

COVID 19, Your School, and Other Workplaces: A guide on leave, accommodation, and safe work requirements

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Prologue

The right to safe work is an internationally recognized human right. Unfortunately, it is a human right that is largely ignored by US employment laws and a right that is being violated in this time of COVID.

For teachers, the forced return to face-to-face education is a clear violation of this most basic human right. A return to face-to-face is not safe and it is not reasonable. Even in countries where schools returned face-to-face — that had much lower infection rates than the United States — the schools saw surges in COVID cases and often had to shut down. Schools in the US are opening with higher infection rates than any other country has had as they have attempted to open schools.

This is not an experiment as Dr. Fauci has suggested. It is a forced disaster. We have already seen school and school-like settings across the US have resulted in surges of the virus (WVU, Clemson, Westchester School, and Georgia Camp) and have often had to immediately shut down (one day after opening in Indiana and two days after opening in Tennessee).

The evidence is clear, and we cannot close our eyes to the fact that children do get infected with COVID, children do spread the virus, children do get sick from the virus, and children do have to be hospitalized, end up in ICU, have to be intubated, and even die from the virus.

We also have to open our eyes to the fact that 25% or more of our school educators and staff are particularly vulnerable to the virus.

We know parents are demanding a return to face-to-face, but they have little understanding of what that will look like. Dr. Fauci has warned teachers that they should be sure to wear a medical grade mask, goggles, gloves, and disposable clothes coverings. If they are forced to face-to-face, teachers will have to be sure they are at least six feet away from students, that students are six feet away from each other, and that students are all wearing masks. There can be no personal contact. Students who contract or are suspected of contracting the virus will have to be placed in isolation rooms. There absolutely cannot be any so called “normal” return to face-to-face.

So much of this push for face-to-face has occurred because parents are misinformed or uninformed about the virus as well as potential options they have to qualify for leave and accommodations in the workplace. Many teachers are also unaware of the rights they have to leave, accommodations, and safe work. This guide is meant to provide some of that information. Having this information is one tool in our fight for safe schools. Using it is another. But these tools alone are not a silver bullet. They will not solve this situation on their own. However, we cannot afford to leave any tool in the toolbox as we fight this battle. We must use everything available to us – concerted action, legal action, and public action.

The following guide will provide you with legal information that may help you and those around you.

Introduction

With COVID-19, the issue we generally discuss is what your rights are to safe work, or in the alternative, leave from work.

There are three laws we can look at:

1. The ADA and the accommodation process for COVID issues
2. The Families First Coronavirus Response Act and the extended Family Medical Leave Act
3. The Occupational Safety and Health Act

I want to stress that none of these options are ideal. None cover every scenario. None will be perfect for anyone. However, we are looking for all avenues to protect lives – educators, staff, students, and families. In some cases, these apply directly to teachers. In others, these may be resources for family and community members to address their concerns about schools going virtual.

So I will to cover the topics in this order:

1. Leave
2. Accommodations to the work
3. Workplace safety measures

Leave

Families First Coronavirus Response Act

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

The Basics

1. Was passed in response to the COVID outbreak.
2. Was put into effect in April and runs through December 31, 2020.
3. Two components – the Extended FMLA and the Emergency Paid Sick Leave (EPSL).
4. Up to 12 weeks of paid leave (varying levels of pay).

Exempt Employers (not all employers have to provide leave under this act)

1. Federal employers
2. Large private sector employers (more than 500 employees)
3. Small employers (50 or fewer) if it would jeopardize their business

Covered Employers

1. Most public employers are covered. Federal employers are generally excluded.
2. Private employers with fewer than 500 employees are covered. If you are employed by a staffing agency larger than 500 employees but actually work directly for another employer, the other employer is a joint employer, and if they have fewer than 500 employees, they must provide you with the leave.
3. Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or childcare unavailability if the leave requirements would jeopardize the viability of the business as a going concern. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity; the absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or there are not sufficient workers who are able, willing, and qualified and who will be available at the time and place needed to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity

Protected Employees

1. All employees of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19.

2. Employees employed for at least 30 days are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.
3. Health care providers and emergency responders are excluded from coverage.

Type of Leave You Can Receive: Emergency Paid Sick Leave (EPSL – 80 hours of leave)

If you have to quarantine

1. Where the employee is unable to work because the employee is quarantined (pursuant to federal, state, or local government order or advice of a healthcare provider) **and/or experiencing COVID-19 symptoms and seeking a medical diagnosis;** or
2. The law may provide you with your full pay (capped at \$500 per day).
3. Only for two weeks. There is a good chance that schools will be in quarantine more than once.

Conditions for self-quarantine

1. You are eligible for paid sick leave if a health care provider directs or advises you to stay home or otherwise quarantine yourself because the health care provider believes that you may have COVID-19 **or are particularly vulnerable to COVID-19 and quarantining yourself based on that advice prevents you from working (or teleworking).**
2. You may not take paid sick leave under the FFCRA if you unilaterally decide to self-quarantine for an illness without medical advice, even if you have COVID-19 symptoms. Note that you may not take paid sick leave under the FFCRA if you become ill with an illness not related to COVID-19. Depending on your employer's expectations and your condition, however, you may be able to telework during your period of quarantine.

If you have to take care of a child or other individual family member who is subject to such a quarantine

1. 80 hours paid leave
2. Full pay up to \$500 per day

If you have to take care of a child due to caretaker or school closing due to COVID or have to take care of someone with a bona fide need due to their being quarantined

1. You may also qualify for the two weeks of pay but at 2/3 of your regular rate capped at \$1,000 per week.
2. You also can qualify for 10 weeks of the same level of pay under the extended FMLA component of FFCRA (see below).

If you take EPSL, your employer cannot require you to take your paid leave (if provided by the employer) concurrently.

Extended FMLA – 10 weeks of partially paid leave

The Basics

1. Must have been with the employer for a minimum of 30 days to qualify for 2/3 pay up to \$1,000 per week.
2. Qualifies for leave if need to take care of child due to school closing, meaning physically closed. So if the school goes online/virtual, you are entitled to this leave if the employee is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19:
 - a. Day care facilities, preschools, before and after school care programs, schools, homes, summer camps, summer enrichment programs, and respite care programs
 - b. A “childcare provider” is someone who cares for your child. This includes individuals paid to provide childcare like nannies, au pairs, and babysitters. It also includes individuals who provide childcare at no cost and without a license on a regular basis, for example grandparents, aunts, uncles, or neighbors.
 - c. If the physical location where your child received instruction or care is now closed, the school or place of care is “closed” for purposes of paid sick leave and expanded family and medical leave. This is true even if some or all instruction is being provided online or whether, through another format such as “distance learning,” your child is still expected or required to complete assignments.

For the extended FMLA, you can be required to take other paid leave concurrently.

Notice and Documentation the Employee Must Provide

1. **Notice:** Where leave is foreseeable, an employee should provide notice of leave to the employer as is practical. After the first workday of paid sick time, an employer may require employees to follow reasonable notice procedures to continue receiving paid sick time.
2. **Required Documentation:** When requesting paid sick leave or expanded family and medical leave, you must provide your employer either orally or in writing the following information:
 - Your name
 - The date(s) for which you request leave
 - The reason for leave; and
 - A statement that you are unable to work because of the above reason.

If you request leave because you are subject to a quarantine or isolation order or to care for an individual subject to such an order, you should additionally provide the name of the government entity that issued the order.

If you request leave to self-quarantine based on the advice of a health care provider or to care for an individual who is self-quarantining based on such advice, you should additionally provide the name of the health care provider who gave advice.

If you request leave to care for your child whose school or place of care is closed or childcare provider is unavailable, you must also provide:

The name of your child

The name of the school, place of care, or childcare provider that has closed or become unavailable; and

A statement that no other suitable person is available to care for your child.

Employers Notice Requirements

1. Post notice of your rights.
2. Inform you if they have reason to believe you may qualify.
3. Approve your leave or give reason for denial/request info within 5 days.

How To Take Leave

1. If the extended leave is for the closure of a school or daycare provider, the leave generally must be taken on consecutive days. However, an employer can allow for intermittent leave. This is important as schools consider A/B type of schedules.
2. The Department of Labor encourages (does not require) employers and employees to collaborate to achieve flexibility and meet mutual needs, and the Department is supportive of such voluntary arrangements that combine telework and intermittent leave.

Other Leave Entitlement: Standard FMLA

1. 12 weeks unpaid leave to care for self, parent, child, or spouse for a serious health condition or for the birth, placement, or adoption of a child
2. Unpaid, but some states provide pay or supplement: California, Connecticut, D.C., Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Washington
3. Some cities also provide for paid sick leave or family leave. San Francisco and Minneapolis are two examples.

What To Do If Denied Leave

If you believe your employer is improperly refusing you paid sick leave or expanded family and medical leave, you may call WHD at 1-866-4US-WAGE (1-866-487-9243) or visit www.dol.gov/agencies/whd. Your call will be directed to the [nearest WHD office](#) for assistance to have your questions answered or to file a complaint.

In some cases, you may also be able to file a lawsuit against your employer directly without contacting WHD. Some state and local employees may not be able to pursue direct lawsuits because their employers are immune from such lawsuits. For additional information, see the WHD website at: <https://www.wagehour.dol.gov> and/or call WHD's toll free information and help line available 8am–5pm in your time zone, 1-866-4-US-WAGE (1-866-487-9243).

Accommodations to the Work

The Americans with Disabilities Act (ADA) and COVID

What if you want to continue to work rather than take leave or you do not qualify for the leave but have circumstances that mean you cannot/should not be working under workplace norms? You may qualify for an ADA accommodation, which may include telework.

Who Is Covered under the ADA and/or Rehabilitation Act

1. Applies to employers with 15 or more employees
2. Covers all employees, including essential workers
3. Covers otherwise qualified individuals with a disability

Otherwise Qualified Individual

1. Meets the qualifications for the job
2. Presence or perception of a substantial impairment/disability that impacts one or more life function (seeing, breathing, walking, working, etc.)
3. Able to perform the essential functions of the job, either with or without an accommodation

Employer Responsibilities

Employers must provide a reasonable accommodation to otherwise qualified individuals who are able to perform the essential functions of the job (either with or without such accommodation) unless such an accommodation would create an undue hardship.

Reasonable Accommodation

Effectively addresses the issue and allows the employee to perform the essential functions. Some things are not reasonable per se – changing the workload, regular attendance (although type of attendance is not – i.e. telework versus face-to-face).

Essential Functions of the Job

The reasons the job exist, the heart of the job – factual, case-based determination, burden on employer to show these:

Undue Hardship

1. More than a financial analysis (i.e. not cost/benefit)
2. Really look at feasibility or significant disruption to the business or production. Cannot be based on the morale of other workers – per se.
3. An accommodation poses an "undue hardship" if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the

accommodation, the resources available to the employer, and the operation of the employer's business.

4. If a particular accommodation would result in an undue hardship, an employer is not required to provide it but still must consider other accommodations that do not pose an undue hardship.

Disabilities/Qualifying Conditions

1. The ADA only applies to qualifying conditions that impact the worker (i.e. cannot be for care of family members or to avoid harm to family members).
2. The high-risk factors identified by the CDC and WHO are included as qualifying conditions for a reasonable accommodation. Other conditions not yet recognized also would qualify.
3. If an employee has a condition that puts them at higher risk of contracting or suffering from COVID, it is a qualifying disability as determined by the EEOC.
4. If a condition would be exacerbated by COVID, it is also a qualifying disability.
5. Mental health issues are treated the same way as physical issues. The EEOC's directives on COVID specifically recognize that those with anxiety, OCD, PTSD, etc. may indeed suffer more as a result of COVID and that employers must engage in the accommodation process with such employees.
6. Age and pregnancy alone do not qualify, which is problematic. Age might have to ID an underlying condition. Pregnancy may have a Pregnancy Discrimination Act issue.

Reasonable Accommodation Process during COVID-19

1. Cannot require you to jump through hoops. Simply notifying the employer you need an accommodation in any way triggers their responsibility to start the process. You do not have to use the term reasonable accommodation. You do not have to put it in writing. It can come through a third party.
2. Employers are expected to engage in an interactive process.
3. Employers can request reasonable medical documentation:
 - a. The EEOC is suggesting they should not do so during this time (i.e. health professionals are busy dealing with other issues, and people should not be going to hospitals/doctors' offices unless necessary).
 - b. They cannot request this documentation if the condition is obvious or already known.
4. The accommodation simply has to be effective – it allows the employee to engage in the essential functions of the job while meeting their need (i.e. not exposing them to the heightened risk of COVID).
5. The employer **MUST** provide such an accommodation unless they can show it creates undue hardship.
 - a. Look at the level of disruption to the business. It would have to at a minimum create significant difficulty in operating the business.
 - b. The cost puts a significant burden on the ability of the business to operate.
 - c. Cannot be based on the morale of other workers.

- d. Cannot just be an inconvenience.

Specific COVID-19 EEOC Directives

1. When an employer receives a request for accommodation to reduce the risk of exposure to the coronavirus, an employer must consider this request under the ADA and engage in the interactive process to provide reasonable accommodations, barring undue hardship.
2. The individual might have an underlying impairment and limitation that, if infected with coronavirus, would lead to serious complications. There is no comprehensive list of such impairments, but individuals with heart disease, diabetes, lung disease or asthma, a weakened immune system, kidney disease, cirrhosis, etc. are considered at higher risk for developing.
3. Given the current overload on health-care providers and facilities in response to managing the coronavirus pandemic, individuals may not be able to access their healthcare provider simply to obtain ADA documentation. Also, the risk of exposure to coronavirus from visiting a healthcare provider and the requirement to practice social distancing or sheltering in place may impede individuals from accessing an appropriate professional who can provide ADA documentation at this time.
4. Note that [disability-related documentation](#) is not required to approve an accommodation under the ADA, but employers may ask for information to establish the right to receive an accommodation. During the current pandemic coronavirus situation, employers are encouraged to consider various means for obtaining information to establish this right. The following practical suggestions may be useful:
 - a. Ask the individual for specific information about their impairment, limitations, and need for accommodations related to the coronavirus situation (e.g., what the underlying disability-related need for accommodations is).
 - b. Consider whether the employer already has sufficient information on file about the impairment and limitations for which an accommodation is needed (e.g., from a previous request for an accommodation for the same impairment).
 - c. Accept information from a personal medical record from a past visit to a healthcare provider who establishes the impairment.
 - d. Accept a telemedicine consult with an appropriate provider, a form or stamped note from a clinic, or an e-mail from a healthcare provider who establishes the impairment and need for an accommodation.
 - e. Request authorization to communicate directly with the individual's healthcare provider for confirmation of the impairment and clarification regarding the need for an accommodation.
 - f. Approve the accommodation request without obtaining formal disability-related documentation if the employer has good reason to believe the individual has the impairment for which they have requested an accommodation and document that disability-related documentation will not be required at this time given the current public health situation.

Telework/Virtual/Work from Home as A Reasonable Accommodation

1. During a pandemic, EEOC guidance suggests telework is more commonly considered a reasonable accommodation.
2. COVID-19 has made telework even more relevant. Even if an employee has no telework program, telework may fall under a reasonable accommodation, even if the employer does not allow any other employee to telework. The employer may adopt a different accommodation, but only if it meets the requirement of reasonable.
3. Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.
4. In making the determination if working from home is a reasonable accommodation:
 - a. This determination should be made through a flexible "interactive process" between the employer and the individual.
 - b. The employer and the individual need to discuss the person's request so that the employer understands why the disability might necessitate the individual working at home and how the job could still be performed from the employee's home.
 - c. An employer and employee first need to identify and review all of the essential job functions. The essential functions or duties are those tasks that are fundamental to performing a specific job.
 - d. An employer may need reassign some minor job duties or marginal functions. If a marginal function needs to be reassigned, an employer may substitute another minor task that the employee with a disability could perform at home to keep employee workloads evenly distributed.
 - e. After determining what functions are essential, the employer and the individual with a disability should determine whether some or all of the functions can be performed at home. Examples of roles that may not be able to be done from home: food servers, cashiers, and truck drivers. Emphasis is on that most tasks CAN be done from home.
5. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone, and information can be exchanged quickly through e-mail.
6. If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs. For example, an employee may need to meet face-to-face with clients as part of a job, but other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to review documents and write reports from home.
7. Cannot refuse telework due to the excuse of morale of the workforce.

Denial of Accommodation

If you have been denied an accommodation you can file a complaint with the EEOC and/or your state Human Relations/Rights Commission:

EEOC – Complaint Process:

<https://www.eeoc.gov/filing-charge-discrimination>

For more details:

<https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

<https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm>

JAN is the Job Accommodation Network contracted by the EEOC to advise on workplace accommodations.

Workplace Safety Measures

Occupational Safety and Health Act and COVID

<http://www.osha.gov/covid-19>

States have varying relationships with OSHA and how their safety clauses apply in both the public and private sector. OSHA contacts should be able to give you more information and in many states, the DoL regulates workplace safety for state, municipal, and government workers.

The General Duty Clause

Section 5(a)(1) of the Occupational Safety and Health Act (the "General Duty Clause") requires an employer to furnish to its employees: "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

OSHA's Guidance on Preparing Workplaces for COVID-19

1. While OSHA emphasizes that this guide does not create new legal obligations, they also emphasize the General Duty Clause.
2. OSHA tells employers what they need to do to keep the place safe:

Employers and workers should use this planning guidance to help identify risk levels in workplace settings and to determine any appropriate control measures to implement.

This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations as well as descriptions of mandatory safety and health standards. The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace. The Occupational Safety and Health Act requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a) (1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

OSHA's Guidance Depends on the Risk Levels of Jobs

OSHA specifically categorizes school employees, including teachers, as medium risk. However, they might also meet the definition of high risk (generally limited to health care workers) depending on the level of the virus in a community. High exposure risk jobs are those with high potential for exposure to known or suspected sources of COVID-19.

Medium Risk

Defined

Medium exposure risk jobs include those that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with SARS-CoV-2 but who are not known or suspected COVID-19 patients. In areas without ongoing community transmission, workers in this risk group may have frequent contact with travelers who may return from international locations with widespread COVID-19 transmission. In areas where there is ongoing community transmission, workers in this category may have contact with the general public (e.g., schools, high-population-density work environments, and some high-volume retail settings).

Recommended Measures for Medium Risk Jobs

1. Install physical barriers, such as clear plastic sneeze guards, where feasible.
2. Consider offering face masks to ill employees and customers to contain respiratory secretions until they are able leave the workplace.
3. Keep customers/students informed about symptoms of COVID-19 and ask sick customers/students to minimize contact with workers until healthy again.
4. Where appropriate, limit customers' and the public's access to the worksite or restrict access to only certain workplace areas.
5. Consider strategies to minimize face-to-face contact (e.g., drive-through windows, phone-based communication, or telework).
6. Communicate the availability of medical screening or other worker health resources (e.g., on-site nurse or telemedicine services).
7. Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask, and/or a face shield or goggles. PPE ensembles for workers in the medium exposure risk category will vary by work task, the results of the employer's hazard assessment, and the types of exposures workers have on the job.

Additional Measures for High Risk Jobs

1. Employers will need to assure that there are proper air-handling systems installed (medical grade air handling systems).
2. Those with COVID or suspected of having COVID should be placed in airborne infection isolation rooms.
3. Most workers at high or very high exposure risk likely need to wear gloves, a gown, a face shield or goggles, and either a face mask or a respirator, depending on their job tasks and exposure risks.

If you believe your employer has failed to meet these safety standards or is in violation of the General Duty Clause, you should contact OSHA immediately.

How To Contact OSHA

Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to help ensure these conditions for America's working men and women by setting and enforcing standards and providing training, education and assistance. For more information, visit www.osha.gov or call OSHA at 1-800-321-OSHA (6742), TTY 1-877-889-5627.

OSHA Regional Offices

Region 1

Boston Regional Office
(CT*, ME*, MA, NH, RI, VT*)
JFK Federal Building
25 New Sudbury Street, Room E340
Boston, MA 02203
(617) 565-9860 (617) 565-9827 Fax

Region 2

New York Regional Office
(NJ*, NY*, PR*, VI*)
Federal Building
201 Varick Street, Room 670
New York, NY 10014
(212) 337-2378 (212) 337-2371 Fax

Region 3

Philadelphia Regional Office
(DE, DC, MD*, PA, VA*, WV)
The Curtis Center
170 S. Independence Mall West, Suite 740
West
Philadelphia, PA 19106-3309
(215) 861-4900 (215) 861-4904 Fax

Region 4

Atlanta Regional Office
(AL, FL, GA, KY*, MS, NC*, SC*, TN*)
Sam Nunn Atlanta Federal Center
61 Forsyth Street, SW, Room 6T50
Atlanta, GA 30303
(678) 237-0400 (678) 237-0447 Fax

Region 5

Chicago Regional Office
(IL*, IN*, MI*, MN*, OH, WI)
John C. Kluczynski Federal Building
230 South Dearborn Street, Room 3244
Chicago, IL 60604
(312) 353-2220 (312) 353-7774 Fax

Region 6

Dallas Regional Office
(AR, LA, NM*, OK, TX)
A. Maceo Smith Federal Building
525 Griffin Street, Room 602
Dallas, TX 75202
(972) 850-4145 (972) 850-4149 Fax

Region 7

Kansas City Regional Office
(IA*, KS, MO, NE)
Two Pershing Square Building
2300 Main Street, Suite 1010
Kansas City, MO 64108-2416
(816) 283-8745 (816) 283-0547 Fax

Region 8

Denver Regional Office
(CO, MT, ND, SD, UT*, WY*)
Cesar Chavez Memorial Building
1244 Speer Boulevard, Suite 551
Denver, CO 80204
(720) 264-6550 (720) 264-6585 Fax

Region 9

San Francisco Regional Office
(AZ*, CA*, HI*, NV*, and American Samoa,
Guam and the Northern Mariana Islands)
San Francisco Federal Building
90 7th Street, Suite 2650
San Francisco, CA 94103
(415) 625-2547 (415) 625-2534 Fax

Region 10

Seattle Regional Office
(AK*, ID, OR*, WA*)
Fifth & Yesler Tower
300 Fifth Avenue, Suite 1280
Seattle, WA 98104
(206) 757-6700 (206) 757-6705 Fax

Other Potential Resources

1. If you believe your rights have been violated, you should contact an attorney. You want an experienced plaintiff-side employment attorney. The National Employment Lawyers Association provides contacts to these attorneys. <https://www.nela.org/>
2. Be familiar with health and safety clauses in your Collective Bargaining Agreement (CBA). In many cases, you will be able to refuse unsafe work. In others, you may have to follow the “work first, grieve second” process.
3. Your state health departments might also have enforcement measures.

Frequently Asked Questions (FAQs)

What is PPE?

While there are various definitions of PPE, under OSHA the definition is equipment worn to minimize exposure to hazards that cause serious workplace injuries and illnesses. These injuries and illnesses may result from contact with chemical, radiological, physical, electrical, mechanical, or other workplace hazards. Cloth face coverings are not considered PPE.

Does the employer have to provide PPE?

Generally under OSHA, employers WILL have to provide PPE. Under the OSHA guidance on COVID, teachers are listed as medium risk, meaning they must have gloves, gowns, face coverings, and goggles. Cloth face coverings are NOT considered PPE under OSHA, indicating that the required face covering under OSHA is more than a cloth face covering. While this guidance states that it is not meant to create additional obligations, employers may need to provide this equipment. Under the ADA, supplying such equipment may also be required. However, the EEOC does consider some protective equipment personal use equipment, so it may put the burden on employees to supply the equipment. Given the shortage of PPE, OSHA has made an additional recommendation for employers to engage in telework wherever possible. This recommendation is made in numerous places throughout federal agencies' response to COVID-19.

Would having a medical professional on the premises be a requirement under OSHA?

It does not appear to be. However, employers should have a COVID response team, and asking for such an accommodation under the ADA might be a possibility.

If I use leave under the FFCRA, will this count against my normal FMLA?

Yes. The leave under the extended FMLA and the related EPSL does count toward the 12 weeks maximum FMLA in a calendar year.

Will employers use a large number of employees requesting leave or accommodation as proof of an undue hardship?

They may make this argument, but it does not appear it would be found to be such. Considering that they would be left with a reasonable option of going to virtual/online schooling, it does not appear to meet the legal definition of an undue hardship.

Is the 30-day requirement for FMLA a calendar month or number of working days (minus days off)?

Calendar month

How do you apply to get the leave?

Your employer should have forms or provide you with information about the documentation they need. However, here is a link to the [DOL forms for standard FMLA certification](#). You can use these if your employer does not have a form and if you are taking leave due to a closed school.

Provide a typed signed letter that your child's school is closed and there is no other available person to take care of them.

Does FFCRA apply if your child's school is offering a "remote" option that you choose?

While it has not been determined definitively, it appears that if your child's school offers face-to-face during the normal full weekly schedule that the FFCRA would not be available.

Would having to redo scheduling of students constitute "undue hardship"?

It does not seem likely as there are other options. The employer could simply accommodate via virtual learning.

Could dwindling state budget (paying for a sub, for example) be considered "undue hardship"?

Budgets definitely can create an undue hardship. It could impact how much of an accommodation would be provided in terms of how much would they spend. However, the move to virtual would not be an unreasonable expense. So the argument could be that the employer is creating their own undue hardship by refusing to move to virtual.

Are there particular names of mental health conditions that are covered under ADA?

Yes. The ADA does have some specific areas they cover as well as some specific exclusions. Some of those relevant to the COVID situation include all CDC and WHO recognized factors that make one high risk, which are covered. Conditions exacerbated such as OCD, PTSD, and anxiety are all also specifically covered. Pregnancy and age are not disabilities under the ADA. Outside of the COVID issue, other items that have been generally covered include most cancers, severe obesity, dyslexia, osteoporosis, and severe allergies (any significant impairment to a body system or mental or physical disorder).

Does it matter if you were born with the condition or not?

It does not matter. However, the longer the condition lasts or is likely to last, the more likely it is to be considered a disability under the ADA. Also, the greater the impairment, the more likely. For instance, a sprained ankle is more likely to be transitory and not covered, but two broken legs would be a substantial impairment and likely to be covered.

Do the numbers of COVID cases in an area factor into qualifying for ADA?

They would definitely seem to have an impact on the reasonableness of the accommodation. The idea is that the accommodation allows the employee to do their work while overcoming the condition. If they have a heightened risk due to COVID, and the community has a high rate of COVID, the only reasonable accommodation may be to work from home. Keep in mind: if that is the only way for an employee to continue to work, but they CAN perform the essential functions of the job at home, the employer would NOT be allowed to force the employee to take leave as an accommodation.

Is it an OSHA violation to have students eating lunch in a teacher's classroom (students need to take off their masks)?

This situation would definitely seem to violate the OSHA standards as well as many of the standards established by many health departments. It is also why the mask required under medium risk jobs is more than a cloth mask. Teachers should definitely have a medical grade mask that protects them from the virus.

Is having a lack of sinks on campus for hand-washing considered an OSHA violation?

Engineering standards under the OSHA guidance seem to at least suggest the need for hand-washing stations.

Epilogue

The right to safe work is a fundamental human right. However, in the course of normal business, that right is ignored in the US employment culture and largely ignored in US employment law as well. The era of COVID-19 has made this issue abundantly clear — perhaps most especially for educators and staff in K-12 and higher ed.

There is no reason that during this time of COVID-19, employers, including school districts, cannot take the steps they should and that are necessary to protect the lives of educators and staff. There are some laws in the U.S. — the ADA, the FFCRA and OSHA — that do push employers in that direction. However, rather than following the spirit of these laws and recognizing the inherent value of the lives of employees, we see employers looking for loopholes and ways around providing even the most basic of accommodations.

As a result, the legal rights described here should be viewed as one tool. Be prepared to have to fight for these and ideally look to fight collectively. Your union leaders, building reps, stewards, and Union EC should all be able to help you file for leave, accommodations, and safe workplaces. Make sure that you have documentation and witnesses every step of the way. Also, be prepared to use other tools — pressure campaigns, corporate campaigns, and even safety strikes as the AFT and Randi Weingarten have supported.

It is literally a fight for lives. Only by standing together can we win this fight.

In solidarity!

Resources Used in This Guide

Families First Coronavirus Relief Act

<https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>

EEOC Guide on Telework as a Reasonable Accommodation

<https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation>

EEOC on COVID 19 and the ADA

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

EEOC Pandemic Preparedness

<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

JAN Accommodation during COVID 19

<https://askjan.org/blogs/jan/2020/03/the-ada-and-managing-reasonable-accommodation-requests-from-employees-with-disabilities-in-response-to-covid-19.cfm>

<https://askjan.org/topics/COVID-19.cfm>

<https://askjan.org/blogs/jan/2020/03/coronavirus-covid-19-stress-and-mental-health-conditions.cfm>

OSHA

Returning to work plans: <https://www.osha.gov/Publications/OSHA4045.pdf>

Preparing workplaces for COVID 19: <https://www.osha.gov/Publications/OSHA3990.pdf>