



*A Union of Professionals*

## **Legal Guidance for Union Members**

### **Your Rights on Issues of Leave during a Public Health Emergency**

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.

#### **Q. How does a declaration of a public health emergency impact a collective bargaining agreement?**

A. 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.

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

A. The appearance, and ongoing threat, of the 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 the interest of both employers and employees to agree to a leave procedure for suspected and confirmed cases of exposure to the coronavirus, as well as to develop leave policies for the disruption of day-to-day work. As such, locals should engage in bargaining with employers to determine everything from the type of notice employers should provide employees in the event of a workplace exposure or a disruption in

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services, to the leave policies that will govern the workplace during the public health emergency, as declared by either a state official or the federal government.

Case law interpreting the federal National Labor Relations Act 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](#). 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. 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.

**Q. Can a member be required to use accrued leave if they are impacted by the coronavirus?**

A. Absent contractual language that speaks directly to the issue or new agreed-upon policies and procedures following bargaining with the employer, union members 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.

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

A. 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 members whole for any lost wages or to force employer compliance to the collective bargaining agreement.

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

A. The federal Family and Medical Leave Act guarantees unpaid, job-protected leave for workers at businesses with at least 50 employees who have a serious health condition or must care for a family member with a serious health condition. A positive test for the virus and inpatient treatment, or care of a family member with a positive test and required inpatient treatment, would likely qualify as a serious health condition entitling a member to unpaid leave. An employee cannot receive both FMLA and workers' compensation. An employer may require an employee to substitute paid leave accrued under an employer policy or collective bargaining agreement for unpaid FMLA leave. K-12 educational 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.

[Many states and localities](#) 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](#) and [New Jersey](#) have adopted these types of laws.

Finally, [at least six states](#), 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. Maine and New Jersey state law also provide legal protections for people subject to isolation or quarantine.

#### **Q. Would workers' compensation cover members that contract the coronavirus?**

A. 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 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 at work and provide the appropriate amount of time for payment of wages for the quarantine or isolation period. Generally, workers' compensation does not normally 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 in the event that they fall ill. [Similar presumptions exist in some state workers' compensation systems](#) for firefighters for certain kinds of diseases.

**Q. Would unemployment benefits cover members that contract the coronavirus?**

A. Generally, unemployment insurance provides partial wage replacement benefit payments to workers who lose their job or have their hours reduced through no fault of their own. Like workers' compensation, unemployment insurance is generally not immediately available the first day an employee misses work. 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. 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.

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

A. The Equal Employment Opportunity Commission [has issued guidance for employers regarding](#) pandemic preparedness in the workplace and compliance with the Americans with Disabilities Act. 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, in areas where the virus becomes widespread in the community, as assessed by state or local health authorities or the Centers for Disease Control and Prevention, this could be allowed.