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Legal Counsel to Employers and Schools

COVID-19 UPDATE

Client Advisor

March 20, 2020

As you are aware, the U.S. President and the Massachusetts Governor have declared states of emergency in response to the COVID-19 crisis. The landscape is changing rapidly as a result of the progress of the virus and the governmental interventions at Federal, State and local levels to combat it. This legal update is designed to address the most pressing questions we have been receiving from clients and others to help you make necessary choices when it comes to labor and employment issues implicated in the crisis. Future updates will address other questions affecting our clients and friends, and refine the advice below as additional information becomes available.

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## **A. Union Information Requests/Bargaining Obligations**

*Will the emergency conditions allow an Employer to make unilateral changes without notice and an opportunity to bargain prior to implementation?* Unfortunately, even under these unprecedented emergency conditions, do not expect that the Department of Labor Relations (“DLR”) will give employers a pass when disputes arise when the dust clears about actions taken to deal with COVID-19. Maintaining a dialogue with Unions is critical. This includes responding to information requests as promptly as practicable under the circumstances. The Union is entitled to information relevant to its representation of employees, and providing the information will meet your obligation to give notice prior to making a change.

A management rights clause in a collective bargaining agreement (“CBA”) which includes broad rights to respond to an emergency will be helpful, but employers still have an obligation to bargain over the impacts of emergency actions on employee wages, hours and working conditions. DLR decisions recognize that exigent circumstances may justify implementation of a

change before meeting a bargaining obligation. However, employers are still required to continue bargaining immediately after the change.

Catch-up Notice. Since traditional notice and bargaining has not been possible in many cases, a catch-up notice is advisable. This notice should clearly state the actions taken to date and actions that are contemplated. The notice should emphasize that changes are temporary and do not set a precedent. The notice should offer a “meeting” that may have to take place by means other than face to face to discuss any concerns that the Union may have and request the Union to identify any concerns in advance of the meeting.

## **B. Placing Employees on Leave**

*How should employers compensate employees who are not working and what types of leave should be applied?*

### **1. Have a consistent protocol and review it frequently.**

Working or not. Employers should identify which employees are required to work either in person or remotely. Most public employers are paying employees who are ready, willing, and able but not required to work due to the shutdown of certain offices to in person visitation. This may need to be revisited based upon the availability of funding, so any assurances made to unions should have that review built in.

Sick and Quarantine Leave. The protocol should address when an employee should not be required (or allowed) to report to work out of concern for their exposure to COVID-19. The protocol should also address whether and what extent they should be permitted or required to use available paid leave. These employees include:

- Employees who have symptoms of or have tested positive for COVID-19;
- Employees who are quarantined by order or recommendation of a public health agency or health care provider;
- Employees with underlying health issues which would make them (or immediate family members) particularly susceptible to COVID-19;
- Employees who have a reasonable basis to show that they have been exposed to COVID-19.

Fear of Exposure. There may be employees who do not fit into the above descriptions but do not want to come to work because have generalized fears of exposure. Generally, an employee cannot refuse to come to work out of fear of infection. Employees may only refuse to work where they believe that they are in imminent danger, which OSHA defines as “any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act.”

### **2. Beware of Requiring Disclosures of Health Information**

Disclosures of Health Information. Employers may develop a voluntary self-disclosure process for employees who wish to self-disclose information to determine whether the employee may be more

susceptible to COVID-19, but beware of requiring such information from employees as it may violate the Americans with Disabilities Act. Similarly, employers cannot require an individual they know to be in a high-risk category (i.e., employees with known disabilities, or over a certain age) to stay home or telework on that basis. Absent influenza-like symptoms, such actions would likely violate the Americans With Disabilities Act or other non-discrimination laws.

On the other hand, it is permissible to ask employees if they have symptoms of COVID-19 and about their exposure to others who may have the virus. Employers who encounter an employee exhibiting symptoms of COVID-19 may inquire with the employee whether they are experiencing cough, fever, chills or shortness of breath (such questions are allowed during an influenza pandemic consistent with the EEOC's 2009 Pandemic Preparedness Guidance). If the employee discloses other symptoms, the employer can send the employee home based on the reasonable belief that the employee poses a "direct threat" to the health or safety of others. If the employee is not experiencing any other symptoms, it may be unreasonable for the employer to send the employee home, especially if the symptom has another identifiable cause.

### **3. Use of Paid Sick Leave**

Under most circumstances, employees who are out of work for COVID related reasons (detailed in the bullets above) will qualify and be entitled to paid sick leave under either the new Emergency Sick Leave Act or the FMLA expansion signed into law as part of the Families First Coronavirus Response Act, described below. Bargaining with employees should take into consideration the terms of existing contracts and the new statutes to ensure that any conflicts are resolved in a way that does not violate the new law.

### **4. Dealing with Employee Travel**

***Can the Employer Require an Employee to Quarantine if the Employee Has Been Traveling?*** While most employees are deciding not to travel to COVID-19 danger locations, some employers have encountered those who have. According to past EEOC guidance, if the CDC and/or state or local public health officials recommend that people who visit specified locations remain at home after traveling during a pandemic, an employer may ask an employee what locations they have traveled to, even if travel is for personal reasons. Currently, the CDC requires travelers arriving from certain high-risk areas or regions with widespread transmission of COVID-19 to self-quarantine for a period of 14 days after their arrival. As such, employers may implement a policy prohibiting employees that recently traveled to certain places (as identified as high risk by the CDC) from coming to work for 14 days.

Employers should provide advance notice to employees and their collective bargaining representatives that it may require those employees to self-quarantine or self-monitor for a 14-day period upon their return if the employee has travelled to a high-risk area or may have been exposed to COVID-19. If an employee is required to self-quarantine because of travel to a high risk location, the employee may be entitled to use sick leave during the period of self-quarantine as detailed below.

## C. New Federal and State Laws Affecting Employers (As of March 20, 2020)

### 1. Families First Coronavirus Response Act

Effective April 2, 2020, the Families First Coronavirus Response Act contains two provisions that provide paid leave to employees who are forced to miss work as a result of the COVID-19 outbreak: The Emergency Family and Medical Leave (FMLA) Expansion Act and the Emergency Sick Leave Act. Both the FMLA expansion and paid sick leave provisions apply to all public sector employers and private sector employers with fewer than 500 employees.

#### Emergency FMLA Expansion Act.

- Expands FMLA protections to employees on a temporary basis through the end of 2020.
- Reduces the eligibility requirement to employees who have been employed for at least thirty (30) calendar days (before the first day of leave).
- Employer must allow twelve (12) weeks of FMLA leave to an employee if the employee is unable to work (or telework) to care for a child under eighteen (18) years of age if the school or place of care has been closed, or the child care provider for such child is unavailable due to a “public health emergency” (defined as a COVID-19 emergency declared by a Federal, State, or local authority).
- First ten (10) days of FMLA leave is unpaid leave (an employee may choose to use accrued leave during this period)
- Remaining time must be paid at two-thirds of the employee’s regular pay rate. The Act includes a cap of \$200 a day and \$10,000 in the aggregate.
- Employee’s job is protected, with some exceptions for smaller employers.

#### Emergency Sick Leave Act

- Provides for up to eighty (80) hours of paid sick leave for full time employees who are unable to work (or telework) in any of the following circumstances:
  1. The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
  2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  3. The employee is seeking a medical diagnosis or care because they are experiencing symptoms of COVID-19;
  4. The employee is caring for an individual who is self-isolating because the family member has been diagnosed with COVID-19; or such individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19 (note: no longer limited to just family members);
  5. The employee is caring for their son or daughter if the school or place of care of such child has been closed, or the childcare provider of the child is unavailable due to COVID-19; or
  6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

- Paid sick leave is immediately available (no waiting period or accrual)
- For reasons 1-3 above sick leave is paid at the employee's regular pay rate, capped at \$511 per day and \$5,110 in the aggregate.
- For reasons 4-6 above sick leave is paid at two-thirds of the employee's regular pay rate capped at \$200 per day and \$2,000 in the aggregate.
- Paid sick leave will not carry over to the following year and is in addition to any paid sick leave currently provided by the employer.

The paid sick leave provided for in the emergency legislation is in addition to any sick leave benefit already offered by employers (including subject to state or local requirements). Under the legislation, an employer may not require an employee to use other paid leave or accrued time before the employee uses the paid sick time under the act. Nothing prohibits employers from changing their leave programs after the law goes into effect.

Finally, the bill allows an employer of certain health care providers and emergency responders to elect to exclude the employee from the application of these two provisions. Both provisions of the Act allow for subsequent U.S. Department of Labor regulations to exempt businesses with fewer than fifty (50) employees where the requirement would jeopardize the viability of the business. We will post additional information and interpretive guidance about these laws on our website.

## **2. State Unemployment Benefits**

Governor Baker signed emergency legislation waiving the one-week waiting period for any individual claiming unemployment benefits because they have been separated from work as a result of "any circumstance relating to or resulting from" the COVID-19 outbreak or the effects of the declaration of a state of emergency. The legislation authorizes the Department of Unemployment Assistance to issue benefits to any individual who becomes unemployed because of business shutdowns in response to the outbreak, or any individual who must remain at home to care for a sick or quarantined family member or care for a child if the child's school or care provider has closed or is unavailable due to the COVID-19 outbreak.

### **D. Pending Legislation Seeks to Classify COVID-19 as Work Related for Certain Employees; Meanwhile, Police and Fire Unions Seek Chapter 41, Section 111F Coverage for COVID-19 Related Absence.**

The Massachusetts legislature is reviewing a bill, *An Act Relative to Emergency Hazard Health Duty* (HD 4927 and S2602), that would treat absences by public safety personnel in connection with COVID-19 as work related. This would include not only illness, but also quarantine or self-quarantine in connection with suspected exposure without regard to whether the exposure was work related. This would protect public safety workers and first responders (but not other medical personnel) from using their accrued leave. It would also shift the cost of treatment from employer funded health insurance to employers directly in the case of police and fire personnel covered under Chapter 41, Section 111F, or to workers' compensation programs in the case of other employees.

We have been working with the Massachusetts Municipal Association to monitor and give input on this legislation, including to minimize the short and long term costs on Employers. Employers would be well advised to voice their concerns to their Legislators.

At the same time, Police and Fire Unions have been sending demands to bargain these types of benefits even without the legislation. Employers should respond to these requests as the issue is bargainable, and should not be dismissive of the requests, even though we do not recommend accepting this approach. We have argued that municipal employers have been sensitive to the issues and are fairly addressing them in bargaining for all employees, including public safety employees.

#### **E. COVID-19 Postings on NMP Website**

Please note that NMP continues to post COVID-19 orders, advisories, guidelines and legislation on its website ([www.nmplabor.com](http://www.nmplabor.com)). Also, our attorneys continue to be available by email and telephone to answer any questions and provide any advice. The following is a list of what we posted so far on our website:

- Families First Coronavirus Response Act
- An Act Authorizing Waiver of the One Week Waiting Period For Unemployment Benefits
- Order Limiting Gatherings to 25 People
- Massachusetts School Closing Order
- U.S. Department of Education Updates Guidance For Schools and School Personnel
- Governor Baker Order Suspending Parts of Open Meeting Law
- Pandemic Preparedness In the Workplace And The Americans With Disabilities Act
- Declared State Of Emergency In Massachusetts

If you have any questions or would like to discuss the information above in more detail, please feel free to contact:

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