



# COVID-19: LEGAL SUPPORT

## WE STAND READY

The lawyers of Cafardi Ferguson Wyrick Weis + Gabriel stand ready to assist local governments and businesses with all of their legal needs related to the Coronavirus outbreak. We have expertise in local government labor and employment law and business operations, and we also have county and municipal solicitors on staff to provide expertise about emergency powers of local governments in crisis situations. We don't just provide our clients cell phone numbers for our lawyers when there is a crisis, because personal connection and immediate responsiveness to our clients is the normal way we do business.

Many of you have been in contact with us over the last few weeks as the outbreak has occurred. We are in constant communications with local officials regarding their emergency declarations and related powers, as well as their labor and employment issues arising from this crisis. Local businesses are also responding to the emergency, and we are advising them regarding reduced operations and employment issues related to temporary closures and service reductions.

From our experience both before and during this crisis, we recommend local government officials focus their energy on 3 areas for the immediate future:

### THREE KEY AREAS OF FOCUS:

1. Understanding and Exercising their Emergency Powers Regarding the Public
2. Analyzing and Reducing their Operations
3. Understanding and Preparing for Labor and Employment Issues that Will Arise

We have prepared this brief, issue-spotting guide for your use, so that you can have a checklist of things that you should be dealing with right now. We have also included some links to helpful resources where you can find reliable, up to date information.

*Continue Reading »*

**If you need assistance with any of these things, know that, as always, our team is just a phone call, text, or email away.**

**CFWW+G** [www.cfwwg.com](http://www.cfwwg.com) | 412.515.8900

Chris Gabriel: 412.328.5853 | Stephanie Fera: 814.594.9201 | John Rushford: 412.913.8043

# PRIORITY CHECKLIST



CAFARDI FERGUSON WYRICK WEIS + GABRIEL LLC

## 1. WHAT EMERGENCY POWERS DOES MY COUNTY/MUNICIPALITY HAVE?

Mayors of Third Class Cities and Boroughs have broad emergency powers under the Third Class City Code and the Borough Code. (See 11 Pa.C.S. § 11203; 8 Pa.C.S. §10A06).

All local government entities have emergency powers under the Emergency Management Services Code. (See 35 Pa.C.S. §7101; §7105).

Counties and some Municipalities also have Emergency Powers under their Boards of Health if they have established them. These generally will overlap.

## 2. DO WE HAVE TO CONTINUE TO HOLD PUBLIC MEETINGS?

No. You can cancel meetings at least temporarily.

If you need to continue holding meetings, you can satisfy the quorum and voting requirements telephonically. The Office of Open Records recommends that you make accommodation for public participation in meetings, but acknowledges that this likely can be avoided under a Disaster Emergency Declaration.

In addition, the law specifically allows local governments to suspend formal requirements for bidding and purchasing and many other things under a Disaster Emergency.

## 3. SHOULD WE CLOSE OR REDUCE OPERATIONS?

Yes. As of March 18, both the State and Federal government have recommended or required non-essential businesses to close and are recommending people not assemble in groups of more than 10 people.

## 4. HOW DO WE DECIDE WHO IS, AND WHO IS NOT, AN ESSENTIAL EMPLOYEE IF WE WANT TO REDUCE OPERATIONS?

Some calls are easy, others will be harder. County jail guards and 911 dispatchers, for example, are essential. Many other local government employees are not in the sense that their services could be suspended for 1-2 weeks without significant disruptions.

Each entity will have to evaluate its work force for itself, but generally we recommend asking whether or not the entity and the public can do without the service provided by each group of employees for: 1 week, 2 weeks, or longer. For many offices, this answer will be “yes” in the short term. Consider also that most offices can be run short-staffed for the intermediate or longer term.



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## 5. CAN WE REQUIRE EMPLOYEES OR MEMBERS OF THE PUBLIC TO SUBMIT TO A FOREHEAD SCAN TO SEE IF THEY HAVE A FEVER BEFORE ENTERING OUR OFFICES?

We support this decision if you make it, and we likely would do this if large numbers of people visited our offices.



That being said, there is no easy answer to this question from a legal standpoint. The EEOC suggests that employers may be able to do this without being subject to claims of discrimination. But that is advice for private employers and does not take into account the question of whether such a scan is a search under the 4th Amendment, which is an important consideration for public employers. This is an emergency, and safety is the first consideration. Legal questions with no obvious answer may just have to wait.

## 6. CAN WE REQUIRE EMPLOYEES WHO ARE HOME SICK TO GET A MEDICAL CERTIFICATION FROM THEIR DOCTOR CERTIFYING THAT THEY ARE FREE FROM CORONAVIRUS BEFORE THEY RETURN TO WORK?

Yes, we can require a medical certification to return to work, but keep in mind that there are limited testing kits available and generally people are being discouraged from seeking medical care unless their symptoms are more serious. It may be impractical to require such a certification at this time. This may change if testing becomes more available. For now, the best practice is to advise employees not to return to work, until they have been symptom free for at least 3 days.

## 7. CAN WE REQUIRE EMPLOYEES WHO ARE SICK, OR WHO HAVE TRAVELED TO AREAS WITH KNOWN CORONAVIRUS OUTBREAKS TO REMAIN HOME?

Yes, you can require employees who are sick to stay at home. In addition, you can also require employees to disclose personal travel to affected areas and limit their return until it is clear that they did not contract the virus, which is typically a period of 14 days.

## 8. IF WE CLOSE OR REDUCE OPERATIONS, DO WE HAVE TO PAY OUR EMPLOYEES?

The law does not require you to pay non-exempt employees for time that they do not work. You are not required to continue to pay your rank and file employees if they are off and not working. However, exempt employees are going to be entitled to their full wages if they perform any work while they are at home. This includes checking their emails.

Employees may be permitted to utilize their paid leave for any absences, and employees who are not receiving pay may also be entitled to unemployment compensation benefits during this time.

In fact, the State Unemployment Compensation Office has relaxed some of the requirements, including the waiting week requirement, for employees to receive unemployment compensation. They have put out a fact sheet of frequently asked questions, which is available by following the link [here](#).

## 9. IF WE WANT TO PAY OUR EMPLOYEES, OR MAKE CHANGES TO OUR PAID TIME OFF BENEFITS LIKE SICK LEAVE, WILL WE HAVE A PROBLEM WITH OUR UNIONS?

This is an emergency situation and so we have helped many of our clients make changes quickly. Generally speaking, the unions are asking for employees to be sent home and for employers to be flexible with leave policies. If what you are doing is enhancing the employees' ability to be home and receive pay, the unions are likely to work with you and/or not object to emergency measures.

If you require assistance with these issues, please call us.

## 10. CAN EMPLOYEES TAKE FMLA LEAVE FOR THIS?

Illness in the nature of the flu or other respiratory infections are not normally covered by FMLA unless they result in a "course of continuing treatment," however, the Families First Coronavirus Response Act has recently been passed. As detailed more fully below, it provides expanded FMLA leave for Coronavirus related absences from work.

# FAMILIES FIRST CORONAVIRUS RESPONSE ACT



The Families First Coronavirus Response Act was enacted on March 18, 2020. The Act provides paid sick leave and free coronavirus testing, expands food assistance and unemployment benefits, and requires employers to provide additional protections for health care workers. There are two components that will govern the payment of sick leave for employees absent from work due to the Coronavirus.

The first is the Emergency Paid Leave Act, which provides full time employees with up to two weeks (80 hours) of paid sick leave for Coronavirus related reasons:

1. To self-isolate because the employee is diagnosed with Coronavirus.
2. To obtain a medical diagnosis or care if such employee is experiencing the symptoms of Coronavirus.
3. To comply with a recommendation or order by a public official with jurisdiction or a health care provider on the basis that the physical presence of the employee on the job would jeopardize the health of others because of—(A) the exposure of the employee to Coronavirus; or (B) exhibition of symptoms of Coronavirus by the employee.
4. To care for or assist a family member of the employee—(A) who— (i) is self-isolating because such family member has been diagnosed with Coronavirus; or (ii) is experiencing symptoms of Coronavirus and needs to obtain medical diagnosis or care.
5. To care for the child of such employee if the school or place of care has been closed, or the child care provider of such child is unavailable, due to Coronavirus.

Part-time employees are also entitled to leave for the reasons above based upon their average weekly hours over a two week period.

The sick leave under this Act shall be in addition to any leave already provided by your municipality, and may be used before any sick leave to which the employee is already entitled. Employees absent for their own Coronavirus exposure shall be entitled to compensation at their regular rate of pay; however, employees absent to care for a family member must be paid at least two-thirds (2/3) of their regular rate of pay.

The second is the Emergency Family and Medical Leave Expansion Act, which expands the FMLA to provide up to 10 weeks of paid leave to eligible employees who need to be off work for Coronavirus related absences, specifically:

1. To comply with the recommendation of a public health official or health care provider that the employee's physical presence would compromise the health of others due to the employee's exposure to or the demonstration of symptoms of the Coronavirus;
2. To care for an at-risk family member who is adhering to a recommendation of a public health official or health care provider that the employee's family member's presence in the community would compromise the health of others due to the employee's exposure to or the demonstration of symptoms of the Coronavirus;
3. To care for the employee's child if the child's school or place of care has been closed, or if their childcare provider is unavailable, due to the Coronavirus.

Note that to be eligible for leave under this Act, an employee need only to be employed for 30 calendar days. The first 2 weeks of leave can be unpaid (or the employee may elected to use his or her paid leave) and the remaining 10 weeks of leave will be paid at an amount of not less than two-thirds (2/3) the employee's regular rate of pay calculated in accordance with the FLSA.



## RECOMMENDED RESOURCE LINKS

- <https://content.govdelivery.com/accounts/USEEOC/bulletins/281e437>
- [https://www.eeoc.gov/facts/pandemic\\_flu.html](https://www.eeoc.gov/facts/pandemic_flu.html)
- <https://coronavirus.jhu.edu/>
- <https://www.uc.pa.gov/Pages/default.aspx>
- <https://www.health.pa.gov/topics/disease/Pages/Coronavirus.aspx>
- <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>