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209 East State Street • Columbus, Ohio 43215-4309
Phone: 614-221-5627 • Fax: 614-221-6986 • www.ccao.org

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THE IMPACT OF THE OHIO DEPARTMENT OF HEALTH TRAVEL ADVISORY ON COUNTIES

Prepared by Marc A. Fishel
Fishel Downey Albrecht Riepenhoff, LLP

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On July 22, 2020, the Ohio Department of Health (ODH) issued a COVID-19 travel advisory to protect against the spread of COVID-19. This advisory applies to states with a rate of positive COVID-19 tests of 15% or higher based on a seven-day rolling average. The list of states on the travel advisory will be updated every Wednesday. The advisory states, "If someone must travel, ODH is recommending 14 days of self-quarantine after leaving those locations." The travel advisory then sets forth what individuals should and should not do during the self-quarantine. As of July 29, 2020, twenty states had some form of travel order or advisory.

This travel advisory has created questions for counties concerning employees seeking to use vacation for out-of-state travel to one of the states on the advisory list. Because the July 22, 2020 travel advisory was not issued as an order, employers have options on how to treat requests for vacation leave involving travel to one of these states. This memo sets forth the various rights and duties, including legal and practical issues, for county appointing authorities responding to vacation leave requests. As with other aspects of COVID-19 issues, counties should consult with legal counsel and human resources professionals as decisions are made on this matter. Some of the issues and solutions set forth in this memo could also be impacted by provisions of a collective bargaining agreement.

The ODH travel advisory does not mandate a specific approach for counties when employees request vacation leave. Therefore, appointing authorities are not obligated to make any changes for reviewing and approving vacation leave requests. In addition, the travel advisory does not mandate an employer to require its employees to self-

quarantine after returning from business or vacation in one of the designated states. As a result, one option for appointing authorities is to maintain the status quo. The travel advisory does not require an employer to modify its policies on out-of-state travel or approving vacation leave.

On the other hand, appointing authorities who so desire can rely on the ODH travel advisory to make some temporary changes to vacation leave and for employees returning from vacation in one of the designated states. There is a wide range of options an employer can implement in response to the travel advisory. Counties should be flexible in their approach to these issues. There likely is not a “one size fits all” solution. The vacation leave requests should not automatically be denied simply because an employee intends to travel out of state. On the other hand, counties who want to possibly restrict travel and/or require post-travel quarantine need to make decisions based on information and not on assumptions. These situations should be viewed on a case by case basis and after consultation with legal counsel and human resources professionals.

In normal circumstances, an employer does not need or request details about an employee’s vacation leave request. An employee submits their request and the employer approves the leave unless there are staffing or operational reasons to deny the request. COVID-19 is not a normal circumstance. One way for an appointing authority to assess vacation leave requests during the pandemic and travel advisory is to gather more information from the employee. While the travel advisory is in effect, a county may require employees to provide details about their vacation plans. Employers can ask versions of the following questions during the travel advisory:

1. Whether the employee intends to travel out of state.
2. If so, the destination city and state and any planned stops.
3. The method of travel (airplane, car, etc.).
4. Protection methods used while traveling.
5. Places staying while out of state (hotels, AirBnB, private home, etc.)
6. Other relevant factors indicating the type of contact the employee may have with others during the out of state travel.

Once employers have this information, a decision can be made about 1) whether the request should be granted; and, 2) what conditions (such as quarantine upon return), if any, should be imposed. Please note that employees who lie about this information can be subject to disciplinary action.

Unless restricted in some way by a collective bargaining agreement, public employers have the right to deny vacation leave requests. Normally, most requests are granted because it is infrequent there is a legitimate reason to deny them. As stated above, we are not in normal times. Therefore, a public employer has the right to deny a vacation request if the decision is supported by operational needs. For example, if an appointing authority decides an employee travelling to a state on the travel advisory list needs to quarantine for 14 days upon return, that employee will be off work for three weeks

(assuming a one-week vacation). If an appointing authority legitimately cannot be without the employee for three weeks, the vacation request could be denied.

Once the appointing authority has sufficient information about the employee's travel plans, a decision can be made about what conditions, if any, will be placed on the employee when returning from leave. At that point, the employee can decide if they still want to use vacation leave under the conditions.

By gathering information about an employee's plans when vacation is requested during the pandemic, an employer can make an informed decision about what return to work conditions, if any, will be imposed. As a practical matter, an employee is more likely to accept these conditions if they are explained at the time the leave is requested.

There are several potential options counties can apply if there is a need to restrict employees returning from certain out-of-state travel. Some of the options include:

1. Remote work if available and practical;
2. A 14-day quarantine period;
3. A negative COVID-19 test meeting current medical best practices;[1]
4. Modified work hours to minimize contact with other employees and the public;
5. Modified work location to create workplace social distancing;
6. A combination of items 1-5.

The first option for an employer to consider is to allow the employee to telework during the quarantine period. Obviously, some positions are not able to telework. The decision on whether to allow telework is up to the employer. An employee does not have to be allowed to telework if there is no work available or the employer simply cannot or does not want to authorize it. On the other hand, if telework is an option, the employer can require it in lieu of the employee being off work for 14-days. The employee cannot refuse telework in this situation and expect to be off work on leave for the quarantine period.

The second option for the 14-day period is to require the self-quarantine and place an employee on administrative leave with pay. This approach avoids potential challenges to a decision by an appointing authority that "forces" an employee to use their own paid leave. On the other hand, placing an employee on paid administrative leave essentially adds two weeks to an employee's vacation. It may encourage some employees to use vacation for a trip to one of the travel advisory states to get three weeks off work instead of just one week.

Third, employers can consider whether to allow employees to use emergency paid sick leave (EPSL) under the Family First Coronavirus Response Act (FFCRA). Under this statute, employees are entitled to two weeks of EPSL, not deducted from other leave, for the following reasons:

[1] This standard changes as we learn more about COVID-19. Clearly, a test administered the first or second day back from vacation is not sufficient.

- The employee is subject to a federal, state, or local quarantine or isolation order related to the pandemic;
- The employee has been advised by a health care provider to self-quarantine due to the pandemic;
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

In this situation, the EPSL can be used for the period of self-quarantine after returning from travel to a state on the advisory list if the quarantine is required by a federal, state or local order. The July 22, 2020 COVID-19 travel advisory issued by the Ohio Department of Health, however, is not an order. An advisory does not fall within the scope of the EPSL even though there are valid reasons for employers to follow it. Therefore, an employee should not be permitted to use EPSL for a quarantine period after returning from out of state travel unless the employee has been advised by a medical provider to self-quarantine or the employee is experiencing COVID-19 symptoms and is seeking medical treatment.

Fourth, employers can require employees to use accrued but unused leave. If an employer chooses this option, the question becomes what leave is available for the employee to use. Clearly, an employee can be permitted/required to use vacation leave, personal leave and compensatory time. An employee likely can be permitted to use sick leave as well.

Ohio Revised Code section 124.38 provides an employee may use sick leave for absences due to personal illness, pregnancy, injury, exposure to contagious disease that could be communicated to other employees and illness, injury or death in the employee's immediate family. Most collective bargaining agreements have a similar definition.

In this situation, the reason for a 14-day quarantine is due to the employee's travel to a state with high COVID-19 rates. Therefore, the basis for requiring employees to self-quarantine for 14 days upon return is based on exposure to a contagious disease that can be communicated to other employees. As a result, employees who are required to self-quarantine by an appointing authority based on the travel advisory are entitled to use sick leave.

In general, employees should be allowed to decide which leave they want to use during the quarantine period. Presumably, most employees will choose sick leave. Employees who do not have sufficient sick leave to cover the 14-day period (10 work days) should be permitted to use other earned but unused leave.

Fifth, employees who do not have enough paid leave to cover the quarantine period can be placed on leave without pay. In these situations, the appointing authority still has the right to require the employee to quarantine pursuant to the travel advisory. There is no legal requirement to pay employees for this time off if they do not have sufficient leave

balances to cover the entire time off. The lack of leave does not change the employer's options to require a quarantine period in accordance with the travel policy.

A 14-day quarantine period in response to out-of-state travel does not qualify for Family and Medical Leave. The FMLA provides for time off due an employee's serious health condition, an immediate family member's serious health condition where the employee's presence is reasonably necessary, or upon the birth (including pregnancy-related conditions), adoption or foster placement of a child. An employee required to self-quarantine after out-of-state travel does not have a serious health condition. Therefore, FMLA does not apply. Similarly, this leave does not qualify for extended FMLA leave provided by the FFCRA.

The travel policy recommends individuals returning from certain out-of-state travel to self-quarantine for 14 days upon returning home. The ODH advisory states individuals should remain at home and avoid all in-person activities, separate themselves from others in the home and not have visitors. An appointing authority cannot enforce these recommendations. The only thing an employer can be concerned with is keeping an employee away from the workplace for two weeks.

If an appointing authority decides to require telework and/or self-quarantine as a result of the travel advisory, these requirements should be conveyed to employees as soon as possible. Employers with collective bargaining agreements should review the management rights provision and other applicable sections as well as convey to the union any temporary policy changes. Many of the options available to counties arguably affect terms and conditions of employment. Therefore, it is possible unions will seek to bargain concerning the new self-quarantine requirements or file grievances concerning these changes. Of course, a policy requiring self-quarantine under these circumstances arguably protects other bargaining unit employees who are not travelling out of state so it is equally likely unions will be supportive of this type of policy. Any policy changes should be provided to the union and the employer should be prepared to meet and discuss the temporary policy with the union. An employer does not have the right to enact a policy that violates the collective bargaining agreement.

The issues presented by the travel advisory are complex. As with other COVID-19 matters, the best practices and circumstances frequently change. Since ODH chose to issue an advisory, the answers for how employers should respond are less clear than if it had issued an order. Employers are encouraged to consider the implications of either decision- whether to require self-quarantine or not to impose any such requirement. Counties should consult with legal counsel and human resources professionals as they work through this process.