

Wage & Hour and Continuous Operations COVID-19 Considerations

1. Are pre-schools required to pay teachers when the school is closed, and the teachers are not on the work schedule?

If a pre-school decides to close in response to the COVID-19 outbreak, the obligation to pay at-will employees is as follows: non-exempt employees (hourly) do not need to be paid for any hour that they do not actually work; exempt employees (salaried) must be paid their full salary for any week in which they perform any work. However, any time an exempt employee performs no work in any given week they do not need to be paid. If they work a partial week, they get their full weeks' salary. Depending on a pre-school's written policies, the pre-school might be able to apply PTO towards an exempt employee's salary for a partial workweek.

If teachers have written contracts that expressly guarantee employment for any specific period of time, as opposed to being at-will, the school's obligations and options will be subject to the language of the contract.

The school should review its PTO policies to determine whether any payments may be requested by employees in the event of an emergency closure. If the language of the policy expressly permits use of PTO for circumstances that include emergency closure, employees must be paid according to the terms of the policy. If the policy does not specifically permit employees to use PTO in the event of an emergency closure, then PTO does not have to be made available. On the other hand, if the school can afford it, the school can decide to allow employees the option to use up their PTO, even if it is not technically available for an emergency closure. ***This issue may need to be revisited in light of the recently enacted Families First Coronavirus Response Act.***

2. If teachers have paid time off in their employment contracts, can they request and use this time when the pre-school is closed for a national emergency?

An employee's "right" to request PTO will depend on the terms of each pre-school's written policies. For example, if use of PTO requires approval, then a request could be denied in order to address the school's financial concerns; however, denial of approval should be made across the board, to avoid even the appearance of discrimination.

PTO policies are a matter of contract, not law, so they can be changed to address an employer's issues, if changes are made in a non-discriminatory way. With the caveat that it would be inadvisable to make policy changes that would divest employees of PTO that had previously vested (*i.e.*, was due no matter what). Amounts of PTO that have accrued but that are not defined under the school's policies as vested may be changed by across-the-board (*i.e.*, non-discriminatory) policy revisions.

3. If teachers can use PTO during a national emergency, and employers are required to pay the PTO, does it have to be paid out in a lump sum during the normal payroll period? Or, can it be spread out over several paychecks?

If there is a contractual (per written policies) entitlement to PTO under the circumstances, the PTO can be paid out on a per diem/weekly basis. There is no need to pay a lump sum; the PTO may be paid for days used in any workweek on the school's regular payroll schedule.

4. What if the school cannot afford to pay all the PTO for everyone at the same time (since the school won't be getting paid tuition during the closure)?

If the school is financially unable to pay PTO according to its own policies and as outlined above (*i.e.*, not in a lump sum), then the employer may change its policies across the board to address financial concerns. As noted above, however, in making such changes, it is important to distinguish between making changes that would

divest employees of PTO that had previously vested (i.e., was due no matter what) vs. changing policies relating to PTO that is merely accrued. In other words, amounts of PTO that have accrued but are not defined under the school's policies as vested may be changed per an across-the-board (i.e., non-discriminatory) policy.

5. Does a church school remaining in session go against the recommendation to curtail gatherings of 10 or more?

<https://www.cdc.gov/coronavirus/2019-ncov/downloads/considerations-for-school-closure.pdf>

6. If a school remains in session and a child or employee becomes ill with COVID-19, is the church/school liable?

Churches (and their schools) are generally deemed to have a general duty of care to maintain safe premises, which would likely be deemed met if they follow steps outlined in the CDC's guidance for businesses. Church pre-schools should consult the CDC guidance for "Medium Risk" employers. Further, a school has a duty to warn invitees (children and their parents) and staff of any latent hazards of which the church or school has superior knowledge. So, it is recommended that the church or school notify the congregation and parents if it knows that a person who has tested positive for COVID-19 has been present on church or school property within the past 14 days. In making such announcements the identity of the individual with COVID-19 should be kept strictly anonymous to comply with the ADA and/or avoid potential liability for defamation.

Workers' Comp: Generally, diseases and sicknesses are excluded from coverage by Florida's Workers' Comp statutes. However, the statute (FL statute 440.151) does allow an exception for "Occupational Diseases," diseases that result from the "nature of employment" AND is actually contracted while working AND the infected person had a position that exposes them to the disease to a greater degree than the general public.

So, for hospital workers and first responders, they would likely have coverage, while a teacher contracting the illness from a student probably would not have coverage.

For any person covered under the Conference Workers' Comp policy who believes they contracted COVID-19 at work, please report your claim to our Third Party Administrator, The Johns Eastern Company, at 800-616-6857; however, based on FL statute 440.151, there will very likely be no coverage.

OSHA: In any workplace with non-ministerial employees, under the general duty clause of OSHA, an employer would have a duty to take reasonable precautions to protect employees, i.e. act in accordance with CDC Guidelines. Religious organizations are exempt from maintaining injury and illness records but are required to report workplace related in-patient hospitalization or fatality. A non-ministerial employee who complains and/or refuses to work because of the actual presence or reasonable probability of disease in the workplace might be deemed to have an OSHA 11(c) claim for retaliation if disciplined for refusing to work.

FMLA (Currently): Any church with 50 or more employees should be mindful that an employee who is sick or has a sick spouse, child, or parent would be entitled to up to 12 weeks' unpaid leave. In any situation where an employee is being required to take sick leave because they are infected or in close contact to an infected person, however, the employer should beware if the suspended employee does not want to sue FMLA leave (you can't force anyone to use FMLA; so a legal consult might be in order to see if employer attendance policies or other applicable law would come into play).

FMLA (Coming soon): Effective April 2, 2020, through December 31, 2020, the recently enacted Families First Coronavirus Response Act modifies the FMLA to create obligations on all employers with less than 500 employees, including 12 weeks of leave (some paid, some unpaid) for all employees employed for 30 or more days, limited to cases where (1) the employee is diagnosed with COVID-19, (2) has to care for a family member with COVID-19, or (3) has to care for a minor child whose school has closed in response to the COVID-19 pandemic. It is unclear whether the Department of Labor will be issuing regulations that exempt small

employers (under 25) or create any other exemptions. As currently provided under this new law, all employers are required to post notices regarding employee rights under this amendment by March 25, 2020. Please note that such obligations are not triggered by a decision to shut down operations—only by the three specific scenarios listed above. More on this new law will be forthcoming.

ADA: the Americans With Disabilities Act may come into play if an employee develops a disability as the result of being infected and needs some type of accommodation to perform their job duties. In addition, ADA requirements regarding the confidentiality of employee medical conditions applies to all employees; thus, even if it becomes necessary to warn employees or families of infection in the schools or workplace, names of infected employees should never be given by the employer. Employers are, however, permitted to subject employees to heightened inquiries, testing, and restrictions, consistent with the CDCs recommendations and as set forth more fully in the EEOC Guidance at the link below:

<https://content.govdelivery.com/accounts/USEEOC/bulletins/281e1ee>

- 7. If schools stay open can parents be asked to sign a form stating they understand the risks associated with keeping their child at the school?**

This issue remains under consideration, and additional updates will be provided.

- 8. If churches open their doors to distribute food and a volunteer contracts the virus, is the church liable?**
Possibly.

- 9. Can we ask the volunteer to sign an assumption of risk document?**

A form for use in connection with volunteer food distribution has been developed and is attached.