

OHIO ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS



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To: OAPFF Affiliates and Members

From: General Counsel Henry Arnett, Co-Counsel Colleen Arnett

Re: Legal and Contractual Considerations on the Coronavirus

Date: Updated March 24, 2020

A number of other issues and developments have occurred since we wrote our first memo on March 16, 2020. This is an update to that memorandum.

The coronavirus has employers, employees and labor unions across this nation sailing into uncharted waters. The same is true for all OAPFF locals and members. We know many of you have questions about the coronavirus and its effects on the operations of your department and the obligations and responsibilities of your local. We are going to try to answer some of those questions. However, to be honest, at this point there are many more questions than there are answers.

The coronavirus pandemic is raising a number of issues that are not typically addressed in collective bargaining agreements. Even the various employment laws that apply to your employer and our members are often not designed to handle the issues raised by this crisis. If you have any questions after reviewing the materials, and we're sure you will have some, we urge you to consult with your District Vice President.

DECLARATION OF EMERGENCY

Our first and maybe most important piece of advice to you is that, on just about any issue that may come up, you need to review your collective bargaining agreement to see if that issue is addressed by the agreement.

One potential problem is that most collective bargaining agreements do contain language that would allow for a waiver or a suspension of the terms of the collective bargaining agreement if there is a declared emergency of one sort or another. If you have such a provision and if your local government or other government official does indicate that an emergency has been declared, check the terms of that emergency order, verify that the procedure for declaring an emergency has been followed, and then review what portions, if any, of your collective bargaining agreement may be suspended as a result of that emergency. For instance, some contracts may state that in the event of an emergency, time deadlines (such as answering a grievance) may be suspended, while other contracts may allow suspension of the whole contract. In short, verify exactly what effect an emergency declaration has on your agreement.

Many of the contracts that do include this language really only specifically address the rules, agreements, and practices relating to the **assignment** of an employee. It seems that many employers are looking to use the federal and state coronavirus emergency

declaration to change firefighters schedules and/or revoke time off (such as vacation and Kelly Days). However, assignment changes are different than scheduling changes. This waiver language gives the department the right to, for example, switch someone from a 40 hour fire prevention position to a crew. It does not give the department the right to do anything else, such as changing hours of work revoking time off.

QUARANTINES/SELF-ISOLATION

Many questions may arise after firefighters are exposed to the coronavirus. That exposure might be on the job, either from a coworker or a patient treated on an emergency medical run, or it could be an off-duty, away from the job, exposure. Firefighters who are exposed may be quarantined or told to self-isolate at home. Right now the typical quarantine period is 14 days, but, as with everything else in connection with this virus, that presumably could change.

Given the current climate, we think that everyone would agree that a department which has a reasonable belief a firefighter has been exposed to the coronavirus would be within its management rights to order the firefighter to not report to work.

INJURY LEAVE/ADMINISTRATIVE LEAVE/SICK LEAVE/EARNED TIME

But what happens if a firefighter is sick, is quarantined, is told to self-isolate, or is told by the employer not to report to work for 14 days? If a firefighter has to be off, the question that arises is how is the firefighter to be compensated. The first thing you need to do is review your collective bargaining agreement to see if that supplies any answers. If the firefighter is sick or is caring for someone who is sick, there should be no problem applying the terms of the collective bargaining agreement on sick leave.

On the other hand, if the firefighter is not sick but is not working because of a quarantine or an order from the department not to report to work because of exposure to the coronavirus, the question becomes a little more complicated. Some contracts have sick leave provisions that deal with the use the sick leave when the employee is quarantined; however, most collective bargaining agreements probably do not have any language allowing sick leave to be used for quarantines. If the contract does allow sick leave to be used if a firefighter is quarantined, what this actually means may sometimes be in dispute. Is a firefighter who is told to self isolate by a doctor in a quarantine situation?

In addition, if the quarantine or self-isolation is because of an on-the-job exposure, the question would be whether or not the firefighter should be placed on paid administrative leave or injury leave, as opposed to forcing the firefighter to use his/her own sick time. If the firefighter wants to work but is told by the employer that he/she cannot report to work, should a firefighter be required to burn the firefighter's sick leave or other earned time off? While it would seem apparent that an employer who refuses to allow a firefighter, who is displaying no symptoms of illness, to work should place the firefighter on paid administrative leave, some employers may argue that they have no provisions for administrative leave and that the firefighter therefore has to use his/her own earned time or go on an unpaid leave status. We are guessing that the majority of collective bargaining agreements do not address this issue, but you should insist that administrative leave be utilized in such a situation.

Injury leave may also be an option, but the problem with using injury leave is that

most contracts allow injury leave only for allowed workers compensation claims. As discussed below, a coronavirus illness, even if clearly sustained as a result of an on the job exposure, may not qualify for workers compensation.

Assuming there is no clear answer as to how a firefighter is to be compensated, this is obviously something that you may want to raise with the employer and indicate that the parties need to bargain over this.

CONFIDENTIALITY

Typically, medical information obtained by or provided to the employer is confidential. If, for instance, the employer finds out that Firefighter A has ever tested positive for HIV, the employer could not release that information and would have to keep the identity of Firefighter A and his condition private. But what if the employer finds out that Firefighter A has contracted the coronavirus? The law would probably say that Firefighter A's identity and his condition is confidential and should not be revealed. But common sense would suggest that the employer, which does after all have a duty to maintain a safe working environment, should reveal this information to some extent. Disclosure may be necessary so that those individuals who may have interacted with Firefighter A know of their possible exposure and can take appropriate actions.

Of course, the question might still remain as to the extent of the disclosure. Should disclosure be made to Firefighter A's crew? To his shift? To the entire fire department? To members of the public, such as family members who were present during an EMS run and who may have interacted with Firefighter A? At this point, an employer who reveals what would otherwise be considered confidential information is probably not going to face repercussions so long as the disclosure is limited to what would reasonably be necessary to protect the health and safety of co-workers and the public.

PHYSICAL EXAMS

Most employers generally cannot require their employees to take physical examinations, at least in the absence of a reasonable belief that the employee is unable to perform his or her job or presents a risk to the health and safety of others. This would include something as simple as asking an employee to have his or her temperature taken. A number of people are questioning whether this legal requirement would still hold in light of the current situation, and whether employers can now legally require employees to submit to an exam, such as having their temperatures taken, before entering the workplace.

Regardless, as most of you will already know, the rules that apply to other employers often do not apply to fire departments. Because firefighters are in safety sensitive positions, employers can often require them to submit to physical exams even when other employers could not do so. Thus, there would appear to be no prohibition on a fire department checking any of its firefighters to determine if they are showing any of the symptoms of coronavirus.

MANDATED OVERTIME/HOLDOVER

With the possibility that some departments may experience a significant absenteeism problem because of firefighters being sick or unable to report to work, the possibility of mandated overtime or involuntary holdovers becomes very real. What to do about this? First, again, review your collective bargaining agreement. Is mandated overtime

prohibited? Has the employer been allowed to mandate overtime or require firefighters to involuntarily holdover in the past? If the answer is not clear-cut based upon your contract, demand bargaining on the issue.

WORKERS COMPENSATION

The OBWC has answered the question whether a COVID-19 illness would be covered, sort of. In a FAQ's page just posted on its website, OBWC states the following:

Q 1: If I contract COVID-19, is it a compensable workers' compensation claim?

A: It depends on how you contract it and the nature of your occupation. Generally, communicable diseases like COVID-19 are not workers' compensation claims because people are exposed in a variety of ways, and few jobs have a hazard or risk of getting the diseases in a greater degree or a different manner than the general public. However, if you work in a job that poses a special hazard or risk and contract Covid-19 from the work exposure, BWC could allow your claim.

Note that OBWC does not say it *would* allow the claim, only that it *could* allow the claim. That tells us that a final decision on this issue really hasn't been made yet. Still, at least it is a good sign that OBWC didn't rule out coverage. We suggest that if a firefighter does become ill from the coronavirus, and can show that there was an on-the-job exposure, the firefighter should consider filing a claim. If allowed, that might have the added benefit of invoking any applicable injury leave provisions found in the firefighter's collective bargaining agreement.

OBWC also addresses several other issues on the FAQ's page. These include the following:

OBWC makes it clear that workers compensation benefits will not be paid if someone is quarantined due to COVID-19. If you are not actually sick, there will be no benefits such as temporary total compensation. However, unemployment compensation benefits might be available.

Some benefits, such as temporary total compensation, are being extended to April 30, 2020, even if the claimant cannot obtain the medical documentation that would otherwise be required for an extension.

OBWC is temporarily suspending all independent medical examinations (IME's). If permitted by the law, OBWC will be using physician file reviews to a greater extent. OBWC is also exploring alternative means of obtaining IME's, including "virtual" exams.

Although questions still remain, OBWC is obviously working to answer many of the issues raised by COVID-19.

EXTRA DUTIES

As other government employees take time off, there is always the possibility that the remaining employees, e.g., firefighters, will be asked to assume some of their responsibilities. Does your contract allow extra duties to be placed upon firefighters? Should the employer bargain on the extent of those extra duties (and extra compensation for the extra duties)?

RESTRICTIONS ON TRAVEL OR SECONDARY EMPLOYMENT

Some employers have indicated that they are going to prohibit employees from traveling or quarantine an employee after they get back from traveling (even if the employee is not exhibiting any symptoms). If there is nothing in your contract that addresses this then it would be considered a change in the terms and conditions of employment and must be bargained with the local.

We are also seeing employers attempting to prohibit secondary employment. Again, if that is the case, and there is nothing in your collective bargaining agreement that allows the employer to do that, then they are unilaterally changing the terms and conditions of employment. In order to change the terms and conditions of employment, the employer *must* bargain with the local.

BARGAINING WITH THE EMPLOYER

As you can see, it is apparent that there are a number of issues that are not adequately answered by an existing contract or the law. This memorandum probably only addresses a few of those issues; others are certain to arise.

As a local, you need to inform the employer that you are always willing to work with it to accomplish what is best for the citizenry and your members. Still, you need to make it known to your employer that just because there is a crisis, that does not give the employer free rein to unilaterally make changes, ignore the contract, disregard the law, or take any other action it deems desirable despite the adverse effect on firefighters. Your local still represents your members, and any changes to their terms and conditions of employment should be bargained, not just imposed by the employer.

Some employers may argue that because of exigent circumstances it can take unilateral action without negotiating with the local. Make it clear that despite all of the uncertainties with the coronavirus, there is always time to sit down with your local, discuss the issues, and reach an agreement on how best to resolve those issues.

These are challenging times, but they are also times that show the importance of being united and having the protection, assistance and guidance of your union. Please do not hesitate to contact us if you have any other questions.