WASB Legal and Legislative Video Update, December 16, 2020, 12 pm

WASB Staff Counsel will address the following topics:

I. Important School Board Election Dates
II. FFCRA Expiration.
III. Quick Quits
IV. Quarantine Alternatives.
V. Vaccinations

WASB Government Relations staff will address the following:

I. Vaccination update
II. CARES Act funds
III. State legislative COVID-19 response
IV. Messaging - Need to be in contact with legislators
V. Federal legislative COVID-19 response

Here are a few notes and links relevant to those topics:

WASB LEGAL UPDATE

I. Important School Board Election Dates

December 28, 2020 – Last Day for Incumbent Notice of Noncandidacy

No later than 5 p.m. on the second Friday preceding the latest time prescribed for filing declarations of candidacy, an incumbent may file written notification with the school district clerk that the incumbent is not a candidate for reelection to his or her office. If an incumbent fails to file this notification and also does not file a Declaration of Candidacy (and, where required, nomination papers) by 5:00 p.m. on the ballot access deadline, then the deadline for filing the materials necessary to appear on the ballot is extended by 72 hours for all other candidates for such office. Section 120.06(6)(b)3.; see also Form EL-163

Note: The second Friday preceding the deadline for filing Declarations of Candidacy is December 25, 2020. Section 990.001(4)(b) specifies that deadlines falling on Sundays or legal holidays are extended to the next secular day. Section 990.001(4)(c) states that for deadlines requiring the filing of papers with school district officials (and other local government units) falls on a Saturday and the school district does not have office hours on said Saturday the deadline is extended to the next day that is not a Sunday or legal holiday.

In its past guidance, the former Government Accountability Board advised that local filing officers (i.e., school district clerks), or their designees, must be available to receive notifications of noncandidacy until 5:00 p.m. on this date unless all incumbents whose terms are expiring in April 2021 have already filed (1) a notification of noncandidacy, or (2) the necessary ballot access documents.
January 5, 2021 – Ballot-Eligibility Deadline for Filing Declarations of Candidacy, Campaign Registration Statements, and Nomination Papers (if required)

No later than 5 p.m. on the first Tuesday in January prior to the spring election, or on the next day if Tuesday is a holiday, any qualified elector of the school district, including incumbents, may file a sworn declaration of candidacy (Form EL-162sd), campaign finance registration statement (Form CF-1), and nomination papers, where required, with the school district clerk at the place specified in the notice of the election. Sections 8.30(2) and 120.06(6)(b)2. The filing office must remain open until 5:00 p.m. to receive candidate filings on the day of the filing deadline (January 5, 2021).

If an incumbent fails to file a declaration of candidacy and, if required, nomination papers by January 5, 2021, and if the incumbent also did not timely file a notice of noncandidacy, then all candidates for the office held by the incumbent, other than the incumbent, may file a Declaration of Candidacy and, if required, nomination papers no later than 72 hours after the regular deadline. If the ballot access deadline is extended under those circumstances, the filing office must remain open until 5:00 p.m. on the day of the extended filing deadline (72 hours after the regular deadline in 2021 is Friday, January 8, 2021).

January 12, 2021 – Deadline for Verification and Certification of Ballot Eligibility, Determination of Need for Primary Election and Drawing of Lots for Ballot Order for Placement

January 15, 2021 – Deadline for Non-Exempt Committees to File January Continuing Campaign Finance Report

II. FFCRA Expiration

A. What options are available for employees who use up their Emergency Paid Sick Leave and are quarantined or otherwise require additional leave due to the pandemic after December 31, 2020:

1. There is no new information regarding an extension of the FFCRA at the present time. The main items to consider in the potential extension of EPSL are the following:
   a. A specific time frame when the district provided leave is available.
   b. The district-provided leave would only be accessible after the FFCRA (EPSL and Expanded FMLA) are exhausted; and
   c. If EPSL and Expanded FMLA are extended, then the board may revisit the future application and availability of any district provided leave.

2. Some districts have offered additional non-accumulative sick leave benefits to staff who are quarantined due to a workplace exposure. In addition some districts have gone further and offered other expanded leave options beyond sick leave, personal leave, emergency leave etc. even where the exposure and/or acquisition of the virus was not connected to a workplace exposure.

B. Child care/Other leave options after FFCRA:

1. Offer remote work if the District has it and can accommodate it under the ADA and/or WFEA (If the employee has a disability and/or is pregnant).
2. Offer remote work if the District has it and wants to honor a request beyond ADA and/or WFEA.

3. Local policy for "child care leave" (or “medical leave” depending upon the individual’s circumstances and local policy/employee handbook language). They would be eligible for COBRA for the months they were on leave.

4. Local policy for other unpaid leaves of absence. They would be eligible for COBRA for the months they were on leave.

5. They could either come back to work or they would be deemed to have resigned from their position.

III. Quick Quits - Employees who Retire or Resign Mid-year

A. Employees with an individual Contract:

1. Liquidated Damages: Employees who retire or resign mid-year/during the term of the contract may be subject to liquidated damages pursuant to the terms of the employee’s individual contract. In addressing liquidated damages, Wisconsin courts have stated that liquidated damages are not intended to be punitive, but rather to allow the district to recover the cost of finding a replacement employee. With respect to the amount charged and the timing of the damages, that would be based upon the employee’s individual contract language and the legal principles listed below:

   - Is the clause reasonable under the “totality of the circumstances”?
   - Factors to consider in determining if the clause is reasonable under the “totality of the circumstances”?
   - Did the parties intend to provide for damages or a penalty?
   - Is the injury caused by the breach difficult or incapable of accurate estimate at the time of the contract?
   - Are the stipulated damages a reasonable forecast of the harm caused by the breach?


2. Specific Performance: School boards may not enter into an employment contract with a teacher (section 118.22(2)) or administrator (section 118.24(6)) for a period of time as to which that teacher is under contract with another school board. A school board might respond to a teacher or administrator resignation by refusing to release the teacher or administrator from their contract. Although a board may refuse to accept a resignation a court would not likely order specific performance of the contract (in other words require the teacher or administrator to render employment under the contract). A board might negotiate with the teacher or administrator to delay the resignation in exchange for a release from the contract.

B. Other Employees: Terms of resignation/retirement will be described in the individual employee’s letter of assignment, employee handbook and/or board policy.
C. All Employees: Employee quits may raise another of additional issues, e.g. leave taken but not earned under FFCRA/Employee handbooks, eligibility for retirement benefits, other advance payments, etc.

IV. Quarantine Alternatives

A. Quarantine, defined as the strict physical separation of individuals who have been exposed to a communicable disease, is an essential strategy for preventing the spread of COVID-19. Ideally, quarantine should be continued for the full incubation period, i.e., the period during which an exposed person is at risk for becoming infectious, or 14 days. In accordance with recently revised CDC guidelines, the Wisconsin Department of Health Services (DHS) supports shortening the standard quarantine period from 14 days to 10 days for people who remain asymptomatic, provided that daily symptom monitoring continues for the full 14 day period.

1. New Options

According to DHS, the two alternative strategies for discontinuation of quarantine are listed below:

a. Quarantine can end after Day 10 without testing if no symptoms have been reported during daily monitoring.

b. Quarantine can end after Day 7 if the result of a diagnostic COVID-19 test is negative and if no symptoms were reported during daily monitoring. The test specimen may be collected and tested within 48 hours before the time of planned quarantine discontinuation, but quarantine cannot be discontinued earlier than after Day 7. A pending test result on day 7 is not sufficient to end quarantine early.

For these two alternative strategies to be acceptable, the following conditions must be met:

1) Daily symptom monitoring must continue for all individuals in quarantine through Day 14.
2) No clinical evidence of COVID-19 has been elicited by daily symptom monitoring during the entire period prior to the end of quarantine.
3) Persons must be advised that if symptoms develop at any time, they should immediately self-isolate and contact the local public health authority or their healthcare provider to report this change in clinical status.
4) Persons must be counseled regarding the need to adhere strictly to all recommended non-pharmaceutical interventions, (i.e., consistent mask use, social distancing, and avoiding gatherings) for the full 14 days after exposure.”

2. District Responsibilities to Monitor

Once a district selects one of the alternative strategies, the person(s) under the reduced quarantine timeline needs to adhere to the conditions established by the DHS set forth above.

In monitoring the individual’s compliance, the district should exercise “due care” to that individual and to students, staff, and visitors to ensure that individual’s compliance. The district should assess whether such compliance is possible based upon the circumstances of the individual’s placement at the school district. For example, will the district be able to ensure that the individual will be able to maintain social distancing and maintain consistent
mask use? In circumstances where that is not possible, the district may choose not to implement the reduced quarantine timeline option due to a potential increase in the risk of exposure to, or spread of, the virus and the risk of increasing the number of potential individuals on quarantine due to close contact protocols.

3. Potential District Liability
It is possible that a district could be held liable if the district did not exercise due care in preventing the exposure to, or spread of, the virus if it did not ensure that the individual complied with the DHS requirements. For that to occur, the person harmed (employee/student/visitor) would have to prove that he/she contracted the virus at the district and there was a potential injury to the employee/student/visitor from the virus. This could prove to be difficult if the virus is widespread in the community.

In addition, the person harmed would have to be able to demonstrate that the district did not exercise due care and that it did not take reasonable steps to mitigate the spread of the virus. This could be demonstrated if the individual under the reduced quarantine failed to follow the above requirements and the district did not intervene to ensure compliance by that individual.

Employees who can prove they contracted COVID-19 during the course of employment may be eligible for workers’ compensation. See, DWD Workers’ Compensation and COVID-19

4. Employee Indemnification and Immunity
In general, Wisconsin Statutes §895.35 and Wisconsin Statute §895.46 indemnifies officers employees who act within their scope of employment. The statute has exceptions where the individual acted outside the scope of employment and/or for certain intentional acts. An employee or agent may be personally liable if they were acting outside of their employment and purposefully did not exercise due care.

“Due care” means: “the conduct that a reasonable man or woman will exercise in a particular situation, in looking out for the safety of others. If one uses due care then an injured party cannot prove negligence. This is one of those nebulous standards by which negligence is tested.”

Please note that there are also other limits on governmental immunity under Wisconsin Statutes §893.80. The most important exceptions lie in tort cases: “ministerial” actions; known dangers and caps on damages ($50,000 damages cap applicable to tort claims against a school district, officer, employee, or agent; and $250,000 / injured person for a school employee’s negligent operation of a motor vehicle, see Wisconsin Statute §345.05).

Wisconsin’s state law “Notice of Claim” requirement, governmental immunity statute, and tort claim damages limitations do not apply to federal claims (or even to all state-based claims). Federal courts will consider claims of “qualified immunity” for individual public employees who are sued for damages for alleged violations of others’ constitutional rights. Qualified immunity is available when the individual being sued did not violate any rights that were “clearly established” under applicable law at the time of the incident. Qualified immunity is not available when the suit is against the school district as an entity.

Wisconsin’s governmental indemnification statutes generally will apply even if “qualified immunity” is not granted (Wisconsin Statutes §895.35 and Wisconsin Statute §895.46).
V. Vaccinations

The Food and Drug Administration has issued an Emergency Use Authorization (EUA) for the first vaccine for COVID-19 last week and will likely issue another EUA for a second vaccine on Friday. The FDA has stated the following regarding EUAs:

How will vaccine recipients be informed about the benefits and risks of any vaccine that receives an EUA? Emergency Use Authorization for Vaccines Explained | FDA

FDA must ensure that recipients of the vaccine under an EUA are informed, to the extent practicable given the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product. Typically, this information is communicated in a patient “fact sheet.” The FDA posts these fact sheets on our website.

The EUA is an interim step in the approval process and the FDA expects vaccine manufacturers to continue clinical trials and pursue licensure (approval).

The EEOC has said the following about employers requiring employees to take vaccines (note this applies to vaccines not under an EUA):

May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic? https://www.eeoc.gov/sites/default/files/2020-04/pandemic_flu.pdf

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII (“more than de minimis cost” to the operation of the employer’s business, which is a lower standard than under the ADA). Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

This answer is the most recent guidance we have from the EEOC. To date, the EEOC has not put out a statement regarding COVID-19 vaccinations and guidance on whether employers may require such a vaccine as a condition of employment. Due to that fact, the answer for the influenza vaccination is the most relevant guidance on the topic.

In sum, as of today the vaccine could be required if it is not under an EUA, but accommodations would need to be considered for disabilities, health conditions and religious objections. Due to that fact, it is most likely more legally sound as of today to encourage employees to get vaccines (not under an EUA) rather than requiring them to get them. If an employee does not take the vaccine, the employer may look at other accommodations to reduce risk – PPE use by the employee, telework, etc. An employer may be able to offer some modest additional payment, gift card, etc. to an employee who takes the vaccine. A financial penalty for refusing to take the...
vaccine may create issues under the ADA and WFEA for an employee with a disability that cannot take the vaccine; or Title VII and the WFEA for an employee with a religious objection.

WASB LEGISLATIVE UPDATE

1. Vaccination Update

a. Wisconsin expects delivery of 49,725 doses of the Pfizer/BioNTech vaccine this week. Additional shipments will be made once supply becomes available. The first doses of the vaccine will be shipped directly to eight regional hubs across the state that have the ultra-low temperature storage capability needed for the Pfizer vaccine. Since there is a limited supply of the vaccine there are Wisconsin-specific recommendations on vaccine prioritization during what is deemed “phase 1A” of vaccine distribution. Per those recommendations frontline healthcare workers and residents of long-term care facilities will be the first to receive the vaccine, which requires 2 doses about 21 days apart.

b. A second vaccine by Moderna is scheduled to be reviewed tomorrow (Dec. 17). If the FDA approves the Moderna vaccine for emergency use, Wisconsin will receive 101,000 doses of COVID-19 vaccines from Moderna next week. That figure is up dramatically from the 16,000 dose figure announced earlier. Like the Pfizer vaccine, the Moderna vaccine requires two doses, although the they are received about 28 days apart.

c. In all cases, the plan for distribution and timing of vaccinations will come out of the Department of Health Services (DHS). The DHS will work with local health departments and health care providers regarding delivery and administration of the vaccinations.

d. Given that vaccines will remain in short supply in the near term, as a practical matter it is likely that it will be late winter or spring before all the health care workforce (which includes 400,000 workers) and long-term care residents are vaccinated… and educators and others can begin receiving the vaccine. Competing with educators for vaccinations in phase 1B of the distribution will be others who comprise the “essential workforce” such as police and firefighters and grocery store workers, and those over age 65 with pre-existing conditions that might make them more vulnerable.

i. The process of determining the rank or priority for vaccinations of those who come after the phase 1A distribution, including K-12 educators, is currently in a state committee called the State Disaster Medical Advisory Committee. Here is a link to its webpage: https://www.dhs.wisconsin.gov/sdmac/index.htm.

ii. School boards, educators and other members of the public have an opportunity to provide input directly to the committee. You can also contact the Department of Health Services directly by writing to the office of Secretary-designee Andrea Palm at: DHSSecretaryAndreaPalm@dhs.wisconsin.gov.

e. There are some interesting challenges for schools. For example, while school nurses are designated as health care providers eligible to receive vaccinations in phase 1A, their employers (schools or districts) are not health care providers so it may not be easy to identify their home base for vaccinations—i.e., where exactly they go to be vaccinated. Similarly, once the priorities are established and educators learn where they are in the
queue, they will also need to know where to go to get their shots, particularly if the available vaccine is the Pfizer vaccine that requires ultra-cold storage.

f. As noted, DHS will be working with local health departments and health care providers to iron out the details. Although CVS and Walgreens are under a contract to manage the vaccination of long-term care residents, it is our understanding that the DHS currently does not have a contract with a mass vaccinator that could broadly handle vaccinations of school personnel. It is unlikely that the state will have such a contract in place before mid-January at the earliest.

g. DHS now has a general vaccine page available here:
https://www.dhs.wisconsin.gov/covid-19/vaccine.htm
Members of the public can submit questions to this inbox:
DHSCOVIDVACCINEPUBLIC@wi.gov

2. CARES Act funds

a. ESSER (Elementary and Secondary School Emergency Relief) Fund and GEER (Governor’s Emergency Education Relief) Fund

b. ESSER and GEER are unusual in that the period of performance is not tied to a fiscal year. Funds are available for eligible costs incurred between March 13, 2020 and September 30, 2022.

c. This means districts have an unusually long window—until September 30, 2022—within which to obligate the funds make expenditures and file claims. This long window has raised concerns on the part of some lawmakers that schools are not accessing these CARES Act funds.

d. Of particular concern are the GEERS grants available to 156 school districts and 3 tribal schools. Lawmakers have been making open records requests to the DPI for information on how many school districts have applied for access to these funds. Apparently, the federal Dept. of Education has a website that has posted information on this—the data is apparently gleaned by “scraping” information from state websites. There is a considerable lag in the updating these data, which has alarmed some of the lawmakers making these requests.

e. Funds not being expended will almost certainly be used by lawmakers as an excuse to not fund schools (similar to arguments that have been raised in the past about school district fund balances).

f. While we would encourage school leaders to make expenditures that make sense for the district, we would discourage districts to make expenditures in haste to satisfy the unrealistic timetables of lawmakers making these open records requests. You know best what your districts need and what makes sense for your district.

g. In general, school districts may use GEER grant funds for, among other things, any activities that are authorized under the ESEA. A frequently asked questions (FAQ) document from the U.S. Department of Education encourages states and school districts to invest GEER grant funds in technology infrastructure and professional development.
that will improve capacity to provide high-quality, accessible, distance education, or remote learning. This may include:

- Providing off-campus access to reliable, high-speed internet for students and teachers through the purchase of internet-connected devices/equipment, mobile hotspots, wireless service plans, or installation of Community Wi-Fi Hotspots, especially in underserved communities;
- Purchasing hardware and software applications for students and teachers;
- Providing access to high-quality digital learning content, apps, and tools that can deliver engaging and relevant learning experiences that are accessible to all students;
- Covering costs associated with making materials accessible for students with disabilities or English learners; and
- Providing professional development and training for teachers on effective strategies for the delivery of remote and digital instruction.


a. Gov. Evers: ~$550 million plan including funding for COVID testing/contact tracing as well as provisions waiving state assessment and report card requirements and allowing the rehiring of retired teachers and staff.

b. Assembly GOP - ~$100 million plan including liability protections for schools and businesses but also various provisions that would pre-empt local school board decision-making and penalize districts for decisions made in the interest of public safety.

c. Senate GOP – Will not meet in 2020. Use some of the state’s surplus medical assistance funds to address pandemic needs. Wants legislative oversight of pandemic-related spending and vaccination deployment.

4. Messaging - Need to be in contact with legislators

a. Narratives and perceptions:
   i. Schools are not expending CARES Act relief funds because they were not really needed;
   ii. Schools operating in a hybrid or virtual instructional model are saving money;
   iii. Schools operating in a hybrid or virtual instructional model are caving to their staff/teacher’s union at the expense of students;
   iv. Parents deserve some form of compensation or rebate for their trouble because schools have moved to hybrid or virtual instructional models rather than in-person instruction.

b. Counter messaging:
   i. Document increased costs due to the pandemic and share with lawmakers.
Examples: Additional technology costs (devices, hotspots, repair or replacement of equipment due to greater use, software, etc.); Additional custodial services and cleaning and sanitizing costs; PPE and cleaning supplies; Substitute teachers and increases in sub pay; Additional school nurse costs; Modifications to HVAC systems, additional filters, UV sanitizers; Increased pupil transportation costs; etc.

ii. Share decision points to how you came to your current instructional model whether in-person, hybrid or virtual including:

1. Staffing issues with staff testing positive, needing to be isolated; Staff in close contact with infected persons, needing to be quarantined etc. and the disruptions that causes.

2. Local health department input.

3. Liability insurer and/or attorney input.

5. Status of Federal legislative COVID-19 response

a. After months of stalled negotiations, the most promising development is a Bipartisan compromise package to provide COVID relief ($908 billion). This legislation was developed by a group of U.S. Senators and could potentially be paired with a must-pass federal funding bill. Current funding for the federal government is slated to run out on Friday (12/18) if an additional funding bill is not approved. Congressional appropriators are said to be on the verge of agreeing on an omnibus federal budget bill to not only keep the federal government running not simply for a short while, but for the remainder of the 2021 fiscal year, which ends on September 30, 2021.

b. On Monday (12/14), a group bipartisan group of lawmakers unveiled a two-part version of this $908 billion COVID-19 relief package.

c. The first part would provide $748 billion to fund another round of Paycheck Protection Program (PPP) assistance for small businesses; an extension of unemployment benefits; and more money for schools, COVID testing, vaccine distribution and other widely agreed-upon items.

- The proposal is said to include $82 billion for education, an amount which includes $54 billion both K-12 education and $20 billion for colleges and universities. In addition, $7.5 billion is included for a Governor’s Fund. Provisions earmarking some of this funding for private and parochial schools are also included in the bipartisan package, although details were not available at the time this post was written.

- The proposal is also said to include $10 billion for broadband, including $6 billion for state broadband connectivity and deployment and $3 billion for educational connectivity and distance learning.

d. The second part would provide $160 billion in aid for state and local governments as well as liability protections for businesses from COVID-related lawsuits, tying together the two biggest sticking points to emerge from the several months of negotiations over a
relief package. Democrats have urged aid for state and local governments. Republicans have pushed for liability protections.

e. The first part seems like it almost a “slam dunk” to pass. However, whether the second part will pass along with the first remains to be seen. If the second part does have enough votes to pass, it could either be passed as a separate piece of legislation or it could be added to the larger omnibus federal funding bill. The latter would likely avoid any chance of a potential presidential veto.

f. Senate Majority Leader Mitch McConnell has said that Congress will not adjourn for the Holidays without passing a COVID-19 relief package.