

What You Need to Know Heading into the 2021-22 School Year

May 5, 2021

Presented by: Mary S. Gerbig, Claire E. Hartley,
Alana M. Leffler and Emily R. Turzinski



Buelow Vetter

Buikema Olson & Vliet, LLC



**GUIDANCE ON
RECOVERY AND
COMPENSATORY
SERVICES, VIRTUAL
PROGRAMS AND
STUDENT SPEECH**

Special Education and Summer Programming

❖ Additional Services

- ❖ The analysis should focus on determining what additional services are required to lessen the impact of the school closure so the student can continue to make progress that is appropriate given the student's unique circumstances. This may require providing additional services to address any regression of skills and to accelerate progress such that the student can continue to make appropriate gains. In determining whether and to what extent additional services should be provided, the IEP team should consider whether or not it is reasonable for the student to regain the skill and make appropriate progress within a certain amount of time without the need for the services. However, if the student's performance is significantly below where it was when schools were closed due to the emergency order, additional services would be required.

Special Education and Summer Programming (Cont.)

❖ Documenting Additional Services

- ❖ The LEA should document the additional services in the program summary of the student's IEP. Clearly label the services "additional services due to extended school closure" and include a description of the service (e.g., specially designed instruction in reading comprehension), and the frequency, amount, location and duration of the services. State the services in the IEP so the level of the LEA's commitment of resources is clear to the parents and other IEP team members. Duration of the additional services should be provided within the timeframe of the annual IEP, which may include during the summer.

Special Education and Summer Programming (Cont.)

❖ DPI Additional Services Advice to Parents

- ❖ School staff that work with your child and the IEP team should work together, along with the parent, to discuss adding or not adding additional services to the IEP.
- ❖ Parents and families know their child best and spend the most time with them during school closure. Be prepared to share what you have seen about your child's learning.
- ❖ Services must be in addition to and not replace your child's current education.
- ❖ IEP teams are not required to replace every minute your child missed special education services during the school closure, and in most cases, this would not be possible.
- ❖ Additional services are not automatically required if your child did not receive all of the services as specified in their IEP.
- ❖ The amount and type of additional services are what your child needs to address loss of skills or knowledge so your child can make progress and catch up more quickly and/or address any new needs your child may have since school buildings closed.
- ❖ In deciding about where additional services will be provided, IEP teams must still consider what would be the least restrictive environment for your child's education.”



Special Education and Summer Programming (Cont.)

- ❖ Know the Difference Between Additional Services and Compensatory Education
- ❖ “Compensatory services” are words used most often to describe when a parent or other person files a state complaint or the parent requests a due process hearing. These require DPI or a hearing officer to make a decision as to whether the school did or did not provide a free appropriate public education (FAPE) to a student with an IEP.
- ❖ “Additional services” are words used to describe services that may be needed because school buildings were closed to in-person instruction. Some students may need more special education instruction and support when they come back to school.

Special Education and Summer Programming (Cont.)

❖ Compensatory Services

- ❖ What is the difference between compensatory or recovery services and additional services?
 - ❖ Both “compensatory “ and “recovery” are terms used interchangeably, and refer to special education and related services required for those students who did not receive a free appropriate public education (FAPE) during the 2020-21 school year.
 - ❖ Due to circumstances related to the pandemic, some students did not receive or were unable to access some of their special education services necessary to receive FAPE this year. (i.e. may not have received a required service during this time, virtual services were ineffective in allowing the students to make sufficient progress towards their IEP goals, or eligibility for special education was delayed because evaluations were not completed).
 - ❖ In all of these cases, LEAs must determine on an individual basis if compensatory or recovery services are required because the student did not receive FAPE for all, or for a portion, of the 2020-21 school year.

Special Education and Summer Programming (Cont.)

❖ Compensatory Services

- ❖ How do we determine if a student requires compensatory or recovery services?
 - ❖ LEA may use the analysis outlined in the department's Additional Services Bulletin 20.01. IEP teams should consider the extent to which the student failed to make progress toward their IEP goals and in the general education curriculum due to lack of FAPE.
 - ❖ IEP teams should review and consider IEP implementation, the services provided and the effectiveness of these services, data on students progress, and parent input. If it is determined a student requires compensatory services, the services should be clearly labeled as such in the program summary of a student's IEP and include frequency, amount, location and duration of the services. The decisions about the extent and duration required, must be made on an individual basis, and the services must supplement and not supplant the student's existing educational program.

Special Education and Summer Programming (Cont.)

❖ Compensatory Services

❖ How can compensatory or recovery services be funded?

- ❖ Compensatory education must be provided by appropriately licensed staff in accordance with a student's IEP at no cost to the family. Compensatory or recovery services are allowable expenses for state categorical aid and IDEA Part B flow-through grants. Federal stimulus funds available under the Elementary and Secondary Schools Emergency Relief Fund under the CARES Act, Coronavirus Response and Relief Supplemental Appropriations Act (CRRSA Act), and the American Rescue Plan Act (ARPA) may also be used.



Special Education and Summer Programming (Cont.)

❖ Compensatory Services

❖ Can compensatory or recovery services be provided to students with disabilities who have graduated with a regular diploma or reached the age of 21 during the 2020-21 school year?

❖ Yes, as local educational agencies are conducting IEP team meetings for those students who will be graduating with a regular high school diploma or reaching the age of 21 during the 2020-21 school year, attention must be given as to whether compensatory or recovery services are required due to the effects of the pandemic on the provision of FAPE. In considering the need for compensatory or recovery services, the IEP team should examine the student's progress towards achieving their annual IEP goals for the 2020-21 school year. IEP teams should pay particular attention to matters associated with the student's transition to postsecondary education or training, employment, and independent living. These decisions must be individualized. If it is determined that compensatory or recovery services are required, the adult student or guardian should be in agreement as to when they will be provided. There is no timeline as to when they must be provided, but should be as soon as possible.



Shortened Day

❖ Documenting in the IEP

- ❖ The only time it is appropriate to shorten the school day for a student with a disability is when the student's IEP team determines a shortened day is required to address the student's unique disability-related needs. For example, if because of the student's medical needs, the student is physically unable to tolerate a full school day, a shortened day may be appropriate. Before deciding to shorten the student's day, the IEP team must consider if there are other ways to meet the student's needs.
- ❖ The IEP must include:
 - ❖ an explanation of why the student's disability-related needs require a shortened day, and
 - ❖ a plan for the student's return to school for a full day, including a plan to meet more frequently to review student data and determine whether the student is able to return to school full-time.
- ❖ The student should return to a full school day as soon as she or he is able, and under most circumstances, a shortened school day should be in place for only a limited amount of time. The IEP team must meet more frequently than once a year, and as often as necessary to review the plan and to determine when the student is able to return to school full-time.



Shortened Day (Cont.)

- ❖ IEP Completeness Is Required for A Shortened School Day
 - ❖ “However, when an IEP team decides to shorten a student’s school day, they must clearly base the determination on the student’s disability-related needs and clearly explain why the shortened school day will address these needs. The team must consider if there are other ways to meet the student’s needs, including adding supports and services or other placement options.

Shortened Day (Cont.)

- ❖ In this case, the IEP documents the need for the student to increase “stamina” without a clear, specific description of that term. The IEP did not provide clear documentation of other supports and services considered or other placement options reviewed before deciding to shorten the student’s school day. While the team planned to meet frequently to review student data, and in fact met several times, the IEP does not provide clarity around which data the team would review during these meetings, nor does it specify the expected levels of progress needed to indicate the team should increase the length of the student’s school day. The team did not properly develop the student’s IEP and did not provide sufficient information regarding shortening the student’s school day.” IDEA Complaint Decision 20-063.

Open Enrollment

- ❖ March 26, 2021, Governor Evers signed Senate Bill 109, now [2021 Wisconsin Act 18](#), related to open enrollment.
- ❖ Wisconsin Act 18 permits open enrolled students in a nonresident school district to attend a fully virtual option during the 2021-2022 school year.
- ❖ This law permits school districts to offer a fully virtual option to both its resident and open enrolled students during the 2021-2022 school year without having to establish a virtual charter school.

Student Speech on Social Media

- ❖ After decades of using the test from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the U.S. Supreme Court just heard oral argument in a case that is reviewing the connections between schools and student speech on social media.

Student Speech on Social Media (Cont.)

- ❖ On April 28, 2021, the U.S. Supreme Court heard oral argument in *Mahanoy Area School District v. B. L.*, Docket No. 20-255 to determine whether *Tinker*, which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus.



PUPIL NONDISCRIMINATION



Wis. Stat. 118.13

Pupil Discrimination Prohibited

- ❖ “[N]o person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability.”
- ❖ Chapter PI 9 of the Wisconsin Administrative Code addresses complaint procedures, appeals to DPI, reporting to DPI, and more.

Pending DPI Rule Changes

- ❖ DPI has proposed changes to the pupil nondiscrimination procedures in Ch. PI 9: https://docs.legis.wisconsin.gov/code/chr/all/cr_21_007
- ❖ “Designate an employee of the school district to receive complaints regarding discrimination under s. 118.13, Stats., and this chapter. The designated employee shall be responsible for providing the complainant a copy of the school district’s discrimination policy and procedure and shall assist the complainant in filing a written complaint which meets the procedural requirements specified in this section.”
- ❖ “Require a final written determination of the complaint be provided to the complainant within 60 days of receipt of the complaint, unless the parties agree in writing to an extension of time. The final determination shall state the relevant facts and policy provisions considered so that the complainant is reasonably informed of the basis for the determination. If the school district determines that discrimination has occurred, the final determination shall also state the steps the school district will take to end the discrimination and remedy its effects.”

Pending DPI Rule Changes (Cont.)

- ❖ Each board shall evaluate annually the status of nondiscrimination and equality of educational opportunity in the school district. The evaluation shall include the following:
 - ❖ Methods, practices, curriculum and materials used in instruction, evaluated for potential bias or stereotyping.
 - ❖ Methods, practices, curriculum and materials used in counseling, evaluated for potential bias or stereotyping.
 - ❖ Methods, practices, and materials used in pupil assessment and testing, evaluated for potential bias or stereotyping.
 - ❖ Trends and patterns of disciplinary actions, including suspensions and expulsions, disaggregated by pupil protected class status.
 - ❖ Participation trends and patterns and school district support of athletic, extracurricular and recreational activities, disaggregated by pupil protected class status.

DPI Review of Appeals

- ❖ Under Wis. Stat. 118.13, the DPI reviews appeals of school districts' final determinations of pupil nondiscrimination complaints.
- ❖ DPI has adopted the “standard promulgated in guidance by OCR, which provides for a finding of discrimination when: (1) a racially hostile environment exists; (2) the district had actual or constructive notice of the racially hostile environment; and (3) the district failed to adequately redress the racially hostile environment.

Guidance from the U.S. Department of Education

- ❖ **Questions & Answers on Racial Discrimination and School Discipline (December 21, 2018),**
<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-vi-201812.pdf>
- ❖ “Title VI protects students throughout the disciplinary process, including behavior management in the classroom; referral to an authority outside the classroom because of misconduct; the school’s response to student misconduct, which may or may not include exclusionary discipline for the student; and any administrative reviews of disciplinary decisions.”

Guidance from the U.S. Department of Education (Cont.)

- ❖ **Dear Colleague Letter on Nondiscriminatory Administration of School Discipline (January 8, 2014) -- Rescinded**
<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>
- ❖ Contains recommendations for school districts, school administrators, teachers, and staff, including recommendations for: safe, inclusive, and positive school climates; training and professional development; the appropriate use of law enforcement; clear and consistent discipline policies; emphasizing positive interventions over disciplinary removals; and data collection and review

Title IX and Transgender Students: What's New from the Biden Administration?

- ❖ President Biden's Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>
 - ❖ Extends the U.S. Supreme Court's analysis in *Bostock v. Clayton County* to Title IX: "In *Bostock v. Clayton County*, 590 U.S. ____ (2020), the Supreme Court held that Title VII's prohibition on discrimination "because of . . . sex" covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock's* reasoning, laws that prohibit sex discrimination — including Title IX... -- prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary."

Title IX and Transgender Students (Cont.)

- ❖ Directs the Education Secretary to review existing actions (orders, regulations, guidance documents, etc.) and consider “whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement statutes that prohibit sex discrimination and the policy set forth in section 1 of this order.”

Title IX and Transgender Students (Cont.)

- ❖ Memo from Principal Deputy Assistant Attorney General Pamela Karlan, Civil Rights Division Re: Application of *Bostock* to Title IX (March 26, 2021)
 - ❖ <https://www.justice.gov/crt/page/file/1383026/download>
 - ❖ “After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX’s prohibition on discrimination “on the basis of sex” is that it includes discrimination on the basis of gender identity and sexual orientation.”

Title IX and Transgender Students (Cont.)

- ❖ “Before reaching this conclusion, the Division considered whether Title IX “contain[s] sufficient indications” that would merit a contrary conclusion. The Division carefully considered, among other things, the dissenting opinions in 3 Gloucester and Adams, and the concerns raised in the dissents in Bostock. Like the majority opinions in those cases, however, the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from Bostock’s textual analysis and the Supreme Court’s longstanding directive to interpret Title IX’s text broadly.”
- ❖ “Whether allegations of sex discrimination, including allegations of sexual orientation or gender identity discrimination, constitute a violation of Title IX in any given case will necessarily turn on the specific facts, and therefore this statement does not prescribe any particular outcome with regard to enforcement.”

Title IX and Transgender Students (Cont.)

Recommendations:

- ❖ Respond to and address student needs and concerns related to gender identity and expression at school on a case-by-case basis
- ❖ Develop procedures or guidelines relating to transgender students which focus on process and do not guarantee a result for particular requests. Such procedures would ensure consistency among the schools. For example, the procedures would address issues such as which District representative students and parents should contact with concerns relating to the student's gender identity and expression at school, what information the District may ask for before making a decision, communication with and involvement of parents, student confidentiality, etc.



IMPORTANT POLICIES TO CONSIDER FOR NEXT SCHOOL YEAR

SECLUSION AND RESTRAINT

- ❖ Effective March 4, 2020, see Section 118.305.
- ❖ Places obligations on Private Schools in which LEA's place students under Section 118.15(1)(d)(4) or 119.235.
- ❖ Applies to any school participating in the Special Needs Scholarship Program.
- ❖ Includes a law enforcement officer in procedural requirements when seclusion or physical restraint is used.
- ❖ Clarifies the definitions of physical restraint in areas relating to supportive equipment, transportation, use of a prone position and as to whether multiple or a single incident, of physical restraint has occurred.

SECLUSION AND RESTRAINT (Cont.)

- ❖ Prohibits the use of rooms or areas to which doors have locks.
- ❖ Augments the appropriate follow-up by district officials to the use of seclusion or physical restraint, and defines “parent.”
- ❖ Delays the annual reporting requirements to the School Board to October 1, and now includes a December 1 report to DPI.
- ❖ For children with IEPs, harmonizes the procedures for the appropriate use of seclusion or physical restraint with corresponding IEP components.
- ❖ Modifies the scope and level and content training relative to the use of physical restraint.

SECLUSION AND RESTRAINT (Cont.)

- ❖ Wisconsin DPI Guidance on Implementing the New Requirements
- ❖ *IDEA Complaint Decision 19-014*
 - ❖ “The parent was called each day physical restraint or seclusion was used with the student, and district staff believe they used the terms “physical restraint” and “seclusion” when notifying the parent of the behavior incidents; however, the district acknowledges they did not notify the parent of the availability of written reports of these incidents. It was not clear to the parent that physical restraint and seclusion were used until the parent received written reports in December. During the complaint investigation, it was evident the district’s protocol for completing and processing seclusion and physical restraint incident reports is unclear to staff. Staff were unsure as to who is responsible for completing the reports and some reports that teachers completed were not signed by administration or a designee and included in the electronic database. The district failed to properly utilize physical restraint and seclusion with the student.”

SECLUSION AND RESTRAINT (Cont.)

❖ *IDEA Complaint Decision 19-048*

- ❖ An incident of physical restraint was documented in the student's behavior reports on February 22, 2019, and a district staff member mentioned another instance of restraint in the last two weeks of the school year. Although the parent was notified of the February 22 incident, in none of the instances was a written report developed and made available to the parent. The district improperly utilized seclusion and physical restraint with the student.

SECLUSION AND RESTRAINT (Cont.)

❖ *IDEA Complaint Decision 19-059*

- ❖ The teacher left the classroom and partially closed the door for protection, but kept her foot in the door so it could not be closed and observed the student through a window in the door. Shortly after the SRO arrived, the student slammed against the teacher who had gone into the classroom to get something for another student. At that point, the SRO restrained the student. It was not a continuous restraint, but upon being released, the student would begin hitting, kicking, punching, scratching the SRO and trying to take items from the SRO's belt and pocket.
- ❖ DPI held that although District staff did not participate in the restraint of the student (restrained by SRO), the district did not properly use seclusion with the student. Staff secluded the student in a classroom that had a lock on the door and contained objects or fixtures that may have injured the student.

TITLE IX

- ❖ New Title IX regulations went into effect August 14, 2020.
- ❖ The new regulations require school districts to have a policy that contains the school's grievance process for resolving complaints of sexual harassment under Title IX.
- ❖ The Title IX policy should be distinct from more general nondiscrimination or harassment policies.
- ❖ Related policies should be revised as appropriate to clarify the interrelationship between those policies and the Title IX Sexual Harassment Policy.

TITLE IX (Cont.)

❖ Title IX in Effect: Lessons Learned

- ❖ Title IX Coordinators may have to clarify the parties upon receipt of complaints.
- ❖ Criminal investigations may delay Title IX investigations conducted by the District.
- ❖ Consider how Title IX investigations will run concurrent to other policy violations (i.e. Athletic Code violations, etc.).
- ❖ Off campus conduct may still impact a student's ability to participate in or benefit from an educational program or activity.
- ❖ Title IX Coordinators may have to sign a formal complaint and initiate the grievance process to avoid a deliberately indifferent response.

OTHER POLICIES AFFECTED BY COVID-19

❖ Masks

- ❖ Be aware of and follow any County or Local Mask Orders.
- ❖ School Districts can enact and enforce their own mask policies.
 - ❖ Consider liability concerns, health and safety risks, and recommendations from the CDC, DHS, or local health departments.
 - ❖ Consider possible medical, disability, or religious accommodations.

❖ Other Safety Protocols

- ❖ Draft and enforce COVID-19 policies and protocols in a manner that is not discriminatory.

OTHER POLICIES AFFECTED BY COVID-19 (Cont.)

- ❖ Update Enrollment and Attendance Policies for students (students enrolling at various points during the year; flexible attendance policies with virtual options to encourage students to stay home if sick).
- ❖ Review and revise policies and procedures related to virtual learning, security, and privacy protocols (and plan for a cyber event/attack), and prepare necessary consent forms.
- ❖ Update extracurricular and athletic policies based on CDC guidance and WIAA guidelines.
- ❖ Consider updates to Visitors Policies and procedures.
- ❖ Update student discipline, suspension/expulsion, and anti-bullying policies.
- ❖ Employee Policies.
- ❖ Nondiscrimination, Harassment, and Other Equity Policies.



HR CONSIDERATIONS FOR BACK TO SCHOOL

COVID Protocols During the Summer & Beginning of the 2021-22 School Year

- ❖ Mask Issues and Requirements
 - ❖ Governor Evers' Mask Mandate Overturned on March 31, 2021.
 - ❖ Be aware of and follow any County or Local Mask Orders.
 - ❖ School Districts can enact and enforce their own mask policies.
 - ❖ Consider enacting mask policies to avoid liability concerns.
 - ❖ Consider talking with insurer regarding liability as well.
- ❖ Changing quarantine policies for vaccinated individuals or in schools when other protocols are present (i.e., masks, social distancing)?
 - ❖ Consult with local health department, DHS and CDC guidance.
 - ❖ Consider impact on liability and/or immunity.
 - ❖ Consider talking with insurer regarding liability as well.

COVID Protocols During the Summer & Beginning of the 2021-22 School Year (Cont.)

- ❖ Vaccinations - Employer mandates v. employer encouragement/incentive.
 - ❖ Until vaccine is fully FDA approved (not just emergency use authorization), patients have to be allowed to opt out of getting vaccine.
 - ❖ As a result, there is a potential argument that terminating an employee for refusing vaccine under emergency use authorization could lead to claims of unlawful discharge in violation of public policy.
 - ❖ If mandated, provide advance notice and keep in mind ADA/WFEA and religious exemptions will need to be considered.

COVID Protocols During the Summer & Beginning of the 2021-22 School Year (Cont.)

- ❖ Incentives must be *de minimus* to avoid vaccines being considered mandatory (and to prevent violation of rules regarding voluntary wellness programs).
- ❖ Paid time off, gift cards, gift baskets, etc. valued under \$100, for example.
- ❖ Consider providing to those who want to get the vaccine but are unable to receive the vaccine due to medical condition/disability or sincerely-held religious belief, to avoid potential discrimination claims.
- ❖ Legislation that would have prohibited employers from mandating vaccination did not get enacted.

COVID Protocols During the Summer & Beginning of the 2021-22 School Year (Cont.)

- ❖ Vaccination status and proof of vaccination are confidential.
 - ❖ The EEOC has indicated “simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be ‘job-related and consistent with business necessity.’”
 - ❖ The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.

COVID Protocols During the Summer & Beginning of the 2021-22 School Year (Cont.)

- ❖ HIPAA applies to covered entities, as well as their covered functions. The school itself is not, generally a covered entity under HIPAA. However, if a school has a self-insured health plan, that portion of its operations are regulated by HIPAA. Also, Section 120.13(2)(e) of the Wisconsin Statutes specifically provides that personally identifiable medical and claims records relating to any self-insurance plan are to be kept confidential by the plan administrator and are exempt from public records disclosure. Access to the insurance medical records by school personnel may be provided with the written informed consent of the employee and to the extent that the district personnel requires the records for the performance of their job. However, a school would not be able to re-disclose those medical records except in very limited circumstances.

COVID Protocols During the Summer & Beginning of the 2021-22 School Year (Cont.)

- ❖ When requesting or requiring proof of vaccination or information that the employee received the vaccine, employees should be told to only provide information that the employee received the vaccine, number of doses, and dates received, without additional medical or family history information, to avoid issues with under the ADA or GINA. Additional information should be redacted from any documentation provided by the employee to the employer.
- ❖ Any waiting list or scheduling form should also be maintained confidentially and should not allow other employees to view who is signed up or on the list.

FFCRA as Amended by the ARPA

- ❖ Employers can choose to extend the emergency paid sick leave and expanded family medical leave that expired December 31, 2020.
- ❖ As of April 1, 2021, the American Rescue Plan Act broadened the COVID-19-related sick-leave reasons for which an employee would qualify for paid sick leave and for which an employer could seek related payroll tax credits.
 - ❖ The three new qualifying reasons for emergency paid sick leave under FFCRA include:
 - ❖ getting tested or awaiting test results or medical diagnosis for COVID-19;
 - ❖ getting the vaccine; or
 - ❖ recovering from an illness or medical condition associated with getting the vaccine. In order to qualify for the tax credit, the employer must provide paid leave for one of these qualifying reasons.

FFCRA as Amended by the ARPA (Cont.)

- ❖ The new law also expands coverage for expanded family medical leave benefits of the FFCRA to include the original six qualifying reasons for emergency paid sick leave plus these three new reasons.
- ❖ ARPA eliminates the requirement that the first 10 days of expanded family medical leave be unpaid.
- ❖ It also creates a new bank of up to 10 days per employee of qualifying paid sick leave that is available for tax credits for 2021, beginning on April 1, 2021. Thus, the amount of the tax credit per employee has increased from \$10,000 to \$12,000.

FFCRA as Amended by the ARPA (Cont.)

- ❖ Did you adopt a new leave policy or modify existing leaves? You don't have to.
 - ❖ Quarantine/symptoms only? Leave for testing? Leave for vaccination?
 - ❖ Differentiation between potential workplace exposure and other exposure?
 - ❖ Childcare unavailability?
 - ❖ Balance between staffing and operational needs and incentivizing employees to stay home if exposed/symptomatic.
 - ❖ Consider implications of policy changes on carryover/payout of leaves.
 - ❖ When will your policy expire? (Consider including an automatic termination clause if a new federal paid leave law is passed)
 - ❖ Communicate changes to employees so they can plan accordingly.

WFEA and ADA Accommodation Issues

❖ Remote Work

- ❖ If you are still allowing remote work for certain positions, an employee with a disability in one of those positions will be permitted to work remotely, if necessary, for the employee to successfully perform the employee's job.
- ❖ What if you end remote work for a position?
 - ❖ Are you making exceptions for anyone else in that position? (Childcare issues, vulnerable household members).
 - ❖ If not, probably can try to bring the employee with a disability back with everyone else, BUT, are other accommodations reasonable for the employee to successfully perform job duties?
- ❖ Can you still argue undue hardship if employees have been doing the job successfully for a year?
 - ❖ Do you have evidence that the arrangement was a hardship but a necessary one due to the pandemic?
 - ❖ Did you explain that remote work arrangements were temporary and subject to change (not dispositive)?
 - ❖ Was the request for remote work indefinite? Can you pin down a return date and wait it out/wait for vaccination?

WFEA and ADA Accommodation Issues (Cont.)

❖ Leaves of Absence

- ❖ State and federal FMLA may apply as well, if eligible. Keep in mind differing rules on determining eligibility (hours counted).
- ❖ An indefinite leave of absence is generally not a reasonable accommodation under the ADA and WFEA. WFEA is less definitive on length considered unreasonable.
 - ❖ “Until vaccinated” is not a definite period.
 - ❖ Could doctor say until June 1 in good faith? Probably, even if the doctor is likely implying until vaccinated.
 - ❖ What about saying March, then April, then May? At some point that approach is questionable unless there is a clear medical reason for the extension other than “not vaccinated yet.”

WFEA and ADA Accommodation Issues (Cont.)

- ❖ “Dear Doctor” notes are an essential part of sorting through these various doctor’s notes and requests for accommodation.
- ❖ Begin discussions with employees about potential accommodations and/or return to in-person work expectations over the summer.
 - ❖ Re-engage in the interactive process.
 - ❖ You may be able to request updated medical information including the impact of vaccination on their need for accommodations.

Summer Unemployment Compensation: Letters of Reasonable Assurance

- ❖ “Reasonable Assurance is “assurance of employment sufficiently certain that a reasonable person in the same situation would rely upon such assurance in making decisions related to employment and income.”
- ❖ Recent Decision:
 - ❖ With respect to a letter offering a paraprofessional position for the next year but was unsure if the school would have in-person instruction. The paraprofessional did not have work the prior year after the schools closed through June 2020, but the district paid the employee.
 - ❖ LIRC found: “The assurance offered was not sufficiently certain that a reasonable person in the same situation would rely upon such assurance in making decisions related to employment and income. Given these circumstances, this tribunal is not persuaded that the employer met its burden to show the employee had reasonable assurance that she would work as paraprofessional for the employer in the upcoming academic term in the same or similar capacity as the previous academic term.”

Questions?



THANK YOU!

Mary S. Gerbig

P: 920-362-5064

F: 262-364-0286

Email: mgerbig@buelowvetter.com

Claire E. Hartley

P: 262-364-0260

F: 262-364-0280

Email: chartley@buelowvetter.com

Alana M. Leffler

P: 262-364-0267

F: 262-364-0287

Email: aleffler@buelowvetter.com

Emily R. Turzinski

P: 262-364-0268

F: 262-364-0288

Email: eturzinski@buelowvetter.com