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LEGAL UPDATE

December 15, 2020

To: Superintendents, Member School Districts (K-12)
From: Kaitlyn Schwendeman, Assistant General Counsel *KAS*
Ellie R. Austin, Of Counsel *ERA*
Subject: Employee Leave and Accommodations during COVID-19
Memo No. 74-2020

Our office has received numerous questions regarding employee leave rights and accommodation requirements during the COVID-19 pandemic. In light of the imminent expiration of the Family First Coronavirus Response Act (“FFCRA”) additional leave benefits on December 31, 2020, we are issuing this Legal Update to provide an overview of available leave for certain types of requests related to COVID-19. However, we note that this is only a general overview and we strongly recommend consulting with legal counsel regarding individual circumstances, as each request for leave and/or accommodations is unique.

General Background

Many Local Education Agencies (“LEAs”) are preparing to, or have already, returned to in-person instruction. With a return to the school site by all employees comes questions regarding employee leave rights during this time.

Employees have multiple leave allocations that may be available for their own illness/injury due to COVID-19, including, but not limited to:

- Education Code-granted sick leave¹
- LEA-granted vacation leave²
- Personal Necessity Leave³
- Family Medical Leave Act/California Family Rights Act Leave
- Extended Illness Leave⁴

¹ Education Code §§ 44978, 87781, 45191, 88191

² Education Code §§ 45197, 88197

³ Education Code §§ 44981, 87784, 45207, 88207

⁴ Education Code §§ 44977, 87780, 45196, 88196



- Compensatory time⁵
- Board-granted leave of absence⁶

Adding to the complexity of these leaves is the unique challenges associated with COVID-19, including increased risk of illness for employees with certain characteristics who may otherwise be healthy, and mandatory quarantine required after potential or actual exposure or positive test result.

We commonly see four types of leave or accommodation requests associated with COVID-19:

1. Employee is themselves ill, or taking care of a family member sick with COVID-19.
2. Employee has received a positive COVID-19 test, or has been advised to quarantine by the Local Health Officer (“LHO”), but is not displaying symptoms of illness.
3. Employee has certain characteristics that lead to an increased risk of serious illness from COVID-19.
4. Employee lives with someone with certain characteristics that lead to an increased risk of serious illness from COVID-19.

1. Actual Illness

In the case where the employee themselves is ill, the LEA’s regular sick leave rights will apply. Currently, the CDC and CDPH recommend that an employee quarantine until:

- (1) 10 days since symptoms first appeared, and
- (2) 24 hours with no fever without the use of fever-reducing medications, and
- (3) Other symptoms of COVID-19 are improving.⁷

Cal/OSHA *requires* the exclusion of an employee who has tested positive and displays symptoms of COVID-19 until the three above conditions are met. For additional information, please see our office’s Legal Update No. 72-2020.

If an employee is caring for a family member sick with COVID-19, generally the employee may not utilize their own sick leave except for those days which may be used for personal necessity. However, LEAs may have negotiated additional rights beyond those provided by Education Code; we recommend that each LEA review their collective bargaining agreements, reopening MOUs, and Board Policy for application of the use of sick leave.

FMLA/CFRA leave may also apply if the employee or their family member has a “serious health condition,” which is defined as “an illness, injury, impairment, or physical or mental condition that involves: inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.”⁸

⁵ Education Code §§ 45128, 88027

⁶ Education Code §§ 44964, 87765, 45199, 88199

⁷ See: <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html>

⁸ 29 U.S. Code § 2611(11)



As always, LEAs should check any applicable collective bargaining agreements for additional leave rights and clarification on use of leave application.

2. Positive Test Result and/or Advised to Quarantine

If an employee has tested positive but is not displaying COVID-19 symptoms, current CDC/CDPH guidance is that the employee should quarantine for ten (10) days following the date of the test/sample collection.⁹ Similarly, an employee may be subject to a quarantine order by the LHO due to potential exposure to COVID-19, without a positive test result. These quarantine orders are typically for between 7 and 14 calendar days.

Cal/OSHA requires that an employee who has tested positive and is not displaying symptoms be excluded from the workplace for a period of ten (10) days after the positive test. Employees who have been exposed to someone with COVID-19 must be excluded for fourteen (14) days after the exposure. For additional information, please see our office's Legal Update 72-2020.

During this time, the employee may have few leave options available to them if they are unable to work remotely. The Education Code does permit a Board of Education to grant a leave of absence to an employee who must quarantine, and at the Board's discretion this leave may be paid.¹⁰ As always, the LEA may negotiate with its exclusive representative for additional rights beyond those provided by law.

3. "At Risk" Employees

Often an employee has no indication that they may have COVID-19, but are concerned about returning to the workplace because they believe that they are at greater risk for serious illness.¹¹ In this case, we recommend that a LEA first ascertain whether the employee is disabled under the Americans with Disabilities Act ("ADA"), and if so, engage in the interactive process with the employee to ascertain what, if any, reasonable accommodations can be made. Please note, the Equal Employment Opportunity Commission has stated that "[b]ecause the ADA would not require an accommodation where the employee has no disability, the employer may verify that the employee does have a disability, as well as verifying that the accommodation is needed because the particular disability may put the individual at higher risk."¹²

We urge LEAs to contact legal counsel regarding individual leave and/or accommodation requests.

⁹ See: <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html>

¹⁰ Education Code §§ 44964, 87765, 45199, 88199

¹¹ The CDPH has a list of what conditions may make someone at greater risk for serious illness, available at <https://covid19.ca.gov/symptoms-and-risks/#higher-risk>

¹² See *Question 17*, EEOC "Transcript of March 27, 2020 Outreach Webinar" available at <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q17>



4. Living Situation

Finally, LEAs may receive requests for leave and/or accommodation for employees who themselves do not fit into categories 1-3, but reside with someone who may be at risk for serious illness.

Unfortunately, there are few, if any, rights to leave and/or accommodation for these employees. Employees may be able to utilize vacation time, compensatory time, or any negotiated “no tell” days, if applicable. However, employees would generally not be eligible to utilize other leave days. Similarly, a right to a reasonable accommodation requires that the employee themselves is disabled, as discussed above, and therefore is unlikely to apply.

In some instances, LEAs have negotiated additional rights for these employees with their union partners. Please be sure to review any applicable collective bargaining agreements (including memoranda of understanding) to determine whether any rights apply to these employees.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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