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Legal Counsel to Employers and Schools

COVID-19 UPDATE

Client Advisor

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On March 23, 2020, Governor Baker issued a Stay-at-Home Order requiring all businesses and organizations not providing “COVID-19 Essential Services” to close their physical workplaces for two weeks starting Tuesday, March 24th at noon. This was followed two days later with an Order extending the state’s school closures until May 4, 2020. As you know, there are no shortages in new challenges and difficult decisions facing cities, towns and school committees. While we were required to close our physical office, NMP is working remotely and the availability of our attorneys and staff has not changed. We continue to be available to support you in your efforts to navigate these unprecedented times. As part of that effort, we will continue to provide weekly updates that address the most pressing questions we have been receiving from clients and others, and keep you informed about new and pending legislation.

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

### *How do employers meet bargaining obligations during this unpredictable time?*

1. Communicate. Continue to send update notices to Unions, respond to information requests and “meet” in some form (phone or video conference is fine with agendas and follow-ups by email). An open dialogue is critical even if it is not possible, or prudent, to formalize comprehensive final agreements given the weekly, if not daily, changes caused by the COVID-19 crisis. Any formal agreements should include language that reflects the temporary and unprecedented (therefore “non-precedential”) nature of the agreement, and contemplates the likelihood of further changes dictated by the crisis and decisions at the local, state and national levels that may need to be made with little advance notice.

2. Triage. Demands to bargain safety issues need the most urgent attention. You may also be receiving proposals that are not so urgent; i.e., Unions seeking some form of premium compensation based on their members being required to perform work even if not full time, while other employees are being paid without doing any work and, therefore, subject to less risk of exposure to the virus. This is inevitable in these circumstances, but this issue is better put off until the dust settles, including because once one group of employees receives any premium, other Unions will argue for the same for their members. Do not ignore these requests but respond with a reasonable timetable for addressing the issues raised in order of importance. More on that in the context of schools and public safety in the sections that follow.
3. Document. You would not be reading an NMP update without hearing “document!” Even if you do not reach an “agreement” in your discussions with unions, you should take care to document what you have communicated, what the conversations were, what if anything was agreed, and what the next steps were. Email is a great way to do this, since it is in writing, has a time and date stamp built in, and serves a communication to the recipient. Even if you do not want to dive in to details in an email to the union, you can send an email to your internal team (and to counsel if you may want the protection of the attorney client privilege – we love getting emails!) and those emails will be there when you need to remember the sequence of events.

## **B. School Closures: Privacy, Special Needs, and Teachers**

Districts took various approaches to the initial school shutdown, from providing optional enrichment to a full distance learning curriculum. As the shutdown continues, and more districts are preparing to provide virtual learning and online educational services, a few issues have repeatedly been brought forward.

### **1. Remote/Distant Learning and FERPA.**

*Is there a danger of a legal violation if teachers teach remote lessons and parents or others are present, or the lessons are recorded and shared beyond the class?*

The short answer is: No. FERPA (the Federal Educational Rights and Privacy Act) is the federal law that protects personally identifiable information (PII) in students’ education records. Schools are prohibited from disclosing PII without consent unless the disclosure meets an exemption under FERPA.

Similar to face-to-face learning, who can observe a classroom is a local decision. FERPA is a law that protects student records, not interactions, so it does not prohibit individuals from observing a classroom (virtual or face-to-face). Under FERPA, a teacher is already prohibited from disclosing PII to other students in the normal classroom, and so it is unlikely that a teacher would share a student’s PII during a virtual class. According to the U.S. Department of Education, “FERPA does not protect the confidentiality of information in general; rather, FERPA applies to the disclosure of tangible records and of information derived from tangible records,” something unlikely to be shared during classroom instruction, regardless of whether in-person or remote. *See* USDE Letter to Mamas (December 8, 2003).

Also, FERPA permits “directory information” to be shared if the appropriate policy is communicated to students and parents. The use of a student’s name, for example, is “directory information.” Most districts issue a directory information notice to parents annually or include a statement in their student handbooks each year regarding the use of directory information by the district. Absent an objection from a parent that he or she does not agree with the district’s designation of certain information as directory information, the district is free to use the student’s name and other listed directory information.

As a best practice: Teachers should establish and post ground rules for virtual classrooms and other remote instruction, and interactive group instruction should be on platforms reasonably restricted to students. While many of the rules will mirror rules established for face-to-face classrooms, they may also include rules about minimizing distractions in the home during instructional time (by finding a private space) and prohibitions on recording or disseminating remote lessons as appropriate.

## **2. Special Education Compliance Issues.**

At this time the federal government has not waived the federal requirements under the Individuals With Disabilities Education Act (IDEA), and so a duty to provide qualified students with a free and appropriate public education (FAPE) remains.

Whether the district is responsible for providing FAPE during extended periods of closure depends on whether the school closure causes educational services for all students to pause within the District. If this occurs the District is generally not required to provide special education services to affected special education students during that same period of time. To date, many districts have avoided providing substantive educational services to students out of a concern that doing so would open them up to IDEA compliance issues. However, a supplemental fact sheet from the U.S. Department of Education (USDOE) issued on March 21, 2020, makes clear that school districts should not avoid providing educational services to students in order to avoid its obligations to special education students under IDEA and Section 504. See Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (March 21, 2020), available on our website.

**What does this mean for school districts?** It means that schools must continue to provide students with the instruction and resources they need to make progress. FAPE may include, as appropriate, special education and related services provided through remote instruction provided virtually, online, or telephonically. Importantly, in its March 21, 2020 fact sheet, the USDOE acknowledged the exceptional circumstances districts find themselves in and a need to be flexible. “In this unique and ever-changing environment, OCR and OSERS recognize that these exceptional circumstances may affect how all educational and related services and supports are provided, and the Department will offer flexibility where possible.” At the same time, it also outlined how many disability-related modifications and services may be effectively provided remotely or online.

The reality is however, that remote learning and remote services may not be able to provide a student with everything on his or her IEP. In such cases, a student may not receive FAPE. It is

up to the schools and school providers to use good faith efforts to meet each student's needs to the best of their ability under these unique circumstances. As the guidance and rules around these efforts continue to evolve, the following suggestions are offered to help teams meet the needs of their students:

- Communicate regularly with families. Discuss with families what the district can do and the options for providing instruction and services. Think creatively and work together to address the student's current needs, which may be different due to the changes in environment and situation.
- Whenever possible, secure parental consent to amend a student's IEP to reflect services actually available and able to be provided during the school closure. You can also enter into temporary agreements allowing for the delivery of modified services. As part of any amendment or agreement, assure the family that any changes are temporary and that the amendment is not intended or will not alter or replace their "stay put" rights to the student's pre-closure services should a disagreement over the student's next IEP or placement arise when schools reopen.
- Comply with deadlines to the extent possible. Because no modifications have been made to IDEA, school districts continue to be responsible for meeting evaluation, re-evaluation, and annual review/meeting timelines. Where possible work with families to agree to reasonable extensions, but keep in mind that if everything is pushed back to when schools reopen you may be creating another untenable situation come September. IEP meetings held via telephone or video conference still provide a parent with a meaningful opportunity to participate and should be encouraged where appropriate.

It is also important to remember that not all variations or deviations from a student's current IEP will automatically trigger compensatory services. Whether or not compensatory services are merited will need to be assessed on a case by case basis when schools reopen. The issue will be what progress was made (or not made) during the period of closure and not just what services could not or were not provided. More on this to come in future advisories.

### **3. What to Include in your Teacher MOUs.**

Even before the school closures were extended until at least May 4, some teachers' unions (and other groups) were approaching Districts with proposed Memoranda of Understanding (MOU) to define what their responsibilities would be during the closure and determine how compensation and leave would be handled. While every district is different here are a few guidelines based on our recent experiences.

- Emergency Powers: Acknowledge that the District has had to take actions on short notice due to the emergency and may have to do so as the situation develops. Assure the union that even if bargaining cannot be completed before an action, that post-action bargaining will occur.
- Remote work responsibilities: Set expectations regarding the amount of time and on what schedule teachers are expected to be available to students and working on distance learning. Measurable expectations are best and can also include required communication with students, families and department heads, and time dedicated for professional development. Build in flexibility that allows you to adjust the model if it is not working or to react to enhanced requirements from the state or federal governments.

- Compensation for remote work: Most Districts are appropriately paying teachers full base pay for remote work without the use of leave time. However, you may want to prescribe a different result in the case of stipends for jobs that are not being performed (coaches, activities, etc.). Other employees may be employed on different schedules.
- Uses of Paid Leave: Many unions are trying to secure agreements that employees will not have to use any paid leave under any circumstances. Some Districts are requiring the use of sick leave if the employee is unable to perform remote work. For employees (like custodians) sick leave is often required if the employee is unable to work due to illness or quarantine.
- Evaluations: Teacher unions have been seeking to exempt all distance learning activities from evaluations and even stop evaluations completely. Districts should retain some flexibility here, in order to comply with DESE requirements and maintain teacher accountability. If possible, you can address how teacher evaluations and observations will be handled, or prescribe a process for determining those issues going forward.
- Professional Development: Outline any training or professional development being offered or required.
- FAPE and Special Needs: Identify the ongoing requirement to provide eligible students with FAPE and the need to work collaboratively with special education staff to modify and adapt lessons or instruction as appropriate. Districts may also want to address the requirement to attend and participate in IEP meetings and to conduct student evaluations.
- Include language acknowledging that this is a fluid situation and that the parties understand and agree that the MOU will need to be reviewed regularly and updated and modified as necessary to comply with changes in state and federal law.
- Clearly state that the MOU is temporary and non-precedent setting.

In addition to teachers, Districts may need to enter into separate MOUs for other bargaining units.

## C. New Federal Laws Affecting Employers (As of March 27, 2020)

### 1. NEW: Coronavirus Aid, Relief, and Economic Security Act “CARES Act” (H.R. 748)

On March 27, Congress passed the CARES Act, the third phase of economic relief related to the COVID-19 outbreak, which provides funding to individuals, businesses, and health care providers. President Trump promptly signed the more than \$2 trillion stimulus bill. Some of the relevant provisions of the Act are listed below:

- Provides \$150 billion to states and local governments to use for expenditures incurred as a result of the COVID-19 public health emergency.
- Permits the Secretary of the Treasury to make up to \$500 billion in loans to states, municipalities and eligible businesses.
- Extends unemployment benefits for individuals out of work as a direct result of COVID-19. The bill would provide an increase in benefits of \$600 per week for up to four months, in addition to the base amount paid by each state.
- Creates a \$349 billion loan program for small businesses and expands number of businesses eligible for such loans. The bill would allow small businesses to borrow money for a variety

of qualified costs related to employee compensation and benefits. The bill also provides an additional \$562 million for the Small Business Administration (SBA) to provide Economic Injury Disaster Loans (EIDL) to businesses.

- Removes the cap for payments under the Emergency Paid Sick Leave Act. Employers may, but are not required to, pay more than \$511 per day or \$5,110 in the aggregate for employees taking sick leave because of a quarantine order or \$200 per day or \$2,000 in the aggregate for employees taking paid sick leave to care for an individual subject to a quarantine order or to care for their child as a result of school or child-care closures.
- Allocates \$30 billion in educational funding, including \$13.5 billion in formula grants directly to states for elementary and secondary education. These funds will assist local school districts, including planning and coordinating during long-term closures, improving education technology to support online learning, and other activities permitted by federal education laws. Additionally, \$3 billion will be allocated to governors in each state to disperse at their discretion to local educational agencies that have been determined to have been most significantly impacted by the COVID-19 outbreak.

***Note:** There is a provision in the Act, section 18006, that states that, “[a] local educational agency, State, institution of higher education, or other entity that receives funds under ‘Education Stabilization Fund’, shall to the greatest extent practicable, continue to pay its employees and contractors during the period of any disruptions or closures related to coronavirus.” Before the bill had even passed the House, the National Student Transportation Association (NSTA) began touting this provision as a victory and strong provision benefiting school bus contractors. We will provide additional information and a further understanding of the implications of this language as it becomes available.*

- Allows the Secretary of Education to waive certain assessment and accountability reporting requirements for state and local educational agencies to receive funding.
- Makes available \$3.5 billion for the Child Care Development Block Grant, which will allow child-care programs to continue operations. This funding will ensure that first responders and health care workers can access child-care during the pandemic.
- Includes \$8.8 billion in additional funding for child nutrition programs to ensure that children receive meals during school closures.
- Provides \$850 million in DOJ grants that will go directly to state and local governments to assist officers in responding to COVID-19 incidents. The funds will support criminal justice needs, such as overtime payments and personal protective equipment (PPE).
- Provides \$100 million in emergency management performance grants to support state, local, and tribal governments to support coordination, communications, and logistics, and an additional \$100 million in grants to assist firefighters with purchasing PPE.

Obviously, some of the provisions sound promising and raise myriad (unanswered) questions about how they will be implemented. We will continue to update you on this law as implementation begins.

## **2. UPDATE: Families First Coronavirus Response Act (FFCRA)**

**The law takes effect April 1** (*Note: the effective date was previously reported as April 2, but updated guidance from the U.S. Department of Labor (USDOL) sets the effective date as April 1*).

The new law is described more fully in last week's Advisor. A new USDOL posting has been issued to satisfy a requirement that Employers post a notice of the requirements and availability of the FFCRA in places where employee notices are typically posted. Given that many employees are working remotely, Employers are also encouraged to email a copy to employees or make this notice available electronically. A copy of the required Notice is **available on our website**.

***What is the process for excluding certain health care providers and emergency responders from the application of these two provisions?***

Both the Sick Leave and Enhanced FLMA provisions of the FFCRA allow an Employer to elect to exclude emergency responders (including police officers and fire fighters). USDOL has not yet issued regulations on this provision, but the local Wage and Hour Division of USDOL, says their "internal guidance" indicates that Employers can do partial exemptions. For example, an employer could presumably permit first responders to use the additional 80 hours of sick leave but deny them the ability to access FMLA+ as a result of a need for childcare. There is no particular requirement on how to invoke the exemption, as long as it is not exercised discriminatorily.

The exclusion is designed to minimize the potential for emergency responders to remain out of work when they are most needed. For this reason employers are most concerned with FMLA+ that allows paid leave to stay at home and care for children due to schools being closed and lack of childcare. Given the need to have adequate first responders available it would be prudent for Employers to take advantage of the ability to limit the availability of these benefits. Doing so would support the Employer's need to have a sufficient complement of first responders available to come to work as needed. On the other hand, limiting access to sick leave for first responders who are sick or quarantined may be a bad idea as it could lead to passage of a more onerous provision by the state legislature as described below.

### **D. Pending Legislation**

#### **1. NEW: Governor Baker files *An Act to Further Address Challenges Faced by Municipalities and School Districts Resulting from COVID-19***

The bill, (H4586), filed March 24, 2020 would provide needed flexibility to deal with the challenges and the disruptions caused by the outbreak. Some of the highlights of the proposed legislation include:

- Permits Regional School Districts to suspend the statutorily required vote to approve budgets for FY 21. The Department of Elementary and Secondary Education may certify an amount to allow the district to continue operating until a budget is adopted.
- Enables the Board of Elementary and Secondary Education, upon recommendation of the Commissioner of Elementary and Secondary Education, to modify or waive the

requirements of the competency determination for high school graduation. Additionally, the Commissioner may waive the MCAS testing requirement.

- Permits the Commissioner of Elementary and Secondary Education to extend the April 1, 2020 Student Opportunity Act deadline requiring districts to submit their first 3-year plan to address “persistent disparities in achievement among student subgroups.”
- Removes the limits on hours and compensation for municipal retirees who return to work for the municipality during the state of emergency to alleviate workforce disruptions.
- Allows municipalities to waive late-payments for tax bills and change due dates for tax bills.
- Modifies the local permitting process during the state of emergency by tolling the time in which municipal or regional permitting entities must act on permit applications. The bill would also allow permits to be filed electronically and suspends any requirement that a hearing permit application be held within a certain period until forty-five (45) days after the end of the state of emergency.

## **2. UPDATE: Police and Fire Unions Seek Chapter 41, Section 111F Coverage for COVID-19 Related Absence.**

Pending bills in the state legislature to create a work-relatedness presumption for first responders absent for COVID-19 reasons is more fully described in the previous Advisor. We continue to work with the Massachusetts Municipal Association to monitor and give input on this legislation, including proposals to minimize the short and long term costs on Employers. It is promising that this legislation continues to be debated and negotiated. Employers would be well advised to voice their concerns to their Legislators.

Police and Fire unions have continued to seek 111F coverage for COVID-19 absences through negotiations. Employers should continue to respond to requests to bargain these issues by Police and Fire Unions, but we do not recommend agreeing to this proposal. The issue is bargainable so Employers should not be dismissive of the requests. If municipal employers continue to address the underlying concerns fairly in bargaining for all employees, including public safety employees, it will minimize the argument that special legislation is necessary to protect these groups.

We will continue to monitor all pending legislation and its implications for Massachusetts municipalities.



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

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, telephone and video conference to answer any questions and provide any advice. The following is a list of the new materials added to our website since our last Advisor:

- U.S. DOE Issues Supplemental Fact Sheet Re: Students With Disabilities
- Pandemic Preparedness in the Workplace and the ADA (updated 3/22/2020)
- Massachusetts Stay-at-Home Advisory and List of Essential Service Providers
- Governor Baker Extends School Closures Until May 4; Calls for Expanded Remote Learning.
- The US Dept. of Labor has Issued Guidance and the FFCRA Rights Notice

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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