

The Coronavirus and the Pennsylvania Public Employer—What Do We Do?

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If you have watched the news, listened to the radio or picked up a magazine, you have heard of COVID-19, commonly referred to as “coronavirus.” Coronavirus is a respiratory virus which is thought to have originated in Wuhan China in late 2019. Coronavirus displays many symptoms which may sometimes mimic the flu or a cold. According to the United States Center for Disease Control (“CDC”), coronavirus is typically spread person to person through moisture droplets created by coughing or sneezing. The droplets can also remain on surfaces where a person can touch them and subsequently infect themselves by touching the eyes, nose or mouth. Currently, the World Health Organization (“WHO”) has classified coronavirus as a pandemic, though the CDC has not yet made a similar official declaration.¹ Although coronavirus was first thought to spread regionally (with infected people who had either traveled to or were somehow connected to a region where the virus was already present), many cases in the United States now have involved community spread (where no known travel to infected areas has resulted in a person becoming infected).

As of March 13, 2020, Pennsylvania has twenty one confirmed or presumptively positive cases of coronavirus, with the largest amount in Montgomery County. Even though cases have already arisen in Pennsylvania, it is not too late for public employers to prepare for a response. In Pennsylvania, political subdivisions sit at a unique intersection when it comes to coronavirus issues. Obviously, municipalities, in cooperation with state and federal authorities, play a role in helping to protect their residents from infection. Separately, as an employer, political subdivisions, like their private sector analogues, must balance the safety and well being of their employees with the need to service their customers, i.e., their residents and business owners. However, unlike the private sector, some statutes do not apply to public employers (such as the Occupational Safety and Health Administration (“OSHA”)), while constitutional provisions restrict a public employer, unlike a private employer.

THE BASICS

Let’s start with some of the basics that apply to all employers. If possible, make sure that your municipality is providing sanitized wipes for employees with which to wipe down surfaces within municipal buildings. Encourage employees to wash their hands any time that they use the restroom and/or before they eat. Although it may seem like common sense, employers should remind employees to cover their mouths with their elbow when they cough or sneeze. To the extent possible, employees should also be advised to avoid personal contact with residents or vendors visiting the municipal building. Employees should also attempt to maintain a safe distance from visitors, whether it is accomplished by

¹ An epidemic is typically used to describe a health or other catastrophe which has impacted a geographic area and is spreading beyond control. By contrast, a pandemic typically refers to an epidemic which has spread beyond geographic borders, including internationally or globally. This classification (epidemic vs. pandemic) is important as it can dictate the steps which an employer can take to safeguard the workforce.

distance or by a physical barrier, such as a plastic partition. Employers should also review their air circulation and filtration systems.

In addition, employers should get the message out their employees that, if they are sick, they should strongly consider staying home. Employees are doing more harm than good by coming to work sick (particularly if they have respiratory and/or flu-like symptoms) and increasing the potential for the spread of coronavirus or other illness throughout the workforce. For employees who present with respiratory or flu-like symptoms, they should strongly be encouraged to seek medical treatment so that appropriate diagnostic testing can occur. Public employers should also be prepared to take a more relaxed approach to absences due to the need to care for a sick family member.

WHAT YOUR MUNICIPALITY SHOULD DO NOW

In addition to practical steps, public employers should also review logistical preparations. In this respect, the coronavirus should be viewed as and treated like other disasters, such as flooding or massive snowstorms. Employers should ensure that they have up-to-date contact information for all employees and a reliable way to contact them. A point person (as well as at least one backup) should be designated for contacting state and federal officials as necessary to report any issues. In addition, employers should prepare contingency plans for suppliers and vendors in case they are necessary.

Now is also the time to review collective bargaining agreements and handbooks regarding leave time, suspension or disruption of operations and whether such events require the municipality to pay employees in the event that the employees are required to stay home due to an inability of the public employer to function. In the case of a non-union environment, if the municipality has not already done so, it should adopt a policy addressing this contingency. In this policy, the public employer should take a definitive stand on the issue of whether or not employees will be paid in such cases or must utilize leave time.

Similarly, employers may wish to consider liberalizing leave time usage. This could include allowing employees to utilize leave time to care for ill family members. Before doing so, employers should communicate this change to non-union employees. This communication should expressly set forth the change to sick leave (as well as the unique factors which required it). It should also identify a benchmark where sick leave usage modifications will return to normal. For unionized employees, the employer should obtain a side letter identifying these points.

For public employees who qualify for leave under the Family and Medical Leave Act (“FMLA”), the public employer should ensure that Human Resources personnel are trained in determining when coronavirus issues trigger FMLA entitlement and when they do not. More than likely, if an employee is home sick with the coronavirus or a similarly debilitating illness, such time should be designated as FMLA time (subject to particular handbook or collective bargaining agreement provisions). Likewise, an employee suffering from coronavirus or similar infection may be eligible for accommodation under the Americans With Disabilities Act (“ADA”). Such accommodation might include telecommuting or reasonable recovery time. Depending upon the circumstances, time spent caring for certain ill family members may also be considered FMLA time. Conversely, an asymptomatic employee is not entitled to FMLA leave, except for testing, but, depending upon a given employer’s leave time provisions, the employer may allow or require the employee to be absent. In such a case, the employer may afford unpaid leaves of absence or authorize telecommuting due to concern about potential employee infection. Before doing so, employers may want to develop a policy which expressly sets forth the change to sick leave (as well as the unique factors which required it). This should identify a benchmark where sick leave usage modifications will return to normal. For unionized employees, the employer should obtain a side letter identifying these points.

EPIDEMIC V. PANDEMIC—WHAT DOES IT MATTER?

At the outset, employers may appear to be unconcerned with what classification the WHO and the CDC assigns to coronavirus. However, that classification significantly influences the scope of actions which an employer may take with regard to its employees. For instance, in an epidemic classification, an employer may ask all employees certain

questions regarding their ability to report to work due to non-illness factors such as appropriate childcare, reliance upon public transportation. These questions cannot be targeted to reveal medical information, however. An employer may not ask an employee if he or she suffers from a chronic health condition that would make them more susceptible to coronavirus.

In contrast, if a pandemic designation is made by the WHO, an employer has the ability to require individuals who display symptoms of infection to go home and to not report for work until infection free. An employer may also **mandate** that employees participate in infection control processes, such as washing hands. Likewise, an employer may take an employee's temperature during a pandemic (however, not every person infected with coronavirus will display a fever). In addition, when an employee calls out from work during a pandemic, an employer may ask the employee about specific symptoms of coronavirus, such as the presence of fever, vomiting, etc. Finally, if the CDC has recommended quarantine of individuals who traveled to certain areas, an employer may ask employees returning from travel (even personal travel) if they traveled to areas subject to quarantine if the employee traveled to such area. As noted previously, whether such leave due to a mandatory quarantine is with or without pay may be a subject of policy. In any case, your management/Human Resources team should be educated and up to date as to how they respond to employee absence issues and what steps they can legally take based upon the current designation of the coronavirus.

As noted above, the WHO had already made a pandemic designation. However, the CDC, although noting the WHO designation, has not yet made such a designation. A plain-language reading of the guidance of the Equal Employment Opportunities Commission ("EEOC") suggests that the scope of what an employer may do in regard to ADA and FMLA issues is somewhat contingent upon both organizations (WHO and CDC) making such declarations. Employers, in consultation with their labor counsel, will need to decide how much risk they are willing to take presently, and how aggressively they respond to the situation.

With regard to certain employees, such as first responders, additional, specialized messaging may be appropriate. In addition to generally educating employees about the risks of coronavirus and steps that they can take, first responders should receive guidance as to how to conduct their role if they come in contact with a person who is exhibiting signs of coronavirus. If your municipality utilizes dispatchers for police, fire and ambulance service, dispatchers should include in their interaction targeted questions regarding coronavirus symptoms (cough, fever, vomiting, international travel recently, etc.). Likewise, if the municipality has not already done so, a review of training and certifications is critical to ensure that first responders are up to date on infectious disease protocol and have the necessary equipment. In some emergent cases, advanced preparations may be impractical. However, if possible, EMTs and other individuals who have ready access to protective clothing and gear should be involved in situations where first responders encounter individuals who display coronavirus symptoms.

WHAT SHOULD YOU BE CONSIDERING FOR THE LONGER TERM

Due to the ever-evolving events, although an employer can make prudent plans, it must be prepared to react to in a flexible way based upon newly released information from healthcare professionals. For instance, a public employer may choose to maintain a requirement that an employee absent for three days or more must provide a medical excuse. Likewise, an employee out for a significant period of time may normally be required to produce a doctor's note to confirm fitness for duty. The employer should review and consider adopting policies that require any employee who has tested positive for coronavirus to remain out of work for a period of 14-days following the confirmatory test. Currently, return to duty notes/tests may be somewhat impractical. The number of testing kits available is unknown and, in any case, local physicians may not have access to them currently. Employers may wish to keep provisions which require a doctor's note before returning to work. However, employers should be mindful of the fact that, in the event that coronavirus spreads in the United States and in Pennsylvania, it is likely to overwhelm the medical community, both primary care providers and emergent facilities. In that case, resources may be at a premium, and a municipality may wish to consider waiving these requirements in some cases because resources are better spent treating cases.

Likewise, public employers need to assess how they treat traveling employees. The CDC recently released guidance counseling that employers should discourage non-essential travel. Unlike larger, national or international companies, a Pennsylvania public employer is unlikely to have employees traveling outside the country for municipal business. However, large group gatherings, as well as business travel to other areas of the Commonwealth could increase the potential for employee exposure and, consequently, spread of the virus. Given this guidance, a Pennsylvania municipal employer may want to reconsider authorizing such travel to high- risk destinations which would clearly include out of state/country travel, but may evolve into even further restrictions.² Similarly, large gatherings should be discouraged. The more difficult decision is what steps to take when an employee voluntarily travels to an area with a higher risk of infection. As noted above, although the CDC has discouraged non-essential travel, it has not expressly banned it. May a public employer impose a mandatory self-quarantine on an employee who voluntarily travels to a destination where travel is discouraged or forbidden? Unlike private sector employers who may impose such bans, public employers are somewhat at a disadvantage. However, several other factors may arrive at the same result. For instance, the CDC has enacted mandatory quarantines for individuals traveling to certain areas designated as high risk. Employers (public or private) are not permitted to frustrate such quarantines by demanding that such individuals report for work. Likewise, the federal government has imposed travel bans on European travel (with exceptions for United States citizens).

With regard to employees who have traveled but have not displayed symptoms, public employers are at somewhat of disadvantage, absent a mandatory quarantine imposed by the CDC. Specifically, the ability to travel internationally is considered a constitutionally protected liberty interest (and the ability of a US citizen to travel within the country enjoys heightened protection). Accordingly, if such interest is impinged, including through usage of a mandatory self-quarantine upon return, it may implicate some due process procedures which must be satisfied. In addition, such a course of action taken against an employee who displays no signs of infection could also give rise to a claim of being regarded as disabled under the ADA until such time as the CDC declares a pandemic. This is even more so the case when the employer purports to require an unpaid quarantine period or requires the employee to use leave time during the period. Prior to pursuing any such course of action, you should discuss it and obtain advice from your solicitor or labor counsel.

Regardless of the level of preparation, it appears clear that the coronavirus is going to disrupt the public sector. The real question will be the degree of disruption. However, there is still time for your municipality to take appropriate steps to prepare. Through planning and review of your existing procedures, you can position your municipality in the best possible way to minimize the disruption and maximize the safety and security of your workplace and fulfill your obligations to the citizens you serve.

This Labor & Employment Alert is intended to keep readers current on developments in the law, and is not intended to be legal advice. If you have any questions, please contact authors Scott E. Blissman at 215.851.8485 or sblissman@eckertseamans.com, Ryan J. Cassidy at 215.851.8531 or rcassidy@eckertseamans.com, or any other attorney at Eckert Seamans with whom you have been working.

² For instance, the United States State Department issues travel restriction levels for specific countries and regions based upon geopolitical, health and other risks. For example, a level of three is indicative of an area where non-essential travel should be reconsidered. A level 4 classification is a recommendation not to travel in that area. Accordingly, a municipality may tie decisions based upon travel to a region with a level of 3 or higher.