

COVID19 FAQ's

Contributed by: Christine Mayhew, Esq. ANDERSON JONES, PLLC

The following has been composed by attorney Christine Mayhew. Ms. Mayhew is an outside, independent attorney and is not an employee of PENC. The provision of this information does not establish an attorney-client relationship between Ms. Mayhew and the recipient of this information. Ms. Mayhew has compiled this information for educational and informational purposes only and it is not to be taken as legal or other advice. Actual legal advice particular to a specific factual situation would require a detailed and careful analysis of the facts and applicable law. No reader of this information should act or refrain from acting on the basis of information contained herein without first seeking legal advice from his or her counsel.

What legal changes have been made to provide paid leave to those unable to work because of illness or the closure of schools or day care?

President Trump signed the Families First Coronavirus Response Act (FFCRA) into law earlier this year. Two provisions are most important to teachers and other district staff members:

- The Emergency Family and Medical Leave Act expands the Family and Medical Leave Act (FMLA) to cover some situations specific to novel coronavirus, such as a parent's need to care for their children who would normally be in school or childcare.
- The Emergency Paid Sick Leave Act provides a legal entitlement to paid sick leave for some employees who are absent for work due to certain coronavirus-related reasons.

These laws are new and therefore there is not established precedent as to how these laws will be applied, though we do have some published guidance from the US Department of Labor on these laws. Here is some additional analysis:

1. **Paid sick leave** (80 hours or 10 days) for all full time employees who qualify (part time employees are allowed leave in an amount equal to the average number of hours the employee works over a two-week period)
2. **Expansions of the Family and Medical Leave Act** to provide an extended period of unpaid or partially paid leave to certain employees who are 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 ('E-FMLA').

While the **paid sick leave** applies to any employee who has a medical condition which qualifies, the **E-FMLA provision** only applies to employees who have been employed for 30 days or more.

PAID SICK LEAVE:

In terms of the **paid sick leave**, it applies when

(1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19.

(2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.

(3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.

(4) The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2).

(5) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID–19 precautions.

(6) 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.

The amount of compensation is calculated based on the usual rate of pay and the number of hours the employee would otherwise be normally scheduled to work, except there is a maximum benefit of:

- \$511/day and \$5,110 in total for use under (1) – (3) above.
- \$200/day and \$2,000 aggregate for use under (4) – (6) above.
- For use under (4) – (6) above, the employee is compensated at two-thirds their normal rate of pay.

E-FMLA

The E-FMLA only applies to an employee 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. The regular FMLA is still in place as well so folks that do not fall under E-FMLA, but would fall under the FMLA, still have those benefits and protections.

If the law applies, it provides that:

- The first 10 days of leave under the E-FMLA are unpaid. The employee may elect to substitute paid vacation, personal, medical, or sick leave.
- After 10 days, the employee is entitled to pay at two-thirds of the employee’s regular rate of pay.
- Maximum compensation is \$200 per day, with a maximum of \$10,000 in total.
- The employee required to give notice of need for leave as soon as practicable
- When the employee is able to return, the employee’s rights are similar to a return from FMLA, except where (1) the business has fewer than 25 employees, and (2) the employee’s position has been eliminated due to changes in operation caused by public health emergency. In this case, the employer must make reasonable efforts to re-employ the employee for one year.

Please see attached guidance from the Department of Labor regarding specific details of the Emergency Sick Leave and E-FMLA:

<https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

In addition to the new paid sick leave law and the E-FMLA, an employee with a disability covered under the ADA might qualify for an accommodation of time off from work as an accommodation for the disability, and the employee may also be covered for leave time under the regular Family Medical Leave Act (“FMLA”). However, both leave time under the ADA and FMLA may be unpaid.

Can a staff member stay home if they are afraid of becoming infected?

There is not currently a law in place which protects a teacher or staff member from coming to work solely on the basis of being scared of contracting the virus. However, there are some considerations to be made.

The first step in addressing an issue of being fearful of returning to work would be to talk with your administrator about your concerns and why you have them. Do this early and keep lines of communication open.

If an employee has a medical condition which qualifies as a disability under the Americans with Disabilities Act (“ADA”), the employee may consider asking the district to consider time away from work a reasonable accommodation of a disability under the Americans with Disabilities Act; the staff member might also consider other accommodations such as work from home where available. Other accommodations might also be available. In addition, the Occupational Safety and Health Act of 1970 (“OSHA”) provides some protection against workers from going to an unsafe working environment. Finally, the Family Medical Leave Act (“FMLA”) can offer medical leave under certain circumstances to employees who are suffering from a defined serious health condition. Under both the ADA and FMLA, a staff member’s health care provider will likely have to be involved in the request.

Again a specific analysis would need to be done as to the specific facts of a case to see if either the ADA or FMLA, or protection under OSHA, would apply; readers should contact legal counsel to discuss the particular facts and circumstances of their individual situation and to obtain advice tailored to their specific situation.

Can a staff member stay home if they live with someone who is high risk to contract COVID19?

FMLA allows employees to take certain leaves of absence to care for a sick family member under certain circumstances. Whether or not an educator would be eligible to take leave under FMLA to care for a family member who has not contracted COVID19 and would therefore not be covered under the FFCRA set forth above, but who is at risk to contract this disease, would require a very detailed factual analysis. If you believe that you may fall into this category, you should talk with your administration about FMLA leave to care for a family member with a serious medical condition. Medical documentation from your family member and his or her health care provider may be required. More information can also be found here:

<https://www.dol.gov/general/topic/benefits-leave/fmla>

Can a district require a teacher be tested for infection?

The Equal Employment Opportunity Commission has recently published guidance on what type of medical exams employers can conduct as related to COVID19, and that guidance can be found here: <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> If a school district has a reasonable belief, based on objective evidence, that an employee poses a direct threat to the health and safety of others, the school system may have grounds to ask an employee to be tested.

Can a teacher be reprimanded or fired for disagreeing with their district's plan to reopen next school year?

The answer to this question is complicated. Teachers and other school district employees have protections regarding expressing their opinion. The most important is the right to expression protected by the First Amendment to the U.S. Constitution. But First Amendment protections are not absolute and do not apply in every situation. The U.S. Supreme Court has ruled the First Amendment does not apply when a government employee (all public school employees are government employees) comments on a matter involving his/her own job duties. The First Amendment only applies to comments made as a citizen.

In addition, even where the First Amendment does apply, the U.S. Supreme Court has ruled that there is a “balancing test,” where the employee’s right to express his/her opinion is weighed against the disruption that results from that opinion.

If a teacher expresses his or her disagreement with a plan, it is possible that serious negative consequences could result because of this balancing test. In addition, it is almost always best to express concerns professionally. Also as might be expected, the particular facts of a situation, including in what is being said, have to be taken into consideration as to whether or not the speech is protected. There are few bright line rules or absolutes.

In the end, although the First Amendment might provide some protection, educating students is a very team-oriented project, and the ill will that can result from extreme or offensive communications can both make the workplace a very unpleasant place and actually hurt the education the students will receive.

Can a staff member be fired for complaining about a safety and health issue at school?

The North Carolina Retaliatory Employment Discrimination Act protects certain employees from retaliation from engaging in protected behavior and specifically includes protection for those

employees who initiate any inquiry, investigation, inspection, proceeding or other action, or testify or provide information to any person with respect to a violation of the North Carolina Occupational Health and Safety Act. Again the specific circumstances regarding the complaint would have to be examined to see if it would fall under the protections REDA provides. More information regarding REDA can be found here: <https://www.labor.nc.gov/workplace-rights/retaliatory-employment-discrimination>

What remedies are available to a staff member if he or she contracts COVID19 at school?

The North Carolina Worker's Compensation Act may provide coverage for a staff member who contracts COVID at work. We all know that teaching subjects educators to routine illness at an increased rate compared to the general public. The hard part may be proving a teacher got a highly communicable disease at work rather than from non-occupational exposure. If the staff member is at a school where there was a widespread outbreak, that claim might have a better chance than a teacher who contracted the disease which was not widely present at the school. It may be impossible to prove exactly where it came from, so the Industrial Commission (the NC agency tasked with overseeing worker's compensation claims) would deal with the preponderance of the evidence; *i.e.* is it more likely than not that the teacher caught the disease at school. A widespread outbreak at work is evidence from which the Industrial Commission could conclude that a teacher's employment likely contributed to the development of the disease.

For example, a teacher who lives alone, isolates at home, disinfects/cleans regularly, and wears PPE might have a chance if a student in his or her class tested positive. Conversely, a teacher who is not taking protective measures outside work may not prevail on a worker's compensation claim.

It may be possible to have an accident claim too. If a teacher is wearing PPE and a student pulls the mask away and breathes or spits in the teacher's face, and the student were to test positive and then the teacher became sick, that is a case where the disease may be compensable under the Worker's Compensation Act.

As with many issue regarding COVID19, this area of the law is still developing.
