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FAQ re School Closures and HB 2910

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On March 27, 2020, Governor Ducey signed House Bill 2910 into law (Ariz. Session Laws, Ch. 47 (2020), hereinafter HB 2910). The law is immediately effective. The purpose of this alert is to provide general information about these hot topics. Please contact us if you desire legal advice on a particular situation.

1. After March 30th, must all support staff or other employees who cannot complete their duties from home, return to work to prior duties or other assigned duties if they were previously assigned to be "on call" working from home?

After March 30th, all employees will either return to work, work remotely if able to do so or perform other duties as assigned on-site or remotely. Districts should endeavor to try to assign tasks to all staff so as to promote the distance learning now required.

Text of HB 2910 can be found at https://www.azleg.gov/legtext/54leg/2R/bills/HB2910H.pdf

2. Is the District permitted to assign employees duties outside of their typical job description? What risks exist?

As long as the employee is appropriately trained and supervised, duties can be reassigned as appropriate while things are so disrupted. See Governing Board Policies CBA, GCK and GDJ. If an employee suffers a work related injury, the District would refer that matter to its workers' compensation insurer.

3. What is meant by the statement that employees shall "commit to being available to work" in HB 2910?

Employees must be available to work, meaning that they are ready, willing and able to perform assigned tasks. If the employee is not available to work, the employee should pursue taking time off using paid time off, vacation leave, sick leave, or unpaid leave, if necessary. There is no specific guidance on how Districts and employees shall communicate regarding the employee's availability. Some Districts are having employees sign protocols regarding working remotely or being "committed to work."

4. What if an employee refuses to come to work as assigned at a District facility?

HB 2910 does not address this contingency and the bill contains somewhat conflicting language. If a District assigns an individual to work at a District facility and the employee refuses, the District should evaluate whether the employee is "committed to being available to work" and may have the option to place the employee in dock status. The District may also need to review whether the employee qualifies for any type of leave. The District could review its options to discipline an employee or terminate but should ensure that all risks are individually evaluated with respect to each situation.

5. How does the Families First Coronavirus Response Act affect an employee's ability to take leave?

The Families First Coronavirus Response Act takes effect April 1, 2020. That Act requires Districts to provide up to 80 hours of paid sick time in certain situations, in addition to whatever other sick time the District already offers. As of April 1, full time and part time employees are covered and can use this sick leave if they are unable to work on-site or remotely for any of the following reasons:

- **a. Employee is subject to federal, state or local quarantine or isolation;**
- **b. Employee is told by a health care provider to self-quarantine;**
- **c. Employee has COVID-19 symptoms and is seeking a medical diagnosis;**
- **d, Employee has to care for an individual subject to a federal, state or local quarantine or isolation;**
- **e. Employee is caring for his or her child whose school or place of care is closed or the child care provider is unavailable due to COVID-19 reasons; or**
- **f. Employee qualifies for a substantially similar condition as may be further specified by the Department of Health and Human Services.**

We will distribute additional guidance on this new law this week.

6. What if an employee was out on Family and Medical Leave Act (FMLA) prior to school closure?

Under FMLA regulations, the District is required to extend an employee's FMLA leave by the amount of time the employer's activities have ceased. Accordingly, most employees who began FMLA leave before schools closed will likely be entitled to additional time away from work as "school closure" days might not count towards the 12 weeks of FMLA leave. See 29 C.F.R. Section 825.200(h).

If an employee who is out on FMLA leave now desires to work remotely, the District should follow its typical procedures regarding an employee returning from leave, which may require the District to obtain a physician's release.

7. If the District adopted a resolution and paid time and a half or some other shift differential to hourly employees designated as essential employees prior to March 30th, should it continue to do so?

The District must put all employees who are available to work back to work under HB 2910. Districts no longer need designations of essential and non-essential employees and should return all employees to being paid straight time for non-overtime hours. If the District wants to consider raising the wages of certain classes of hourly employees, it should consult with counsel about its ability to do so.

8. Is the District required to continue to pay employees who have been hired through its community education programs if those programs have been discontinued?

HB 2910 did not differentiate the requirement to continue pay to District employees based upon any funding source. But, this is a fact specific inquiry and use of M&O funds are limited in some situations.

9. After March 30th, is there greater accountability of employee work hours?

For hourly workers, it is a District's responsibility to maintain accurate records of all hours worked. This enables the District to verify that it has paid people minimum wage, compensated them for all hours worked and paid overtime when necessary. Typically, being "on call" is not considered work time for purposes of the Fair Labor Standards Act and so employees are generally not required to be paid while "on call." Districts may want to consult with legal counsel about "on call" restrictions that your District has in place.

Districts should have employees complete a time card or sign in and out of the District's tracking system to document the days and hours worked. Districts can have employees log their tasks while working remotely but are not required by law to do so.

10. Can Districts continue to pay for services obtained from third party vendors during the school shut downs?

Districts are permitted to continue to pay for services that it requires from workers employed by third party vendors who perform duties for the District during a school closure. Districts will need to evaluate what services it needs. The District will need to review all relevant contracts.

11. What should our District do regarding extra-duty activities stipends for work that cannot be completed during the closure?

HB 2910 does not specifically address this issue. Pro-rating extra duty pay is a reasonable and defensible position to take, although there is some risk that a disgruntled employee could bring an unpaid wage claim.

12. Is there any guidance on what defines continued general education opportunities? Is there any guidance on what documentation or evidence that Districts should be maintaining in order to comply?

Neither the Arizona Department of Education nor the State Board of Education have officially commented on those issues yet. Informally, ADE staff have indicated that it will require attestation of opportunities offered but that it would allow schools flexibility.

13. Should Districts take attendance?

HB 2910 directs that schools must begin to provide educational opportunities by March 30, 2020. The law did not address the taking of attendance. ADE's guidance regarding special education students recommends documenting efforts to communicate and involve parents and students. The District likely could but is not required to mark students who do not participate as absent.

14. What are a District's obligations under IDEA with respect to timelines for special education students?

State guidance does not reduce the District's requirements under federal laws such as IDEA or Section 504. HB 2910 suspends state special education deadlines. The Arizona Department of Education still requires that Districts meet the timeline requirements. Furthermore, the guidance from OCR and OSERS reaffirmed the District's obligations to meet the required timelines. The Arizona Department of Education's guidance provides some flexibility in how those requirements can be met, but there is no waiver of timelines.

The CARES Act passed by Congress allows the Secretary of Education to report to Congress thirty (30) days after the bill is signed to potentially recommend additional waivers to IDEA and Section 504.

The best course of action at this time is to attempt to meet your procedural deadlines as possible. ADE's guidance updated March 27, 2020 is instructive.

https://www.azed.gov/specialeducation/special-education-guidance-for-covid-19/

15. What are a District's obligations under IDEA with respect to educating special education students?

The supplemental fact sheet from the U.S. DOE states that "although federal law requires distance instruction to be accessible to students with disabilities, it does not mandate specific methodologies. Where technology itself imposes a barrier to access or where educational materials simply are not available in an accessible format, educators may still meet their legal obligations by providing children with disabilities equally effective alternate access to the curriculum or services provided to other students."

https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf.

Districts should strive to provide "equally effective" instruction which can be accomplished through different methodologies (e.g., physical educational packets, telephonic instruction with teachers, pre-made video instruction, etc.). If the District provides "equally effective" instruction through different methodologies, it still must provide access to all platforms being offered to its general education students. Upon the return to school, IEP teams must individually determine whether a student is owed compensatory education.

16. If a District is going to offer on line instruction, is the District required to provide internet and/or computers to all students, if they do not have access?

There has not been specific guidance on this issue other than ADE's discussion regarding providing special education students with equal access. See:

https://cms.azed.gov/home/GetDocumentFile?id=5e7aa37803e2b3080c564f89 (updated 3/27/20).

Districts are cautioned to guard against inequities for students who may not have access to technology in the provision of instruction during this period of closure. Some Districts are loaning out technology to assist with this. Internet providers have also offered free connectivity. Districts must abide by regulations governing the Family Education Rights and Privacy Act if distributing directory information to an internet provider.

17. What should a District do regarding state assessments and graduation requirements?

Districts do not yet have guidance from ADE on these topics yet.

18. What should a District do regarding incomplete teacher evaluations and performance based pay plans?

Districts do not have guidance on this topic. This may remain an area in which Districts may exercise local control. If so, Governing Boards would need to develop an alternative teacher and administrator evaluation plans for this school year as well as a revised performance based pay plan. Options might include:

- **a. Using last school year's scores and performance based pay assessments with an alternative plan for new staff;**
- **b. Doubling initial observation scores and using last school year's assessment data; or**
- **c. Using alternative data other than state assessments for the data portion (such as District based benchmarks).**