

### **Vermont Municipal Employers' FAQs re: COVID-19**

Many Vermont municipal employers have questions regarding their legal options and obligations in light of the COVID-19 (“C-19”) pandemic and the State and federal government’s response, particularly on the subjects of employee leave and pay and benefits. The following information is an overview of some frequently asked questions (“FAQs”) and our responses to those questions. It is not intended to provide guidance regarding prudent measures to reduce the spread and risks of C-19. As you read this information, a few points to keep in mind and some recent developments are:

- The following information is general in nature and should not be relied upon as legal advice for any specific situations. For specific guidance please contact John Klesch, Joe McLean or Bob Fletcher, preferably by email as we are all working remotely:

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- Collective bargaining agreements (“CBA”) and employer personnel policies could potentially affect a particular employer-employee relationship and produce a different result than described here. For example, if a CBA explicitly addresses work stoppage due to an emergency, such provisions could produce a different obligation on the part of the employer than what is dictated by the general law.
- This guidance attempts to explain what is legally required of or available to municipal employers. Also, there is no legal restriction on providing employees pay or benefits in excess of what is required by law (although providing such extra pay or benefits may require consent of a labor union for employees subject to a CBA). If an employer provides broader benefits than required, the employer must provide such benefits evenly across the workforce unless there are valid reasons to distinguish between employees.
- On March 24, 2020, Governor Scott issued Addendum 6 to Executive Order 01-20 (“EOA-6”), which generally is a “stay at home” order effective March 25, 2020 at 5:00 PM. However, unlike businesses and non-profits, government entities such as municipalities have not been ordered to suspend in-person business operations. In fact, the Executive Order requires that essential local government functions remain open, including offices that provide essential government services. Without limiting the foregoing,

particularly identified public health and safety operations, some of which are municipal in many Vermont towns and cities, that must remain open include:

- Law enforcement, public safety, and first responders;
- Critical infrastructure, which includes at least utilities, telecommunication, airports and transportation infrastructure;
- Trash collection and disposal, recycling and operations and maintenance of drinking water and wastewater/drainage infrastructure.

Municipal employers which continue operating are required under EOA-6 to take certain C-19 measures, identified below in Q3/A3 and the **Poster** we have drafted which appears as the last page of this document for your use.

- The Families First Coronavirus Response Act (“FFCRA”) goes into effect April 2, 2020 and will affect at least some of the information stated here. Please review the brief FFCRA summary below and plan to become informed of the details on complying with FFCRA.

### **FAQ as of 5:00 PM March 25, 2020**

Q1: Must a municipal employer (hereafter “we” and “you”) require an employee who is infected with C-19 to stay out of the workplace?

A1: Yes, under EOA-6 ¶ 4(c). The employee should be allowed to work remotely if possible and, to the extent not possible, must be allowed to utilize accrued sick leave. The employer may consider allowing use of vacation leave provided it does so for all similarly affected employees. If an employee is asymptomatic but asserts s/he is infected or likely infected, the employer likely can require reasonable proof. However, what is reasonable under the current circumstances may be less than for usual sick leave eligibility because of the anticipated shortage of health care provider and testing availability, and because of the employer’s desire to avoid possible spread of C-19.

Q2: Must we require that an employee who is symptomatic with what reasonably appears to be a contagious condition (flu, cold, etc.), but who has not positive-tested for C-19, stay out of work?

A2: Unclear, but we believe the answer is Yes. EOA-6 ¶ 4(c) states only that government entities must require employees who are “sick” to “remain home.” Even though sneezing, runny nose, or gastrointestinal issues might not be C-19

symptoms, we view this directive as requiring municipal employers to order employees to stay out of work if they are exhibiting contagious illness symptoms even if not actually tested positive for C-19.

Q3: Must we take any special measures for our offices and operations that remain open?

A3: Yes. Under EOA-6 ¶ 4, municipalities must develop strategies, procedures and practices designed for strict adherence to CDC and Vt. Dept. of Health guidance to ensure recommended social distancing, specifically:

- a. maintaining a distance of 6 feet between persons;
- b. requiring employees to practice appropriate hygiene measures, including regular, thorough handwashing;
- c. requiring employees who are sick remain home; and
- d. regularly cleaning and disinfecting frequently touched objects and surfaces.

To comply with this directive, at a minimum we recommend distributing and posting these guidelines in your municipal workplace immediately along with a directive to employees to follow the guidelines. **A sample poster is attached at the end of this document for your use.**

Q4: Can we screen employees for C-19 by asking if they have been in close contact with diagnosed individuals?

A4: Yes. Asking someone if they have been in contact with an infected individual is not an impermissible health condition inquiry. Health information about an employee's family members etc. should be kept confidential.

Q5: Can we screen employees for C-19 by asking if they are symptomatic or by taking their temperature?

A5: Yes. EEOC has issued recent guidance that employers may ask questions about C-19 symptoms and measure employee temperatures under the current situation, keeping all such information confidential.

Q6: If an employee claims s/he have reason to believe s/he may be infected with C-19 but is asymptomatic and wants to be allowed to remain home, must we allow him/her to be excused?

A6: No, unless the individual meets at least “Medium Risk” criteria established by CDC, in which case: Yes. EOA-6 requires that Vermont municipal entities must adhere to CDC guidance on social distancing. CDC has issued Exposure Risk Categories and Recommendations for Management by Risk Level, updated and available at <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html> (see Tables 1 and 2). We interpret EOA-6 ¶ 4 to incorporate this guidance, meaning that if an employee is “Medium Risk” or “High Risk”, as defined by CDC, they must not come to work. Medium risk includes travel categories such as cruises or travel to certain countries with C-19 outbreaks. Medium risk also includes risk based on “close contact” with individuals who are (1) symptomatic and (2) positive-tested for C-19. Close contact means within 6 feet for a prolonged period or having direct contact with infectious secretions (e.g., being coughed on). You should be allowed to ask employees questions reasonably necessary to determine if an employee’s status meets any of the criteria of the CDC risk assessment because it is reasonably necessary to do so in order to be able to comply with EOA-6. Any information related to an employee’s or family member’s health condition should be treated confidentially.

Q7: Can we require employees who are not ill with C-19 to stay out of work because of lack of work due to reduced/suspended operations, such as temporarily closing a municipal recreation facility or library?

A7: Yes. You must pay salaried employees ordered home for lack of work their entire week’s pay for any week during which they perform any amount of work. If a salaried employee is ordered home for an entire week and ordered to not perform any work whatsoever, then s/he is effectively furloughed and no salary is owed. There is no obligation to pay hourly employees ordered to stay away, though the employer can consider allowing such employees to use paid leave even if not required by current policies (such as use of sick leave by an employee who is not actually sick and does not otherwise meet criteria for sick leave usage).

Q8: Can we require employees who are not ill to stay home because we want to help stop spread of C-19?

A8: Yes. The same payment guidance applies as for A6.

Q9: Must we allow an employee who is not symptomatic with any contagious illness or diagnosed with C-19 to be absent if requested?

A9: If the employee advises you, or you are already aware, that s/he has a condition which increases risks connected with C-19 exposure, then Yes, provided it is not an

undue hardship on the employer to allow for the requested leave. This answer is based on legal obligations under the Americans with Disabilities Act. Keep in mind: (1) the employee must actually disclose to the employer the condition which causes increased risk, (2) the employer can require proof of that condition, though we do not necessarily recommend doing so in the short term given the high demand on health care providers; and (3) any information and documentation regarding the employee's disclosed condition must be kept confidential, secure and separate from a personnel file. Such an employee should be permitted to use sick and vacation leave, after which leave is without pay for both hourly and salaried employees.

Q10: If an employee is confirmed to have C-19 infection, should we advise co-workers?

A10: Yes, co-workers should be advised that an individual has been diagnosed, but the individual should not be identified.

Q11: What other steps should we take if an employee is out of work due to C-19?

A11: Employees who are infected with C-19 most likely qualify for 12-weeks of unpaid leave under FMLA and/or the PFLA, to the extent both the employer and employee are covered by one or the other statute. Likely you can designate leave for the employee's C-19 illness, or the employee's caring for a family member with C-19, as FMLA/PFLA leave so that the leave time would count against the 12 weeks of leave per year authorized by law. Technically, FMLA regulations require an employer to designate qualifying leave as FMLA leave. However, it is possible FFCRA will affect this guidance.

### **FFCRA – effective April 2, 2020**

We will monitor FFCRA for issuance of U.S. Dept. of Labor regulations and can answer specific questions if you contact us. In the meantime, a general overview of the statute is that FFCRA applies to all government employers. It will require posting notices approved by the Dept. of Labor which are expected to be published imminently. FMLA policies will have to be adopted or amended to comply with FFCRA. The previous limitation that FMLA does not apply to municipal employers with less than 50 employees working within a 75-mile radius will not apply to FFCRA.

The general benefits covered employers must make available to all employees are (1) up to 80 hours of paid leave because the employee is quarantined and/or

experiencing COVID-19 symptoms and seeking a medical diagnosis (capped at \$511 per day), and (2) up to 80 hours of paid leave at 2/3 the employee's regular rate due to absence to care for ill persons or a child whose school or daycare is closed (capped at \$200 per day). In addition, a covered employer must provide employees who have worked for the employer at least 30 days, an additional 10 weeks of leave at 2/3 rate of pay to care for a child whose school or childcare provider is closed or unavailable for reasons related to COVID-19.

Private employers will be allowed a tax credit equivalent to all payments made pursuant to FFCRA, which of course does not aid municipal employers. Tax exempt employers might possibly be afforded a credit against social security taxes, but there has yet been no legislation or regulation providing such a measure. However, FFCRA wages do not require withholding and remittance of FICA or Medicare. For the time being, FFCRA appears to present an unfunded mandate to municipal employer.

**NOTICE TO EMPLOYEES RE: COVID-19**  
**REQUIRED WORKPLACE PRACTICES**

**As required by a recent Executive Order amendment issued by Vermont Governor Phil Scott, ALL EMPLOYEES ARE HEREBY DIRECTED AS FOLLOWS EFFECTIVE IMMEDIATELY:**

- a. Maintain a distance of 6 feet between persons at all times possible;**
- b. Practice appropriate hygiene measures, including regular, thorough handwashing;**
- c. Report to your manager and remain home if you are sick, including if you are infected with COVID-19 and/or have symptoms such as cough, fever, tiredness, or difficulty breathing<sup>1</sup>, and**
- d. Appropriate/designated staff shall regularly clean and disinfect frequently touched objects and surfaces.**

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<sup>1</sup> According to CDC <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>. If you have difficulty breathing, seek immediate medical attention.