

EMPLOYMENT LAW DURING COVID-19

What Happens if Teachers and Staff Don't Come Back to Work?

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SCENARIO

- First day of school is here! You've done your best to stay in touch with teachers over the summer and you have a general sense of who is planning to return and who is not planning to return, but you don't have a firm headcount yet because much of your staff is waiting to see what the state of affairs, as it relates to the pandemic, will look like at the end of August. And you've been hesitant to force anyone into a corner and demand a firm commitment, so you're just crossing your fingers, hoping you have a teacher in every room. Thirty minutes before class is about to start, you receive eight emails from your eight different staff members—half teachers—as follows:

SCENARIO, CONT.

- Email #1: My parents live with me and they are both over 80 years old. I am worried about exposing them. I wanted to wait until today to see if anything might change, but since it doesn't look like it will, I'm not going to be able to come into work. Please find me a long-term substitute.
- Email #2: I have type 2 diabetes and am high risk for contracting COVID-19 and getting really sick. My husband and I decided last night it would be best if I didn't return to school. I'll be returning when this pandemic goes away.
- Email #3: I just found out my daughter's day-care is closing and I don't have any other childcare for her. I can't come in until I find adequate childcare for her. I don't know how long that will be.
- Email #4: I woke up this morning with a cough. I don't have a fever—yet—but I'm pretty sure I have COVID. Sorry.

SCENARIO, CONT.

- Email #5: I have major anxiety and have been working with a therapist for the past 6 months to get things under control. I thought I was okay, but when I woke up this morning, the thought of returning to school with all these germ-infested, asymptomatic little COVID-19 carriers makes me so anxious I want to throw up. I am requesting a formal accommodation under the ADA to stay home and teach online.
- Email #6: I just got a phone call from my uncle's wife's sister-in-law's niece, who tested positive for COVID-19. I'm pretty sure I've been around her recently, so I'm worried I've been exposed. I don't want to pass it on to anyone else so I'm taking some time off.
- Email #7: I have asthma, cystic fibrosis, and walking pneumonia and I need an air purifier for my room. The one I need is \$800.00. Please have it ready for me by the end of the week or I will be working from home.
- Email #8: I refuse to wear a mask because it infringes on my God-given right to breathe and my constitutional and civil rights. I'll come to work, but only if I don't have to wear a mask.

WHAT DO YOU DO???

- Hopefully, this is not your first day back, but likely, these are the kinds of emails/phone calls you have been receiving all summer.
- So... how do you balance health concerns and employment requirements?
- Today we're going to address each of these situations and the federal, state, and/or local laws applicable to each.

EMAIL #1: CARETAKERS FOR OLDER OR IMMUNOCOMPROMISED FAMILY

- There is no federal, state, or local law that protects employees because family or household members are high risk for contracting COVID-19.
- This is important because this means there is no legal obligation to provide any sort of accommodation or special arrangement for this employee.
- There is also nothing *prohibiting* you from offering certain protections, like additional PPE, an opportunity to work from home **if that is an option for this particular employee**, plexiglass, etc.
- If you do offer to provide additional PPE or provisions to help this employee feel more secure about coming to work, do not call them “accommodations” and do not refer in any way to the Americans with Disabilities Act (“ADA”). THIS IS NOT AN ADA ISSUE BECAUSE IT IS NOT THE EMPLOYEE WITH A DISABILITY.

MODIFICATION TO EMAIL #1: WHAT IF THE EMPLOYEE IS OVER 65?

- Employees over the age of 40 are protected by the Age Discrimination in Employment Act (ADEA) but there is no requirement in that law to provide accommodations for older employees. It only provides that you cannot discriminate on the basis of age.
- So if you allow younger employees to work at home because they understand how to use the various distant learning tools available, but not the older employees because they don't understand how to use these tools, you have a problem.
- Otherwise, offering the same services and support you would offer to a caregiver of someone over 65 would be appropriate.

EMAIL #2: EMPLOYEE IS HIGH RISK DUE TO UNDERLYING HEALTH CONDITION

- An employee may be high risk for contracting COVID-19 based on many health conditions. The following is a list from the CDC of conditions that are considered “high risk”:
 - Cancer
 - Chronic kidney disease
 - COPD (chronic obstructive pulmonary disease)
 - Immunocompromised state (weakened immune system) from solid organ transplant
 - Obesity (body mass index [BMI] of 30 or higher)
 - Serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies
 - Sickle cell disease
 - Type 2 diabetes mellitus

HIGH RISK EMPLOYEES, CONT.

- The CDC has also listed conditions that **might** put people at an increased risk for severe illness from COVID-19:
 - Asthma (moderate-to-severe)
 - Cerebrovascular disease (affects blood vessels and blood supply to the brain)
 - Cystic fibrosis
 - Hypertension or high blood pressure
 - Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids, or use of other immune weakening medicines
 - Neurologic conditions, such as dementia
 - Liver disease
 - Pregnancy
 - Pulmonary fibrosis (having damaged or scarred lung tissues)
 - Smoking
 - Thalassemia (a type of blood disorder)
 - Type I diabetes mellitus

HIGH-RISK EMPLOYEES, CONT.

- If you have an employee with a condition that puts that employee in the “high-risk” category, that employee **MAY** qualify for reasonable accommodations under the Americans with Disabilities Act (“ADA”) **IF** that employee’s condition is a disability under the ADA.
 - The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.”
 - Cancer, chronic kidney disease, type 2 diabetes are all going to likely be considered a disability under the ADA.
 - Obesity, pregnancy,* and smoking is not.
 - Simply being “high-risk” for contracting COVID-19 does not automatically qualify someone for an accommodation.

*While pregnancy is not considered a disability under the ADA, there are federal and state laws that protect pregnant women so consider that you may need to make accommodations for pregnancy as well, just not under the ADA.

HIGH-RISK EMPLOYEES, CONT.

- So what do you do?
- If you determine—in consultation with your legal counsel—that the high-risk employee does in fact have a disability, you are required to engage in the “interactive process” with the employee, meaning, you and the employee sit down and engage in a discussion about the essential functions of the job and what kind of accommodation is reasonable and would enable the person to perform his/her essential job functions.
- As an employer, you are entitled to request medical documentation during this process. A health care provider’s insight can be very useful in coming up with a reasonable accommodation **but the health care provider’s suggestions are not the final say.**
- DOCUMENT THESE CONVERSATIONS.
If you have ADA paperwork, have the employee fill it out. Generally, the employee will take the paperwork to the employee’s health care provider who fills out much of the paperwork.

HIGH-RISK EMPLOYEES, CONT.

- After confirming a disability, the next question is, what is a “reasonable accommodation?”
- What may have been a reasonable accommodation prior to COVID-19 may not be now, depending on the number of persons you have that could ask for such an accommodation.
 - Simply not working is not a reasonable accommodation—“I’ll be back when the pandemic is over” is not an accommodation you have to provide
 - If tele-work (ie, online teaching for teachers) is an option, that might be a reasonable accommodation. **YOU DO NOT HAVE TO CREATE AN ONLINE OPTION FOR TEACHERS WHO WANT TO TEACH ONLINE.** If your school does not offer online and if you have no need to online teachers, the request from a teacher to telework is not a reasonable accommodation.
 - Purchasing an \$800 air purifier? Depends. How many similar requests could you get? I might not be a burden; 20 might be.

HIGH-RISK EMPLOYEES

- Two very helpful resources from the EEOC can be found at the following sites:
- <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Check out these resources for more specific questions about accommodating employees during COVID-19

EMAIL #3: CAREGIVER FOR CHILDREN WITHOUT CHILD CARE

- In March, 2020, Congress passed the Family First Coronavirus Response Act (FFCRA) which included two relevant provisions for employees:
 - The Emergency Paid Sick Leave Act provisions; and
 - The Expanded Family Medical Leave Act provisions
- Under both of these provisions, employees without childcare may take time off to care for their children at 2/3 their salary for up to 12 weeks.
- The following slides summarize these two acts

EMERGENCY PAID SICK LEAVE ACT

- Applies to ALL employees—regardless of size of employer or duration of employment, full-time or part-time
- Full-time employees are entitled to up to 80 hours of paid sick leave for the following 3 circumstances:
 - The employee is quarantined pursuant to federal, state, or local law.
 - The employee has been advised by a health care provider or the local health department to quarantine; or
 - The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis*

*An employee may not take paid sick leave under the FFCRA if he unilaterally decides to self-quarantine for an illness without medical advice, even if he has COVID-19 symptoms.

OR

- Full-time employees are entitled to up to 80 hours of sick leave at 2/3 their pay:
 - To care for an individual who falls into any of the 3 circumstances above
 - To care for a child if the child's school or daycare is closed; or
 - If the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services
- You must allow employees to use this paid sick time before using any other leave provided by the school.
- **THIS IS A ONE-TIME FREEBIE! 80 HOURS OF PAID SICK LEAVE TOTAL THROUGHOUT THE YEAR, NO MATTER HOW MANY TIMES A PERSON IS TOLD TO QUARANTINE.**

WHAT ABOUT PART-TIME EMPLOYEES?

- Part-time employees are also entitled to paid sick leave under the EPSLA
- Part-time employees are entitled to leave for the average number of work hours in a 2-week period. For example, if an employee works an average of 20 hours a week, the employee is entitled to 40 hours of paid sick leave under the EPSLA, not 80.

EXPANDED FAMILY MEDICAL LEAVE ACT

- Applies to all employees who have worked for the employer for at least 30 days
- Allows employees who cannot telework to take their 12-weeks of leave under the FMLA to care for kids whose school or child care provider is closed for reasons related to COVID-19.
- This is not an ADDITIONAL 12 weeks; it is just an additional basis for requesting time off under FMLA
- The employee is entitled to 2/3 of the employee's regular salary during this time.
- NOTE: The first 2 weeks will count toward the 80 hours of paid sick leave from the Emergency Paid Sick Leave Act
- Regular FMLA employer conditions do not apply (i.e., the employee must only have worked for the employer for the previous 30 days, the provision applies to employer with less than 50 employees, etc.)

NOTE!!

FFCRA IS SET TO EXPIRE DECEMBER 31, 2020

- Unless and until Congress renews this law, it is only good through December, 31, 2020.
- Helpful resources from Department of Labor:
<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#55>

EMAIL #4: SYMPTOMATIC OF COVID-19

- In accordance with all health department guidance, please encourage sick employees to stay home!
- If the employee has COVID-19 symptoms and is awaiting a medical diagnosis (i.e., he's either waiting to be tested, or has been tested and is awaiting the results), the employee may qualify for paid time off per the Emergency Paid Sick Leave Act (EPSLA), reason #3.
- Remember—if the employee is simply being extra cautious and chooses not to seek a medical diagnosis, the EPSLA doesn't apply, and the employee will have to take his/her own sick leave.

EMAIL #5: ANXIETY—REQUESTS TO TELEWORK

- Anxiety is a mental health condition has been considered an impairment under the ADA.
- See slides 11-13. In sum,
 - Does the employee's anxiety qualify as a disability?
 - Is there medical documentation to support the employee's disability?
 - What are some accommodations that might be reasonable under the circumstances to allow the employee to perform the essential functions of his job?
 - Staying home may not be reasonable under the circumstances.
- When denying a requested accommodation, consider other accommodations that might allow the employee to do his/her job. Please do not simply deny without offering something else. The process is supposed to be interactive—back and forth, dialog between employee and employer until a reasonable accommodation can be agreed upon.*
 - *If there is no agreement, this is where the employee separates... and then likely sues. And then the courts decide whether the requested accommodations were reasonable under the circumstances.

EMAIL #6:POSSIBLE EXPOSURE

- Unless an employee has been directed by the health department to quarantine due to exposure, the employee should come to work.
- “Exposure” is being defined by the Utah State Health Department as close contact—ie, within 6 feet—for 15 minutes or more.
- Being at the same party as someone who knows someone whose aunt or uncle tested positive is not likely going to result in a directive from the local health department to quarantine.
- IF a person is contacted by the health department based on exposure to a person who tested positive, the health department will direct the person to either stay home, or will tell the person he/she can go to work.
- If the health department tells the person to stay home, the person is entitled to up to 80 hours of pay under the EPSLA.
- If the health department has NOT told the person to quarantine, and the person is not symptomatic, the person should be at work.

EMAIL #7: MULTIPLE MEDICAL CONDITIONS, REQUEST EXPENSIVE PPE

- See slides 11-13.
- Go through the ADA process!
- Document!
- Do not dismiss the request; but also do not break your bank providing such requests to all employees.

EMAIL #8: WON'T WEAR A MASK

- On July 17, 2020, the Utah State Health Department passed a State Public Health Order requiring all individuals on school property to wear a face covering.
- That order was updated on August 14, 2020, to state individuals must wear face masks, and specifically exempts face shields unless a mask is worn with a shield. (
- There are some exceptions:
 - Individuals with medical conditions, mental health conditions or a disability that prevents the person from wearing a mask
 - Students on an IEP or 504 who have an accommodation that necessitates an exemption
 - Other exceptions that generally don't apply broadly to all employees. (See the full text of the State Public Health Order [here](#).)

FACE MASKS, CONT.

- The Public Health Order allows a school to require an individual with a medical condition, a mental health condition or a disability to provide medical documentation verifying the need for an exemption. The amended order states the verification must come from one of the following: **Doctor of Medicine (MD), Doctor of Osteopathic Medicine (DO), Physician Assistant (PA), Advanced Practice Registered Nurse (APRN)**, documenting a need for an exemption under Subsection (3)(d).
- Strongly recommend creating some kind of exemption form that requests the following information:
 - What is the medical condition, mental health condition, or disability; and
 - How does it prevent the person from wearing a face covering
 - The health care provider's license # and phone # to follow up on (the form should include a section for the individual to consent to having the health care provider release medical information)
 - What alternatives to a cloth face mask are possible, ie—would a face shield work?
- Employees who refuse to wear face coverings and do not follow the school's process for obtaining an exemption may be terminated or put on leave until they agree to wear the mask.

EXEMPTION FORMS FLOATING OUT THERE ONLINE

https://www.defendingutah.org/post/2020/08/16/no-masks-required-in-schools-here-s-the-law?fbclid=IwAR1Q5hUCwC0glHPr-lthZXfj7It8-tZCZO1Cq_v5jiUl18c7H-8dwC6pS5w

<https://www.utahcommittee.us/Resolutions>

My children as listed below are hereby exempt from all suggestions, guidelines, and rules that claim to force the wearing of masks. Obstructing breathing for my children is dangerous to their health and is a violation of Utah's laws recognizing parental supremacy. I am not asking permission. I am informing you of the law and I expect compliance.

[Child Name] – Birth Date: [Child Birth Date]

[Child Name] – Birth Date: [Child Birth Date]

[Child Name] – Birth Date: [Child Birth Date]

The governor's current executive order allows for numerous exemptions. I expect these exemptions to be honored for my children as found in Executive Order 2020-48 Section 3 and State Health Order 2020-11 Section 3.

Any attempt to force or intimidate my children into wearing a mask while I am not present may be considered a crime under various applicable laws. Denying my children access to the physical premises may be met with legal action. We are taxpayers and expect full access to public buildings without discrimination for any reason. Denying my children access to the school while claiming it is somehow a law is a violation of US Code Title 18 Section 242 which provides criminal penalties for a government representative depriving someone of their rights under the color of law.

In addition to the executive order, there is currently no law in Utah that can force any adult or child to wear a mask under any condition against their will. Article VI of the Utah State Constitution grants legislative power to the legislature and the people through referendum, not to any administrator, school board, health department or governor.

Utah law and the Utah State Constitution recognize that parental rights are superior to other interests and allows for parents to make decisions for their children in all matters.

Utah Code 62A-4a-201 states that Utah recognizes the rights of parents, and the state may not interfere with the decisions parents make for their children without proper due process.

*Under both the United States Constitution and the constitution of this state, a parent possesses a fundamental liberty interest in the care, custody, and management of the parent's children. A fundamentally fair process must be provided to parents if the state moves to challenge or interfere with parental rights. A governmental entity must support any actions or allegations made in opposition to the rights and desires of a parent regarding the parent's children by sufficient evidence to satisfy a parent's constitutional entitlement to heightened protection against government interference with the parent's fundamental rights and liberty interests.

Our family's healthcare decisions are between us and the medical professionals we choose, not the government. I will not jeopardize my family's health because evidence shows many risks of wearing masks, including, but not limited to, the following:

- Hypoxia: When body tissue does not get enough oxygen
- Hypercapnia: When elevated levels of carbon dioxide in the blood can cause dizziness, shortness of breath, headaches, and in extreme cases, hyperventilation, seizures and possible death (found in OSHA regulations)

I also believe it to be a religious obligation to care for my children's health, and find it a violation of religious freedom to be compelled to engage in behavior that I expect to jeopardize health.

We do not need permission to exercise our constitutional rights as parents, nor can we be compelled to go through any bureaucratic process before our rights are granted to us. Those rights existed and may be exercised by us simply stating them, as we have done here.

Thank you for your compliance with the law.

[Father's Name] (Father)
[Home Address]

(Date)

[Mother's Name] (Mother)
[Home Address]

(Date)

DON'T TAKE THE BAIT!

- Courts have long held that both the federal government and state governments have broad authority to respond to emergency health crises.
- The 10th Amendment, which gives states all powers not specifically given to the federal government, allows them the authority to take public health emergency actions, such as setting quarantines and business restrictions.
- Governors have broad powers to invoke restrictions in their state.
- The mask mandate is not a constitutional violation. Period.

WHAT ABOUT... “I DON’T THINK IT’S WISE TO START IN-PERSON CLASSES, SO I WON’T BE COMING BACK”

- There is no law protecting persons who simply don’t believe it’s wise to start in-person school at this time.
- If the person:
 - Does not have a disability making the person high-risk and possibly necessitating an accommodation;
 - Does not have a mental health disability necessitating an accommodation because the pandemic exacerbates their condition;
 - Has not been ordered to quarantine
 - Does not have symptoms of COVID-19
 - Does not have children at home who require childcare due to closure or schools/daycare for COVID-related reasons
 - Is not a caregiver to family members who are at high-risk
- The employee has to come to work. End of story.
- If the employee refuses, the employee may be terminated.

PRACTICAL POINTER: BE NICE ABOUT ALL OF THIS!

- Your employees run your school; without them, you would not have a school.
- There are various levels of concerns regarding this pandemic
- Your responsibility as an employer is to be responsive to your employee's concerns, while also running the business of children and school.
- Be compassionate while complying with the law.
- Questions—feel free to reach out to us!

GOOD LUCK!

HELPFUL QUESTIONS AND ANSWERS

- Q: What about the 500 employee threshold?
- A: Doesn't apply to public entities
- Q: Kids' school is online, or part online, part live. Is school considered "closed" for purposes of taking expanded FMLA?
- A: Yes.
- Q: Can an employee take intermittent leave to care for a child?
- A: Only if the employer and employee agree on such an arrangement.
- Q: Do you have to exhaust your sick leave before taking EPSL?
- A: No. In fact, EPSL must be offered—rather than employer provided sick leave—if you have a qualifying reason for taking EPSL.

Q&A, CONT.

- Q: Can an employer reduce hours of staff who are no longer needed due to shortages during COVID-19?
• A: Yes.

- Q: Can an employee collect EPSL if he is not working as much due to reduced hours?
• A: No. The only way to get EPSL is to meet one of the 6 qualifying reasons

- Q: What kind of documentation can I request to verify the employee qualifies for EPSL? *Correction from last training!!!
• A: Only the following: dates for which employee requests leave, the reason for the leave, a statement that you are unable to work because of the above reason, and the entity or health care provider directing you to quarantine. If an employee requests leave for child care reasons, you may request: name of child, name of school/child care that has closed, and a statement that no other suitable person is available to care for the child.

- Q: What kind of documentation can I request regarding a disability that may require an accommodation?
• A: The same documentation as you would request in non-pandemic times.

Q&A, CONT.

- Q: Employee has used his 80 hour of EPSL, and is now requesting 12 weeks to care for a child. Do I have to pay him 12 MORE weeks?
- A: No, only 10. First 10 days of FMLA are NOT paid; it's only the subsequent 10 weeks that are paid at 2/3 salary. If the employee has not used EPSL yet, the employee would be paid 2/3 salary for the entire 12 weeks (2 weeks of EPSL pay, and 10 weeks of EFMLA pay.) If the employee HAS used his EPSL, the employee is only entitled to 10 weeks of paid leave, AFTER the first 10 days of unpaid leave.
- Q: Can an employee take intermittent leave under EPSL?
- A: No. The employee can take EPSL as long as he/she meets a qualifying reason. Once that qualifying reason no longer exists, the employee must return to work. If the leave was less than 80 hours, the employee may take leave again in the event of another qualifying reasons, until he meets the 80 hours.
- Q: Do I have to pay EPSL to an employee who doesn't get benefits?
- A: Yes. All employees are entitled to EPSL. All employees who have worked for you for 30 days or more are entitled to EFMLA benefits.