KP LAW eUpdate

# FAQS FOR MUNICIPAL EMPLOYERS ON THE NOVEL CORONAVIRUS COVID-19 UPDATED - March 21, 2020

The recent outbreak of the COVID-19 virus has raised many issues for municipal employers. There are numerous personnel-related questions that arise in the event of a department, building, or government closure, and mandatory or voluntary quarantines. Because of the significant local variations in terms of employee demographics, unionized versus non-unionized staff, and locally-adopted policies, procedures and by-laws, the answers to these questions may not necessarily be the same from community to community. Additionally, President Trump recently signed the Families First Coronavirus Response Act (Families First Act), creating federally mandated paid leave for many employees. The Act will take effect no later than April 2, 2020, which is 15 days following its March 18th enactment. While the statutory language is less than clear, this appears to mean that employers have until April 2nd, but no later, to implement the relevant provisions.

In light of the adoption of the Families First Act, we have updated our previously-issued employment-related "Frequently Asked Questions (FAQ)" and responses, reflecting impacts made by the Act. The responses to the questions outlined below are, out of necessity, general in nature and may well differ depending upon employee matters in your community and specific factual circumstances. As a result, you are encouraged to contact Town or Special Labor Counsel for specific personnel advice as to how to handle the employment impacts of governmental closures and/or quarantines.

**What are the effects of the Families First Coronavirus Response Act passed by Congress on March 18, 2020?**

The Families First Coronavirus Response Act ("the Act") introduces two requirements affecting all municipalities and other political subdivisions of the Commonwealth: Paid Sick Leave and Paid Family and Medical Leave. The provisions of the Act apply through December 31, 2020, but no later. Critically, the Act allows employers to exclude health care providers or "emergency responders" from these new legal entitlements.

*Paid Sick Leave*

Regardless of how long an employee has worked for the employer, the employer must provide 80 hours of additional Paid Sick Leave to full-time employees, and fewer hours to part-time employees based on their average hours of work, if the employee is unable to work (in person or remotely) because:

(1) the employee is subject to a COVID-19-related quarantine or isolation order at the Federal, State, or local level;

(2) a health care provider has advised the employee to self-quarantine due to COVID-19 concerns;

(3) the employee is experiencing COVID-19 symptoms and seeking a diagnosis;

(4) the employee is caring for an individual subject to the order or advice described above;

(5) the employee is caring for a child due to COVID-19-related school closure or professional child care provider unavailability; or

(6) the employee is experiencing other substantially similar conditions specified by the Secretary of Health and Human Services

Employees on Paid Sick Leave shall be paid at their regular rate if on leave for reasons (1)-(3), but no more than $511 per day. If on leave for reasons (4)-(6), they shall be paid 2/3 their regular rate, no more than $200 per day.

If one of these reasons apply, an employee must receive their leave, and the employer cannot require that they provide their own coverage. Additionally, it is unlawful for an employer to require that an employee eligible for Paid Sick Leave to use any other form of paid leave prior to using their 80-hour entitlement.

*Paid "Public Health Emergency Leave under the FMLA*

Regarding Paid Family Leave, the Act amends the Family and Medical Leave Act (FMLA), establishing "Public Health Emergency Leave" as a new entitlement for leave under the FMLA, but with its own additional provisions. Note that the Act significantly changes the eligibility requirements **for this type of leave only**. Thus, to be eligible, an employee need only have worked for the employer for at least 30 calendar days. The employee is not required to have worked for at least twelve months and for 1,250 hours prior to the leave, nor is eligibility for this leave conditioned upon the employee working for an employer who employs at least 50 employees within a 75 mile radius of the employee's worksite. This new Paid Family Leave enables eligible employees to care for children during school closures or due to unavailability of their professional child care provider, as follows:

- 10 days (2 weeks) of unpaid leave, although an employee may substitute any accrued leave in order to be paid during that period. Practically speaking, in our opinion, an employer cannot preclude an employee from using Paid Sick Leave to cover this period, in a situation where they are simultaneously eligible for Paid Sick and Paid Family Leave.

- Up to 10 weeks of paid leave, which amount may be reduced for employees who have already used some of their standard FMLA allotment during the preceding year. Employees shall be paid at 2/3 their regular rate, no more than $200 per day.

At this point, there is a question as to the employer's discretion to evaluate whether an employee is truly unable to work as a result of child-care concerns, such as where another adult in the same home is not working (for whatever reason) and therefore is available to care for the same children.

Finally, although the Act creates a tax credit for employers intended to help cover the costs of these new forms of paid leave, this tax credit **does not** apply to municipal governments as subdivisions of the Commonwealth, nor to any agencies or instrumentalities of such state or local governments.

**Can an Employer require an Employee to go home if the Employee exhibits potential symptoms of COVID-19 or if the Employer has credible information that the Employee or a member of their household has been in direct contact with somebody who has been diagnosed with or is showing potential symptoms of COVID-19?**

If an employee comes to work and the employer has a reasonable belief that the employee is sick because the employee is showing symptoms of COVID-19, an employer may send the employee home. The employer should use caution when making the decision, ensuring that the decision is based on a reasonable suspicion that the employee may have COVID-19, to avoid potential violations of the anti-discrimination statutes, including the American with Disabilities Act (ADA).

The same action can be taken if the employer has credible information that the employee or a member of their household has been in direct contact with somebody who has been diagnosed with or is showing potential symptoms of COVID-19. These decisions should be based upon credible, factual and confirmed information. Employees should be encouraged to self- report, which obviously could be affected by the employer's decision on how the employee will be treated while on leave. Please note that under the Families First Act, employees who are experiencing COVID-19 symptoms and are seeking a diagnosis are entitled to Paid Sick Leave, as outlined above. For more information on the symptoms associated with COVID-19, please refer to the Centers for Disease Control and Prevention (CDC) website that can be found at https://www.cdc.gov/cornoavirus/2019 .

**Does the Employer have to pay the Employee who is sent home by the Employer?**

The answer depends upon the terms of the employee demographics, unionized versus non-union staff and locally-adopted policies, procedures and by-laws. The answers to this question may not necessarily be the same for each community. Please be advised that following the enactment of the Families First Act, employees have fairly broad entitlements to Paid Sick Leave. Practically speaking, it is highly likely that a situation where the employer sends the employee home in connection with the COVID-19 outbreak will result in the employee being entitled to Paid Sick Leave under this new federal law.

Prior to the adoption of the Families First Act, we had advised that, in general, an employer may do the following.

> **Union employees** – In general, the employer should pay the employee if the employer requires the individual to go home.
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> **Non-union/Non-exempt (hourly employee**) - The employer does not have to pay the employee under the Massachusetts Wage Act for hours not worked. The employer, however, should consider the implications of requiring an employee to leave work and stay home without pay if that employee is later determined not to be diagnosed with COVID-19. Under the current circumstances, employers should do everything possible to encourage employees who are exhibiting symptoms of COVID-19 or who have been in contact with someone who has COVID-19 to stay home and out of the workplace.

**Non-Union/Exempt (salary) employees** – In general, an exempt employee who is sent home by the employer should continue to be paid the employee's salary. Exempt employees must be paid their salaries even if they work only a few hours during the workweek.

This guidance remains valid, for circumstances not covered under the Families First Act (for instance, situations not related to the COVID-19 virus outbreak).

**Can the Employer require an Employee to use sick leave or other accrued time off for days missed?**

As a preliminary matter, under the Families First Act, employees entitled to Paid Sick Leave as outlined above, including because they are subject to a government order to quarantine or isolate, because a health care provider has advised them to self-quarantine, or because they are exhibiting symptoms and seeking a diagnosis, cannot be required to use accrued time before they use their Paid Sick Leave. Once employees have exhausted their own Paid Sick Leave, and if they are not otherwise entitled to Paid Family Leave, the following fact-specific situations arise:

**Union** - If the employer sends the employee home, the employer cannot require the employee to use sick leave or other accrued time off for the days missed. If the employee subsequently tests positive for COVID-19, at that time, the employer may require the employee to use accrued sick time or other accrued leave in order to be paid. If the employee does not have any accrued time remaining, the employee may consider requesting time from a sick leave bank, if applicable.

**Non-Union/Non-Exempt** - If the employee is not a member of a union and is a non-exempt (hourly) employee, the employer may require that the employee use sick leave or other accrued time off to be paid for days missed.

**Exempt Employee** - If the employee is an exempt employee, the employee should not require the employee to use sick leave or other accrued time off for days missed in order to be paid. If the employee subsequently tests positive for COVID-19, at that time, the employer may require the employee to use accrued sick time or other accrued leave.

**Can the Employer require a "fitness for duty exam" and/or require an Employee to get note from health care provider?**

If the employer has a reasonable belief that the employee has COVID-19, the employer may send an employee to the employer's physician for a fitness for duty examination at the employer's expense. If an employee tests positive for COVID-19 and is out of work as a result, an employer may require the employee to provide a note from a health care provider that the employee is fit to return to work, prior to returning to duty.

**If Employee "self-quarantines," does the Employer have to pay the employee for time not worked?**

If the employee "self-quarantines" and does not come into work because the employee is experiencing COVID-19 symptoms and seeking a diagnosis, or has been advised by a health care provider to self-quarantine due to COVID-19 concerns, the employee is eligible for Paid Sick Leave under the Families First Act.

If neither two circumstances exist, the employer does not have to pay the employee who "self-quarantines," and may require the employee to use sick leave or other accrued time in order to be paid.

Note that if an employee is subject to a local, state, or federal quarantine order, this is not a "self-quarantine" situation, *per se*. Paid Sick Leave is provided for in this situation, under the Families First Act.

**Does the Family and Medical Leave Act (FMLA) apply?**

It depends upon the reason for leave requested under the FMLA.

In general, an employee is not entitled to take FMLA leave to stay home in order to avoid getting sick. Prior to the Families First Act, an employee similarly was not entitled to FMLA leave to take care of a child solely due to a school closure (and not the serious illness of the child). Now, the Public Health Emergency Leave provision discussed above allows an employee to take FMLA leave to care for a child impacted by COVID-19 school or day care closures.

Moreover, an employee with COVID-19 may not have a "serious health condition" for FMLA purposes, although complications from COVID-19 may constitute a serious health condition. By definition, however, if an employee is hospitalized overnight due to COVID-19, or receiving ongoing medical treatment after a hospitalization for COVID-19, the employee has a "serious health condition" under the FLMA.

**If the Employer shuts down, does it have to pay its Employees?**

The answer depends again upon the terms of the employees demographics, unionized versus non-union staff and locally-adopted policies, procedures and by-laws. The answers to this question may not necessarily be the same for each community. An employer may always choose to pay its employees for not working during the closure. In general, an employer may do the following.

> **Union employees** – In general, an employer is only required to pay employees for hours worked. However, G.L. c. 150E, § 6 requires employers to bargain with union employees over mandatory subjects of bargaining such as wages, hours and terms of conditions of employment. Employers should not make unilateral changes to these conditions and must provide adequate notice to unions so that they may bargain over issues that may arise. The employer should pay the employee who the employer requires to go home, including during a shutdown even if due to a state of emergency declared by the state or local government entity. Employers should review their respective collective bargaining agreements for any terms that already exist, which may apply during a shutdown or state of emergency. The employer would have to notify the union of the change in condition, namely, sending employees home without pay, and bargain the change.
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> **Non-union/Non-exempt (hourly) employee** - The employer does not have to pay the employee under the Massachusetts Wage Act for hours not worked. Accordingly, if the employer closes its building(s) and the non-union, non-exempt employees are not working from home during the period of the closure, the employer does not have to pay the employee. The employer should consider the implications of sending

employees home without pay. The employer may always choose to pay its employees during the closure or the employee may use accrued leave in order to be paid.

**Non-Union/Exempt (salary) employees** – In general, an exempt employee who is sent home because the work place is closed does not have to be paid and may be "furloughed". However, we encourage employers to use extreme caution if that employee performs any amount of work while home, since they would need to be paid in that instance for actual work performed. As with other category of employees, the employer may always choose to pay its employees during the period of the shutdown.

Note that the Families First Act does not cover employer shutdowns, although there may be federal legislation passed in the future to address such situations.

**May an Employer require Employees to work from home?**

**Union employees** – As set forth above, G.L. c. 150E, § 6 requires employers to bargain with union employees over mandatory subjects of bargaining such as wages, hours and terms of conditions of employment. Requiring employees to work from home may be considered a change in work condition, requiring notice to the union and an opportunity to bargain.

**Non-exempt employees** – An employer should have a process in place for all non-exempt employees who work from home to report their hours, to ensure that the employee is not working overtime, or, if overtime hours are worked, that they are paid. Such processes may include requiring the employee to provide notification when they begin work, when they take breaks and when they are done work for the day, the same as should be done when the employee is physically at work. The employee should be required to submit timesheets for hours worked while at home.

Where the employer has converted to remote operations, the Families First Act provides that Paid Sick and Paid Family Leave shall be unavailable to employees who are able to "telework" for the reasons stated in the Act.

**If an Employee is diagnosed with COVID-19 and claims it is the result of contact while at work, does the Employee have claim for workers' compensation benefits or benefits under G.L. c. 41, § 111F?**

Typically, the contraction of a contagious disease is not considered a workplace injury. However, an employee may nonetheless apply for benefits. In doing so, the employee will have to show that the employee contracted COVID-19 while at work as opposed to somewhere else in the community. Please note that the answer to this question may be impacted by pending state legislation.

**What are the restrictions on sharing identification and information on Employee who potentially has been in contact with or shown symptoms of COVID-19?**

Employers should exercise caution regarding the use and disclosure of employees' medical information, under state law, including the Public Records Law, and the federal Health Insurance Portability and Accountability Act (HIPAA), and their implementing regulations. Absent narrow exceptions to the use and disclosure of employees' medical information, protected health information should not be disclosed.

Please be advised that HIPAA only applies to "covered entities", including medical providers or employer sponsored group health plans. Even if, however, the employer is not considered a "covered entity" under HIPAA, it is important to limit the disclosure of employees' private medical information. Disclosures of employees' medical information should only be made to authorized entities during a public health emergency or with the employees' written authorization.

**Can an Employer prohibit Employees from traveling internationally and domestically?**

An employer may limit or prohibit an employee from *work-related travel* both domestically and internationally. While an employer may not limit an employee's *personal* travel, an employer may inquire about an employee's travel, and advise the employee that if they travel to a country that CDC considers being at high risk (or take a cruise), they may be quarantined upon their return and sent home from work without pay (or be required to use paid accrued leave).

***Perhaps most important, remember that this is a fluid situation and advice may change depending on circumstances.***

Please feel free to contact your KP Law Labor and Employment attorney with any questions concerning labor and employment questions, and/or e-mail us at coronavirusinfo@k-plaw.com. We will be in touch with you as soon as possible.