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COVID-19 & PUBLIC EMPLOYMENT LAW: ANSWERS TO FREQUENTLY ASKED QUESTIONS FOR GEORGIA MUNICIPAL EMPLOYERS

Public Employment Law/COVID-19 FAQs
Series One: How to Maintain Safe and Healthy Workplace While Remaining Compliant with Americans with Disabilities Act
[UPDATED]

Our City is committed to following the guidances and recommended practices from the Centers for Disease Control and Prevention's (CDC) and the Georgia Department of Public Health (GDPH) for minimizing the potential for exposing our employees to COVID-19. At the same time, we are aware that the Americans with Disabilities Act (ADA) imposes substantial limitations on our City's ability to require employees to submit to medical exams and to answer medical questions. Given the current public health crisis, we are struggling to reconcile those limitations with our obligation to provide a safe and healthy workplace for all employees.

Q1. **How far can our City go in attempting to provide a safe and healthy work environment for all employees without violating the ADA? Can the City require that employees comply with the recommended precautions designed to prevent the spread of COVID-19?**

A: Yes, the City can – and should – impose such a requirement. Precautions that can be imposed on the City's workforce include:

- Wash hands frequently with soap and water for at least twenty (20) seconds at a time after touching any surface or handling tools, equipment, packages, and other items that have been touched or handled by others. A person's hands are only clean until the next surface or item he/she touches.
- Use hand sanitizer when soap and water is not available. Alcohol-based hand sanitizers with greater than sixty (60) percent ethanol or seventy (70) percent isopropanol are recommended.
- Avoid touching your eyes, nose, and mouth with unwashed/unsanitized hands. These are all mucous membranes that serve as key entry points for the virus. The average person touches his/her face over twenty (20) times per hour. It is largely an involuntary/subconscious act that is difficult to avoid altogether, and once it occurs there are no practical, effective steps that can be taken to mitigate the possibility of transmission. These facts should illustrate the critical importance of frequently washing/sanitizing the hands.
- Cover your mouth and nose with a tissue when you cough or sneeze and then immediately wash your hands. If a tissue is unavailable, cough and sneeze into the inside of your elbow. Do not reuse tissue after coughing, sneezing or blowing your nose into it.
- Clean and disinfect commonly/frequently touched items and surfaces, including workstations, computer keyboard and mice, telephones, handrails, and door knobs.
- Avoid using areas or items used by other employees, such as desks, offices, computers, telephones, writing implements, or other work tools and equipment, when possible. If necessary, clean and disinfect them before and after use.

- Practice social distancing by avoiding large gatherings and maintaining distance (approximately 6 feet) from others when possible.

Q2. Can the City require that employees notify their supervisor or Human Resources if they have symptoms associated with COVID-19?

A: Yes, the City can – and should – impose such a requirement. While there are no symptoms that are entirely unique to COVID-19, those that have been identified as consistent with the infection include:

- Fever and/or Chills.
- Cough and/or Sore Throat.
- Shortness of Breath / Trouble Breathing.
- Persistent Pain / Pressure in the Chest.

Q3. Can the City require that employees notify their supervisor or Human Resources if they have contracted/have been diagnosed with COVID-19?

A: Yes, the City can – and should – impose such a requirement. Relevant follow-up questions would be:

- What was the date of the diagnosis?
- Did he/she have symptoms and, if so, when did they first develop?
- What other employees has he/she had "close contact" since developing symptoms? Since being diagnosed? **[See Series 1, Q13, for explanation of "close contact".]**

Q4. Can the City require that employees notify their supervisor or Human Resources if they are exposed to a person infected with COVID-19?

A: Yes, the City can – and should – impose such a requirement. In so doing, however, the City should bear in mind that because "exposure" is an imprecise term, it will be necessary to evaluate the information provided by the employee to determine whether the reported exposure requires action on the City's part. As explained in more detail below, the City need only act based on "significant risk" exposures. **[See Series 1, Q13, for explanation of "significant risk" exposures.]** Elarbee Thompson's Public Sector Group has developed an Exposure Risk Assessment Checklist for use by GMA and its members for this purpose.

Q5. Can the City require that employees with symptoms associated with COVID-19 stay home (not come to work)? What about employees who have had "significant risk" exposure to a person infected with COVID-19? What about employees who have contracted/have been diagnosed with COVID-19?

A: Yes. The EEOC recognizes that, in times of public health emergencies such as the current COVID-19 pandemic, strict adherence to the ADA's limitations may compromise critical initiatives designed to slow the spread of the pathogen causing the crisis. The EEOC has therefore published a guidance, recently updated to address the COVID-19 pandemic, to assist employers in reconciling the tension between the ADA and the obligation to provide a safe workplace for employees. In announcing release of the updated

guidance, the EEOC made the following statement: "The ADA and Rehabilitation Act rules continue to apply, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19. Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety."

In view of the foregoing, the EEOC is taking the position – at least during the pendency of the current public health crisis – that requiring an employee to stay home (or sending an employee home) because he/she has symptoms consistent with COVID-19, has had a "significant risk" exposure to a person infected with COVID-19, or has contracted/has been diagnosed with COVID-19, does not violate the ADA.

Q6. What if an employee with symptoms associated with COVID-19 insists that he/she is simply suffering from allergies? Or a common cold? Does that impact the City's ability to send him/her home?

A: No. While the City may take such information into consideration, the stakes are simply too high for the City to be required to accept such assurances. Symptoms associated with allergies or minor conditions are often indistinguishable from symptoms associated with COVID-19. As such, to ensure a safe and healthy workplace, the City should apply the same standards to all employees who are symptomatic. If, however, such an employee is able to provide medical certification from his/her treating healthcare provider confirming that the exhibited symptoms are non-communicable, the City may rely on such documentation and allow the employee to return to work.

Q7. How much information may our City request from an employee who calls in sick or who comes to work but then reports that he/she is sick, in order to protect the rest of its workforce?

A: According to the EEOC, during a public health crisis such as the current pandemic – and notwithstanding the ADA's restrictions on medical inquiries – employers may ask such employees yes or no questions whether they are experiencing symptoms associated with COVID-19. **[See Series 1, Q2, for explanation of symptoms.]** Of course, the City must be consistent in its approach and avoid focusing its inquiries on protected classifications of employees (e.g., older employees or employees of a given national origin) and must also ensure that all medical information obtained through these inquiries is maintained as confidential in accordance with ADA requirements.

Q8. Can the City send an employee home or require that he/she not come to work if it has reason to believe that the employee has symptoms associated with, has had a "significant risk" exposure to, or has contracted COVID-19 – if the employee fails to report or even denies it?

A: Yes. To comply with the ADA, however, any such determination must be supported by a reasonable belief formed after consideration of objective evidence. This would include information provided by the employee – during the public health crisis, the City may ask the employee yes or no questions regarding symptoms associated with, possible "significant risk" exposure to, or having contracted COVID-19, so long as it avoids focusing such inquiries on any particular category of employees (e.g., older employees

or employees of certain national origins). The City may also take into consideration observable symptoms such as coughing or apparent difficulty breathing, as well as other relevant information such as credible reports that the employee stated that he/she is experiencing non-observable symptoms associated with COVID-19 or that a member of his/her household has contracted COVID-19. The City should document the process by which any such determination is made, including a description of the observations, information, or other evidence relied upon, and place the documentation in the employee's confidential medical file should it ever become necessary to defend the determination and the actions taken as a result of that determination.

Q9. In addition to asking questions relating to symptoms, "significant risk" exposure, or contracting COVID-19, can the City take the employee's body temperature to determine whether he/she has a fever?

A: The EEOC's guidance notes that measuring an employee's body temperature meets the definition of a medical examination under the ADA. As such, the City would be required to demonstrate that taking the employee's temperature is job-related and consistent with business necessity. Due to the current public health crisis, however, the EEOC has taken the position that this standard is met (but is quick to point out that not every person with COVID-19 will have a fever). In checking employees for fever, the City would need to ensure that it avoids focusing on any particular category of employees (e.g., older employees or employees of certain national origins). The City would also need to take the employee's temperature in a manner designed to ensure confidentiality and, as with all medical information, must maintain the results in a confidential medical record in compliance with the ADA.

Q10. What should we do if we learn that an employee who has been coming to work contracts/is diagnosed with COVID-19? Can we notify the employees who may have had "significant risk" exposure to the employee? Should we notify the CDC or GDPH?

A: First, the employee should be prevented from returning to work in accordance with the below described protocols. **[See Series 1, Q11, for explanation of return-to-work protocols.]**

Second, the City should notify employees determined to have experienced a potential "significant risk" exposure, without revealing the infected/potentially infected employee's name and while otherwise maintaining ADA-mandated confidentiality (even where the employee's identity is known or apparent – which is often the case). **[See Series 1, Q13, for explanation of "significant risk" exposures.]** To facilitate this, the infected employee should be asked – if possible – to identify all employees with whom he/she had close contact at any point over the preceding fourteen (14) days. **[See Series 1, Q13, for explanation of close contacts.]** Depending on its assessment of whether the contacts identified rise to the level of "significant risk" exposure, the City should be prepared for the possibility of having to send these other employees home in accordance with the recommended time periods set forth below (which underscores the importance of social distancing within the workplace). **[See Series 1, Q11, for explanation of return-to-work protocols.]**

Finally, employers are not currently required to report confirmed or suspected cases of COVID-19 (or exposures thereto) to the CDC or GDPH.

Q11. When should an employee who the City required to stay home due to symptoms consistent with COVID-19 be permitted to return to work? What about employees who were required to stay home due to a "significant risk" exposure to COVID-19? What about those who contracted/were diagnosed with COVID-19?

A: The GDPH has issued mandatory guidelines in accordance with Governor Kemp's Declaration of a Public Health State of Emergency. These guidelines, which are consistent with those issued by the CDC, are in most instances triggered by notifications received by a person from his/her healthcare provider or from a public health official or clinical laboratory. Because employers cannot safely wait to be advised of such notifications before acting in most instances, the below-described recommended return-to-work protocols have been adapted from the GDPH guidelines and CDC risk assessment guidelines for each category of employee (i.e., those with symptoms associated with, those with "significant risk" exposure to, and those who contract COVID-19):

- Symptoms Protocol. Send the employee home until at least twenty-four (24) hours after he/she is no longer symptomatic (measured from when he/she is no longer taking any medication to suppress the symptoms). If this 24-hour period seems short, bear in mind that it does not begin to run until after the cessation of symptoms – provided the employee has discontinued fever-reducing medications, cough suppressants, etc.).

- Exposure Protocol. Send the employee home for at least fourteen (14) days measured from the date of last known exposure. This applies to an employee who is known or has been determined to have experienced a "significant risk" exposure to an infected person as described below. This 14-day period represents the COVID-19 incubation period which is applied due to the lack of other relevant information about the employee's status – unless the employee submits medical documentation from a healthcare provider confirming that he/she may return earlier.

  If the employee does not develop symptoms associated with COVID-19 within this 14-day period, he/she can return to work. On the other hand, if the employee develops such symptoms or is diagnosed with COVID-19 during the 14-day period, then he/she transitions to the Symptoms Protocol described above or the Disease Protocol described below, as applicable.

- Disease Protocol. There are two such protocols – one for asymptomatic persons who have tested positive for the disease and one for symptomatic persons who have been diagnosed with the disease without the benefit of a test.

  - Where the diagnosis is based on a positive test result: If the employee properly isolated immediately following the test result and did not develop any symptoms associated with COVID-

19, he/she can return to work after seven (7) days have elapsed from the date of the positive test result.

- Where the diagnosis is not based on a positive test result: If the employee properly isolated immediately following the diagnosis, he/she can return to work seventy-two (72) hours following the cessation of symptoms (without the assistance of symptom-suppressing medication) – most importantly, the fever – provided that at least seven (7) days have elapsed since the symptoms began. For example, an employee who:

  - Starts experiencing symptoms on April 1,
  - Is diagnosed with COVID-19 (without having been tested) and goes into isolation on April 2,
  - No longer has a fever on April 4 and stops taking fever-reducing medication (e.g., acetaminophen) on that day, and
  - Still has no fever on April 5 and is experiencing improvement as to other symptoms,

  can return to work on the later of (a) seven days after symptoms began – April 8 or (b) seventy-two hours after cessation of fever without fever-reducing medication and with improvement in other symptoms – April 7. So, in this example, April 8 would be the last day the employee would be prohibited from coming to work.

Q12. If an employee with a "significant risk" exposure to a person with COVID-19 had close contact (as defined below) with several other employees before the exposure was reported and the employee sent home, does the above-described Exposure Protocol also apply to these other employees?

A: No. The CDC and other public health organizations refer to persons in the status of these other employees as "Contacts-of-Contacts." They are considered to be low-risk for contracting COVID-19 and therefore it is not necessary to apply any particular protocols to them unless or until:

- The original employee with whom they had close contact develops symptoms or is diagnosed with COVID-19 (in which case the Exposure Protocol should be applied); or

- One or more of them develop symptoms associated with or contract/are diagnosed with the disease (in which case the Symptoms Protocol or Disease Protocol should be applied, as applicable).

Because of the possibility that the original employee who was sent home under the Exposure Protocol may develop symptoms associated with or contract/be diagnosed with COVID-19, it is advisable to ascertain which employees he/she had close contacts (as defined below) with so as to be in a better position to act if necessary.

Q13. When does an employee's contact with a person with COVID-19 rise to the level of a "significant risk" exposure warranting application of the above-described Exposure Protocol?

A: This is determined through application of the CDC's risk assessment standards, as adapted for the workplace. The CDC recognizes high, medium, and low-risk exposures. Only high and medium-risk exposures are considered "significant risk" exposures warranting application of the Exposure Protocol.

- High-Risk Exposure. An employee is considered to have had a high-risk ("significant risk") exposure if he/she (a) is living in the same household as, (b) is an intimate partner of, or (c) is providing care for a symptomatic, infected person where recommended protocols for isolation are not being followed. This includes an employee who has lived in the same household as, has been an intimate partner of, or has cared for a symptomatic, infected person in the last fourteen (14) days. For purposes of this assessment, "intimate partner" refers to a spouse, boyfriend, girlfriend, or dating partner; the term includes, but does not require, sexual intimacy.

- Medium-Risk Exposure. An employee is considered to have had a medium-risk ("significant risk") exposure if he/she (a) has traveled internationally, (b) has traveled on a cruise ship or river boat, (c) has had close contact (as defined below) with a symptomatic, infected person in an enclosed space, (d) has had physical contact with the secretions of a symptomatic, infected person, (e) is living in the same household as, is an intimate partner of, or is caring for a symptomatic, infected person where recommended protocols for isolation are being followed. This also includes an employee who has lived in the same household as, has been an intimate partner of, or has cared for a symptomatic, infected person in the last fourteen (14) days.

  Note that because both high and medium-risk exposures are considered "significant risk" exposures for purposes of applying the recommended Exposure Protocol, it is not necessary for the City to distinguish between high and medium-risk exposures. As such, the above-described information relating to the two risk classifications is provided for informational purposes only, and the Exposure Risk Assessment Checklist does not make such distinctions.

- Close Contact. For purposes of these risk assessment standards, "close contact" means being within six (6) feet of the infected person for a prolonged period of time (i.e., 15 minutes or more) in a confined and/or enclosed space. It also refers to having physical contact with such a person's infectious secretions (e.g., as produced by a sneeze or cough).

- Low-Risk Exposure. An employee is considered to have had a low-risk/insignificant exposure if he/she has been in the same indoor environment as a symptomatic, infected person for a prolonged period of time not constituting a close contact (as defined above), and is considered to have had a no-risk exposure if he/she has interacted with a symptomatic, infected person under circumstances that do not meet any of the high or medium-risk conditions (e.g., walking by or briefly being in the same room with the person).

Q14. When an employee has been absent due to reasons relating to COVID-19 and indicates that he/she is ready to return to work, does the ADA allow the City to require medical certification that the employee is fit to return to work?

A: Yes, although both the EEOC and the CDC encourage employers to take a somewhat flexible approach to this requirement, based on the reasonable assumption that doctors and other healthcare professionals may not have time during – and in the days and weeks following – the COVID-19 pandemic to provide such documentation.

Q15. Should the City be concerned whether COVID-19 is a "disability" for ADA purposes? Even if it's not, would the City be "regarding" an employee as disabled if it determines – based on a reasonable belief formed from objective evidence – that he/she has COVID-19, and then prohibits him/her from returning to work?

A: Notwithstanding how serious the condition can be, COVID-19, in most instances, is unlikely to qualify as a disability given its limited duration. As with any non-qualifying condition, however, complications arising from it may qualify as a disability. Similarly, an otherwise non-qualifying condition will not be treated as a disability under the ADA's "regarded as" definition if it is transitory, which COVID-19 appears to be in most instances. While these are valid considerations generally, the City should not let them interfere with the proper exercise of its judgment and discretion during this public health crisis.

Q16. Our City stresses the importance of social distancing – both in and out of the workplace – in accordance with the CDC's guidances and recommended practices. One of our employees has a part-time job as a server and bartender at a popular bar in our community. Notwithstanding the public health crisis, the bar continues to attract numerous customers each night and the employee's department head is concerned that the employee's continued employment at the bar creates a high risk of exposing other City employees to COVID-19. Can the department head withdraw his/her prior approval allowing the employee to work this second job?

A: Almost certainly. If your City has a policy on part-time employment, follow whatever procedure it may establish for granting and/or withdrawing approval. Most policies specify that the part-time job must not interfere with City employment and/or that approval may be denied or withdrawn if deemed to be in the City's best interests. Either standard would be satisfied here, given the current circumstances. Even if the policy does not require notice, or if there is no policy, consider having your department head meet with the employee to voice his/her concerns and to give the employee an opportunity to respond to them. Unless the employee is able to adequately address the concerns expressed, the department head can then suspend or withdraw approval of the part-time job.

It is also advisable for the City to direct all department heads to revisit approved part-time jobs to assess their compatibility with the City's ongoing efforts to protect the safety and health of its employees and the public it serves (as well as to head off any potential argument by the employee that he/she was singled out or subjected to disparate treatment for some unlawful reason).

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This Public Employment Law FAQ Series was prepared by the Public Sector Group of Elarbee, Thompson, Sapp & Wilson, LLP, a legal practice group specializing in the representation of state and local government clients throughout Georgia primarily in matters relating to labor and employment. It was designed to serve as a comprehensive guide for the benefit and use of the Georgia Municipal Association and its membership during the declared public health emergency relating to COVID-19.

This series was prepared based on the most current information and legal analysis available; however, because the legal landscape relating to the pandemic is necessarily fluid, this resource will subject to periodic updates and revisions. As such, it is not intended, and should not be interpreted or relied upon, as legal advice. GMA members are encouraged to consult with their attorneys or outside counsel as needed. Elarbee Thompson's Public Sector Group is also available for consultation by contacting R. Read Gignilliat (404.582.8442 / gignilliat@elarbeethompson.com) or Sharon P. Morgan (404.582.8406 / morgan@elarbeethompson.com). As always, GIRMA members may contact Elarbee Thompson's Public Sector Group directly via the GIRMA Helpline (800.721.1998 / girmahelpline@elarbeethompson.com).