ALC
Annual Leadership Conference

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School Law Hot Topics

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Welcome! Today's Agenda:

- Introduction and Overview
- Open Meetings Act Review
- COVID-19 Leave Issues
- COVID-19 and the Family Educational Rights and Privacy Act (FERPA)
- Title IX Update
- Conclusion and Questions

Open Meetings Act: Virtual Meetings

Telephonic or video conferencing meetings are permitted under the following circumstances:

- Before January 1, 2021 and retroactive to March 18, 2020, **under any circumstances.**
- On and after January 1, 2021 through December 31, 2021, only to accommodate absent board members due to military duty, a “medical condition” or “statewide or local state of emergency.”
- After December 31, 2021, only to accommodate board members due to military duty.

Virtual Meetings: Definitions

- **"Medical condition"** means an illness, injury, disability, or other health-related condition.
- **"Statewide or local state of emergency"** declared pursuant to law or charter by the governor or a local official or local governing body that would risk the personal health or safety of members of the public or the public body if the meeting were held in person.

Virtual Meetings: Procedures

- School boards **shall** establish procedures to accommodate the absence of members due to military duty, a "medical condition" or a "statewide or local state of emergency."
- Procedures must allow an absent board member to participate in and vote on business before the school board and provide for:
  - ✓ Two-way communication
  - ✓ Publicly announcing at the beginning of a meeting and then documenting in the minutes that a board member is attending the meeting remotely.

Virtual Meetings: Procedures (Cont.)

- Announcement must identify specifically the member's physical location by stating the county, city, township, or village and state.
  - ✓ Does not apply to military duty.
  - ✓ Does not apply to virtual meetings for ***any*** reasons.
- Procedures must also describe how "the public will receive notice of the absence of the member and information about how to contact that member sufficiently in advance of a meeting…to provide input on any business that will come before the [school board]."

Virtual Meetings: Public Comment

- All virtual meetings be conducted in a manner that permits two-way communication so that public participants can hear members of the school board and can be heard by the school board and other participants **during a public comment period**.
- School boards **may** use technology to facilitate typed public comments **during the meeting** submitted by members of the public participating in the meeting that may be read to or shared with board members and other participants to satisfy the two-way communication and **public comment** requirements.

What is “a breach of the peace?”

- “A person shall not be excluded from a meeting otherwise open to the public except for **a breach of the peace** actually committed at the meeting.” MCL 15.263(6)
- Township board expelled a citizen from an open meeting:
  - Plaintiff filed a lawsuit to remove a trustee from the board.
  - Chair: “So, thank you, Mr. Cusumano [Plaintiff], you probably have cost us another few thousand dollars.”
  - Plaintiff rose from his seat and walked to the lectern to speak.
  - Chair: “Sit down, your time to speak is over.”
  - Plaintiff: “I just wish that this board would act appropriately and professionally,” as he walking back to his seat.
  - Chair: “That’s enough. Deputy, would you please remove this man.”

What is “a breach of the peace?” (Cont.)

- Previous cases recognize that “‘a breach of the peace’ constitutes seriously disruptive conduct involving abusive, disorderly, dangerous, aggressive, or provocative speech and behaviors tending to threaten or incite violence.”
- “[C]ases clarify that under Michigan law a ‘breach of the peace’ goes well beyond behavior acceptable in a civil society.
- “The mere violation of [a rule] cannot automatically constitute a ‘breach of the peace,’ and expulsion solely for not abiding by such rule, without more, violates MCL 15.263(6)’s prohibition against exclusion of any person from a public meeting.”
- Trial court upheld meeting expulsion…Court of Appeals reversed that decision. *Cusumano v Dunn*, No. 349959, August 27, 2020.

MI COVID-19 Employment Protection Act

- Public Act 238 of 2020.
- Doesn't apply to employees whose primary workplace is their residence.
- Doesn't grant paid leave but provides unpaid leave after all leave entitlements have been exhausted.
- An employer cannot discharge, discipline or retaliate against an employee who: (1) take leaves under the Act, (2) opposes a violation of the Act or (3) reports COVID-19 health violations.
- An employee must not report to work and may take leave under the Act if the employee (1) tests positive for COVID-19, (2) displays "principal symptoms" of COVID-19," or (3) has close contact with a person who tests positive for COVID-19 or displays principal symptoms of COVID-19.

MI COVID-19 Employment Protection Act

An employee who tests positive for COVID-19 or displays the principal symptoms of COVID-19 shall not report to work until **all** of the following conditions are met:

a) If the employee has a fever, 24 hours have passed since the fever has stopped without the use of fever-reducing medications.

b) Ten days have passed since either of the following, whichever is later: (i) the date the employee's symptoms first appeared or (ii) the date the employee received the test that yielded a positive result for COVID-19.

c) The employee's principal symptoms of COVID-19 have improved.

MI COVID-19 Employment Protection Act

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An employee who has “close contact” with an individual who tests positive for COVID-19 or with an individual who displays the principal symptoms of COVID-19 shall not report to work until **one** of the following conditions is met:

a) Fourteen days have passed since the employee last had close contact with the individual.

b) The individual with whom the employee had close contact receives a medical determination that they did not have COVID-19 at the time of the close contact with the employee.

** “Close contact” means being within approximately 6 feet of an individual for 15 minutes or longer.*

MI COVID-19 Employment Protection Act

- An employer may request that an employee take a COVID-19 test if the employee does not report to work due to experiencing principal symptoms of COVID-19.
- If an employee has COVID-19 symptoms and fails to make a reasonable effort to be tested within 3 days after a request is made by the individual's employer to take a COVID-19 test, the employee will not be protected by the Act and is subject to discipline or termination under applicable laws, contracts or the employer's policies.

Family First Coronavirus Response Act

- Emergency Family and Medical Leave Expansion Act (EFMLEA)
  - Amends the FMLA and provides eligible employees partial paid leave if their child's school/daycare is not available due to a public health emergency.
- Emergency Paid Sick Leave Act (EPSLA)
  - Provides eligible employees limited pay leave for certain COVID-19 related reasons.
  - Full-time employees are entitled to up to 80 hours of leave for a two-week period.
- Both Acts will apply through Dec. 31, 2020 unless extended.

COVID-19 Leave: EFMLEA

- Employees who have worked at least 30 days before the designated leave and the employee is unable to work because they must care for a minor child because the child's school or childcare provider has been closed or unavailable.
- Up to twelve (12) weeks.
- The first two weeks may be unpaid.
- The remaining weeks are paid at 2/3 of the employee's regular pay.
- EPSLA and EFMLEA run concurrently.

COVID-19 Leave: EPSLA

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An employee qualifies for this leave if one of the following apply:

- Employee is subject to a federal, state or local quarantine or isolation order related to COVID-19 or a health care provider advised the employee to self-quarantine due to concerns related to COVID-19
- Employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
- Employee is caring for an individual who is subject to a federal, state or local quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to quarantine
- Employee is caring for his or her child if the child's school or place of care has closed, or the child's care provider is unavailable, because of COVID-19
- Employee is experiencing another substantially similar condition specified by the Secretary of Health and Human Services (HHS)

EPSLA Leave: Compensation

- Employees are paid their regular rate of pay if the employee is taking leave for a reason related to their own symptoms of COVID-19 or exposure to the illness.
- An employee taking care of someone subject to quarantine or a child whose childcare provider who is closed or unavailable is entitled to receive 2/3 of their regular pay.
- Compensation is capped at $511 per day and $5,100 per month.

Availability of FFCRA: Return to School Plans

- If the school's operations are fully virtual, the FFCRA is available for eligible employees.
- If the school's operations are hybrid, the FFCRA is available for eligible employees on days when their child is not permitted to attend school in person and must instead engage in remote learning so long as the employees need the leave to actually care for their child during that time and no other suitable person is available to do so.
- If the school offers both in person and virtual option and the employee chooses a virtual route, the FFCRA is not available, unless other provisions of the FFCRA apply.

FFCRA: FAQs

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Is an employee that is required to quarantine due to possible contraction of COVID-19 entitled to paid sick leave before using accrued hours of sick time?

If an employee must quarantine due to possible contraction of COVID-19, the employee is entitled to paid sick leave that is not deducted from accrued sick time. However, the district does have an option to offer the employee remote work from home. Employees who can work and have the option to telework are not eligible for FFCRA leave.

FFCRA: FAQs

If an employee has a child whose school is offering in person instruction and they elect to educate their child remotely, do they qualify for leave?

In the situation when an employee's child's school is offering in-person instruction, but the employee has an option and elects to have his/her child educated remotely FFCRA leave is not available to that employee. In this situation school is available to the child, and the child is only participating in online/remote learning at the employee's choice.

FFCRA: FAQs

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Are stay-at-home and shelter-in-place orders the same as quarantine or isolation orders? If so, when can I take leave under the FFCRA for reasons relating to one of those orders?

Yes, for purposes of the FFCRA, a Federal, State, or local quarantine or isolation order includes shelter-in-place or stay-at-home orders, issued by any Federal, State, or local government authority. However, in order for such an order to qualify you for leave, being subject to the order must be the reason you are unable to perform work (or telework) that your employer has for you. You may not take paid leave due to such an order if your employer does not have work for you to perform as a result of the order or for other reasons.

FFCRA: FAQs

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Do I have to provide an employee intermittent FFCRA leave?

Yes, intermittent FFCRA leave is available. An employee is not required to have the consent (i.e., agreement) of his/her employer to take intermittent FFCRA leave. Under the FFCRA, intermittent FMLA can be taken in full-day increments, to an employee who is teleworking, or physically at the workplace, but needs to care for a child whose school or place of care is closed or whose childcare provider is unavailable.

COVID-19: FERPA Issues

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FERPA v. HIPAA

- The federal regulations that implement the legal requirements of HIPAA's Privacy Rule specifically exclude information considered as "education records" under FERPA from HIPAA's privacy requirements.
- Thus, the HIPAA Privacy Rule does not apply to education records that are protected by FERPA.
- This includes student health/medical records and immunization records maintained by school districts.

COVID-19: FERPA Issues (Cont.)

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- Student health records may be disclosed without consent to public health departments if a school district believes that the virus that causes COVID-19 poses a serious risk to the health or safety of an individual student in attendance at the district.
- Must be an articulable and significant threat based on the totality of the circumstances.
- The information may not be disclosed to the media, because they are not “appropriate parties” under FERPA’s health or safety emergency exception.

COVID-19: FERPA Issues (Cont.)

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- If a school district learns that student(s) in attendance are out sick due to COVID-19, the district may disclose non-personally identifiable information about the student's illness to other students and their parents in the school community without consent.
- If a district releases the fact that individuals are absent due to COVID-19 (but does not disclose their identities), this would not be considered personally identifiable information (PII) to the absent students under FERPA as long as there are other students who are absent for other reasons.

COVID-19: FERPA Issues (Cont.)

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- There may be limited situations during a health or safety emergency in which schools may determine (in conjunction with health, law enforcement, or other such officials) that parents of students are "appropriate parties" to whom to disclose **identifiable** information about a student with COVID-19.
- In these situations, parents may need to be aware of the identity of students with COVID-19 in order to take appropriate precautions or other actions to ensure the health or safety of their child or themselves.
- Determination is made on a case-by-case basis.

COVID-19: FERPA Issues (Cont.)

- Schools may not disclose without consent the names, addresses, and phone numbers of absent students to a county health department so it may contact the parents of the students in order to assess the students' illnesses.
- This is "directory information" on students that is linked to non-directory information.
- Unless a specific FERPA exception applies, school districts should prepare consent forms for parents to sign to allow the potential sharing of this type of information if they intend to create a tracking or monitoring system to identify an outbreak before an emergency is recognized.

Title IX Update

- The U.S. Department of Education recently issued new regulations under Title IX, the federal law prohibiting sex discrimination at educational institutions that receive federal funding.
- The regulations, which became effective August 14, 2020, address sexual harassment of students and employees and provide a detailed complaint resolution process.

Title IX Update: Training

- Title IX Coordinator, investigator, informal resolution facilitator, and decisionmaker must have Title IX training under the regulations
- Most updated Title IX policies provide that all school district employees will be trained concerning their legal obligation to report sexual harassment to the Title IX Coordinator.
  - It is critical that a school district train all employees concerning this legal obligation since the school district will be considered to have "actual knowledge" of sexual harassment if any board employee has notice of such conduct.


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