BACK TO SCHOOLS AND CAMPUSES DURING A PANDEMIC: CONCERNS AND CONSIDERATIONS[1]

Prepared by MTA Legal Services Division
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On March 10, 2020, Gov. Baker declared a state of emergency in Massachusetts due to the international outbreak of the COVID-19 virus. Use of the word "pandemic" was just beginning then but as we approach 5 months under this state of emergency, it is now a daily word and new reality.

Just when our members were adjusting to the abrupt shift to crisis education remotely this spring and its impact on their professional and personal lives, they are now faced with the prospect of returning to in-person instruction this fall despite the on-going pandemic and the possibility of subsequent "waves" of increased cases. Not surprisingly, returning to classrooms is raising a lot of concerns, anxiety, and even fear.

This memo looks at the legal considerations for the frequent questions that have been arising around returning to "brick and mortar" education this fall. It does not address the health and safety recommendations for "reopening" from the CDC, the state, or DESE specifically, though those recommendations and guides should inform discussions at all levels. MTA has issued three critical positions on returning to in-person leaving #OnlyWhenItsSafe. One is the MTA Board of Directors position on resuming learning remotely until it is safe to return to a hybrid or in-person model. The second is its own proposal for re-opening schools: https://massteacher.org/-/media/massteacher/files/news/proposaldese.pdf. The third is a set of Environment Health and Safety Standards created by our own EH&S Committee that locals have the right to bargain over. And MTA is sponsoring a petition for the safe reopening of our institutions for higher education: https://actionnetwork.org/petitions/a-petition-from-the-unionized-education-workers-who-make-our-campuses-work/. Also, it is important to keep in mind that guiding and planning around COVID-19 is constantly in flux.

Most importantly, one must keep in mind that while this memo is written from a legal perspective, we understand that there are serious health and safety issues in returning to in-person instruction and service with potentially deadly consequences. As such, this memo provides guidance related to relevant laws but we know that those laws are just one tool supporting the on-going organizing and advocacy efforts at local and state levels to ensure a safe return to in-person instruction and services for all our members, students, and the broader community. To that end, the MTA began a statewide organizing campaign that has united the 370+ locals to fight for the health, safety, and wellness of MTA members, our students, families,

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[1] ***This memo provides guidance only and does not have the force of law. It should not be construed as legal advice and it is not intended to create an attorney-client relationship. This memo also may be subject to change due to the evolving nature of the pandemic and possible future changes to relevant laws and regulations.***

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I. WHAT CAN I DO IF I HAVE PERSONAL CONCERNS ABOUT RETURNING TO IN-PERSON INSTRUCTION AND SERVICES?

Many people have concerns about returning to in-person instruction and services because they have underlying health issues that put them at greater risk of serious illness if they contract COVID-19, or they live with someone with such health issues, or they are anxious about contracting the virus even without having underlying health issues. The Centers for Disease Control and Prevention ("CDC") describes certain populations as having a *high risk of serious illness* due to COVID-19, including older adults (65+) and people with one of the following conditions:[2]

- Cancer
- Chronic kidney disease
- Immunocompromised state (organ transplant)
- Obesity
- Sickle cell anemia
- COPD
- Type 2 diabetes

The CDC further finds that people with the following conditions *might be at increased risk of serious illness* due to COVID-19:

- Asthma
- Pregnancy
- Neurologic condition
- Smoking
- Cystic Fibrosis
- Smoking
- Liver disease
- Immunocompromised state (various)
- Hypertension
- Type 1 diabetes
- Pulmonary fibrosis
- Cerebrovascular disease

This section looks at different options for taking leave in lieu of returning to work this fall or seeking an accommodation due to a disability.

A. CONTRACTUAL RIGHTS TO TAKE LEAVE

The terms of your collective bargaining agreement ("CBA" or "contract") govern the use of sick leave. If you have a medical condition that qualifies for sick leave under your contract, nothing about the pandemic impacts your ability to access that leave.

[2] This list is subject to change as the CDC gathers more evidence. The most up-to-date information may be found on the CDC website: https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html.

1. Can I use sick leave instead of returning to work even if I am not sick?

Usually, sick leave is limited to times an employee is ill or attending medical appointments. Sometimes the contract or past practice allows for use of sick leave to care for immediate family or household members. But in this public health crisis, some employers may be more willing to expand the use of sick leave. Indeed, the U.S. Department of Labor ("DOL") has encouraged employers to consider a more expansive approach to their sick leave policies to help with this public health crisis. Any change in policy should be negotiated with impacted unions and your local union may have negotiated a temporary agreement for a more expansive use of sick leave during the pandemic.

Keep in mind that employers under some circumstances may request a doctor's note to substantiate a need for extended sick leave (the parameters of requiring such documentation are often set forth in the contract). Moreover, abuse of sick leave may be grounds for discipline, up to and including dismissal. You should contact your local union for assistance in having a conversation with your employer about using sick leave if you seek to utilize it for any reason not explicitly covered by your contract.

2. My employer says that if I travel and then I am unavailable to work due to the state's mandatory 14-day quarantine[3] then it will not approve leave for the quarantine period. Can it do that?

This is not an easy question to answer. First, we do not believe that employers can tell employees when or where to travel except to the extent that the "when" falls under CBA provisions. Note, for example, contracts that prohibit taking leave the day before or after a holiday weekend. *Employers also cannot refuse to pay federal Emergency Paid Sick Leave benefits to someone who is subject to a federal, state or local quarantine order; the federal legislation does not give employers that leeway* (see more on the Emergency Paid Sick Leave Act in section C below). However, employers likely have the discretion to refuse to grant leave under contracts to make up the difference in pay between what the EPSLA covers and employees' regular pay.

Moreover, we are concerned that employers could discipline employees who are unable to report to their assignment because they knowingly put themselves in a position to incapacitate themselves. Of course, we would fight such discipline and it seems a backdoor way of restricting employees' liberties. Given how circumstances forced everyone to see how remote work can work for many position, locals can argue that people in these circumstances be "assigned" to work from home during the quarantine period (or whenever employees can get a negative COVID-19 test). But we cannot know how arbitrators, who would ultimately rule on the interpretation and application of collective bargaining provisions, would rule faced with a discipline case or a denial of leave case under these circumstances. The reason motivating the

[3] The most recent travel restrictions, including penalties for noncompliance, can be found here: https://www.mass.gov/info-details/covid-19-travel-order.

travel may carry weight as well (e.g., a beach vacation in Florida may be viewed less favorably than a trip there due to serious illness or death in the family).

If employers are going to adopt a policy around how they will handle post-travel quarantines, then that should be bargained with the unions. If the travel immediately precedes the start of class and the locals are starting the school or academic year in full remote teaching mode, then the 14-day quarantine is probably irrelevant. For preK-12 educators, the "agreement" with DESE for the first 10 school days to be planning days, presumably to be done remotely, may make it a moot question. But there are likely many positions our members hold for which employers may require physical presence at the start of the year. And that does not address what happens for mid-year travel. Anyone affected should consult their local union for assistance.

B. FAMILY MEDICAL LEAVE ACT ("FMLA") RIGHTS

For eligible employees,[4] the FMLA provides up to 12 weeks of unpaid leave for their own or a family member's serious medical condition. It may be taken all at once or intermittently. Not all illnesses are "serious health conditions" that trigger FMLA eligibility. "Serious health condition" under the FMLA means an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. FLMA leave to care for a family member includes both physical and psychological care. COVID-19 has not reduced FMLA rights. If you or a family member are ill with COVID-19, then FMLA leave may be available if you are otherwise eligible and meet the conditions. The DOL website has more information about FMLA and the pandemic: https://www.dol.gov/agencies/whd/fmla/pandemic.

The FMLA only provides for unpaid leave. An employee may request to use accumulated leave to be paid for part or all of FMLA leave time. The DOL takes the position that an employer may require an employee to utilize accrued leave concurrent with FMLA leave. The MTA believes this is an unsettled question in the courts. Regardless, an employer must bargain with its union before adopting a policy of requiring concurrent use of accrued leave with FMLA leave.

3. Can I use FMLA leave to stay home from work to avoid exposure to COVID-19?

It depends. Although the DOL has encouraged employers to review their leave policies and consider more flexibility due to the potential for serious illness under a pandemic, FMLA leave is limited to those who have or are caring for someone with a "serious health condition." An employer may require medical certification of the serious health condition, which must be completed by a health care provider and support the request for leave. If the employer doubts the validity of the certification, it may require second and even third opinions (at the employer's expense). Based on your personal circumstance, your health care provider may believe that you have a serious health condition that in the context of a pandemic warrants the

[4] Employees must have worked for their employer for at least 12 months and had at least 1250 hours of service in the previous 12 months.

use of FMLA leave to ensure your safety (even though you may not have needed FMLA leave pre-pandemic for your health condition). You should consult with your health care provider(s) to see if they believe there are grounds for requesting FMLA leave and if they will submit the appropriate medical certification.

If you are concerned about exposing a close family member to COVID-19 (such as an elderly parent or child with a medical condition that falls in a high risk category), the risk of exposure is more attenuated and it may be more difficult to get a health care provider to agree to the medical certification or for the employer to see the situation as a qualifying serious health condition eligible for FMLA leave. Also, consult with your local union about any flexibilities in access to leave policies it may have negotiated with the employer.

C. EMERGENCY PAID SICK LEAVE ACT ("EPSLA") & EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT ("EFMLEA")

The federal Families First Coronavirus Response Act ("FFCRA") provides emergency paid leave for employees impacted by COVID-19 through the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Expansion Act ("EFMLEA"). These laws are only in effect from April 1, 2020 through December 31, 2020. They do not impact your rights under the FMLA.[5]

4. What if I am not sick but I have to self-quarantine or I have to care for a family member who has to self-quarantine?

All public sector employees [6] are entitled to up to 10 days of paid sick leave under the EPSLA if they are unable to work because of their own COVID-19 related illness or quarantine[7] or to care for someone with COVID-19 related reasons. This includes caring for a child if a school or place of childcare is closed due to the COVID-19 or a childcare provider is unavailable due to COVID-19.[8] EPSLA leave may be taken intermittently if both the employer and employee agree.

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[5] https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave.

[6] Employers may exclude certain health care providers and emergency responders. However, the DOL encourages the exception be applied judiciously. More information on types of positions that may fall under these exceptions may be found in guidance on the DOL website: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#56.

[7] The employee, or the person she is caring for, must be unable to work because she is subject to a federal, state, or local quarantine or isolation order related to COVID-19 or has been advised by a health care provided to self-quarantine due to concerns related to COVID-19.

[8] EPSLA may be used only if the employee is unable to work because of any of the following:
a. Employee is subject to a federal, state, or local quarantine or isolation order related to coronavirus;
b. Employee has been advised by a health care provider to self-quarantine due to concerns related to coronavirus;
c. Employee is experiencing coronavirus symptoms and seeking a medical diagnosis;

EPSLA is in addition to any accrued contractual sick leave; you may utilize EPSLA before taking any personal accrued sick leave. Compensation is determined by statute, depending on the reason for the emergency leave. If it is related to an employee's own illness or quarantine, the employee is entitled to their full rate of pay up to a maximum of $511 per day, capped at $5110 total. If it is related to caring for another person, including needing to care for a child due to closing of school or childcare, the employee is entitled to 2/3 their regular rate of pay up to a maximum of $200 per day, capped at $2000 total. However, because the FFCRA does not diminish other rights or benefits, employees may supplement emergency paid sick leave with accrued paid leave under existing CBAs or policies to attain normal earnings for the period of emergency paid sick leave.

5. What if I need to stay home to take care of my child because I lost my childcare arrangement or her school is either entirely or partially remote learning?

The EFMLEA expands access to FMLA leave to provide up to 12 weeks *paid* leave for childcare needs related to the COVID-19 public health emergency. It is only available to employees who are unable to work due to the need to care for son or daughter[9] if the school or child-care provider has closed or is unavailable due to the pandemic.[10] "Child care provider" should be interpreted broadly, including not just day care but nannies or family members who may normally care for children. It also covers when brick and mortar buildings are closed but instruction continues remotely. EFMLEA may be taken intermittently if both the employer and employee agree.

The EFMLEA does not expand the amount of total time available under the FMLA; instead, it expands the type of situation where it may be taken as described above. Employees are still limited to 12 weeks in a 12-month period. But employees only need to be employed 30 days to be eligible for EFMLEA; significantly shorter than the 12 months required for FMLA.

The first 10 days are unpaid under this provision; however, employees may elect to utilize EPSLA leave or their accrued leave for the first 2 weeks. After the first 10 days, employees are entitled to not less than 2/3 their regular rate of pay (based on the number of hours normally scheduled to work), up to a maximum of $200 per day, capped at $10,000 total benefit. Because the FFCRA does not diminish other rights or benefits, employees may supplement

d. 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

e. 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;

f. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of Labor and Secretary of the Treasury.

[9] Son or daughter includes 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.

[10] Employers may exclude certain health care providers and emergency responders. *See* note 4, *supra*.

EFMLEA with accrued paid leave under existing CBAs or policies to attain normal earnings for the period of EFMLEA.

Additionally, your local union may negotiate remote work arrangements or paid leave for employees whose children's school buildings or childcare arrangements closed.

6. Can my employer deny me EPSLA leave if I knowingly travel somewhere that falls under the state's mandatory 14-day quarantine order?

See answer to Q2 above.

D. AMERICANS WITH DISABILITIES ACT ("ADA") ACCOMMODATIONS

The ADA is a federal law prohibiting discrimination based on disability. The Massachusetts statutory counterpart, M.G.L. c. 151B, contains similar protections. The ADA is relevant to the pandemic in three major ways: First, it regulates employers' disability related inquiries and medical examination for all applicants and employees, including those who do not have disabilities. Second, it prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (a significant risk of substantial harm to the health and safety of themselves or others) even with reasonable accommodation. Third, it requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic. https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

7. My employer sent a survey asking questions about whether I can return to my school or campus due to the pandemic – can it do that? What questions can my employer ask?

It depends on what the survey asks and how. An employer may not ask disability related questions unless they are job related and consistent with business necessity; i.e., that an employee's ability to perform essential job functions are impaired by a medical condition or an employee poses a direct threat (to himself or others) due to a medical condition that cannot be addressed by a reasonable accommodation.

An employer may ask questions designed to assess potential staff issues, such as access to childcare, transportation, and whether employees or someone in their household is at higher risk for serious illness if they contract COVID-19.

The EEOC advises the employer to ask about these issues in one question and have the employee answer "yes" or "no" without asking the employee to identify which issues apply. Because the disability related inquiry is part of a larger survey question and does not require the employee to give a specific answer regarding his/her own personal medical condition, it is permissible. This is example of such a survey from the EEOC:[11]

[11] https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

Directions: Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

Answer: YES ___ NO____

8. Can my employer take my temperature or require that I follow other safety protocols?

While COVID-19 is regarded as a direct threat to public health, employers may measure employees' body temperature. Requiring infection control practices (e.g., daily temperatures, regular hand washing, gloves, coughing and sneezing etiquette, etc.) does not implicate the ADA but does raise bargaining issues with the union. Similarly, the use of personal protective equipment during a pandemic may be required but it is also is subject to bargaining with the union. An employee could, however, need a reasonable accommodation under the ADA related to these issues (e.g., non-latex gloves; gowns designed for mobility-impaired employees).

9. Can my employer ask me questions about symptoms I may exhibit at work if I say I don't feel well or call in sick?

Yes, employers may ask questions about symptoms to determine if employees may have COVID-19. They may also send employees who exhibit symptoms of COVID-19 home. A designated representative of an employer may interview an employee who has COVID-19 or exhibits symptoms to determine who that employee had contact with at work. An employer may notify the individuals with whom the affected employee had contact but generally is prohibited from disclosing the employee's identity (absent consent by the employee).

10. Can I be terminated for being considered high risk or living with someone who is high risk of serious illness if I contract COVID-19?

An employer may not refuse to allow an employee to work or take adverse action against an employee solely because of a disability that places her at a higher risk for severe illness if she contracts COVID-19. Under the ADA, an employer can only take such action if the employee's disability poses a "direct threat" to her health that cannot be eliminated or reduced by a

reasonable accommodation. This is a high bar for the employer to meet, requiring significant risk of substantial harm. In a pandemic context, the consideration may include the likelihood of being exposed to the virus at work and the measures implemented to protect workers from exposure. Even where there is a direct threat to an employee's health, the employer must consider if there are reasonable accommodations that would eliminate or reduce the risk (absent undue hardship to the employer) before it can consider barring a return to work or the taking of adverse action.

An employer may not terminate an employee because she lives with someone who is at high risk for severe illness if she contracts COVID-19. If that happened, there may be a claim for "associational discrimination," meaning discrimination based on being associated with someone who is disabled or regarded as disabled by the employer.

11. I was diagnosed with COVID-19, do I have to inform my employer? And if I do, must my employer keep this information confidential?

Most employers are requesting that employees self-report if they have been diagnosed with COVID-19. This helps the employer do contact tracing and notify anyone else who may have been exposed. However, the employer must keep the identity of the person self-reporting confidential (absent consent by the employee). However, an employer cannot require self-reporting.

12. Who is entitled to an accommodation under the ADA?

The ADA only requires a reasonable accommodation for qualified individuals with a disability and if granting an accommodation does not create an undue burden for the employer.

Establishing a disability:
A person may be disabled if:

- he has a physical or mental condition[12] that substantially limits a major life activity[13];
- he has a history of a disability (e.g., cancer that is in remission);

[12] Including any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

[13] Including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

- he is *believed* to have a physical or mental impairment that is not transitory (lasting 6 months or less) or minor (regardless of actual impairment).

Establishing "qualified individual":
Someone who meets the legitimate skill, experience, education, or other requirements of a position and can perform the essential functions of the position, with or without an accommodation. (Essential function may be guided by job descriptions or past practices.)

Establishing a "reasonable accommodation"*:*
A modification or adjustment to a job or work environment that enables a qualified employee with a disability to perform the essential functions of his job. Examples include: modifying existing facilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials or policies; or having qualified readers or interpreters.

Establishing "undue hardship":
The ADA describes an undue hardship as an "action requiring significant difficulty or expense." Several factors are considered, including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility or facilities involved in the reasonable accommodation and of the employer overall; the number of persons employed at such facility and overall; the effect on expenses and resources, or the impact otherwise of such accommodation upon operations; and
- the type of operation or operations of the employer, including the composition, structure, and functions of the workforce.

13. What happens after I request an accommodation?

An employer must consider the employee's request and engage with the employee in a flexible, *interactive process* to try to find a suitable accommodation. Employers and employees are expected to work together to identify possible accommodations.

An employer is not required to provide the specific accommodation requested but it must provide a accommodation that is effective. An employer need not eliminate an essential function of the disabled worker's position to allow a disabled employee to perform the job. If an essential function must be eliminated, the employee will not be a "qualified" disabled person entitled to protection under the ADA. An employer also can refuse to provide an accommodation if the individual would pose a direct threat to himself or herself or others in the workplace even with the accommodation. Moreover, an employer is excused from providing a reasonable accommodation if the accommodation would result in an "undue hardship" for the employer.

14. If I ask for a reasonable accommodation, what information can my employer require from me?

An employer may ask questions or seek medical documentation to determine first if the employee meets the definition of disabled under the ADA. It is entitled to only enough information to determine the limitations caused by the disability that need to be addressed; i.e., that the disability necessitates a reasonable accommodation. Sometimes the disability and limitations are obvious. But if not, then permissible questions may include: (1) how the disability creates a limitation; (2) how the requested accommodation will effectively address the limitation; (3) whether another form of accommodation could effectively address the issue; and (4) how a proposed accommodation will enable the employee to continue performing the "essential functions" of his position (i.e., the fundamental job duties).

The employer may require reasonable documentation to help it make an informed decision regarding a disability and need for a reasonable accommodation. Any requested documentation must be limited to determining these two issues. Therefore, a request for an employee's entire medical records would be overbroad in most cases. But it may request documentation from a health care or rehabilitation professional (e.g., doctor, psychologist, nurse, physical therapist, licensed mental health professional, etc.) to support the accommodation request. Medical documentation may be able to identify the disability without disclosing the actual diagnosis, should the employee wish to keep that information confidential.

The process of requesting and determining a reasonable accommodation should be an interactive dialogue – an informal process to clarify the employee's needs and identify appropriate reasonable accommodations. The employer is not obligated to provide the exact accommodation requested.

15. What is a reasonable accommodation in the COVID-19 context?

It depends. A reasonable accommodation may mean mitigating exposure risk; e.g., by installing plexiglass shields, additional cleaning of surfaces, providing appropriate personal protective equipment ("PPE"), extra social distancing space in work areas, proper ventilation and access to fresh air, filtration devices, staggering work hours or splitting shifts/classes to limit number of people exposed to, and working remotely. But whether these (or other) accommodations are "reasonable" is fact dependent, based on the individual's disability, the type of position the employee holds, and whether the accommodation creates an undue hardship for the employer.

The EEOC supports working remotely to control the spread of the infection and as an accommodation for employees with disabilities that put them at high risk of complications from COVID-19.[14] The state's phased re-opening plan also states that those employees at high risk should work from home if possible and be given priority consideration for workplace

[14] https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

accommodations, even during "phase 3" of the reopening (the last phase before a return to "normal").[15] These are helpful resources for the interactive dialogue. But unfortunately, they do not establish an unequivocal right to remote work instead of in-person instruction or services.

16. I have a disability and I had a reasonable accommodation prior to the pandemic. Does my employer have to maintain my accommodation?

Generally, yes. However, an accommodation may need to be modified if the working conditions have changed. The parties should engage in an interactive dialogue to ensure any changing needs for accommodation are met.

17. I have a disability but prior to the pandemic I did not need an accommodation. Can my need for an accommodation change based on COVID-19?

Yes, a disability may be exacerbated by the context of a pandemic (e.g., mental health issues). Or a disability may put an employee at greater risk of severe illness if she contracts COVID-19 and a reasonable accommodation is needed to mitigate that risk. Again, the interactive dialogue needs to occur to determine a reasonable accommodation for the new needs.

18. I am pregnant, does that entitle me to an accommodation?

It depends. Pregnancy itself is not a disability but certain pregnancy-related conditions may be. And a pregnant employee may have a pregnancy-related condition where certain external conditions may make it dangerous for her to leave her house. An employer also cannot treat someone who is pregnant differently than others. As noted above, the EEOC and the state re-opening plan encourage remote work for employees at high risk of serious illness from contracting COVID-19. Pregnancy is on the CDC as a category of employees who might be at *increased* risk; it's not as strong an argument as those with high risk but ideally employers should be sympathetic about not putting their pregnant workers in potential harm's way.

19. I am 65+ years old, does that entitle me to an accommodation?

Age itself is not a disability under the ADA. An employer cannot mandate that everyone 65+ stay home. An employee 65+ who wants to work remotely who is not otherwise disabled for purposes of the ADA must be treated the same as comparable workers (e.g, if other workers are allowed to work remotely, the same opportunity must be offered to someone 65 or older.) Older adults are considered high risk by the CDC and EEOC and state guidance assert that older workers should work remotely and be a category of employee given priority in accommodations. These provide good advocacy talking points for locals working with older employees seeking an accommodation of remote work.

[15] https://www.mass.gov/doc/reopening-massachusetts-may-18-2020/download (p. 14).

20. I requested a reasonable accommodation of working entirely remotely but my employer says it cannot grant it – now what?

Remember, the ADA requires an *interactive dialogue* about what a disabled employee needs in an accommodation and effective options for meeting the needs. Enlist the assistance of your local union in having this dialogue and try to be creative and explore different types of accommodations. It is a violation of the ADA if the employer refuses to engage in an interactive dialogue. It may be a violation of the ADA if the employer refuses to provide a reasonable accommodation or only offers alternatives that do not meet the accommodation needs of the employee so that she can perform the essential functions of her job. Whether there is a violation may depend on whether the employer has a defense to its refusal to provide reasonable accommodation: is the employee a direct threat and therefore should not be working? was a reasonable accommodation offered but refused by the employee? would it create an undue hardship to grant a reasonable accommodation?

We cannot predict how the courts will rule if refusals of requests to work remotely lead to claims filed under the ADA. There are several questions the courts are likely to key in on:

- Is it an essential function of the job to provide in-person instruction or services? It is possible that the answer to this question is dependent on the circumstances at the time – what is the pandemic situation? what is the reopening plan of the school or college?
- If a request to work remotely is denied, is the alternative offered by the employer a reasonable one? For example, is the employer relying on having safety protocols in place to mitigate the risk of expose and is that reasonable (i.e., effective)?
- Would the requested accommodation create an undue hardship for the employer? It is likely that the analysis will be impacted by the volume of requests to work remotely and what the overall plan of reopening the schools or colleges put in place.

Each situation must be evaluated based on its specific facts.

21. What if my employer says it cannot accommodate all the employees seeking an accommodation of working remotely but my medical provider says I should avoid going back to in-person instruction or services until the pandemic ends or a vaccine is created?

This is a difficult situation that could come up in many places. It is possible that an employer could make out a case of undue hardship to accommodate *everyone* who requests to work remotely. Whether an employer would have a valid defense to a failure to accommodate claim under the ADA will depend on a lot of factors, such as: the number of employees requesting an accommodation to work remotely compared to the total workforce; the composition of that group of employees (are they all from one department or facility? do any of the employees meet the qualifications for alternative assignments where remote work is available?); the employer's need or ability to provide remote instruction or service positions; and whether in-person instruction or service an essential function of the job.

The issue of what are the essential functions of the job may be a key part of the analysis. Generally, employers have the managerial prerogative to determine the qualifications for a position and it was likely a widely held (even if unwritten) presumption previously that teaching required an instructor to be in the classroom with the students. But the abrupt switch to remote instruction forced on educators in the spring showed that remote teaching can work. This gives leverage from an advocacy perspective. However, past *temporary* excused performance of an essential function during the pandemic is unlikely to establish that an employer has permanently change a job's essential function, that long term remote work *is de facto* a reasonable accommodation, or that remote work does not impose an undue hardship on the employer.

Ultimately, if the employer can establish undue hardship in accommodating all valid requests for accommodations, then the parties should discuss how to prioritize who can work remotely and explore other options through an interactive dialogue process. But if there are no other temporary positions that would be a reasonable accommodation or other mitigating safety measures are not sufficient to ensure safety of someone at high risk, then the last resort accommodation may be to grant leave, whether paid or unpaid. Employers should be considering liberal leave policies (in conjunction with negotiations with their unions). In addition, employees may want to look into whether they are eligible for short- or long-term disability benefits.

22. Can I get an accommodation to protect someone in my household who is considered at high risk of serious illness from contracting COVID-19?

The ADA does not *require* an employer to grant an accommodation for the purpose of protecting someone else in the employee's household or family. That does not mean that you cannot ask for consideration of an accommodation but your employer does not have a legal obligation to accommodate your request. However, the ADA does protect against harassment or disparate treatment based on one's association with a person who is disabled. You should consult with your local union to see if there are policies that have been negotiated that help employees in this situation.

You may also be able to utilize EPSLA for up to 10 days if you need to care for someone who is ill or quarantined due to COVID-19 (see section on EPSLA above). Moreover, if you have an immediate family member who suffers from a "serious health condition" as defined by the FMLA, you may be eligible to utilize FMLA leave (see section B above on FMLA leave).

23. What if I do not have a disability but I fear going back to in-person instruction and services during this pandemic – can I get an accommodation?

While such fear may be rational depending on the spread of the virus in the surrounding community, the state of the physical facilities where one works, and the feasibility of mitigating measures, the ADA only obligates an employer to provide a reasonable accommodation to someone with a disability who needs it to perform the essential functions of the job. Your

contract may have leave provisions you can invoke or your employer may be taking a more flexible approach to leaves during the pandemic. While legal options may be more limited, the MTA and many locals and members are organizing around issues related to when and how classes are held this fall as well as many safety issues in the facilities where members work. Consult your local union for assistance.

24. Can my employer retaliate against me for requesting an accommodation, even terminate me?

An employer cannot retaliate against an employee for requesting an accommodation; that would violate the ADA (and corresponding state law at M.G.L. c. 151B). However, in engaging in the required interactive dialogue to find a reasonable accommodation, employees should be sure to explore all options so that the employer does not conclude that they are not a "qualified individual" (unable to perform the essential functions of the position, with our without an accommodation) or that they have become incapacitated and unable to work even with a reasonable accommodation. These would be extreme positions for an employer to take. All possible accommodations, including unpaid leave as a last resort, should be discussed so that an employer would not have grounds to make such a claim.

25. Can my employer force me to get a COVID-19 vaccine if one becomes available?

An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability; an exemption could be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, an employee may be entitled to an exemption based on a sincerely held religious belief, practice, or observance regarding vaccines. Again, the employer would need to provide a reasonable accommodation barring undue hardship (though the standard for undue hardship under Title VII is lower than under the ADA). Also, requiring vaccinations may require bargaining with the union. Generally, the better approach is for employers to encourage employees to get vaccinated.

II. WHAT CAN I DO IF I HAVE CONCERNS ABOUT THE SAFETY OF MY WORKPLACE?

The MTA is zealously advocating for a safe return to schools and campuses. Additionally, our local affiliates are negotiating with their employers and local leaders and many members are organizing and advocating at the state and local levels. Talk to your local union or MTA field representative about strategies to influence decision-making at the local level; they can also connect you to efforts taking place at the state level. It is also important to be aware of existing guidance issued by official sources such as:

- https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html)
- https://www.mass.gov/doc/reopening-massachusetts-may-18-2020/download
- https://www.mass.gov/doc/dese-fall-reopening-guidance/download

26. What do I do if safety protocols are not being followed?

Document your concerns in writing and bring them to the administration's attention. Depending on the situation, this may be the building administrator, a designated Covid-19 coordinator, or someone higher up in the organization. Be sure to copy your local union and work with it to help organize other employees around the health and safety issues. You may want to try to find common cause and organize with students, parents, other unions, and/or the broader community.

If the administration does not respond appropriately to address the lapses in safety protocols, report the violations. There may be multiple reporting options:

- File an "OSHA" complaint with the Massachusetts Department of Labor Standards (see section III.A for more information on the state health and safety laws).

  https://www.mass.gov/service-details/covid-19-workplace-safety-measures-for-reopening

- Contact the Attorney General, who has set up a hotline and online complaint form for employees who feel there are unsafe working conditions due to COVID-19 and the failure of an employer to enforce recommended protocols.

  https://www.mass.gov/forms/report-unsafe-working-conditions-in-massachusetts-during-covid-19

- The Attorney General also enforces the statute that requires businesses to provide well-ventilated workplaces and avoid unsanitary conditions. G.L. c. 149, § 113.

- Report violations to your local board of health, which has the authority to fine employers. A directory of local boards of health is available here:

  https://www.naccho.org/uploads/downloadable-resources/Local-Health-Department-COVID-19-Directory.pdf (Massachusetts starts at p. 62)

- Contact your state representative or state senator.

  https://malegislature.gov/Search/FindMyLegislator

Your union may also file a grievance if there is a violation of a health and safety provisoin in your collective bargaining agreement, or it may demand to bargain over safety concerns if they are something new that has not been addressed by the parties before.

27. If I speak out about COVID-19 related health and safety issues, can my employer terminate me?

You may be protected under various laws for speaking out about health and safety issues.

- Employees may not be discharged or discriminated against for filing a complaint or exercising a right under the Massachusetts OSHA law. 454 C.M.R. 25.07.

- The AG has asserted that employees may not be retaliated against for filing a complaint with her office.
- The state whistleblower protection law (G.L. c. 148, § 185) prohibits a public employer from retaliating against an employee for:
    i. Disclosing or threatening to disclose a reasonable belief of violations of a law or regulation or which the employee reasonably believes poses a risk to public health or safety.
    ii. Providing information to or testifying before any public body conducting an investigation or holding a hearing regarding alleged violations of law or regulations or policies or practices the employee reasonably believes poses a risk to public health or safety.
    iii. Objecting to or refusing to participate in any activity, policy, or practice which the employee reasonably believes is in violation of law or regulation, or which the employee reasonably believes poses a risk to public health or safety.

  However, in order to be protected, prior to reporting the issue to a public body *an employee must first bring the activity, policy or practice to the attention of a supervisor in writing and give the employer reasonable opportunity to correct the problem*. This step can only be skipped if the employee: is reasonably certain that the issue is known to one or more supervisors and the situation is an emergency; reasonably fears physical harm as a result of disclosure; or makes the disclosure before a judicial body, law enforcement agency, or prosecutorial office.
- Educators who advocate for safe working conditions or funding to facilitate the safe return to in-person instruction and services may have First Amendment protections. To be protected, they must be speaking as citizens (rather than employees) about matters of public concern (rather than private matters concerning their personal situation). Generally, workplace safety for schools and colleges is a matter of public concern. Care should be taken to ensure such speech is made during non-work time and using their personal devices. Use private accounts and platforms rather than those of the employer and do not appear to be speaking on behalf of the employer. Moreover, such speech cannot disrupt the business operations of the employer.
- If an employee speaks out about working conditions that impact colleagues, on behalf of colleagues, or in a way that seeks to enforce health and safety provisions in the collective bargaining agreement, then the employee is engaged in protected concerted activity and cannot be discriminated or retaliated against by the employer under the state labor law, G.L. c. 150E. Contact your local union to inquire if an unfair labor practice charge should be filed.
- There may be strong arguments to make in a discipline arbitration that there was no just cause for the discipline (if there is just cause protection in the collective bargaining agreement) or that the conduct at issue does not actually constitute the grounds for discipline alleged by districts for teachers with professional teacher status.

III. DO I HAVE LEGAL GROUNDS TO INSIST ON REMOTE LEARNING AND TEACHING AND REFUSE TO RETURN TO IN-PERSON INSTRUCTION OR SERVICES DUE TO COVID-19?

The answer to the question largely will rest on the specific facts and circumstances at the time of such action. However, although G.L. c. 150E prohibits strikes by public sector employees, not all concerted actions regarding how or even if labor is withheld necessarily constitutes a strike. Occupational safety and health law may provide some protection if there is an objectively serious threat to life or death. There are also exceptions in traditional labor law when a refusal to work would not be considered grounds for termination if there are bona fide health and safety issues.

Perhaps more importantly, these laws may be used as talking – and pressure – points in broader organizing and community outreach campaigns around shared worker-community interests in schools and colleges operating without the risk of serious illness or death to students, educators, and support staff. You have a First Amendment right to raise health and safety issues that are of public concern. You have the right to engage in protected concerted activity to speak out about working conditions. And G.L. c. 150E specifically states that this law does not "limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to conditions of employment." G.L. c. 150E, § 1. You have a voice and you have the right to speak out about health and safety concerns impacting your working and students' learning conditions and to organize with others to influence decisions being made that impact working and learning conditions.

A. WORKPLACE SAFETY AND HEALTH LAW

In 2018, the Massachusetts Legislature applied the federal Occupational Safety and Health Act ("OSHA") to state and local government employees. It specifically adopted a "general duty clause" that requires that employers to provide work and a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. 29 U.S.C. § 654(a)(1), adopted by reference G.L. c. 149, § 6½. The Massachusetts Department of Labor Standards ("DLS") enforces this law.

28. Can I refuse to work in a facility or in a manner that I feel is unsafe to my health due to COVID-19?

The federal regulation regarding the OSHA law notes that the statute does not expressly provide for a right to refuse to work because of a dangerous condition but recognizes that there could be an occasion where an employee is confronted with a choice between not performing assigned tasks or subjecting him or herself to serious injury or death arising from a hazardous condition in the workplace. If there is no reasonable alternative, then an employee could refuse in good faith to expose themself to the dangerous or hazardous condition and be protected from discrimination or retaliation because they did so. But the apprehension of injury or death must be such that a reasonable person under the same circumstances would conclude not only

that there is a real danger of serious injury or death but that there is insufficient time to eliminate the danger through statutory enforcement channels. Where possible, the employee must have tried to get the employer to correct the dangerous condition prior to refusing to work. 29 C.F.R. § 1977.12.

Massachusetts regulations, like the federal regulations, protect employees from discrimination or retaliation for filing a workplace safety complaint or for exercising any right under the statute. 454 C.M.R. § 25.07. They do not, however, contain the same explicit language regarding circumstances where an employee may be protected for refusing to work due to dangerous or hazardous conditions. Because Massachusetts law provides that employers must provide at least the same protection as under federal OSHA law, the courts may find that the same regulatory standards should apply as well. However, there have been no cases in Massachusetts yet to test that claim.

It is clear, however, that for a refusal to work to be protected, the danger of death or serious injury must be one that cannot be dealt with through the usual complaint process with DLS. Therefore, the regulation likely would not protect an employee from refusing to work for general – albeit entirely rational and legitimate – concerns about COVID-19 safety. But the regulations *may* protect an employee or employees due to specific circumstances that the employer refuses to address and which pose a significant danger. For example, a particular workplace could become a COVID-19 "hot spot" with a high transmission spread and the employer refuses to act or take adequate action in response.

29. What steps should I take to best protect myself under the Massachusetts OSHA law if my workplace is not safe due to COVID-19?

Generally, the first step is to bring the COVID-19 related issue to the attention of your employer, preferably in writing. Be as specific as possible. You may want to enlist your local union and your colleagues to assist and support your claims. If your employer does not adequately respond to address the danger or hazard, you should file a complaint with the DLS. It has created a complaint portal on its website specifically for COVID-19 related issues: https://covid-19c.dls.eol.mass.gov/covid19/Complaints/create. As set forth in the above section, you may also report COVID-19 related health and safety concerns to the AG and local health boards.

If you are considering asserting the right to refuse to work under the state OSHA law (keeping in mind that the refusal to work protection under Massachusetts regulations is untested), it is important to take the following steps:

- establish that there are objective grounds to conclude the situation poses an imminent risk of serious injury or death;
- notify your employer in writing of the danger and why it poses an imminent risk to health and safety, being as specific as possible; and

- in advance, or simultaneously if necessary, report the condition to DLS and to any whistleblowing hotline that has been established specifically for employers reopening during the COVID-19 pandemic. \

B. DISCIPLINE ISSUES

30. Can my employer discipline me for refusing to return to in-person instruction or services if I am willing to perform my duties remotely?

While it is commonly understood that employees are supposed carry out their duties and then grieve any work-related concerns afterwards (the "work now-grieve later" principle), it is also a well-established exception to this principle that an employee does *not* have to continue to work where unusual or abnormal health and/or safety hazards exist. In other words, it is not an unlawful of withholding of labor in the face of abnormal health and safety risks. In evaluating whether this exception should apply to discipline issued to an employee for refusing to work, arbitrators generally use a "reasonable person" approach; i.e., whether the facts and circumstances known to the employee at the time would have caused a reasonable person to fear for his or her health or safety. It is not necessary to show actual injury. Many collective bargaining agreements also have a provision regarding health and safety that can bolster an employee's defense against discipline for refusing to work under unsafe or unhealth conditions. Again, the outcome of these cases will be very fact dependent.

C. LABOR LAWS

The right for public sector employees to unionize and collectively bargain is granted by statute and varies by state. The statute that gives public employees in Massachusetts the right to form and join a union for the purpose of collective bargaining is G.L. c. 150E. The Commonwealth Employment Relations Board ("CERB") is the state agency charged with enforcing G.L. c. 150E. Under G.L. c. 150E, § 9A (§ 9A), it is unlawful for a public employee or employee organization to engage in *or* "to induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by such public employees." Numerous state and federal courts have upheld the constitutionality of prohibitions on the right to strike for public sector employees.

31. I hear talk about the possibility of insisting on remote work to start the year, and refusing to immediately return to in-person instruction and services, if the circumstances make it unsafe. Does this type of talk violate § 9A?

The MTA believes that it would be a violation of educators' and their unions' First Amendment rights to prohibit them from generally talking about the right to refuse to work due to unsafe conditions. Our position is that courts should interpret § 9A narrowly to balance the interest behind preventing the disruption to public services, and sometimes public safety, due to strikes or work stoppages with First Amendments rights. CERB and Massachusetts courts that have held unions representing public sector employers liable for inducing, encouraging, or condoning a strike have usually done so in the context of a *specific* planned action or when the action was

imminent and it was deemed necessary for the CERB to step in to take steps to prevent a specific strike/work stoppage. It may be that courts will find that specificity and imminence, as opposed to general discussions about options employees may have at some unspecified future point based on different contingencies, is significant to interpreting how broadly to apply the prohibitions of § 9A. While MTA cannot say for sure where CERB or the courts would draw the line where First Amendment rights give way to § 9A prohibition on inducing, encouraging, or condoning a strike, we will fight any effort to muzzle members and locals on these issues.

The questions at issue at this point do not seem centered on refusing to work but instead trying to influence where or how the work is done by taking the strong advocacy position that members should not have to return to *in-person* instruction or services until health and safety concerns in this pandemic are addressed, as informed by and consistent with science. That does not appear to cross the line into being unlawful under § 9A and MTA strongly supports such efforts and would challenge to quash such advocacy.

32. Is there an exception to the prohibition on refusing to work when or where health and safety is at issue?

The health and safety issues presented by the COVID-19 pandemic are real. Any discussion around how and where members will perform their duties should be raised as part of a broader organizing campaign around the shared worker-community interest in schools and colleges that do not pose a risk or serious illness or death for educators, students, their families, and the broader community. The discussion is not about "strikes" per se but rather what options do members and their unions have that avoid serious illness or death from simply showing up and doing their jobs. Members and locals should be gathering information about the working conditions, the health and safety issues in the buildings where members would be required to work, and any data that supports their concerns. Discussion of any refusal to return to in-person instruction or services – notably the discussion is *not* about refusing to work altogether – is that it is the last option that everyone is working very hard to avoid.

Should it occur down the line that a return to in-person instruction and services is mandated by an employer despite legitimate concerns about dangerous or hazardous conditions, then members and their unions should document their concerns and file them with the appropriate authority or authorities (such as the DLS, the AG, and/or local health boards). Consideration of whether the circumstances warrant refusing to report to *in-person* work under these conditions should be done in consultation with legal counsel to evaluate if such refusal may be protected under applicable laws.

D. UNEMPLOYMENT

33. If I quit rather than return to work this fall, can I get unemployment?

Leaving work voluntarily usually means you are not eligible for unemployment *unless* you can establish by substantial and credible evidence that you left (a) for good cause attributable to your employer; or (b) for urgent and compelling personal reasons. Reasonable concerns about

unsafe working conditions may be good cause for quitting. OSHA findings of safety violations will support finding good cause attributable to the employer but it is not necessary in order to establish good cause. It is important to note that the Department of Unemployment Assistance ("DUA") *generally requires that you take reasonable steps to try to resolve the problem with your employer before quitting*.

According to U.S. Department of Labor guidelines, deciding to voluntarily quit due to general concerns about exposure to COVID-19 is not sufficient to establish eligibility for unemployment benefits. However, though the DUA may be influenced by this opinion, it still should undertake a fact-specific analysis about your specific circumstances. For example, do you have an underlying health condition that renders you a poor risk for contracting COVID-19? Is a family member with whom you live a poor risk if you contract and then transmit the virus? Is your employer providing appropriate personal protective equipment and cleaning supplies for your job? Whether you have continued to physically report to work, or you have been working remotely and your employer is transitioning back to brick and mortar operations, you must have more than a general concern about your health and safety and you should attempt to resolve your specific concerns with your employer before contemplating quitting.

IV. WHAT IF I CATCH COVID-19 AFTER RETURNING TO IN-PERSON INSTRUCTION OR SERVICES?

Everyone hopes that our members will remain safe and healthy whenever they return to in-person instruction and services. Should an employee contract COVID-19, here are a few things to keep in mind.

34. Can my employer send me home if I show symptoms similar to those of COVID-19?

Yes, employers may send employees who exhibit symptoms of COVID-19 home. A designated representative of an employer may interview an employee who has COVID-19 or exhibits symptoms to determine who that employee had contact with at work. An employer may notify the individuals with whom the affected employee had contact but generally is prohibited from disclosing the employee's identity (absent consent by the employee).

35. Can my employer test me for COVID-19?

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." During the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus. Testing must be done in a nondiscriminatory manner. Employers should also ensure the accuracy and reliability of the test is chooses (which should be a viral test, not an antibody test) and consider the incidence of false-positives or false-negatives associated

with a particular test. An employer intending to adopt a policy of testing employees should bargain with the union.

36. What rights to medical leave do I have if I contract COVID-19?

See section I above for the discussion about contractual sick leave, EPSLA, and FMLA leave.

37. Is COVID-19 considered a disability under the ADA?

No court or agency has given a clear answer to this question. But if you contract COVID-19, you do have rights under the EPSLA, FMLA, and your contractual sick leave benefits (see section I). You may also be eligible for workers' compensation (see the following question). Also, various long-term impacts some people suffer from COVID-19 may become disabilities.

38. Am I eligible for workers compensation if I contract COVID-19 after returning to in-person instruction or services?

Possibly. Workers' compensation is a system of insurance designed to replace, in part, wages lost due to injuries suffered in connection with their work. To qualify, an employee must have sustained a personal injury that: (1) arose out of the course of employment (i.e., was a result of employment activities); and (2) occurred in the course of employment (i.e., engaged in conduct consistent with the position and pertinent or incidental to his employment). Disability caused by infectious disease is a personal injury covered by workers' comp ***if*** the nature of employment is such that the hazard of contracting the disease is *inherent* in the job. G.L. c. 152, § 1(7A).

In short, an employee will need to demonstrate a causal connection between his work and contracting COVID-19. To do this, he will need to establish with evidence that it is more likely than not that he contracted the virus during work rather than other activities unrelated to work (e.g., going to a crowded restaurant or bar; not wearing a mask in public where social distancing is not possible, traveling to places with high rates of transmission of COVID-19). And the employee will need to show that contracting the infection is inherent to his position. There are certainly good arguments to make in support of this proposition but due to a lack of case law we do not know if such arguments would be successful.

An employee who is temporarily completely disabled and granted workers' compensation benefits may be entitled to 60% of his average weekly wages, up to approximately $1431.66/week. These benefits are not taxed. The employee may supplement workers' compensation benefits with accrued sick leave to equal his full wages. There is a 5-day waiting period for receipt of benefits.

Other options that may be available include short- and long-term disability benefits. If an employee becomes permanently disabled from COVID-19, another consideration may be accidental disability retirement (if the employee is not eligible for superannuation retirement).

To be eligible for ADR, a medical panel of three physicians must determine that: (1) the member is *unable to perform the essential duties of the job*; (2) the disability is *permanent*; and (3) the medical condition is a result of an incident, a series of incidents or a hazard *undergone on the job*. Eligibility and determination of benefits is complicated for an ADR. You can consult an MTA retirement consultant for further information. But usually the first step is to file for workers' compensation benefits and possibly short- or long-term disability benefits.

If you believe you contracted COVID-19 at work, contact your local union for assistance.