Administrative Law COVID-19 Response
Briefing Document
Spring 2020

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Who Is Affected?


The guidance document broadly applies to the following groups:

- Employers
- ADA-covered employees entitled to reasonable accommodations
- Employees and job applicants not covered by the ADA

On March 11, 2020, the coronavirus disease (COVID-19) was...declared a pandemic.

Core Legal Issues

As a result of the COVID-19 pandemic, employees generally do not know how to prioritize their health and wellbeing against their work obligations, nor do they know what their employer is capable of asking of them.

The guidance document addresses the following core questions:

- What are employers required or permitted to do to determine an employee’s medical condition before a pandemic?
- What are employers required or permitted to do to determine an employee’s medical condition during a pandemic?
- What are employers required or permitted to do after a pandemic?

About the EEOC’s Guidance Document

The EEOC’s guidance document addresses how the Americans with Disabilities Act (ADA) applies in the context of a pandemic.

The EEOC originally issued this guidance document in response to the 2009 spread of H1N1 but re-issued and updated it in March 2020 to address its application to COVID-19. The updated version retains the same principles as the 2009 document but incorporates new information to respond to current employer questions specifically regarding COVID-19.

The Americans with Disabilities Act (ADA) protects job applicants and employees from disability discrimination. However, in the pandemic context, the ADA applies more broadly to all individuals rather than to only those with an ADA-covered disability.

The EEOC guidance document utilizes a question-and-answer format to educate employers on how to be ADA-compliant during the COVID-19 pandemic. In addition to answering basic potential employer questions, the guidance document also provides hypothetical examples demonstrating how to implement it and contains sample forms and surveys an employer may utilize that are guaranteed to be...
Pandemic Preparedness in the Workplace and the Americans with Disabilities Act

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ADA-compliant. The guidance organizes such questions-and-answers based on the progression of the pandemic—starting with the initial stages before a pandemic is declared through the aftermath of the pandemic.

Impact on Existing Law

The guidance document gives employers more discretion than normal under the ADA to inquire about an employee’s medical condition in light of COVID-19 and its various symptoms, and whether an employee is able to be present at work based on his or her symptoms.

The ADA is relevant to pandemic preparation in at least three ways. First, the ADA regulates employers’ disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a “direct threat.” Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

The updated EEOC guidance document does not change the existing law but rather supplements how it is to be applied in the COVID-19 pandemic context.

Potential Legal Challenges

Under the guidance document, employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

The EEOC’s guidance document is interpreting its own organic statute, the American with Disabilities Act. As an agency interpreting its own statute through a guidance document, the agency is entitled to, and will likely survive, Skidmore deference.

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2 Id.
How an Employer can be ADA-Compliant

I. Subject and Impact of the New Policy


As a result of the COVID-19 pandemic, employees generally do not know how to prioritize their health and wellbeing against their work obligations, nor do they know what their employer is capable of asking of them. The ADA protects job applicants and employees from disability discrimination. However, in the pandemic context, the ADA applies more broadly to all individuals rather than to only those normally covered by the ADA. For instance, the ADA is relevant to pandemic preparation in at least three ways:

First, the ADA regulates employers’ disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a “direct threat” (i.e., a significant risk of substantial harm even with reasonable accommodation). Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

Below is a discussion of how the updated EEOC guidance document changes existing law, actions that are required to be taken to comply with the new policy, and recourse that dissatisfied individuals have as a result of the policy.

II. How the New Policy Changes Existing Law

The March 21, 2020 EEOC update of the 2009 guidance document retains the principles from the 2009 document that originally addressed H1N1 but incorporates new information to respond to current employer questions.

A. Existing Law

Under the ADA, an inquiry is “disability-related” if it is likely to elicit information about a disability. Additionally, a “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health. Factors such as whether the test involved the use of medical equipment, whether it was invasive, whether it was designed to reveal the existence of a physical or mental impairment, and whether it was given or interpreted by a medical professional, determine whether a procedure is a “medical examination.”

Under the ADA, an inquiry is “disability-related” if it is likely to elicit information about a disability. Additionally, a “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health. Factors such as whether the test involved the use of medical equipment, whether it was invasive, whether it was designed to reveal the existence of a physical or mental impairment, and whether it was given or interpreted by a medical professional, determine whether a procedure is a “medical examination.”

Further, a “direct threat” is a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation,” and is not protected by the nondiscrimination provisions of the ADA.
Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information. The EEOC’s regulations identify four factors to consider whether an employee poses a direct threat: “(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.”

Finally, a “reasonable accommodation” is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job’s essential functions, or enjoy equal benefits and privileges of employment. An accommodation poses an “undue hardship” if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation. If an undue hardship exists, an employer is not required to provide it but must still consider other less burdensome accommodations.

B. Changes to Existing Law

The updated EEOC guidance document does not change the existing law but rather supplements how it is to be applied in the COVID-19 pandemic context.

The guidance document provides employers with more discretion than they otherwise would have under the ADA to determine an employee’s medical condition in light of COVID-19 and its various symptoms, and whether an employee is able to be present at work based on his or her symptoms. For instance, employers can request information from hires about whether they have COVID-19 and require tests.

Part III discusses what employers can or must do to comply with the ADA during this pandemic, further illuminating how this EEOC policy supplements or changes existing law.

III. Actions Requires to be Taken to Comply with the New Policy

A. Pre-Pandemic

The main of the guidance document pre-pandemic is the permissible scope of inquiry an employer may make of an employee regarding the employee’s susceptibility to illness. Broad questions (can typically be answered with a simple “yes” or “no” without elaboration) tend to be more permissible than specific questions.

Examples of appropriate questions:

- 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).

An inappropriate inquiry pre-pandemic would be a disability-specific question such as whether an employee “has a compromised immune system or health condition that the CDC says could make him or her more susceptible to complications of influenza?” Such a question is likely to elicit a response that...
“disclose[s] the existence of a disability,” and thus is not permitted under the ADA. 18

B. During a Pandemic

Once the World Health Organization declares a pandemic, an employer has slightly more latitude with employees in relation to the ADA. The guidance states how an employer can be ADA-compliant in relation to health-related inquiries, medical examinations, and other actions related to operations in the workplace.

1. Health-Related Inquiries

During a pandemic, the rule that an employer may not ask specific disability-related questions continues to apply so long as an employee is asymptomatic in relation to the pandemic. This prohibition includes questions regarding increased susceptibility or vulnerability to catching the virus. 19 The guidance reiterates:

“If pandemic influenza is like seasonal influenza...making disability-related inquiries or requiring medical examinations of employees without symptoms is prohibited by the ADA.” 20

The EEOC guidance does create an exception to this general prohibition by stating, “If an influenza pandemic becomes more severe or serious according to the assessment of local, state or federal public health officials, ADA-covered employers may have sufficient objective information from public health advisories to reasonably conclude that employees will face a direct threat if they contract pandemic influenza. Only in this circumstance may ADA-covered employers make disability-related inquiries or require medical examinations of asymptomatic employees to identify those at higher risk of influenza complications.” 21

Employers are allowed to ask specific medical questions to their employees if they call in sick or report that they are sick. 22 The guidance states that an employer may ask an employee if they are currently experiencing the known symptoms associated with COVID-19 such as “fever, chills, cough, shortness of breath, or sore throat.” 23 Similarly to the asymptomatic employees described above, these medical questions can become more specific, asking directly about an employee’s disabilities, if they are “justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.” 24 If an employee has not reported to work as expected, an employer may ask why the employee was absent. 25

If an employee is sick, either with the pandemic virus or otherwise, the employer is obligated to keep such information confidential. 26 Further, if an employer makes a permissible health-related inquiry that elicits, or if an employee voluntarily discloses, an ADA-covered disability, then the employer must also keep such information confidential. 27

Finally, an employer may ask if an employee has travelled to locations identified by the CDC or local public health officials as an area impacted by the pandemic, even if the travel was for personal reasons. 28

2. Medical Exams or Procedures

Generally, the ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees. 29 However, given that “the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions as of March 2020, 26 Id. at 8 (2020) (“Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.”).
27 Id. at 9 (2020) (“If an employee voluntarily discloses (without a disability-related inquiry) that he has a specific medical condition or disability that puts him or her at increased risk of influenza complications, the employer must keep this information confidential.”).
28 Id. at 8 (2020) (The CDC or local health authorities might have recommended timelines for how long such travelers should remain at home “until it is clear they do not have pandemic influenza symptoms.”).
employers may measure employees’ body temperature.”30 The guidance warns that body temperature is not dispositive of the virus in that some individuals with the virus do not have a fever.31 The guidance also states that while there is currently no vaccine available for COVID-19, if there were one, both the ADA and Title VII of the Civil Rights Act of 1964 prohibit an employer from mandating employees take vaccines.32

3. Workplace Operations

The EEOC guidance also answers many questions about how employers can operate during a pandemic and what they can require of their employees. For example, employers can require employees to adopt infection-control practices such as handwashing, coughing and sneezing etiquette, and proper tissue usage and disposal with implicating the ADA.33 Similarly, an employer can require an employee to wear personal protective equipment such as face masks, gloves, and gowns, absent any disability-related need for accommodation.34

Further, employers during a pandemic can restrict employees’ ability to work in the workplace. For example, an employer may send an employee home if they display symptoms associated with COVID-19 or have been diagnosed with having the virus.35 Similarly, an employer may encourage their employees to telework during a pandemic.36

One of the most important questions during a pandemic is what an employer must do in order to continue providing reasonable accommodations to employees with ADA-covered disabilities. The EEOC guidance document states explicitly that “an employer’s ADA responsibilities to individuals with disabilities continue during an influenza pandemic” and that the employer must continue to provide reasonable accommodations during the pandemic barring undue hardship.37 However, the document also states:

The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted.38

This guidance to employers is particularly ambiguous and might leave many questions for employers about whether their actions are ADA-compliant. For example, an employee with an ADA-related disability might be concerned about going to work because their disability renders them particularly vulnerable to catching COVID-19 yet the nature of their job does not allow them to telework. What reasonable accommodations are these employees entitled to? The answers to such a question are beyond the scope of this paper but are important gaps left in the EEOC guidance that need to be addressed.39

C. After a Pandemic

In the aftermath of a pandemic, an employer may require an employee who has been away from the workplace during a pandemic to provide a doctor’s note certifying their fitness to return to work.40

30 Id. at 8.
31 Id.
32 Id. at 10.

“An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer’s business, which is a lower standard than under the ADA).”

33 Id. at 9.
34 Id.
35 Id. at 7.
36 Id. at 9.
37 Id. at 10.
38 Id. at 10-11.
D. Hiring During a Pandemic

A pandemic may change an employer’s process for hiring new employees to include medical-related inquiries and examinations. For example, “an employer may screen [all] job applicants [whether they have an ADA-covered disability or not] for symptoms of COVID-19 after making a conditional job offer, as long as it does so for all entering employees in the same type of job.”41 Further, an employer may require a job applicant to have their temperature taken post-offer, pre-employment.42

The pandemic may similarly impact the onboarding process for new hires. An employer may also require new-entering employees to have a post-job offer medical examination to determine their general health status, so long as such requirement is consistent for all entering employees of that job category.43

Relatedly, an employer has several options if any job applicants or new hires are found to have COVID-19 or symptoms of it. First, the employer may delay the start date of an applicant who has COVID-19 or symptoms associated with it.44 However, if the employer needs the applicant to start work immediately but the individual has COVID-19 or its symptoms, the employer may withdraw the individual’s job offer.45 An important limitation on withdrawing or rescinding a job offer is that the applicant must have COVID-19 or its symptoms—the employer cannot withdraw a job application solely because the results of a post-offer medical examination reveals that the applicant has a medical condition that puts them more at risk or susceptible to COVID-19.46

IV. Recourse for Dissatisfied Members of the Public

Under the guidance document, employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.47

41 Id. at 11.
42 Id.
43 Id. at 6-7.
44 Id. at 11.
45 Id.
46 Id. at 7 (unless the applicant poses a direct threat that could not be reduced without a reasonable accommodation).
47 Id. at 11.
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3: About the FHA Moratorium on Foreclosures and Evictions
4: Impact on Existing Law
5: Potential Legal Challenges

Who Is Affected?
The moratorium on foreclosures and evictions affects:

- Lenders servicing Title II and Home Equity Conversion (HECM) reverse mortgages
- Homeowners with a mortgage insured by the FHA under Title II
- Homeowners with HECM reverse mortgages
- Renters in housing secured with a Title II mortgage or a HECM reverse mortgage

“This is an uncertain time for many Americans, particularly those who could experience a loss of income. As such, we want to provide FHA borrower households with some immediate relief given the current circumstances.” - Federal Housing Commissioner Brian Montgomery

Core Legal Issues
The letter from the FHA directs mortgage lenders to pause foreclosures on and evictions from properties secured with Title II and HECM mortgages. These mortgages are insured by the FHA. The letter’s legal authority derives from the contractual relationship between the FHA and the lenders, who are pre-approved to provide loans under FHA programs.

This factsheet addresses three questions:
1. Which mortgages qualify for the moratorium?
2. How does the CARES Act overlap with the moratorium?
3. Can homeowners or renters sue if lenders or landlords do not follow the moratorium?

About the FHA Moratorium

In response to the COVID-19 pandemic and associated national emergency, on March 18, 2020 the Secretary of the Department of Housing and Urban Development authorized the Federal Housing Administration to issue a mortgagee letter implementing a 60-day moratorium on foreclosures and evictions.

Which mortgages qualify for the moratorium?
The moratorium applies to FHA-insured properties secured under the Title II single family forward or Home Equity Conversion (HECM) reverse mortgage programs. It halts foreclosure proceedings already in progress and prevents initiating new foreclosures. It also stops evictions of persons living in properties secured by Title II forward mortgages or HECM.

Over the past five years, the FHA has insured over 5.6 million Title II single-family mortgages. Over the same period, it insured almost a quarter million

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reverse mortgages under the HECM program. In total, the FHA actively insures over 8 million single family mortgages.

How does the CARES Act overlap with the moratorium?

After the FHA issued the moratorium, Congress passed the CARES Act, which expands the categories of properties covered by the eviction moratorium and extends the moratorium period to 120 days. Renters can search a database compiled by the National Low Income Housing Coalition to determine whether their home is covered by the federal eviction moratorium.

Impact on Existing Law

In order to secure FHA-insurance for loans, mortgage providers must be approved by the FHA and agree to comply with regulations and policies issued by the Secretary. Federal law provides that mortgage providers who issue FHA-insured mortgages must engage in loss mitigation to provide alternatives to foreclosure, as provided in regulations by the Secretary.

Here, the FHA is relying on its authority to issue policies that are binding on mortgagees because of the contractual relationship between the parties arising from the FHA’s insurance of the mortgage.

Potential Legal Challenges

Generally, lenders and mortgage servicers must comply with the FHA’s moratorium if they service loans given under Title II or HECM. However, there may be instances of noncompliance.

Can homeowners or renters sue if lenders or landlords do not follow the moratorium?

It depends. If the homeowner is seeking to sue only because the lender or servicer has disobeyed a FHA or HUD policy or regulation, she cannot sue because she does not have a private right of action. This is because FHA policies alone do not create a right to sue as "the regulations promulgated under the National Housing Act govern relations between the mortgagor and the government, and give the mortgagor no claim for duty owed or for the mortgagee’s failure to follow said regulations."

However, mortgage holders could sue if the regulations were incorporated into the deed of trust, as contractual obligations. However, this would make the issue a contractual dispute governed by state law, and federal courts would not have jurisdiction unless the parties were from different states and the amount in controversy was over $75,000.
FHA Moratorium on Foreclosures and Evictions

Introduction

In response to the COVID-19 pandemic and associated national emergency, the Secretary of the Department of Housing and Urban Development authorized the Federal Housing Administration to issue a mortgagee letter implementing a 60-day moratorium on foreclosures and evictions.12

The moratorium applies to FHA-insured properties secured under the Title II single-family forward or Home Equity Conversion (HECM) reverse mortgage programs. It halts foreclosure proceedings already in progress and prevents initiating new foreclosures. It also stops evictions of persons living in properties secured by Title II forward mortgages or HECM.

This guidance from the FHA potentially has widespread impact in Richmond. Richmond has the second highest eviction rate in the country according to the Princeton University Eviction Lab.13 Further, areas of Richmond with high eviction rates also face high foreclosure rates, and research suggests both types of housing insecurity are linked.14

(1) Subject and Impact of the Moratorium

The National Housing Act15 established the mutual mortgage insurance program under which the federal government insures mortgages so that lenders can provide loans with lower down payments and longer repayment timelines. Section 203(b) of Title II outlines the requirements for a mortgage to qualify for federal insurance. The Federal Housing Administration is the entity responsible for insuring mortgages that meet the requirements. The moratorium covers Title II mortgages for single-family homes16 and Home Equity Conversion mortgages.17

Over the past five years, the FHA has insured over 5.6 million Title II single-family mortgages.18 Over the same period, it insured almost a quarter million reverse mortgages under the HECM program.19 In total, the FHA actively insures over 8 million single family mortgages.20 On the same day that the FHA announced the 60-day moratorium, the Federal Housing Finance Agency directed Fannie Mae and Freddie Mac to suspend foreclosures and evictions for 60 days, expanding the scope of the federal government’s COVID-19 response.21 Of $11.1 trillion in outstanding mortgage debt, $5 trillion is backed by Fannie Mae or Freddie Mac.22 The FHA is directing mortgage holders to contact their mortgage servicer to see if they are eligible for the moratorium and other payment assistance programs.

After the FHA and FHFA issued moratoria, Congress passed the CARES Act, which expands the categories of properties covered by the eviction moratorium and extends the moratorium period to 120 days.23 Renters can search a database compiled

18 U.S. DEPT OF HOUS. AND URBAN DEV., FHA SINGLE-FAMILY MUTUAL MORTGAGE INSURANCE FUND PROGRAMS, QUARTERLY REPORT TO CONGRESS, FY 2020 Q1 (2020), calculation of Exhibit A-1, fiscal years 2015-2019,
19 Id.
23 The CARES Act contains a 120-day moratorium on eviction filings for any property secured with a federally backed mortgage loan or multifamily mortgage loan “insured, guaranteed, supplemented, or assisted in any
by the National Low Income Housing Coalition to
determine whether their home is covered by the
federal eviction moratorium.\(^\text{24}\)

\textbf{(2) Change to Existing Law}

In order to secure FHA-insurance for loans, mortgage
providers must be approved by the FHA and agree to
comply with regulations issued by the Secretary.\(^\text{25}\)
Federal law provides that mortgage providers who
issue FHA-insured mortgages must engage in loss
mitigation to provide alternatives to foreclosure, as
provided in regulations by the Secretary.\(^\text{26}\)

The latest version of the manual provides that once
the President has declared a major disaster, mortgagee must implement loan foreclosure
procedures, including a foreclosure moratorium of 90
days on all FHA-insured mortgages.\(^\text{27}\)

Currently, the President has declared major disasters for all 50
states, the District of Columbia, and the U.S.
territories.\(^\text{28}\)

In the past, this provision has been invoked for
natural disasters, like for Hurricanes Irma, Harvey
and Maria that devastated Puerto Rico.\(^\text{29}\)
It is unclear why HUD did not invoke the provision in this instance
and only provided an initial moratorium of 60 days.
Perhaps it is because FHA wanted its guidance to
extend to evictions from FHA-insured properties as
well, and the manual does not contain policies
addressing evictions, only foreclosures.

\textbf{(3) Compliance}

In order to comply with the moratorium, landlords and
mortgage servicers should not evict or foreclose on

\textit{...way by the Federal Government.” Coronavirus Aid, Relief,
281, § 4024 (2020).}

\textit{Federal Eviction Moratoriums, NAT’L LOW INCOME HOUS.

\textit{24 C.F.R. § 203.257 (2020); 24 C.F.R. § 203.255(b)(11)
(2020),
12 U.S.C. § 1715u(a) (2012).}

\textit{U.S. DEP’T OF HOUS. AND URBAN DEV., HANDBOOK 4000.1,
785 (2019),
1hsgh_Update7.pdf.}

properties secured with a Title II or HECM mortgage.
However, mortgagees may find compliance
challenging in some circumstances because of limited
resources to inspect and repair properties. This may
extend timelines to complete foreclosures on
vacant/abandoned properties. Prior moratoriums
have raised legal questions about tolled statute of
limitations and other deadlines: e.g. if a foreclosure
cannot be started, restarted or completed within the
statute of limitations period due to the moratorium,
will the time be barred?\(^\text{30}\)

\textbf{(4) Recourse and Litigation}

As FHA policies do not give mortgage holders a
cause of action, this section focuses on any potential
litigation under the CARES Act.

The CARES Act generally restricts landlords from
evicting residents from “covered properties.”\(^\text{31}\)
It also provides that a lessor of a “covered property” may not
evict a tenant after the 120-day moratorium expires
without a 30-day notice.\(^\text{32}\)
The CARES Act also
authorizes forbearances on certain federally-backed
multifamily mortgage loans, and prohibits borrowers
from charging late fees or evicting tenants for non-
payment while such a forbearance is in effect.\(^\text{33}\)

Legally determining whether a property is covered by
the moratorium depends on whether the rental
premises are in a “covered dwelling.”\(^\text{34}\)
The CARES Act defines “covered dwelling” to include substantially
any type of residential tenancy, so long as (i) the
tenant actually occupies the unit and (ii) the unit is in

\textit{See generally}
https://www.law360.com/articles/1256601/past-crises-
model-virus-response-for-mortgage-industry

\textit{CARES Act, § 4024(b)
CARES Act, § 4024(c)
CARES Act, § 4023(d)
CARES Act, § 4024(a)(1)}
a “covered property.” A “covered property” includes any property participating in a housing program covered under the (a) Violence Against Women Act (VAWA), (b) that has a (1) federal backed mortgage loan or (2) multifamily mortgage loan, or (c) under the rural housing voucher program.

The VAWA prong includes many different types of properties: (1) any property that participates in a HUD subsidized low-income housing program (including tenant-based vouchers like “Housing Choice Vouchers” or “Section 8 Vouchers”) and project-based assistance, (2) public housing, (3) Section 202 and 811 homes for the elderly and people with disabilities, (4) the HOME program, (5) properties participating in the Low-Income Housing Tax Credit program, and (6) Rural Development Section 514/516, 515, 533 and 538 properties.

Federally-backed mortgage loans include loans secured by any lien on residential properties having 1-4 units and that are “made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by HUD or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.” A federally-backed multifamily mortgage loan has the same definition, except that it is secured by a property with five or more dwelling units.

Factually determining whether the moratorium applies to properties with tenants who participate in housing subsidy programs or benefit from low-income housing tax credit rent limits, is not difficult. But discerning whether a property has a federally-backed mortgage loan or participates in VAWA-covered programs the tenant does not know about may be considerably more difficult.

Tenants could use the National Housing Preservation Database for properties that receive unit-based subsidies, low-income housing tax credits, and similar federal benefits. However, tenants will often not be in a position to know what loans secure their rental properties, or have access to the documents from which to find out. Tenants should review the contents of any mortgages, deeds of trust, or other instruments recorded for a property to detect the presence of a federally-related loan. Though, not all federally-related loans necessarily require a public filing that identifies the loan as federally-backed. Such public documents do not necessarily indicate the involvement or subsequent acquisition by a relevant federal enterprise or the cancellation of federal insurance. In many communities, land records may be available online. But, records offices may be closed to the public for reasons related to the pandemic. Even if available to the public, such records may not be up-to-date.

Landlords, however, should have access to the necessary documents to determine whether a property has a federally-backed mortgage. These may include the note or mortgage instruments themselves, other closing documents, servicing notices, account statements, or other correspondence. Both Fannie Mae and Freddie Mac maintain websites borrowers (but not others) may use to look-up whether each enterprise owns their loan. Tenants should attempt to work with their landlords or, if landlords attempt to evict tenants, tenants could mount a legal challenge and utilize discovery to find the necessary information. Generally, the plaintiff will have the burden so the landlord will need some showing that the property is not covered.

35 CARES Act § 4024(a)(1)(A)  
36 CARES Act § 4024(a)(2)  
37 See VAWA 34 U.S.C. § 41411(a)  
38 CARES Act, § 4024(a)(4)  
39 CARES Act, § 4024(a)(5)  
40 https://preservationdatabase.org  
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Who Is Affected?
In short: students with disabilities & everyone in their lives.

Before diving into the nuances of the recent policies released by the Department of Education (DOE) on providing for students with disabilities during the COVID-19 pandemic, the people most impacted by these policies and practices merit mention:

- First, the students with disabilities themselves, who are now in completely different educational environments and are facing new challenges that they may not be equipped to handle;
- Second, the parents and families of students with disabilities, who are now fulfilling both the caretaker and educational instructor roles; and
- Third, the public school teachers, who are now struggling to adapt to distance teaching, while they are worried about their students and feel unable to satisfy those students’ needs.

"It truly has been a struggle to change to this forum of distance learning. Not seeing my students, not knowing how they’re actually doing, and only seeing some respond is heartbreaking. . . ."
~ a New Jersey Special Education teacher

Core Legal Issues
The DOE’s Question & Answer Document (Q&A Document) provides information regarding policies for students with disabilities during COVID-19.

The DOE released this Q&A Document, which responds to questions posed by concerned parties regarding educational requirements for children with disabilities during the COVID-19 pandemic. This Q&A Document responds to local educational agencies (LEAs) responsibilities to uphold the applicable provisions of the Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act, and the Americans with Disabilities Act (ADA).

In a report to Congress released on April 27, 2020, the Secretary of the DOE, Betsy DeVos, asked Congress to issue a waiver for children three years or older to continue to receive services without a re-evaluation as technically required under Part C of the IDEA.

There are three core questions addressed by the Q&A Document:

Q: Can a school system modify its requirements under the IDEA during COVID-19?

Q: How are students with disabilities being monitored and assessed during and post-COVID-19?

Q: What activities and services will continue to be provided under IDEA during COVID-19?
About the DOE’s COVID-19 Provisions for Students with Disabilities:

The DOE’s Q&A Document is intended to provide clarity regarding the ongoing responsibilities of LEAs and EIS programs under IDEA during COVID-19.

“During an outbreak of COVID-19, local educational agencies (LEAs) and early intervention service (EIS) programs will need to collaborate with their state educational agency (SEA), Bureau of Indian Education (BIE), or local public health department, as appropriate, to address questions about how, what, and when services should be provided to children with disabilities.”

The first part of the Q&A Document covers Part B of the IDEA and Sec. 504 of the Rehabilitation Act, which concern local educational agencies’ (LEAs) requirements for schoolchildren with disabilities. The DOE responds to six questions raised and/or anticipated to be raised regarding local educational agencies’ ongoing compliance with the IDEA during COVID-19.

The second part of the Q&A Document discusses Part C of the IDEA, which concerns early intervention programs’ requirements for toddlers (children aged 0-2) with disabilities, who are not yet schoolchildren. The DOE responds to three questions here regarding ongoing compliance of programs for toddlers with disabilities i.e. children not yet within the public school system.

Impact on Existing Law

The IDEA, the ADA, and the Rehabilitation Act require schools to provide certain accommodations for children with disabilities. While the requirements have not changed much (but rather are slightly clarified), the biggest impacts will be felt by individual school districts which may struggle with adequately implementing the legal requirements of the IDEA, the ADA, and the Rehabilitation Act.

Between the Q&A Document, as well as the DOE’s April 27th Report, the Department is clearly not trying to change the law itself. The Q&A Document relies on the IDEA, the ADA, and the Rehabilitation Act. The IDEA mandates that all students with disabilities receive a free appropriate public education (FAPE), which requires school districts to provide each qualifying child with an individualized education program and any accompanying services that the school deems appropriate.

The Q&A Document details that local educational agencies are still required to ensure that students with disabilities are provided equal access to the same opportunities as their non-disabled peers, including the requirement of a FAPE.

The impact of the Q&A Document on existing law, however, hinges on how the standards and requirements of the IDEA, ADA, and Rehabilitation Act are being implemented, and whether local agencies follow the guidance provided.

Educational agencies are still complying with those requirements.

Through interviews that were conducted with various educators and news articles that detail the frustrations and challenges of the change to distance learning, local educational agencies are clearly struggling with the complexity of balancing their resources and abilities with their legal requirements.

Potential Legal Challenges

The legal challenges as a result of this guidance are less likely to be directed at the DOE itself, and more towards the individual school districts which, for one reason or another, are struggling to remain compliant with the IDEA, the ADA, and the Rehabilitation Act.

With little time to make contingency plans, restricted access to human resources, equipment, educational tools, and most other instructional devices, individuals and teams normally responsible for the instruction, care, and development of children with disabilities within public programs are unable to adhere to the IDEA, the ADA, and the Rehabilitation Act in the same ways.

And yet, the DOE’s Q&A Document provides little leeway to fall out of compliance. This rigidity already has and will continue to expose state and local agencies to legal liabilities. Aggrieved parties, including the children themselves, their families, or other caregivers and advocates could highlight these shortcomings of state and local agencies, by initiating action against the DOE. However, it’s important to note that all parties involved are presumably putting forth a good faith effort to make this transition to distance-learning as pleasant, yet effective as possible.

As will be discussed in further detail below, these are challenging times for everyone, but especially for children with disabilities. These children and their families depend on daily instruction and regular care to ensure their physical, emotional, and psychological development.

Furthermore, due to the inflexibility of the DOE’s policy, school districts themselves may be able to file suit to challenge the reasonability of the policy. For many school districts, this exposure to liability could mean bankruptcy, which will certainly harm more children in the long term than a brief waiver of some legal requirements.

In-Depth Analysis of the DOE’s Provisions, the Law, and Potential Challenges

Legal Requirements

Title II of the ADA prohibits discrimination against qualified individuals with disabilities in any public entities’ programs, activities, or services. Title II applies to all state and local governments, departments and agencies, and any other instrumentalities or special purpose programs.

Section 504 of the Rehabilitation Act preceded the ADA, and the ADA was said to clarify many of the Rehabilitation Act’s intended purposes. Both the ADA and the Rehabilitation Act are at play here. The Rehabilitation Act was the first disability civil rights law to prohibit discrimination against people with disabilities. For programs that receive federal funding, Section 504 works with the ADA and IDEA to protect people with disabilities from exclusion or unequal access to education, jobs, and/or community programs.

Part B of IDEA is the section which lays out the educational guidelines for school children 3-21 years of age. By law, states are required to educate

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5 Id.
students with disabilities, and the IDEA provides funding for state and local school districts to do so. To be eligible for funding, schools must comply with six main principles of the IDEA: (1) Every child is entitled to a free and appropriate public education (FAPE); (2) when a student between the ages of 3 and 21 is believed to have a disability that has substantial impact on the student's learning or behavior, the student is entitled to an evaluation; (3) creation of an Individualized Education Plan (IEP) that lays out a series of specific actions and steps through which educational providers, parents and the student themselves may reach the child's stated goals; (4) education and services for children with disabilities must be provided in the least restrictive environment, and if possible, those children be placed in a "typical" education setting with non-disabled students; (5) input of the child and their parents must be taken into account in the education process; and (6) when a parent feels that an IEP is inappropriate for their child, or that their child is not receiving needed services, they have the right under IDEA to challenge their child's treatment.7

Part C of IDEA recognizes the need for identifying and reaching very young children with disabilities.8 This portion of IDEA provided guidelines concerning the funding and services for children from birth through the age of 2. Every family is entitled to appropriate, timely, and multidisciplinary identification and intervention services for their very young child i.e. infants and toddlers. Eligible families are required to receive an Individualized Family Service Plan (IFSP), which lays out the priorities, resources and concerns of the family; additionally, this IFSP describes the goals of the child, the services to be provided to the child, and steps for eventual transitioning of the child into formal education. Families have a right to participate in the creation of the IFSP, and must give consent prior to the initiation of intervention services. Lastly, parents are entitled to timely resolution of all conflicts or complaints regarding the evaluation or services provided to their child.9

With that being said, the DOE's Q&A Document takes each of these federal frameworks into account when responding to ongoing requirements for state and local agencies during COVID-19. The Rehabilitation Act and the ADA provide the statutory minimums required of all public entities receiving federal funding, but IDEA provides additional protocols for those public entities specializing in education and is specifically tailored to serving children with disabilities within public schooling systems. Since the DOE's main focus here is the children with disabilities and their families, IDEA is most applicable, and thus most relied on by the DOE throughout the Q&A Document.

The DOE's Q&A Document responds to questions about ongoing compliance with Part B and Part C of IDEA, respectively. In the first part, the DOE recognizes ongoing difficulties with distance learning for school children with disabilities in the wake of COVID-19, yet reiterates the requirements of IDEA. In doing so, the DOE provides little flexibility to deviate from its compliance requirements. The Document provides discretion for LEAs in one realm: how to allocate funds for ongoing activities and resources; but the Document plainly omits any waivers or adaptations for LEAs regarding educational and assessment metrics for children with disabilities during distance-learning.

Specifically, in Questions 1 through 4, the DOE emphasizes that children with disabilities that are either (1) home because the school system has closed or (2) home because the risk of exposure at school jeopardizes the child’s safety, should nonetheless continue to receive educational instruction, citing IDEAs requirements.10 However, the DOE does not clarify any adaptations that would appropriately respond to this transition while keeping LEAs in compliance. As will be further discussed below, meetings and certain benchmark assessments are required for children with disabilities, and without

7 Id.
9 Id.
10 See QUESTIONS AND ANSWERS ON CHILDREN WITH DISABILITIES, supra note 1.
any ability to visit with the child in person, LEAs and individualized teams are struggling to not only access their students, but also effectively educate them.

Question 5 addresses the issue of contingency plans, but as will also be discussed in further detail below, the DOE’s Q&A Document was released in March 2020, providing little to no time for LEAs or individual teams to organize and execute contingency plans for distance-learning for students with disabilities. Question 6 then asks what activities, beyond those of classroom instructional services, will continue to be provided during COVID-19, to which the DOE grants broad flexibility for LEAs to allocate federal funding for such activities on a discretionary basis. Again, as will be further discussed later, many of these funds are seemingly getting lost in the administrative costs of this transition to distance-learning.

The second part of the DOE’s Q&A Document then recognizes the difficulties with providing EIPs to toddler with disabilities and their families, yet again reiterating the requirements of IDEA. This time, the DOE provides slightly more flexibility to deviate from its compliance requirements than that of its responses regarding Part B of IDEA. The DOE again provides discretion for IEPs regarding distribution of funding for appropriate activities, yet provides little to no discretion for how to reach toddlers with disabilities and their families from a distance.

Betsy Devos, Secretary of the DOE, released a report on April 27, 2020 asking Congress to waive the requirement for the evaluation of toddlers with disabilities before transitioning from IEP services to special education services, as provided by LEAs. IDEA essentially requires a triennial reevaluation or review (an assessment of a child with disabilities at least once every three years). This always happens right before children with IEPs turn 3, and Secretary DeVos has waived this requirement so that toddlers with disabilities may continue to receive services since these reevaluations may not be practical nor possible to conduct during COVID-19.

With that waiver since issued, the DOE emphasizes in Questions 1 through 2 that toddlers with disabilities who are unable to receive services either because the offices are (1) closed or (2) are open, but unable to provide services necessary to the child’s individual IFSP should continue to provide services based on a case-by-case analysis of needs and adaptation to those needs. Question 3 asks what activities, beyond those of instructional services, will continue to be provided during COVID-19, to which the DOE grants broad flexibility for EIPs to allocate federal funding for such activities on a discretionary basis. Many of these funds are being utilized for the administrative costs of transitioning from regular to newly-adapted services, however.

Realities of Implementing Legal Requirements, and Impacts on Students, Families, and Educators

11 See QUESTIONS AND ANSWERS ON CHILDREN WITH DISABILITIES, supra note 1; see also infra “Realities of Implementing Legal Requirements, and Impacts on Students, Families, and Educators.”
12 See QUESTIONS AND ANSWERS ON CHILDREN WITH DISABILITIES, supra note 1.
13 Id.
14 Id.
18 QUESTIONS AND ANSWERS ON CHILDREN WITH DISABILITIES, supra note 1.
19 QUESTIONS AND ANSWERS ON CHILDREN WITH DISABILITIES, supra note 1.
20 Many references throughout this section are based on individual, grassroots research conducted through interviews with current special education teachers or other school employees who have seen the impact of COVID-19 on students in their school who receive special education services. Many of these teachers shared stories that are...
Perhaps the biggest problem facing students, parents, and educators is the reality of trying to implement the “business as usual” requirement in environments that are anything but “business as usual.”

Effectively, the Q&A Document combined with federal requirements provides little to no breathing room for students, families, and educators who are experiencing a once-in-a-lifetime catastrophic event. Clearly, following the federal requirements is important (and obligatory), but the DOE’s policy fails to take into account the harsh realities facing these students, their families, and their educators. As one article appropriately summed up the dilemma facing school districts and educators in complying with federal guidelines: “[o]wing to mixed signals from the federal government on how to proceed, in addition to concerns over liability for not being able to provide mandatory services, many school districts struggle to provide the support students [with disabilities] will need in the months to come. The extent to which children and students with disabilities receive help may, for the moment, rely on the creativity of school district officials, teachers and parents.”

For example, statistically, approximately one-third of all students who are served under the IDEA suffer from what’s called a “Specific Learning Disability” (SLD). SLDs include Dyslexia, Dysgraphia, Dyscalculia, Auditory processing disorders, and Nonverbal learning disabilities. These SLDs result in various hardships, including weaker fine motor skills, difficulty comprehending numbers and mathematical symbols, and difficulty in reading and related language-based processing skills. The next three most prevalent categories are Speech or Language Impairment, Other Health Impairment, and Autism, at nineteen percent, fourteen percent, and ten percent of all students served under the IDEA, respectively. “Other Health Impairments” is generally an umbrella term used to describe any other impairments not otherwise covered, but most commonly refer to impairments like Attention Deficit Hyperactivity Disorder (ADHD), or others that affect a child’s strength, energy or alertness.

When a student has impairments that affect his or her comprehension or ability to pay attention, the structure of their environment and teaching is of utmost importance, hence why IEPs are so important to the education of students with disabilities. So when a classroom environment is upended because of COVID-19, clearly there will be difficulties for such students to adjust to losing that structured environment and teaching. This occurrence is incredibly similar to those represented in various news articles also referenced in this section. Summaries of these grassroots interviews are available from Robin Nagel. These sources will be indicated by “Grassroots Research,” with anonymous letters to indicate individual educators and school districts.

21 Mario Koran, “This is Crisis Teaching”: Students with Disabilities Slip Through Cracks as Coronavirus Shuts Schools, GUARDIAN (Apr. 5, 2020, 06:00 AM), https://www.theguardian.com/world/2020/apr/05/this-is-crisis-teaching-students-with-disabilities-slip-through-cracks-as-coronavirus-shuts-schools.

26 Lee, supra note 23.
28 Jonathan Custodio, Disabled Students Already Faced Learning Barriers. Then Coronavirus Forced an Abrupt Shift to Online Classes, CHRONICLE (Apr. 7, 2020) https://www.chronicle.com/article/Disabled-Students-Already/248444 (“Organization is key in classroom teaching, and for students with learning disabilities or brain injuries, that significance is amplified in a virtual setting.”).
probably best described by a Chicago-area attorney who stated that while “closures have been hurtful to all kids, [] students with disabilities are most vulnerable, and tend to react badly to transitions.”

As one teacher put it, “The kids we work with need that close proximity that we can’t provide right now.”

Despite the clear and obvious setbacks to a sudden transition to distance learning, the DOE, through its Q&A Document, absolutely fails to assist LEAs and educators in adjusting, in ensuring that students who are reliant on structured environments are still being cared for. The first “Fact Sheet” that the DOE released after the Q&A Document was equally vague, notably really only stating that schools were not required to provide special education services if the school was closed for all students.

Because of this lack of structure, parents and teachers alike worry that students who have been progressing and doing well at the in-school environment will regress during distance learning, requiring extra time and work later just to get students back to where they were prior to the distance learning period. For example, one teacher discussed a sixth-grade student with autism who relies heavily on routines and cannot handle a break in that routine. Prior to distance learning, this student worked well independently at school and, when interested, would be one of the highest performers in his class. But since transitioning to distance learning, while the routines and structures of being home are ones he knows well, he does not have adequate structure or support to keep him engaged in his schooling. His teacher worries that this combination of issues will lead to a regression in what he has otherwise been able to achieve.

Furthermore, not only are students struggling to learn at home because the environment itself is different, many students may also lack the technology or internet access necessary to fully participate in virtual or distance learning. Some of this is due to limited resources in a family, where parents working from home or older siblings need to use the single family computer. Others have no computer. Still others do not have access to an internet connection. While some school districts have been able to apply for funding through the CARES Act and have been able to provide laptops to students, and still other districts have negotiated with wireless internet service providers to provide free internet for at least part of the distance learning period, not every school district has been able to provide as well for their students. For example, rural school districts in Western New York simply do not have the funding or the resource of contracting with internet service providers, instead having to coordinate hard-copy work packets and flash drives with recorded videos.


33 Grassroots Research, supra note 20, Teacher B2.


35 Grassroots Research, supra note 20, Teacher B1, C, E1, F.
Furthermore, some other school districts have implemented policies that do not allow educators to teach “live” on various virtual platforms like Zoom or Google Hangouts, instead requiring that educators pre-record videos that are then distributed to students.36 Some teachers have expressed concern that pre-recorded videos are not enough to ensure that a student has actually grasped a concept, and worry about students’ abilities to move on to a new grade level next fall if they are unable to grasp the last three-to-four months of the current school year.37 Others worry about the very real likelihood that their students will lose progress made over past academic years, and regress into old behaviors that so many have worked so hard on improving.38

Another example of how the Q&A Document absolutely fails in understanding the realities of implementing legal requirements during COVID-19 is that the Document advocates that LEAs have “contingency plans” in place for dealing with distance learning and complying with a student’s IEP—however, this Document was released the “very same day” that most school districts held their last day of in-person classes.

As one teacher put it: “When the whisper of remote learning started, we were told to plan for two weeks of work without much guidance. We put together packets and sent home all necessary materials for two weeks.”39 In other words, educators were barely given notice to put together packets for two weeks’ of work, let alone draft contingency plans that would give the student’s service providers and the student’s parents “an opportunity to reach agreement as to . . . the services that would be provided during the dismissal.”40

Some districts have taken an extended break in order to ensure they are adequately prepared to implement all education—but especially special education.41

As another fundamental issue, parents are now the ones responsible for the in-person, one-on-one learning that now happens in their homes. But, while many of these parents are surely well-versed in their child’s disability and perhaps certain triggers or the basics of certain therapies, most parents are not special education teachers, speech or language pathologists or occupational therapists.42 And some teachers are seeing that parents who were historically more “checked-out” from their child’s education prior to the onset of the distance learning period, continue to be “checked-out,” leaving many teachers in the dark as to how their students are doing, and whether these students even have the abilities to get their work done.43

A natural question at this point, after looking over all of the struggles that students, families, and educators are facing with the adjustment to distance learning, is “What is being done about IEPs that are probably entirely premised on in-person instruction, structured educational environments, and equal access to technology as students’ peers?”

The short answer: Absolutely nothing (from everything we can tell). Certainly there are some students who may not need a revised IEP—whether they are the exception and have been able to adjust well, or are otherwise able to receive the full amount of services otherwise due.44 But for students who cannot access technology and cannot receive services, or for students who are not performing well in the transition to distance learning, to be blunt, their IEPs are likely not being complied with.45 Other IEPs

36 Grassroots Research, supra note 20, Teachers C, E1, F.
37 Grassroots Research, supra note 20, Teachers C, E1.
39 Grassroots Research, supra note 20, Teacher A.
40 See QUESTIONS AND ANSWERS ON CHILDREN WITH DISABILITIES, supra note 1.
41 Hanna & Graham, supra note 32; Koran, supra note 21.
42 Adely, supra note 38.
43 Grassroots Research, supra note 20, Teacher A, C.
44 Grassroots Research, supra note 20, Teacher A, E1.
45 See Grassroots Research, supra note 20, Teachers C, D, E1, F; See also, Erica L. Green, DeVos Weighs Waivers
Department of Education’s COVID-19 Provisions for Students with Disabilities

Lauren Earley & Robin Nagel

May 2020

haven’t been revised because the schools are only closed temporarily, and it may be more time than it would be worth to revise an entire IEP for distance learning.46

To be clear, an IEP is a legal document, required under federal law for many students with disabilities.47 But, instead of trying to assist districts in providing resources or other guidance on how to best implement a regular IEP during distance learning or even seeking congressional waiver on strict compliance with an IEP, the DOE has been rather silent.

Non-compliance with an IEP opens school districts up to legal liability for failing to follow federal requirements. This puts school districts between a rock and a hard place, between not necessarily having the resources to implement services and worrying about exposing themselves to legal liability. School districts have been pressing the DOE to provide guidance or instructions, and even insulation from legal liability for their inability (through no fault of their own, to be fair) to provide adequate services that identically match disabled students’ IEPs.48 However, the Department has largely been silent, leaving districts wondering if they will end up losing hundreds of thousands, if not millions, of dollars in the near future because of the impossibilities of continuing “business as usual” during the COVID-19 pandemic.49

Legal Liabilities

The legal liabilities at play in this situation are two-fold: first, state and local agencies are exposed to liabilities for noncompliance with IEPS and/or federal requirements; and second, individuals and individualized teams within state and local agencies are exposed to liabilities for similar noncompliance. In the first place, the DOE’s Q&A Document rigidly requires the same protocols under the IDEA, the ADA, and the Rehabilitation Act that have always been required. Without allowing for any waivers during COVID-19, what we are seeing is that state and local agencies are struggling to provide ongoing services in the same ways in order to comply with these requirements. Essentially, there is a disconnect between the DOE’s issued requirements and state and local agencies’ abilities to uphold those requirements because instructional resources have shifted, access to students has changed dramatically, and individualized plans are not being updated accordingly. With that being said, children with disabilities, their families, and other advocates could bring claims against these noncompliant agencies.

Second, there is a disconnect where the rubber meets the road, more specifically. Even if certain state and local agencies have been able to comply with the same requirements under the IDEA, the ADA, and the Rehabilitation Act, specific teachers and employees have expressed frustration in implementation—they are receiving little support from their respective agencies, and feeling unprepared to adapt to the changing circumstances of the child, let alone, implement new plans for that child’s educational needs. This is another form of exposure for state and local agencies because children with disabilities, their families, and other advocates could


bring claims against these noncompliant agencies by means of the noncompliant employees.

Noteworthy, the individuals and teams normally responsible for care, education, and development of these children care deeply about making this transition to social-learning as seamless and effective as possible for the children with disabilities. This plays an important role because aggrieved parties (i.e. the children themselves and their families) recognize the employees' and agencies’ frustrations with noncompliance, and may not be as likely to make claims against the very people who are presumably trying their best.

This transition to distance-learning has been undeniably difficult for all parties involved: students, currently homeschooling and being away from the normalcy of their schedules; parents, currently working from home and conducting home schooling; teachers, currently instructing students electronically; and especially those children with disabilities and their families whose access to important human resources and specialized educational programs is now severely limited. The school systems are the traditional vehicle by which all children receive instruction, structure, care, and development, and with school closures, these traditional vehicles have had to completely shapeshift.

All of this is important to recognize in terms of this discussion because the DOE’s rigidity of sticking to its same playbook could prove detrimental to the very communities it is intended to serve and protect. Furthermore, legal liabilities have the likelihood to cost school districts hundreds of thousands if not millions of dollars in settlements, litigation costs, and the like. Effectively, because of the DOE’s failure to adequately inform, prepare, and protect its school districts, educators, and other affected parties, many school districts could very well see enormous losses in the near future, when budgets will already be stretched paper-thin because of an economic downturn as the U.S. deals with the pandemic.

Parents of students with disabilities would be well within their right to sue to enforce IEPs that are not necessarily being complied with. In districts where there are clearly steps that schools can be taking, such a case may be one worth pursuing. But in those districts where resources, technology, and safety concerns are severely hampering educators’ abilities to connect with students and provide the needed services, the DOE ought to have sought a waiver of IEP requirements to protect such districts.

If a court were to hear a suit against a school district that did everything within its power to comply with the IEPs, but simply could not comply for reasons outside of its control, we could not accurately wager whether a court would sustain such a case. However, it may be reasonable for school districts and educators who rightfully fear liability to sue in some capacity for temporary waiver of certain IEP requirements. While we understand that waiving IEP-compliance requirements does result in harm to students with disabilities, we think it important to recognize that the best advocacy here would be a waiver of requirements that schools cannot reasonably provide during this time—but that other requirements that can be fulfilled continue to be fulfilled.

Under the CARES Act, the DOE had the ability to request congressional waiver of these requirements. The DOE refused to do so. This refusal, as discussed above, leaves school districts out in the cold, unable to fulfill some requirements, and worried about losing millions in lawsuits. School districts can (and to some degree, should) file suit against the DOE, in order to protect themselves since the DOE has otherwise refused to do so.

When the DOE issues guidance or policy statements, like the Waiver Report and the Q&A Document, if questioned in court, the DOE’s actions is only due a low level of deference—only to the extent that the

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51 WAIVER REPORT, supra note 15.

52 QUESTIONS AND ANSWERS ON CHILDREN WITH DISABILITIES, supra note 1.
DOE’s interpretation of the CARES Act (and, alternatively, the IDEA, the ADA, and the Rehabilitation Act) is persuasive. When looking to whether the DOE’s reasoning is persuasive, a court will look to any thoroughness evident in the DOE’s consideration, the validity of their reasoning, any consistency with any earlier or later pronouncements, and any other factors with the power to persuade. The DOE’s best argument would be ongoing compliance with the law—however, through its Waiver Report, and other guidance issued in the past anticipating disasters and providing guidance on the front end, the DOE has demonstrated an ability to adapt to changing, emergency scenarios.

However, the DOE’s fatal flaw is this: by failing to give schools breathing room to adapt and do what is best for students, the DOE is exposing schools to enormous liabilities that will harm more students in the future, than may temporarily remove some services from students. There is little that is “reasonable” about this plan. Drastic times call for drastic measures, and it is time the DOE stepped up to protect its schools.

### Conclusion

These are unprecedented times. Life has dramatically changed for many. State and local educational facilities are no exception. Almost all have closed, programs have been suspended indefinitely, and students and teachers alike have moved to distance-learning electronically.

Our federal government has long-recognized the importance of protecting its citizens who have disabilities—providing equal opportunity to access education, jobs, and the many activities of life. Children with disabilities, including toddlers (0-2) and schoolchildren (3-21), receive extra protection and advocacy to adequately protect their civil rights.

Before the COVID-19 pandemic, these extra protections and advocacies were materialized through the IDEA; IEPs and LEAs provided a variety of hand-on instruction and educational resources to ensure individualized care for children with disabilities. The transition from these implementation methods to distance learning was swift and chaotic, and with good reason—time was limited, resources were stretched, and vulnerable children were secluded quickly for their own safety. But in the midst of COVID-19, fueled by uncertainty and lack of guidance, teachers and individualized teams within state and local educational agencies have been struggling to maintain the same level of instruction and care that they were once able to provide. Without access to their on-site resources, program facilities, and with limited human resources to execute their individualized plans, the children with disabilities, already some of the most vulnerable students, will suffer and are suffering most.

The DOE’s Q&A Document nonetheless reiterates the original requirements of IDEA, the ADA, and the Rehabilitation Act. Maybe by providing the baseline, the DOE hoped to confirm the minimum requirements, but without taking into account the contextual limitations of these times, the DOE is really just making the agencies unable to continue meeting the minimum susceptible to recourse by children with disabilities and their families. The DOE emphasized the same old scale without recognizing that the world is on a completely different one right now. As a result, school districts and educators worry about future legal liabilities, and families worry about losing any progress their children have made.

Our purpose in this analysis was to clarify the DOE’s position, the applicable laws and standards, and to

54 *Id.*
highlight action plans for concerned parties. These are challenging times, but with the proper level of guidance, support, and adaptability, we could all emerge happy and healthy on the other side.

### Glossary of Abbreviations

**ADA**: Americans with Disabilities Act  
**ADHD**: Attention Deficit Hyperactivity Disorder  
**BIE**: Bureau of Indian Education  
**CARES Act**: Coronavirus Aid, Relief, and Economic Security Act  
**DOE**: Department of Education  
**EIS**: Early Intervention Service  
**FAPE**: Free Appropriate Public Education  
**IDEA**: Individuals with Disabilities Education Act  
**IEP**: Individualized Education Program  
**IFSP**: Individualized Family Service Plan  
**LEA**: Local Educational Agency  
**SEA**: State Educational Agency  
**SLD**: Specific Learning Disability
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1: Who Is Affected?
2: Core Legal Issues
3: About the Safety Alerts for Operators (SAFO) 20009
4: Impact on Existing Law
5: Potential Legal Challenges

Who Is Affected?
Interim Health Guidance for Air Carriers and Crews Members for the safest operation of flights during the COVID-19 outbreak.

Groups of people affected by this document are as follows:

- Crews of airplanes flying within the United States during COVID-19
- Air Carriers located in the United States operating during the COVID-19 crisis.
- Foreign Air Carriers operating within the United States.

Core Legal Issues
This SAFO contains updated safety recommendations to assist air carriers operating within the United States in meeting their statutory duty to provide service with the highest possible degree of safety in the public interest.

This document shall address the following:

Q: What procedures should crew members adopt in efforts to identify sick crew members and passengers?

Q: What minimum policies should air carriers adopt in preparing a response plan for the COVID-19 outbreak?

Q: What notifications should air carriers provide local, and destination state and local health officials regarding COVID-19 passengers?

About SAFO 20009
Airline Carriers in the United States have a duty to “provide service with the highest possible degree of safety in the public interest.”

As a way to ensure that carriers meet this requirement, the Federal Aviation Administration (FAA) established the SAFO information system to educate and make recommendations to air carriers so they can meet their statutory duty. SAFO’s often contain critical and time sensitive information.

SAFO 20009 updated and replaced SAFO 20003 and provides interim occupational health and safety guidance for air carriers and crew members regarding Coronavirus Disease 2019 (COVID-19). These recommendations remain non-regulatory and are meant to provide guidance on best safety practices within the industry.
Subject and Impact of New Policy

Recommendations for Air Crews within the United States

The updated guidance provides monitoring procedures for air crews. To help diagnose crewmembers, the document includes a list of related symptoms. Additionally, the document provides safety procedures for transporting and housing crews.

Recommendations for Air Carriers in the United States

SAFO 20009 directs all air carrier’s located in the United States to prepare a response plan for COVID-19. The document outlines health monitoring policies to be adopted by carriers including:

- Procedures for remaining in contact with employees to monitor their health
- Implementing screening procedures for crewmembers at the start of their duties.
- Consulting with the CDC, state, and local health authorities in addressing the outbreak.

The SAFO reminds air carriers that passengers who pose a direct threat to health or safety may also be removed from a flight.

Notification recommendations for air carriers operating in the United States for potential crew member’s who may have been exposed to COVID-19

The SAFO recommends that carriers:

- Notify the CDC if a crewmember worked on a flight for two days before symptoms developed.
- Notify the CDC if a crewmember with COVID-19 needs to be repatriated to the United States or relocated from one U.S. State or territory to another.

Impact on Existing Law

In their efforts to provide adaptable guidance for the COVID-19 pandemic, SAFO 20009 replaces the cancelled SAFO 20001, and SAFO 20003, which provided interim guidance.

The new guidance, SAFO 20009, incorporates many of the recommendations that were in the initial document while expanding on some of the recommended procedures for air carriers.

SAFO 20009 follows the Center for Disease Control’s (CDC) guidelines and recommendations for containing the spread of COVID-19. The guidance highlights measures to limit air crew contact with other individuals.

While SAFO guidance remains non-regulatory and non-binding, the FAA reminds air carriers that these documents may contain critical information that should inform safety operations.

Potential Legal Challenges

SAFO 20009 remains a guidance document and is non-binding on air carriers and crew members. Yet, air carriers operating within the United States are required to “provide service with the highest possible degree of safety in the public interest.” SAFO documents contain valuable safety and health recommendations. This may lead the FAA administrator to take SAFO documents into account when issuing safety certificates.

Air Carriers maintain the option of developing their own response plan implementing sufficient safety procedures. If an individual wishes to challenge the legality of the SAFO document they would need to have an enforcement action brought against them which references SAFO guidelines.
In-Depth Analysis of the DOE’s Provisions, the Law, and Potential Challenges

Subject and impact of the new policy

In their efforts to provide adaptable guidance for the COVID-19 pandemic, the Federal Aviation Administration (FAA) cancelled SAFO 20003 and replaced the guidance with an updated document.\(^1\) The new guidance, SAFO 20009, incorporates many of the recommendations that were in the initial document while expanding on some of the recommended procedures for air carriers.\(^2\) These recommendations remain non-regulatory and are meant to provide guidance on best safety practices within the industry.\(^3\) However, the enabling order for all SAFO documents, FAA 8000.87A does state that the SAFO orders may contain “critical” guidance and strongly suggests that air carriers and FAA personnel familiarize themselves with the safety information.\(^4\)

SAFO 20009 follows the Center for Disease Control’s (CDC) guidelines and recommendations for containing the spread of COVID-19.\(^5\) Both SAFO 20003 and 20009 provide approaches that help to limit airline personnel’s contact with outside individuals. In addition there are multiple procedures for monitoring and diagnosing individuals that may have contracted COVID-19. These recommendations are being made to help maintain safety in an essential industry that is necessary for the delivery of goods and essential personnel to various areas across the country and abroad.\(^6\)

Changes in Policy

SAFO 20003 and 20009 provide recommendations for air carriers and their crews. These recommendations are also directed at foreign operators within the United States.\(^7\) The guidance documents identify specific sections that apply to crews and carriers separately. However, the nature of the guidance indicates that familiarity with the entirety of the recommendations is preferred.

In addition, while FAA investigators and employees are not the intended audience of the recommendations, the FAA has stated that these groups should familiarize themselves with the recommendations.\(^8\) SAFO guidance documents provide best practices for the safety of crews and passengers. In advancing its mission, the FAA has stated that understanding these best practices is useful for its employees.

Primary Recommendations

The addition of SAFO 20009 expands on the previous recommendation and expands on policy suggestions for air carriers.\(^9\) The order also provides further procedures for air crews that are operating within the United States.

Recommendations for Air Crews within the United States

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\(^4\) Id.


\(^6\) Id.


The updated guidance provides monitoring procedures for air crews that are aimed at identifying sick employees. Relying on CDC guidance, the recommendations are adapted to air carrier concerns and focus on symptoms associated with COVID-19. To help identify relevant symptoms the document includes a list of related symptoms including:

- Developing a fever, cough, or shortness of breath
- Testing positive for SARS-CoV-2, even if it presents without symptoms
- Have been exposed to a sick person presenting the above symptoms or testing.

To assist in monitoring these symptoms the FAA recommends that crewmembers should monitor by taking their temperature twice a day, and report any related symptoms. In addition if they believe they have any of these symptoms the employees should not report for work.

In addition to monitoring their own symptoms, air crew employees should self-quarantine if any household member, intimate partner, or individual that they have been in close contact to develop any of the identified symptoms. If any of the symptoms develop in the employee or one of the individuals listed above, the individual should stay home until cleared by a healthcare provider.

SAFO similarly creates, and expands on previous health protection measures for airline and common carrier co-workers, passengers, and crew members. The major recommendations include maintaining a distance of 6 feet from other crew members and passengers when possible, including stages of the flight such as take off and landing. The SAFO, initially recommends that the personnel should follow the guidance of the CDC, which recommends wearing facemasks when possible. However, The SAFO goes on to state that personnel should ‘consider’ the use of the mask, which is seemingly less forceful than the CDC’s ‘recommendation’ of the masks use. The document finally directs the U.S.-based Air Crews and Air Crews state to be mindful of local State and local health authorities in the area that they are located.

Recommendations for Air Carriers in the United States

SAFO 20009 directs all air carrier’s located in the United States to prepare a response plan for COVID-19.

The document outlines provisions health monitor policies to be adopted by carriers including:

- Procedures for remaining in contact with employees to monitor their health, and do not report for work measures members who are experiencing worrisome symptoms.
- Implementing screening procedures for crewmembers at the start of their duties. Including, temperature monitoring, and symptom checks.
- Consulting with the CDC and state and local health authorities in allowing symptomatic crew members to return to work.

SAFO 20009 also provides air carriers with significant advice for minimizing exposure to their crew members. The FAA recommends that air carriers take a more involved role in monitoring the transportation and housing of their crews. This includes providing private ground transportation that still allows for distancing recommendations suggested by the CDC. In addition, the order also suggests that air carriers rely on hotels and other housing near to the airports that the crews are operating out of and ensure that the rooms are sanitized prior to the crews arrival.
To help minimize infection risks during the operation of aircraft, the FAA also recommends that air carriers provide cleaning and disinfecting supplies. The order also includes procedures for disinfecting air cabins and supplies, to help maintain a clean environment for both crews and passengers. These recommendations also include increasing the frequency that cabins are cleaned, and ensuring that personal protective equipment (PPE) is available to protect both crew members and limit the danger of potentially sick passengers. To further assist with these procedures, it is recommended that crews are trained in applying cleaning materials and PPE.17

The FAA also reminds air carriers that the existing regulation, 14 CFR § 382.23, allows airlines to remove passenger’s that pose a direct threat to health or safety due to communicable disease.18

SAFO 20009 goes on to state notification recommendations, suggesting that the carrier notify state and local health officials if they are aware of any crew member who has contracted COVID-19. They recommend that the carrier notify the CDC if:

- A crewmember worked on a flight for two days before symptoms developed until the CDC’s isolation measures were met.
- If a crewmember with COVID-19 needs to be repatriated to the United States or relocated from one U.S. State or territory to another before CDC’s criteria for discontinuing isolation or before 14’s have passed since potential exposure.
- Notify the public health authorities at the outbound destination for outbound flights.

SAFO 20009 recommends that carriers develop a plan to notify crewmembers who may have been exposed to an infected co-worker or passenger.19

SAFO 20009 states that air carriers should develop response plans for managing crewmembers with COVID-19. These response plans should include procedures for transporting employees that have tested positive or are presumed positive for COVID-19. These plans should include means for returning crew members that are outside the United States to their home jurisdiction. These plans should be coordinated with both local health authorities and the CDC.

To conclude, the document clarifies that common air carriers may choose to exceed these recommendations in the development and implementation of their own policies.

**Actions Required by the Guidance**

SAFO documents remain guidance provided by the FAA that are non-regulatory in nature. The initial enabling order explicitly states that SAFO guidance does not create any obligations for FAA investigators. While the implementation of SAFO does not create specific obligations, the agency maintains that each SAFO guidance document contains critical safety information and should inform on best practices and that air carriers may choose to implement or exceed their recommendations. While SAFO guidance does not impose specific duties on FAA investigators, the agency does encourage that its employees understand the contents of all SAFO guidance.

**Potential Legal Challenges**

SAFO 20009 remains a guidance document and remains non-binding on air carriers and crew members. However, air carriers operating within the United States are required to “provide service with the highest possible degree of safety in the public interest.”20 SAFO’s contain valuable safety and health

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17 Id.
18 14 CFR § 382.23 (Regulation is current through May 1, 2020)
recommended actions. As such, the Administrator of FAA may consider the extent to which air carriers have complied with these recommendations when issuing operating certificates. 21

An individual dissatisfied with policy maintains the option of developing their own response plan implementing sufficient safety procedures. If an individual wishes to challenge the legality of the SAFO they would need to respond to an ‘final’ enforcement action based on this guidance. 22 The non-regulatory nature of SAFO documents indicates that it is unlikely for the FAA to base an enforcement action on the guidance. However, it is possible that an enforcement action based on separate orders or regulations could use the SAFO guidance as a de facto regulation. This action could allow a regulated party to challenge the guidance in court.

21 See generally, Id.

Who Is Affected?

This temporary rule expands the paid family and medical leave available to employees affected by the coronavirus pandemic.

- Private employers employing fewer than 500 employees eligible for tax credits.
- Small businesses employing fewer than 50 may be exempted.
- Employees of non-federal agencies, including local and state employees.
- Only some, and very few, Federal employees, and the Office of Management and Budget (OMB) may exclude those covered.
- Employees with COVID-19 symptoms who are in local, state, or federal government mandated quarantine.
- Employees taking care of family members who are in local, state, or federal government mandated quarantine.
- Employees taking care of children whose child care providers are closed or unavailable due to COVID-19.

Core Legal Issues

This temporary rule expands paid leave provided to employees affected by the coronavirus, which allows them to comply with mandatory quarantines without having to choose between their, or their family’s, health and their job.

This temporary rule offers new protections and relief to American workers and employers under the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA), both parts of the Families First Coronavirus Response Act (FFCRA).

The FFCRA extends paid family and medical leave by amending Title I of the Family and Medical Leave Act (FMLA).

This document answers the following questions:

**Q:** Which employees are eligible to receive paid sick leave benefits as a result of this temporary rule?

**Q:** What rate are employers required to pay employees for family and medical leave?

**Q:** How many hours of paid sick or family leave are employers required to provide to their employees?
About the Paid Leave Under the Families First Coronavirus Response Act

This temporary rule offers new protections and relief to American employees and employers under the EPSLA and the EFMLEA, both parts of the FFCRA.

Requirements for Employers with Fewer than 500 Employees

Employers must provide employees with up to two weeks, 80 hours, of paid sick leave if the employee is quarantined or experiencing COVID-19 symptoms. This paid leave must be provided at the regular rate of pay.4

Employers must also provide all employees with up to two weeks, 80 hours, of paid sick leave if the employee needs to care for someone who is quarantined or caring for a child whose other care provider is closed or unavailable due to COVID-19.

Additionally, employers must provide up to 12 total weeks of paid expanded family and medical leave to employees employed for over 30 days who need to care for a child whose other care provider is closed or unavailable due to COVID-19. Employers are only required to provide two-thirds of the regular rate of pay for the second and third leave options for family and medical leave.5

Employers must provide these forms of paid leave to both full-time and part-time employees.6 The employer must pay for the amount of time that the employee was expected to work, including part-time hours, which may be averaged as well as over 40-hour weeks as would otherwise be expected. However, the paid leave will only be extended to a total of 80 hours every two weeks.7

Employers with More Than 500 Employees

This bill does not mention any requirements for companies with more than 500 employees; therefore, these employees will have to rely on the policies of the companies they work for.

Small Business Exception

Small businesses are only exempt from providing paid sick leave for caring for a child due to school or place of care closures or unavailability due to COVID-19 and expanded family and medical leave for child care due to school or child care closures or unavailability.8

Small businesses may be exempt if they have under 50 employees and complying with the FFCRA would threaten the viability of the company, as determined by an authorized officer of the business where at least one of the following three circumstances are found.9

First, the small business may be exempt if the leave would result in expenses and financial obligations that exceed the businesses revenues.

Second, there may be an exception if the absence of the employee requesting leave would produce a substantial risk to the financial health or operational capabilities of the business due to the employee’s specialized skills, knowledge or responsibilities.

The third circumstance for an exemption is if there are not enough employees who are available, able, willing, and qualified to fulfill the necessary labor or services performed by the employee requesting leave in order for the small business to operate at a minimal capacity.

If a business meets at least one of these three circumstances as determined by an authorized officer of the business and has fewer than 50 employees, the

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4 See id.
5 See id.
7 See id. at Question No. 80.
8 See id. at Question No. 58.
9 See id.
business will be exempt and will not have to offer paid family or medical leave under this temporary rule.\textsuperscript{10}

**Tax Credits for Covered Employers**

In order to help employers afford these expanded paid family and medical leave requirements, businesses are able to seek reimbursements through tax credits.\textsuperscript{11} Private companies are entitled to fully refundable tax credits each quarter. These tax credits are applied against the employer’s already-owed Social Security taxes; however, if these payouts are still not covered, then the Treasury Department is authorized to help cover the rest with cash payouts.\textsuperscript{12}

**Impact on Existing Law**

The Department of Labor promulgated regulations to implement public health emergency leave and emergency paid sick leave to allow working families to better face health emergencies arising out of the COVID-19 global pandemic under Title I of the FMLA. These provisions were created under a time-limited statutory authority established under the FFCRA.\textsuperscript{13}

Paid Leave under the Families First Coronavirus Response Act is a temporary rule, meaning that this rule is effective through December 31, 2020 and will not affect the FMLA after December 31, 2020.\textsuperscript{14}

The Secretary of the Department of Labor was granted authority to issue regulations “as necessary, to carry out the purposes of the FFCRA, including to ensure consistency” between the EPSLA and the EFMLEA.\textsuperscript{15}

The Department of Labor was able to promulgate this regulation without going through Notice and Comment rulemaking under the good cause exception to the federal Administrative Procedure Act (APA) Section 553(b)(B).\textsuperscript{16} The FFCRA authorizes the Department to issue regulations under the EPSLA and the EFMLEA pursuant to the good cause exception of the APA.\textsuperscript{17}

Because of the rapid escalation of COVID-19, notice and comment rulemaking “\textit{would likely delay final action on this matter by weeks or months, and would, therefore, complicate and likely preclude the Department from successfully exercising the authority created by sections 3106 and 5108. Moreover, such delay would be counter to one of the FFCRA’s main purposes in establishing paid leave: enabling employees to leave the workplace now to help prevent the spread of COVID-19.}”\textsuperscript{18}

This rule was able to go into effect immediately under 5 U.S.C. 553(d)(3) based on the showing of good cause. The FFCRA authorizes the Department to issue regulations that are effective immediately under the EPSLA and the EFMLEA pursuant to this good cause exception to the APA.\textsuperscript{19}

**Potential Legal Challenges**

Disaffected members of the public have several options for challenging this temporary rule’s enactment including:

**Challenging the Lack of Notice and Comment Rulemaking**

Because these requirements were issued in the form of a temporary rule pursuant to the good cause exception of the federal Administrative Procedure Act Section 553(d)(3), one way of challenging this rule is

\textsuperscript{10} See \textit{id.} at Question No. 59.
\textsuperscript{14} See 85 F.R. 19326 (April 6, 2020).
\textsuperscript{15} See \textit{id.}
\textsuperscript{16} See \textit{id.} at 19342.
\textsuperscript{17} See \textit{id.} at 19342.
\textsuperscript{18} \textit{Id.}
\textsuperscript{19} See \textit{id.}
by arguing that this rule’s enactment did not meet the requirements of this exception.

Agencies are permitted to forego Section 553’s notice and comment requirement if “the agency for good cause finds” that compliance would be “impracticable, unnecessary, or contrary to the public interest.” The APA does not explain what precisely constitutes good cause, but courts have found that there are three main categories of good cause cases: (1) emergencies; (2) contexts where prior notice would subvert the underlying statutory scheme; and (3) situations where Congress intends to waive Section 553’s requirements.

In this case, the Paid Leave Under the Families First Coronavirus Response Act temporary rule not proceeding through notice and comment rulemaking was justified to the exigency of the COVID-19 pandemic. One could challenge this rule by arguing that there was sufficient time for this rule to be made according to notice and comment rulemaking requirements. The other two categories of contexts where prior notice would subvert the underlying statutory scheme and situations where Congress intends to waive Section 553’s requirements are not likely to apply here.

Challenging the Department of Labor’s Deference

This temporary rule was made using informal rulemaking and is subject to the \textit{Chevron} test in order to determine the agency’s deference in creating the rule.

The FFCRA explicitly states that “the Secretary of Labor shall have the authority to issue regulations for good cause.” Additionally, the rule clearly administers the requirements described by the FFCRA in order to extend paid leave requirements.

Therefore, the two \textit{Mead} prerequisites have been met and the \textit{Chevron} test may be applied.

The first problem to address under this temporary rule is which part of the rule is being contested. The FFCRA clearly expresses the overall requirements for extended paid leave, but is largely silent on how the law should be administered. The FFCRA will likely be found ambiguous or silent on issues related to the administration of the act. Those actions under this temporary rule would receive the deference in \textit{Chevron} step two.

However, the FFCRA does list some administration requirements that may not receive deference. Similarly, specific requirements under the FCRA, such as the covered circumstances for paid leave, may not be ambiguous and would not receive deference.

\begin{itemize}
\item See 85 F.R. 19326 (April 6, 2020).
\end{itemize}
Enforcement Policy for Face Masks and Respirators During the Coronavirus Disease (COVID-19) Public Health Emergency (Revised)

Michael Baddar & Samuel Shaffer
May 2020

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4: Impact on Existing Law
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Who Is Affected?
Producers and Consumers of PPE, beware.

- Any new or existing producer of facemasks, face shields, and N95 respirators
- The medical community and any other large-scale purchaser of facemasks, face shields and N95 respirators
- Any essential business that requires workers to wear PPE.

“Initially, authorities in the West encouraged the public not to use masks. Probably driven by the predicted shortage of masks for medical staff. This is changing now that we include the perspective that while the mask is not 100% effective, in emergency situations even a small reduction of risk is better than no reduction at all.”

-Dr. Timothy Sly, Epidemiologist and Professor, Ryerson University

Core Legal Issues
This guidance document relaxes FDA approval requirements for the production of certain types of facemasks, face shields, and surgical masks. The regulation being relaxed is the requirement for FDA approval prior to medical devices entering the market found at 21 U.S.C. §360(k).

This document raises the following legal questions:
Q1: Which types of devices are covered by this guidance document?
Q2: Which aspects of the current regulatory scheme are being relaxed for the devices implicated in this document?
Q3: Because the guidance document specifically withholds these exemptions from products that create...
an “undue risk in light of the public health emergency,” what risk to the public health constitutes “undue risk” for the purposes of this guidance document?

### About the FDA Enforcement Policy Guidance

Presented is an FDA guidance document pertaining to face mask and respirator production during the current COVID-19 Pandemic:

1. It outlines the current restrictions on face mask and respirator production and also highlights which regulations will not be enforced during the current Pandemic.
2. It advises purchasers of alternatives to FDA approved masks in the event that FDA approved masks and respirators are not available due to the increased demand.
3. It also advises consumers that they should exercise extra caution when using these alternatives because they have not been intensively studied by the FDA.
4. Finally, the document sets out the requirements for the emergency use authorization of decontaminated single use PPE’s that would allow for reuse.

In general terms, this FDA guidance document is designed to cover any facemask, face shield, or respirator that falls under the definition of “medical device” found in Section 201(h) of the Federal Food Drug and Cosmetic Act [Codified at 21 U.S.C. §321(h)].

More specifically, the guidance is designed to apply to the following types of products: facemasks, face shields and N95 respirators not intended for a medical purpose, facemasks intended for a medical purpose that are not intended to provide liquid barrier protection, face shields intended for a medical purpose, surgical masks intended to provide liquid barrier protection, and alternatives when FDA-cleared or NIOSH-approved N95 respirators are not available.

### Impact on Existing Law

If the device is compliant with Food Drug and Cosmetic Act (FD&C Act) Sec. 201(h), the following statutes and regulations are waived:

- FD&C Act Sec. 510(k) & 21 CFR 807.81 - Prior Submission of a Premarket Notification
- 21 CFR 807 - Registration and Listing Requirements
- 21 CFR Part 820 - Quality System Regulation Requirements
- 21 CFR Part 806 - Reports or Corrections and Removals
- 21 CFR Part 830 & 21 CFR 801.20 - Unique Device Identification Requirements

If the device is not compliant with FD&C Act Sec. 201(h), the following statutes will remain in effect:

- FD&C Act Sec. 510(k) & 21 CFR 807.81 - Prior Submission of a Premarket Notification
Potential Legal Challenges

This guidance document is an agency interpretation of its own regulatory actions, and as such, it is likely entitled to Skidmore deference in the event of any challenge. The criteria that will be used to assess the permissibility of the document under Skidmore are:

- The thoroughness of the agency’s investigation
- The validity of its reasoning
- The consistency of its interpretation over time
- Other persuasive powers of the agency
1. **Who is Affected?**

The groups that are predominately affected by this FDA guidance document are (1) any new or existing producers of facemasks, face shields, and N95 respirators, (2) the medical community and any other large scale purchaser of facemasks, face shields and N95 respirators, and (3) any essential business that require workers to wear PPE.

One of the primary goals of this document is to relax the regulatory procedures required when new products are introduced into the market. Because the relaxation comes at the pre-market stage, manufacturers that are already making facemasks and face shields that are contemplated by the guidance document likely will have already received FDA premarket approval. Manufacturers that have previously manufactured these kinds of masks and are seeking to release new products that would ordinarily need to be submitted for FDA premarket approval will be able to use the new procedures outlined in this guidance document.

2. **Core Legal Issues**

Which devices are covered by this guidance?

In general terms, this FDA guidance document is designed to cover any facemask, face shield, or respirator that falls under the definition of “medical device” found in Section 201(h) of the Federal Food Drug and Cosmetic Act [Codified at 21 U.S.C. §321(h)]. More specifically, the guidance is designed to apply to the following types of products: facemasks, face shields and N95 Respirators not intended for a medical purpose, facemasks intended for a medical purpose that are not intended to provide liquid barrier protection, face shields intended for a medical purpose, surgical masks intended to provide liquid barrier protection, and alternatives when FDA-cleared or NIOSH-approved N95 respirators are not available.

It is worth noting that when the FDA refers to “intent” in any of these categories of products, they are mainly referring to the intent ascribed to the device by the manufacturer of the product. This intent is typically evidenced by the battery of testing protocols that the product is subjected to as well as...
the labeling and marketing that accompanies the device when it is sold.4

The FDA has also alluded to the fact that if a device is not a “medical device” as contemplated by Section 201(h), then it categorically does not fall under the regulatory authority of the FDA, and thus is not covered by the guidance document.5

What regulatory standards are being relaxed for qualifying devices?

This guidance document essentially issues an Emergency Use Authorization (EUA), which is typically defined as a vehicle by which FDA may achieve maximum regulatory flexibility while assuring the safety and availability of certain products and devices.6 So, for the above-mentioned categories of devices, which regulatory standards are being relaxed to ensure maximum flexibility?

In broad strokes, the EUA issued in this guidance document waives the FDA review requirement that is usually required for medical devices in Section 510(k) of the Federal Food Drug and Cosmetic Act [Codified at 21 U.S.C. §360(k)].7

This section requires a manufacturer of covered products to submit a report to the FDA at least 90 days prior to the introduction of the product. This report should include information regarding (1) the class in which the device is included under the Act or an explanation of why the device does not fall into a particular category and (2) a summary of the actions taken to comply with the requirements of the Act including things like clinical trial data and certifications the device has received.8

While the EUA does waive this significant aspect of the usual regulatory process, there are still a number of requirements in place for products that fall under the scope of this guidance document.

Devices that are covered by this document must still be tested prior to their introduction to the market.9 The particular standards that must be met through this testing are ascribed via the guidance document to each category of device individually.10 Many of these testing standards and procedures are the same as those required of medical devices prior to the issuance of this guidance document.11 So, when that is the case, the primary regulatory

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4 See Id.
6 Id. at 8; FDA WEBINAR: ENFORCEMENT POLICY FOR PERSONAL PROTECTIVE EQUIPMENT (PPE) DURING COVID-19: IMMEDIATELY IN EFFECT GUIDANCE (Apr. 6, 2020) 12.
8 21 U.S.C §360(k).
9 FDA WEBINAR: ENFORCEMENT POLICY FOR PERSONAL PROTECTIVE EQUIPMENT (PPE) DURING COVID-19: IMMEDIATELY IN EFFECT GUIDANCE (Apr. 6, 2020) 22.
11 See Id.
relaxation will be the waiver of the FDA review requirement.

The other main requirement that must be met for medical devices under this guidance document is the labeling requirement. Any device that is produced and marketed under this guidance document must be labeled in accordance with the terms of the document to reflect the purposes for which it is designed to be used. Any language reflecting the purpose of the device must be consistent with the terms used in the guidance document.

While these requirements are still in place for specific categories of medical devices, there seems to be significant discretion given to manufacturers as to which category they decide to place their product into, so long as certain standards are met.

What constitutes “undue risk” that would disqualify a product from receiving these exemptions?

The guidance document provides a fairly major caveat to the exemptions listed in the previous section. Any device that would create an “undue risk in light of the public health emergency” will not be afforded the relaxed regulatory standards that are created by this guidance document. The term “undue risk” is somewhat ill-defined in the guidance document itself, but its definition becomes a bit clearer when compared to other recent FDA guidance documents that use it.

The FDA has recently issued a number of guidance documents that affect the regulatory standards surrounding the distribution of certain medical products and devices. Some of these other pieces of guidance utilize the term “undue risk” to indicate a status that would render the product ineligible for the relaxed regulatory standards contained in the EUA. After a review of the comparative uses of the term “undue risk” it becomes clear that the most prominent usage of the term is made in reference to the labeling and purported uses of the product.

The FDA seems to be primarily concerned with the accuracy of the labeling that accompanies the devices to be distributed under these new regulatory standards. The main concerns surrounding the labeling seem to be (1) that the device fits within an appropriate category as contemplated by the proper guidance document and

12 FDA WEBINAR: ENFORCEMENT POLICY FOR PERSONAL PROTECTIVE EQUIPMENT (PPE) DURING COVID-19: IMMEDIATELY IN EFFECT GUIDANCE (Apr. 6, 2020) 22.
13 Id.
15 See e.g. U.S. FOOD & DRUG ADMIN., ENFORCEMENT POLICY FOR CLINICAL ELECTRONIC THERMOMETERS DURING THE CORONAVIRUS DISEASE 2019 (COVID-19) PUBLIC HEALTH EMERGENCY (2020); U.S. FOOD & DRUG ADMIN., ENFORCEMENT POLICY FOR GOWNS, OTHER APPAREL, AND GLOVES DURING THE CORONAVIRUS DISEASE (COVID-19) PUBLIC HEALTH EMERGENCY (2020); U.S. FOOD & DRUG ADMIN., ENFORCEMENT POLICY FOR STERILIZERS, DISINFECTANT DEVICES, AND AIR PURIFIERS DURING THE CORONAVIRUS DISEASE 2019 (COVID-19) PUBLIC HEALTH EMERGENCY.
16 Id.
17 See id.
(2) that the consumer is accurately appraised of the intended uses of the device.\textsuperscript{18}

The accuracy of categorization seems to be emphasized because that categorization is what determines the applicable standards to be applied in lieu of a formal review that usually takes place in the section 510(k) FDA review process.\textsuperscript{19} Each category of medical device receives its own set of safety and flammability standards as well as a particularized testing protocol that must still take place even in light of the EUA.\textsuperscript{20} These standards are almost entirely applied based on the categorization of the particular piece of equipment.

With that in mind, it seems that the primary concern of the FDA when it comes to “undue risk” is the medical device is properly categorized to fit its intended uses and that that categorization is accurately passed on to the consumer via the labeling of the product. The risk enters the equation when it becomes possible that a consumer could believe that the device offers protection that has not been ascertained by proper testing and compliance with safety standards. This risk, in certain scenarios, could be significant enough to revoke the waiver of the 510(k) review process by the FDA.

3. About the Document

This document is an FDA guidance document pertaining to face mask and respirator production during the current Pandemic. This document was released on April 2, 2020 and was intended to replace an earlier document that was released by the FDA on March 25, 2020. Primarily, it outlines the current restrictions on face mask and respirator production and also highlights which regulations will not be enforced during the current Pandemic. It advises purchasers of alternatives to FDA approved masks in the event that FDA approved masks and respirators are not available due to the increased demand. It also advises consumers that they should exercise extra caution when using these alternatives because have not been intensively studied by the FDA. Finally, the document sets out the requirements for the emergency use authorization of decontaminated single use PPE’s that would allow for reuse. Since before this pandemic the PPE’s were considered medical waste after use, this represents a large and necessary policy shift. The guidance document lays out (1) what information various firms need to report (2) which PPE’s are allowed to be decontaminated and reused (3) the duration that this guidance is in effect.

4. Impact on Existing Law

As outlined in the document itself, the Emergency Use Authorization it creates alters compliance with the existing statutory and regulatory scheme in the following ways:

a. If the device is 201(h) compliant the following statutes and regulations are affected by being waived:

Prior submission of a premarket notification outlined in Food Drug and Cosmetic Act Sec. 510(k), Registration and Listing requirements

\textsuperscript{18} See Id.
\textsuperscript{19} See U.S. FOOD & DRUG ADMIN., ENFORCEMENT POLICY FOR FACE MASKS AND RESPIRATORS DURING THE
\textsuperscript{20} See Id.
in 21 CFR 807, Quality System Regulation requirements in 21 CFR Part 820, reports or corrections and removals in 21 CFR Part 806, and Unique Device Identification requirements in 21 CFR Part 830 and 21 CFR 801.20 are all waved if the PPE device meets the definition of approved medical device under 201(h) of the FD&C Act.21

b. If the device is not 201(h) compliant the following statues and regulations are implicated by specifically still being required:


5. Potential Legal Challenges

Given the nature of the current crisis and the fact that many non-medical trained actors are being required to deal with PPE for the first time, there is sure to be confusion on the regulations involving these PPE.

One of the first things the FDA wants to make clear is the following:

“The FDA recognizes that, when alternatives, such as FDA-cleared masks or respirators, are unavailable, individuals, including healthcare professionals, might improvise PPE. The FDA does not intend to object to individuals’ distribution and use of improvised PPE when no alternatives, such as FDA-cleared masks or respirators, are available.”

As such the guidance document gives us one standard we can rely on for a defense. Simply put, the FDA is not coming after you if you have no choice but deviate from the guidelines, whereas sticking to the guidelines would leave you unsafe and without any PPE.

Going further, should you wish to challenge any part of the guidance document, it is important to understand how much deference will be given to this document. This is a guidance document in which the FDA is interpreting its own regulations. Under the current standard set forth in Mead V. United States, this would win the document Skidmore deference in almost every case. Under Skidmore the following criteria are evaluated to see how much deference the document should get:

- The thoroughness of the agency’s investigation
- The validity of its reasoning
- The consistency of its interpretation over time
- Other persuasive powers of the agency

While overcoming Skidmore deference is not impossible it will create a difficult barrier to any legal challenges.

22 Id.
Finally, the document can be challenged on the grounds that it was deficient in terms of notice and comment rulemaking. While the document is undergoing notice and comment currently, it was implemented without prior notice and comment due to an ongoing emergency. The FDA justifies this by pointing to 21 CFR 10.115(g)(2) which states:

“FDA will not seek your comment before it implements a Level 1 guidance document if the agency determines that prior public participation is not feasible or appropriate.”

The list of appropriate steps the FDA must take are codified in 21 CFR 11.115(g)(2) as:

(A) Publish a notice in the Federal Register announcing that the guidance document is available;

(B) Post the guidance document on the Internet and make it available in hard copy;

(C) Immediately implement the guidance document; and

(D) Invite your comment when it issues or publishes the guidance document. Paragraph (h) of this section tells you how to submit your comments.

Therefore if you attempt to bring a challenge against the deficiency of notice and comment you must contest that either COVID-19 and the current situation do not constitute an emergency for which public participation in notice and comment was not feasible or appropriate or show the FDA has been deficient in performing any of the statutory requirements of implementing a guidance document without prior participation listed above.