

March 17, 2020

In response to the seemingly endless array of public announcements, warnings, and advisories, many public employers now seek to institute immediate changes to working conditions in response to the coronavirus pandemic. Our association clients – particularly those in public safety – must stand ready to assert their labor rights on behalf of their members, who, after all, are the first individuals that will be called upon to serve their communities and provide support to those in need in these uncertain times. Just as your members must remain ready to serve, the team at Rains Lucia Stern St. Phalle & Silver, PC stands ready to do the same on your behalf.

As always, information is the best means of preparation, so we are sharing a list of common labor issues that we have already confronted, and foresee confronting, in the time ahead.

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MEET AND CONFER RIGHTS & DECLARED EMERGENCIES

As all association leaders are aware, employers have an obligation to provide reasonable written notice prior to making any change to working conditions within the scope of representation – including work schedules, leave policies, pay rates, etc. (Gov. Code § 3504.5(a), 3505.) There is an exception to this requirement, however, for declared “emergencies.” Government Code section 3504.5(b) states that an employer need not provide advance notice prior to making a change, so long as the employer provides notice to and meets with the collective bargaining representative “at the earliest practicable time following the adoption of” a change within scope. Many employers have already invoked this exception and no doubt there will be many more in the coming days.

An employer’s decision to declare an “emergency” and circumvent Section 3304.5(a)’s advance notice requirement is “discretionary” and therefore entitled to some deference. However, employers cannot abuse this discretion, meaning that employers relying on an emergency to justify changing working conditions

must demonstrate the existence of an actual emergency. Employers must establish that there is an “imminent and substantial threat to public health or safety,” for which “a substantial likelihood that serious harm will be experienced [] unless immediate action is taken.” This is “not synonymous with expediency, convenience, or best interests” of the employer.

For most of us in California, especially those working and living in the Bay Area, there will be objective criteria that will likely support a local declaration of emergency. With that said, each declaration and accompanying response will need to be examined in light of the unique situation in each jurisdiction.

When an employer looks to take unilateral action in furtherance of a declaration of emergency, labor leaders must demand:

1. Factual specificity as to what the emergency precisely entails in that jurisdiction, including the source of the information;
2. An articulation of how the unilateral changes are responsive to the emergency; and
3. A meeting “as soon as practicable” to discuss whether any alternatives in the best interests of association membership should be considered and implemented.

MODIFIED WORK SCHEDULES INCLUDING CANCELLATION OF DAYS OFF

While the default course of action for most public safety agencies is to respond to emergencies by modifying employee shift schedules (including cancelling days off), the correlation to responding to the coronavirus pandemic is typically going to be nonexistent. Although employers will legitimately want to limit employee exposure and the potential for coronavirus spreading throughout the agency, the need to change schedules or cancel days off seemingly has no correlation to those objectives. As none of our clients have reported a significant impact on staff availability as a result of the coronavirus, there is time for labor and management to meet and confer on contingency plans should events turn for the worse. Recognizing that the closures of schools, daycares, and other services will adversely impact employee households, there is reason to address staffing needs and resources even if agencies are confident that the coronavirus will not directly impact staffing. Any changes are subject to the meet and confer requirements under the Meyers-Milias-Brown Act, as well as other state and federal laws.

WORKERS’ COMPENSATION CLAIMS

Should a member believe they have been exposed to coronavirus while on the job, they should be advised to immediately:

1. Inform their employer through formal channels (i.e., in writing to an appropriate supervisor) of their exposure and/or symptoms;
2. Complete and submit a DWC-1 Form (Workers’ Compensation Claim Form) to the employer;
3. Where it is feasible, obtain medical documentation of your symptoms and your need to miss work and provide this information to your employer at your earliest

convenience.

4. If necessary, utilize any available sick leave to return home;
5. Document all instances in which exposure occurred or could have occurred while on-duty; and
6. Contact our [workers' compensation team](#) to guide and protect their rights.

Association leaders can assist in these instances by documenting what efforts, if any, their employers have taken to implement the recommendations of the World Health Organization (WHO), the Center for Disease Control (CDC), and the County Public Health Departments, including but not limited to allowing work from home, providing for social distancing in briefing, locker rooms, and all non-emergency situations (i.e., situations other than active violent felonies), and increased access and availability of personal protective equipment, sanitizer, cleansing wipes, etc.

FAMILY MEDICAL LEAVE

RLS is closely monitoring newly drafted federal legislation which has already been passed by the House of Representatives that will expand the Family Medical Leave Act (FMLA) for coronavirus related absences. That legislation will address the right to paid and unpaid leave for patient treatment, care and recovery, as well as child care necessities arising from the closures of schools and daycare facilities.

DIRECTIVES TO UTILIZE SICK LEAVE IN THE EVENT OF OBJECTIVE SYMPTOMS

Although it is not uncommon for employees to work through mild cold and flu-like symptoms, it is of critical importance that employees utilize sick leave benefits available to them to ensure the health and welfare of themselves and their colleagues. Moreover, in order to ensure the availability of the workforce, it should be expected that employers will become more vigilant in exercising their discretion to order an employee demonstrating objective symptoms associated with coronavirus to utilize their accrued sick leave and return home until they are free of symptoms for at least 24 hours (without the use of medicine).

EMPLOYER OPERATION SHUTDOWN

We have become aware of many public employers that have “shut down” certain government services, or are planning to do so imminently. In order to protect their rights, before leaving work and returning home, members should be advised that:

1. If they do not want to leave work and are not sick, to inform their employer through formal channels (i.e., in writing to an appropriate supervisor) that they want to remain on the job;
2. If directed to return home, secure a formal order to do so from an appropriate supervisor; and,
3. Demand being placed on paid administrative leave for the duration of the order.

In almost every instance, members have a right to the continuation of their paycheck. Associations should take care to ensure that orders to members to return home and not work come via official order and/or proclamation by the employer's governing authority, and that such orders will have the effect of mandatory paid administrative leave.

We encourage our clients to contact their designated labor representative to guide them through the above and any other labor issue that may arise. Again, we stand ready to serve you. Take care of one another and stay safe.

SERVING ALL OF CALIFORNIA

NOTICE: Making a false or fraudulent workers' compensation claim is a felony subject to up to 5 years in prison or a fine of up to \$50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.