KNOW YOUR RIGHTS

Educator FAQs on Reopening Schools

WEAC Legal Division
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This document is intended to provide general guidance on educator questions related to the reopening of schools. It does not constitute legal advice. Contact your UniServ Director if you require individual advice on a specific issue.

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INTRODUCTION

The Wisconsin Education Association Council (WEAC) believes that any reopening schools plan must ensure the health and safety of students and staff and also prioritize long term strategies on student learning and educational equity.

No one knows better than an educator how much students benefit from face-to-face instruction and interactions with their peers, but parents and educators agree we must have the time and resources to reopen safely. NEA and WEAC have put forward plans which mitigate risk, but they require funding from policymakers to ensure social distancing, rigorous cleaning and disinfecting standards, PPE, testing and contact tracing and access to internet and devices for all students.

Understandably, educators have many questions and concerns about reopening schools safely. The following attempts to address those questions and concerns. If you require guidance on specific individual issues, please contact your UniServ Director.

EMPLOYEES WITH UNDERLYING HEALTH CONDITIONS

Q: I have an underlying medical condition that puts me at high risk of COVID-19 complications, and I am nervous about returning to school, what rights do I have?

A: Employees with high risk medical conditions can request accommodation under the Americans with Disabilities Act (ADA).
Individuals at higher risk for severe COVID-19 illness due to an underlying medical condition may be entitled to a reasonable accommodation under the ADA. The Centers for Disease Control and Prevention (CDC) identified the following serious underlying medical conditions that place employees at higher risk for severe illness from COVID-19 and that, with the exception of obesity, would **also** likely qualify as ADA-covered disabilities:

Chronic kidney disease	Serious heart conditions
COPD	Sickle cell disease
Immunocompromised from solid organ transplant	Type 2 diabetes mellitus
Obesity (BMI 30 or higher)	

The CDC also notes that there are other conditions that **might** increase an employee's risk for severe illness from COVID-19. These include moderate to severe asthma, cerebrovascular disease, hypertension, cystic fibrosis, immunocompromised state (such as from blood or bone marrow transplant, HIV, corticosteroid use), dementia, liver disease, pulmonary fibrosis, thalassemia, and type 1 diabetes mellitus and pregnancy.(See p. 6, herein, for more information on pregnancy).

The fact that an employee has a high-risk condition on the CDC list does not necessarily entitle the employee to stay home from work. The employee must request a reasonable accommodation and engage in an interactive process with the employer to explore possible accommodations. A connection between the condition and need for accommodation to reduce the risk from the condition must exist. Employees with conditions the CDC asserts **might** increase the risk of serious illness from COVID-19 should request accommodation as needed but should be aware that eligibility is uncertain.

The employee does not need to provide medical documentation at the time of the request for the accommodation; however, the employer may request it and the employee will need to comply. Therefore, the employee should contact the employee's physician to discuss the need for potential accommodations and should be prepared to provide medical documentation to the employer that is relevant and necessary to support that the employee has a disability under the ADA requiring an accommodation.

Employees may seek various types of accommodations.
Accommodations **could** include:

Transfer to vacant position with less contact with people	Telework/ remote work
PPE/Distancing/Other transmission reduction measures	Medical leave (be sure the duration of the leave is not open-ended; establish an end date, i.e., until CDC criteria for safe reopening have been satisfied).

Note that the employer may be able to establish that an accommodation would pose an undue hardship and deny the requested accommodation (i.e., allowing a classroom teacher to telework while students are in the classroom in need of supervision).

If a request for accommodations is denied, the employee should ask the employer for the specific reason for the denial and should report the denial to the employee's local union or UniServ Director.

Employers cannot require employees with high risk conditions to stay home.
An employer cannot bar an employee from the workplace *solely* because the employee has a high-risk medical condition. The employer can only make the employee stay home if the condition constitutes a "direct threat" to the employee's health. A direct threat is defined as a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced through reasonable accommodation.

Employers are most likely prohibited from requiring employees to disclose high risk medical conditions.
Employees with underlying medical conditions may voluntarily disclose high-risk conditions, but it is probably not permissible for employers to force disclosure. Normally, asking employees if they are immuno-compromised or have a chronic condition is a disability-related inquiry prohibited by the ADA. However, the ADA permits such inquiries if a pandemic becomes severe enough to reasonably conclude that compromised employees will face a direct threat from the pandemic disease. In that circumstance, employers may engage in disability-related inquiries of asymptomatic employees to identify those at higher risk of complications from the pandemic disease. In March 2020, the EEOC determined that the COVID-19 pandemic meets the direct threat standard in regard to the disease itself. Therefore, an employer may require daily temperature checks or ask questions about symptoms. However, the EEOC has been silent on whether this direct threat determination extends to high risk, non-COVID-19 medical conditions or disabilities. Absent explicit EEOC guidance, the employer is likely still barred from requiring disclosure of underlying medical conditions.

If you have a high risk condition, talk to your local leadership or UniServ Director for advice in starting the interactive process with your employer as soon as possible.

OLDER EMPLOYEES

Q: I am at high risk of COVID-19 complications because I am an older employee, what rights do I have?

A: Age does not entitle an employee to stay home or to request accommodation.
The Centers for Disease Control and Prevention (CDC) has identified that the risk of severe illness from COVID-19 increases as you get older, with the greatest risk among those age 85 or older. The CDC previously considered people aged 65 years or older to be high risk due to age alone. On June 25, 2020, the CDC issued revised criteria that no longer refers to persons aged 65 or older as a distinct high risk group. However, employers may still be using 65 years of age as a benchmark to assess risk.

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against employees age 40 or older. However, the ADEA does *not* include a right to reasonable accommodation for older workers due to age. With that said, employers could voluntarily agree to provide accommodations to older worker who request them.

Employer cannot make older employees stay home solely due to age.
The ADEA prohibits discrimination due to an employee's age. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of age for adverse employment actions, including involuntary leave, layoff or furlough.
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Older employees must be given similar accommodations as similarly situated younger employees.
The ADEA requires that older workers be treated the same as other workers. This means an older employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees. If an employer is providing accommodations for other employees based solely on their fear of contracting COVID-19, the older employee is also entitled to similar accommodation.

The employer can give preferential treatment to older workers.
The ADEA permits employers to favor older workers, even if it results in younger workers of any age being treated less favorably. For example, an employer may offer telework only to workers aged 65 or older. The ADEA does not require the employer to offer the same accommodation to workers aged 40 – 64 years of age.

PREGNANT EMPLOYEES

Q: I am pregnant and am concerned about returning to work for in-person instruction during the pandemic, what rights do I have?

A: Pregnancy by itself does not entitle an employee to stay home or to request accommodation.
An employee cannot request accommodation *solely* because the employee is pregnant. Pregnancy is not a disability under the Americans with Disabilities Act (ADA). The Centers for Disease Control and Prevention (CDC) has, however, indicated that pregnant persons "might be at an increased risk" for severe illness as a result of COVID-19.

Pregnant employees may request accommodation if they experience pregnancy-related conditions that qualify as disabilities.
Pregnancy-related medical conditions may be disabilities under the ADA, even though pregnancy itself is not. A pregnancy-related medical condition, such as gestational diabetes, could be considered high risk due to COVID-19 and may warrant accommodations.

Pregnant employees must be given similar accommodations as other employees with non-high risk medical conditions.
The Pregnancy Discrimination Act (of Title VII) specifically requires that women affected by pregnancy, childbirth and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who are similar in their ability or inability to work. If an employer is providing accommodation for other non-high risk conditions, the pregnant employee may also be entitled to similar accommodation.

Employers cannot make an employee stay home solely because the employee is pregnant.
Sex discrimination under Title VII includes discrimination based on pregnancy. Even if motivated by benevolent concern, an employer is not permitted to single out workers on the basis of pregnancy for adverse employment actions, including involuntary leave, layoff or furlough.

EMPLOYEES WITH MENTAL HEALTH CONDITIONS

Q: I have a mental health condition that is causing me difficulty coping with the stress of the pandemic. What rights do I have?

A: Employees with mental health conditions that qualify as disabilities under the Americans with Disabilities Act (ADA) may request reasonable accommodations. Mental health conditions are treated the same as disabling physical conditions under the ADA. An employee seeking an accommodation must request it (preferably in writing) and provide certain documentation supporting the request for the accommodation if requested by the employer. (See p. 3-4, herein, for more details on accommodations).

EMPLOYEES LIVING WITH HIGH-RISK INDIVIDUALS

Q: Someone in my household has a high-risk condition and I'm concerned about exposing them to COVID-19 by returning to work. What rights do I have?

A: The Americans with Disabilities Act (ADA) does not require accommodations under these circumstances. However, employees may have leave available to care for a disabled family member.

Under state and federal Family and Medical Leave Act (FMLA) laws, employees are entitled to unpaid leave to care for the serious health condition of specified family members**.** Under the Families First Coronavirus Response Act (FFCRA) employees are entitled to paid leave when caring for someone who is subject to a quarantine/ isolation order. (See p. 10 for more information about the FFCRA). Employees may also request a leave of absence from the employer to care for a family member even if one of these laws does not apply. The employer could voluntarily agree to grant the request for leave, though it would not be obligated to do so.

EMPLOYEES WITH COVID-19

Q: What should I do if I contract COVID-19?

A: Stay home and report your absence using the standard procedure at your workplace. Even if you are working from home, you should contact your supervisor by telephone or email. If you are at the job site, you should go home immediately after informing your supervisor. Your employer can require you to stay home if you are reporting COVID-19 symptoms.

Please be aware that your employer can inquire about your symptoms and require you to identify all coworkers you have been in "close contact" with within the prior two weeks. You must cooperate with these inquiries.

Contact your primary care physician for a diagnosis and treatment. You should be ready to provide proof to your employer that you are infected with COVID-19. You will also need a medical diagnosis to access benefits under the Families First Coronavirus Act (FFCRA).

Ask your doctor for an opinion on whether the virus was contracted at work. You may be eligible for worker's compensation, but only if a doctor will certify to a reasonable degree of medical probability that you contracted the virus during the course and scope of your employment. This will be difficult to prove. Be prepared to provide your doctor with a list of your close contacts with all people in the prior two weeks, any information you have about the presence of the COVID-19 in your school, and the steps you have taken outside of work to prevent infection.

Contact your union and human resources department about use of sick days/medical leave. Request Emergency Paid Sick Leave (EPSL) from human resources. You are eligible for two weeks of EPSL under the FFCRA. You should request that this leave be taken first before using any accrued sick leave. If your recovery time outlasts any available paid leave, contact human resources to ask for leave under the Family Medical Leave Act (FMLA) or for a medical leave of absence.

Monitor your symptoms and stay home until you meet the criteria to end home isolation. When you stop experiencing symptoms, consult with your doctor about when it would be safe to return to work. Inform your HR representative when you have a return date. Your employer may require a doctor's note certifying fitness for duty.

Contact your union representative if you have any questions or concerns about how your employer is responding to your medical crisis.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

Q: What leave am I entitled to under the Families First Coronavirus Response Act (FFCRA)?

A: The FFCRA provides paid sick leave and parental leave to eligible employees, including all public school employees, for certain COVID-19 related situations. The law took effect on April 2, 2020, and expires on December 31, 2020.

Emergency Paid Sick Leave

The FFCRA grants full-time employees up to 80 hours (i.e. 10 days) of paid sick leave. Part-time employees are entitled to paid leave equal to the number of hours they work, on average, over a two-week period. Part-time employees with irregular work schedules are entitled to leave equivalent to the number of hours the employee worked per day over the past six months.

Employees may use the paid sick time under FFCRA prior to any existing paid leave offered by the employer. FFCRA prohibits employers from forcing employees to use other paid leave first. Further, employers may not modify their existing paid leave policies to avoid being subject to this requirement.

Employees may use FFCRA sick leave, and ***will be compensated at their regular rate of pay up to a maximum of $511 per day***, when the employee is unable to work due to:

- Quarantine pursuant to federal, state or local government order related to coronavirus;
- Having been advised by a health care provider to self-quarantine due to coronavirus concerns; or
- Employee experiencing COVID-19 symptoms and seeking a medical diagnosis.

Employees may also use FFCRA sick leave to care for others, and ***will be compensated at two-thirds of the employee's regular rate of pay up to a maximum of $200 per day***, in the following situations:

- To care for an individual who is subject to quarantine pursuant to federal, state or local government order or who has been advised by a medical provider to isolate for reasons related to coronavirus;
    - **Note:** The law does not appear to require any particular familial or other relationship between the employee and the individual they are "caring for"
- To care for a son or daughter under the age of 18 whose school or childcare provider has been closed or is unavailable due to coronavirus; or
    - **Note:** "Son or daughter" is defined to include biological, foster or adopted child, a stepchild, a child of a domestic partner, a legal ward or the child of a person standing *in loco parentis*
- The employee is experiencing a substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Labor and Secretary of the Treasury.

Emergency Family and Medical Leave Expansion Act

Congress also amended the Family and Medical Leave Act (FMLA) to provide employees with up to 12 weeks of paid leave for childcare needs related to the coronavirus pandemic. This benefit is only available to employees who are unable to work (or telework) due to a need to care for a son or daughter under the age of 18 if that child's school or place of care has been closed or is unavailable due to a coronavirus-related public health emergency. Employees must have been employed for at least 30 days in order to use this emergency leave.

Under the EFMLA, the first 10 days (two weeks) of the twelve weeks of leave will be unpaid. During these initial two weeks, the employee has the option to elect to substitute any accrued paid leave (including Emergency Paid Sick Leave). The employer cannot force the employee to substitute paid leave. The remaining 10 weeks of leave will be paid at two-thirds of the employee's regular rate of pay up to a maximum of $200 per day and $10,000 in the aggregate. For part-time workers, pay will be calculated by averaging the number of hours worked, per day, over the previous six months.

To the extent the need for leave is foreseeable, the employee is required to provide the employer with notice. As with the FMLA, the employee must be restored to his or her job position, or equivalent, upon return from leave.

REQUIRING FACE COVERINGS

Q: My employer says it is illegal to require students and staff to wear masks; is this true?

A: No. While wearing a mask has become a political issue taken up by conservative groups across the country, some of whom have filed lawsuits claiming mask requirements violate individuals' constitutional rights, e.g. freedom of speech, such lawsuits are unlikely to be successful.

In the school setting, we believe school boards are allowed to impose dress codes without violating students' "individual liberties." It follows that schools can require students to wear masks during a global pandemic.

Moreover, the Centers for Disease Control and Prevention (CDC) guidance on school reopening provides that "[f]ace coverings should be worn by staff and students (particularly older students) as feasible, and are most essential in times when physical distancing is difficult." See link, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html.

Similarly, DPI's reopening guidance states that "DHS recommends adults and students over age 2 wear cloth face coverings." See link, https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Education_Forward_web.pdf,

COMMUNICATION ABOUT POTENTIAL WORKPLACE EXPOSURE TO COVID-19

Q: Will I be informed if a student or staff person in my school is diagnosed with COVID-19?

A: The CDC recommends that school districts coordinate with local health officials to communicate about possible COVID-19 exposure. School districts will not name the individual diagnosed as they are required to maintain the confidentiality of this information under state and federal law. If you were in close contact with the student you will also be contacted by the local health department with information and recommendations.

LIABILITY WAIVERS

Q: My employer is asking me to sign a waiver releasing the district from liability if I contract COVID-19, should I sign?

A: Hold off on signing any such waiver and immediately provide it to your UniServ Director for review.

Such a waiver is almost certainly ineffective. In the vast majority of cases, worker's compensation would provide the only means of relief for employees who contract COVID-19 at work, and worker's compensation rights cannot be waived. Likewise, rights under state workplace safety laws cannot be waived.

That the employer is asking employees to sign such a waiver suggests that it cannot provide a safe workplace, as it is required to do by law. Employees should work with their unions on responding to and communicating externally about the employer's apparent acknowledgement that it cannot provide a safe environment for students and staff.

SAFE WORKPLACE LAWS

Q: What laws keep me safe at work? How can I report unsafe working conditions?

A: <u>Occupational Safety Statute</u>
Wisconsin grants public employees rights and protections relating to occupational safety and health at least a stringent as those provided to private sector employees under the OSH Act. See the Public Employee Health and Safety Law, Wis. Stat. §101.055. The Wisconsin Department of Safety and Professional Services (DSPS) is charged adopting safety standards, receiving and investigating public employees' requests for inspection and enforcing employer compliance with safety standards. A public employee who believes that a safety or health standard is being violated, or that a situation exists which poses a recognized hazard likely to cause death or serious physical harm, may request the DSPS to conduct an inspection. Such requests for inspection may be filed by the employee or his or her union representatives. When filing the request for inspection, the employee or representative may designate that his or her name should not be disclosed to the employer and the DSPS must honor that request. After a request for inspection is filed, the DSPS determines, in its discretion, whether an on-site inspection is warranted and, if so, what if any remedial measures are necessary. Employers are prohibited from discharging or discriminating against an employee for filing a request for inspection, for testifying in a DSPS proceeding or for reasonably refusing to perform a task which represents a danger of serious injury or death. The Equal Rights Division of the Wisconsin Department of Workforce Development adjudicates complaints alleging discrimination under the Public Employee Health and Safety Law.

Unfortunately, neither OSHA nor the DSPS have established any regulatory standards relating to COVID-19. Considering the current lack of mandatory safety standards addressing COVID-19, it is unknown whether the DSPS will exercise its discretion to investigate COVID-related inspection requests. To compare, at the federal level, according to the New York Times, OSHA has received more than 5,000 complaints related to COVID-19, yet has issued only a single citation to a nursing home which failed to report employee hospitalizations within 24 hours.

We are concerned some employers may reopen facilities, without adequate safety precautions in place, believing that a DSPS enforcement action is unlikely. However, even if the DSPS ultimately declines to investigate a complaint or inspect a school, there may still be value in filing a good-faith complaint with DSPS so that the agency is at least put on notice of safety issues in schools.

<u>Safe Place Statute</u>
In addition to meeting OSHA's specific standards, Wisconsin employers have a more general duty to furnish safe employment for employees and a safe place of employment for employees and frequenters (which includes students). See the Safe Place Statute, Wis. Stat. §101.11. To fulfill their duties, employers must implement safeguards and adopt processes reasonably adequate to render the place of employment safe. While an employer does not need to guarantee absolute safety, it must provide an environment as free from danger to the life, health, safety, or welfare of employees and frequenters (including students) as the nature of the premises will reasonably permit.

If employers fail to satisfy their duties to employees under the statute, an injured employee is entitled to a 15% increase in any workers compensation benefits due. If employers fail to satisfy their duties

to frequenters of the premises, such as students, an injured frequenter can bring a lawsuit against the employer.

Labor Activity Protections

Beyond the protections described above, Wisconsin public school employees have the right to engage in concerted activities for mutual aid and protection under the Wisconsin Municipal Employment Relations Act (MERA), Wis. Stat. §111.70. This would include working with your union to advocate for safe working conditions and reporting dangerous conditions. If your employer interferes with or retaliates against you for exercising your rights under MERA, your employer may have committed a prohibited practice. The Wisconsin Employment Relations Commission adjudicates prohibited practice complaints. More on your rights under MERA can be found on pages 17-18, herein.

REFUSING TO WORK

Q: Can I refuse to return to work because of concerns for my safety related to COVID-19?

A: A refusal to work should be an absolute last resort and can have severe employment consequences. Efforts should be made through your union to persuade the employer to adopt standards that make employees feel safe before refusing to work.

Under the Public Employee Safety and Health Law, Wis. Stat. § 101.055, an employer cannot discharge or otherwise discriminate against a public employee because the employee "***reasonably*** refused to perform a task which represents a ***danger of serious injury or death***."

Whether the refusal was "reasonable" is a key factor in determining if an employee is protected from discharge or discrimination under this law. A refusal to work under conditions where the employer has implemented all CDC recommendations, is not likely to be deemed reasonable. However, a refusal to work where the employer has ignored such guidelines could be deemed reasonable.

In addition, the task that the employee is being asked to perform must present "a serious danger of injury or death." This may be difficult to establish in the context of COVID-19, especially since neither OSHA nor DSPS have developed enforceable safety standards to protect workers from COVID-19 and would depend on the circumstances.

Furthermore, employees who, in concert, refuse to work because of their good faith belief that the tasks they are being asked to perform are dangerous, may have protections from retaliation by the employer under the Municipal Employment Relations Act (MERA), Wis. Stat. § 111.70. This issue has not directly been addressed by the Wisconsin Employment Relations Commission, the agency that enforces MERA. However, the National Labor Relations Act (NLRA) does provide such protections, and decisions under the NLRA **may** guide the decision making of the WERC.

Be sure to consult with your UniServ Director before refusing to work so that the specific circumstances of the refusal can be reviewed and analyzed.

SPEAKING OUT

Q: What right do I have to speak out regarding concerns about schools reopening safely and other COVID-19 safety issues?

A: Wisconsin's Municipal Employment Relations Act, Wis. Stat. §111.70(2), provides municipal employees (including teachers and support staff) with the right to engage in lawful, concerted activities for the purpose of mutual aid and protection. It is a prohibited practice for a school district to interfere with, restrain, or coerce municipal employees in the exercise of this guaranteed right.

In general, speaking about workplace safety issues in the context of the COVID-19 pandemic for the mutual aid and protection of employees is likely to be protected speech so long as it is lawful (e.g., threats of violence in your requests/demands for safe working conditions would take them out of the lawful realm). As COVID-19 is a highly communicable disease that has already killed over 120,000 people in the U.S. in less than 6 months, preventing the spread in school settings among staff and students is a matter of mutual aid and protection.

Example:

- Engaging in discussions with co-workers and questioning administration about whether safety measures are sufficient to protect employees:
    - Will the district implement effective sanitization and decontamination of doorknobs, handles, surfaces, equipment?
    - What measures are employers putting in place to prevent employees and students from contracting COVID-19 in classrooms, gyms, hallways, offices, bathrooms, etc.?
    - Will employers follow DPI's recommendations regarding wearing face masks within school district facilities for the protection of employees and students?

In addition, the 1st Amendment protects speech when public employees speak as citizens (not employees) about matters of public importance (not private matters about personal issues or individual work concerns).

To best assure 1st Amendment protection, do the following:

- Speak as a citizen about broad policy issues (such as preventing the spread of COVID-19), not personal workplace gripes.
- Choose language and tone carefully. If speech is disruptive to the school community it can lose protection.
- Don't use school devices or accounts for your communication.

Examples:

- Signing a petition to ensure adequate funding so schools can implement needed safety measures.
- Writing a letter to the editor, as a citizen, about the need for safe school reopening plans.

Consult with your UniServ Director to frame speech in ways most likely to have protection under MERA or the 1st Amendment

ADDITIONAL RESOURCES:

- DPI's Education Forward: Safely and Successfully Reopening Wisconsin Schools (https://dpi.wi.gov/sites/default/files/imce/sspw/pdf/Education_Forward_web.pdf)

- CDC (https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html)

- "What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," EEOC Guidance Document, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

- Pandemic Preparedness in the Workplace https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

- NEA COVID-19 Resources https://educatingthroughcrisis.org/your-rights/

- WEAC Platform on Safe Reopening of Schools http://weac.org/2020/06/12/weac-releases-platform-for-safe-reopening-of-schools/