

MERCERTRIGIANI

Living & Governing Through Coronavirus (and other Acts of God or *Force Majeure*)

Employment Considerations

For community associations that maintain a staff of employees, the Coronavirus pandemic raises additional concerns that must be addressed. While associations are not responsible for the health and safety of *residents*, associations are responsible for providing a safe workplace free from recognized hazards for *employees* – this may be particularly difficult under current circumstances because association staff members provide services to residents, increasing personal contact and the possibility of exposure to Coronavirus.

In coordination with staff leadership, boards of directors should adopt and implement procedures in response to Coronavirus concerns to mitigate exposure risks. The following may be considered when developing a plan of action –

Perform Routine Environmental Cleaning – A common theory is that the Coronavirus may survive on surfaces touched by an infected individual for a period of hours or up to three days, depending on the surface. It is *imperative* that associations ramp up cleaning and disinfecting of surfaces commonly touched in the course of employment, including – doorknobs, countertops, computer keyboards, phones, tables, chairs, toilets and sinks.

Practice Social Distancing – Community associations were not among the businesses directed to be closed in Executive Order Number Fifty-Three issued by the Governor of Virginia on March 23, 2020. So, associations are not required to close offices or business operations. But, individual contact must be limited and adequate social distancing must be practiced – avoid gatherings of more than ten persons and maintain a personal distance of at least six feet from others when possible. Strategies for social distancing recommended by the CDC include staggering shifts and increasing physical space between employees and visitors.

Promote Preventive Hygiene – Coronavirus is apparently spread primarily through person-to-person contact, most often after touching your eyes, nose and mouth with unwashed hands. Encourage employees to [cover coughs and sneezes](#), but not with hands. Hands should be [washed frequently](#) – 20 seconds with soap and water. Employees should avoid touching their eyes, noses and mouths. Social distancing should be encouraged. The CDC has published [flyers](#) that may be posted around the workplace to encourage preventive hygiene. Encourage sick employees to stay at home. Send employees showing signs of illness home – [symptoms](#) of COVID-19, the disease relating to Coronavirus, includes fever, cough and shortness of breath.

Assess Working Conditions – If employees can fulfill responsibilities from home or outside the office, remote work may be implemented. When association services require staff to be onsite, resident interaction should be limited as much as possible – reduce office hours or use alternative communication methods (email, telephone, written comments). If service calls are provided to units, precautions should be taken to limit exposure – use of masks and other hazard equipment may be appropriate in tandem with routine cleaning and sanitizing.

Evaluate Leave & Pay Policies – Boards should review leave policies. While Virginia currently does not *require* private companies (such as community associations) to provide sick, vacation or personal leave, companies will be expected to comply with established policies. In reviewing leave policies, boards should consider whether employee benefits should be extended or expanded – it is important to look beyond immediate legal requirements to broader business implications and unintended consequences. For example, by limiting paid leave, employees may be compelled to return to work prematurely and expose other employees and residents to infection. Community associations are *businesses* and board members should exercise their best business judgment in making decisions about leave and wage policies.

Statutory Paid Leave Requirements – Federal statutes, such as the Family and Medical Leave Act and the Americans with Disabilities Act, that require employers to provide job-protected leave will impact community associations on varying levels. Separate analysis is required to determine whether these federal laws apply (these standards generally do not apply to employers with fewer than fifteen employees), in addition to Virginia wage laws and the Fair Labor Standards Act.

The Families First Coronavirus Response Act (“FFCRA”) was enacted on March 18, 2020. Effective April 1, 2020, the FFCRA provides emergency wage relief to employees in two forms – the Emergency Paid Sick Leave Act (“EPSLA”) and the Emergency Family and Medical Leave Expansion Act (“EFMLA”). FFCRA applies to all employers with less than 500 employees and, among other measures, prohibits employers from discharging, disciplining or otherwise discriminating against any employee who seeks to benefit from the FFCRA. The Secretary of Labor will issue regulations to implement FFCRA exemptions to businesses *with less than fifty* employees if viability of the business may be jeopardized by imposing FFCRA requirements.

All employers subject to the FFCRA must display the notice prepared by the United States Department of Labor in a conspicuous place in the main area of the employer’s premises by April 1, 2020. The FFCRA notice poster is available [here](#).

EPSLA – Under the EPSLA portion of the FFCRA, employees are entitled to paid sick leave – the duration of paid sick leave depends on whether the employee is a full-time or part-time employee. In order to be entitled to paid sick leave, the employee must be unable to work for one of the following reasons:

- (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) has been advised by a health care provider to self-quarantine related to COVID-19;
- (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- (4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- (5) is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
- (6) is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

The amount of wages to which an employee is entitled depends upon the reason (of those listed above) the employee is unable to work. If the reason the employee is not among the six reasons listed above, the employee is not entitled to paid leave under the EPSLA.

Paid sick leave under the EPSLA is in addition to current sick leave or personal time offered to employees. Employees may not require employees to exhaust current paid time off before electing to use paid sick leave under the EPSLA.

EFMLA – The EFMLA provides expanded family and medical leave to employees who are unable to work because

- (i) the employee is quarantined or experiencing COVID-19 symptoms and seeking medical diagnosis or
- (ii) of a bona fide need to care for an individual subject to quarantine or for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19 or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

Where the employee is unable to work because of reason (i) above, employees are entitled to two weeks (up to eighty hours) of paid leave at the employee's regular rate of pay. Where the employee is unable to work because of reason (ii) above, employees are entitled to two weeks (up to eight hours) of paid leave at two-thirds the employee's regular rate of pay – employees who have been employed for at least thirty days, however, are entitled to an additional ten weeks of pay.

The first ten days of leave under the EFMLA may be unpaid, but employees may elect to use other accrued paid leave, including paid leave the employee may be entitled to under the EPSLA. After ten days, employers must pay employees wages in accordance with the EFMLA until the EFMLA leave period is exhausted.

Disseminate Information – Communicating changes in association operations is important, for employees *and* residents. Employees need to know what steps are being taken to ensure a safe work environment. Residents need to know how changes in operations may impact availability of association staff and whether to expect any disruptions in service. Information should be disseminated to regularly.

Remain Calm – Encourage employees to exercise courtesy to others. Remember that community associations are housing providers subject to federal and state fair housing laws that protect persons with disabilities and persons who are members of other protected classes.

Insurance – Boards should request guidance from association insurance brokers to determine applicability of insurance to concerns raised by Coronavirus – Is there coverage for claims related to unsafe working conditions? Does workers compensation insurance provide coverage for employees potentially infected while on the job?

These are extraordinary times and there is no single established protocol – we are all learning and finding ways to address questions and circumstances as they arise. But, boards should act promptly to address staff member concerns and take preventive measures to reduce health (and legal) exposure.

<i>Employer Resources</i>	
Center for Disease Control & Prevention	https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html
United States Department of Labor	https://www.dol.gov/coronavirus
United States Department of Labor – FFCRA Information	https://www.dol.gov/agencies/whd/pandemic
Virginia Department of Labor & Industry	https://www.doli.virginia.gov/wp-content/uploads/2020/03/Coronavirus-Hazard-Alert.pdf
Occupational Safety and Health Administration	https://www.osha.gov/Publications/OSHA3990.pdf
U.S. Equal Employment Opportunity Commission	https://www.eeoc.gov/facts/pandemic_flu.html