

OHIO ASSOCIATION OF PROFESSIONAL FIRE FIGHTERS



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TO: OAPFF AFFILIATES and MEMBERS

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**REF: LEGAL and CONTRACTUAL CONSIDERATIONS on the NOVEL
CORONAVIRUS 2019 (COVID-19)**

The coronavirus has employers, employees and labor unions across this nation sailing into uncharted waters. The same is true for all of our 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.

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

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 of 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 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

Many people might assume that if a firefighter contracts the coronavirus as a result of exposure on-the-job, that the disease would be covered by workers compensation. That might not be a safe assumption. Although the Bureau of Workers Compensation has probably not addressed the issue yet, and while it is possible that the Bureau would conclude that an on-the-job exposure to the coronavirus would be a legitimate workers compensation claim, past practice would suggest that the coronavirus disease would likely not be ruled as a valid workers compensation claim.

This is so because there is nothing about the coronavirus that makes it an occupational disease. You obviously do not need to be a firefighter to contract the virus. Consider that right now an employee who contracts the flu as a result of an exposure while working, would not have the flu considered a covered workers compensation claim. Again, anyone can contract the flu, so there is nothing unique about a firefighter getting the flu. While it remains to be seen, and hopefully the Bureau would recognize the importance of protecting first responders who are exposed to the virus as part of their jobs, it is still quite possible that the Bureau would treat the coronavirus the same as it does other common diseases such as a cold or flu.

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)?

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 our union. Please do not hesitate to contact us if you have any other questions.