EDUCATOR RIGHTS
IN THE PANDEMIC ERA

Michael McGonigle
GAE General Counsel
GAE Legal Services – Now. More then ever.

- **Employment Liability Protection**
  - $1 million liability - $3 million aggregate
  - $3 million attorney fees/costs - $9 million aggregate

- **Employment/Certification Defense**
  - No predetermined cap on legal fees/costs
  - Many defense cases exceed $10,000 due to appeals
  - Affirmative lawsuits $50,000+
  - For over 50 years, Legal Services has expended millions of dollars, winning back pay, and expanding educator rights!

[joingae.org](http://joingae.org)
Families First Coronavirus Response Act Emergency Paid Leave Expires December 31, 2020!

• The FFCRA emergency paid sick leave is in addition to and may be used first before using other sick leave benefits.
• The law does not diminish existing leave rights under employer policies.
• Employers are prohibited from requiring employees to use other paid leave first and may not modify their existing paid leave policies to avoid being subject to this requirement.
FFCRA – KEY PROVISIONS

• Leave is available for immediate use, regardless of how long the individual employee has been working for the employer.

• Full-time employees are entitled to 80 hours of paid sick time (the equivalent of 10 eight-hour days).

• Part-time employees are entitled to the number of hours they ordinarily work on average over a 2-week period; for part-time employees with a variable schedule, leave is calculated based on the number of hours the employee was scheduled per day over the previous 6-month period.
FFCRA – KEY PROVISIONS

• Leave may be used only if the employee is unable to work (or telework) because of any of the following:
  • Employee is subject to a federal, state, or local quarantine or isolation order related to coronavirus;
  • Employee has been advised by a health care provider to self-quarantine due to concerns related to coronavirus;
  • Employee is experiencing coronavirus symptoms and seeking a medical diagnosis;
  • Employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation order related to coronavirus; or who has been advised by a health care provider to self-quarantine due to concerns related to coronavirus.
• Employee is caring for a son or daughter if a school or place of care has been closed due to coronavirus, or the childcare provider of the son or daughter is unavailable due to coronavirus. “Son or daughter,” as under the FMLA, includes a biological, foster, or adopted child, a stepchild, a child of a domestic partner, a legal ward, or the child of a person standing in loco parentis, under 18 years of age.

• The employee is experiencing any other substantially similar condition [https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave](https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave)
FFCRA – KEY PROVISIONS

• The employer may require the employee to follow reasonable notice procedures
• Employers cannot require that an employee be involved in searching for or finding a replacement worker
• Employees are protected from retaliation (including job loss, discipline and discrimination)
• Emergency paid sick leave does not carry over from one year to the next, and is not paid out at the termination of employment
FFCRA AMENDS THE FAMILY AND MEDICAL LEAVE ACT “FMLA”

• Emergency leave is *only* available to employees who are unable to work (or telework) due to a need for leave to care for a son or daughter under the age of 18 if the school or place of care has been closed, or the child’s childcare provider is unavailable, due to a public health emergency related to coronavirus (as declared by a federal, state or local authority).

• Employee must only have been employed for at least 30 days to access this leave (as opposed to the 12-month employment period for FMLA).

• The first 10 days may be *unpaid*. 
Federal Statutes

• Family Medical Leave Act (FMLA)
• [www.dol.gov/esa/whd/fmla](http://www.dol.gov/esa/whd/fmla)
  • 12 months/1250 hours
  • Up to 12 workweeks per year
  • District must hold position or substantially similar position and maintain health insurance
  • District can require unpaid leave
  • Notice by employee/medical certification
  • Intermittent leave allowed
  • Covers “serious health condition”
Federal Statutes - ADA

- Americans with Disabilities Act (ADA)
- ada.gov
  - Employers must provide a “reasonable accommodations” for persons with qualifying disabilities
    - Disability must meet legal requirements
    - Reasonable accommodations
Federal Statutes – ADA

Is COVID-19 a Disability?
• “Actual” disability—probably
• “Regarded as”—probably
• Fear of future—probably not
Federal Statutes – ADA

• Employer actions—OK screening
  • Asking returning travelers about exposure
  • Asking why employee was absent
  • Requiring infection-control practices
  • Requiring use of personal protective equipment (but may need accommodation)
  • Encouraging getting any vaccine
  • Taking temp or asking about symptoms
Federal Statutes – ADA

• Employer actions—OK screening
• Require fitness for duty exam prior to return to work
• Taking temperature and screening for symptoms of applicants
• Delay start date of applicant w/ symptoms
• Withdraw offer if applicant has COVID-19 or symptoms
Federal Statutes – ADA

• Reasonable Accommodations—May Be Required Because:
  
  • Of COVID-19 diagnosis, it is an “actual” or “record of” disability
  • Employee has another disability that creates heightened risk (if disclosed)
  • Older citizens 50s, 60s, 70s higher risk of severe illness
  • “Underlying conditions” at any age either “are” or “might be” at higher risk. See, CDC guidance https://bit.ly/3jkwEtW
  • Because of exacerbation of mental disability (e.g., anxiety disorder)
Federal Statutes – ADA – eeoc.gov

• Types of Accommodations
  • Telework
    • Especially prevalent now – except: food service workers, custodians, maintenance, bus drivers
    • Reasonable in many (but not all) cases
    • Make sure tech is accessible to worker

• Leave
  • Probably easy because of virus’s short duration
  • Can be unpaid unless contract or company policy provide paid leave
  • Longer leave to avoid exposure?
Federal Statutes – ADA

• “Undue hardship” is statutory defense
• Confidentiality—employer must keep confidential the info disclosed during accommodation process (need to know)
• Retaliation—Requesting accommodation is protected activity
• Caring for family members—ADA does not require accommodations (e.g., leave) to care for others but employer cannot treat such requests differently from others
Federal Statutes – ADA – EEOC Pandemic Resources

Federal Statutes - Constitution

• Freedom of Speech
  • Not absolute
• Other “freedoms”
  • Religion
  • Press
  • Association
  • Petition
Federal Statutes - Constitution

Public employee’s speech is NOT protected if:

• It is spoken within job duties – *Garcetti*
• It deals with private, personal matters, personnel matters
• It causes disruption in the workplace even if “public concern”
• It is unlawful or untrue, defamation
Federal Statutes - Constitution

• Strongest protections:
  • The First Amendment protects the speech of public employees only to the extent that they are speaking as private citizens on matters of public concern
  • Utilize your other statuses: citizen, taxpayer, voter, parent, grandparent, aunt, uncle
  • Utilize your local association, speak collectively
  • Utilize relationships with local community groups
Georgia’s Legal Landscape

• OSHA federal health and safety statutes/regulations. Georgia is one of a handful of states that decided not to opt-in to these workplace protections for public agencies including public schools.

• Lacks state statutory/regulatory scheme for workplace safety, *but see*, local “school safety” plan OCGA 20-2-1185.

• Collective bargaining not so much (but see, Memorandum Of Understanding “MOU”).

• State Whistleblower Act? CDC “guidance” is not law, rule, or regulation
  • SBOE Rule 160-1-3-.03 Infectious Diseases.

• Common law civil “tort” remedy, e.g., negligence, dangerous workplace? State is immune from liability unless actual malice is demonstrated.
Georgia’s Legal Landscape – Can I Require Masks?

• Common law doctrine “manage, supervise, control” your classroom includes the duty to have a safe classroom for yourself and students.
  • Insubordination is defined as a 1) willful refusal to follow a 2) lawful directive and reasonable directive, which 3) does not place the Educator at an unusual or abnormal health or safety risk.

• “Teacher Authority” law, OCGA 20-2-738 conduct that substantially interferes with the learning environment or poses an immediate safety threat. Remove student. Placement Review Committee. Placement back into your classroom alternative placement. Possible PDP.

• “School safety” plan requirement OCGA 20-2-1185
• Locally elected board of education
Georgia’s Legal Landscape

• If I believe I contracted COVID-19 at school, then what?
  • File Worker’s Compensation claim for injury sustained in the workplace
  • “Causation” will be hotly contested
  • Before returning, obtain a negative test as evidence in attempts to narrow causation
Georgia’s Legal Landscape


• Approved SWSS Contracts - Exhibit B Only: http://www.gadoe.org/External-Affairs-and-Policy/Policy/Pages/IE2.aspx
  • Refer to this web site for a detailed list of your school district’s waivers from state education law
What GAE Legal Is Doing To Fight Back!

• August 8, 2016 NEA/GAE lawsuit filed against Atlanta Public Schools civil action number 2016CV279349

• Plaintiffs GAE, AAE, Jane Doe and Jane Roe
  • Enjoin implementation of “Turnaround Plan”
  • School board acted “ultra vires” without authority to privatize entire staff at Carver High School cluster
  • End run around compliance with charter “conversion” election procedures guaranteed for staff and parents
  • No safeguards for Fair Dismissal Act or earned “tenure” rights violates Georgia constitution

NEA/GAE Lawsuit pending against Fannin County Schools. Remaining constitutional issues: “retroactive application” and “impairment of contract”
What GAE Legal Is Doing To Fight Back – Protecting Your Rights To Organize!

• GAE sued the Walker County Board of Education to assert teacher rights to speak publicly in opposition to the grading policies in the district. The district’s public participation policy placed substantial impediments on a teacher’s right to speak at school board meetings.

• The Court ruled the board policy is unconstitutional as it allowed the superintendent to silence speech he disagreed with. The Court permanently enjoined the school board from enforcing its own policy.
Conclusion:
We are stronger together.
GAE Legal Services is there to support you.
Thank you for your membership!