

Comprehensive COVID-19 Strategy Plan For Independent And Private Schools

3.20.20

Many schools have closed temporarily and moved to remote learning processes consistent with local or state orders, health department, or CDC guidance. We are receiving many questions regarding how schools should manage certain processes both during this time of closure and as they plan to reopen the schools. In addition, many of our schools and daycare centers have remained open. They, too, have questions about their operations and risks associated with same.

The Fisher Phillips Education Practice Group has set forth below our second set of COVID-19 FAQs and recommendations after our initial set of FAQs and 10-point action plan published in early March. We welcome your questions and continued communications as independent schools throughout the United States continue to work through these issues.

You should also review our Fisher Phillips website homepage which we have transformed into a COVID-19 Resource Center for Employers. The resource center provides an easily accessible compilation of practical and timely guidance to help employers address the most pressing questions posed by the ongoing coronavirus pandemic.

GENERAL WORKPLACE ISSUES

What are the guidelines regarding emergency paid sick leave (EPSL) and emergency FMLA (EFMLA) during this time?

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President Trump signed the Families First COVID-19 Response Act on March 18, 2020. The new law becomes effective April 2, 2020. The Fisher Phillips FAQs regarding this new law will be available in the next few days on our website.

We already have room in our budget to pay our employees as if operations were normal, should we continue to do so?

We recommend that schools delay sending any broad communications regarding what the school will pay employees until you better understand the implications of the EPSL and EFMLA at this point if you haven't already. In addition, because we do not know how long the coronavirus pandemic will last (and how long it will cause school closures or other negative impacts), you should be especially careful in making promises or commitments to pay employees indefinitely as this kind gesture could expose the school to substantial liability.

In order to continue operating as usual, can we reduce employee pay if we need to for budgetary reasons?

If there are no state and local laws that prohibit your school from doing so, yes you can. Any change should be prospective in nature. You should ensure that you are consistent in reducing or adjusting pay (i.e. if you are going to implement a 15% pay reduction, do so for everyone who is similarly situated; or have good reasons why you are only adjusting in certain areas). For non-exempt employees, it is also important to ensure that you do not drop below the relevant state or federal minimum wage requirements.

As for exempt employees, most will fall into the teaching professional exemption. Under federal law, this exemption is not dependent on the employee be paid on a salary basis. Thus, you could reduce it. However, you must check your state law because some states do require a level of salary for teachers to qualify for the exemption.

As for other exempt employees – such as administrators, guidance counselors, registered nurses, etc. – you may reduce their salaries, but you should avoid indicating that you are reducing pay for reduced hours. This is because such a statement could be interpreted as an intent to convert the employee to a non-exempt status. It is better to say that you are reducing the salary (but not below the minimum state or federal salary basis requirement) for the foreseeable future until the crisis passes and operations can return to normal. You should also keep the new compensation arrangement in place for at least one quarter; otherwise, the U.S. Department of Labor (DOL) may view it as an impermissible reduction in salary that could destroy the employee's exempt status.

If we need to extend the school year, are we obligated to pay employees extra pay for summer work?



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The short answer is that you should probably plan to do so for most employees unless the extension is for a minimal amount of time. Specifically, however, you are required to pay **non-exempt employees** for all hours worked, whether during the normal school year or during an extended school year.

As for **teachers**, you have more flexibility. First, you should check the employment contract. Many contracts have language that contemplates that, due to unforeseen circumstances, the school year may be extended and the employee (teacher) expected to work such extended time without additional pay. This language is typically intended to address the unexpected weather emergency. In such cases, the salary outlined in the contract would cover those few additional days of work. Make sure that your state law would not require a different result.

However, if the school wants to require the teacher to work several additional weeks or all summer, this would be additional work that a teacher would likely argue goes beyond what the contract language contemplated. Even though requiring the teacher to work the additional weeks without additional pay would not violate federal wage and hour law (because a teacher's exempt status is not dependent on being paid on a salary basis), doing so could violate some state laws and could create a morale problem unless the teacher received pay for a similar number of weeks that the teacher did not work (i.e. if distance learning was not an option yet the teacher continued to be paid her regular salary).

As to **other exempt employees** (i.e. administrators, guidance counselors, registered nurses, etc.), many of these individuals are already contracted or engaged to work for the full 12 months. Thus, the arrangement with them already contemplates summer work even though the school may typically give them shorter summer hours. If the contract contemplated only 10 months of work, however, then if you expect them to work extra hours in the summer, you should closely evaluate the employee's salary per week and whether additional salary payments may be due for the extra weeks.

Finally, as for any of these types of issues, you should consider the morale concerns that would result if you tell employees that they must work extra weeks for no additional pay, especially during a time when their retirement funds and other savings have been negatively impacted. Assess the circumstances of each category of employee and work with counsel to ensure that your plan is consistent with state and federal laws, school policies, and the employee's contract.

GENERAL COVID-19 ISSUES

Should schools be asking constituents to report COVID-19 and direct exposures even during times when school is not in session?



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Yes, at this point the school should ask that parents and employees notify the Head of School (or designee) if someone in their community has tested presumptive positive, positive, or has had direct exposure to a positive COVID-19 case.

Are we required to report these positive cases to the Health Department?

This will vary by state. We suggest that you contact the health department if you have a positive COVID-19 diagnosis to advise of the fact of the diagnosis and then to ask if the school is required to report any of the specific information (such as the person's name, address, contact information, etc.) to the health department. They will guide you whether to disclose personally identifying information and then you can follow that guidance. You can also report it to the health department with the employee's or family's consent (which we recommend you get in writing).

Should we share with our school community the fact that someone has tested positive in our community?

Yes. Your school should send a notice to the community without identifying the individual by name or position but rather using categories such as "employee, student, or parent." If the school can get written consent from the family/employee to disclose the family/employee's name when notifying the community of the positive test, this will help provide context for individuals possibly exposed to the person.

Advise in the notice that persons who have been in contact with the individual who tested positive will be separately notified. Then the school should attempt to get as much information as possible about those who may have come in contact with the individual who tested positive. We have a sample Notice to Employees about a Positive COVID-19 test on our FP COVID-19 Resource Center's Data Bank of Templates and Forms. This notice will need to be modified if the school is not in session and/or involved a student or other family member. Check with your counsel for appropriate wording.

ISSUES FOR SCHOOLS REMAINING OPEN

There is no state or local order requiring that our school close. Other schools in the area are closed but we have remained open. Is there any risk to our choosing to stay open?

In determining whether to stay open or close, the school should assess the guidance from the Centers for Disease Control and Prevention (CDC) and Health Department. In addition, if all or a large majority of the schools in your area have closed, and your school remains open, a question could later arise in the event of an injury whether your school dropped below the standard of care for the industry. In other words, if everyone in your industry in your area believes it is unsafe to be open except you, and then someone within your community (who was required to work or attend) becomes extremely ill or possibly dies from exposure to COVID-19 at your school, the question that will be asked was whether it was reasonable for you to continue to operate and whether you were exposing



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the children and staff to unnecessary foreseeable risk.

A related question: Can daycare facilities that are currently closed but considering re-opening require parents to sign a waiver essentially recognizing potential risks associated with potential exposure to COVID-19 if they decide to drop their child off?

While we would not recommend that an employer ask employees to sign waivers in this situation because doing so could potentially impact workers' compensation coverage. On the other hand, it might make sense to have a family who wants to use the daycare under those circumstances sign a waiver. The waiver should outline the specific risks of continuing to utilize the daycare in light of the COVID-19 pandemic and waive claims associated with those risks.

Be aware that many counties and states have put out very specific guidance for licensed daycare operations that are continuing to operate. For example, we are aware of areas requiring curbside pickup and drop off. We do not recommend that schools begin enrolling new students for their daycare operations nor expand current operations to include a licensed daycare if they do not already have one. You should check with your local health department to determine whether they have published special guidelines for daycares in your area.

What can we do for employees who are scared to come to work or are in an at-risk population?

Assuming that the employee does not meet the requirements for Emergency Paid Sick Leave or Emergency FMLA, there may be some situations in which you need to take a harder line when an employee's presence is essential and require the employee to work or be disciplined for failure to do so. For example, if the employee is a nurse and you only have only two nurses who are trained to handle emergency situations, in this time of COVID-19 crisis, you will likely need both nurses to be ready, willing, and able to work for accreditation, legal, or operational purposes.

In such a case, identify what the employee's work-related concerns are and see if you can find ways to reasonably address them. For example, with a nurse, you may want to limit the number of people who can come into the area where the nurse is working and require the others to wait outside, social distancing. Obviously, you want to ensure that the nurse has appropriate protective equipment and adequate assistance. There will be other precautions and changes you may be able to make, depending on your facilities. If the employee still refuses to work, you should consult counsel before terminating to ensure that you are considering all issues.

As for other non-essential employees, determine if there are any options that will either reduce their discomfort (finding a space where they can work away from others to reduce risk of exposure) or see if you can find work to enable them to work from home at this time, even if it is not their normal work. If none of those options are feasible, and if the stated reason for leave does not qualify the employee for Emergency Paid Sick Leave or Emergency FMLA, you should let the employee use PTO. Once their PTO is exhausted, they would convert to an unpaid status.



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Before forcing non-essential employees to come in to work or to be terminated, you should think through the morale concerns and the negative public relations that could result from such an action.

What if we no longer need all of our employees because our services are not at the same level of demand? Can we reduce schedules, rotate work, or find other things for them to do?

In some operations, like daycare or nursery operations or schools that are providing some learning at school in small groups, those employees conducting lessons or providing supervision will be essential to your ability to continue to operate. However, given that many parents may be keeping their children at home, you may not be operating at full capacity and may need only some teachers or daycare staff to report to work. In these cases, you can make decisions to reassign or rotate work, or reduce hours as appropriate for your workplace.

To avoid discrimination claims in how you make assignments, you should consider assigning or rotating work on a seniority basis (choosing first the employees with the most seniority who are qualified to fill the available positions). When considering whether to rotate employees, keep in mind that keeping small groups together on a day-to-day basis, rather than rotating children or employees in and out, may assist in stopping the spread of COVID-19, should there be an outbreak at the school or within a school family. Consider the level of the pandemic in your community.

If an employee is scared to come to work, follow the steps outlined above, such as talking through whether there are ways to make them comfortable. You might need to tell them that in this time of crisis, they are essential and need to come in (presuming they do not qualify for leave under the new legislation).

TUITION AND FINANCIAL ISSUES

Should we stick to our force majeure policies regarding tuition?

There may be reasons to give tuition discount options to your lower year students, generally younger than 3rd grade. In this situation, there might not be a comparable option for the supervision and instruction that the students receive in school.

For most students, however, distance-based learning will continue, and the parents can be expected to pay normal tuition. This will be based on the discretion of your individual school, considering your school's needs given the grades and ages of children you instruct.

You should also consider whether to reimburse parents whose children may be engaged in distance learning where amounts that the school is saving by not having the student present (such as bus transportation, lunch costs, etc.). This is not a "must," but it would certainly be an act of good will.



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Is the decision to enforce or relax the tuition obligation a board decision or an operations decision?

It will depend to some extent on the school's typical process for budget adjustments. Given that tuition refunds relate to the fiscal health of the school, it is appropriate to involve the board or a committee of the board (executive committee, finance committee, etc.). If this decision is to be decided by the board, they need to understand the in-depth processes that are occurring at the school including distance-based learning and which grade levels are participating. If this decision is made by the administration, they should remain in close communication with the Board.

You should also review the school's enrollment agreement. In some instances, your school may already have in place a cancellation policy that allows your parents to give short notice and cancel tuition for the rest of the year without liability.

How do we handle contracts for cancelled events (prom, graduation, etc.) or where we may have to cancel a contract a vendor who is not needed during a shutdown?

This will require a review of the contract, including the cancellation and force majeure clauses. Many of these clauses impose hefty payments or state that the contract will not be cancelled, or any costs relieved, unless the unexpected reason for the closure (like pandemic) makes it impossible or illegal for the event to occur.

If there are current orders in place in your state or city that limit the number of people who may gather to substantially less than that contemplated for your event, or that require the community to shelter-in-place during the time when your event would occur, then continuing with any scheduled event would be unlawful. Therefore, your contract should be void. In the absence of a given order, you may be able to rely on CDC or state and local government recommendations to receive a credit, or a rescheduling date from your vendors.

PHYSICAL CAMPUS ISSUES

While the school is closed, who is permitted to be on our campus?

Unless any state or municipal order states otherwise, you should be able to have security, cleaning staff, and one or two essential employees (such as the Head of School and a business office employee) on campus at this time to manage essential functions. No students or small groups of students should be permitted on campus for any educational, athletic, or extracurricular reason at this time.

Schools should try to avoid having teachers on campus after a closure order to prepare for distance learning, etc. This should have been planned for ahead of time so when the closure order comes, you are ready to implement immediately.



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Schools should also review their contracts with entities that have rented space on the school's campus to determine whether such outside group can continue to use the space in light of state or local orders. If so, you should ensure that they vacate for 14 days before school reopens so the campus can be cleaned and quarantined before students and staff return. Your rental contract or facilities use agreement may also contain language allowing you to cancel the outside group's use of the property.

Should we have staff who are currently on campus sign a waivers and releases?

We do not recommend that you do so. The likelihood is that if an employee is required to work, injuries or serious illnesses may be covered by workers' compensation. We do not want schools doing anything or having employees sign waivers or releases that that might negate workers' compensation coverage.

If an employee has been offered to privately work for a family or group of families at this time, can they do that?

If this work would take place during the school day when the employee is supposed to be working remotely for the school, the school has a good argument that the employee should not be engaged in such personal matters for compensation. However, if the school permits employees to moonlight during non-school hours, you should check the language in the policy to see what exceptions or conditions exist.

In addition, if the employee is working closely with others (like babysitting for a young child in a parent's home) or engaging in an activity with a group away from school, this would be inconsistent with the purpose of social distancing.

DISTANCE-BASED LEARNING ISSUES

When using different services like Zoom and Google Classroom for distance-based learning, what student privacy issues should be considered?

Many of these platforms potentially (or actually) collect personally identifying information for commercial purposes. In that case, the platforms are covered by COPPA and they have the obligation to obtain parental consent to gather information from children under the age of 13. If the site is being used only for educational purposes and the platform is not collecting personal information from students for commercial purposes, then the school can consent to the use of the platform for parents.

A separate issue is whether the school is recording student voices or images. If so, there may be privacy and consent laws in your state that should be considered. To cover these issues, we recommend that you consider taking the following actions, which should also be sent in writing



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(email) to parents:

- State that you are recording the lesson (including the recording of children's voices and images) at the beginning of each lesson.
- Also, consider sending parents an email advising that the students' voices and images may be recorded during distance learning and advising them that if they choose not to have their child's voice or image recorded, they should take steps with their computer or the spacing of the child to the computer to block their child's image from being recorded.
- They should also instruct their own child not to verbally participate and advise the teacher of such instruction.

Are there any other considerations that have arisen regarding distance-based learning?

Yes, many of the platforms are being overwhelmed worldwide. Be sure to either have a Plan B in place or a plan as to how you will handle situations in which students or employees are unable to participate due to platform problems.

Be sure you are clear with families about the school's expectations for virtual attendance and how "virtual absences" will be handled. Articulate whether students are required to check in to classes at specific times, be available during the day at times when they do not have a virtual class (free periods, lunch periods, study halls, etc.), and or turn in assignments.

Make sure you have as much consistency as possible across a single grade level. One second-grade teacher should not be providing four hours of content while another second-grade teacher is providing 30 minutes.

Should we continue with guidance counseling using distance-based principles?

It is not necessary for the school to continue this service during school closure periods, and your school should take into consideration the privacy issues that might come into place regarding who else may hear any confidential conversations between the counselor and the student (whether on line or by phone). The school should consider getting consent from the parent before any counseling occurs consenting to the counseling, outlining that the parent/student must ensure that the counseling is taking place in a private area, and advising whether the session is being recorded. You should note that if the session is being recorded, you have a higher likelihood that the parent may request a copy of the recording or that the recording might be discoverable in future legal proceedings.

In addition, most schools have (or should have) boundary policies that prevent one-on-one interactions with students, including by phone, text, or online. For safety purposes, you should consider having a parent in the room when the counseling occurs so there are no questions later



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about inappropriate conversations or behaviors.

MISCELLANEOUS ISSUES

What types of actions have state or local governmental associations taken to waive certain school requirements (like the number of days that school must be in session)?

This varies on a state-by-state basis. You should be in contact with your state agencies and/or accrediting organizations regarding guidance on this topic. It is our understanding that some states are waiving attendance policies and adjusting the annual required number school days. We expect more on this topic as the duration of the closures extends.

SCHOOL RE-OPENING CONSIDERATIONS

What should we think about when we consider re-opening?

Although we realize many schools are considering the option of distance-based learning for the remainder of the school year, there may be some instances where schools in less-affected areas can consider re-opening.

Consider all CDC and Health Department guidance regarding people beginning to congregate in groups again. Consider also that if your school closed when there were only 12 cases in your area, you shouldn't be re-opening until the number is similar or lower. Be overly cautious and follow all guidance from local and state government regarding group settings. For example, certain cities currently recommend no social gatherings more than 10 people. Other cities currently have an order against any meetings with more than 50 people. Although going against a recommendation is not illegal, it is highly ill advised at this time. Going against an Order is illegal and can subject a school to legal liability.

If we do re-open, what questions should we be asking of employees, students and families?

You can ask them a set of questions including:

- What major travel have you or your immediate family/household members taken in the last 14 days?
- Have you traveled internationally? If so, where?
- Have you been on a cruise? If so, to where?
- Have you traveled domestically beyond our immediate region? If so, where?
- Were you instructed to self-quarantine or self-monitor upon returning from any travel?
- Upon any return travel, have you experienced (if "yes," please provide details):



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- A fever or ≥ 100.4 F/38 C
- Cough
- Shortness of breath
- Fatigue
- Sneezing
- Aches and pains
- Runny or stuffy nose
- Sore throat
- Diarrhea
- Headaches
- Have you recently been in close contact with anyone who has exhibited any of the symptoms listed above?
- Have you recently been in contact with anyone who has tested presumptive positive or positive for COVID-19?

Can we take the temperature of our employees, students, and families when they return to school?

Taking an employee's or student's temperature is considered a "medical examination" under the Americans with Disabilities Act. But in the midst of the crisis and in a geographic location where there is still a substantial prevalence of coronavirus, the ADA permits the taking of temperatures.

If the school is going to implement this process, then it must ensure that the person who is taking temperatures is either a nurse or trained in how to handle this process properly, with proper equipment, sanitation, protective gear, and in a way that ensures confidentiality/privacy. All records should be kept under lock in key in separate medical folders consistent with ADA guidelines.

If we do re-open, how should we handle visitors to campus?

We suggest a limited visitor policy if your school decides to re-open at any point this Spring. You can reschedule reasons for visits or have convert the visit to an online meeting.

CONCLUSION

We will continue to monitor this rapidly developing situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have any questions about this situation or how it may affect your school, please contact any member of our Education Practice Group or your Fisher Phillips attorney. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19



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Coronavirus and our FP Resource Center For Employers, maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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