



MAKING EMPLOYMENT DECISIONS DURING A PANDEMIC FAQ

Updated August 1, 2020

On March 11, 2020 the World Health Organization characterized COVID-19 as a pandemic, meaning the organization had identified the worldwide spread of a new disease. In light of the spread of COVID-19 and the WHO's characterization of COVID-19 as a pandemic, the President of the United States declared a national state of emergency and Governor Polis declared a state of emergency in Colorado. The pandemic has caused closures, significant media attention, and has prompted discussion among students, families, teachers, administrators, school boards, and community members who seek to understand how to deliver education and conduct business in this environment.

CASB has received a number of questions about legal requirements regarding the impact of COVID-19 on various employment related issues. CASB encourages school boards to use this document as a resource to help inform conversations and support the work of the district as the board seeks to provide a safe environment for all students and employees. This document is for informational purposes only and does not constitute legal advice. Specific questions should be referred to the school district's legal counsel. It is not intended to provide answers to every question that may emerge on this topic, nor is it intended to provide one size fits all answers to what are complex and rapidly evolving issues.

Background on the legal framework

While there are a number of laws that have employment implications associated with COVID-19 and an employer's response to these issues, there are several laws that are prominent during the current pandemic. The laws are detailed below and divided between new laws enacted during the COVID-19 pandemic and laws that were in existence prior to the pandemic and remain relevant and applicable in employment situations.

Recently Enacted Laws (Updated August 1, 2020):

1. *Families First Coronavirus Response Act*: A federal law passed on March 18, 2020 that became effective April 1, 2020 and remains in place until December 30, 2020. Relevant pieces of this law related to employment include:
 - *Emergency Paid Sick Leave*: Employers will provide paid sick leave for employees who meet specific COVID related criteria. This leave is known as Emergency Paid Sick Leave (EPSL) and is a separate source of paid leave equalling 80 hours of paid leave for full-time employees or the two-week equivalent of pay for part-time employees.¹

¹ U.S. Dept. of Labor, *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

Additional information regarding emergency paid sick leave may be obtained from the United States Department of Labor.

- *Expanded FMLA:* The Family Medical Leave Act (FMLA) was temporarily expanded to include a new qualifying reason related to the public health emergency created by COVID. A qualifying need related to a public health emergency means that the employee is unable to work because the employee needs to care for a son or daughter under 18 years of age of such employee if the child’s school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency.
 - *Notification of Employee Rights:* Districts must provide this [notice](#) of employee rights under the new law in a conspicuous space on school premises. This may also be done through emailing or posting on the district’s website.
2. *Coronavirus Aid, Relief, and Economic Security Act (CARES Act):* A federal law that became effective on March 27, 2020 and provides education leaders with the “flexibility to use funds from the Elementary and Secondary School Education Relief Fund (ESSER Fund) for immediate needs, such as tools and resources for distance education, ensuring student health and safety, and developing and implementing plans” for the 20-21 school year.²
3. *Healthy Families and Workplaces Act:* A state law (SB20-205) which requires employers to provide paid sick leave to employees under various circumstances. Relevant provisions include:
- *Interplay with FFCRA:* On and after the effective date through December 31, 2020, employers are required to provide employees paid sick leave to take for reasons related to COVID-19 in the amounts and for the purposes specified in the federal Emergency Paid Sick Leave Act in the Families First Coronavirus Response Act (FFCRA).
 - *48-Hour Leave Cap:* Beginning January 1, 2021, employers are required to provide paid sick leave, accrued at one hour of paid sick leave for every 30 hours worked, up to a maximum of 48 hours. Employers are also required to provide additional amounts of paid sick leave during a public health emergency.
 - *Reinstatement of Paid Sick Leave:* Employers are also required to reinstate any paid sick leave to an employee who separates from employment and is rehired by the same employer within 6 months, subject to certain conditions. To this end, employers must retain records documenting, by employee, the hours worked, paid sick leave accrued, and paid sick leave used.
 - *Notification of Employee Rights:* Districts must provide notice of employee rights under the new law. This may be done through supplying each employee with a written notice

² U.S. Dept. of Education, COVID-19 (“Coronavirus”) Information and Resources for Schools and School Personnel, available at <https://www.ed.gov/coronavirus?src=feature>.

containing the information in the Act and displaying a poster, created by the Colorado Department of Labor and Employment, in a conspicuous and accessible district location.

4. *Whistleblower Protection Public Health Emergencies*: A new state law ([HB20-1415](#)) prohibits employers from discriminating, retaliating, or taking adverse action against any worker who, in good faith, raises any reasonable concern about workplace violations of government health or safety rules, or about an otherwise significant workplace threat to health or safety related to a public health emergency, if the employer controls the workplace conditions giving rise to the threat or violation. Relevant provisions include:

Employees Allowed to Wear PPE: Employers are prohibited from discriminating against employees who voluntarily wear their own personal protective equipment (PPE), if certain conditions are met.

Creates Right to Civil Action: Employees may bring a civil action against an employer after exhausting administrative remedies.

Notification of Employee Rights: Districts must provide notice of employee rights under this law in a conspicuous district location.

Previously Enacted Laws Relevant to Employment During COVID-19

1. *Americans with Disabilities Act (ADA)*: The ADA is a federal law prohibiting discrimination on the basis of disability in employment. The law requires employers to make reasonable accommodations to the known physical or mental limitations of employees with disabilities, unless it results in undue hardship.³
2. *Family Medical Leave Act (FMLA)*: The FMLA is a federal law that entitles eligible employees to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.⁴ (As noted above, the Families First Coronavirus Response Act expanded FMLA has added a new qualifying reason).
3. *Occupational Safety and Health Act (OSHA)*: The OSHA is a federal law that regulates workplace safety and the conditions of employment. The law requires employers to engage in specific safety and health precautions.⁵

³ U.S. Dept. of Justice, Civil Rights Division, *A Guide to Disability Rights Law*, available at <https://www.ada.gov/cguide.htm>.

⁴ U.S. Dept. of Labor, *Family and Medical Leave Act*, available at <https://www.dol.gov/agencies/whd/fmla> - :~:text=The FMLA entitles eligible employees,employee had not taken leave.

⁵ U.S. Dept. of Labor, *Occupational Health and Safety Administration*, available at <https://www.osha.gov/laws-regs/oshact/completeoshact>.

Frequently Asked Questions and Answers

Q. What additional policies does a board need to adopt pertaining to leave and COVID related issues?

A. School districts currently have policies addressing the various types of leave employees may use or have available to them under a variety of situations. School districts do not necessarily need a separate board policy specifically addressing COVID-19 related absences. However, nothing prohibits a board from adopting such a policy, if the board believes adopting such a policy is in the best interests of the local school district. Board members should be cognizant that many of the new laws addressing COVID-19 sunset or expire. Therefore, Boards should plan for this, if the decision is made to adopt a COVID-19 specific policy.

Is your board policy up to date? See CASB sample policies:

- GBGA *Staff Health (and Medical Examination Requirements)*
- GBGF *Federally-Mandated Family and Medical Leave*
- GBGG *Staff Sick Leave*
- GBGH *Sick Leave Bank*
- GDD *Support Staff Vacations and Holidays*

Q. Is an employee who has been diagnosed with COVID eligible for paid leave?

A. Most likely. Employees can utilize paid leave, in accordance with board policies or master contracts. Additionally, employees have access to the Emergency Paid Sick Leave available under the Families First Coronavirus Response Act from April 1, 2020 to December 31, 2020. If an employee exhausts paid leave options, the district should follow unpaid leave policies and procedures.

Q. What are the steps a district must take for an employee who requests leave to care for an at-risk family or household member? (Added August 1, 2020)

A. Districts most likely have leave request forms and leave processes currently in place. These will need to be updated to account for leave requests under the FFCRA emergency paid sick leave provisions. Districts may choose to include the qualifying reasons for leave outlined in the FFCRA⁶ in the district's current forms or the district may decide to create a new form and workflow process, as these provisions will sunset on December 30, 2020.

Q. Is leave time counted during a calendar year or for a school year? (Added August 1, 2020)

⁶ U.S. Dept. of Labor, *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

A. It depends on the type of leave being requested or utilized. For example, under the FFCRA, the emergency paid sick leave is counted from April 1, 2020 to December 30, 2020.⁷ However, most other leave will run according to the school year. Districts should review local board policy and any master contracts to see what timelines are specific for other leave banks.

Q. Can an employee take 80 hours of leave under the FFCRA if they are diagnosed with COVID and then take another 80 hours if they are diagnosed again? (Added August 1, 2020)

A. No. According to the United States Department of Labor, “the total number of hours for which you receive paid sick leave is capped at 80 hours under the Emergency Paid Sick Leave Act.”⁸ However, the employee may be entitled to paid leave under a different category of leave.

Q. What type of leave is used if the district sends an employee with possible COVID symptoms home? (Added August 1, 2020)

A. It depends. Based on how the situation arises, administrative leave with pay or sick leave may be appropriate. The district should contact their HR department or legal counsel to determine which is appropriate given the individual situation.

Q. Must a district allow an employee to wear a mask, if the employee wishes to do so?

A. Yes. Governor Polis issued Executive Order D 2020-067 on May 16, 2020. A provision of the Executive Order, “requir[es]workers in critical businesses and critical government functions to wear a non-medical mask covering their nose and mouth while at work and while serving the public.”⁹ Additionally, the CDC encourages employees to “wear a cloth face covering to cover their nose and mouth in all areas” of a business.¹⁰

Q. How should the district respond if an employee refuses to return to work out of fear of conducting COVID?

A. The district should follow processes and procedures currently outlined in federal and state law and local board policy. For example, if an employee states they are afraid to return to work, the district may evaluate the following options:

- The district may engage in the interactive process under the Americans with Disabilities Act to determine reasonable accommodations, if the employee has a disability.

⁷ U.S. Dept. of Labor, *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

⁸ U.S. Dept. of Labor, *Families First Coronavirus Response Act: Questions and Answers*, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

⁹ Colo. Exec. Order No. D 2020 067 (May 16, 2020), <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20067%20Extension.pdf>.

¹⁰ Centers for Disease Control and Prevention, *Interim Guidance for Administrators of US K-12 Schools and Child Care Programs*, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-schools.html>.

- The employee may be entitled to use FMLA or the expanded FMLA if the requirements are met.
- The employee may be entitled to use applicable leave (e.g., sick, vacation, personal, etc.) they have accumulated, including the new emergency paid sick leave pursuant to the Families First Coronavirus Response Act.

The district should consult with its legal counsel when evaluating the best course of action to ensure compliance with law, board policy, and any applicable master contracts.

Q. Can the district take the temperature of employees?

A. Yes. Under typical circumstances, employers may only conduct a medical exam, including temperature checks, in limited circumstances. However, “because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature.”¹¹

Please note, if a district records the temperatures of employees and maintains a medical log, this information must be confidentially maintained.¹²

Q. Can the district require a medical release for an employee to return to work if the employee has tested positive for COVID-19?

A. Yes. Employees may request medical releases, but should do so in a uniform manner that conforms to board policy and/or master contracts.¹³

Q. Can the district request that an employee obtain a second medical opinion? (Added August 1, 2020)

A. Under FMLA, an employer can request a second opinion, but it is important to note the expense will be paid for by the district.¹⁴

Q. When can the district require a doctor’s note? (Added August 1, 2020)

A. Districts should follow the provisions outlined in board policy, procedures, or master contracts. These documents may detail under what circumstances a doctor’s note may be requested (e.g., after three consecutive days of absence).

Q. What does it mean to furlough an employee and what is the impact of such a decision?

¹¹ United States Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

¹² *Id.*

¹³ *Id.*

¹⁴ U.S. Dept. of Labor, FMLA Frequently Asked Questions, available at <https://www.dol.gov/agencies/whd/fmla/faq>.

A. A furlough is a mandatory temporary leave of absence from which an employee is expected to return to work or to be restored from a reduced work schedule. Furloughed employees may be required to take a certain number of unpaid days or hours throughout the year, or take a single block of unpaid time off. (For additional information on furloughs and the financial impacts, please review CASB's *Making Tough Budget Decisions FAQ*).

Q. What are governance considerations the Board needs to address regarding employment issues related to COVID-19?

A. While there are a number of important considerations the Board should account for, the considerations below are paramount:

- **Policies:** Ensure district policies are up to date so administration has clear and current guidance from the board about expectations and how to proceed.
- **Consultation with Legal Counsel:** Every employment situation is unique. Throughout the process of making employment decisions, the district should consult with legal counsel, so decision makers understand the risks of different options.
- **Communication and Employee Privacy:** When communicating about any employee situation, it is important to remember that employees have a right to privacy. Particularly during the current pandemic, there may be times when the Board becomes aware of highly confidential information that is protected by federal and/or state law. Prior to disclosing any information, be sure to consult with legal counsel.

Q. Where can a district locate additional resources relevant to COVID and employment decisions?

A. Information is changing rapidly. It is important to review the most current information from reputable sources. Below are organizations that are providing regular information pertaining to information that impacts employers and employees:

Centers for Disease Control and Prevention, *Coronavirus (COVID-19)*, available at <https://www.cdc.gov/coronavirus/2019-nCoV/index.html>.

Colorado Department of Education, *COVID-19 Resources for Schools*, available at <https://www.cde.state.co.us/safeschools>.

United States Department of Justice, Civil Rights Division, *A Guide to Disability Rights Law*, available at <https://www.ada.gov/cguide.htm>.

United States Department of Labor, *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave>.

United States Department of Labor, *Families First Coronavirus Response Act: Questions and Answers*, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

United States Department of Labor, Family and Medical Leave Act, available at <https://www.dol.gov/agencies/whd/fmla#:~:text=The%20FMLA%20entitles%20eligible%20employees,employee%20had%20not%20taken%20leave.>

United States Department of Labor, Occupational Health and Safety Administration, available at <https://www.osha.gov/laws-regs/oshact/completeoshact>.

United States Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

This resource is for informational purposes only and does not constitute legal advice. Specific questions should be referred to the school district's legal counsel.

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*June 2020
Last updated August 2020*