

Legal Update: Winter 2021

BASA Regional Meetings

January 2021

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Today's Agenda

- Managing the Remote Workplace
- HB 404
- This Week's COVID-Related Issues
- Negotiations Outlook for 2021



What's Happened Since March 2020 ...

- Orders, orders and more orders ... SO.MANY.ORDERS.
 - Not to mention recommendations
 - And “Guidance” from various entities
- Federal legislation – FFCRA
- Federal agency regulations/ guidance – EEOC, DOL
- State legislation – HB164, HB197, HB606
- State agency guidance – ODE, ODH
- Close school/re-open school (*kind of*)
- Litigation related to orders and re-opening school



Remote Instruction

- Employees need to understand that traditional rules still apply while teaching remotely
- Have you issued written expectations?
 - Instruction
 - Broadcasting
 - Professional conduct
 - Attire
 - Environment
- Establish pipeline to communicate concerns



Remote Instruction

- Political and religious items, attire or backdrops
- Side conversations – chats, breakout rooms
 - One-on-one conversations?
- Sharing content (inappropriate/confidential)
- Recordings – by teacher, by student/parent
- Bias, discrimination, harassment
- Understanding expectations of students and enforcement of same (attendance)
- Understanding reporting obligations (child abuse/neglect, bullying, etc.)



Professional Conduct

- ODE Tip Sheets
 - Remote Instruction – Tip Sheet 11
 - Professional Boundaries and Personal Business – Tip Sheet 12
- How to use them?
- Be prepared for follow-up/response



Bring Your Kid to Work Day(s)/Week(s)

- In order to address staffing issues, a number of districts are considering allowing teachers to bring their kids to work with them
 - Presents a variety of issues – latchkey/licensing, interplay with FFCRA, etc.
 - Need to understand potential liability
 - Important to consult with insurance carrier regarding coverage
 - Should you have teachers execute a waiver to bring students?



Ohio Amended House Bill 404 ("H.B. 404")



Amended House Bill 404

- When House Bill (“HB”) 197 went into effect last spring, during the initial phase of the coronavirus (“COVID-19”) pandemic, it provided relief to Ohio school districts in many important areas of school functions.
- HB 197 provisions sunset on **December 1, 2020** while school districts continue to face the COVID-19 pandemic, state of emergency, and related challenges.
- HB 404 passed to provide a continuance of essential operations and extend many of the HB 197 provisions into the summer of 2021.



Open Meetings

- Extends until July 1, 2021, the temporary authorization for Board meetings and hearings to be held and attended via electronic technology.
 - You may need to adopt an updated resolution



Evaluations

- Performance evaluations for teachers, school counselors, administrators, and superintendents may be suspended by the school board for the 2020-2021 school year, if the evaluation has not already been completed for this year and the school board determines it would be impossible or impracticable to complete it.
- The board may collaborate with bargaining units to make this determination.
- If evaluations are suspended, an employee shall be deemed not have been evaluated for purposes of section 3319.11 of the Revised Code.
- The legislation specifies that a board is not precluded from using an evaluation completed prior to the effective date of HB 404 for employment decisions.



Evaluations

- Extends the prohibition against using value-added data, other high-quality/metric student data, or academic growth data to evaluate positive student outcomes attributable to a teacher, principal, or school counselor while conducting performance evaluations.
 - Specifies that a teacher who does not have a student growth measure as part of an evaluation for the 2020-2021 school year must remain at the same point in the teacher's evaluation cycle, and retain the same evaluation rating, for the 2021-2022 school year as for the 2019-2020 school year.
 - This is in addition to teachers remaining at the same point in the teacher's evaluation cycle and at the same rating for the 2020-2021 school year, which is already included under current law.



Evaluations

- Extends the authority for a school district that did not participate in the teacher evaluation pilot program established for the 2019-2020 school year to continue evaluating teachers on two-year or three-year evaluation cycles, even if the district completes an evaluation for those teachers in the 2020-2021 school year without using a student growth measure.



Evaluations

- Bargaining obligation?

- Be cautious of consequences of suspending evaluations
 - Limited contract teachers
 - Teachers being considered for continuing contract
 - Reduction in force issues



COVID-RELATED HOT TOPICS OF THE WEEK



FFCRA: Expiration and Extension

- FFCRA expired on 12/31/20; FFCRA extended (kind of) until March 31
- Can employees still request leave?
- Do you still need to approve requests?
- What does this mean for leaves that started prior to expiration?



FFCRA: Expiration and Extension

- Do you extend?
 - How to deal with absences?
- What specifically do you extend?
 - In whole or in part?
- For how long?
 - Through March or school year?
- How do you extend?
 - Resolution; MOU
- Consequences of not extending?



FFCRA: Recurring Issues

- What is “telework”?
- Application of sick leave to various situations (e.g., childcare)
- Documentation required



How to Approach Vaccinations

- With vaccine looming on horizon, can employers mandate that employees receive the vaccine?
- Host of legal issues, particularly for public employers
 - Remember, constitutional considerations for public sector
- Do you need to bargain the requirement?



How to Approach Vaccinations

- Vaccinations are treated differently under the law than “screenings” such as temp-check, symptom checklist and even actual testing, which are medical exams/inquiries
- Variety of laws that come into play, including OSHA, ADA, etc.
- In general, there must be a reasonable belief that the employee’s ability to perform essential job duties will be impaired by a medical condition or that the medical condition will pose a significant risk of substantial harm that cannot be eliminated by reasonable accommodation
 - Reliable, objective criteria that supports business need for your policy



How to Approach Vaccinations

- Look to flu shot requirements for guidance
 - When required, typically you end up with well over 80% (as opposed to less than half)
- Employers may generally require employees to get the flu shot to protect from contraction and spread (various state laws and any applicable CBA may limit or enhance)
 - EEOC has suggested employers implementing policies *encourage* employees to get the shot, but has not prohibited the requirement; OSHA gave greenlight in 2009
- However, even where permissible, there are exceptions for ADA-covered disability and sincerely-held religious beliefs (think mask exemptions)



How to Approach Vaccinations

- If an employee indicates that they have a disability or religious belief that exempts them from the applicable vaccine, then what?

- You guessed it ... interactive process!

- Based on flu shot assessment, the policy should be rooted in objective rationale, tied to job descriptions and administered consistently
 - Should clearly outline how to request exemption (think facial coverings policy and form)
 - No retaliation (no negative repercussions for exemptions)
 - Keep information out of personnel file



How to Approach Vaccinations

- Would requiring a vaccination be a mandatory subject of bargaining?
- Look to management rights clause, any language related to safety, etc.
- NLRB decisions may guide determination (SERB has not opined on analogous situation)



How to Approach Vaccinations

- Be prepared for the “you never required the flu shot” argument
 - EEOC has deemed COVID-19 a “direct threat”
- Surveys show an increase in the number of individuals who would not get the vaccine at this point in time (citing speed at which it was developed, “first run” concerns, etc.)
- What about staffing concerns if you require? Will you have enough employees?



Bargaining Outlook: Version 2021



Hot Topics for 2021

- Wages and Insurance
- Evaluation
- Time, time, time
- Union security
- Class size
- Remote instruction
 - Short-term
 - Long-term
- Leaves/safety

