

ALLIANCE FOR HIGH QUALITY EDUCATION
All Member Conference Call

March 24, 2020
10:00 A.M.

MEETING SUMMARY

In attendance on phone conference: Jessica Voltolini, Tony Podojil, guests Jim Betts, Craig Burford (OESCA), Kevin Miller (BASA), Julie Martin and Derek Towster (Scott Scriven), and member representatives from 41 school districts.

Tony Podojil convened the meeting by phone conference at 10:00 a.m. The primary focus of this meeting was to give an update on the General Assembly and answer concerns about collective bargaining due to the Governor's closing of schools based on health concerns related to the spread of Coronavirus.

Jessica stated that she anticipates the legislative priorities will be focused 100% on COVID-19. The House is scheduled for session today and tomorrow. The Senate is scheduled for Wednesday and Thursday; they will be sending out a 3-hour notice before a session is called. Guide 81 a Covid-19 response bill dropped yesterday to be the working Regulatory Relief Coronavirus Bill for Covid-19 related action and HB 582 also covers COVID-19 and capital budget issues.

Two bills that we will be concerned about is HB581 and HB582 both concern the primary election date and information on EdChoice.

Jessica plans to update everyone in real time on report card issues and time sensitive dates.

Our guest, Julie and Derek, answered questions that were sent to Jessica prior to the call and will touch on Federal Legislative- The Families First Coronavirus Response Act.

Stay at Home Order

The Stay at Home Order was issued for March 23, 2020 at 11:59 PM till April 6, 2020 at 11:59 PM. Derek stated that District Superintendents and employees are able to leave home to go to work to perform essential functions that the district needs to perform in order to facilitate for distance learning and to maintain the facilities.

He stated this order can be organized into two categories:

1. Ohio residents to stay in their home with some exceptions
2. Ohio business to cease operations with exception

With regards to the restrictions on residents leaving their home, they are able to leave for essential activities, essential governmental functions, essential business and operations, also able to travel

to or from educational institutions for purposes of receiving materials for distant learning, receiving meals and any other related services.

The main one we want to focus on is essential activities which includes health and safety activities, retrieving necessary supplies and services, outdoor activities, certain types of work and taking care of others.

Certain types of work will be most important for district superintendents and their employees which includes performing any work providing essential governmental functions or minimum basic operations. Restrictions on business has an exception for essential business and operations and that all business regardless of whether they are an essential business or operations can still continue to provide minimum basic operations. In summary, the order as related to school districts has an exception for both school districts and their employees for the performance of minimum basic operations an essential business and operation.

Basic Operations is going to allow superintendents and employees to conduct the minimum necessary activities to maintain the value of the districts inventory, preserve the condition of their facilities, ensure security, process payroll and employee benefits or related functions. The previous closure order for students K-12 is still in effect. Under the definition of essential business and operations, the things schools can do are essential infrastructure activities, essential governmental functions, the facilitation of distance learning and performance of essential functions and food services to students or members of the public on a pick up and take away basis only. Infrastructure activities for schools would include food production, school construction, building management and maintenance, cyber security operations, internet, video and telecommunications systems. Onsite operations must comply with keeping the social distancing requirements by designating with signage tape or other means 6 foot spacing for employees and customers, hand sanitizer readily available for employees and customers, implement separate operating hours for elderly and vulnerable customers and post on line if a facility is open and how to best reach the facility. Miscellaneous requirements mandate to close all playgrounds, allow as many employees as possible to work from home, encourage employees to work from home until free of fever and symptoms for 72 hours, ensure sick leave policies allow sick employees to stay home to care for themselves, children and other family members, and employees that suffer with an Acute Respiratory illness cannot be required to provide a health care note to return to work or validate the illness and last under miscellaneous we are required to frequently clean commonly touched surfaces. (see attached)

Julie addressed the issues of what authority do we have to pay employees or why is it not clear what districts are doing, and why do we hear so many different options. She referred to two Statutes, 3319.08 and 3319.081 which talk about paying teachers and regular non-teaching employees for all time off when the school is closed due to an epidemic or other public calamity. She stated to refer to the bargaining agreement for teachers also check to see what the agreement states for non-teaching staff for calamity days. School buildings are closed but school is not closed under the stay at home order. Either way employees are going to get paid whether under state law or contract. Districts should talk to unions for unique circumstances, look back at average

hours for hourly staff, individual contracts, ask union about premium pay, MOU for in building staff, check contracts for food service workers if with an outside vendor, and talk about letting staff that is on leave return early because they can now work from home but be sure they can actually work remotely.

She then addressed how to proceed with evaluations and possible non-renewal of teachers. The only legal reason to do an evaluation is if a superintendent does not want to renew a contract with a teacher. If you do not want to non-renew a teacher, evaluations can be put on the lower list of priorities that need to be done.

Things to think about if a superintendent and the union decide to enter an MOU, determine who is the evaluator, decide about altering timelines, define observations, or can the superintendent deem all evaluations complete.

Be sure to identify expectations for employees for what they are doing during distance learning. Figure out how to determine if staff is meeting those expectations. Continue with any investigations before the stay at home order. Decide if you will need a reduction in force and how that may affect the future if those employees have taken another job. Check labor agreements for strict language on notice and process for which reduction can take place.

Julie then gave highlights for the Family First Coronavirus Response Act (see attached). This law signed by President Trump last week goes in effect on April 2, 2020. It covers two parts the Federal Paid Sick Leave Act which will cover all employees from the first day worked at the district for 80 hours paid leave capped at \$511.00 per day for full time employees. Part time employees will look at the average hours worked for the previous 2 weeks and will be paid for 80 hours at 2/3 of regular hours. This is for employees that are not allowed to work due to their own illness or to care for a family member or child.

The second is the FMLA expansion which now provides for people that cannot work or telework because they must care for a sick son or daughter under 18 years of age. They will have the first 10 days unpaid and then be paid 2/3 normal pay capped at \$200 per day.

Member Questions:

Can a district be liable for individuals violating the playground restriction?

Playground closure states to close not secure the playground, post signs stating the playground is closed until further notice due to the stay at home order.

Teachers are requesting to work from their classrooms or the building for their distance learning duties, are they allowed to do that?

Yes, they can come in as long as it falls under the need to provide distance learning. However, each district will want to decide if the request is cost effective if the school has already been cleaned and is shut down.

Are we required to pay workers that are being hired by families to provide daycare while employees are being paid to stay home by the district? Employees need to complete the duties

requested by the district and should be available for their regular hours. It comes down to what hours the employee is supposed to report to their job remotely.

What does a district do when they need a full Board of Directors vote and are unable to meet?

More information on this question will be addressed this week and talked about in the next all members conference call meeting.

We will need to think about how to get back to normal once the order is lifted for students to return to school. Consider budget reductions.

Next Conference Call:

The next call will be **March 31, 2020, at 10 AM by phone conference.**

The meeting adjourned at 11:20 a.m.

(see attached)

UPDATE: The Families First Coronavirus Response Act Is Signed Into Law

Coronavirus Response Act. The law should be effective 15 days after it was signed, or presumably April 2, 2020.

The Act (among other things) requires that private employers with fewer than 500 employees and almost all public employers provide essentially two weeks of emergency paid sick leave and that they provide Family and Medical Leave Act (FMLA) leave for certain absences related to COVID-19. The FMLA leave is unpaid for the first 10 days and paid at a rate of 2/3 of the employee's wages after that period. Covered employers will have access to tax credits related to this additional paid leave.

A summary of these provisions is provided below. At a minimum, employers will need to prepare for the Act's effective date by updating their current FMLA and/or medical leave policies, considering how the Act will affect their financial status, and creating a method of tracking any payments made under the Act to best take advantage of the available tax credits.

Amendments to the Family and Medical Leave Act

The Act adds "public health emergency leave" to the list of qualifying leaves under the FMLA. The amendment, unless extended, will sunset on December 31, 2020.

The Act covers all employers with fewer than 500 employees, although small businesses with fewer than 50 employees will be exempt from providing the leave if it would jeopardize the viability of the business as a going concern. The Department of Labor (DOL) will issue regulations to better define when a small business is exempt. In the interim, small employers will need to analyze whether they fall within this description based on their specific financial situation.

For purposes of public health emergency leave, the Act defines an eligible employee to include an individual who has been employed for at least 30 days by the employer. The employee does not need to have worked a specific number of hours to be eligible and does not need to work at a work site at which there are 50 employees within a 75 mile radius (which are requirements under the FMLA generally). Employers who employ health care providers or emergency responders may exclude such employees from this form of leave.

An employee will qualify for public health emergency leave under this amendment to the FMLA if the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency with respect to COVID-19. For this purpose, a "child-care provider" means a provider who receives compensation for providing child-care services on a regular basis. The term "school" means an elementary or secondary school.

The Act requires that:

Employers provide employees unpaid leave during the first 10 days of the leave, although employees may substitute available paid leave during this period (employers may not force substitution).

After the first 10 days of leave, employers provide leave paid at a rate of no less than 2/3 of the employee's regular rate of pay (as that term is defined under the Fair Labor Standards Act) for the remainder of the 12 week FMLA period (or whatever period of time the employee has remaining under the employer's current FMLA policy). The pay must be at the employee's regular rate, capped at \$200 per day, for the hours the employee would have otherwise worked.

The maximum total pays an employee may receive under this provision is an aggregate of \$10,000. If the employee's hours are variable, employers must average the hours worked (or during which the employee took leave) for the past 6 months. Employers who are signatory to a multiemployer collective bargaining agreement that provides paid sick leave may fulfill the paid leave obligations through its contributions to a plan that provides for the paid leave.

An employee must provide notice to the employer as soon as practicable for leaves that are foreseeable.

Under the Act, an employee must be restored to his or her position (or an equivalent position) unless the employer employs fewer than 25 employees and the position held by the employee who takes a public health emergency leave no longer exists due to economic conditions or other changes in operating conditions that affect employment and are caused by a public health crisis during the leave. To apply this exception to the restoration requirement, the employer must:

Make reasonable efforts to restore the employee to an equivalent position; and

If the reasonable efforts fail, make reasonable efforts for one year (beginning either on the date on the need due to the public health emergency ends or the date that is 12 weeks after the employee's leave commenced, whichever is earlier) to contact the employee if an equivalent position becomes available.

There are a few aspects of this new form of FMLA leave that are not addressed in the Act. For example:

Can employees take this leave intermittently or on a reduced schedule? It is not addressed in the Act, so we can only assume that intermittent or reduced schedule leave is permitted.

Can an employee be required to provide a certification or other proof that the school or childcare provider is closed or unavailable? As with other forms of non-medical FMLA leave, we expect the DOL's position will be that the employer must accept a statement from the employee and/or other basic evidence that the school or child care provider closed (e.g., an e-mail announcing the closure, a news article, etc.).

Does time off taken prior to the effective date of the law for the reasons listed above count towards the required FMLA leave? We anticipate that the answer is no. Employers may always choose to provide leave beyond that which is required by law. We expect that the DOL will treat leave provided before the effective date as gratuitous leave.

The Act does not explicitly extend an employee's FMLA entitlement. Accordingly, an employee who has exhausted their 12 weeks of FMLA will not be entitled to additional leave. However, if the employer is not currently covered under the FMLA, but previously gave an employee a lengthy

leave equivalent to FMLA, it appears that, unless the Act is modified, the employer will be required to provide an entire 12 weeks of leave under this amendment.

We hope that these questions and others will be cleared up either through an amendment to the Act or future regulation. Notably, an employee cannot bring a civil action against an employer with less than 50 employees for its failure to provide the leave, but the DOL may still investigate and bring an action against the employer.

This FMLA amendment will require employers who are currently subject to the FMLA to issue a temporary amendment to their policies and employers who are not currently subject to the FMLA to issue a policy addressing this new leave.

EMERGENCY PAID SICK LEAVE ACT

Under this provision of the Act, private employers with fewer than 500 employees (that engage in commerce or be in an industry that affects commerce) and almost all public employers will be required to provide emergency paid sick leave related to COVID-19.

As with the FMLA amendments, this form of leave will be required through December 31, 2020. Here is a summary of the requirements:

Employers will be required to provide full-time employees 80 hours of emergency paid sick leave and provide part-time employees with emergency paid sick leave in an amount that the employee works, on average, in a two-week period. This obligation can be fulfilled through a collectively bargained multiemployer plan. Employers of employees who are health care providers or emergency responders may elect to exempt such employees.

The emergency paid sick time must be available for use immediately, regardless of how long the individual has been employed, for one of the purposes described below.

The employer cannot require that the employee find a replacement to cover the hours during which the employee is using paid sick time.

An employee may first use this emergency paid sick time before the employee uses other accrued paid sick time, and an employer cannot force the employee to use other paid sick time first.

After the first day of emergency paid sick leave, the employer can require that the employee follow the employer's reasonable notice requirements.

Employers will need to post a model notice, which is being prepared by the DOL.

The unused amount of emergency paid sick leave will not carry over from one year to the next and does not need to be paid out at the end of an individual's employment.

The DOL can exclude certain health care providers and emergency responders or exempt small businesses with fewer than 50 employees when the imposition of the requirement would jeopardize the viability of the business as an ongoing concern.

Emergency paid sick leave can be used for any of the following:

An absence because the employee is experiencing the symptoms of COVID-19 and seeking a medical diagnosis.

An absence because the employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19

An absence because a health care provider has advised the employee to self-quarantine due to concerns related to COVID-19

An absence for the purpose of caring for an individual who is subject to a Federal, State or local quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19

An absence for the purpose of caring for a child if the child's school or place of care has been closed or is unavailable due to COVID-19 precautions.

An absence because the 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

When the leave is needed for the employee's own condition or circumstances (the first 3 reasons above), the pay must equate to what the employee would otherwise be paid, capped at \$511 per day and \$5,110 in the aggregate. When leave is needed to care for a child or other individual (or when the leave is taken because the employee is experiencing a "substantially similar condition"), the required pay is 2/3 of the employee's pay capped at \$200 per day and \$2000 in the aggregate. If the employee has a variable schedule, employers will need to use the same 6 months averaging as is used in the FMLA amendment. An employee entitled to paid sick time will end on the employee's next scheduled work shift after the need for leave ends. The DOL will issue guidelines on calculating the payments.

It is not clear whether an employer can require an employee to use this emergency paid sick leave during the first 10 days of unpaid leave available under the FMLA amendments summarized above. In addition, emergency paid sick leave does not appear to apply to a situation in which an employee is caring for an individual who is experiencing symptoms of COVID-19, but who has not been advised by a health care provider to self-quarantine or ordered by the government to quarantine or self-isolate. This is likely an unintended gap, but, given the pressures on the health care system during the pandemic, it is a gap that may need to be corrected to ensure that employers can take tax credits (described below) for the payments made to employees in such situations.

Employers may not interfere with an employee's right to use emergency paid sick leave, may not discriminate against an employee who requests or uses emergency paid sick leave, and may not retaliate against an employee for using or requesting to use emergency paid sick leave. Employers who violate this portion of the Act will be in violation of the Fair Labor Standards Act, meaning that they may be liable to the employee for the emergency sick time that should have been provided, interest, an amount equal to the emergency paid sick time that should have been provided (i.e., liquidated damages), equitable relief (such as reinstatement), fees and costs.

TAX CREDITS FOR EMERGENCY PAID SICK AND PAID FAMILY AND MEDICAL LEAVE

To help defray the cost to employers of providing the required paid leave, covered private employers will be allowed to take a credit against the employer portion of social security taxes (i.e. 6.2%) or the hospital insurance taxes it paid on employees' wages each calendar quarter (through the end of 2020). The credit is an amount equal to the qualified emergency paid sick leave wages

paid by the employer that quarter under the above Emergency Paid Sick Leave Act or the paid leave provided under the above amendments to the FMLA, in addition to any qualified health plan expenses related to the paid leave provided. For wages paid under the Emergency Paid Sick Leave Act, the credit will be capped at \$511 per day for days on which full pay is required and \$200 per day for days on which 2/3 pay is required. For wages paid under the amendments to the FMLA, the credit cannot exceed \$200 per day with an aggregate cap of \$10,000 in a calendar quarter. A similar tax credit will be allowed for certain self-employed individuals.

The maximum number of days for which an employer may take credit for emergency paid leave, in a successive quarter, is 10 days more than the aggregate number of days for which the employer took credit in the prior quarters. The credit for either emergency paid leave or paid FMLA leave cannot exceed the social security and hospital insurance tax imposed on the employer for wages paid in that quarter; however, any excess will be treated as an overpayment that can be refunded to the employer. Employers may elect not to use this tax credit. If an employer does choose to take the credit, the employer's gross income will be increased by the amount of the credit taken. The Secretary of Treasury will issue regulations related to these tax credits.

We will continue to monitor regulations and other guidance related to this Act. We will also monitor other legislation being considered in Congress related to the COVID-19 pandemic and other matters affecting employers in this unusual time period. If you have questions on employment-related matters, please contact Tami A. Earnhart or any other member of our Labor, Employment & Immigration Group. For matters outside of employment, please refer to our COVID-19 Resource Center and contact a member of our COVID-19 Task Force.

Ohio's Stay at Home Order - March 22, 2020

This afternoon, a [Stay at Home Order](#) (“Order”) was issued by Dr. Amy Acton, Director of the Ohio Department of Health, mandating residents stay at home and non-essential businesses close except as otherwise provided in the Order. The Order will take effect at 11:59 p.m. EDT on Monday, March 23, 2020 and remain in effect until 11:59 p.m. EDT on April 6, 2020 unless it is rescinded or modified prior to its expiration.

Educational institutions (including public and private pre-K-12 schools, colleges, and universities) are defined as exempt essential businesses. The prior order regarding closure of schools remains in effect. Below, we highlight relevant portions of the Order.

Leaving Home for Essential Activities is Permitted

Employees are authorized to leave their residences to perform essential activities, including performing work for a school. Under the Order, each school district should determine its essential functions and identify employees and/or contractors necessary to perform these functions. Employers are to allow as many employees as possible to work from home.

Individuals are permitted to travel to schools to receive materials for distance learning, to receive meals, and for other similar services.

Providing Food Services is Still Permitted

Schools may continue providing meals to those in need, so long as the food is provided on a pick-up and takeaway basis only. Districts may not permit food to be eaten at the pick-up site or any other gathering site.

Minimum Basic Operations are Permitted to Maintain School Districts

The Order permits employees to perform activities necessary to maintain the condition of the school district (e.g., processing payroll and other employee benefits, paying bills, indoor and outdoor maintenance) and to facilitate the district's remote work (e.g., administrative and/or technology functions that can only be performed on site) so long as they follow social distancing requirements.

Playground Closure

The Order mandates the closure of children's play centers and playgrounds. Districts whose playgrounds are used by the public should post signage advising the public of this closure.

Social Distancing Requirements

When your district engages in the activities described above, it must adhere to social distancing requirements. This includes: (1) designating six-foot distances with signage, tape, or by other means for customers and employees to maintain appropriate distance; (2) having hand sanitizer and sanitizing products readily available for employees and customers; (3) implementing separate operating hours for elderly and vulnerable customers; and (4) posting hours online and indicating how best to contact the district.

As a reminder, issues related to COVID-19 are fluid and subject to rapid change. Additional information about Coronavirus and the State's response can be found [here](#).

This communication is intended as general information and should not be relied upon as legal advice. If advice is required, please contact any of our attorneys on our cell phones, at (614) 222-8686, or via email.