

MEMORANDUM

TO: New Jersey Municipal Managers Association
FROM: Matthew J. Giacobbe, Principal Partner
Marina V. Stinely, Associate
DATE: March 13, 2020
Re: COVID-19 Questions and Answers for Public Sector Employers

The coronavirus disease 2019 (“COVID-19”) outbreak is an unprecedented global event that is resulting in myriad issues for municipal, county and state governments. The purpose of this memorandum is to provide answers and guidance to frequently asked questions raised by public sector municipal employers when dealing with issues related to the COVID-19 outbreak. The most important recommendation is for municipal governments and their officials and employees to remain calm and help shepherd their respective communities through these uncertain times by continuing to provide essential governmental services.

General Information on COVID-19

COVID-19 is a respiratory disease that has been described as a pandemic by the World Health Organization (the “WHO”). Imported cases of COVID-19 in travelers and person-to-person spread of COVID-19 have been detected in the United States and in New Jersey. The U.S. Center for Disease Control (the “CDC”) has stated that COVID-19 is not fully understood. Reported illnesses have ranged from mild to severe, including illness resulting in death. Symptoms include fever, cough and shortness of breath. Older people and people with certain underlying health conditions like heart disease, lung disease and diabetes, among others, seem to be at greater risk of serious illness.

The WHO is advising countries with unaffected and affected areas to: (1) prepare residents and health facilities in unaffected areas; (2) detect, prevent and treat to break the chains of transmission in affected areas; and (3) reduce and suppress transmission by isolating as many cases as possible and test all suspected cases.

The CDC has stated that COVID-19 “is thought to spread mainly between people who are in close contact with one another (within about 6 feet) through respiratory droplets produced when an

infected person coughs or sneezes. It also may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this is not thought to be the main way the virus spreads.” The CDC advises that “[t]here is currently no vaccine to protect against COVID-19. The best way to prevent infection is to take everyday preventive actions, like avoiding close contact with people who are sick and washing your hands often.”

Frequently Asked Questions

The following are brief answers to frequently asked questions from municipal employers. All municipal employers are encouraged to consult with their respective municipal legal counsel for specific legal guidance, and to review their respective ordinances, personnel policies and/or applicable collective negotiations agreements.

EMPLOYMENT RELATED MATTERS

<u>QUESTIONS</u>	<u>ANSWERS</u>
<p><i>1. What if an employee is sick with or in quarantine because of COVID-19?</i></p>	<p>The New Jersey Department of Labor has issued guidance advising that if an employee has tested positive for COVID-19 or has symptoms of COVID-19 and is unable to work, he/she: can use earned sick leave; can apply for Temporary Disability Insurance; and may be eligible for Workers’ Compensation (if exposed as a result of his/her employment).</p> <p>Municipal employers must notify such employees of his/her rights under the Family and Medical Leave Act (the “FMLA”) and/or the New Jersey Family Leave Act (“NJFLA”) – See Question and Answer #3 below.</p> <p>The New Jersey Civil Service Commission has advised that if a State employee is sick with COVID-19, self-quarantined, under mandatory quarantine, caring for an immediate relative who is sick with COVID-19, or who has a child whose school is closed due to COVID-19, the State employee’s absence should not count toward earned sick leave.</p> <p>New Jersey’s laws on Earned Sick Leave, Temporary Disability and Family Leave Insurance cover all employees, full-time, part-time, temporary and seasonal and may be applicable.</p>
<p><i>2. What if an employee, considered to be vulnerable or higher risk, requests to use earned sick leave to stay home and protect themselves? They are not sick.</i></p>	<p>If an employee is anxious about COVID-19 or is considered to be vulnerable or higher risk, the employee must use earned sick leave with an accompanying medical provider’s note.</p> <p>The CDC recommends employers adopt flexible and non-punitive leave policies, including work-from-home options and staggered work shifts to minimize exposure to COVID-19.</p> <p>Leave taken by an employee for the purpose of avoiding exposure to COVID-19 is not protected under the FMLA. – See Question and Answer #3 below.</p>
<p><i>3. What if an employee</i></p>	<p>Under the Family and Medical Leave Act (the “FMLA”), an employee of a</p>

<p><i>runs out of earned sick leave, would the individual be eligible for FMLA and/or NJFLA benefits?</i></p>	<p>covered employer who is eligible to take FMLA leave may receive FMLA benefits if they are sick or have qualifying family members (<i>e.g., parent, spouse, child</i>) who are sick with COVID-19. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave (with continued medical benefits) in a designated 12-month period for specified family and medical reasons, including, but not limited to: the flu, pandemic influenza and COVID-19. In order to be eligible for FMLA leave, an employee must have been employed by a covered employer for at least twelve (12) months and have worked for at least 1,250 hours during the previous twelve-month period.</p> <p>Leave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA.</p> <p>Under the New Jersey Family Leave Act (“NJFLA”), an employee of a covered employer who is eligible to take NJFLA leave may receive NJFLA benefits if they are caring for a qualifying family member who has COVID-19 or symptoms thereof. The NJFLA entitles an eligible employee to twelve (12) weeks of leave in any twenty-four (24) month period to care for a qualifying family member (<i>e.g., parent, spouse, child</i>). To be eligible for NJFLA leave, an employee must have been employed for at least 12 months and worked at least 1,000 hours in the preceding twelve (12) month period. See N.J.A.C. 13:14-1.2. <i>Unlike the FMLA, the NJFLA does not entitle employees to leave for their own serious medical condition.</i></p>
<p><i>4. What are the issues with First Responders having to work while others are given release time?</i></p>	<p>All essential services, including, but not limited to, Police, Fire, Sewer, Water, Department of Public Works, and Business Administration, must continue to operate. Public sector employers should plan for staffing shortages and cross-train personnel to perform all essential tasks. Public sector employers should also make necessary arrangements so that non-essential staff can work remotely during normal business hours, if necessary. Public sector employers should approve overtime as necessary to continue provide such services and review any applicable collective negotiations agreement to ensure compliance with same.</p>
<p><i>5. What if an individual is out of work because their public employer has closed (even temporarily) because of COVID-19? Or is losing hours because of reduction in force related to COVID-19? Or is sent home from work because their employer thinks they are a risk, or thinks they are at risk?</i></p>	<p>Generally, if a public employer directs employees to <i>temporarily</i> go home and not perform any work (even remotely), the employee should continue to receive his/her pay and related benefits. It is important for public sector employers to make necessary arrangements for non-essential staff to work remotely so that government can continue to operate. If a public employer must institute a reduction in force (“RIF”) and/or permanent reduction in work hours, the adversely affected employee would likely be eligible for Unemployment Insurance benefits and/or any related termination benefits set forth in an applicable collective negotiations agreement.</p>

<p>6. What are an employer's options if inspectors refuse to go in to residences to review work or read meters?</p>	<p>Public sector employers should provide all personnel performing essential services with adequate personal protective equipment to perform their essential tasks. Public sector employers should advise employees to practice respiratory etiquette and hand hygiene. If employees have to enter residences or businesses to perform essential tasks, prior to entry, efforts should be made to confirm that occupants are not sick with COVID-19 and do not have symptoms of or have been exposed to COVID-19.</p>
<p>7. What does OSHA require if an employee shows symptoms of or is diagnosed with COVID-19?</p>	<p>OSHA's General Duty Clause requires employers to provide employees with a safe work environment that is free of recognized hazards. <u>See</u> 29 U.S.C. § 654(a). If an employee shows symptoms of COVID-19 at work, an employer should separate the employee from others, provide personal protective equipment to the employee and contact health officials. Employers should encourage employees who have symptoms of COVID-19 to stay at home.</p> <p>If an employer learns that an employee has been diagnosed with COVID-19, an employer has an affirmative obligation to keep the employee out of the workplace. Employers could be subject to citations from OSHA for permitting or requiring an employee with COVID-19 to come to work.</p>
<p>8. What are employee confidentiality issues?</p>	<p>Any and all policy decisions regarding employees with confirmed and/or presumptive cases of COVID-19 must conform with confidentiality requirements under the Americans with Disabilities Act (the "ADA") and the New Jersey Law Against Discrimination (the "NJLAD").</p> <p>The ADA's basic rule is that employers must keep confidential any medical information they learn about an applicant or employee, even if the information contains no medical diagnosis or treatment course and even if it is not generated by a health care professional. <u>See</u> 29 C.F.R. §§ 1630.13 to 1630.14.</p>

OPRA and OPMA RELATED MATTERS

<u>QUESTIONS</u>	<u>ANSWERS</u>
<p><i>1. If an employee performs work on their home computer does that trigger OPRA for all activity on that personal computer?</i></p>	<p>If an employee is conducting government business at home, the employee should only use their official government e-mail address.</p> <p>If the employee does not have access to their official government e-mail address while at home and must utilize a personal e-mail address, the employee must properly maintain any and all correspondence regarding government business.</p> <p>Any correspondence regarding government business, even remotely, is subject to the Open Public Records Act (“OPRA”).</p>
<p><i>2. What are the rules, if any, for virtual or telephonic meetings of a governing or other public body under OPMA?</i></p> <p><i>How does the public participate if public meetings are held virtually or telephonically?</i></p>	<p>The Open Public Meetings Act (the “OPMA”) allows public meetings to be held in person or remotely, by means of communication equipment. <u>N.J.S.A. 10:4-8 (b)</u>.</p> <p>To conduct a virtual or telephonic public meeting, there must be a physical location where the meeting is recorded that is open to the public. An individual from the municipality (e.g. Clerk or Administrator – a municipality should designate several people who could fill this role) must open the physical location for the meeting and set up any and all virtual or telephone and recording equipment. All members of the public body attending the virtual or telephonic meeting and all members of the public in attendance and/or participating in the meeting must be able to hear each other and communicate with each other to provide a means of public comment.</p> <p>Any public meeting conducted virtually or telephonically should be for <u>essential business only</u> to ensure that essential government services continue (e.g. payroll and salaries, approving overtime, bond payments, insurance payments, maintaining contractual obligations, etc.). The New Jersey Department of Community Affairs and Division of Local Government Services recommend that public bodies holding meetings remotely should avoid entering executive or closed session, unless the topic is urgent, directly affects the health, safety, or welfare of residents, and is an allowed exception under <u>N.J.S.A. 10:4-12</u>.</p> <p>All meetings, including those held virtually or telephonically, must be noticed in a manner consistent with the requirements of the OPMA. The OPMA also sets forth procedures for noticing meetings held under emergent circumstances. <u>N.J.S.A. 10:4-9(b)</u>.</p> <p>The notice for a virtual or telephonic meeting must state that the meeting is for the purpose of conducting essential business only and that members of the public should use caution when making a decision to attend a public meeting during the COVID-19 outbreak. The notice should also expressly outline how to participate remotely and how to submit questions and comments via website, e-mail or mail prior to and/or during the meeting.</p>

	If a municipality is unable to conduct a virtual or telephonic meeting, the meetings should be timely cancelled, rescheduled or held in the ordinary course.
--	--

In addition to these brief answers, please review updates from State and Federal agencies, as new information and guidance is provided daily.

Helpful Links

<https://nj.gov/infobank/eo/056murphy/pdf/EO-103.pdf>

<https://www.nj.gov/labor/worker-protections/earnedsick/covid.shtml>

<https://nj.gov/csc/employees/covid.html>

- The Civil Service Commission is expected to release additional guidance 3/13/2020 regarding COVID-19 related leave

https://www.nj.gov/health/cd/topics/covid2019_schoolbusiness.shtml

<https://www.dol.gov/agencies/whd/fmla/pandemic>

<https://www.osha.gov/Publications/OSHA3990.pdf>

<https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

<https://www.dol.gov/newsroom/releases/eta/eta20200312-0> (US Department of Labor’s March 13, 2020 Guidance on Unemployment Insurance Flexibilities During COVID-19 Outbreak)