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Rob McKenna

## ATTORNEY GENERAL OF WASHINGTON

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August 2, 2006

The Honorable Bob McCaslin  
State Senator, 4th District  
P. O. Box 40404  
Olympia, WA 98504-0404

Dear Senator McCaslin:

By letter previously acknowledged, you have asked for an informal opinion asking what responsibilities cities would have to pay their employees, if a health official orders them to stay away from their workplaces in a pandemic flu, or similar health emergency. Specifically, you pose the following scenario and question:

**A health official could order people not to congregate in groups, including the workplace; this order would require non-essential city employees to stay home for an unknown period of time. What responsibility would a city have to pay salaries and benefits for employees on extended leaves of absence, when there is such an order to stay away from the workplace?**

### BRIEF ANSWER

For reasons explained in the following Analysis, your question is potentially affected by so many variables that it is not possible to give a single definitive answer. Therefore, we respond to your question by first generally describing the authority of local health officers. We then examine local governments' authority and options for structuring their employment relationships to address the circumstances described by your question.

### ANALYSIS

#### Authority Of Health Officers With Respect To Controlling Infectious Disease

Your question assumes that, in responding to a health emergency, a local health officer could order a city's employees to refrain from attending work. We do not examine this assumption in depth, but note the general authority of health officials under Washington law. In Washington, public health issues—such as the control of infectious diseases—are under the authority of local health officers appointed by county commissioners, a local health district, or a



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local board of health. *See generally* RCW 70.05.010–.060. Local health officers, acting under the direction of the local board of health or its appointed administrative officer, have the authority to 1) “[c]ontrol and prevent the spread of any dangerous, contagious or infectious diseases that may occur within his or her jurisdiction”; and 2) “[t]ake such measures as he or she deems necessary in order to promote the public health”. RCW 70.05.070(3), (9).<sup>1</sup>

In AGO 1993 No. 20, the Attorney General summarized the statutory and case law governing the powers of local health boards and officers. Protecting and preserving the health of citizens from disease is an important government function that requires liberal construction of the public health statutes and the powers of local health boards. *Snohomish Cy. Builders Ass’n v. Snohomish Health Dist.*, 8 Wn. App. 589, 595, 508 P.2d 617 (1973); *Brown v. Pierce Cy.*, 28 Wash. 345, 349, 350, 352, 68 P. 872 (1902); *State ex rel. McBride v. Superior Court for King Cy.*, 103 Wash. 409, 419-20, 174 P. 973 (1918). The legislatively delegated power to cities and health boards to control contagious diseases gives them extraordinary power which might be unreasonable in another context. *State ex rel. McBride*, 103 Wash. at 420.

Although I could find no Washington case law on the subject, it has been determined in other states that a municipality or board of health may temporarily take possession of and control *private* buildings if necessary to make effective quarantine, decontamination, or measures to check an epidemic or to protect the public health against the spread of disease. *See* 7 Eugene McQuillin, *The Law of Municipal Corporations* § 24:237, at 119 (2005). It is therefore possible that, under appropriate circumstances, a local health officer could order a city to close city facilities or offices to prevent the spread of infection. How that authority would interact with a city’s responsibilities to provide essential services is not addressed in this opinion. As a practical matter, it seems likely (and certainly, reasonable) that a local health officer would confer with the city regarding alternative measures to closure, and the scope and duration of any closure. In that vein, it is apparent that certain city services are more critical than others. In a health emergency, maintaining critical government operations may be even more important than in non-emergency circumstances.

## **Authority Of Cities To Manage City Affairs With Respect To Terms and Conditions Of Employment**

Although the power of the local health officer is broadly construed, that power does not extend to determining the terms and conditions of city employment. Accordingly, I next turn to the authority of cities to manage their relationships with their employees and pertinent legal restrictions that may arise.

RCW 35.21.175 states that “[a]ll city and town offices shall be kept open for the transaction of business during such days and hours as the municipal legislative authority shall by

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<sup>1</sup> The Governor has emergency powers in the event of public disasters. RCW 43.06.010(12). This opinion does not address how those powers might relate to the circumstances posed by your question

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ordinance prescribe.” Therefore, as a general matter, cities and towns determine their hours of business. As set forth in the preceding section of this letter, the local health officers may have authority in the appropriate circumstances to suspend normal city operations. Accordingly, if city operations are suspended due to the order of a health officer, the city could in its discretion alter the city’s official business hours, or alter the manner in which the city delivers services.

The Legislature has left it to each individual city and town to make decisions regarding the number and duties of city employees and to fix the compensation and working conditions of city employees. *See, e.g.*, RCW 35A.11.020; 35A.13.090. This authority also includes decisions regarding the circumstances under which employees will receive paid leave time from work. Thus, a city’s options with respect to compensating employees under such circumstances would depend to a significant extent on its then-existing employment regulations, policies and contracts governing its relationship with city employees. For example, in AGO 1989 No. 3, at 4, the Attorney General stated: “The Legislature has not established by statute the vacation leave entitlements of various classes of municipal employees, but has left that to each individual municipal corporation.”

As a general matter, it is therefore within the discretion of each city to determine the number of employees it needs to operate the city, what their terms and conditions of employment will be and what compensation and benefits it will pay. For a particular city or town, existing ordinances, employment rules or labor contract terms would determine how the city could address circumstances of the sort contemplated by your question, and the answer could well vary from city to city depending on its employment rules. One thing seems clear, however: A city would be well-advised to consider circumstances of the sort posed in your inquiry, and to establish employment rules and policies that the city deems appropriate to address.

Against this background, several possibilities come to mind regarding how a city might exercise its discretion in establishing employment policies or rules that would apply in the event of a partial or full closure of city operations. The first is suggested by your question—the city could elect to continue to pay salaries and benefits to its employees, who are not allowed to report to work for all or part of a closure period. In the alternative, if city operations are curtailed due to an order of a health officer, the city could decide that reduced city operations require a reduced city work force and lay off certain city employees. Another approach might be to adopt a policy that requires city employees to take leave without pay. Or, a city might decide that employees should use accrued leave or compensatory time under such circumstances and adopt a policy to that effect. For example, the State of Washington has adopted a rule regarding pay during the suspension of government operations. This rule affords state employees the opportunity to use personal holidays and accrued vacation and compensatory time in those circumstances. WAC 357-31-265 (Supp. 1999). Another possibility is that a city may determine to reassign work stations to allow city employees to continue to work without congregating in the workplace. In this regard, I note that the State of Washington’s rule requires that employees be given the opportunity to make up lost work time. WAC 357-31-265 (Supp. 1999).

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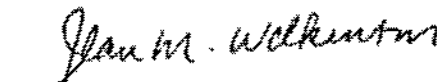
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Certain legal constraints could affect how a city may exercise authority in this area. As with other policy decisions made by the legislative authority of a local government, thought must be given to whether a particular decision would impair a city contract. Pursuant to article I, section 23 of the Washington Constitution, no "law impairing the obligations of contracts shall ever be passed." This constitutional provision prohibits a substantial impairment of a contractual right unless the government can show that the impairment was reasonable and necessary to serve a legitimate public purpose. *Caritas Services, Inc. v. DSHS*, 123 Wn.2d 391, 403, 869 P.2d 28 (1994). Cities therefore would need to consider whether the desired approach would cause the city to impair the terms of city contracts, including collective bargaining agreements. In this regard, the provisions of RCW 41.56 (relating to collective bargaining) and civil service statutes and rules (RCW 41.08; RCW 41.12) should also be considered. In addition, as discussed above, a city would need to follow existing employment rules and policies or update or revise them if necessary. Where such constraints apply, they could be quite significant and it may prove time-consuming to conduct the necessary bargaining or process to amend existing employment policies. In addition, absent employment provisions that provide for payment during periods of city closure, as part of the terms and conditions of city employment, the constitutional prohibition on gifts of public funds (article VIII, section 7) or payment of additional compensation after rendering of services (article II, section 25) arguably could constrain a city's discretion to pay employees who are not providing services to the city. See *Christie v. Port of Olympia*, 27 Wn.2d 534, 179 P.2d 294 (1947) (distinguishing between impermissible payment of additional compensation after services have been rendered, and advance agreement to pay compensation under particular circumstances.) For this reason, too, it would seem advisable for a city to examine its existing employment rules and regulations and implement changes that it determines appropriate to respond to such circumstances.

I note that the Municipal Research Services Council acts as an adviser to cities and towns on legal and policy matters, and this Council may be of further assistance to cities as they consider their options for addressing whether to pay employees, if they are unable to work due to a health officer's closure order.

I trust the foregoing will be of assistance to you. Please be advised that this opinion is the considered opinion of the author, but will not be published as an official opinion of the Attorney General.

Sincerely,

  
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