Legal Update 1: Monday, March 16, 2020 at 4:00 pm

COVID-19 Legal Issues
Frequently Asked Questions

Sponsored by: VSBIT and the Vermont Superintendents Association[1]

Labor and Employment

Q: Can we require that some "essential" employees work on-site during closure?

A: Yes. If employees are not sick or otherwise entitled to leave from work by statute or contract, we can require attendance at school. Whether employees are deemed "essential" by us is largely immaterial as we have a right to insist that all employees work when they are contractually required to do so. There is no need to designate employees as essential. Our needs may change over time. So long as we are compensating employees, we can require that they work, whatever their job functions.

Under the present circumstances, it is important that schools be sensitive to the risks presented to employees. That includes taking proactive steps to make sure that the workplace is as safe as can be. Schools may consider a work from home option. However, the employer does have a right to insist that employees report to work if there is no legal reason why they may not.

Q: Do the safe working conditions provisions in the collective bargaining agreements excuse employees from working at school?

A: Probably not. Most collective bargaining agreements have safe working environment clauses. Those articles require a generally safe workplace. If the employer violates the terms, the employee/association may grieve the violation. Ultimately, an arbitrator is responsible for determining whether conditions violated the contractual safety provision. Where districts are complying with guidance from AOE and the Vermont Department of Health, it will be difficult for the local associations to demonstrate that conditions are unsafe.

Here, employees are suggesting that they do not need to report to work because they consider the workplace unsafe. That is not an appropriate procedural response, even if the conditions are unsafe. The associations may grieve the conditions as a violation of the contract if they wish, but they should not refuse to work. From a purely legal perspective, the employer could

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[1] *The content of this document is offered as a service of VSBIT and VSA and does not constitute legal advice. You should always contact an attorney regarding any specific legal problem or matter. The information in this document has been developed and reviewed by education law attorneys licensed to practice in Vermont.*

administer discipline against employees refusing to work, and then an arbitrator would have to determine if the refusal to work was justified by the allegedly unsafe conditions.

Nobody wants to engage in discipline against fearful employees under the prevailing circumstances. Where students are no longer present at school, where CDC guidance is being followed by the employers and where the employers are taking steps to make the workplace as safe as possible for the few employees at school, there should be an ability to work with local bargaining units to maintain essential operations.

Q: Can we require that employees use sick time first?

A: Maybe. If an union employee is available to work and the district does not have work or has less work for the employee, we must pay the employee all of their contractual wages. If, however, the employee is unable to work a reduced or modified schedule because he or she is sick, the employee is, legally, not entitled to wages and must use sick time for compensation.

Under Vermont law, employees are entitled to use sick time to care for their children where there has been a school or daycare closures because of safety reasons. That will be the case for many district employees. It seems reasonable to expect that those employees who are not able to work because of child care responsibilities would first use sick time before employers would provide other compensation. Likewise, if employees become sick during a time when they are scheduled to perform some work, it also appears reasonable to expect that those employees would use sick time. This is particularly true if the employees are expected to perform some work during closure. After that, the district could pay wages despite the fact that an employee is not able to work.

However, employers should apply their closure compensation policies/practices equitably. If the employer determines that it wishes to pay all employees throughout closure no matter whether they can work, the employer should apply the rule uniformly to all employees. Otherwise stated, if a district intends to pay all employees who do not work and will not be checking in with employees to determine if they are able to work, why other are not working ought not be considered, and sick days should be left undisturbed for employees who are not available to work even though they may be scheduled to work reduced hours. Applied here, just because we know that an employee is not working because of childcare responsibilities or sickness we cannot treat them differently than other employees not working during closure.

The answer to this question is “maybe” because there is no clear law on this issue. The response is based on broad principles of contract law and may be subject to challenge. Local associations could grieve any decision to deduct from accrued sick time during closure. The risk associated with that grievance would be the return of sick days to specific employees. As

always, it is best to reach an understanding with your association so that there is an agreed upon approach.

Q: Can we require employees to work outside of their job categories?

A: It depends upon your collective bargaining agreement(s) and what job categories are in question. Most collective bargaining agreements indicate working conditions for the employees, both support staff and teachers. Employers are not entitled to unilaterally impose new working conditions if they fall outside of those conditions contractually negotiated with the local bargaining unit. Doing so may constitute an unfair labor practice or violate the terms of the contract. For example, if a district asks teachers to deliver food to students instead of teaching classes, that may be a violation of the working conditions of the CBA. If each of the job categories are ESP, there is probably more latitude to require work of an employee outside his/her job category. Ultimately, the answer will depend on the terms of the CBA, job descriptions and the level of similarity between the job categories.

It is best to approach the local bargaining unit representatives and collaboratively work toward a plan to deliver essential services in a way that is reasonable to both sides. After all, the school employees will almost certainly be performing less work for the same amount of pay. There should be a willingness to demonstrate flexibility during this time of crisis.

Governance

Q: Can school boards hold meetings virtually? If so, what are the requirements of the Open Meeting Law?

A: Yes. The open meeting law (1 V.S.A. 312(a)(2)) allows a public body to hold its meetings electronically, so long as several conditions are met:

- The agenda for the meeting must specify a physical location where members of the public may go to listen to the meeting and participate
    - NOTE: You cannot prevent members of the public from coming to the physical location or require them to participate remotely, but you can encourage remote participation by members of the community and provide information about how they can access the meeting remotely on the agenda.
- One member of the public body or its designee must be physically present at the meeting
- All votes must be taken by roll call

- All members of the public body participating remotely must be able to hear all proceedings and identify themselves when speaking

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Q: Can we reschedule our annual meeting if it is scheduled to take place this spring?

A: Yes. The Secretary of State's office has confirmed that a public body may rescind its warning for an annual school district meeting under 17 V.S.A. 2640(a), which states, "When a municipality fails to hold an annual meeting, a warning for a subsequent meeting shall be issued immediately, and at that meeting all the officers required by law may be elected and its business transacted."

If a board decides to reschedule its annual meeting it should rescind the meeting warning and immediately warn it for another date within the 30-40 days required by 17 V.S.A. 2642. In the event COVID-19 remains a health and safety threat to communities on the date of the new meeting, the school board can follow the same process to push out the meeting date again. Every effort should be made to hold the annual meeting prior to June 30, as required by 16 V.S.A. 472(a).

Special Education

We have received a number of questions about the provision of special education services during school closure. At this time, we are waiting for the Agency of Education to issue guidance and/or responses to questions raised by the Vermont Council of Special Education Administrators before we respond to special education questions. For now, please ensure your teams have reviewed:

- VCSEA Questions and Recommendations for Students with Disabilities
- U.S. Department of Education's Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak