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First Responders and COVID-19: What do Law Enforcement and Fire Service Executives Need to Know?

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Without a doubt, COVID-19 presents one of the single greatest challenges for first responders in our lifetimes. The grand scale of this challenge, coupled with states of emergency declared all over Wisconsin, necessitates calculated and flexible approaches. Over the past several days, law enforcement agencies and fire departments have encountered many problems and questions associated with COVID-19 in the employment arena. When addressing those issues, executives must know and follow the employer's policies, collective bargaining agreements, and the local government's state of emergency.

The purpose of this *Legal Update* is to address many of the employment issues Chiefs, Sheriffs, Human Resources Managers, and Administration are encountering on a general scale so they can give careful thought as they approach these issues from a legal compliance standpoint while also continuing emergency response's mission of furthering public safety, health and order for the community. In the end, the goal is always to maintain the necessary level of confidence that the public has in each first responder to faithfully perform his or her responsibilities.

Employee Leave Questions

One of my law enforcement officers wants to take FMLA leave to help care for children who are home because schools are closed. Can my employee use FMLA leave? Can she qualify for FMLA or for benefits under the Families First Coronavirus Response Act that was passed into law on March 18, 2020?

The personal strain on employees is tremendous and that strain will grow. Employers should come up with creative strategies to address employee stress and burnout.

Congress passed the Families First Coronavirus Leave Act on March 18, 2020, which provides FMLA leave and COVID-19 sick leave use to provide care for children who are home from school when the employee cannot work (or telework). The law takes effect on April 2, 2020 and sunsets December 31, 2020. Additionally, the new law allows employers to carve out "emergency responders" from receiving protections under the Act, but the law does not provide a definition for the term "emergency responders."

Public employers should act immediately to adopt a new COVID-19 FMLA and Sick Leave policy. Absent clear regulations defining "emergency responders," to qualify for the exemption, the Policy should define exempted "emergency responders," with a focus on ensuring that definition applies to any employees who provide emergency response—whether police, fire, EMS and paramedics, correctional officers, water and electrical utility, social workers, health employees, public works, or other essential emergency response personnel. Failure to do so risks inadequate staffing and further drain on the remaining emergency response personnel.

For requests for leave such as this one made prior to April 2, 2020 and even for requests made after April 2, officers such as this are not eligible for COVID-19 protected FMLA or sick leave if the employer has taken the necessary steps to exempt emergency responders.

But there are other options for leave available to the officer. First, the officer may pursue entitlement to traditional FMLA to care for a family member with a serious health condition if that situation exists. Second, this officer may seek relief from work through use of other eligible paid time off such as paid leave, compensatory time, or through a shift trade.

Can a supervisor inquire as to a firefighter's current state of health related to COVID-19 symptoms even though the firefighter exhibits no observable symptoms? Can the employer conduct medical exams of a firefighter who may have been exposed to COVID-19?

The EEOC has confirmed that employers may ask employees if they are experiencing symptoms consistent with COVID-19, including fever, chills, cough, shortness of breath, or sore throat. If the employee identifies symptoms, then send the employee home.

An employer who has objective evidence and a reasonable belief that an individual has been exposed to or infected with COVID-19 could require the employee to submit to a medical exam to determine whether they are infected with COVID-19. In lieu of requiring a medical exam, the employer can require the employee to quarantine for the 14-day quarantine period recommended by the CDC. The employer can also require the employee to tell the employee of all the employee's contacts during the previous 14-day work period.

Employee medical information must be kept confidential as required by the ADA.

Can we order an employee to quarantine if the employee tests positive or is exposed to COVID-19? When can the employee return to duty and should we have a medical certification authorizing the employee to return to duty?

The employee exposed to COVID-19 or exhibiting symptoms should be ordered to leave work and follow instructions as to any quarantine requirement imposed by the employee's treating healthcare provider, local and state authorities, and the CDC.

At the end of the quarantine period, an employee who appears symptom-free should be required to confirm they are not infected and are fit to return to duty. Understandably, health care systems are strained. If an employee has been in quarantine for 14 days and is asymptomatic, then medical documentation certifying an employee's fitness to return to work may be waived. Any medical documentation received should be maintained as confidential and separate from the personnel file.

What responsibilities do we have to inform other employees if one of our officers tests positive for COVID-19 or has been in contact with a person who tested positive?

As of right now, you are not able to and should not disclose an employee's personal medical information, which includes a positive test for COVID-19. For now, the employer should advise employees who were in contact with this employee of the exposure or potential exposure. The employer should not identify the affected employee or release any additional medical information. Employees exposed to that employee where risk of infection may exist should be sent home for any imposed quarantine period. The employer must maintain the confidentiality of the identity of the infected employee.

Can we test employees for fever?

As we are faced with a widespread pandemic, the EEOC has provided guidance indicating the employer may test for fever if this pandemic influenza becomes widespread in the community as assessed by local and state authorities and the CDC. Testing for a fever is considered a medical exam. The merits of testing and monitoring body temperature are uncertain, as an elevated temperature may be evidence of an illness, but not COVID-19, and some infected individuals show no temperature. Employers should also assess what type of device they will use and the intrusiveness of the test. Before even considering such a test, the employer should properly verify their direct threat assessment of community spread or sustained community transmission of COVID-19 in their jurisdiction through communication with the local public health officer. Upon making a decision to engage in taking temperatures, a formal protocol should be put into place where fever testing is done by a trained health care professional and the information is kept confidential and provided only to the Chief, Human Resources, and other designated persons with legitimate need for that information.

As an alternative, the employer may simply encourage an employee to voluntarily take his or her temperature before work or encourage the employee to take the temperature while at work if the employee does not feel well.

Employee Travel Questions

One of our employees is returning from vacation in Florida and is driving through Illinois to get home. We see a large rise in reported community spread cases from those areas where the employee traveled. What should we do about having them report back to work? Now one of our other employees is talking about going on a short trip out of state. Can the employer prohibit essential emergency response personnel from traveling to a non-restricted area on the employee's personal time?

The employer should caution employees about travel and the consequences to employees being able to work when they return. The employer generally cannot prohibit otherwise legal activity, such as travel to a lawful area by an employee. However, the employer may choose to not authorize the leave of absence, if applicable, from work hours if the employer is confident based on available information that such travel presents risks harmful the organization, fellow employees, and the public. This issue may also be self-resolving if the employer has postponed or cancelled all non-protected leaves of absence (*i.e.*, leaves not protected by USERRA, FMLA and other legally protected absence).

Employers must remain up-to-date on CDC and local and state travel guidance. The CDC publicizes travel warnings for specific countries and provides guidance for domestic travel. Wisconsin DHS also provides guidance. Employers should identify which locations within the state and U.S. are community transmission areas. Due to community spread, CDC recommends that older adults and people of any age with serious chronic medical conditions should consider postponing nonessential travel.

On March 12, 2020, Wisconsin DHS, made the following pronouncement regarding domestic travel:

- **DHS recommends against all non-essential travel to any U.S. state where the CDC deems there is "sustained community transmission" of COVID-19.** As of March 11, 2020, the CDC has determined sustained community transmission is occurring in the states of California, New York, and Washington. This situation is rapidly evolving, and travelers should refer to the list of "States Reporting Cases of COVID-19 to CDC" on the "Coronavirus Disease 2019 (COVID-19) in the U.S." webpage for the most current list of states where CDC determines that sustained community transmission is occurring. (Click the + sign under the map to see a table that reports CDC's assessment of community transmission in the far right column.)
- For all travelers returning to Wisconsin from U.S. states where the CDC has determined that sustained community transmission is occurring, **DHS recommends that those individuals self-quarantine at home for 14 days and monitor for symptoms of COVID-19** (including fever and cough). The DHS COVID-19 webpage provides instructions on how to self-quarantine and self-monitor for symptoms.

The list and level of warning changes almost daily, particularly as travel advisories increase and individual states begin issuing specific emergency rules that may affect the employee's travel. Because of this changing environment, an employee that disregards travel warnings may jeopardize his or her ability to immediately return to duty thus putting unnecessary strain on coworkers and the community.

The employer and employee should respect the federal, state, and local government's travel warnings and recommendations regardless of when that warning is issued—whether prior to, during, or immediately upon return from travel. Employers should consult with and follow the recommendations of the local health department and the CDC.

Some restrictions are in place prohibiting employees from returning to work depending upon where they traveled. As of right now, travel within the United States does not result in mandatory testing, but that may change. That is separate from considerations when the employee returns and demonstrates symptoms. That is also separate from a local employer's decision to keep the employee in pay status and have them work remotely, if done for precautionary reasons. For municipalities, the ability to require remote work or requiring a leave is based upon the need to protect employees and continue necessary critical operations during this crisis. If the employee is not symptomatic, the employer should consider an assignment working remotely or use of the employee's paid leave as the employee has caused the need for leave. If the employee is symptomatic, the employer should consider sick leave and FMLA leave options.

Can we really tell the firefighter who traveled to an area of community spread to not come to work for two weeks or even longer?

Yes, but it is advisable to approach a decision to put an employee off of work only after receiving full information. It is also recommended that you warn the employee beforehand that they will be required to not report to duty, to self-quarantine, stay away from the firehouse and have no contact with coworkers for 14 days upon return under certain circumstances. Use the Wisconsin DHS guidance above and as updated. For example, if the employee has traveled to an identified community spread or sustained community transmission location, then a common sense approach before putting the employee out for two weeks is to do a case-by-case analysis including questioning the employee about the specific location where they traveled, the means of travel, their activities at the location and the nature and extent of the employee's contact with people in that location, including whether the employee practiced social distancing. The employee must be honest with you as this relates to the employee's fitness for duty.

Department leadership must educate the force about the importance of maintaining the ability to be ready for the next shift and to refrain from off-duty conduct that places fellow first responders at risk of infection. Members of the department should be able to count on one another to not engage in reckless off-duty behavior that may unnecessarily expose that employee or his or her coworkers to COVID-19. Department leadership should discuss travel with employees before the employee engages in travel to risky environments to try and work out a solution. No matter the decision made, an employer must monitor an employee returning from areas identified as high transmission areas for signs of illness and reinforce social distancing as much as possible for those employees.

What if the employee ignores the guidance and gathers with coworkers or reports to work with coronavirus symptoms after travel? Is discipline an option for engaging in such unsafe, reckless, and disregard for others?

A federal court of appeals recently held that it is not necessarily a violation of the ADA to terminate an employee who refuses to cancel personal travel to an area with a high risk of exposure to a deadly disease (Ebola). While some may view that outcome as extreme, others may view it as appropriate. It is important to remember that the U.S. is under a National Emergency and most communities are in a State of Emergency. These unprecedented circumstances necessitate that employees exercise good and judgment, due regard for coworkers and those they serve, and be accountable for engaging in avoidable risky behavior.

What can I ask if a firefighter has traveled, particularly to an area affected by community spread or sustained community transmission or has been exposed to the COVID-19 coronavirus?

Normally, the ADA prohibits employers from making disability-related inquiries and requiring medical examinations unless (1) the employer can show that the inquiry or exam is job-related and consistent with business necessity, or (2) the employer has a reasonable belief that the employee poses a "direct threat" to the health or safety of the individual or others that cannot otherwise be eliminated or reduced by reasonable accommodation.

However, these are not normal times and according to the EEOC, whether a particular outbreak rises to the level of a "direct threat" depends on the severity of the illness. The EEOC instructs employers that the assessment by the CDC or state or local public health authorities provides the objective evidence needed for a disability-related inquiry or medical examination.

During a pandemic, the employer does not have to wait until an employee develops symptoms to ask questions about exposure COVID-19 during recent travel. If the employee tells you they have been recommended to remain at home after traveling, then the employer should ask the employee (1) the specific locations where the employee traveled, (2) the methods of traveling (plane, bus, train), and (3) whether the employee has any symptoms of COVID-19, and (4) specific contact with coworkers since the employee's return.

<u>Quarantine Questions</u>

Our Deputies told us that they don't want to have to stay at home if they contract COVID-19 because they do not want to harm their families. Do we have to provide housing for them such as renting a cabin, hotel room, or using one of our buildings? Also, we heard the Fire Union in one of our communities told the Fire Chief the employer should provide separate housing for infected employees to protect their families. Do we have to do this?

The employer does not choose where an employee decides to quarantine. With that understanding, the employer does not have to provide separate housing for an employee infected with COVID-19. Upon learning that an employee has tested positive for COVID-19, the employer should mandate that the employee follow local, state, and federal quarantine protocols and doctor's orders. Additionally, the employer should prohibit the employee from being on or near department premises and from interacting with coworkers at all times until the employee is fully recovered. We do not recommend that the employer take on risk associated with the providing an employee's new living quarters, including responsibility for possible destruction, cleaning, and other harm. The employer must also be mindful that other employees of the government entity may be exposed to COVID-19, whether on the job or off the job, and will expect similar treatment by the employer if given to others.

Should we seek quarantine of an employee who had contact with a person who had direct contact with an infected person?

Probably not. The employee should be monitored and should apprise you of any changes in health.

Do we have to pay the employee while in quarantine when they claim they contracted COVID-19 from a work-related incident? Isn't the infection and leave away from work covered by worker's compensation?

With regard to worker's compensation, while the employer should report the employee's claim that the employee contracted COVID-19 as an infectious disease while at work, it is up to the worker's compensation carrier to evaluate the merits of the claim. These claims should be reported to the worker's compensation insurer, but we envision many of these claims will be denied as lacking causation or work-related proof since the virus is subject to community spread in many areas where the employee could contract it while outside of work.

The employee may be eligible for traditional state and federal FMLA leave or sick leave or other paid or unpaid leave if the employee is not eligible for FMLA.

The employer's policies and the collective bargaining agreement may address this issue involving compensation and must be reviewed. Generally, if the employing municipality properly exempts emergency responders from the coverage of the FFCRA signed into law on March 18, 2020, an employer will not be required to pay an emergency responder in quarantine for leave under the FFCRA.

The employer may also choose to pay the employee for a temporary period when the employee points to a specific incident where transmission could likely have occurred. In this situation, the employer is recognizing the hazards of the employee's position and treatment of the employee in relation to other similar events such as Hepatitis exposure when a suspect spits on an officer's face and mouth. As such, the specific facts will matter and pay may be an exception rather than a general rule.

<u>Labor-Management Relations Questions</u>

Do we need to communicate with Public Safety Union leadership right now?

Good labor-management relationships matter. Your employees look to the employer and to their union leadership for guidance. If the employer is not communicating with public-safety union leadership, the employer may be missing specific concerns that should be addressed, as well as ways to address particular problems from a broader perspective. You may also help union leadership be in a better position for them to address concerns raised by their members.

Union leadership may also wish to bargain with the employer regarding changes involving mandatory subjects of bargaining. The employer should, as always, err on the side of fulfilling the duty to bargain.

Can the City make unilateral changes to unionized employees' work schedules or duties in response to the COVID-19 crisis under the "emergency" provision and our management rights clause and the declaration of a State of Emergency?

The Municipal Employment Relations Act imposes on unions and employers the duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. Generally speaking, employers who make unilateral changes in defiance of the collective bargaining agreement face grievances and arbitration, and the employer's refusal to bargain and make unilateral change to the contract may also be subject to a prohibited practice complaint.

Some collective bargaining agreements contain provisions that allow for employer flexibility in determining work assignments, scheduling, and layoffs. Those provisions should be followed to the extent possible.

Every collective bargaining agreement is different, so the first place to identify authority for determining the employer's rights and obligations is to review the specific collective bargaining agreement. Specific language matters. The collective bargaining agreement may contain an "emergency" clause or similar provision ("force majure" or other similar language) that, when read in concert with the rest of the contract, relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise. Additionally, the collective bargaining agreement may specifically reserve the right of the employer to make changes to scheduling. However, the parties may have already negotiated the impact of such scheduling changes by requiring the employer to pay overtime for hours worked, for example, outside the employee's normal or regular shift. Under some circumstances, that overtime language may still control even though the employer can make the schedule change.

Whether the COVID-19 outbreak triggers the emergency clause in a contract, and the effect of that emergency clause on the provisions of the contract, will vary significantly based on the individual circumstances faced by that department. Each employer must truly assess that effect as it will be different for every employer.

Arbitrators have recognized that employers may have the power to address emergencies that develop as a result of factors beyond the control of the employer in an exceptional manner and that an employer should not be penalized for taking careful steps to cope with such unforeseen developments even if it necessitates failure to observe all provisions of the contract. Arbitrators have identified limits and standards to assess these situations with consideration of the following:

1. Management must not be directly responsible for the emergency;
2. The emergency must involve a situation which threatens to impair operations materially;
3. The emergency must be of limited time duration; and
4. Any violation or suspension of contractual agreements must be unavoidable and limited only to the duration of the emergency.

The specific facts matter. Some emergency situations necessitate quick, immediate, and decisive action. Others can be planned for and discussed over the span of a few days and where implementation may occur in a matter of days rather than seconds. As such, there are emergencies that can be addressed by continuing to follow the collective bargaining agreement, particularly if the dangers are minimal. However, where the circumstances are truly exceptional and dangerous to the operations of the employer, the employer may explore going beyond the collective bargaining agreement to cope with the problems.

When adjusting work schedules, the employer is well served to notify the union and employees of the anticipated changes, or at least to make a reasonable effort to give notice. Arbitrators will judge how the employer conducted itself. One arbitrator stated:

However, when management makes the decision not to operate the plant on a certain shift, its contractual exemption from reporting pay must be construed in a reasonable way—subject to a rule of reason. If management holds off its decision whether to operate a shift or not until a time that is so close to the actual shift starting time that all employees cannot be expected to get the word before they leave home, it is only fair that those relatively few employees in the circumstances of this case who reported for work in good faith believing that they were required to do so, should receive the reporting pay called for in the collective agreement.

We believe that good labor-management relationships matter and that the safest and most respectful course of action, also designed to reduce the risk of a prohibited practice complaint or grievance, is to notify the union in all cases and discuss the issue with them. This is recommended even if you believe that your particular situation might permit unilateral action under the contract as an emergency. The employer should give the union notice of a proposed change to the collective bargaining agreement so as to engage in meaningful bargaining over that change. The employer should indicate that time is of the essence and that a need for immediate change exists. If the union requests to bargain the impact of a change, then fulfill the duty to bargain. Do not wait until the last minute.

A simple discussion with the local union may result in a good plan and a voluntary agreement to temporarily suspend specific provisions of the collective bargaining agreement. Such efforts with some unions may prove more difficult thus requiring imposition of unilateral action by the employer if truly necessary and permitted by the contract. That unilateral action must be carefully tailored to address the emergency, and the employer must document the efforts made to address the situation. Certainly, if the union grieves such an employer decision, the political fallout for them may be significant. On the other hand, an arbitrator would have to find that these circumstances faced by the employer were not of such an emergent nature as to permit the employer to deviate from the contract requirements. The specific facts will matter and proper documentation by the employer of the reasons and need for deviating from the collective bargaining agreement are essential. The exercise of that right should be exercised sparingly with the focus on maintaining existing long-term labor management relationships.

One of my officers has informed me and the union president that he will no longer make any more traffic stops because personal contact with drivers could expose him to COVID-19. What rights do I have to assign work?

The employer has the right to assign work and particularly work within the scope of duties performed by that position. The employee may have a right to refuse work if a condition clearly presents a risk of death or serious physical harm, which does not appear to be the case at present. An employee can refuse work only when all of the following conditions are met:

- Where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so; and
- The employee refused to work in "good faith," meaning the employee must genuinely believe that an imminent danger exists; and
- A reasonable person would agree that there is a real danger of death or serious injury; and
- There isn't enough time, due to the urgency of the hazard, to get it corrected through regular enforcement channels.

Employers should work with health officials in developing safe practices for addressing different work situations recognizing, as the law does, that emergency response work is itself inherently dangerous. Consider adding safety equipment, social distancing, and all other proper precautions. Further, communicate often with employees for their input and to assure them that their protection is also a priority.

So what should law enforcement executives and fire service executives do?

Here are some helpful tips that you must consider during this challenging time:

- **Workplace Culture Matters**. Emergency responders play a vital role. Encouraging good neighborly habits among coworkers that fosters respect and furtherance of dedicated service with coworkers and the organization's mission, vision, and values is essential. Reaffirming expectations of being the best professional colleague, exercising careful behavior while both on- and off-duty, and maintaining readiness so that an employee can work the next duty shifts are essential and driven by culture. Promptly address issues of employee uncertainty. Employee uncertainty breeds unrest and unwarranted concerns, so giving thoughtful guidance and the comfort necessary to allow an employee to understand that the employer has taken the steps necessary to protect the work environment.
- **Engage, Respect, and Connect the Workforce**. Without any doubt, employees and their families are worried. Appreciation and empathy go a long way. Employees need affirmation that the employer recognizes home life is challenging at this time and that their commitment to public health and order, while necessary, is truly valued. Every organization will address this value differently but it should not go ignored.
- **Work with Administration and Human Resources**. Cooperation and collaboration by all departments within local government is necessary to combatting COVID-19 and maintaining public health and order. Local government leadership must act as a well-functioning unit.
- **Update Policies**. The FFCRA requires the employer to exempt "emergency responders" and health care providers. Policies should be carefully written to not just exclude firefighters or law enforcement officers. The policy must be written in a manner to address the various emergency responders who work for the governmental employer. Policy updates should be temporary and expire no later than December 31, 2020 unless renewed by the employer.
- **Communicate Leave Use Expectations**. Provide employees with clear expectations and procedures as it relates to absences from work, eligibility for leave, and cancelling of leave. Communicate consistent messages with messages from human resources. It is critical that employees alert their supervisor and human resources as to vacations or trips to areas which are domestic "hot-spots" or level 2 or 3 zones, as identified by the CDC. This information will be important for communications with employees and to evaluate any special concerns or actions to be taken to protect the workplace from exposure.
- **Monitor CDC and Local and State Health Guidance**. Information is rapidly changing. We envision that more states, including Wisconsin, as well as local governments, will move toward more restrictive measures to mitigate the spread of COVID-19.
- **Follow Employment Policies and Collective Bargaining Agreements**. If the employer believes it must ignore a specific provision of the collective bargaining agreement in order to do something different, then immediately plan, evaluate possible solutions, and engage local union leadership. We anticipate most local union leaders will understand and will also posit good proactive ideas to temporarily deviate from specific provisions of the collective bargaining agreement.
