COVID-19 and the 2021-2022 School Year: Questions and Answers

As the new school year approaches, administrative "guidance" and "recommendations" have replaced past mandates from now rescinded Executive Orders on school responses to COVID-19. Thus, it is important for school districts to communicate early with their staff, students and parents as to how they will address COVID-19 protocols, expectations and requirements. Circumstances relative to the spread of the virus, however, continue to change. While school districts may feel pressured to make affirmative statements as to their COVID-19 policies and practices at the start of the school year, they should also consider maintaining some flexibility. If federal, state and local laws, rules, regulations, administrative orders or guidance suddenly change, schools must be prepared to quickly respond, if necessary. Additionally, there may be an increased or decreased need to change present practices based on the spread of the virus.

To assist schools in addressing these issues, MSBA has developed the following answers to many of the questions schools have posed. We anticipate these answers and suggestions may change as the school year progresses. Therefore, we suggest that school districts remain alert to the most current mandates and recommendations. MSBA will, of course, work to provide you with any updated information as it becomes available.

MASKS

Q1. Do school boards need to pass resolutions regarding mandating, recommending, or opposing masks in the school district?

A1. There is no legal requirement for a school board to adopt any policy or resolution regarding masks. MSBA recognizes, however, that school boards are experiencing pressure from parents, students, and staff to clarify whether and to what extent masks will or will not be required when the 2021-2022 school year begins. Administration also requires some guidance as to how they will be expected to administer governmental agencies' "recommendations" and if these recommendations change present protocols. Thus, some action by the school board, whether by resolution or motion, would be appropriate and likely is expected by the community. There are issues to consider with each of the three choices (opposing, recommending, mandating) related to masking.

Board Action Opposing Mask Mandates

MSBA does not advise that school boards adopt a position opposing the wearing of masks in school for a number of reasons. First, the Centers for Disease Control and Prevention ("CDC") issued an Order on January 29, 2021, that is still in effect, requiring that face coverings be worn on all public transportation (hubs -i.e., bus stops – and the transporting vehicle). This mandate applies to all school district transportation, regardless of the purpose of the transportation or who provides it. Thus, the mandate applies to transportation to and from school, extracurricular and school sponsored activities and to private vendors who provide transportation on behalf of schools. Certain individuals are exempt from this requirement based on age, disability, or when a mask would create a risk to workplace health, safety, or job duties, as well as times when the mask temporarily may be removed such as when eating or drinking. Transportation operators must use their best efforts to ensure masks are worn when and where required. The CDC's Order may be enforced by the CDC and other federal agencies through criminal penalties, although the CDC will rely primarily on strongly encouraging voluntary compliance first. To avoid the imposition of sanctions, MSBA advises that school boards do not directly or indirectly discourage non-compliance with this mandate by passing a resolution universally opposing masking as doing so would be in violation of this federal requirement.

Second, opposing the wearing of masks could be viewed as an act of discrimination or harassment toward those individuals who are wearing a mask based on a disability. Passing a resolution that opposes the wearing of masks could be viewed as a violation of the Americans with Disabilities Act ("ADA"), the Minnesota Human Rights Act ("MHRA") and other laws protecting individuals with medical conditions who are advised by a health care provider to wear a mask. Violating these anti-discrimination laws or creating a work or school environment that is hostile toward those wearing masks could potentially subject the school district to civil liability and resulting damages.

Third, as noted below, it is possible that staff members, students or even visitors could bring claims that they contracted COVID-19 as a result of a school district failing to provide a safe work/educational environment. While such a claim would be difficult to prove, statements by the school board that are inconsistent with the guidance of the Minnesota Department of Health ("MDH") and the CDC could be used as evidence of negligence or a willful disregard to safety concerns.

Board Action Mandating Masks

As noted above, school districts are required to comply with the CDC Order requiring masking on school transportation. Although no formal action is required to establish the application of law in a school, a motion or resolution recognizing this mandate would help secure compliance. Of course, such notice also may be provided to staff and families by administration without the need for board action.

While school boards are not obligated to pass a policy or resolution that mandates mask-wearing, they do have the authority to require universal indoor masking in their school buildings as well. In this regard, school boards have the "general charge of the business of the district, the school houses, and of the interests of the schools thereof." *See* Minn. Stat. § 123B.02, subd. 1. While no court has ruled on this issue as it applies to Minnesota schools, courts in a number of jurisdictions throughout the United States have held that students do not have a fundamental right under the United States Constitution to not wear a mask. *See e.g.*, *Klassen v. Tr. of Indiana Univ.*, 2021 WL 3073926, Co. No. 1:21-CV-238 at *-- (N.D. Ind. July 18, 2021); *see also U.S. v. Bergland*, 2021 WL 1589548, at *--(D. Minn. Apr. 23, 2021) ("Courts have repeatedly found that requiring participants at trial to wear face masks due to the COVID-19 pandemic does not violate a criminal defendant's constitutional rights.").

Despite the apparent ability to impose this local regulation without the need of an executive order or other legislation, the larger question that will arise for schools is the penalty that would be imposed if a staff member or student refuses to comply. If a school district were to impose such a mandate, it will need to look to its student and personnel policies, collective bargaining agreements/contracts, and perhaps consult with legal counsel as to the ability to permanently remove the student or employee if compliance cannot be attained voluntarily.

<u>Board Action Recommending Masking</u>

School boards also may take a middle of the road approach to requiring masks in school. The MDH and CDC currently are only *recommending* universal indoor masking, regardless of an individual's vaccination status. Thus, school boards could parrot this guidance by similarly announcing that the school district is not requiring but is recommending indoor masking, particularly for those individuals who are not fully vaccinated, who live with individuals who are not fully vaccinated or are immunocompromised or at increased risk for severe disease. Qualifying this position with a statement that the school district will continue to monitor guidance and requirements from applicable federal and state authorities, and reserves the right to update masking requirements as a result of changing circumstances is recommended. Flexible language, as well as flexibility in the modifications to protocols, including masking, in the event of a dramatic increase in COVID-19 numbers will provide evidence that the school district is acting with reasonable care in the event of claims of an unsafe work or school environment.

Q2. Does adopting one of the resolutions listed in Q1 impact the school district's potential risk or liability for the school district if someone in its schools contracts COVID-19?

A2. There is the risk that without universal indoor masking, the school district may increase the potential for the spread of COVID-19 and resulting tort liability, primarily by students but also potentially from staff and visitors. To bring such a claim, an individual must prove several elements.

The first two elements that must be shown are that the school district owes some duty of care toward the injured party and that the school district failed to exercise the necessary level of care. Generally, the duty of care requires reasonable care that often is evaluated in comparison as to how other individuals or entities would act in similar circumstances. In this case, similarities might be drawn to how other public K-12 schools or like institutions are responding. In the case of COVID, where the effects of the virus can differ by region, public schools within a certain radius of the school district may provide this baseline assumption. As both an employer and a caretaker of children in its custody, the school district will have a duty to provide a safe environment, taking into account the use of known, cost-effective precautions (like the use of PPE, social distancing, and other preventative measures recommended by the CDC and MDH) and complying with relevant governmental regulations and guidelines.

In defense of these standards, schools may be able to successfully assert that reasonable care was followed, even if masking was not universal, as the precautionary standards are constantly evolving. This factor might make it difficult for an individual to prove a specific duty. Furthermore, although state and federal agencies have recommended masking they have not mandated it and also have stated that masking is only one element of defense to stop a surge in COVID. Other precautions used by the school district can show that alternative adequate measures were in place to reduce the spread of the virus. What may be most important in addressing this issue is whether the school district takes an active role in keeping apprised of the spread of the virus in the school community, combined with vaccination rates, etc. If, for example, outbreaks significantly increase the number of COVID cases in the community and, in particular the school population, and the school district does not take steps to address possible additional preventative measures, this factor could be used against the school district.

The third factor to keep in mind relative to potential liability by those who may come into contact with COVID is that an individual also must prove that the school district caused the infection and that, as a result, the individual sustained damages. Due to the incubation time before symptoms arise, it may be very difficult for a litigant to prove that the school district was the source of contamination, particularly if an individual assumed some of the risk and chose not to wear a mask at school. Even if the school district could be a potential source, any other potential sources of infection also can help disprove that the school district was the one and only potential source. School districts should keep in mind, however, that they are still required to continue reporting positive cases of COVID. Thus, if there are significant numbers of individuals in a school with COVID, this data can be problematic. For this reason, continued efforts to follow contract tracing and quarantine protocols, even if only recommended and not required practices, will be important to reduce any potential liability that may exist.

Finally, damages must be shown as a result of the school district's actions that allegedly caused the individuals to contract COVID. Here, too, there is a hurdle for most claimants. If the person experiences only a mild case of COVID or one that does not subject the person to long-term health effects, any claim for damages would be limited. Of course, those who have more serious complications due to COVID are the more likely litigants. The pool of potential litigants with significant complications from the virus may exponentially decrease as more individuals become vaccinated.

As to the likelihood of such claims, to date, there are few, if any successful tort claims, either in Minnesota or nationally, where students have alleged liability against a school based on exposure to COVID. There have been few claims across the nation, and none in Minnesota, where an employer has been subjected to a lawsuit by an employee claiming that the employer caused the contraction of COVID. The limited number of lawsuits is likely because claims related to illness or injury caused in the workplace are usually preempted by workers compensation laws that are intended to be the only allowed source of recovery for claims.

While litigation in this area remains an evolving issue, particularly as the long-term effects of COVID are unknown, imposing universal indoor masking provides an effective and visible element of protection against a claim of an alleged unsafe work/educational environment. It is not, however, the only tool that may reduce a school district's liability. In this regard, the CDC recommends layering prevention strategies, including, but not limited to: regular monitoring of transmission levels, vaccination coverage levels, screening/testing results and the occurrence of outbreaks, physical distancing, to maintain a maximum distance between students of three feet and the use of cohorts, to the extent possible; excluding students/staff from school when infected and encouraging testing before a return to school; promoting vaccinations; maintaining effective ventilation systems; handwashing and respiratory etiquette; cleaning and disinfection. The more prevention strategies utilized, the more a school will be protected against the spread of COVID and resulting claims.

Other than implementing appropriate COVID safety protocols, there are few other efforts a school can take to reduce the potential of liability. Generally, a waiver or release from liability against claims by students and staff members who are required to be present in an allegedly unsafe environment generally are not valid. An exception to this rule might apply to extracurricular activities that are not part of the compulsory instruction requirements. School districts also are encouraged to review their present insurance coverage with their insurer to determine if there are any options available for greater liability protection.

Q3. What mechanism can a school board use to give the superintendent the authority to decide when masks are either mandatory or recommended?

A3. A school board may choose to adopt a motion or resolution delegating the authority to the superintendent to decide if and when mandatory or recommended masking will be implemented. When the guidelines are more detailed or some explanation helps explain the basis for the action, a resolution would be more appropriate. A school board may include in its resolution those factors that it desires its superintendent to consider when making this decision, including the multilayered approach discussed above. MSBA also recommends that schools continue to work with local and state health authorities regarding the appropriate measures schools may wish to consider in light of the community spread and positivity rate in each school's area. Even if these entities will not direct when masks should be required, they might provide helpful statistics the superintendent can weigh in making these decisions.

Q4. Can school districts require staff and visitors to wear masks despite low infection rates within the community?

A4. Yes. Schools have the authority to regulate who enters the premises and the rules that govern conduct inside the school building pursuant to the general statutory powers of a school board. Any masking requirements that are imposed should be subject to accommodations, applicable to both staff and visitors, if the individual cannot wear a mask due to a disability or is entitled to a religious exemption.

As this requirement would apply to staff, a school district has the inherent managerial authority pursuant to the Public Employment Labor Relations Act ("PELRA"), Minnesota Statutes Chapter 179A, to determine its policies that govern the functions and programs of the school, including whether or not masking of employees is required. Schools may be obligated, however, to negotiate in good faith the "terms and conditions" as to how this policy may affect the working conditions of its employees.

With respect to visitors, including parents, schools also have the ability to deny visitors permission to enter a school building or school transportation. MSBA Model Policy 901 - Visitors to School District Buildings and Sites - is a useful tool for schools to cite for this authority when trying to enforce such rules with visitors.

Q5. If the school district does not mandate masks, how should it handle bullying or harassment of the voluntarily masked?

A5. Harassment or "mask-shaming" of students and staff who voluntarily wear a mask when no mandate is in place (or even if it is in place) could constitute disability or other protected class harassment/discrimination (i.e., a pregnant employee advised not to wear

a mask may also be entitled to protection pursuant to the Pregnancy Discrimination Act ("PDA") and Title IX based on discrimination due to sex). Similar conduct toward a student wearing a mask could constitute bullying prohibited by the Safe and Supportive Schools Act.

There are a number of steps schools should take to protect against claims of harassment/bullying in general, but also to guard against "mask-shaming" claims.

- School boards should ensure that they have enacted all federal and state mandated policies that address harassment and bullying. Examples of these policies include MSBA model policies: 102 Equal Educational Opportunity; 401 Equal Employment Opportunity; 402 Disability Nondiscrimination Policy; 413 Harassment and Violence; 514 Bullying Prohibition Policy; and 521 Student Disability Nondiscrimination.

- School districts should ensure that staff, students, and parents are provided notice of these policies, at a minimum, in handbooks and through the school district's website.

- The aforementioned policies, as well as the laws upon which they are based, usually require regular, often annual, training. School administrators should be including this training in their back-to-school and staff development training at the beginning of the school year. In those schools that do not mandate indoor universal masking, it is advisable for administrators to specifically notify staff and students that "mask-shaming" may be considered harassment and/or bullying and subject to disciplinary action.

- If a complaint of "mask-shaming" is received, administrators should promptly investigate and respond to the complaint pursuant to the procedures set forth in the school district's policies. This investigative process may require that the complaint be reviewed pursuant to more than just one policy as, for example, harassment may be a form of bullying requiring a multifaceted approach.

- Findings of harassment and bullying should be addressed in accordance with the school district's discipline policies and procedures.

- Regardless of whether a finding of harassment or bullying is made, school administrators should implement additional remedial measures, where appropriate, to ensure that the staff member or student feels welcome at school, that the conduct that caused the complaint does not reoccur and that acts of retaliation are promptly addressed.

Q6. For quarantined students or students that refuse to come to school because the school population is not wearing masks, what is the school's responsibility relative to compulsory attendance and providing an education?

A6. As in any school year, schools should monitor student attendance. Frequent absentees should be contacted to determine the cause of their absences and to work through any barriers to the student's attendance. If the student is not attending school in person, on the advice of a health care provider, due to the student's own medical condition related to COVID-19 (i.e., contracting COVID or being medically fragile), the student's attendance should be accommodated under the school district's attendance policy just like any other medical condition that prevents a student from coming to school. Similarly, students who are quarantined or isolating due to a close contact may be treated the same as students who are ill or had a comparable unanticipated long-term absence in accordance with school district policies. These policies, such as MSBA Model Policy 503 – Student Attendance, provide flexibility to schools to allow medically related absences to be excused. Students whose absences are excused should be required to make up all assignments missed or to complete alternative assignments as deemed appropriate by the classroom teacher in the timeframe provided by policy.

If a student is refusing to attend school, administrators should connect with that student and his or her family to determine the reason for non-attendance. If the reason for the absence is out of a fear of contracting COVID-19, schools should work with the family to find an equitable solution. For example, the parties could consider whether an approved on-line program is an acceptable option or if there are other safety protocols that could be put in place for the student to ease parent/student concerns.

If, however, the student and the school district are unable to come to an agreement for the student's voluntary return to school, the student may be considered a continuing or habitual truant. In that instance, the school district would be required to follow its attendance policy and the Compulsory Attendance Law that requires notice to the parents of their obligations under this law and the subsequent reporting of the habitual truancy to the county. Although not issuing any current guidance, MDE strongly advised schools against suspending students or otherwise disciplining students who did not attend school in-person due to fear of COVID-19 during the 2020-2021 school year. Given this historical position, MSBA recommends that schools contact their legal counsel before imposing any consequences based on a student's refusal to attend school if an amicable arrangement cannot be reached.

COVID-19 VACCINATIONS

Q7. Can school districts ask staff or students if they have been vaccinated? Can school districts require proof of vaccination?

A7. Presently, there is no state or federal law mandating that students or employees of K-12 schools be vaccinated against COVID-19 and show proof of immunization from COVID to the school district. A mandate for students under 12 certainly cannot be imposed when the vaccine has not yet been made available to children in that age group. As discussed below, school districts can impose COVID-19 vaccine mandates that may require proof of vaccination, for those who can be vaccinated, but such policies do raise a number of issues.

Whether or not a school district chooses to impose a vaccine requirement, they should be aware that the ADA and the MHRA limit employers' ability to make medical inquiries of their staff. Pursuant to current EEOC guidance, school districts may ask staff if they have been vaccinated without violating the ADA. Follow-up questions, such as asking a staff members why they have not been vaccinated, could constitute an impermissible medical inquiry. For example, questions requiring the employee to share disability-related information could violate the ADA and the MHRA. Similar standards could be applied to students.

If vaccinations are not made mandatory, school districts may still seek vaccination information from staff and students on a voluntary basis. For example, if a student or employee contracts COVID-19 or becomes a close contact, prior vaccination data may be relevant in determining if the staff member or student is eligible to return to school in-person. Under these circumstances, the employee or student's submission of vaccination information is voluntary as it is not being required as a condition of readmission. Rather, the submission allows the individual the benefit of an earlier return if they wish to share that data.

If any vaccination inquiries are made, schools should ensure that they comply with the Tennessen Warning requirements of the Minnesota Government Data Practices Act ("MGDPA"). More specifically, as the data being collected would be considered private educational or personnel data, an individual should be advised as to the purpose of collecting the data, how the data will be used, if the individual is being required to provide the data or if the disclosure is voluntary and the consequences of providing or refusing to provide the data. *See* Minn. Stat. § 13.04, subd. 2.

Q8. Can schools tell parents whether a specific teacher or employee is vaccinated?

A8. No. Vaccination status of employees of a public entity is not listed as public data pursuant to the MGDPA and, therefore, is private data that cannot be disclosed to the public. *See* Minn. Stat. § 13.43. Thus, schools cannot tell parents if a particular teacher is vaccinated absent a change in law, court order, or written authorization of the teacher. The EEOC similarly opines that an employee's vaccination status is confidential medical data under the ADA and cannot be disclosed to the public. In fact, the ADA requires that confidential medical data be stored separately from the employee's personnel file.

Q9. May districts reply to data requests that ask for aggregated numbers of employees vaccinated?

A9. Yes. If the school district has staff vaccination data, the aggregate number of employees who have been vaccinated may be publicly disclosed with some limitations. Although an individual employee's vaccination status is a private or confidential medical record, school districts can prepare summary data from private or confidential data under Minnesota Statutes, section 13.05, subdivision 7. Summary data is defined as "statistical records and reports derived from data on individuals but in which individuals are not identified and from which neither their identities nor any other characteristic that could uniquely identify an individual is ascertainable." Minn. Stat. § 13.02, subd. 19.

Accordingly, if a school district is preparing summary data, it should make sure the data is not so detailed as to make one or more employee's vaccination status easily identifiable. For example, data showing the percentage of teachers that are vaccinated may be provided. Data detailing teacher vaccinations by school or by grade level may not qualify as summary data, however, depending on the size of the school or school district if identification of these characteristics allows the public to determine who is or is not vaccinated. Although a school district may like to share that all of its employees are vaccinated (assuming this were true), this disclosure would impermissibly identify the vaccination status of all employees.

Also, if summary data of vaccinations of school staff is disclosed, school districts may wish to consider adding a qualifying statement with the release of data. For example, it would be appropriate to inform the public that the school district does not collect vaccination data from employees unless it is voluntarily provided. Thus, the numbers being reported may not accurately reflect the actual number of school staff who are vaccinated. Also, even if there is not a 100% vaccination rate, modifications and accommodations are implemented for those who are not vaccinated in accordance with the school district's COVID-19 safety protocol.

Q10. Can school districts require employees to get vaccinated?

A10. COVID-19 vaccines currently are only available to the public pursuant to an emergency use authorization ("EUA") granted by the FDA,[1] which differs from an approval under FDA vaccine licensure. With EUA vaccines, the FDA has an obligation to ensure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that the FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product.

Mandating a vaccination that is only authorized for emergency use and carries with it this type of warning is potentially problematic. If the EUA vaccination does cause a serious injury or illness to an employee, school districts may be liable for the damages to the employee resulting from the mandate. It may be difficult to obtain a waiver from employees that is legally binding based on the currently unknown long-term risks. If vaccinations are mandated and, therefore a willful act of the employer, it also is unclear as to whether this act will be covered by insurers, including workers compensation. Most insurance coverage does not encompass willful acts and some insurers will not cover COVID-19 illnesses related to the vaccine. As a result, there is a certain amount of unknown financial risk to school districts if they mandate the COVID-19 vaccine.

Notwithstanding the emergency use status of the current vaccines, the EEOC has taken the position that the administration of a COVID-19 vaccine to an employee by an employer, or by a third-party administrator on behalf of the employer, is not a "medical examination" and is permissible under the ADA. The reason for this position is that by administering the vaccine, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination. OSHA has taken a similar position, namely that an employer can require its employees to take influenza vaccines as long as the employee is properly informed as to the benefits of the vaccination and is exempted from the mandate based on a reasonable belief the vaccine will create a real danger of serious illness due to an existing medical condition. As

[1] According to a recent article in the Wall Street Journal, some agency and White House officials hope the vaccine from Pfizer-BioNTech, the only vaccine maker to submit all necessary paperwork to date, will get full, nonemergency use approval as soon as August 15, 2021. More recent discussion of this timeline, however, has trended toward agreement that full approval for Pfizer's vaccine isn't likely until early or mid-September. *See* https://www.wsj.com/articles/fda-weighs-faster-timeline-for-approving-pfizer-vaccine-11628107298. If and when full approval of the vaccine is given, the potential challenges to mandatory vaccinations based on health concerns may significantly diminish. There also may be changes to state or federal laws, rules, regulations or administrative orders or guidance that could affect a school district's decision to mandate staff, student and visitor vaccinations. Thus, school districts should continue to stay vigilant as to this emerging legal issue. MSBA will provide updates to its members if there are significant legal developments once full approval of a COVID-19 vaccine is issued.

a result, there is an argument that employer policies may permissibly require employees to be vaccinated as a condition of continued employment or, at the very least, as a condition of returning to the physical workplace, with certain limits.

There are a number of legal and practical issues school districts should consider if they are contemplating mandatory vaccination by staff as well as students or visitors, even if non-emergency use of the vaccine is approved by the FDA.

- As with inquiries as to why an employee cannot wear a mask, pre-vaccination inquiries may trigger impermissible disability-related disclosures. Because administration of a COVID-19 vaccine likely would require an employee to provide certain pre-screening information that may be necessary to determine whether an employee can be vaccinated, such disclosures can trigger the ADA's provision prohibiting disability-related inquires. To overcome the disability-related inquiry prohibition, an employer must show that such pre-screening questions are "job-related and consistent with business necessity" to comply with the ADA.

- Some employees may not be able to be vaccinated due to a disability. In those cases, the ADA requires that employees be exempt from vaccination requirements, unless it can be shown that the employee's unvaccinated status poses a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.

- Under Title VII, employees may be exempt from vaccinations required by an employer if this procedure goes against an employee's sincerely held religious belief, practice or observance. In this situation, the employee may be entitled to either a total exemption or an accommodation, unless the exemption/accommodation would pose an undue hardship on the employer (a similar but slightly different standard of accommodation that applies to an employee who is a qualified individual with a disability).

- Employees who are pregnant and whose medical providers have advised them not to get vaccinated due to pregnancy may require an exemption as well. While these exemptions likely would be temporary, failure to provide them could constitute sex discrimination, unless the employer can show an undue hardship or significant risk of substantial harm to the health or safety of the individual or others from not being vaccinated.

- The EEOC takes the position that as with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on, or disproportionately applies to, employees based on their protected class. Thus, school districts should keep in mind that some employees may be more negatively affected by a vaccination

requirement and these barriers should be considered before imposing consequences based on non-compliance with the mandate. As with any other possible disciplinary action, a Loudermill hearing should be provided to allow the employee the opportunity to explain why he or she has not followed a directive.

- Unions may assert that employer vaccination policies are a mandatory term and condition of employment that must be bargained. Although school districts may defend such claims on the basis that such policies are an inherent managerial right of an employer to implement pursuant to PELRA, school districts still may be required to negotiate the effect of the policy on employees' terms and conditions of employment.

COVID-19 TESTING, QUARANTINE AND ISOLATION PROTOCOLS

Q11. If COVID-19 testing is recommended for unvaccinated people, who pays for the testing, and can the schools mandate testing?

A11. No state or federal laws specifically preclude employers from requiring their employees to undergo COVID testing. The ADA does raise a concern relative to such testing as it requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, however, the EEOC has not changed its opinion at the present time that employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. The test may be administered before initially permitting an employee to enter the workplace and/or periodically thereafter. Thus, the ADA does not interfere with employers following recommendations by the CDC or other public health authorities regarding whether, when, and for whom testing or other screening is appropriate.

The CDC's Interim Guidance, however, provides that *antibody test* results, as distinguished from molecular tests, "should not be used to make decisions about returning persons to the workplace." In reliance on this guidance, the EEOC has taken the position that under the ADA, an antibody test constitutes a medical examination under the ADA and "should not be used to make decisions about returning persons to the workplace," as the test, at this time, does not meet the ADA's "job related and consistent with business necessity" standard for medical examinations or inquiries for current employees. This interpretation by the EEOC could change if the CDC modifies its Interim Guidance

Similar to requirements that may be imposed regarding universal indoor masking and vaccinations, school districts also should have the inherent managerial right to require

their employees to undergo mandatory COVID-19 testing under PELRA. Testing is currently free in Minnesota whether or not an individual has insurance. If this program ceases and an expense is associated with testing, imposing this cost on school district employees who are members of a recognized bargaining unit likely will be seen as a term and condition of employment subject to good faith bargaining.

MDH included in its most recent publication (August 4, 2021) that guidance on COVID-19 testing in schools and/or of members of the school community is still being developed in conjunction with MDE. MSBA anticipates further information on this topic will be released in the coming weeks and will update its members with any additional guidance on this issue as well as any recommendations as to quarantine and isolation protocols, if provided.

REQUESTED COVID-19 ACCOMMODATIONS

Q12. Do school districts have to allow quarantined staff to work from home?

A12. Many of the laws in existence during the 2020-2021 school year that allowed quarantined staff to take leave or to work from home are no longer in effect. For example, the Families First Coronavirus Response Act ("FFCRA"), that required employers to provide employees with up to two weeks of paid leave if subject to a quarantine or isolation order or recommendation from a physician to self-quarantine or who is experiencing COVID symptoms expired as of December 31, 2020. The Emergency Family and Medical Leave Expansion Act ("EFMLA"), that similarly guaranteed employees the right to leave or to telework for COVID related reasons also expired on this date. Even the Executive Orders from Governor Walz that either obligated or strongly encouraged employers to allow employees to work from home where possible, expired as of July 1, 2021. Thus, many of the laws that allowed quarantined staff to work from home, including while quarantined, are no longer in effect.

Some confusion may exist among employees as to their rights under the FMLA due to the extended rights that previously had been provided. Thus, school districts may need to remind employees that the FMLA does not provide employees with the right to accommodations, such as working from home. Rather, the FMLA only provides an employee with the right to an unpaid leave of absence if they cannot work due to a serious health condition. Employees who are quarantined due to a serious health condition, that could include contraction of COVID, may be entitled to a leave under the FMLA, if the employees' symptoms are significant enough to qualify as a serious health condition. Yet, the right to leave still does not entitle an employee to work from home, either full-time or part-time, unless agreed to by the employer.

The only laws that potentially allow an employee to work from home are the ADA and MHRA if the employee is a qualified individual with a disability who can perform the

essential functions of the position, with or without a reasonable accommodation. Simply contracting COVID-19 may not constitute a disability as generally short-term illnesses do not meet this standard. If, however, the employee suffers from significant symptoms or side effects of contracting the virus or has an underlying health condition that is affected by COVID, the employee may qualify. To make this determination, employees should be required to provide sufficient medical documentation to the school district to substantiate their disabling condition. Even though an employee may be qualified as an individual with a disability, this also does not mean that a school district must allow the employee to work from home. Rather, the school district should enter into the interactive process with the employee to determine the most appropriate, reasonable accommodation. The choice of accommodations lies with the employer, as long as a request from an employee is not unreasonably denied. It also is important to remember that if an essential function of the employee's position is to be on-site to perform duties, the school district is not required to eliminate an essential function or hire another employee to perform this function.

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