



A Union of Professionals

COVID-19 Resources: Legal Guidance for Union Members

Your Rights During a Public Health Emergency

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The following provides brief answers and general guidance arising from situations presented to AFT locals related to the ongoing coronavirus health emergency. As outlined below, many of the answers to leave-related questions are state-specific, and locals should first look at their collective bargaining agreement to determine the leave policies that govern the workplace during the outbreak, and then engage with employers to bargain new leave policies and procedures to respond to the crisis.

How does a declaration of a public health emergency impact a collective bargaining agreement?

While most governors have broad powers to change statutes and regulations in a declaration of emergency, this power does not extend to collective bargaining agreements, particularly in the private sector. Locals should first check their contracts for references to a declared state of emergency to see if any provision speaks to or governs how the collective bargaining agreement is to be interpreted or functions during a declared

state of emergency. In some cases, a collective bargaining agreement may stipulate that some or all of the agreement is suspended in the event of a formal declaration of an emergency. For example, mandatory overtime or schedule posting provisions may include exceptions when a state of emergency has been declared. In others, it may provide enhanced leave protections or leave share policies for members. If the contract provides for a state of emergency, those provisions would control. Even if a contract provides for a declaration of emergency, locals should still engage in bargaining in response to a declaration, as described more below.

Find these resources and more at www.aft.org/coronavirus

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How should a union respond to a declaration of a public health emergency or a change in working conditions in response to the outbreak?

The appearance, and ongoing threat, of the new coronavirus is a change in working conditions for AFT members that warrants a discussion with the employer about how to handle employee occupational exposure to the coronavirus, and clear procedures for disruptions in healthcare and non-healthcare workplaces. Regardless of whether a public health emergency is declared by a governor, it is in both the employers' and employees' interest to agree to a leave procedure for suspected and confirmed cases of exposure to the coronavirus, as well as develop leave policies for the disruption of day-to-day work. As such, locals should engage in bargaining with their employer to determine everything from the type of notice employers should provide employees in the event of a workplace exposure or a disruption in services to the leave policies that will govern the workplace during the public health emergency, either as declared by a state official or the federal government.

Generally, employers must provide reasonable notice and the opportunity to bargain before changing working conditions. Given that circumstances are changing quickly, notice may be as short as the same day or the next day. Case law interpreting the federal National Labor Relations Act (NLRA) is clear that a private sector employer can unilaterally modify bargained-over working conditions to comply with a clear change in law. However, even if there is a new legal requirement, the employer must bargain with respect to how it is going to comply if more than one method of compliance is acceptable under the law. As such, in general, any change in law or regulation by an emergency declaration should not absolve an employer's duty to bargain with the union. On the other hand, the National Labor Relations Board,

the federal agency created to enforce the NLRA, has recently taken a broader view of management rights clauses in contracts allowing for more unilateral changes by private sector employers during the life of the contract. Nevertheless, locals should still demand to bargain over changes in wages, hours and working conditions, including but not limited to leave policy, in response to a declaration of a public health emergency, or in the absence of a declaration, a change in working conditions in response to the outbreak.

Public sector employers are governed by state public sector collective bargaining laws (bit.ly/CEPR-state-pe-cb). Many of these laws are modeled after the NLRA, and state courts and public sector labor bodies often look to the NLRA for guidance when interpreting their own bargaining laws. But, there may still be differences that could change the duties and rights of employers to change working conditions in response to the outbreak, and state officials such as a governor may use their broad emergency powers to assert more control over public employees' working conditions. However, we would still recommend public sector locals attempt to engage in bargaining to secure a fair and just leave policy, among other necessary policies to navigate the crisis.

Can members be required to use accrued leave if they are impacted by the coronavirus?

Absent contractual language that speaks directly to the issue or new agreed-upon policies and procedures following bargaining with the employer, a union member may be forced to use their paid sick or other accrued leave to continue to receive full wages in cases where they are being treated for the virus or are isolated or quantified because of exposure to the virus. Absent contrary state law or clear language in a collective bargaining agreement governing the situation, members could also be forced to use accrued leave for full wages in the event of a temporary

workplace closure or other disruption. As such, an agreement with the employer allowing for paid leave that does not subtract from any accrued leave for members is critical.

How should a union respond to unilateral changes in wages, hours or working conditions by an employer in response to the coronavirus outbreak or after a declaration of a public health emergency?

If an employer unilaterally changes working conditions or directs an employee to perform an action in violation of the collective bargaining agreement, locals should advise members to do as the employer commands. The union should then file a class-action grievance as this practice would impact many members of the bargaining unit, and fight to make a member whole for any lost wages or to force employer compliance to the collective bargaining agreement.

What protections do members have working without a collective bargaining agreement, or in addition to their collective bargaining agreement?

Congress recently enacted the Families First Coronavirus Response Act, which provides emergency paid sick and family leave to many workers. However, there are several exceptions to the new law that AFT members should be aware of. While the new law covers employees of public agencies such as K-12 schools and state

universities, it exempts private employers with more than 500 employees and provides the Department of Labor with the authority to grant waivers to employers of healthcare workers. Therefore, many large nongovernmental hospitals will be exempt, and hospital employers may seek waivers in the future.

For members that the new law covers, the new law provides full-time workers with full paid leave for two weeks—or 80 hours—of missed work that is related to the coronavirus. Part-time employees are entitled to the typical number of hours that they work in a typical two-week period. Pay is broken down in two ways: at the employee's regular rate, to quarantine or seek a diagnosis or preventive care for the coronavirus; or at two-thirds the employee's regular rate to care for a family member for such purposes or to care for a child whose school has closed or whose child care provider is unavailable due to the coronavirus. Emergency paid sick leave must be made immediately available to employees, regardless of how long they have worked for the employer.

This paid sick leave must be offered **in addition** to any paid sick leave offered in an employer policy (or guaranteed in a collective bargaining agreement), and an employer cannot require an employee to use their accrued leave prior to using the emergency paid sick leave (although an employee is free to do so). An employer cannot change its policy in response to the new law. This mandated paid sick time cannot carry over after this year and expires at the end of 2020.

In addition to paid sick leave, the new law provides, with the same employees exempted as noted above, emergency family and medical leave. Employees are covered as long as they have been on the job for at least 30 days, and they have the right to take up to 12 weeks of job-protected leave under the Family and Medical Leave Act (FMLA) to be used for any of the following reasons:

- To adhere to a requirement or recommendation to quarantine due to exposure to or symptoms of the coronavirus disease, COVID-19;

- To care for an at-risk family member who is adhering to a requirement or recommendation to quarantine due to exposure to or symptoms of the coronavirus disease; and
- To care for a child of an employee if the child's school or place of care has been closed, or the child care provider is unavailable, due to the coronavirus.

The first two weeks of leave under the emergency FMLA can be unpaid (although employees are free to use either the above emergency paid sick leave or accrued paid leave), while the remainder of the leave must be paid at no less than two-thirds of the employee's usual pay. An employer may not require an employee to substitute paid leave accrued under an employer policy or collective bargaining agreement for emergency FMLA leave. K-12 education employees are governed by special rules affecting the taking of leave near the end of a semester or intermittent leave or leave on a reduced schedule. It appears this law does not alter those rules.

Many states and localities (bit.ly/SickDaysLaws) have enacted laws that are more generous than the FMLA. Locals should check their state or local laws to determine if members are entitled to paid leave in the case of exposure to the coronavirus, and how the law interacts with collective bargaining agreements.

State law may also require an employer to allow employees to use paid leave accrued under an employer policy or collective bargaining agreement in the event that a public health emergency is declared or their child's school has closed. Michigan (bit.ly/MI-PMLA) and New Jersey (bit.ly/NJ-ESL) have adopted these types of laws.

Finally, at least six states (bit.ly/employee-protection), recognizing the lack of statutory protection for employees in a situation where isolation or quarantine may be necessary, have enacted legislation that explicitly prohibits the termination of an employee who is subject to isolation or quarantine. In Delaware, Iowa,

Kansas, Maryland, Minnesota and New Mexico, an employer is prohibited from terminating an employee who is under an order of isolation or quarantine, or has been directed to enter isolation or quarantine. Under Minnesota law, an employee who has been terminated or otherwise penalized for being in isolation or quarantine may bring a civil action for reinstatement or for the recovery of lost wages or benefits. New Jersey and Maine state laws also provide legal protections for persons subject to isolation or quarantine.

Would workers' compensation cover members who contract the coronavirus?

Generally, a workers' compensation claim for exposure to the coronavirus would be the same as any other claim. The member would bear the burden of proving his or her exposure occurred at work. This would entail questions of exposure history, onset of symptoms, incubation and, ultimately, medical expert opinions on causation. Workers' compensation is regulated at the state level, so locals should first check with a qualified workers' compensation attorney before advising members on the potential for workers' compensation.

In cases where a worker feels symptomatic and is isolated but is not being treated, policy guidelines from the director of a workers' compensation system could provide clear rights of relief for healthcare workers and other workers exposed to the virus on the job and provide the appropriate amount of time for payment of wages for the quarantine or isolation period. Generally, workers' compensation does not provide for 100 percent of lost wages and is not immediately available after the first day an employee misses work. Engagement with a director of a state workers' compensation system should be done in concert with securing an agreement with the employer regarding leave and lost wages. This could also be

an opportunity to influence policy to provide that workers at highest risk of exposure be presumed eligible for workers' compensation if they fall ill. Similar presumptions exist in some state workers' compensation systems (bit.ly/coverage-firefighters) for firefighters for certain kinds of diseases.

Would unemployment benefits cover members who contract the coronavirus?

Generally, unemployment insurance provides partial wage replacement benefit payments to workers who lose their jobs or have their hours reduced, through no fault of their own.

Prior to the enactment of the Families First Coronavirus Response Act, the federal law enacted in response to the health crisis, the Department of Labor announced new flexibility for states in administering their unemployment insurance to provide for payment of benefits when an employer temporarily ceases operations due to the virus, when an employee is quarantined with the expectation of returning to work after the quarantine is over, and when an individual leaves employment due to a risk of exposure or infection or to care for a family member. The act builds on this flexibility and incentivizes states to waive the usual one-week waiting period for benefits without penalty; provides more federal assistance to states to support partial unemployment payments to workers who have hour cutbacks instead of layoffs and to help states create work share programs; incentivizes states to ease eligibility requirements, such as work search requirements, and to extend unemployment benefits for individuals for longer periods.

Provided all other unemployment requirements are met under state law and regulations, a member should be eligible to receive unemployment benefits for actions by the employer or government such as mandatory quarantines or isolation, reduced hours or

temporary closure of a workplace. Additional situations could be covered depending on the actions taken by state officials. For example, California has already waived its one-week unpaid waiting period and allows for collection by a parent if his or her child's school is closed.

Unemployment insurance is very state-specific, so locals should check with a qualified attorney before advising members on unemployment eligibility following an employer action in response to the coronavirus. Locals should continue to push state officials to take advantage of the new flexibility provided by the federal government and allow as much participation as possible for members and members of the public to take advantage of unemployment insurance if their lives are impacted by the coronavirus.

Can an employer force members to undergo a medical examination prior to working?

The Equal Employment Opportunity Commission has issued guidance for employers regarding pandemic preparedness in the workplace (bit.ly/EEOCpandemic) and compliance with the Americans with Disabilities Act as well as more specific coronavirus guidance (bit.ly/CV-ADA). Generally, an employer cannot force an employee to undergo a medical examination prior to working without running afoul of the Americans with Disabilities Act. However, because the Centers for Disease Control and Prevention as well as many state health authorities have acknowledged this as a pandemic, employers may be allowed to do things like take an employee's body temperature. During a pandemic, employers may ask employees if they are experiencing symptoms, but that information must be kept confidential in compliance with the ADA and other applicable laws.