

COVID-19: Legal Considerations for Massachusetts Municipal Employers in 2021

Massachusetts Municipal Human Resources
Association

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Emerging Issues



- OSHA Recommended Safety Precautions
- The COVID-19 Vaccine
- COVID-19 Leave Options
- Remote Work Policies
- Potential Workers' Compensation Claims

Ongoing Concerns with COVID-19

OSHA Updated Guidance

President Biden has requested OSHA update its COVID-19 guidance

- OSHA issued revised, updated guidance on January 29
 - Voluntary, not mandatory
 - Recommend implementation of a COVID-19 prevention program
 - Assignment of workplace coordinator
 - Thorough hazard assessment
 - Putting in place measures to combat hazards (PPE and face coverings, separation of sick EE's, physical distancing, barriers, cleaning and hygiene supplies)
 - Consideration of special protections for persons at higher risk of illness (including older adults)
 - Education and training and establishing system of communication for any complaints
 - Instruction to stay home for sick workers and isolation of sick workers who report to work

OSHA Updated Guidance

- Continued OSHA Guidance
 - Continue to allow telework, where possible
 - Enhanced cleaning and disinfection
 - Guidance on screening and testing
 - Recording and reporting infections and deaths
 - Make vaccine available at low-cost or no cost to employees
 - Continue protective measures even as more employees become vaccinated
 - Important to determine internal reporting procedure to avoid discrimination/retaliation claims
- Emergency temporary standards expected from OSHA by March 15
- Increased enforcement by OSHA of workplace violations

COVID-19 Vaccine Considerations

Vaccinations

Massachusetts Vaccination Current Schedule:

- All Phase 1 Priority Groups -- Released
 - Health care workers
 - Long-term facility residents
- Phase 2– Released as of Feb. 1
 - Group 1: 75 and older
 - Group 2: 65 and older, individuals with 2+ certain medical conditions, residents and staff of low income and affordable senior housing
 - Group 3 (not yet released): Front-line workers, court system workers.
 - ***Governor Baker just announced that beginning on March 11th preK-12 education workers will be able to get vaccinated.**
- Phase 3 groups – Not yet released (Starting April 2021)
 - The general public including higher education workers, bottled beverage industry workers, Veterinarians

Vaccinations

Employers can require employees to be vaccinated.

- Vaccination is not a medical examination under ADA
 - However, pre-screening questions may constitute a medical examination
 - Must show job related and consistent with business necessity
- Employer can require proof of vaccination
 - Follow-up questions may constitute inquiry into disability
- Genetic Information Nondiscrimination Act not implicated by these acts
 - **However, be wary of pre-screening questions.**

Vaccinations

- Provide reasonable accommodations based on disability or sincerely held religious belief
 - For disability, employer can exclude employee if unvaccinated employee would pose a direct threat due to “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
 - For religion, employer must provide reasonable accommodation unless it would pose an undue hardship, defined as more than a de minimis burden or cost on the employer
- Engage in interactive process

During the COVID-19 Pandemic, Employers MAY:

- During the COVID-19 Pandemic, Employers MAY:
 - Send employees home if they display coronavirus-like symptoms;
 - Cough, fever, chills, sore throat, shortness of breath;
 - Ask employees if they are experiencing coronavirus-like symptoms;
 - Ask employees if they have traveled to an affected area;
 - Measure an employee's body temperature to determine if they have a fever;

During the COVID-19 Pandemic, Employers MAY: (cont'd)

- Ask why an employee has been absent from work;
- Ask employees to telework;
 - **May be considered a reasonable accommodation for employees with disabilities/handicaps**
- Require a fitness-for-duty certificate to return to work
 - **BUT CDC currently recommending against this to avoid burden on healthcare system**
- Screen applicants for COVID-19 symptoms
 - Must do for all employees entering the same job type
- Delay start dates or withdraw job offers from applicants experiencing COVID-19 or similar symptoms

During the COVID-19 Pandemic, Employers MAY NOT:

- During the COVID-19 Pandemic, Employers MAY NOT:
 - Ask an employee if they have a compromised immune system or chronic health condition, unless they are experiencing coronavirus symptoms;
 - Assume that all disabilities carry an increased risk of developing COVID-19 or complications;
 - Compel employees to get a seasonal influenza vaccine regardless of medical conditions or religious beliefs
 - Does not protect against COVID-19;
 - Employees may be entitled to an exemption based on ADA disability or religious belief

COVID-19 Leave

Families First Coronavirus Response Act

- **Effective April 1, 2020**

- Expired December 31, 2020 BUT tax credit extended through March 31, 2021
- Leave allotment is the same as it was dating back to April 1.

- **Emergency Family Medical Leave Expansion Act**

- Expands the FMLA for public health emergencies related to COVID-19
- Employees eligible after 30 days of employment;
- Permits eligible employees to take up to 12-weeks of job-protected leave under the FMLA when the employee is unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to the current public health emergency
 - For children over the age of 14 the parent must certify that special circumstances exist requiring care of the child.

Families First Coronavirus Response Act

- **Emergency Paid Sick Leave Act – Up to 80 hours of sick leave**

- The employee is subject to a Federal, State or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
 - Paid leave is employee’s regular rate, or the highest applicable minimum wage (state, local, or federal), whichever is higher. Capped at \$511 per day, \$5,110 in the aggregate.
- The employee is caring for an **individual** who is subject to a quarantine or isolation order or health care provider advisory, as described above.
- The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions;
- The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor;
 - Paid leave is 2/3 of employee’s regular rate, or 2/3 of the highest applicable minimum wage (state, local, or federal), whichever is higher. Capped at \$200 per day, \$2,000 in the aggregate.

Families First Coronavirus Response Act

• Tax Credits

- For both the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act:
 - Employers eligible for a refundable tax credit equal to 100% of qualified wages paid by the employer for each calendar quarter;
 - Subject to same caps
 - Some portion immediately recoverable by withholding the SS tax, but otherwise need to apply to IRS for a refund
 - <https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provide-d-by-small-and-midsize-businesses-faqs>

Other Available Leaves

- Employer Sick Leave Policies
- FMLA Leave
 - Up to 12 weeks of unpaid leave in a benefit year for:
 - **A serious health condition that makes the employee unable to perform the functions of their job**
 - **To care for the employee's spouse, son, daughter, or parent who has a serious health condition**
- Leave as a reasonable accommodation under the ADA and M.G.L. c. 151B §4
- Paid Family and Medical Leave (PFML)
 - Up to **20** weeks of medical leave for employee's serious health condition, Up to **12** weeks of family medical leave to care for a family member with a serious health condition
 - PFML leave to care for a family member does not take effect until 7/1/2021
 - Statute does not require PFML for municipal employees however municipalities may opt-in by vote in their legislative or governing body

Remote Work Policy Considerations

Remote Work: The Big Picture

- Can be a great accommodation for employees that need a disability or religion accommodation.
- Can be used for worksite safety purposes
 - Effective February 8, 2021, most businesses including offices, museums, and libraries, are now allowed to operate at a 40% occupancy limit.
 - Remote work allows for employees that need to be on-site to have more space for OSHA related safety protocols.
- Can be challenging when managing current employees and onboarding new employees

Key Considerations

- Eligibility requirements
 - E.g. position, performance requirements, tenure with company
 - Determine if said employee will be able to work from home without decreased productivity
- Internet and technology security concerns
 - Privacy and data security
- Equipment/Expense reimbursement
- Revaluation of workhours
 - E.g. employees that are tele-working due to childcare issues
- Tax implications
- Effect on team dynamics.

Workers' Compensation Issues

Workers' Compensation & COVID-19



- Workers' compensation only covers injuries that are work related.
 - Employer sponsored vaccination programs could potentially fall under this category.
- Coverage for communicable disease, such as COVID-19, is further limited to situations where “the hazard of contracting such diseases by an employee is inherent in the employment.”
- Per guidance from the Attorney General’s Office there are certain positions where the individual’s employment inherently leaves them with a heightened risk of COVID-19, thus likely qualifying for worker’s compensation.
 - E.g. nurses working with COVID-19 patients.

Workers' Compensation & COVID-19

- Employer Duties:
 - Notify the Department of Industrial Accidents (DIA) and your Workers' Compensation Insurance Company within seven days of the employee giving you notice.
 - This notice should include the name and nature of the business of the employer, the name, age, sex, and occupation of the injured employee, and the date, nature, circumstances and cause of the injury and such additional information as the division shall prescribe.
- The decision on whether an employee qualifies for workers' compensation is up to the insurance company.

THANK YOU

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