

# Hot Topics in School Labor Law

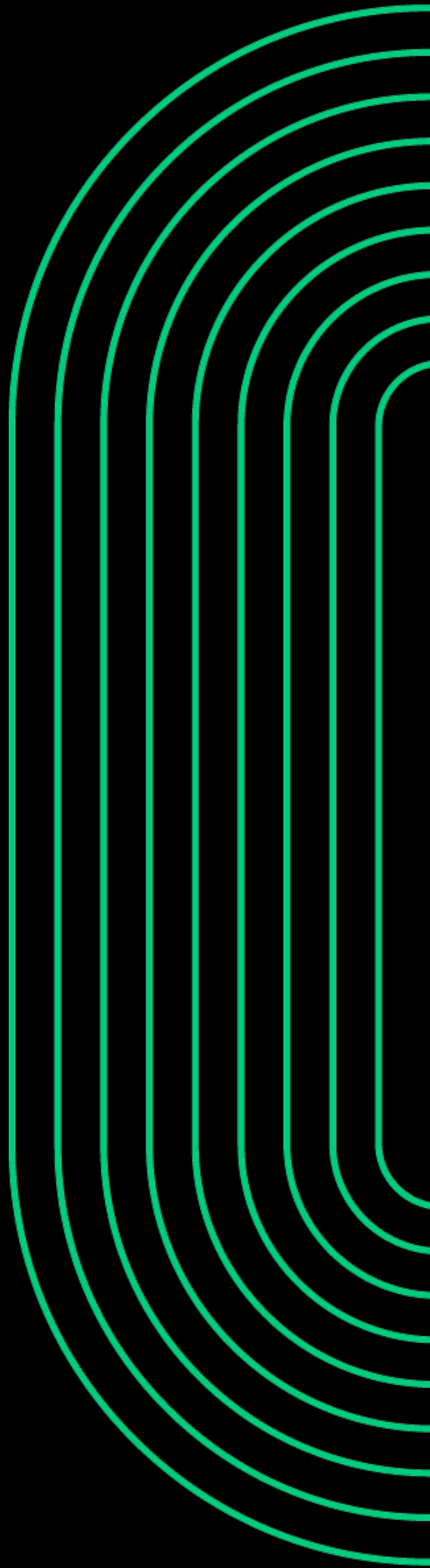
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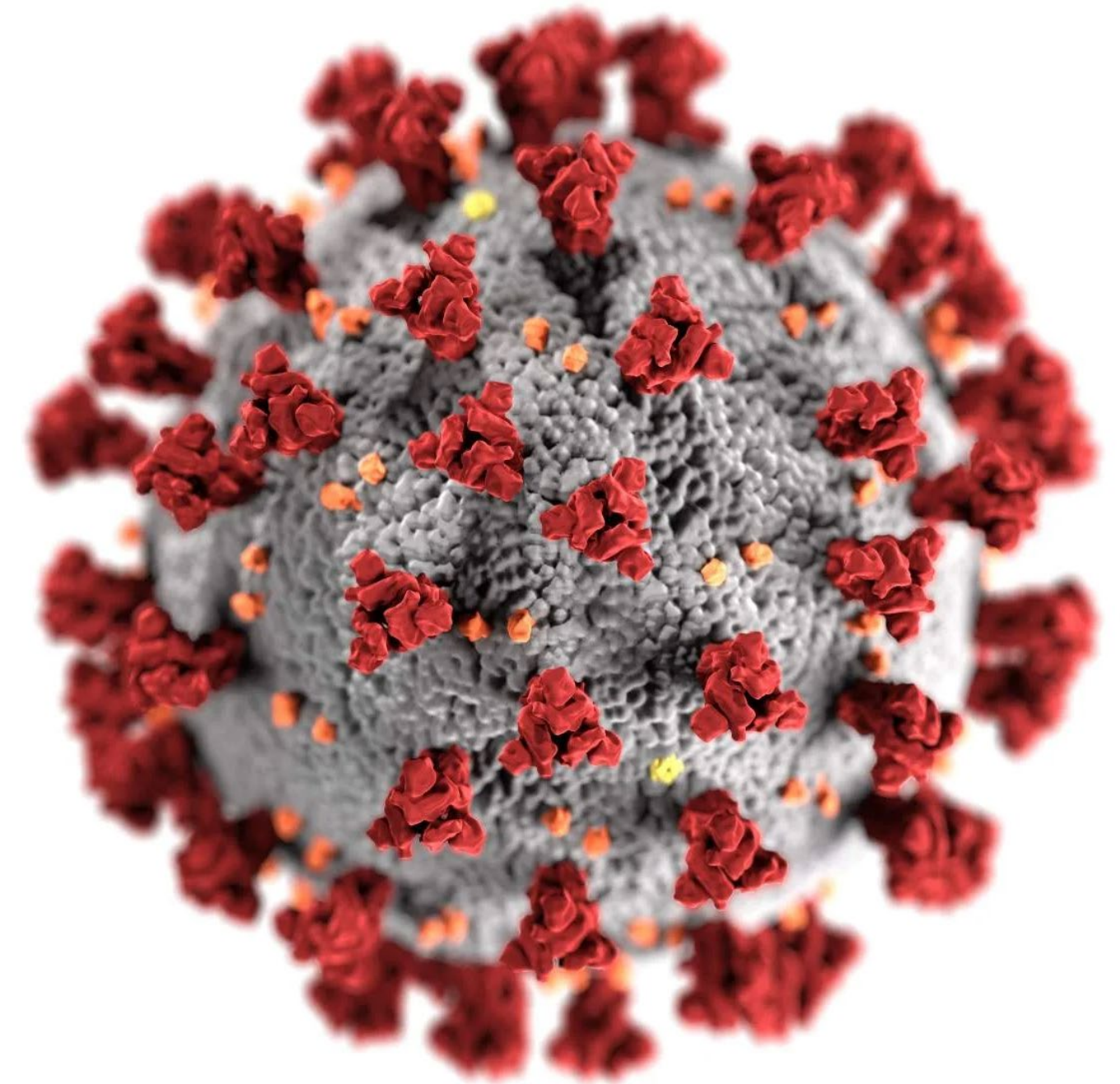


# COVID-19 and Beyond Bargaining Trends



# COVID-19 Short-Term Bargaining Solutions

- Many school districts used the “Band-Aid” approach to bargaining during the 2019-2020 and 2020-2021 school years, including:
  - Temporary memorandums of understanding addressing virtual learning, sick leave, childcare leave, and related issues;
  - Rollover collective bargaining agreements; and
  - Placing less pressing issues on the backburner.



# Returning to “Traditional” Bargaining

- Now that school districts are returning to a more traditional, in-person format, issues placed on the backburner are coming to the forefront.
- In addition, unions are pressing for less traditional benefits during bargaining as a result of COVID-19, including:
  - Use of ESSER Funds
  - Sick, Childcare, and Family Leave
  - Remote Work
  - Emergency Days and Virtual Instruction
  - Safety Equipment (PPE) and Hazardous Conditions



# ESSER Funds



- Elementary and Secondary Schools Emergency Relief (ESSER)
  - 12 allowable (and required) categories of spending under the CARES Act (Section 18003 and 18006).
  - School districts have broad authority and flexibility to determine spending, although spending is earmarked.
  - Funds will be monitored by the Michigan Department of Education and must be used by September 30, 2022.
    - MDE = Not intended to contribute to ongoing costs of District.
  - BOE responsibility to utilize funds in a legal and fiscally responsible way.
  - No “secret” to union as to how much you have vs. other Districts vs. other spending.

# ESSER Funds

- Bargaining recommendations:
  - ESSER funds may be used in a responsible way to promote staff recognition and retention.
  - It is important to treat ESSER money and additional compensation as a **one-time**, COVID-19 related **off schedule** payment.
  - Examples: One-time longevity bonus or “appreciation” payment for staff flexibility, dedication and extra duties during the pandemic and virtual learning.



# Educator Shortages

- High Demand, Short Supply
  - Decreasing trend in teacher workforce.
  - Since March 2020, teacher resignations and retirements have increased.
  - Due to COVID-19 quarantine and isolation requirements, frequency and duration of teacher absences have increased.
- Changes in economic conditions have also led to salary schedule shopping or positioning after initial offer.
- ESSER Funds may be used for recruitment and retention.



# Recruitment and Retention

- Initial Placement on Salary Schedule
  - Restrictions? “Up to Step X” – consider increasing and/or bifurcating
- Signing Bonuses
  - Must be negotiated
- Additional compensation for hard to fill positions
  - Related Service Staff; Hard to Fill Teaching Positions
- Reimbursement for Advancement of Degree, Education or Training
- Longevity Increases = big pushes to increase amounts/decrease years of service
- Increased Flexibility around Paid Leave provisions
  - Be cautious here, but perhaps can consider something? (ex: business days)



# Substitute Teacher Shortages

- Public Act 149 of 2021
  - To address the current substitute teacher shortage, Governor Whitmer has signed a bill temporarily permitting Michigan public schools to use nonteaching staff as substitute teachers.
  - Temporarily allows school districts to employ individuals who do not possess a teaching certificate or permit as substitute teachers so long as the individuals:
    - Are otherwise employed by or work at the school district.
    - Have a high school diploma or high school equivalency certificate.
- Effective through June 30, 2022

# Hiring Retirees

- Pending Senate Bill 726 would amend MPERS by:
  - Reducing the amount of time a retiree would have to be retired from teaching before he or she could be reemployed as a substitute teacher without having his or her retirement benefits reduced from 12 to 4 months.
  - Eliminating a provision requiring a reporting unit at which an individual who retired after June 30, 2010, provides substitute teaching services to pay 100% of the contribution rates for the unfunded actuarially accrued liability for retiree health care and pension to the retirement system.
- SB 726 is currently pending before the House and has been referred to the Committee on Education.

# Sick Leave Days

- Many MOUs executed during COVID-19 temporarily expanded employee use of sick leave days.
  - Number of sick leave days available to employees.
  - Qualifying reasons for the use of sick leave (quarantine and isolation, vaccinations, and testing).
  - Availability of days in a sick leave bank.
- Unions may seek to incorporate these changes into successor agreements.



# Family and Childcare Leave

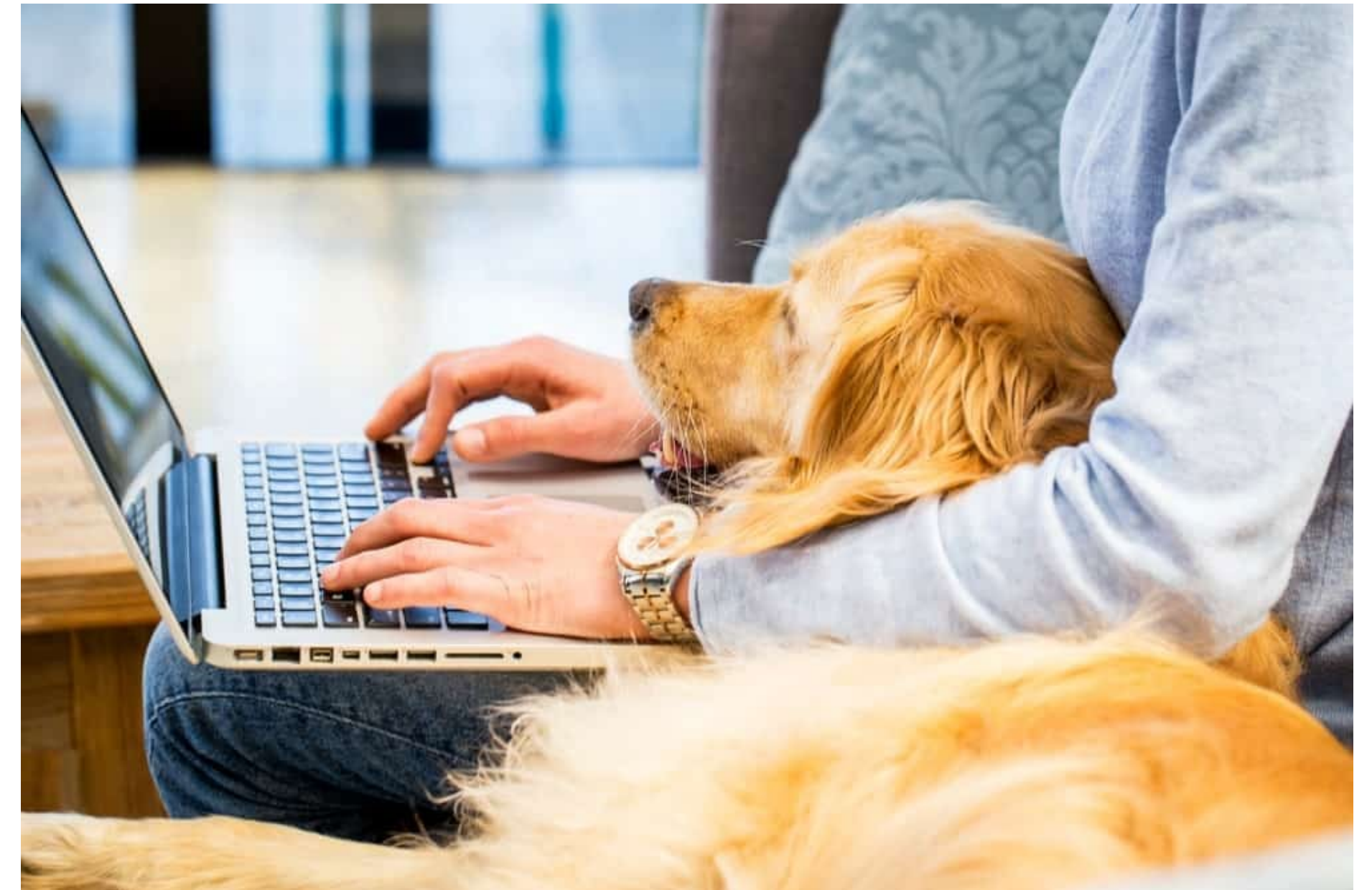
- Many COVID-19 MOUs also addressed the temporary use of sick leave days for childcare or family-related needs.
- Families First Coronavirus Response Act (FFCRA), which permitted employees to use FMLA leave for certain childcare-related reasons, expired on December 31, 2020.
- Unions may seek to incorporate these changes into successor agreements, including expanding the use of sick leave days or leaves of absences for childcare needs.





# Remote Work

- Unions may seek to incorporate remote work policies used during the pandemic into successor agreements.
- Recommendations:
  - Contract language vs. BOE Policy?
  - Establish categories of positions that may be eligible for remote work.
  - Ensure any language regarding remote work policies provides for administrator prior approval.
  - Apply administrator discretion consistently among eligible employees.



# Snow Days & Emergency Days

- Given the ability to pivot to virtual instruction when needed, school districts and unions may take a closer look at contract language addressing snow days or other emergency closures
- Proposed language may include:
  - Procedures for “true” snow days vs. virtual instruction days
  - Notice to staff regarding school closures
  - Work expectations during snow days or other emergency days





# Virtual Instruction

- Although virtual instruction is a prohibited subject of bargaining under PERA, unions may demand impact bargaining on various topics such as:
  - Class size/overload pay
  - Asynchronous vs. synchronous instruction
  - Staff reporting to school district vs. staff working from home
  - Compensation for training on new technology
  - Recording virtual classrooms or instruction



# EEOC Updates





# New EEOC Guidance: Americans with Disabilities Act & COVID-19



# Americans with Disabilities Act & COVID-19

- ***What is a “disability” under the ADA?***
  - A “disability” is a physical or mental impairment that substantially limits a major life activity or has a history of a substantially limiting impairment.
- ***Is COVID-19 a disability under the ADA?***
  - According to the EEOC, it depends on the specific facts involved in an individual employee’s condition.
  - Asymptomatic or mild symptoms similar to the common cold or flu that resolve in a matter of weeks with no other consequences would not meet the definition of a disability.
  - However, more severe symptoms may qualify as a disability.

# Americans with Disabilities Act & COVID-19

- COVID-19 symptoms that may meet the definition of “disability” under the ADA could include but are not limited to:
  - Ongoing but intermittent multiple-day headaches, dizziness, brain fog, and difficulty remembering or concentrating;
  - Receiving supplemental oxygen for breathing difficulties and has shortness of breath;
  - Heart palpitations, chest pain, shortness of breath, and related effects due to the virus that last for several months; and
  - “Long COVID”: According to the Centers for Disease Control (“CDC”), “a wide range of new, returning, or ongoing health problems people can experience more than four weeks after first being infected.”

# Examples of Long COVID Symptoms

Tiredness or fatigue	Depression or anxiety
Difficulty thinking or concentrating (sometimes called “brain fog”)	Fever
Headache	Loss of taste or smell
Dizziness on standing	Difficulty breathing or shortness of breath
Fast-beating or pounding heart (known as heart palpitations)	Pins-and-needles feeling
Chest pain	Diarrhea
Cough	Sleep problems
Joint or muscle pain	Multiorgan effects or autoimmune conditions



# Long COVID as a Psychological Condition

- According to guidance from the Department of Health and Human Services, as it relates to Long COVID as a disability under the ADA and Section 504, some people with Long COVID experience symptoms such as:
  - Lung damage
  - Heart damage, including inflammation of the heart muscle
  - Kidney damage
  - Neurological damage
  - Damage to the circulatory system resulting in poor blood flow
  - Lingering emotional illness and other mental health condition



# Reasonable Accommodations for COVID-19

- Employees with Long COVID or other symptoms that rise to the level of an ADA disability could be entitled to certain reasonable accommodations, which may include:
  - Personal protective equipment (PPE);
  - Social distancing;
  - Part-time work or flexible work schedule;
  - Job restructuring of non-essential duties;
  - Temporary leave; or
  - Work from home.



# Family and Medical Leave Act & COVID-19

- Employees are eligible to take FMLA leave if they work for a covered employer and:
  - Have worked for their employer for at least 12 months;
  - Have at least 1,250 hours of service over the 12 month period before their leave begins; and
  - Work at a location where at least 50 employees are employed by the employer within 75 miles.
- Qualifying reasons for FMLA include an employee's own "serious health condition" or the need to care for a family member's "serious health condition."





# Family and Medical Leave Act & COVID-19

- ***Does COVID-19 qualify as a “serious health condition” under the FMLA?***
  - COVID-19 may be a serious health condition if the employee is unable to perform the functions of the employee’s job.
  - The most common serious health conditions:
    - Require an overnight stay in a hospital or other medical care facility;
    - Incapacitate the employee or the employee’s family member for more than three consecutive days and that include ongoing medical treatment; or
    - Are chronic conditions that cause occasional periods when the employee or the employee’s family member is incapacitated, requiring treatment by a health care provider at least twice a year.



# Family and Medical Leave Act & COVID-19

- ***Can parents or caregivers take FMLA leave due to school closures or other childcare-related needs?***
  - No. FFCRA expired on December 31, 2020, and there is currently no federal law covering non-government employees who take off from work to care for healthy children.
  - Employers may otherwise agree to childcare leave policies, although not required by law.



# New EEOC Guidance: Caregiver Discrimination



# Caregiver Discrimination

- On March 14, 2022, the EEOC released a technical assistance document on COVID-19 and caregiver discrimination, explaining discrimination against employees and job seekers with family caregiving responsibilities.
- Discrimination against applicants and employees related to pandemic caregiving responsibilities may violate Title VII, the ADA, or other EEOC-enforced laws.
- Caregiver discrimination violates federal employment discrimination laws when it is based on an applicant's or employee's membership in a protected class (pregnancy, sexual orientation, gender, race, color, religion, national origin, age, disability, or genetic information).

# Female Applicants and Employees

- Unlawful discrimination based on female workers' caregiving may arise in a variety of ways, often connected to gender-based stereotypes about caregiving responsibilities or roles. For example:
  - Refusal to hire or promote a female applicant or employee based on assumptions that she would (or should) focus primarily on caring for her young children, parents, or other adult relatives.
  - Penalizing female employees more harshly than similarly situated male employees for absences or missed deadlines due to caregiving duties.
  - Declining to assign female caregivers demanding or high-profile projects that increase advancement but require overtime or travel based on assumptions that it will make it easier for female employees to juggle work and personal obligations.



# Male Applicants and Employees

- Male applicants and employees are also protected from caregiver discrimination based on sex.
- It is unlawful for employers to discriminate against male caregivers based on their gender or based on gender stereotypes of men as breadwinners and women as caretakers.
- Examples:
  - Denying men leave or permission to work a flexible schedule for pandemic-related caregiving duties if the employer grants such requests when made by similarly situated women.
  - Refusing requests for exceptions from return-to-work policies or attendance policies made by men with caregiving responsibilities based on gender.



# LGBTQ+ Applicants and Employees

- LGBTQ+ applicants and employees are also protected from caregiver discrimination based on sex.
- Examples:
  - Requiring proof of a marital or other family relationship with the individual needing care, if such requirements are not imposed on other employees who make such requests.
  - Denying caregiving leave to an employee with a same-sex partner based on the sexual orientation or gender identity of the employee or the employee's partner.

# Pregnancy Related Discrimination

- Examples:
  - Refusing to hire pregnant applicants, or refuse to promote pregnant employees, based on assumptions that they will or should be primarily focused on ensuring safe and healthy pregnancies.
  - Allowing employees to harass pregnant co-workers for maintaining a physical distance from colleagues, changing their schedules, teleworking, or other actions to avoid being exposed to or infected with COVID-19.
  - Unilaterally requiring pregnant employees to telework or adjust their schedules to limit contact with colleagues, customers, or others whose COVID-19 or vaccination status may be unknown.

# QUESTIONS?



# Thank You



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## **Legal Disclaimer**

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.