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Q&A – Advocating for and Supporting At-Risk Educators
UniServ Webinar (8/31/20)

Below are answers to questions posed in the chat during the webinar, "Advocating for and Supporting At-Risk Educators," held on August 31, 2020.

ADA Accommodations

Once an accommodation is identified through the interactive process, can the parties later modify that accommodation?

Yes. The duty to engage in the interactive process and to accommodate a disabled employee is an ongoing one. This means that as circumstances change, parties can and should reengage in the interactive process. For example, a disabled employee whose needs were once, but are no longer, adequately addressed by an existing accommodation—because, for example, her disability has become more acute or she suffers a new and different disabling condition—can seek a modified or additional workplace accommodation.

A school district is telling employees that the only available accommodation is a leave of absence – is that lawful?

Probably not. It is possible that a leave of absence could be the only reasonable accommodation in some circumstances for some employees, but it is highly doubtful that it is the only possible accommodation for all employees who may have a disability. In order to maintain that leave is the only possible accommodation, the employer would have to show more than just a preference for this accommodation; it would need to show that the other possible accommodations either do not adequately address the employee's needs or pose an undue burden. And the mere fact that an accommodation comes at some financial cost, or results in some difficulty or disruption to the employer does not mean that it poses an undue burden. Given all of this, it is hard to imagine that a leave of absence would truly be the only available reasonable accommodation, especially in the case of public education employees who need an accommodation due to the disability-related risks of COVID-19 complications. After all, a range of possible accommodations, some posing very minimal financial costs or operational disruption, might be available,

including, depending on the employee, modified work sites, routines, or assignments; additional PPE; and/or remote work.

How can we push back against a district that is saying a leave of absence is the only available accommodation?

An employee or her union can, depending on the facts of the case, threaten legal action. As explained above, it is likely that an employer insisting that a leave of absence is the only available reasonable accommodation is violating the law. If it stakes this position in the interactive process, the employer is also likely unlawfully acting in bad faith, insisting on a predetermined outcome rather than exploring the employee's needs and possible accommodations with an open mind and problem-solving attitude. It is likewise unlawful for an employer to refuse to engage in the interactive process entirely, and instead categorically insist on a single, one-size-fits-all accommodation in lieu of examining individual employees' needs. Check with your State affiliate General Counsel or Legal Department about possible legal claims under the ADA, as well as any claims under other laws that may apply in your State.

However, precisely because the administrative and legal systems often move slowly, a union should consider other ways of challenging employer misconduct. Such tactics could include bargaining over workplace safety and accommodation issues; organizing the employees and the community around the message that the school district should be working to identify ways to ensure that dedicated education professionals can safely remain on the job, not pushing them out on leave; pointing out to the district the inevitable consequences of its ill-advised policy (i.e., that large numbers of educators may go on leave); and possibly bargaining over pay and medical benefits for employees forced to take leaves under the employer's policy.

Finally, as always, employees and/or their union should demand that the employer confirm and explain its position *in writing*. Sometimes such a demand alone suffices to make an employer reconsider an unlawful decision. And if it does not, the existence of a written statement can be extremely valuable—not just in subsequent legal challenges, but also in political, organizing, and public relations campaigns.

Is it unlawful for an employer to engage in the interactive process in "bad faith"?

Yes. The law requires employers to participate in the interactive process in good faith—making a sincere effort to explore and identify ways to accommodate an employee's disability. Under the federal ADA, an employer can be held legally liable if their bad faith prevented the employee from receiving an otherwise available reasonable accommodation. State laws may be different; for example, under the California employment disability discrimination law, an employer may be liable for acting in bad faith even if there were no available reasonable accommodations. Check with your State Affiliate General Counsel or Legal Department about the laws that apply in your State.

How much medical documentation is necessary or appropriate? How many times can a school district request information from the employee's medical provider?

There is no hard-and-fast rule here; the extent of the medical documentation that must be provided, and the degree to which an employer may demand additional documentation depends on the circumstances. The touchstone here is informing the employer of the existence and extent of the disability and the need for a workplace accommodation.

Thus, where the employee's disability and need for an accommodation is already known or obvious, no additional medical documentation is necessary. And where—more commonly—this is not the case, an employee need only provide (and an employer may only demand) documentation that verifies the existence of a disability, the employee's disability-related limitations, and the need for a workplace accommodation.

Medical documentation does not need to be provided by a medical doctor; the law requires only that it be provided by an appropriate health care provider or rehabilitation specialist. So long as the documentation identifies the nature, severity and duration of the impairment; the activity or activity the impairment limits and the extent of the limitations; and explain why a workplace accommodation is needed, it suffices under the law. And if these requirements are met, an employer should not demand additional information, and certainly repeated employer demands for new or different medical documentation are improper.

See NEA's ADA COVID Medical Provider Note Template for a fillable sample medical provider's note that can be customized based on a member's medical condition and job.

What can we do if the employer takes the position that its general COVID-19 mitigation steps *are* the accommodation? How can we redirect the employer to providing *individual* accommodations?

General COVID-19 mitigation steps—like any workplace safety measures—are vital and unions should demand both that these measures be implemented and a seat at the table as they are being formulated. That said, general workplace mitigation efforts are *not* necessarily a substitute for workplace accommodations for individual employees whose disability places them at higher risk of COVID-19 complications.

Where an employer's general health and safety protocols do not adequately address an employee's concerns (and those concerns are substantiated by a health care provider or rehabilitation specialist), the employee may request, and the employer must engage in, the interactive process to identify reasonable accommodations. How an employee or her union can respond to an employer that takes the position that its general mitigation efforts suffice depends on when and how the employer articulates its position. If the employer refuses to engage in the interactive process on the grounds that the employee has already been accommodated, it should be reminded that the law mandates this process to identify individual accommodations

and that a flat refusal is unlawful. If the employer engages in the interactive process but insists that no accommodation is necessary, the employee (or her representative) should explain how and why general mitigation measures are inadequate and why additional accommodations are required—and that the employer's position constitutes unlawful bad faith. An employee's recourse here is filing an administrative charge alleging disability discrimination.

Additionally, unions that become aware of employers taking such a position should consider pressuring the employer directly and apart from any individual accommodation request. A union can speak on behalf of all employees to demand that the employer honor its legal obligation to identify individual reasonable accommodations for individual disabled employees; explain generally how and why standard workplace safety measures might be inadequate for individual disabled employees; and (not least) threaten legal action.

Where would one file a legal challenge to an employer's refusal to provide a reasonable accommodation or engage in the interactive process in good faith?

Legal challenges are filed with the federal Equal Employment Opportunity Commission (EEOC) or a State equivalent agency. Remember that the time limits here are relatively short and strictly enforced. Generally, employees must file a charge within 180 calendar days from the time of the events in question. Please check with your State Affiliate General Counsel or Legal Department about the specific deadlines and procedures.

Can an employer refuse to engage in the interactive process and instead dictate the accommodation to be provided a disabled employee?

No. The law requires that an employer work with the disabled employee through the interactive process to evaluate obstacles and identify possible accommodations. It is unlawful for an employer to refuse to engage in the interactive process, even if it has already offered an accommodation.

Can an employee reject workable accommodations and return to the interactive process in order to obtain the specific accommodation s/he is looking for?

No. Under the ADA, an employee is entitled to *a* reasonable accommodation, not necessarily his or her preferred accommodation. If the employee has rejected accommodations identified through the interactive process that are in fact workable, the employer may decline further to engage in the interactive process.

Leave – FMLA and Families First Coronavirus Response Act (FFCRA)

Can employees who have children attending school on a remote/in-person hybrid schedule take FFCRA (expanded FMLA) leave to care for their child(ren) during the days that their child(ren) are at home?

This depends on whether hybrid attendance is the only option at the child's school or whether the parent was given a choice between in-person and hybrid or remote learning. On August 27, the DOL issued updated guidance specifically answering two questions about eligibility, as many schools across the country reopen with some options for remote learning or hybrid schedules. The DOL clarified that when the child's school is operating exclusively on a hybrid schedule, the parent is eligible for FFCRA on each of the child's designated remote-learning days. However, if the parent has a choice between in-person or remote learning and choses remote learning (because, for example, the parent is concerned about their child contracting COVID-19), the DOL considers the school to be "open" for purposes of the FFCRA, and the employee is *not* eligible for FFCRA leave. See https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (#98-99).

There is a further question here, however, about intermittent leave, which the DOL has not yet provided clarification on, and which is causing a lot of confusion for both employers and employees. The further question arises out of the fact that a parent's need for leave only on the days of the week their child has remote learning would presumably be considered "intermittent leave." In DOL's FFCRA rule and prior guidance on intermittent leave, although the DOL stressed the need for employers to be flexible around leave, scheduling and telework, it ultimately gave employers discretion to grant or deny intermittent leave. This part of the rule, requiring employer approval of intermittent leave, was one of several parts of the DOL regulations that was struck down by a federal court. However, the implication of that decision outside of the Southern District of New York is unclear, and DOL has not yet stated whether it is going to appeal the court's ruling, whether it will issue a new rule, or whether it will take any other actions to address this issue. It is possible that DOL could issue a new rule on this any day now, so be on the lookout for guidance from your State Affiliate General Counsel or Legal Department.

Can the expanded FMLA be "broken up" and taken in smaller increments? Is this considered a hardship on the employer?

The need to "break up" the emergency FMLA childcare leave is addressed above in the response on "intermittent leave." The "undue hardship" defense against providing an ADA reasonable accommodation doesn't apply to the question of intermittent leave under the FFCRA. Some employers may be using this kind of language to explain their denial of intermittent leave because the current FFCRA rule and guidance from the DOL, although it currently leaves it up to the employer's discretion whether to grant the leave on an intermittent basis, strongly encourages employer flexibility in light of the challenges posed by COVID-19. Whether or not granting intermittent leave is actually unduly disruptive to the employer's operations would be a very fact-specific inquiry, which would depend on,

for example, the employee's position, available coverage when the employee is out, flexibility of the work, and any changes that have already been implemented in the workplace due to the pandemic.

Note that there are special rules for school employees related to taking regular FMLA leave on an intermittent or reduced schedule basis. *See* 29 C.F.R. § 825.600-604. These special rules apply only to instructional employees and primarily have to do with taking leave during the period leading up to the end of the academic term.

If an individual has used regular FMLA leave earlier in the year, do they still get the full 12 weeks of expanded FMLA under the FFCRA?

No. The expanded FMLA comes out of the same 12-week "pot" of FMLA leave an employee has during their employer's 12-month FMLA year. So, if they have already used 10 weeks of leave earlier in that year, for example, for childbirth and bonding, they would only be able to take 2 weeks of expanded FMLA for childcare purposes under the FFCRA. See https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (#44, 45).

Are there job protections under the expanded FMLA benefits, as with FMLA leave?

Yes, just as with regular FMLA, an employee has a right to return to their same (or a nearly equivalent) job after taking either type of leave under the FFCRA (emergency paid sick leave or expanded FMLA). The DOL makes clear, however, that this does not mean that the employee is protected from layoff if that employment action would have affected the employee regardless of whether they took leave. In other words, the employee can still be laid off for a legitimate business reason, but the employer has to demonstrate that they would have laid off the employee even if they hadn't taken leave. See https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (#43).

Can an employee be required to use other leave concurrently with the expanded FMLA leave?

Yes, unless there is a policy or collective bargaining agreement to the contrary. The law allows the employer to require "concurrent" use of other leave while the employee is using the expanded FMLA leave *if employer policies and any applicable agreements with the union allow for this*. 29 CFR § 826.23. The employer can only require concurrent use of leave that is ordinarily available to the employee to use to care for a child, such as vacation or personal leave, and only if there are no other agreements with the union or employer policies that prohibit requiring such "concurrent use." If the employee exhausts their regular existing leave and still has some of the 12 weeks of expanded FMLA leave remaining, the employer must pay the employee at least 2/3 their regular rate (capped at $200 per day and $10,000 aggregate) for that remaining time. [DOL FAQ #31].

Note that the employer may not require employees to use any other paid sick leave for a COVID-19 related qualifying reason before or while they are using emergency paid sick leave. [DOL FAQ #32].

Can an employee voluntarily use paid leave before or along with the FFCRA leave?

Yes, but only if the employer agrees. The emergency paid sick leave is in addition to existing leave. It is only available through December 31, 2020, and does not roll over to next year. So, in almost all cases, it would make sense for employees to use this leave first before using any other leave. If the employer agrees, however, the employee can use existing leave to supplement the benefit they receive under the emergency paid sick leave, up to their regular salary. [DOL FAQ #32].

For the expanded FMLA leave, the law provides that if there is no other prohibition in state law and the employer agrees, the employee can use other leave, such as vacation, to make up the remaining salary beyond the 2/3 pay (capped at $200 per day) they would receive while on the expanded FMLA leave. 29 CFR § 826.70(f).

When does this leave expire?
The FFCRA currently only runs through December 31, 2020. Unless it is reauthorized by Congress, all entitlements to this special COVID-19 leave will expire at the end of this year.

Additional Resources

NEA Resources for Members

- https://educatingthroughcrisis.org/your-rights/

ADA, COVID High-Risk (CDC), and Accommodations

- https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html
- https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws
- https://askjan.org/

Families First Coronavirus Response Act

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