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to: scott kinney, superintendent, superior school district

from: Kaleva Law offices

subject: return to work for employees

date: July 31, 2020

We have reviewed the MOA proposed by the MTSBA and the MFPE. This MOA, like the previous MOA, obligates the District to take actions that are not required by law, but could be considered by your Board. I have redlined the proposed MOA with suggested language changes as requested to provide the District with flexibility to address staff concerns about returning to work.

Our concerns with the MOA are that the obligations for the Boards far exceed what is required in law. Your Board can choose to offer these additional benefits to the employees, but it is not required by law. As with the policy series being promoted, your Board can always choose to obligate the District to provide greater benefits to the staff, but it is not required by law.

1. Paragraph 3. The training is not required under the Governor’s School Reopening Guidelines, but schools were asked to consider training as part of their reopen plans. This section is not required and I believe most schools are incorporating any necessary training into their initial PIR days.

2. Paragraph 4. The CDC recommendations have been all over the map and most schools are not looking to the CDC recommendations but to state and county health departments for guidance. To avoid a potential conflict between the CDC and our state and county guidance, we removed the obligation to follow the CDC and left it as an option. In addition, policy and procedure is not required so if your District is not adopting the policy series, you don’t need or want that language.

3. Paragraph 6. This section implies that teleworking is guaranteed for all staff, which it is not. While Districts may try to accommodate as many staff as possible with teleworking, it is not a requirement to permit staff to telework. The “on-call” language is also troubling – it is undefined and not an issue normally associated with exempt professional staff.

4. Paragraph 7. The use of the word “shall” means you are obligated to allow any staff member who presents with one of the five (5) conditions listed to telework, regardless of whether you have an actual position for them to fill through teleworking. In addition, any teacher whose child’s school or daycare is closed is entitled to work remotely. This may not be possible given the needs of the District.

In addition, the conditions used to determine teleworking in Subsection A are the same conditions listed for staff who are entitled to emergency sick leave under the FFCRA. This section unnecessarily confuses the issue of whether the individual is entitled to FFCRA leave with the requirement to telework. The section also states that the District can request medical documentation for any of the listed circumstances, but it cannot do so under the FFCRA. This section mixes the teleworking and the FFCRA, and the implementation will subject the District to possible liability for demanding medical documentation when the FFCRA does not support the request.

Employers are required to maintain the following records for **each** FFCRA leave:

A. The name of the employee taking leave;

B. The date(s) for which leave is requested and provided;

C. A statement from the employee of the FFCRA eligible reason for which leave is taken, with the following information:

* 1. If the employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19, ***the employee must provide the name of the government entity that issued the order***.
  2. If the employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19, ***the employee must provide the name of the healthcare provider who advised the employee to self-quarantine***.
  3. If the employee is experiencing symptoms of COVID-19 and seeking medical diagnosis, then that statement is sufficient **(no other documentation needed)**.
  4. If the employee is caring for an individual who is subject to (1) or (2) above, **the employee must provide the name of the individual for whom the employee is caring, the employee’s relationship to that individual, and the name of the government entity or healthcare provider that required the quarantine**.
  5. If the employee is caring for a son or daughter due to a COVID-19-related school or care center closure, or care provider unavailability, **the employee must provide the name and ages of their children; the name of the school, care center, or care provider that is unavailable for COVID-19 related reasons; and a representation that no other person will be providing care for the child during the period for which the employee is receiving EFMLEA. To the extent the children for whom the employee is caring for are over the age of 14, the employee must also state that special circumstances exist requiring the employee to provide care**.
  6. If the employee is experiencing a “substantially similar condition” as specifically defined by the Secretary of Health and Human Services (HHS), but as of yet, the HHS Secretary has not defined any “substantially similar conditions,” and thus this reason for leave is not (yet) applicable.

A statement that the employee is unable to work (or telework) because of the FFCRA eligible reason.

We recommend that the District provide employees seeking FFCRA leave with a certification form that clearly details all above identified information for employees to complete and sign. I have also included a copy of that form.

The FFCRA regulations make clear that employers cannot require additional documentation of an employee’s reason for leave, aside from what is listed above and any further guidance issued by the IRS or DOL. The proposed MOA does not recognize that limitation and will likely lead to administrators requesting medical documentation when they are not permitted to do so.

Finally, the MOA obligates the District to continue with these expanded obligations and rights to telework and provide paid leave past the time of the expiration of the FFCRA. This is a financial obligation that the District would need to consider before agreeing to in the MOA.

5. Paragraph 8. This paragraph as written again implies that teleworking is guaranteed. The District must first determine whether a position can be performed remotely, and whether it is willing to permit the employee to do so. Each decision will be on a case-by-case basis, as each request to telework will be considered a request for an accommodation for the employee’s own disability. The ADA does not require that you grant a request to telework – the decision will be based on whether the request is reasonable or whether there is another effective alternative. All other telework requests are entirely up to the District.

6. Paragraph 9. This paragraph is not necessary if you included language in the individual contracts regarding termination in the even the activity is cancelled.

Again these decisions are up to your Board, and I would use the revised template as a starting point rather than obligate the District as suggested in the proposed MOA. Please let me know if you have any questions or concerns.