

Alerts & Articles

COVID-19 (Coronavirus) Alert

03.05.2020

This alert is intended to provide information regarding the recent outbreak of “coronavirus disease 2019” (COVID-19), and to highlight potential legal implications for school and community college district employers (“school employers”).

I. Coronavirus Disease 2019 (COVID-19)

On January 31, 2020, the U.S. Department of Health and Human Services declared a public health emergency in the United States. According to the Centers for Disease Control and Prevention (CDC), as of March 4, 2020, there are at least 80 cases of COVID-19 and 9 deaths nationwide, with confirmed and presumptive positive tests reported in 13 states, including California.

According to the California Department of Public Health, as of March 4, 2020, there are a total of 53 positive cases of COVID-19 and one death in California alone, including four cases of community transmission and three cases of unknown origin. As of March 4, 2020, the State of California and various other public entities (including, for example, Los Angeles County) have declared public health emergencies. School closures have been reported in 22 countries, including the United States (<https://www.nytimes.com/2020/03/04/world/coronavirus-schools-closed.html>).

This is a quickly evolving situation and we are learning new information each day. Sources of up-to-date information include the following.

- <https://www.cdc.gov/coronavirus/2019-ncov/specific-groups/guidance-for-schools.html>
- <https://www.ed.gov/coronavirus>

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- http://www.ochealthinfo.com/phs/about/epidasmt/epi/dip/prevention/novel_coronavirus
- <http://publichealth.lacounty.gov/media/Coronavirus/>
- <https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>

Schools are strongly encouraged to develop a contingency plan, in consultation with federal, state and local public health and education officials, for continuation of operations in the event COVID-19 is prevalent in their local area.

In Los Angeles County, for example, both the Los Angeles County Department of Public Health and the Los Angeles County Office of Education have advised that school employers should prepare for school dismissals (i.e. school remains open for staff, but students are sent home), school closures (i.e. school is closed, and all students and staff are sent home), and modification, postponement, or cancellation of school sporting events and after school activities. (<http://www.publichealth.lacounty.gov/media/Coronavirus/GuidanceSchoolAdministrators.pdf>).

The topics discussed below are intended to assist in contingency planning. Decisions on these topics, including exclusion of students/staff from school, should be taken on the basis of objective evidence, and guided by written standards (incorporating the latest information from public health authorities), so as to reduce the likelihood of claims that the school employer is acting in an arbitrary or discriminatory manner.

II. Student/Staff Attendance And Exclusion From Campus

School employers must balance the benefits of school attendance against health and safety concerns of other students, staff, and community members.

School employers are encouraged to abide by directives of local, state, and federal health and education authorities relating to school attendance. The Los Angeles County Department of Public Health and the Los Angeles County Office of Education, for example, have advised that students and staff with even mild illness should be separated from others, sent home, and should stay home until they exhibit no fever for



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24 hours without use of fever-reducing medication. (See <http://www.publichealth.lacounty.gov/media/Coronavirus/GuidanceSchoolAdministrators.pdf>; LACOE School Health Programs Bulletin, Vol. 2, No. 5, dated March 2, 2020.)

In addition, applicable law authorizes students and/or staff to be excluded from school in the following circumstances:

Schools must exclude students and staff from attending school if they reside in a quarantine area:

- No instructor, teacher, pupil, or child who resides where any contagious, infectious, or communicable disease exists or has recently existed, that is subject to strict isolation or quarantine of contacts, shall be permitted by any superintendent, principal, or teacher of any college, seminary, or public or private school to attend the college, seminary, or school, except by the written permission of the health officer. (Health & Safety Code, § 120230; Educ. Code, § 48213)
- School officials are encouraged to consult with public health officials for assistance in determining when students must be excluded. The county health officer has the authority to exclude students from school and quarantine individuals (Health and Safety Code section 120230). The California Department of Public Health website also contains additional information regarding exclusions and quarantine. (see <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>).

Schools may exclude a student from attending school in the following circumstances:

- There is good reason to believe that the child is suffering from a recognized contagious or infectious disease (Educ. Code, § 49451) [K-12];
- The continued presence of [a student] would constitute a clear and present danger to the life, safety, or health of a pupil or school personnel (Educ. Code, § 48213) [K-12];
- Students [are] suffering from contagious or infectious diseases (Educ. Code, § 76020) [Community College];
- However, a student's race/ethnicity will not justify a student's exclusion from school. Over the past month, news reports have described several incidents in which Chinese-Americans and other individuals of Asian descent have been the victims of violence, harassment, and threats due to unfounded fears that they have the coronavirus. School employers have an obligation to prevent and address discrimination against students and employees.
- Moreover, a student's mere presence in a region where coronavirus is prevalent may not suffice to justify their exclusion from school upon returning home, particularly if the student is not subject to any quarantine order. Questions of this sort should be discussed with public health officials and legal counsel. (*Arline v. School Board of Nassau County*, 107 S.Ct. 1123, 1131 (1987).

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III. Health-Related Inquiries of Employees

Employers are generally limited in their ability to make health-related inquiries or require medical examination of employees, pursuant to the Americans with Disabilities Act (“ADA”) (42 U.S.C., § 12100 et seq.) and the California Fair Employment and Housing Act (“FEHA”) (Government Code, § 12900 et seq.). However, both the ADA and FEHA permit examinations or inquiries the employer can show to be *job-related and consistent with business necessity*, and permit exclusion of employees who pose a *direct threat* to the health or safety of other individuals in the workplace. (See 42 U.S.C. section 12113(b); Government Code section 12940(a)(2).) A “direct threat” is defined as a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” (42 U.S.C. section 12111(e)(3) and (8); 29 C.F.R. sections 1630.2(r), 1630.15(b)(2))

In the absence of a pandemic or other severe threat to public health, employers may:

- Exclude employees residing in a quarantine area. (Educ. Code, § 48213; Health & Safety Code, § 120230);
- Make non-health-related inquiries of employees (e.g. whether they would be able to attend work in the event of a pandemic which resulted in closure of schools, services, public transportation, etc.).
- Direct employees to comply with directives of the CDC or local health authorities.
- Send home employees who exhibit symptoms of contagious disease.
- Authorize additional leaves of absence (potentially subject to a bargaining obligation).

In the event public health officials determine the existence of a pandemic, there may be a sufficient basis to allow employers to make medical inquiries and take actions not generally authorized in the absence of a pandemic. The EEOC has not yet published guidance specific to COVID-19, but the EEOC website refers to guidance issued by the EEOC in 2009 relating to the H1N1 virus (https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm ; https://www.eeoc.gov/facts/pandemic_flu.html), which states that, in the event of an “influenza pandemic,” employers **may** also be able to:

- Require a doctor’s note or other clearance prior to allowing employees to return to work. [*Though public health officials are advising employers consider not requiring doctor’s notes, so as not to overwhelm the health system*]
- Take employees’ temperatures to determine whether they have a fever.
- Make direct disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of complications.
- Compel employees to wear personal protective equipment.
- Employers are encouraged to discuss these options with public health officials and legal counsel prior to taking action.

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IV. School Nurses and First Responders

Cal/OSHA's regulations require protection for workers exposed to airborne infectious diseases such as the 2019 novel (new) coronavirus (2019-nCoV). The Aerosol Transmissible Diseases (ATD) standard (Title 8, California Code of Regulations, § 5199) contains the requirements for protecting employees from diseases and pathogens transmitted by aerosols. These requirements must be addressed in school employers' Injury and Illness Prevention Program. At a minimum, the employees potentially impacted by this requirement include school nurses, school police, and other first responders, as well as any employees engaged in screening students (or others) for disease. (See <https://www.cdph.ca.gov/Programs/CCDC/PHP/DEODC/OHB/Pages/ATDStd.aspx>).

V. Emergency Authority/Collective Bargaining

Contingency planning for a pandemic will likely implicate school employers' collective bargaining obligations under the Educational Employment Relations Act (Gov. Code., § 3540 et seq), which provides, in part, that all matters logically and reasonably related to wages, hours and enumerated terms and conditions of employment, and specifically safety conditions and leaves/reassignment policies, are *mandatory* subjects of bargaining.

As a result, bargaining demands and union requests for information relating to pandemic planning should be expected.

In the event that a school employer needs to take immediate action (e.g. to arrange for teachers to provide education remotely in the event of a school dismissal), without sufficient time to engage in collective bargaining, school employers should keep unions informed, but **may** be able to take action on the basis of emergency powers described in Board Policy and/or authorized in Collective Bargaining Agreement(s). The U.S. Supreme Court has also recognized that public entities may impair contractual rights in limited instances "to safeguard the vital interests of its people." (*Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 410.)

School employers are encouraged to consult with legal counsel prior to engaging in any exercise of emergency powers.

SIGNIFICANCE:

School employers are encouraged to work with local, state, and federal health and education authorities, as well as legal counsel, to prepare for all eventualities – including school dismissals, school closures, and impact on school events/activities – arising from COVID-19.