

## Back to school Q&A

The following are a sample of the variety of questions relating to the reopening of schools during the pandemic received by WASB staff counsel in the last few weeks:

### Face covering requirements:

Q1: Governor Evers' Emergency Order #1 already requires all people age 5 and older to wear face coverings when indoors. Why should a school district consider adopting its own face covering requirement?

A1: A spokesperson for the governor confirmed to the WASB that the order requiring face coverings is intended to apply to schools. Students, staff and visitors are subject to the Emergency Order #1 face covering requirement in schools that choose to not adopt their own face covering requirement.

Note that Emergency Order #1 expires on September 28, 2020 unless there is a superseding emergency order or rule. The Legislature has authority to revoke the emergency order. Schools may choose to adopt their own face covering requirement should the governor's order expire or be terminated. There are also circumstances where the governor's order does not apply. One exception allows single speakers making educational and other presentations to remove their face covering when actively speaking, provided they remain at least 6 feet away from others at all times – classroom teachers and others would be covered by this exception to the governor's order.

Q2: Does Emergency Order #1 restrict school board authority to adopt stricter requirements?

A2: Emergency Order #1 supersedes any local order that is less restrictive. Local governments may issue orders more restrictive than Emergency Order #1.

Q3: May schools require students, staff and visitors to wear face coverings?

A3: School boards may require students to wear face coverings at school. A requirement that a student wear a mask at school is a part of the student code of conduct and would be enforced like other rules applicable to students.

School boards may also require staff to wear face coverings at school. The EEOC has stated that employers may require employees to wear personal protective equipment during a pandemic. Note that many face coverings do not meet the OSHA standard for masks and employers should use the term "face coverings" instead of "masks" unless they intend to require masks meeting OSHA PPE standards. Employers should provide reasonable accommodations for employees with disabilities, absent undue hardship. See [Pandemic Preparedness in the Workplace and the ADA](#) for more information.

[Section 120.13\(35\)\(a\)](#) gives school boards the power to adopt rules applicable to persons who enter or remain in buildings operated by the school board.

Q4: May schools require students, staff and visitors who seek an exemption from a face covering requirement for medical reasons to provide a statement from a health care provider?

A4: School boards may require students requesting an exemption from a face covering requirement for medical reasons to provide documentation from a health care provider. Note that such documentation should be treated as a pupil medical record under section 118.125(2m).

## Back to school Q&A

The EEOC has issued guidance stating that employers receiving employee requests for accommodations due to medical conditions may require medical documentation to determine if the employee has a disability or if there is a reasonable accommodation that can be provided. See [What You Should Know About COVID-19 and the ADA](#), Q&A D5, D6, G2 and G3 for more information.

School board authority to adopt rules governing visitors to schools under [section 120.13\(35\)\(a\)](#) is broad. Board authority to require visitors to wear masks would include authority governing when exceptions are allowed to that requirement and the documentation required to allow such exceptions. Note that the [Q&A](#) issued with Emergency Order #1 states that individuals with medical conditions preventing use of face coverings are not required to carry documentation. Note also that the school district's obligations under Title II of the Americans with Disabilities Act may require that school districts allow exceptions to a face covering requirement for some visitors with disabilities.

Q5: May schools who offer students both an in-person and virtual instruction option require students who cannot wear a mask for medical reasons to attend school virtually?

A5: The placement of students who cannot wear face coverings for medical reasons should be determined on a case-by-case basis. Such students may have rights under the IDEA and section 504.

### Staff requests for leaves under the FFCRA and accommodations under the ADA:

Q6: When are employees eligible for Emergency Paid Sick Leave (EPSL) under the Families First Coronavirus Response Act (FFCRA)?

A6: Employers shall provide up to 80 hours of paid sick time for full-time employees when the employee is unable to work or telework because of any of the following:

- Employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.
- Employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - Leave for any of these three purposes is paid at the regular rate of pay up to a maximum of \$511 per day.
- Employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).
- Employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions.
- Employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.
  - Leave for bullets 4, 5 and 6 is paid at 2/3<sup>rd</sup> of the regular rate of pay up to a maximum of \$200 per day.

Q7: When are employees eligible for Expanded Family and Medical Leave (EFML) under the FFCRA?

A7: Employees are eligible for up to 12 weeks of EFML when caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions:

- The first two weeks of leave are unpaid. The employee may substitute accrued paid leave or EPSL if available.

## Back to school Q&A

- Subsequent weeks are paid at 2/3<sup>rd</sup> of the regular rate of pay up to a maximum of \$200 per day.
- Employees may take up to 12 weeks of FMLA or EFML in a 12-month period. Use of EFML reduces availability of FMLA and vice versa. See for more information: [FFCRA Q&A #44](#)

Q8: What leave is available to employees with children attending a mix of in-person and virtual instruction?

A8: The Department of Labor stated the following in its Q&A on the FFCRA:

70. My child's school or place of care has moved to online instruction or to another model in which children are expected or required to complete assignments at home. Is it "closed"?  
Yes. If the physical location where your child received instruction or care is now closed, the school or place of care is "closed" for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as "distance learning," your child is still expected or required to complete assignments. [FFCRA Q&A](#)

In other words, a school that offers only virtual instruction is closed for purposes of EPSL and EFML.

In Q&A #21 (EPSL) and #22 (EFML) the Department of Labor stated that employees may take EPSL or EFML intermittently to care for a child whose school or childcare is closed only if the employer agrees:

#21 In contrast, if you and your employer agree, you may take paid sick leave intermittently if you are taking paid sick leave to care for your child whose school or place of care is closed, or whose child care provider is unavailable, because of COVID-19 related reasons. For example, if your child is at home because his or her school or place of care is closed, or child care provider is unavailable, because of COVID-19 related reasons, you may take paid sick leave on Mondays, Wednesdays, and Fridays to care for your child, but work at your normal worksite on Tuesdays and Thursdays.

#22 May I take my expanded family and medical leave intermittently while my child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, if I am not teleworking?  
Yes, but only with your employer's permission. Intermittent expanded family and medical leave should be permitted only when you and your employer agree upon such a schedule. For example, if your employer and you agree, you may take expanded family and medical leave on Mondays, Wednesdays, and Fridays, but work Tuesdays and Thursdays, while your child is at home because your child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons, for the duration of your leave.

The FFCRA does not address intermittent leave and the Department of Labor statement that intermittent leave is available only with the employer's agreement is based on the temporary rule it adopted relating to EPSL and EFML. The US District Court for the Southern District of New York recently ruled that the Department of Labor exceeded its authority in adopting parts of the temporary rule, including that portion of the rule allowing intermittent leave for childcare only with employer agreement. Note that the temporary rule limit on intermittent leave for other qualifying reasons was not addressed in the decision. The decision severed the requirement that employers agree to the intermittent leave from the temporary rule, and, depending on how that is interpreted, the language in the rule allowing intermittent leave remains, only now without the condition that the employer agree to intermittent leave. WASB has no information on whether this decision has been appealed. If the decision stands, employees may have the

## Back to school Q&A

right to take intermittent leave to care for children whose school or childcare has closed without their employer's consent.

Q8: Do employers have an obligation to allow employees to telework if their children attend a mix of in-person and virtual instruction?

A8: The FFCRA does not require employers to allow employees to telework when their child's school or childcare is not available due to the pandemic. Employers may permit employees to telework but are not required to do so. See Q&A #17 in [FFCRA Q&A](#). Employers may have an obligation to allow telework as a reasonable accommodation to a disability under the Americans With Disabilities Act (ADA) have no similar obligation to employees whose children's school or childcare is closed due to the pandemic.

Q9: What leave is available to an employee with children attending a school offering the option of both in-person and virtual instruction if the employee chooses virtual instruction?

A9: As is noted above, the Department of Labor stated in its Q&A #70 on the FFCRA that a child's school is closed for purposes of the FFCRA when the physical location of the school is closed and the school offers only online instruction. If the school offers a choice of online and in-person instruction the school is not closed and FFCRA leave is not available.

Q10: Our school district provides childcare and has space available for the children of our employees. May we require employees seeking EPSL or EFML to use the district provided childcare instead of taking leave?

A10: No. The temporary rule governing use of both EPSL and EFML by employees with children whose school has closed use the phrase "is unable to work due to a need to care for his or her Son or Daughter whose School or Place of Care has been closed, or whose Child Care Provider is unavailable, for reasons related to COVID-19." See 29 CFR section 826.20(a)(1)(v) and (b). The rule refers to the child's school or childcare provider being closed, and the availability of alternative schools or childcare is not referenced in either the rule or the Q&A as an exception to the employee's right to take EPSL or EFML.

Q11: What leave is available to employees who present us with a doctor's statement that they have an underlying health condition that puts them at higher risk of complications due to the virus?

A11: The Department of Labor stated the following in its Q&A on the FFCRA:

61. When am I eligible for paid sick leave to self-quarantine?

You are eligible for paid sick leave if a health care provider directs or advises you to stay home or otherwise quarantine yourself because the health care provider believes that you may have COVID-19 or are particularly vulnerable to COVID-19, and quarantining yourself based upon that advice prevents you from working (or teleworking). [FFCRA Q&A](#)

Employees are eligible for up to 80 hours of leave for this purpose. EFML is not available for this purpose.

Q12: How should school districts respond to employees who request to telework because they have an underlying health condition that puts them at higher risk of complications due to the virus?

A12: Employees with underlying health conditions that put them at higher risk of complications due to the virus are likely protected under the ADA – the underlying health condition may be a disability under the ADA. Telework is one of many possible accommodations that might be offered to employees with

## Back to school Q&A

disabilities. Employees must be able to perform the essential functions of the job with or without accommodations and if the essential functions of a job cannot be performed by telework, an accommodation involving telework may not be possible. Employers should engage in an interactive process with employees and may request medical documentation where the employee's disability is not obvious. EEOC guidance on providing reasonable accommodations to employees during the pandemic can be found at [What You Should Know About COVID-19 and the ADA](#).

Q13: If the employee is eligible for EFML under the FFCRA and does not return from the leave of absence is the cost recoverable like FMLA?

A13: The Department of Labor temporary rule does not address an employer recovering the cost of health benefits from an employee who does not return from an EPSL or EFML. The temporary rule says the following about health benefits of employees who quit or are terminated following an EPSL or EFML at 29 CFR 826.110(g):

(g) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), an Employer's obligation to maintain health benefits while an Employee is taking Paid Sick Leave or Expanded Family and Medical Leave ceases under this section if and when the employment relationship would have terminated if the Employee had not taken Paid Sick Leave or Expanded Family and Medical Leave (*e.g.*, if the Employee fails to return from leave, or if the entitlement to leave ceases because an Employer closes its business).

Other employee questions relating to the pandemic:

Q14: If staff is exposed to COVID-19 at school is the district required to pay deductibles/medical expenses related to the cost of testing or other items?

A14: Section 632.895(14g) mandates that COVID-19 testing be covered by health plans offered by school districts and other local governments:

**(14g)** Coverage of COVID-19 testing.

**(a)** In this subsection, "COVID-19" means an infection caused by the SARS-CoV-2 coronavirus.

**(b)** Before March 13, 2021, every disability insurance policy, and every self-insured health plan of the state or of a county, city, town, village, or school district, that generally covers testing for infectious diseases shall provide coverage of testing for COVID-19 without imposing any copayment or coinsurance on the individual covered under the policy or plan.