WASB Legal and Legislative Video Update, September 15, 2021, 12 pm

State Legislative Update

Activity is ramping up rapidly in legislative committees in preparation for the fall floor session. That "floor session" actually takes the form of a series of three-day sessions starting on Sept. 28 and a four-day session starting Oct. 25. Committees are busily readying bills for floor action.

October will be a busy month. Those three-day sessions will take place: Sept. 28-30; Oct. 12-14; Oct. 20-22, with a four-day wrap-up session on Oct. 25 to 28. That will be followed by a two-week session in November from Nov. 2-11. That two-week session will conclude scheduled lawmaking for the 2021 calendar year.

Not unlike in previous legislative sessions Capitol insiders are suggesting that lawmakers need try to get their bills through at least one house during this fall floor period if they hope to get them passed into law.

In calendar 2022, the Legislature is only scheduled to meet in three floor sessions: Jan. 18-27; Feb. 15-24; March 8-10. However, Capitol insiders are suggesting that lawmakers may adjourn before March.

Here is a quick synopsis of recent and upcoming committee activity on bills affecting K-12 education:

Public Hearings Last Week

Senate Committee on Judiciary and Public Safety

SB 355 (Tobacco-21) – proposes raising the legal age for sale, purchase, and possession of cigarettes, nicotine and tobacco products and vapor products to 21.

Raising the age would help keep these products out of K-12 schools. The WASB supports this bill based on WASB Resolution 6.02, which states:

"Tobacco-free, Nicotine-free and Vaping-free Schools The WASB supports school learning environments free of tobacco, nicotine and vaping products and devices."

There are some concerns that the definition of "vapor products" in the bill does not include non-nicotine vaping liquid sold separately from the devices, as well as parts, components, and accessories. The WASB has encouraged lawmakers to broaden this definition to make the bill easier to enforce.

Public Hearings This Week

Assembly Committee on Education (Sept. 14)

AB 446 (Reading readiness overhaul) - proposes a massive overhaul of the reading readiness program including a laundry list of new state mandates relating to screening, assessments, interventions, parental notifications and reporting requirements.

The WASB expressed concerns about the prescriptive nature of the bill, its heavy reliance on additional assessments and the lack of resources for interventions required if these additional assessments reveal certain reading deficits among students. This includes a lack of resources for professional development of teachers regarding proper interventions in response to assessment results, instructional coaches, curriculum and instructional materials suggested by particular assessment outcomes. In other states where the approach suggested by this bill has been implemented, states have provided such resources to local districts.

Assembly Committee on Corrections (Sept. 14)

AB 216 (school report cards) – requires the DPI, for purposes of measuring a school district's improvement, to exclude data derived from a juvenile detention facility or secured residential care center for children and youth if 50 percent or more of the pupils residing at the facility do not reside there for the entire school term.

The WASB supports Assembly Bill 216. Our support is based on a resolution adopted by our membership at our 2020 Delegate Assembly and brought to our attention.

When school report card scores are calculated, the components of a school's or district's score that are based on state assessment results (i.e., standardized test results) are calculated using full academic year students. However, full academic year student status ***is not*** used in the calculations of attendance, absenteeism, dropout, and graduation rates; these measures apply to all students. Thus, even students who attend school within a district for a relatively short period of time may strongly affect a district's report card score if they drop out or fail to graduate. This bill addresses this.

Assembly Committee on State Affairs (Sept. 15)

AB 435 (Cursive) – requires the state superintendent of public instruction to incorporate cursive writing into the model academic standards for English language arts. The bill also requires all school boards, independent charter schools, and private schools participating in a parental choice program to include cursive writing in its respective curriculum for the elementary grades. Specifically, each elementary school curriculum must include the objective that pupils be able to write legibly in cursive by the end of fifth grade. (AB 435 is an identical companion bill to SB 431.)

Assembly Committee on Government Accountability & Oversight

AB 378 (financial info) – requires DPI to create a school district financial information portal, in a format that allows the public to download, sort, search, and access the information at no cost. The bill also creates an advisory committee (including a WASB appointee) to advise the DPI on the portal. The bill requires no new data collection at the school or district level.

AB 475 (referendum interest) – the statement included with the referendum question must also provide the estimated amount of the interest accruing on the amount of the bonds, along with the interest rate. If the interest rate is a variable rate, the statement must also specify the amount of the interest accruing on the amount of the bonds calculated using the lowest rate during the term for which the rate is applicable and the amount of the interest accruing on the amount of the bonds calculated using the highest rate during the term for which the rate is applicable. (This bill was pulled from the hearing agenda. This bill presumably will be scheduled for hearing at a later date.)

Assembly Committee on Education (Sept. 16)

AB 560 (safe haven) – requires a school board that provides a human growth and development instructional program to include in the instructional program an explanation of the process under current law for a parent of a newborn to relinquish custody of the newborn to a law enforcement officer, emergency medical services practitioner, or hospital staff member.

AB 561 (credit recovery courses) – requires a school board annually to report to the Department of Public Instruction the number of pupils who attended a credit recovery course during the school year and, for each pupil, the pupil's grade level and the subject of the recovery course the pupil attended. DPI must annually compile and submit that information to the appropriate standing committees of the legislature. In the bill, "credit recovery course" means a program or course, including an alternative education program, as defined in s. 115.28 (7) (e) 1., that allows a pupil to retake a course

or make up course credit for a course that the pupil took but did not pass and that is required for high school graduation.

JUST ADDED:

AB 562 This bill requires each school board of a school district and each operator of an independent charter school, before providing any program related to sexual orientation, gender, gender identity, or gender expression to a pupil in the school district or attending the charter school, to give notice of the program to the pupil's parents or guardians. This notice is required with respect to a pupil in any grade before such a program is provided to the pupil. A "program" is defined to include instruction and materials as well as any test, survey, questionnaire, or other activity.

A pupil may not be required to participate in a program related to sexual orientation, gender, gender identity, or gender expression if the pupil's parent or guardian submits a written request to opt out of the program.

AB 563 This bill requires the DPI to promulgate rules to develop a model curriculum and instructional materials for grades kindergarten to 12 on civic education to prepare pupils to be civically responsible and knowledgeable adults.

Finally, under current law, a school board may grant a high school diploma to a pupil only if the pupil meets specific statutory requirements, including earning a certain number of credits in various subjects in the high school grades. Currently, a pupil must earn at least three credits of social studies, including state and local government. The bill specifies that the social studies credits also must include one-half credit of civics instruction.

Senate Committee on Education (Sept. 16)

SB 373 (Financial information) – requires DPI to create a school district financial information portal, in a format that allows the public to download, sort, search, and access the information at no cost. The bill also creates an advisory committee (including a WASB appointee) to advise the DPI on the portal. The bill requires no new data collection at the school or district level. (SB 373 is a companion bill to AB 378.)

SB 431 (Cursive writing) – requires the state superintendent of public instruction to incorporate cursive writing into the model academic standards for English language arts. The bill also requires all school boards, independent charter schools, and private schools participating in a parental choice program to include cursive writing in its respective curriculum for the elementary grades. Specifically, each elementary school curriculum must include the objective that pupils be able to write legibly in cursive by the end of fifth grade. (SB 431 is an identical companion bill to AB 435.)

Three things to mention:

Today is the deadline for boards to submit resolutions for consideration by the WASB Policy & Resolutions Committee. The Government Relations Team has begun work on the first two Policy & Resolutions Committee meetings, which will be held virtually on Oct. 1 and Oct.9.

We have also begun planning for the WASB Fall Advocacy Conference that will be held in conjunction with the final Policy and Resolutions Committee meeting of 2021. That committee meeting will be held on the evening of Friday, Nov. 5 and the Advocacy Conference will be held on Saturday, Nov. 6. Both meetings will take place at the Holiday Inn Conference Center in Stevens Point.

We are also preparing for the WASB Fall Regional Meetings.

Federal Funds Update

Federal Funds at the Governor's Discretion

On July 8, the same day he signed the state budget bill into law, Gov. Evers pledged to allocate $110 million in federal COVID relief funds at his discretion to K-12 public schools. These are funds from the state's $2.0 billion allotment of federal Coronavirus Relief Fund (CRF) monies under the CARES Act.

In order to be an "eligible use" of funds received from the CRF, the performance or delivery of the service or good must occur between March 1, 2020, and December 31, 2021.

It is assumed this money will be distributed on an equal per pupil basis to all school districts and will total about $125 per pupil. It is also assumed these funds will be allocated to districts based on this September's third Friday in enrollment counts. According to a memo released earlier this month by the non-partisan Legislative Fiscal Bureau:

> "[U.S.] Treasury guidance indicates that CRF monies may be transferred to school districts, and that school districts may use these funds to cover costs associated with either providing distance learning or re-opening in-person facilities. Treasury further indicates that as an administrative convenience, expenses of up to $500 per pupil will be presumed to be eligible expenditures. As a result, school districts will not be required to document the specific uses of funds up to that amount. On a statewide basis, $500 per pupil would total an estimated $410.0 million in 2021-22."

That $410 million amount is $300 million more than the governor has committed for K-12 education. What this guidance suggests is that the expected payments of about $125 per pupil will be presumed to be eligible expenditures.

We are still awaiting further details from the state Department of Administration and the DPI on the timing of these payments. Watch the WASB Legislative Update Blog for updates.

Update on Other Federal Funding

Excluding funds that are at the discretion of state governors to distribute, three separate pieces of federal COVID relief legislation provided three separate sources of funding dedicated for K-12 education purposes. These funds are broadly referred to as "ESSER" funds. ("ESSER" is an acronym that stands for "Elementary and Secondary School Emergency Relief.")

In total, Wisconsin is eligible to receive $2.4 billion in ESSER funds. Ninety percent of these funds are required to be distributed under the federal Title I formula (i.e., according to the proportion of students living in poverty within each district). The remainder of the ESSER II and ESSER III distributions was impacted by decisions made by the state Legislature's budget-writing Joint Finance Committee.

Congress set slightly different requirements on the allowable uses for each of these three funds. Those differences are outlined in this table.

- The original ESSER fund (ESSER I) was created under the CARES Act enacted in March 2020. Wisconsin received $174.8 million in ESSER I funds. (You can access a spreadsheet indicating the district-by-district allocation of these funds here.)

- ESSER II funds were provided under the CRRS Act enacted in December 2020. Wisconsin received just over $686 million in ESSER II funds. (You can access a spreadsheet with the district-by-district allocation of these funds here.)

- ESSER III funds were provided under the ARP Act enacted in March 2021. Wisconsin is eligible to receive $1.54 billion in ESSER III funds. To receive these funds, the DPI was required to submit *a statewide plan* to the U.S. Department of Education, which was filed on Aug. 27. Approval of that plan is still pending.

  (You can access a spreadsheet with the *anticipated* district-by-district allocation of ESSER III funds here. Upon approval of the state's ESSER III Plan, additional funding *may* be made available to some school districts.)

We want to remind you that individual school districts must also file an ESSER III plan with the DPI. The timeline/deadline for filing those district plans has not yet been determined; however, school leaders should bear in mind that these district plans: a) must be developed through a process of stakeholder engagement; and b) must spell out how at least 20 percent of ESSER III expenditures relate to addressing learning disruption due to the pandemic.

Congressional Update

September is an important month in Washington DC.

The federal fiscal year ends on September 30. Lawmakers need to pass appropriations bills by Sept. 30 to prevent a government shutdown. In effect, Congress must pass a budget or, alternatively, a continuing resolution to continue funding the federal government or a shutdown will ensue. So far, the House has marked up a number of appropriations bills, while the Senate has not marked up any.

Congress is also working on a bipartisan infrastructure package that we described in our August Legislative Update Webinar. House Speaker Nancy Pelosi has promised centrist Democrats she will hold a vote on the Senate-passed bipartisan infrastructure bill by Sept. 27. That pledge is not binding, and politics within her caucus could complicate the timeline.

In addition, Congressional Democrats are also working on a much larger bill, often referred to as a Reconciliation bill, that we describe below. Speaker Pelosi hopes to approve an up to $3.5 trillion plan that invests in social programs and climate policy in conjunction with the infrastructure bill. However, the House, Senate and White House are still writing the plan — and deciding which version could win the support of nearly every Democrat in Congress, which is a necessity given the razor thin margin by which Democrats hold the majority in each house. Putting together this massive package is a bit like stitching together a quilt. Different House committees are working on drafting different portions of the bill. In the end, all of these different committee bills will be combined into a single massive bill.

Finally, the federal government is rapidly approaching the federal debt ceiling. Unless action is taken, the federal government could default on its debt payments, most likely sometime between roughly October 15 and November 15. Democrats are deciding how to lift or suspend the limit on their own after Republicans have insisted they will not provide the 10 votes needed to break a filibuster and raise the debt ceiling.

The latest news out of Washington suggests Senate Democrats will try to combine legislation to raise the nation's debt ceiling with a government funding measure, in order to try to put maximum pressure on their Republican colleagues to support raising the borrowing limit or risk being blamed for a government shutdown. It now appears the most likely path to securing an increase in the debt ceiling is through the adoption of a continuing resolution lasting until perhaps December 10 that would raise the debt ceiling by a percentage amount above the current authorized level.

Will They or Won't They Pass a $3.5 Trillion "Reconcilitaion" Package?

Congressional Democrats have been working to try to enact a $3.5 trillion domestic spending package via the budget reconciliation process—a legislative maneuver that would allow Democrats to advance certain legislation via simple majorities within both chambers. Congressional Democrats aim to use this forthcoming package to complement a narrower infrastructure package passed recently by the Senate. Until consideration of this wider $3.5 trillion bill is complete, House Democratic leaders have held off on consideration of the infrastructure bill. In this way, Congressional leaders hope to garner the necessary votes to advance both proposals later this fall.

House Education Committee Advances Reconciliation Proposal

On September 8, the House Education and Labor Committee released the text of its portion of Congressional Democrats' forthcoming budget reconciliation package.

The release of this reconciliation text is a significant next step in the wider legislative effort. Following the release of the text, the House Education and Labor Committee began a markup of this legislation where committee members considered nearly fifty proposed changes to the underlying legislative text. This markup is still ongoing and so far, the changes adopted by the committee have not significantly altered the main contours of the proposed legislation.

If enacted, the bill would provide a number of investments in K-12 education, including $82 billion for K-12 school infrastructure, $197 million for "Grow Your Own" teacher preparation programs meant to increase teacher workforce diversity, $198 million for teacher residency programs, $198 million for school leadership programs, and $297 million for the Part D of the Individuals with Disabilities Education Act (IDEA). In addition, the bill proposes significant new funding, by some estimates $450 billion, for universal pre-K and childcare subsidies for eligible families. It would also provide $35 billion to expand school nutrition programs to an additional 9 million students and would provide $411 million for impact aid school districts.

Separate from the House Education and Labor Committee's work on their portion of the reconciliation bill, the House Energy and Commerce Committee is also expected to consider and advance legislation that could potentially include additional funding for broadband connectivity efforts through the Emergency Connectivity Fund—which provides schools and public libraries with devices—Wi-Fi hotspots, tablets and laptops to help ensure students and library patrons can connect to the Internet. The National School Boards Association (NSBA) reports the Energy and Commerce Committee proposal reinstates advance refunding, extends the rehabilitation credit for historic school buildings, and is likely to include provisions for Build America Bonds and provisions restoring the deductibility of state and local taxes—sometimes referred to colloquially as "SALT" deductibility.

With the House committee's work expected to wrap up this week, lawmakers on the House Budget Committee must next stitch these various proposals back together into a single legislative package for the full chamber's consideration. Congressional Democratic leadership had tentatively set a nonbinding deadline of Sept. 15 (today) to complete this work, but this deadline may be pushed back to Oct. 15.

The reconciliation bill's prospects in the Senate, however, remain cloudy and it is unlikely that lawmakers in the upper chamber meet this deadline. Hopes for passage of reconciliation bill in the Senate suffered a blow when Sen. Joe Manchin (W.Va.), a key moderate Democrat, reiterated on Sunday that he can't support a $3.5 trillion spending plan. Manchin also said that he didn't support the timeline of voting on the measure this week so that the House could pass it by Sept. 27.

Formal plans for consideration of the legislation have yet to be made public and it is widely expected that the Senate will move forward with a smaller overall reconciliation package, likely necessitating further reductions to the proposals contained in the version proposed by the House.

It is unlikely the Senate version of the Reconciliation bill will go through a committee process. What gets included in the Senate version will likely be determined by decisions in the Democratic caucus and by the Senate Parliamentarian, as the latter makes the final call on whether the bill and its provisions are subject to the filibuster. Should the bill be subject to the filibuster, it would require 60 votes, including 10 GOP votes, to pass. Should the Senate Parliamentarian rule that only a simple majority of 51 votes is required, the bill could pass with only Democrat votes.

Administration Update

White House Announces Additional COVID Measures

On September 9, the Biden Administration released an action plan it calls *A Path Out of the Pandemic*, a sweeping new set of policies to require many Americans who have not yet been vaccinated against COVID-19 to receive a COVID-19 vaccination.

In addition to a new vaccine requirement for all federal employees and contractors, the Department of Labor has been instructed to develop a rule through the Occupational Safety and Health Administration (OSHA) requiring any private employer with 100 or more employees to require vaccination against COVID-19 or require employees who will not get vaccinated to test at least weekly. The rule is expected to include fines of up to $14,000 per employee for employers that do not comply with the new requirements.

WASB Legal and Legislative Video Update, September 15, 2021, 12 pm

WASB Staff Counsel will address the following topics:

I. Employer vaccine mandates.
   a. Inquiries about vaccination status and COVID-19 tests.
   b. Requiring employees to be vaccinated and/or tested.
II. Differentiated leave based on vaccination status.
III. Open meeting law issues relating to live streaming board meetings.
IV. New U.S. Department of Education guidance on full implementation of IDEA during pandemic.

WASB LEGAL UPDATE

I. Employer Vaccine Mandates

Inquiries about vaccination status and COVID-19 tests

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eeoc.gov)

Vaccination status:

> **K.4. Is information about an employee's COVID-19 vaccination confidential medical information under the ADA?** *(5/28/21)*
>
> Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.

COVID-19 test requirement:

> **A.6. May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) when evaluating an employee's initial or continued presence in the workplace?** *(4/23/20; updated 9/8/20 to address stakeholder questions about updates to CDC guidance)*
>
> The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore an employer may choose to administer COVID-19 testing to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others. The ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate. **Testing administered by employers consistent with current CDC guidance will meet the ADA's "business necessity" standard. (Emphasis added)**

Consistent with the ADA standard, employers should ensure that the tests are considered accurate and reliable. For example, employers may review information from the U.S. Food and Drug Administration about what may or may not be considered safe and accurate testing, as well as guidance from CDC or other public health authorities. Because the CDC and FDA may revise their recommendations based on new information, it may be helpful to check these agency websites for updates. Employers may wish to consider the incidence of false-positives or false-negatives associated with a particular test. Note that a positive test result reveals that an individual most likely has a current infection and may be able to transmit the virus to others. A negative test result means that the individual did not have detectable COVID-19 at the time of testing.

A negative test does not mean the employee will not acquire the virus later. Based on guidance from medical and public health authorities, employers should still require–to the greatest extent possible–that employees observe infection control practices (such as social distancing, regular handwashing, and other measures) in the workplace to prevent transmission of COVID-19.

Guidance for COVID-19 Prevention in K-12 Schools | CDC

Table 1. Screening Testing Recommendations for K-12 Schools by Level of Community Transmission

	Low Transmission[1] Blue	**Moderate Transmission Yellow**	**Substantial Transmission Orange**	**High Transmission Red**
Teachers and staff	**Offer screening testing for teachers and staff** who are not fully vaccinated at least once per week.			

Requiring employees to be vaccinated and/or tested

Does President Biden's proposed vaccine mandate for employees of large employers apply to Wisconsin school districts?

President Biden's COVID-19 Plan | The White House

Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly

The Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement. This requirement will impact over 80 million workers in private sector businesses with 100+ employees.

Requiring Staff in Head Start Programs, Department of Defense Schools, and Bureau of Indian Education-Operated Schools to be Vaccinated

To help ensure the safety of students, families, and their communities, the President's plan includes requirements that teachers and staff at Head Start and Early Head Start programs, teachers and child and youth program personnel at the Department of Defense (DOD), and teachers and staff at Bureau of Indian Education-operated schools get vaccinated. The Department of Health and Human Services (HHS) will initiate rulemaking to implement this policy for Head Start and Early Head Start programs, which provide comprehensive education and child development services to ensure that children are well prepared for kindergarten. The Department of Defense operates 160 K-12 schools for students from military families across the U.S. and abroad, and the Department of the Interior operates 53 schools through the Bureau of Indian Education (BIE) across the U.S. on and off tribal lands. These schools and programs collectively serve more than 1 million children each year and employ nearly 300,000 staff. This action will help more schools and early childhood centers safely remain open and give comfort to the many parents that rely on them every day to keep their children safe.

State Plans | Occupational Safety and Health Administration (osha.gov)

Wisconsin is under federal OSHA jurisdiction which covers most private sector workers within the state. State and local government workers are not covered by federal OSHA.

Wisconsin Legislature: 101.055

101.055 Public employee safety and health.

(1) Intent. It is the intent of this section to give employees of the state, of any agency and of any political subdivision of this state rights and protections relating to occupational safety and health equivalent to those granted to employees in the private sector under the occupational safety and health act of 1970 (5 USC 5108, 5314, 5315 and 7902; 15 USC 633 and 636; 18 USC 1114; 29 USC 553 and 651 to 678; 42 USC 3142-1 and 49 USC 1421).

(3) Standards.

(a) The department shall adopt, by administrative rule, standards to protect the safety and health of public employees. The standards shall provide protection at least equal to that provided to private sector employees under standards promulgated by the federal occupational safety and health administration, . . .

Wisconsin Legislature: SPS 332.15

SPS 332.15 OSHA Safety and health standards. Except as provided in s. SPS 332.16 and subch. IV, all places of employment and public buildings of a public employer shall comply with the federal Occupational Safety and Health Administration (OSHA) requirements adopted under s. SPS 332.50.

SPS 332.16 Wisconsin administrative code chapters. Except as provided in s. SPS 332.003 (2), the following chapters of the Wisconsin administrative code shall apply in place of the standards specified in s. SPS 332.15 for those safety and health issues which fall within the scope of the respective chapters.

(15) Chapter SPS 335, Infectious Agents.

SPS 335.01 Definitions. In this chapter:

(2) "Infectious agents" has the meaning set forth in s. 101.58 (2) (f), Stats.

Note: The statutory definition for infectious agents reads: "Infectious agent" means a bacterial, mycoplasmal, fungal, parasitic or viral agent identified by the department by rule as causing illness in humans or human fetuses or both, which is introduced by an employer to be used, studied or produced in the workplace. "Infectious agent" does not include such an agent in or on the body of a person who is present in the workplace for diagnosis or treatment.

May school boards require employees to be vaccinated or tested?

Workplace Vaccination Program | CDC

Vaccine Mandates & Exemptions

COVID-19 vaccines are not mandated under Emergency Use Authorizations (EUAs)

The Food and Drug Administration (FDA) does **not** mandate vaccination. However, whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law.

Employer Vaccine Mandates and Proof of Vaccination

Whether an employer may require or mandate COVID-19 vaccination is a matter of state or other applicable law. If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own healthcare provider, the employer cannot mandate that the employee provide any medical information as part of the proof.

Employee Medical Conditions or Religious Beliefs Exemptions

Two types of exemptions can be implemented:

- **Medical exemptions**
  Some people may be at risk for an adverse reaction because of an allergy to one of the vaccine components or a medical condition. This is referred to as a medical exemption.
- **Religious exemptions**
  Some people may decline vaccination because of a religious belief. This is referred to as a religious exemption.

Employers offering vaccination to workers should keep a record of the offer to vaccinate and the employee's decision to accept or decline vaccination.

Guidance on Exemptions

The Equal Employment Opportunity Commission (EEOC) provides guidance on mandatory vaccination against H1N1 influenza. The EEOC guidance may be applicable to COVID-19 vaccination, which became available in December 2020.

Pandemic Preparedness in the Workplace and the Americans with Disabilities Act | U.S. Equal Employment Opportunity Commission (eeoc.gov)

13. 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 or COVID-19 vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

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 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 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).[(36)]

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Mandatory Employer Vaccination Programs

K.5. Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability? *(12/16/20, updated 5/28/21)*

Yes, provided certain requirements are met. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace. A "direct threat" is a "significant risk of substantial harm" that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. 1630.2(r). This determination can be broken down into two steps: determining if there is a direct threat and, if there is, assessing whether a reasonable accommodation would reduce or eliminate the threat.

To determine if an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace, an employer first must make an individualized assessment of the employee's present ability to safely perform the essential functions of the job. The factors that make up this assessment are: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee's health care provider, with the employee's consent, also may provide useful information about the employee. Additionally, the assessment of direct threat should take account of the type of work environment, such as: whether the employee works alone or with others or works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other

employees and/or non-employees; the number of partially or fully vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.

If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include requiring the employee to wear a mask, work a staggered shift, making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees), permitting telework if feasible, or reassigning the employee to a vacant position in a different workspace.

As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis. (See also K.12 recommending the same best practice for religious accommodations.)

K.6. Under the ADA, if an employer requires COVID-19 vaccinations for employees physically entering the workplace, how should an employee who does not get a COVID-19 vaccination because of a disability inform the employer, and what should the employer do? *(12/16/20, updated 5/28/21)*

An employee with a disability who does not get vaccinated for COVID-19 because of a disability must let the employer know that he or she needs an exemption from the requirement or a change at work, known as a reasonable accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase "reasonable accommodation."

Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom to refer the request for full consideration. As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship (significant difficulty or expense) on the employer. This process may include determining whether it is necessary to obtain supporting medical documentation about the employee's disability.

In discussing accommodation requests, employers and employees may find it helpful to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations. JAN's materials about COVID-19 are available at https://askjan.org/topics/COVID-19.cfm. Employers also may consult applicable Occupational Safety and Health Administration (OSHA) COVID-specific resources. Even if there is no reasonable accommodation that will allow the unvaccinated employee to be physically present to perform his or her current job without posing a direct threat, the employer must consider if telework is an option for that particular job as an accommodation and, as a last resort, whether reassignment to another position is possible.

The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense. See 29 C.F.R. 1630.2(p). Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration. Employers may rely on CDC recommendations when deciding whether an effective accommodation is available that would not pose an undue hardship.

Under the ADA, it is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.

Title VII and COVID-19 Vaccinations

K.12. Under Title VII, how should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance? (*12/16/20, updated 5/28/21*)

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.

EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance. However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. See also 29 CFR 1605.

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment. For suggestions about types of reasonable accommodation for unvaccinated employees, see question and answer K.6., above. In many circumstances, it may be possible to accommodate those seeking reasonable accommodations for their religious beliefs, practices, or observances.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine. Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee

K.13. Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy? *(12/16/20, updated 5/28/21)*

Under Title VII, some employees may seek job adjustments or may request exemptions from a COVID-19 vaccination requirement due to pregnancy.

If an employee seeks an exemption from a vaccine requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment in violation of Title VII.

II. Differentiated leave based on vaccination status

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission (eeoc.gov)

Vaccinations Under ADA and GINA

ADA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.16. Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community? *(5/28/21)*

Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.

K.17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent? *(5/28/21)*

Yes, if any incentive (which includes both rewards and penalties) is not so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. As explained in K.16., however, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.

GINA: Employer Incentives for Voluntary COVID-19 Vaccinations

K.18. Under GINA, may an employer offer an incentive to employees to provide documentation or other confirmation that they or their family members received a

vaccination from their own health care provider, such as a doctor, pharmacy, health agency, or another health care provider in the community? *(5/28/21)*

Yes. Under GINA, an employer may offer an incentive to employees to provide documentation or other confirmation from a third party not acting on the employer's behalf, such as a pharmacy or health department, that employees or their family members have been vaccinated. If employers ask an employee to show documentation or other confirmation that the employee or a family member has been vaccinated, it is not an unlawful request for genetic information under GINA because the fact that someone received a vaccination is not information about the manifestation of a disease or disorder in a family member (known as family medical history under GINA), nor is it any other form of genetic information. GINA's restrictions on employers acquiring genetic information (including those prohibiting incentives in exchange for genetic information), therefore, do not apply.

K.19. Under GINA, may an employer offer an incentive to employees in exchange for the employee getting vaccinated by the employer or its agent? *(5/28/21)*

Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated. See K.14 for more about GINA and pre-vaccination medical screening questions.

III. Open meeting law issues relating to live streaming board meetings

DA accuses Stevens Point school board of violating open meetings law (stevenspointjournal.com)

Office of Open Government | Wisconsin Department of Justice (state.wi.us)

Open Meeting Resources During COVID-19

- March 17, 2020 - Coronavirus Disease 2019 (COVID-19) and Open Meetings advisory addresses the application of the open meetings law during the public health situation regarding COVID-19.
- March 20, 2020 - Coronavirus Disease 2019 (COVID-19) and Open Meetings advisory addresses technological and practical issues that governmental bodies should consider in advance of meetings.
- March 15, 2021 - Sunshine Week Coronavirus Disease 2019 (COVID-19) and Open Meetings advisory encourages governmental bodies to make open meetings accessible remotely until the pandemic is over and, following the pandemic, to continue using practices developed during the pandemic that increase transparency.

Tips on Open Meetings During COVID-19

Members of governmental bodies can promote public health by staying home AND ensure that government business is conducted transparently.

- Open meetings can be conducted by teleconference or videoconference.
- BUT, meetings conducted remotely must be reasonably accessible to the public.

When conducting a meeting remotely:

- You must follow notice requirements under state law.
- Notice must include the info needed for remote access, such as teleconference dial-in information or a video link and any necessary passcodes or login information.
- If the meeting is via videoconference or internet-based, strongly consider providing a telephone option.
- Facilitate reasonable access for people who cannot attend remotely.
- The meeting chair should ask all members to identify themselves before speaking and not to speak over one another.
- When possible, record the meeting and promptly make the recording publicly available on social media or a website.

IV. U.S. Department of Education guidance on full implementation of IDEA during pandemic

New Guidance Reaffirms Importance of Full Implementation of Individuals with Disabilities Education Act Amidst COVID-19 Pandemic | U.S. Department of Education

The Q&As document on Child Find Under Part B of the Individuals with Disabilities Education Act released with the letter is the first Q&A in the series and reaffirms the importance of appropriate implementation of IDEA's child find obligations, which requires the identification, location and evaluation, of all children with disabilities in the states. An effective child find system is an ongoing part of each state's responsibility to ensure that FAPE is made available to all eligible children with disabilities.

Other topic areas under IDEA include:

- meeting timelines;
- ensuring implementation of initial evaluation and reevaluation procedures;
- determining eligibility for special education and related services;
- providing the full array of special education and related services, that may include compensatory services, for students with disabilities to ensure they receive a FAPE; and
- delayed evaluations and early intervention services to infants and toddlers with disabilities and their families served under IDEA Part C.

Return to School Roadmap: Children with Disabilities under IDEA (ed.gov)

OSERS has received multiple requests from a diverse group of stakeholders asking that the Department clarify expectations and requirements for implementing IDEA in light of the many challenges of the COVID-19 pandemic and as more schools and programs are returning to in-person services. These inquiries address a range of topics, such as: meeting timelines, ensuring implementation of initial evaluation and reevaluation procedures, determining eligibility for special education and related services, and providing the full array of special education and related services that children with disabilities need to receive FAPE. Similarly, stakeholders have

inquired about the implications of delayed evaluations and early intervention services to infants and toddlers with disabilities and their families served under IDEA Part C.

As a part of the Department's Return to School Roadmap, OSERS will release IDEA guidance documents in the coming weeks and months which focus on school reopening efforts and are intended to support the full implementation of IDEA requirements by SEAs, LEAs, LAs, and EIS providers. The Return to School Roadmap IDEA guidance documents are also intended to provide useful information to parents of infants, toddlers, and children with disabilities. The documents will focus on those topics most closely related to ensuring that, regardless of the COVID-19 pandemic or the mode of instruction, children with disabilities receive FAPE, and that infants and toddlers with disabilities and their families receive early intervention services.