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COVID-19 UPDATE **Client Advisor** **April 20, 2020**

On March 10, 2020, Governor Baker declared a state of emergency to support Massachusetts's response to the Coronavirus. In the five weeks that followed, stay-at-home advisories were issued, and schools and non-essential businesses were closed. While the federal government and some parts of the country begin to discuss the possibility of reopening, the timeline for returning to business as usual in Massachusetts is far from certain. The impact on the economy is expected to be significant as experts predict a coronavirus induced recession. Inevitably when faced with budget gaps and falling revenues, cities and towns have no choice but to reduce services and personnel. As we hope for the best and plan for the worst, this week's Advisor will address how to prepare for reductions in the public sector workforce.

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A. Preparing for Reductions in the Public Sector Workforce

As cities and towns grapple with the current loss of revenue and impending fiscal crisis, many may find the need to look at workforce reduction as a means of balancing shrinking budgets. Such decisions are unpleasant and can be met with claims of discrimination or unfair treatment. Proper planning can help minimize these claims and better position you for success if you are forced to defend your decision. The general guidance below is intended to outline some of the common issues employers face when considering whether and how to implement work force reductions. We anticipate providing further guidance in the coming weeks on these issues as the circumstances continue to evolve.

1. Understanding Layoffs, Furloughs, and Reductions in Force (RIF)

What is the difference between a layoff, a furlough, and a reduction in force?

Layoffs, furloughs, and reductions in force are three methods of achieving cost savings by reducing payroll costs. While these terms are frequently used interchangeably their meanings are quite different and understanding this can lead to more thoughtful planning.

A **reduction in force** (RIF) occurs when a position or positions are eliminated without the intention of replacement. It is a permanent reduction and can be done for financial reasons, when an organization is going through a reorganization, or when a decision is made to stop providing a service or product. When this occurs, a RIF is appropriate because the employees who provided the service or product are no longer needed. A RIF can be done by termination or attrition, or a layoff can turn into a RIF.

Generally, a **layoff** is an unpaid separation or termination of an employee without any identified or foreseeable expectation of rehire or return (although Massachusetts has certain reinstatement rights for laid-off civil service employees). While a layoff can be temporary or carry with it the possibility of recall, it is not guaranteed or believed to be as certain as when employees are furloughed. When an employee is laid-off, he or she is removed from the employer's payroll and the employer is required to pay the employee all of their earned wages, including vacation time, at the time of the layoff.

Often RIFs and layoffs are used interchangeably (or layoffs are viewed as the means of accomplishing a RIF) because the result is the same: someone losing their job.

Furloughs (also referred to as "**standby status**") are an alternative to layoffs that allow you to retain staff you cannot afford to pay. A furlough is a temporary period of unpaid (either voluntary or involuntary) leave. During a furlough, an employee remains on the payroll but is not permitted to perform any work and there is usually a mutual expectation that the employee will return to work at the end of the furlough period. Furloughs can take several forms. For instance, furloughs can be for a predetermined length of time, a reduction of hours, a reduction of pay, or taken sporadically as "furlough days." Furloughs take different forms for hourly and salaried employees.

Recent guidance from the Attorney General's Office has confirmed that an employer may "furlough" an employee without terminating the employment relationship. An employee who is furloughed may maintain participation in their employer's health insurance plan, vacation time, creditable service for retirement, and other benefits. This means that unlike a layoff, a furlough does not trigger a payout of earned wages, including vacation time, because the employment relationship continues. Furloughs most closely resemble an unpaid leave of absence.

Are furloughed employees eligible for unemployment benefits?

Yes, if the furlough is because of COVID-19, employees are eligible for unemployment benefits. Although an employment relationship continues, and the period of unemployment is only expected to be temporary, such individuals are considered unemployed due to lack of work. An employee that meets this criteria may be placed in what is called "standby status." Standby status, which is discussed below, is meant to help both employers and their employees in situations where the unemployment is expected to be temporary. Additionally, an employee may be eligible for partial employment benefits if they continue to work, but their hours are reduced.

What is "standby status"?

On March 16, 2020, the Massachusetts Department of Unemployment Assistance (DUA) enacted emergency regulations set forth at 430 CMR 22.00 to assist employees in obtaining unemployment

benefits. As part of these regulations, the DUA created a "standby status," which includes individuals who are temporarily unemployed because of a lack of work due to COVID-19 but have an expected return to work date. The standby status designation relieves the employee of the normal requirement to search for work provided that the individual makes reasonable measures to maintain contact with their employer and remains available for any suitable work offered by the employer.

A furloughed employee will be presumed to be in standby status for four weeks without employer action, however, an employer can request to place an employee on standby status for longer (up to eight weeks). And the DUA may grant standby status for longer if a business is expected to be closed or have operations curtailed beyond eight weeks.

We note that despite similar terminology an employee in "standby status" is different from an "on-call" employee who must remain on the employer's premises, be immediately available for work, and be compensated for the time they are "on call". Stand-by employees, although required to be available for suitable work if offered, are not required to remain on the employer's premises during this time. Rather, they must be available to return to work when work becomes available again.

Are furloughed employees still eligible for EPSL and EFMLEA leave?

No. While furloughed employees are not technically separated from employment, as discussed in earlier Advisors, an employee's eligibility for Emergency Paid Sick Leave (EPSL) and Emergency Family and Medical Leave Expansion Act (EFMLEA or FMLA+) leave under the DOL regulations is predicated on the employer having work available for the employee to perform. If an employer closes the workplace temporarily because of a lack of work or because of a shut-down order (either before or after April 1) then the employee would not qualify for such leave.

Besides furloughs, are there other alternatives to layoffs?

Other alternatives to layoffs include freezing wages, reducing or freezing overtime, reducing or freezing expenses, reducing hours or workweeks, extra unpaid days off or sabbaticals, voluntary furloughs, job sharing, and asking employees for suggestions or challenging employees to save money. We will provide more information on some of these options in future Client Advisors.

2. Bargaining and Contractual Obligations

Is there an obligation to bargain with unions over layoffs, reductions, and furloughs?

Yes, in most cases at least impact bargaining will be required if these decisions will affect unionized employees. While an employer may not always need to bargain over the decision to lay off employees, an employer must bargain over the impacts of implementing that decision. If contemplated reductions will involve or impact unionized employees, provide a notice of the contemplated reductions sufficient to give the union a reasonable opportunity to exercise their rights to bargain. Impacts of layoffs might include criteria for selection for layoffs (if not already established by law or contract), possible alternatives to layoffs, and the economic impacts of any layoffs on employees.

Review all applicable policies and agreements (CBAs, personnel by-laws and other personnel policies and procedures) to make sure you are clear on the parties' rights and responsibilities. CBAs may contain specific bargaining requirements and restrictions that must be observed. State and federal laws and regulations should also be reviewed in light of COVID-19 related legislation being passed and financial incentives available to certain employers for maintaining pre-COVID-19 staffing levels.

In the face of layoff notices, unions are within their rights to request information; it is important that employers respond quickly and fully to requests for relevant information.

3. Special Notice Requirements

What notice obligations exist for Civil Service Employees?

It is important to remember that prior to instituting layoffs of civil service employees, an Appointing Authority is required to provide sufficient notice and the right to a hearing in accordance with the provisions of M.G.L. c. 31, s. 41. The notice must contain the specific reasons for the layoff and must be provided to employees seven (7) days in advance of the hearing.

What notice obligations exist for School Districts?

School districts must immediately start planning for RIFs and "non-renewals" for the next school year. Under M.G.L. c. 71, s. 42, notice of non-renewals must be sent to staff **on or before June 15, 2020**, to be effective for the 2020-2021 school year. Some collective bargaining agreements may provide for notice of non-renewal earlier than June 15, so it is important to consult your contracts. Failure to timely notify a teacher of non-renewal results in their automatic re-appointment for the following year.

Although the superintendent's right to reduce staff is statutory and cannot be bargained away, how a RIF is implemented is a mandatory subject of bargaining. Superintendents should consult contract language to understand their bargaining and notice obligations.

4. Plan and Document

Where do I start?

The first and most important step is proper planning. Gather information that demonstrates and supports the need to make staff reductions and make sure this information is clear and can be easily understood and shared when discussing the need to reduce payroll costs with elected officials, employee organizations, and non-union employees.

Consult collective bargaining agreements and town personnel by-laws regarding the authority for layoffs or reductions in force and be clear on what your rights and obligations are generally and with specific groups. Consult labor counsel with questions on collective bargaining issues, civil service rights (including hearing requirements), and notice requirements.

What steps can I take to help minimize liability?

Do your homework (see above). In addition, take the time to consider alternatives so that you can

demonstrate that you have acted fairly and considered options for minimizing layoffs or furloughs. Use objective criteria in your selection process, and document all steps taken, information presented and all communication – formal and informal – with union leadership. Anticipate questions or concerns and prepare or discuss responses with supervisors in advance; work with supervisors to give them the tools they need and advise against making stray comments. Where appropriate, consider offering a severance to certain staff members in exchange for a release.

B. UPDATE: Correction to USDOL FFCRA Regulations

On April 10, 2020, the U.S. Department of Labor (USDOL) revised the regulations implementing the EPSL and EFMLEA (FMLA+) provisions within the FFCRA. While most of the revisions were of minimal significance, the DOL removed section 826.70(f) in its entirety. This was done because of an inconsistency between this section and section 826.160(c)(1) with respect to whether an employer may require an employee to use existing leave concurrently with FMLA+. Section 826.70(f) stated that "neither the eligible employee nor employer may require substitution of paid leave" during the ten-week paid period of FMLA+ leave. Recognizing the inconsistency, the DOL has removed section 826.70(f). With this revision, the regulations are now clear that "**an Eligible Employee may elect to use or an Employer <u>may require</u>** that an Eligible Employee use, provided or accrued leave available to the Eligible Employee [] under the Employer's policies, such as vacation or personal leave or paid time off, concurrently with Expanded Family and Medical Leave." 29 CFR § 826.160(c)(1).

Based on the initial regulations, we previously issued guidance that an employer could allow but not require an employee to use existing employer provided paid leave concurrent with FMLA+. The removal of section 826.70(f) from the regulations, however, clarifies that an employer **may require** an employee to use existing paid leave concurrently with FMLA+ leave. If an employer requires an employee to take existing paid leave provided by the employer concurrently with FMLA+ leave, then the employee must be paid the regular amount of pay to which they are entitled under the employer's leave policy for the period of leave taken. If an employee exhausts their employer provided paid leave during this time, an employer must pay the employee at a rate of two-thirds of their normal rate of pay (capped at $200 per day) for the remaining period of FMLA+ leave used by the employee.

This change does not impact the EPSL provisions, which continue to explicitly prohibit an employer from requiring an employee from using existing vacation, sick, or other paid leave before or concurrently with their EPSL time. It also does not impact or change the employee's ability to use EPSL or employer provided paid leave during the initial two-week period of unpaid FMLA+ leave.

C. Pending Legislation (As of April 10, 2020)

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

There has been no further update regarding S. 2602 and H. 4611, *An Act Relative to Emergency Hazard Health Duty* since the joint hearing held (electronically) on Monday, April 6, 2020. The bill is still before the House Ways and Means Committee. The Massachusetts Municipal Association (MMA) continues to monitor the movement of this bill and expects that there may be some movement next week. NMP has continued to support the MMA's efforts in this area and we will keep you updated as we learn more about the progress of this legislation.

D. COVID-19 Postings on NMP Website

NMP continues to post COVID-19 orders, advisories, guidelines and legislation on its website (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:

- AG's Office Issues Tips For Safe Video Conferencing
- US DOL Issues Corrections To FFCRA Temporary Rule

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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