommends](#) a cloth face cover to help slow the spread of COVID-19, partly because surgical masks and N-95 masks should be reserved for healthcare workers. For practical purposes, cloth face masks are likely the best option because they are more durable, reusable and washable.

**Q: Can Districts ask teachers to clean desks, doorknobs, and other high touch surfaces in the classrooms between student use throughout the school day?**

A: The ISBE guidance and the cleaning recommendations from the CDC all recommend that high touch surfaces be wiped down on a regular basis throughout the school day. Whether your teachers can or will do this will depend greatly on your collective bargaining agreement with both your teachers and your custodians.

**Q: How should a District maintain facilities after reopening?**

A: At this point, there are no requirements for the maintenance of facilities once school reopens. It is advisable for Districts to develop plans regarding maintenance so that expectations of custodial staff are clear and employees and families are given reassurance that the District is taking maintenance seriously. To that end, the CDC has published guidance documents regarding [reopening school facilities](#), and [cleaning and disinfecting school facilities](#). Districts should develop a plan for daily cleaning and a plan for disinfecting when an individual who may have had COVID-19 was within a school facility.











A few general principles mentioned within the CDC guidance:

- Develop, execute and maintain a plan for cleaning and disinfecting facilities.
- Clean and disinfect high-touch surfaces on a daily basis with [EPA registered disinfectants](#).
- Ensure cleaning of outdoor equipment and play areas but not necessarily with disinfectants
- Provide PPE to custodial staff responsible for cleaning school facilities



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