

# **ACSI Legal Town Hall**

## **Managing Personnel Issues**

### **Associated with COVID**

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**June 15, 2020**





## Disclaimer

This presentation is designed to provide accurate and authoritative information regarding the subject matter covered. It is distributed with the understanding ACSI is not engaged in rendering legal, financial or other professional services. The purpose of this presentation is educational. If legal advice or other professional assistance is required, the services of a competent professional should be sought.

ACSI Legal Legislative team is actively looking at issues related to the Coronavirus COVID-19 outbreak that impact Christian education. This page is designed to give you current, relevant information and is updated as new information unfolds.

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- Philip Scott, Esq., In-House Counsel to ACSI
- George Tryfiates, Director of Government Affairs

## CARES Act Guidance

- **UPDATED 6/11/20** - CapinCrouse - On Monday, the SBA and the U.S. Department of Treasury provided some clarification about the new Paycheck Protection Program Flexibility Act. Learn more in our [updated article](#)
- **NEW 6/11/20** - Taylor English - [Child Care Providers: Surviving the Summer With or Without a PPP Loan](#)
- 5/18/20 - SBA - [PPP Loan Forgiveness Application](#)
- 5/19/20 - Key Guidance - CapinCrouse - Recording/Handout of 90 minute [Webcast for Nonprofits: A First Look at Applying for PPP Loan Forgiveness](#)
- **UPDATED 5/19/20** - CapinCrouse - [First Look at Applying for PPP Loan Forgiveness](#)
- **\*\*Deadline was May 18\*\* - Updated 5/14/20 - Faith & Giving - [CARES Act Update](#)**
  - Updated 5/13/20 - Faith & Giving - [CARES Act Update](#)
  - Updated 5/6/20 - Faith & Giving - [CARES Act Update](#)
- 5/13/20 - [ACSI - COVID Ed Coalition Request](#)
- **UPDATED 5/13/20 - [SBA - FAQs Regarding PPP Loan](#)**
- 5/08/20 - USDE - [FAQ's about the Elementary and Secondary School Emergency Relief Fund \(ESSER Fund\)](#)
- 5/08/20 - [Response to CARES Act Equitable Services Guidance](#)
- 5/01/20 - Faith & Giving - [CARES Act - PPP Confusion](#)
- 5/01/20 - ACSI - [Memo Regarding USDE Issues CARES Act FAQs on Equitable Services](#)
- 4/30/20 - [USDE FAQs on Equitable Services under the CARES Act](#)
- 4/27/20 - CapinCrouse - [Accounting for Paycheck Protection Program Proceeds](#)
- 4/27/20 - ACSI - [Memo Regarding New USDE CARES Act Funding Announcement](#)
- 4/16/20 - CapinCrouse - [Webcast for Nonprofits: A First Look at PPP Loan Forgiveness](#)
- 4/13/20 - JDSupra - [PPP Loan Forgiveness: Further Guidance on the Math](#)
- 4/14/20 - CapinCrouse - [IRS Releases Guidance Regarding Deferral of Employer Payroll Taxes Under the CARES Act](#)
- 4/13/20 - USDE - [CARES Act Education Stabilization Fund](#)
- 4/10/20 - Taylor English - [Employee Retention Tax Credit Under The CARES Act: Alternative Tool for Businesses Not Utilizing The PPP](#)
- 4/08/20 - ACSI - [Memo to School Leaders on CARES Act Education Stabilization Fund](#)
- 4/08/20 - ACSI - [Sample Letter Schools Can Adapt for Their LEA](#)
- 4/07/20 - Nutter - [3 Steps \(and a Calculator\) to Help Determine Forgiveness for Your PPP Loan](#)

## Tweets by @ACSILegalLegl



**ACSI Legal Legl**

@ACSILegalLegl

Prioritizing Relationships in Diversity, Equity, and Inclusion: Insights from Research in Christian Schools @ACSIUSA blog [blog.acsi.org/prioritizing-d...](http://blog.acsi.org/prioritizing-d...)



**Prioritizing Relationships in Div...**

Christian school educators reflect ... [blog.acsi.org](http://blog.acsi.org)



Jun 11, 2020



**ACSI Legal Legl**

@ACSILegalLegl

We are saddened to learn of Ravi Zacharias passing. He was a continual defender of the Gospel.



May 19, 2020



**ACSI Legal Legl**

@ACSILegalLegl

Good data here for schools to benchmark their

Embed

View on Twitter

# Employees Returning to School

1. Begin by surveying your staff on their concerns about returning to school. Gather information and make it a part of your planning strategies.
2. Determine those who might be “at-risk” employees.
3. Be open and transparent with your employees. Let them know you are concerned with their health and safety.
  - Tell them what cleaning procedures you will be doing.
  - Listen to their concerns
  - Provide an Employee Assistance Program (EAP). It allows them to get limited professional counseling.
  - Be sure your Group Health Insurance Coverage is up-to-date based on the CARES Act.
    - Covers full cost of COVID-19 testing
    - Covers full cost of COVID-19 vaccine
    - Covers full cost of Telehealth
    - Be aware of Emergency Paid Sick Leave and Emergency FMLA provided under the Families First Coronavirus Act (FFRCA)

# Employees Returning to School

4. Be cautious about disciplining or terminating employees who refuse to return to work due to fear of safety and potential exposure to COVID-19.
5. Build trust in your employees by being honest and transparent by letting them know all the steps you are taking to protect their safety.
6. Be aware of the CDC, State and Local guidelines for reopening schools but also guidance that has to do with places of businesses where it applies to employees.



# Teacher Afraid to Return

- Can the school enforce the contract?
  - Generally yes, but illegal contract not enforceable
  - Attempting to require return contrary to statutes or regulations may make the contract illegal
- Several state or federal statutes may apply
  - OSHA
  - NLRA
  - ADA



# Occupational Safety and Health Act – OSHA

- Purpose - safe and healthful working conditions
- COVID-19 workplace covered by OSHA
- What is required by employee for refusal
- Three primary elements
  - Employee asked employer to eliminate danger, and employer failed to do so
  - Employees refusal to work in good faith, with belief there is an imminent danger
  - Objective standard – reasonable person would believe real danger of death or serious injury
- To address – employer follows CDC and state health department guidelines



# National Labor Relations Act – NLRA

- Some legalize – is a Christian school covered?
- Since US Sup. Crt. Decision in Catholic Bishop case
  - Christian schools not subject to NLRA jurisdiction
  - NLRB decision in *Pacific Lutheran University* – *not religious enough*
  - In *Duquesne Univ. v. NLRB*, DC Court of Appeals stated 3 part test
- The test - (1) holds itself out to the public as a religious institution (*i.e.*, as providing a "religious educational environment"); (2) is nonprofit; and (3) is religiously affiliated
- Is refusing to report for work a “protected activity”
- Fear of exposure or safety issues may be as long as it is made on behalf of more than one employee
- Answer – follow guidelines to provide safe environment





# Americans with Disability Act – ADA

- Underlying health condition is a disability – even if addressed with medication
- If employee raises concern with return due to underlying condition – ADA applies
- Is this a position that must be performed at the school
- Is there a reasonable accommodation – interactive process required, questions re restructure, work remotely,
- ADA does not apply if the concern or underlying condition is a family member
- Is the accommodation an undue hardship or so alter the program impracticable



# Other Contract Issues

- Teacher does not want to do virtual learning
  - Is there an emergency order in place
  - What is the contract language re duties, etc.
- Reduction in force, emergency closure
  - Does the contract have a clause re loss of students
  - Does the contract have a force majeure clause

# Liabilities to Staff

- OSHA general duty clause
  - Can be basis for other claims of a failure to protect employees from COVID
  - Fines from OSHA
- Negligence
  - Its own cause of action as a tort injury
- Court of public opinion
- Workers Compensation
  - COVID, FLU, etc. not generally covered. Exception for COVID in Michigan and Louisiana

# Liabilities to Staff

- OSHA general duty clause
  - general requirement on an employer to keep its workplace free of any recognized hazards that are likely to cause death or serious physical harm to its employees
- An employer violates the general duty clause if:
  - The employer failed to keep the workplace free of a hazard to which employees were exposed.
  - The hazard was recognized.
  - The hazard was likely to cause death or serious physical harm.
  - There was a feasible and economically viable way to correct the hazard.

# Liabilities to Staff

Risk of Negligence – Duty, Breach, Harm, Damages

Court of Public Opinion

- Legal Risk – You don't want to fail meeting a community standard. Standards can be set by:
  - Federal – CDC, US Dept of Educ, etc.
  - State/local authority – health department, governor, public school system (especially if there is a template or state standard).
  - Something you promise – ex. screen all students everyday.
  - Professional organization – AMA
  - Community at large – ex. rates of infection
- Standards to be on the lookout for
  - Federal guidance – CDC
  - State orders and re-opening plans
  - Departments of education plans – state, local

# Mask Requirements

- As a general rule, no requirement that all staff must wear mask. Check what state is mandating.
- Regardless, you can voluntarily require it.
- Staff that refuse without justification can be punished up to termination.
  - Justification would need to be a legitimate medical concern. You then go through the ADA interactive process.
- Common sense suggestions
  - If you are going to require their use you should consider either providing them or stipend to cover their cost.
  - Consider limited use where 6ft rule is hard to enforce – period changes.

# Temperature Checks

- Note: these points apply to medical questionnaires as well as temperature checks.
- Technically a temperature check is a medical evaluation. EEOC has given guidance that it's allowed for COVID.
  - Should obtain parental permission if checking students.
- MUST be job related & consistent with a business necessity.
  - Is this being required by some standard you can appeal to?
- Whether student or staff, this is considered confidential medical records. Keep in a separate file and confidential if you keep at all.
- Needs to apply consistently across the board to all volunteers and visitors as well.

# Mandatory Testing

- Can be required or conducted by school according to EEOC's Technical Assistance Questions and Answers.
  - Seems much more reasonable to require testing if symptoms present themselves.
  - Same confidentiality and medical record concerns.
- Focus more on prevention screening and what to do if someone becomes ill at school.



# Liability Waivers

- Potentially more enforceable with parents/students than with staff.
- Release of liability is a contract. To require staff to sign one to keep their job is not an arm's length agreement and, in some jurisdictions, this likely would defeat the release.
- Use with those you are providing the service of an education to.

# Employment Contracts

- Should include language giving the school the ability to cancel the contract due to enrollment or funding issues under specific circumstances.
- Force Majeure clauses if something like this year happens again.
- Samples of both available on the ACSI Coronavirus resource page.