Connecticut Association of
School Personnel Administrators
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WE AREN'T OUT OF THE WOODS YET:

Personnel Issues Confronting School Districts at the End of the COVID-19 Pandemic

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QUESTION ONE:

This spring, we encouraged a non-tenure teacher to resign instead of having her contract non-renewed. Should we consider the termination of her employment to be voluntary so that she is not eligible for COBRA subsidies as now provided by Section 9500 of the American Rescue Plan Act of 2021?

ANSWER TO QUESTION ONE:

- The American Rescue Plan Act of 2021 (ARPA) provides that persons whose employment is terminated involuntarily and who are eligible for COBRA benefits ("assistance eligible individuals") are entitled to a 100% subsidy for their COBRA payments between April 1, 2021 and September 30, 2021.

- The ARPA also requires that employers send out notification of this change to such assistance eligible individuals, which notifications presumably have been sent out.

- The United States Department of Labor has issued guidance on this provision in the ARPA in the form of Frequently Asked Questions, available online at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-premium-assistance-under-arp.pdf.

- Neither the ARPA nor the FAQs specifically define "involuntary" termination of employment. Moreover, to date, the United States Department of Labor has not provided any guidance or adopted any regulations. However, a helpful analogy is

how unemployment compensation claims are treated. With such a claim, the teacher's resignation here would not be considered voluntary.

QUESTION TWO:

A teacher in my district is just now asking to take leave for childcare reasons related to COVID-19 (because her husband who was the primary caregiver just got a job). What rights does this teacher have to this leave in this situation?

ANSWER TO QUESTION TWO:

Short answer: Not as many rights as the teacher had at the beginning of the pandemic, but be cautious before denying this leave outright.

- First, look to any applicable **collective bargaining agreement, individual employment contract, and/or employer policies or handbooks**. These contracts and policies may provide employees with:
    - Paid time off, such as vacation days, personal days, sick days, family illness leave, and child care leave.
    - Unpaid leave for specified or unspecified reasons.
    - **Be careful about allowing employees to use sick days for child care reasons.** Many employers are strict about letting employees use sick leave only when they are actually sick. Bending this rule now could result in a claim that you are treating similarly situated individuals differently if you depart from decisions you have made in the past or make different decisions in the future.
- In a collective bargaining context, it is also important to review any **past practice** that may govern the situation.
    - If the employer previously allowed employees to take leave for child care for any reason, the employer may be required to do so now unless it bargains over a different result.
    - It is important to avoid **creating** a new practice or precedent by permitting employees to take either paid or unpaid leave for child care reasons in these circumstances. Consider creating an memorandum of agreement to avoid setting a precedent.
- Second, it is important to be aware of all applicable state and federal laws relating to child care leave for COVID-related reasons.

HISTORY OF RELEVANT LEGISLATION:

- The Families First Coronavirus Response Act (FFCRA) **expired on December 31, 2020**. FFCRA had **required** certain employers to provide paid sick and expanded family and medical leave, or FMLA+, to employees unable to work or telework for specified reasons related to COVID-19 from April 1, 2020 through December 31, 2020.

- Earlier this year, under the Consolidated Appropriations Act of 2021, governmental employers were permitted to provide paid leave **on a voluntary basis** through March 31, 2021. However, public employers were **not eligible for expanded tax credits** that were available to small and mid-size private employers. Therefore, there seemed to be little incentive for public employers to voluntarily offer this leave.

- In early April, the ARPA was signed into law by President Biden. One significant impact of the ARPA was the expansion of eligibility for tax credits to certain governmental employers that **voluntarily** provide qualifying paid sick and family leave to employees.

  Now, state and local government employers who voluntarily provide the paid leave that had been available under FFCRA, from **April 1, 2021 through September 30, 2021**, may be eligible for certain tax credits. **Specifically, tax credits under the ARPA are allowed against the employer portion of the Medicare tax for wages paid from April 1, 2021 through September 30, 2021.**

  We mention this here because the leave that entitles public employers to tax credits includes the child care-related leave that had been available under FFCRA -- specifically, paid leave for the reason that the employee is caring for his or her child whose school or place of care has been closed (or child care provider is unavailable) for reasons related to COVID-19.

  We are monitoring this development and awaiting clarification and guidance from the IRS to address this major change from previous rules.

- **NOTE about school district staff:**

  - **Executive Order 10, signed on February 4, 2021, requires local and regional boards of education to continue to provide paid leave to school district employees consistent with the Emergency Paid Sick Leave Act (EPSLA) portion of the FFCRA.**

- Executive Order 10 was set to expire on **May 20,** but Executive Order 12B was issued that day, extending Executive Order 10 **through June 30**.

- Executive Order 10 is retroactive to December 31, 2020, which means that if an employee took leave since December 31, 2020 that would have qualified for paid leave under the EPSLA, the employee is entitled to have any available EPSLA leave applied to such prior leave should the employee elect to do so.

- Employees who have already exhausted all, or part of, their EPSLA leave are not entitled to any new leave; the 80-hour FFCRA cap still applies overall.

- Executive Order 10 does not require extension of the FFCRA's Emergency Family and Medical Leave Expansion Act (FMLA+), which had provided **up to ten weeks of partially paid leave for employees caring for a minor child whose school or place of care has been closed due to COVID-19.** Caring for a child whose school or place of care is closed due to COVID-19 remains a legitimate use of the EPLSA, but such leave cannot exceed 80 hours.

- **The key question remains whether the child's school or place of care is closed due to COVID-19 -- not some other reason unrelated to COVID.**

QUESTION THREE:

My superintendent is planning to eliminate most, if not all, snow days next year by declaring remote learning days. The president of the teachers' union thinks that snow days are important for teacher mental health, and she is demanding negotiations over whether the superintendent can call for a remote learning day instead of a snow day. Is that decision negotiable?

ANSWER TO QUESTION THREE:

- As a threshold matter, we must consider whether offering remote learning days (such as remote learning on snow days) will be permissible next year. The answer appears to be **yes**, based on interim guidance for remote learning for the 2021-2022 school year from the CSDE and legislative initiatives that support the permissive use of remote learning by school districts more broadly (for example, Senate Bill 2, An Act Concerning Social Equity and the Health, Safety, and

Education of Children). Senate Bill 2 passed the Senate on May 5, 2021 and has been calendared for the House. We are monitoring this Bill with interest.

- As to whether the district must negotiate with the teachers' union over the decision to call for remote learning days instead of a snow day, the answer is **no**. School districts have a duty to negotiate when they make a significant change in working conditions. If the change simply relates to an operational concern (*e.g.*, whether to assign new duties to teachers), the employing board of education must negotiate over whether those new duties will be assigned and to whom. However, when a change in working conditions is driven by educational policy decisions reserved to the board of education and the superintendent, there is no duty to negotiate over the decision. Modality of instruction is such a decision. Accordingly, the duty is simply to negotiate over the **impact** of the change in working conditions.

- If the union's concern is the mental health of teachers, one possibility to consider in any impact negotiations is ways to address the concern more directly. For example, one possibility would be to offer a limited about of release or teacher-directed time in exchange for each snow day that becomes a remote learning day.

QUESTION FOUR:

A secretary in the special services department has significant health concerns, including being immunocompromised following treatment for cancer. She has been working remotely for over a year, and her colleagues gladly picked up the extra duties (finding files, making copies) for her during the pandemic. However, her doctor has just sent a note informing us that, given her risk factors, she should keep working remotely on a permanent basis. Can we say that her working remotely is no longer a reasonable accommodation even though we have been permitting her to work remotely for over a year?

ANSWER TO QUESTION FOUR:

- **Just because remote work occurred during the pandemic, it is not necessarily reasonable now**. For example, some employers, including school districts, may have had different, or fewer, needs during the pandemic, resulting in a change in the essential functions of certain employees' jobs. However, those needs may return to business as usual in the fall, and so, too, may the essential functions of certain positions.

- However, employers cannot deny the request for permanent remote work outright. They are still required to engage in the interactive process required by the ADA.

- Specifically, the EEOC has said that the temporary remote experience during the pandemic could be relevant to considering whether a request to work remotely on a permanent basis is reasonable. For example, the period of working remotely because of the COVID-19 pandemic could serve as a trial period that showed whether or not the employee could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests to work remotely in light of this information. As with all accommodation requests, the employee and the employer should engage in a flexible, cooperative interactive process going forward if this issue does arise. The key is to consider the specific facts presented in each situation.

- In this case, the district should consider how the secretary performed while working remotely this year. The district should also consider how, if at all, the secretary's duties will change next year when the district returns to some form of normalcy, and whether the resumption of business as usual may impact the secretary's ability to perform the essential functions of her job remotely.

- Although the interactive process is a highly individualized process that should take into account a specific employee's disability and any accommodations available, the district should keep in mind that if it allows some employees to work remotely, it is setting a precedent for other employees who may also ask for remote work as an accommodation. The district should consider whether remote work is reasonable for certain positions but not others, and if so, why. For example, it may not be reasonable to allow teachers to work remotely (particularly if students are learning entirely in person next year), but the analysis may be different for secretaries and other staff members who do not work directly with students.

- Finally, if the district determines that working remotely is not a reasonable accommodation, it must consider what other accommodations it could offer the employee, such as additional PPE and/or distancing. This analysis must occur through the interactive process.

QUERY: What if an employee has not been, and will not be, vaccinated, and that is driving her request for permanent remote work?

- There are multiple reasons why an employee may not be vaccinated. Specifically, some employees may not be able to get vaccinated for COVID-19 because of a disability or a sincerely held religious belief, practice, or observance. In both cases, employers must provide a reasonable accommodation unless it would pose an undue hardship on the employer. The question, then, becomes whether remote work is a reasonable accommodation.

- If the employee simply refuses to get vaccinated based on a generalized fear of vaccination, the employer may take this into account when determining whether the accommodation of remote work is "reasonable." The analysis as to whether an accommodation is reasonable depends on nature of the job, whether there are other accommodations are available, and/or whether it remains reasonable to continue an accommodation next year, with other accommodations in place, a largely vaccinated population (closer to herd immunity), and decreased transmission rates.

QUESTION FIVE:

Our district is offering a summer program for children with disabilities. Teaching during the summer program is an extra duty assignment that we post every year, and we have never had any shortage of takers, given that we pay teachers and paraprofessionals their full per diem salary for a shortened day. Since the program is only six weeks long, can we post this work opportunity as available only to vaccinated teachers and paraprofessionals?

ANSWER TO QUESTION FIVE:

- In effect, this is a question as to whether the district can require employees in these particular positions to be vaccinated.

- Case law and EEOC guidance conclude that it is permissible under federal law to mandate the COVID-19 vaccine. Specifically, the ADA allows an employer to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, there is still some question about whether the vaccines' emergency use authorization (EUA) limits this authority.

- Also, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

    - Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.

    - A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.

- If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

- If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the FMLA or under the employer's policies.

- There is a separate but related question as to whether it is appropriate to require employees in these summer positions to be vaccinated while not requiring **all** district employees to be vaccinated. The reason for this mandate should be based on business necessity. Here, for example, children with disabilities may be at higher risk than other children of serious illness related to COVID-19, and they may not have been vaccinated themselves. Moreover, there is a legitimate concern that a need to quarantine would severely impair the ability of the employee to fulfill this extra duty assignment.

- It is also important to consider the collective bargaining implications of the decision to require vaccination as a condition of eligibility for these positions. While we do not think districts are required to bargain over the decision to mandate vaccines, they will need to bargain over the impact of this requirement.

QUESTION SIX:

My motto is the more you know, the better. Accordingly, I am planning to send out a survey to staff members asking them to let me know if they have been vaccinated. Given that their vaccination status could affect how we assign staff members, I think we have every right to ask. Can I discipline a staff member who tells me to mind my own business?

ANSWER TO QUESTION SIX:

First of all, can you require proof of vaccination?

- Currently, guidance from the EEOC indicates that employers **can** ask whether an employee has been vaccinated and can require proof of vaccination, **as long as the employer follows certain protocols to ensure compliance with the ADA.**

- Asking for vaccination information and/or requiring proof is not a disability-related inquiry under the ADA.

    - There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related.

    - Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry.

- However, proceed carefully! Asking follow-up questions, such as why an employee **has not been** vaccinated, may elicit information about a disability. Asking for that type of information would have to be job-related and consistent with business necessity, which is a high standard in the COVID-19 vaccination context.

- In addition, if the employer asks for proof, it should warn employees not to provide any medical or genetic information (in order to avoid implicating the ADA), and advise employees that documents will be kept confidential and stored in a file separate from the personnel file.

Should you require proof?

- We also recommend that employers consider why they are asking for proof of vaccination.

- For example:

    - Some employers might seek this information because the CDC offers different recommendations for quarantining after exposure to a suspected or known case of COVID-19 for vaccinated and unvaccinated individuals.

    - Another reason might be to consider options for high-risk employees who may be more protected if they are surrounded by colleagues who have been vaccinated (**but be careful not to reveal that someone is at high-risk).**

- By contrast, **we do not believe it would be appropriate to decide not to inform employees that they have been exposed to COVID-19 simply because they have been vaccinated.** Regardless of an employee's vaccination status, normal protocols of contact tracing and notification should apply.

Can you discipline an employee for refusing to provide proof?

- This takes us back to the question of whether districts should **require** proof of vaccination, or, instead, simply should encourage employees to provide this information voluntarily. These are difficult times, and employees may have many personal reasons for refusing to provide proof. We recommend encouraging, but not requiring, employees to provide proof of vaccination. If an employee refuses to provide proof, the logical consequence will be that the employee will be assumed to be unvaccinated. The district should take steps accordingly in working with the employee (for example, with respect to quarantine requirements and the employee's assignment, if vaccination status is relevant to the assignment).

- Given that employers can **require** proof of vaccination, an employee can be disciplined for insubordination for refusing to provide proof. However, as noted above, disciplining an employee in this circumstance may not be advisable as districts are continuing to work on boosting morale coming out of a very trying year.

QUESTION SEVEN:

One of the teachers in our district is active on social media. She has been whining for over a year that our response to the pandemic has been inadequate. As we look to the light at the end of the tunnel, she continues to see only darkness. In fact, as we start to relax our rules with an eye toward normal operation in the fall, her complaints have only grown shriller. Last week, however, I think that she crossed the line by claiming on Facebook that changes in our protocols are endangering both students and teachers. Can I write her up for riling people up?

ANSWER TO QUESTION SEVEN:

- Since 1968, the United States Supreme Court has interpreted the First Amendment to confer protections on teachers and other public employees who speak out on matters of public concern. The protection applies even if the speaker is incorrect in his/her statements unless there is proof that such false statements were made recklessly or maliciously. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

- In *Pickering*, a teacher wrote to the newspaper and was critical of how the superintendent and the board of education had handled past proposals to raise revenue for the schools. The Supreme Court ruled that teachers (and other public employees) have the right under the First Amendment to speak out on matters of public concern unless such speech disrupts school operation.

- On the other hand, speech about private matters -- *e.g.*, those of personal grievance -- are not protected by the First Amendment.
  - The United States Supreme Court elaborated on the scope of free speech protections for public employees in *Connick v. Myers*, 461 U.S. 138 (1983). In *Connick*, an assistant district attorney, who was about to be transferred over her objection, circulated a questionnaire about office operations, created a "mini-insurrection," and was fired. With one exception (a question on whether employees felt pressured to work on political campaigns), the Court held that the employee was not speaking on a matter of public concern but rather on a matter of personal grievance (the unwanted transfer), and her actions were not protected under the First Amendment.

- **Even if a statement relates to a matter of public concern and would otherwise be protected, speech that is damaging to the operation of the public enterprise is not protected from regulation**. In *Connick*, the Court held that the free speech interests of public employees must be balanced against the legitimate interest of public agencies to operate efficiently. If the speech is a serious disruption, the employer can prohibit it and/or take related disciplinary action against the employee. Following *Connick*, courts have identified various factors that must be considered in determining whether speech by a public employee is protected, including the following:

  - the need for harmony in the public work place;
  - whether there is a need for a close working relationship between the speaker and the persons who could be affected by the speech;
  - the time, manner, and place of the speech;
  - the context in which the dispute arose;
  - the degree of public interest in the speech; and
  - whether the speech impeded the ability of the other employees to perform their duties.

  Applying these factors to various situations, courts have often found speech not to be protected.

- Finally, when an employee engages in protected speech, it is often better not to talk to the employee about that speech. Once an employer raises concerns about

employee speech, the employer invites a retaliation claim if and when any employment action is necessary, including reassignment or discipline.

- **Here, the teacher's statements about workplace safety relate to a matter of public concern given that, perforce, they affect teachers and students. The question, then, is whether the speech may be regulated on the basis that it is causing a serious disruption to the operation of the district. This requires fact-based inquiry into the nature of the disruption, which must be balanced against the teacher's free speech rights.**

- The analysis may be affected here if the teacher was responding to statements made by other teachers about safety issues in the workplace. A public employee's post on social media about working conditions may be protected by the applicable public sector labor relations law (*e.g.*, the TNA or MERA). Based on the original collective bargaining law, the National Labor Relations Act (1935), many states have conferred union rights on public employees. A basic right in such statutory schemes is the right to engage in concerted collective activity without employer interference. If this teacher was reaching out to her colleagues to discuss workplace safety, she may be engaging in protected activity under the TNA.

QUESTION EIGHT:

A paraprofessional sent me an email yesterday with a link to about five different sources of guidance related to masks and declared that she will not be wearing a mask when she returns to school next fall because she was fully vaccinated as of May 15. She also said that she has spoken to a couple Board of Education members who told her that they do not plan to require that vaccinated members of the Board or the public wear masks when they start meeting in person this summer. How should I respond?

RESPONSE TO QUESTION EIGHT:

- There certainly has been a great deal in the public sphere lately about whether the mask mandate has been lifted, and if so, for whom.

- The CDC updated its guidance on May 13, 2021, as follows:

    - Fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.

- Fully vaccinated people can refrain from testing following a known exposure unless they are residents or employees of a correctional or detention facility or a homeless shelter

- **However,** the CDC's guidance is not the end of the story. Employees in your district must adhere to all applicable **state** laws, rules, and guidance. Earlier this week, the Connecticut Department of Public Health issued guidance providing that **all** people, vaccinated or unvaccinated, need to wear a mask when they are inside a school building (pre-K–12) or childcare facility. This is because these settings may be more likely to have people there who are not able to be vaccinated due to young age or a health condition.

- Regarding the Board of Education's plans for in-person meetings, you may want to let the Board know about DPH's latest guidance.

  - Read literally, the guidance requires that all people must be masked inside a school building, regardless of the purpose for being there or the time they are there. If the Board is holding its meetings in a school building, even after school hours, they are advised to adhere to this directive.

  - In addition, the DPH guidance provides the following information for business owners and event operators, which Boards are advised to consider in deciding how to avoid liability issues related to health and safety:

    - Should consider requiring customers to wear a mask when they are inside an establishment if the space is not designed for continuous social distancing.

    - Should consider requiring customers/attendees to wear a mask when they are inside an establishment or at a large indoor event or private gathering where there is likely to be a mix of vaccinated and unvaccinated people (including children younger than 12 years).

We hope that this information is helpful to you and your school district. Remember that summer recess is only weeks away!