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Overview for Today

- 48-201 Consent Forms
- FMLA Designation Reminder
- Renewals
- ARP ESSER Plans
- Q&A

48-201 Consents—Use them!



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"I'm sorry. We more or less did pretty much everything we probably could have."

48-201

- A current or former employer may disclose the following information about a current or former employee upon written consent from the current or former employee
 - Date and duration of employment
 - Pay rate and wage history
 - Job description and duties
 - The most recent evaluation prepared prior to the date of request and provided to the employee

48-201

- A current or former employer may disclose the following information about a current or former employee upon written consent from the current or former employee
 - Attendance information
 - Results of drug and alcohol tests within 1 year of request
 - Threats of violence, harassing acts, or threatening behavior
 - Whether separation was voluntary or involuntary
 - The reasons for the separation
 - Whether the employee is eligible for rehire

48-201

- The current or former employer is presumed to be acting in good faith and immune from civil liability for the disclosure or any consequence of the disclosure
 - Unless the presumption is rebutted by showing the information was false, and the employer knew it was false or active with malice or reckless disregard for the truth

48-201

- The consent must either be:
 - On a separate form outside of the application, or
 - Included in the application with
 - Bold letters
 - Larger font than the largest font in the application
- Consent form must state, at a minimum:
 - "I, (applicant), hereby give consent to any and all prior employers of mine to provide information with regard to my employment with prior employers to (prospective employer)."


48-201

- The consent form:
 - Must be signed and dated by the application
 - Is valid for no longer than 6 months
- Not required to be included, but why not?
- Does not shield the employer from discrimination or retaliation charges, when the employee has exercised any federal or state right

Practical Questions

- How to include it when using an online application
 - Can include it in your online app but must abide by the font requirement
 - State law permits electronic "signatures"
- What if the employee signed a resignation agreement with a nondisclosure clause?

FMLA Designation Reminder



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"Run it past legal first."

FMLA: You're All Covered Employers!

- Covered employers
 - Private sector employers with 50 or more employees
 - Public Agencies
 - *Public and private elementary and secondary schools*
- Covered employers must
 - Display general notices (like FMLA poster)
 - Provide general notices in handbooks/policies
 - Respond timely to employee requests for leave, even if your *employees* are not eligible...

But not all employees are eligible for FMLA leave!

- Eligible employees
 - Must work at site with 50 or more employees within 75 miles
 - "The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are maintained on the payroll during any portion of the year when school is not in session."
 - 12 months of employment
 - 1,250 hours of work in 12 months prior to request
- If you don't think your employees are eligible, check your policy, handbook, and negotiated agreement...

If you don't have accurate hours, the burden is on the employer!

In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), **the employer has the burden of showing that the employee has not worked the requisite hours.** An employer must be able to clearly demonstrate, for example, that full-time teachers (see §825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave.

Notice to Employer

- By employee or agent of employee
- Any reasonable manner: e.g., → in person, phone, fax or e-mail
- Does not have to mention "FMLA" or use words like "serious health condition"
- Employee generally not required to "apply" for FMLA leave
 - Application forms do not extend response timelines or excuse non-response by employer

If Employer is on notice...

THEN →

Burden shifts to employer to inquire further regarding whether leave is FMLA qualifying and respond within statutory timeframes

Eligibility & Rights/Responsibilities Notice Requirement for Employers

- Notice to employee
- *Must provide w/in 5 business days of initial request for leave or when employer acquires knowledge of FMLA-qualifying reason (absent extenuating circumstances)*
- Advise of eligibility status
- If not eligible, must state reason why
- DOL forms are helpful
 - <https://www.dol.gov/agencies/whd/fmla/forms>
 - Almost all responses will use form WH-381 and WH-382

What's a serious health condition?

For purposes of FMLA, *serious health condition* entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in §825.114 or continuing treatment by a health care provider as defined in §825.115.

- Inpatient care: "overnight stay" in hospital or med. facility
- Continuing treatment: Incapacity for 3+ days combined with multiple treatments within 30 days, or regimen of continuing treatment, in-person with health care provider

What's a serious health condition?

- Pregnancy or prenatal care (no 3+ day requirement)
- Chronic conditions which require (no 3+ day requirement)
 - Periodic visits (2x per year)
 - Continuing over extended period of time
 - May cause episodic rather than continuing treatment (asthma, diabetes, epilepsy, etc.)
- Permanent or long-term conditions leading to "any period of absence" to receive multiple treatments
- Conditions requiring multiple treatments for restorative surgery or periods of incapacity for treatment (chemo, radiation, etc.)

You be the judge...

- "My father contracted COVID-19 and just called. He's in the hospital and I need to care for him."
- "I'm so sick of this back pain. I finally went to that specialist in Omaha and I'll have weekly treatment here in town for 3 months"
- "Principal Smith, my wife and I are so happy to report that our fertility treatment worked! I'll finally be able to snuggle my own child on or before October 1!"

Renewals



"Unfortunately, it's just their word against yours."


Renewals

- March 15: earliest contract commitment date
- April 15: statutory default *if no earlier commitment*
- Neg. Agreement, policy, handbook resignation deadline
 - Not required by law
 - Rarely lines up with earlier commitment date
 - Too many caveats "suitable replacement" and appeals for "unique circumstances"

Renewals

- Jane Doe signs renewal agreement and turns it in 3/15
- Jane's son is left off the 4x1 relay team, applies at a neighboring district
- Jane turns in resignation April 7: Jane is bound, unless your policy allows Jane to resign
 - April 15 is not doing any work in this scenario!
- If Jane turns in resignation April 19: Jane is bound, unless your policy allows Jane to resign
- If your policy says "suitable replacement" you will have a fight at the PPC

ARP ESSER III, "Plans" and New USDOE Proposed Rules



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"My teacher said I can be anything I want to be.
I want to be a kid who gets an allowance of \$25 a week."

TITLE II—COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS
Subtitle A—Education Matters
PART 1—DEPARTMENT OF EDUCATION

SEC. 2001. ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND.
 (a) **IN GENERAL.**—In addition to amounts otherwise available through the Education Stabilization Fund, there is appropriated to the Department of Education for fiscal year 2021, out of any money in the Treasury not otherwise appropriated, \$122,774,800,000, to remain available through September 30, 2023, to carry out this section.

(c) **ALLOCATIONS TO STATES.**—The amount of each grant under subsection (b) shall be allocated by the Secretary to each State in the same proportion as each State received under part A of title I of the Elementary and Secondary Education Act of 1965 in the most recent fiscal year.

(d) **SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES.**—

(1) **IN GENERAL.**—Each State shall allocate not less than 90 percent of the grant funds awarded to the State under this section as subgrants to local educational agencies (including charter schools that are local educational agencies) in the State in proportion to the amount of funds such local educational agencies and charter schools that are local educational agencies received under part A of title I of the Elementary and Secondary Education Act of 1965 in the most recent fiscal year.

(2) **AVAILABILITY OF FUNDS.**—Each State shall make allocations under paragraph (1) to local educational agencies in an expedited and timely manner and, to the extent practicable, not later than 60 days after the receipt of such funds.

(e) **USES OF FUNDS.**—A local educational agency that receives funds under this section—

(1) shall reserve not less than 20 percent of such funds to address learning loss through the implementation of evidence-based interventions, such as summer learning or summer enrichment, extended day, comprehensive afterschool programs, or extended school year programs, and ensure that such interventions respond to students' academic, social, and emotional needs and address the disproportionate impact of the coronavirus on the student subgroups described in section 1111(b)(2)(B)(vi) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6311(b)(2)(B)(vi)), students experiencing homelessness, and children and youth in foster care; and

The other 80%

▪ (2) shall use the remaining funds for any of the following:

- (A) Any activity authorized by the Elementary and Secondary Education Act of 1965.
- (B) Any activity authorized by the Individuals with Disabilities Education Act.
- (C) Any activity authorized by the Adult Education and Family Literacy Act.
- (D) Any activity authorized by the Carl D. Perkins Career and Technical Education Act of 2006.

The other 80%

▪ (2) shall use the remaining funds for any of the following:

- (E) Coordination of preparedness and response efforts of local educational agencies with State, local, Tribal, and territorial public health departments, and other relevant agencies, to improve coordinated responses among such entities to prevent, prepare for, and respond to coronavirus.

The other 80%

▪ (2) shall use the remaining funds for any of the following:

- (F) Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population.
- (G) Developing and implementing procedures and systems to improve the preparedness and response efforts of local educational agencies.

The other 80%

▪ (2) shall use the remaining funds for any of the following:

- (H) Training and professional development for staff of the local educational agency on sanitation and minimizing the spread of infectious diseases.
- (I) Purchasing supplies to sanitize and clean the facilities of a local educational agency, including buildings operated by such agency.

The other 80%

▪ (2) shall use the remaining funds for any of the following:

- (J) Planning for, coordinating, and implementing activities during long-term closures, including providing meals to eligible students, providing technology for online learning to all students, providing guidance for carrying out requirements under the Individuals with Disabilities Education Act and ensuring other educational services can continue to be provided consistent with all Federal, State, and local requirements.

The other 80%

▪ (2) shall use the remaining funds for any of the following:

- (K) Purchasing educational technology (including hardware, software, and connectivity) for students who are served by the local educational agency that aids in regular and substantive educational interaction between students and their classroom instructors, including low-income students and children with disabilities, which may include assistive technology or adaptive equipment.

The other 80%

▪ (2) shall use the remaining funds for any of the following:

- (L) Providing mental health services and supports, including through the implementation of evidence-based full-service community schools.

The other 80%

▪ (2) shall use the remaining funds for any of the following:

- (M) Planning and implementing activities related to summer learning and supplemental afterschool programs, including providing classroom instruction or online learning during the summer months and addressing the needs of low-income students, children with disabilities, English learners, migrant students, students experiencing homelessness, and children in foster care.

The other 80%

- (2) shall use the remaining funds for any of the following:
 - (N) Addressing learning loss among students, including low-income students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care, of the local educational agency, including by—
 - (i) administering and using high-quality assessments that are valid and reliable, to accurately assess students’ academic progress and assist educators in meeting students’ academic needs, including through differentiating instruction;

The other 80%

- (2) shall use the remaining funds for any of the following:
 - (N) Addressing learning loss among students, including low-income students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care, of the local educational agency, including by—
 - (ii) implementing evidence-based activities to meet the comprehensive needs of students;

The other 80%

- (2) shall use the remaining funds for any of the following:
 - (N) Addressing learning loss among students, including low-income students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care, of the local educational agency, including by—
 - (iii) providing information and assistance to parents and families on how they can effectively support students, including in a distance learning environment; and

The other 80%

- (2) shall use the remaining funds for any of the following:
 - (N) Addressing learning loss among students, including low-income students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care, of the local educational agency, including by—
 - (iv) tracking student attendance and improving student engagement in distance education.

The other 80%

- (2) shall use the remaining funds for any of the following:
 - (O) School facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards, and to support student health needs.

The other 80%

- (2) shall use the remaining funds for any of the following:
 - (P) Inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement.

Permissible under ESSER =/= no other rules or requirements apply...

The other 80%

- (2) shall use the remaining funds for any of the following:
 - (Q) Developing strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the Centers for Disease Control and Prevention for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff.

The other 80%

- (2) shall use the remaining funds for any of the following:
 - (R) Other activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency.

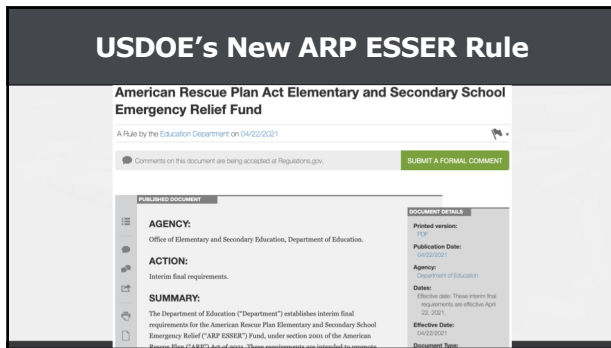
ARP, ESSER also says...

(I) SAFE RETURN TO IN-PERSON INSTRUCTION.—

(1) IN GENERAL.—A local educational agency receiving funds under this section shall develop and make publicly available on the local educational agency's website, not later than 30 days after receiving the allocation of funds described in paragraph (d)(1), a plan for the safe return to in-person instruction and continuity of services.

(2) COMMENT PERIOD.—Before making the plan described in paragraph (1) publicly available, the local educational agency shall seek public comment on the plan and take such comments into account in the development of the plan.

(3) PREVIOUS PLANS.—If a local educational agency has developed a plan for the safe return to in-person instruction before the date of enactment of this Act that meets the requirements described in paragraphs (1) and (2), such plan shall be deemed to satisfy the requirements under this subsection.



New ESSER Rule Basics

- The actual "rules" are 5 pages long, out of 62 (ish) pages of "stuff" from USDOE
- They incorporate the "Safe Return to In-Person Instruction" section of the ARP (from the last slide)
- Require SEA and all recipient LEAs to establish an "ARP ESSER Plan" in addition to the Safe Return plan
 - Guidance says they could be combined

There are 2 Plans?! What the...funding?!

1. ARP ESSER Plan
2. Plan for Safe Return to In-person Instruction and Continuity of Services

LEA ARP ESSER Plan

(2) LEA ARP ESSER Plan.

(a) Each LEA that receives ARP ESSER funds must submit to the SEA, in such manner and within a reasonable timeline as determined by the SEA, a plan that contains any information reasonably required by the SEA. The plan, and any revisions to the plan submitted consistent with procedures established by the SEA, must describe --

LEA ARP ESSER Plans

▪ LEA ESSER Plan must include at least the following:

- The extent to which and how the funds will be used to implement prevention and mitigation strategies that are, to the greatest extent practicable, consistent with the most recent CDC guidance on reopening schools, in order to continuously and safely open and operate schools for in-person learning;

LEA ARP ESSER Plans

▪ LEA ESSER Plan must include at least the following:

- How the LEA will use the funds it reserves under [ESSER III] to address the academic impact of lost instructional time through the implementation of evidence-based interventions, such as summer learning or summer enrichment, extended day, comprehensive afterschool programs, or extended school year programs

LEA ARP ESSER Plans

- LEA ESSER Plan must include at least the following:
 - How the LEA will spend its remaining ARP ESSER funds consistent with [ESSER III within the] ARP Act

LEA ARP ESSER Plans

- LEA ESSER Plan must include at least the following:
 - How the LEA will ensure that the interventions it implements, including but not limited to the interventions under the [20% learning loss requirement] of the ARP Act to address the academic impact of lost instructional time, will respond to the academic, social, emotional, and mental health needs of all students, and particularly those students disproportionately impacted by the COVID-19 pandemic, including students from low-income families, students of color, English learners, children with disabilities, students experiencing homelessness, children in foster care, and migratory students

LEA ARP ESSER Plan Development

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"OK, it's not that effective, but what a crowd pleaser!"

LEA ARP ESSER Plan Development

- When developing the ESSER Plan, each LEA must
 - “engage in meaningful consultation”
 - with stakeholders, including: students, families, school and district administrators (including special ed. admins), teachers, principals, school leaders, other educators, school staff, and their unions

LEA ARP ESSER Plan Development

- When developing the ESSER Plan, each LEA must
 - “engage in meaningful consultation”
 - to the extent present in or served by the LEA: Tribes; civil rights organizations (including disability rights organizations); and stakeholders representing the interests of children with disabilities, English learners, children experiencing homelessness, children in foster care, migratory students, children who are incarcerated, and other underserved students

LEA ARP ESSER Plan Development

- When developing the ESSER Plan, each LEA must
 - “Provide the public the opportunity to provide input and take such input into account”
- Each LEA’s ARP ESSER Plan must be
 - In an understandable *and uniform* format
 - To the extent practicable, written in a language the parents can understand or if impractical, be orally translated
 - Provide in an alternative format consistent with the ADA
 - Be made publicly available on LEA’s website

LEA Plan for Safe Return to In-Person Instruction and Continuity of Services



LEA Plan for Safe Return to In-Person Instruction and Continuity of Services

- An LEA must describe in its plan
 - How it will maintain the health and safety of students, educators, and other staff and the extent to which it has adopted policies, and a description of any such policies, on each of the following safety recommendations established by the CDC
 - Universal and correct wearing of masks
 - Modifying facilities to allow for physical distancing (cohorts/pods)
 - Handwashing and respiratory etiquette
 - Cleaning and maintaining healthy facilities, including improved ventilation

LEA Plan for Safe Return to In-Person Instruction and Continuity of Services

- An LEA must describe in its plan
 - How it will maintain the health and safety of students, educators, and other staff and the extent to which it has adopted policies, and a description of any such policies, on each of the following safety recommendations established by the CDC
 - Contact tracing in combination with isolation and quarantine, in collaboration with State, local, territorial, or Tribal health dept.'s
 - Diagnostic and screening testing
 - Efforts to provide vaccinations to school communities

LEA Plan for Safe Return to In-Person Instruction and Continuity of Services

- An LEA must describe in its plan
 - How it will maintain the health and safety of students, educators, and other staff and the extent to which it has adopted policies, and a description of any such policies, on each of the following safety recommendations established by the CDC
 - Appropriate accommodations for children with disabilities with respect to health and safety policies
 - Coordinate with State and local health officials

LEA Plan for Safe Return to In-Person Instruction and Continuity of Services

- An LEA must describe in its plan
 - How it will ensure continuity of services, including but not limited to services to address students' academic needs and students' and staff social, emotional, mental health, and other needs, which may include student health and food services

LEA Plan for Safe Return to In-Person Instruction and Continuity of Services

- During the ESSER award period (through Sept. 2024 with Tydings amendment?), each LEA must update its plan at least every 6 months (taking into consideration CDC guidance), review and revise the Plan for Safe Return if appropriate
 - Must seek public input on whether revisions are necessary
 - If CDC has updated its guidance when the plan is reviewed, the LEA must address that and explain its policies to comply with the updated recommendations

LEA Plan for Safe Return to In-Person Instruction and Continuity of Services

- If the LEA developed a plan prior to ARP that meets the "statutory requirements" of ARP (noted above) but does not address all the requirements in the new rule

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LEA Plan for Safe Return to In-Person Instruction and Continuity of Services

- If the LEA developed a plan prior to ARP that meets the "statutory requirements" of ARP (noted above) but does not address all the requirements in the new rule
 - LEA must revise and post its plan
 - We're not sure that's what the law says...
 - No later than 6 months after receiving its ARP ESSER funds to meet the requirements of the Plan for Safe Return rules
- Similar to ARP ESSER plan, must be understandable, translated, and provided consistent with ADA

What's NOT in either plan?

- Timelines and deadlines for submission
 - Set by NDE
- Davis-Bacon and Related Acts
- EDGAR procurement requirements
 - Quotes, bids, Buy American, etc.
- State bidding and arch/engineering requirements
- Construction alternatives that may be off the table
- The tens of thousands of dollars of administrative time USDOE predicts each school district's staff will spend making the plans

Some other Hot Topics

- Title IX training, notices, and postings are...not perfect
- FFCRA ARP extension and hybrid extensions
- Vaccine incentives?
 - NDE: not ESSER eligible
- COBRA premium assistance
 - Applies to "state or local governments" subject to continuation provisions under PHSa
- New CRDC forms
- MOE in light of ESSER funds