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Legal Counsel to Employers and Schools

COVID-19 UPDATE

Client Advisor

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Last week Governor Baker announced that Massachusetts schools would remain physically closed through the end of the 2019-2020 school year and that day care centers would remain closed through June 29, 2020. This decision not only impacts school district and their employees, but anyone with school aged children who require care and supervision during the day. Although it is unlikely that Massachusetts' current stay-at-home advisory will be lifted May 4, at some point we will report to work again, and depending on when that happens it will be important to discuss and be aware of accommodations and flexibility working parents may require.

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## **A. Preparing for Reductions in the Public Sector Workforce**

As discussed last week, the ongoing COVID-19 outbreak has some cities, towns, and school committees facing serious revenue shortages and budget deficits. As a result, they are considering cost-saving measures including employee furloughs and reductions in work schedules/pay. This week we address reducing employee working hours or pay, either permanently or through periodic furloughs, and Massachusetts' WorkShare Program.

### **1. Reducing Hours and Wages**

#### *Is it illegal to reduce the wages or number of hours of a non-exempt employee?*

An employer may reduce wages and/or hours for hourly (non-exempt) employees going forward provided that the employee is paid minimum wage. The Fair Labor Standards Act (FLSA) does not preclude an employer from lowering an employee's hourly rate, or from reducing the number

of hours the employee is scheduled to work, as long as the covered employee continues to be paid at least the applicable minimum wage for hours, including overtime hours, actually worked.

When dealing with union employees and those with individual employment agreements there are additional rights and considerations that need to be acknowledged and addressed. The terms of the collective bargaining agreement or employment contract should be followed.

### ***What about wage and hour reductions for exempt employees?***

It is a little more complicated to reduce wages for salaried (exempt) employees, although an employer is generally permitted to make prospective changes. A threshold issue to be determined is whether you want the employee to retain his or her exempt status. For salaried exempt employees, to remain exempt from overtime under the FLSA, the weekly salary must be at least \$684 (\$35,568 per year), otherwise the employee should be transitioned to an hourly position and paid based on hours worked. Note that physicians, lawyers, and teachers are not subject to the salary requirements under the FLSA and reductions in salary for those occupations will not result in the loss of the exemption

Generally, under the FLSA, an exempt employee must receive their full pay for each workweek in which the employee performs any amount of work. In other words, if a salaried employee performs a minimal amount of work (e.g. checking emails) during a furlough, the salaried employee will receive their full pay for the entire week. Conversely, exempt employees do not need to be paid for any work week in which they do not perform any work. As such, employers are generally encouraged to implement furloughs for exempt employees in full-week periods and make prospective changes in schedule and pay with advance written notice. Additionally, employers should make clear to these employees that they are not allowed to perform any work during a furlough, unless previously approved by the employer.

For salaried exempt public sector employees, however, a specific rule applies to furloughs. According to DOL guidance, reductions in pay for employees of public agencies that are furloughed will not “disqualify an employee from being paid on a salaried basis, except in the workweek in which the furlough occurs and for which the employee’s pay is accordingly reduced.” (29 C.F.R. 541.710; WHD Fact Sheet #70). In other words, a salaried public employee not will lose their exempt status entirely because of a temporary reduction in pay that would otherwise violate the salary-basis test during a budget related furlough. Of course the furlough or temporary reductions must be bona fide and not part of a strategy to evade the salary basis requirements.

## **2. Massachusetts’ WorkShare Program: What Employers Need to Know**

### ***What is the WorkShare Program?***

The state’s WorkShare program offers an alternative option for employers to avoid layoffs as a result of the disruptions caused by COVID-19. Employers can divide available work between affected employees in a department or working group instead of laying off one or more workers. Employees work the reduced hours at their regular rate of pay and collect partial unemployment benefits to offset the wages lost as a result of the reduced hours.

For example, an employer reduces hours for its employees in the Recreation Department by 20% instead of laying off 20% of its employees. Under the WorkShare Program, employees receive 80% percent of their weekly salary from their employer for hours worked, and they receive 20% of their weekly unemployment insurance benefit amount.

### ***How does it help employers?***

WorkShare allows employers to retain their employees by avoiding layoffs and allows them to quickly resume regular operations once the disruptions caused by COVID-19 resolve.

### ***What employers are eligible for the WorkShare Program?***

All Massachusetts employers, including government entities, are eligible to participate in the WorkShare program. Government employers who reimburse the Department of Unemployment Assistance (DUA) in lieu of contributions will be charged on a dollar-for-dollar basis for the amount of unemployment benefits paid out to employees.

### ***What are the Employer's responsibilities under WorkShare?***

Employers are required to maintain benefits for participating employees, such as health insurance and retirement benefits. Employers must also keep track of the hours that a participating employee works each week. Additionally, employers need to provide all documentation, records, or other information to DUA that is necessary to verify and administer the WorkShare plan.

### ***What employees can participate in WorkShare?***

Participation in a WorkShare program is voluntary for employees. All full and part-time permanent employees may participate, but temporary and seasonal employees are excluded.

For employees covered by a collective bargaining unit, the union or employee organization must agree to the WorkShare plan. The WorkShare plan will need to include signatures of the appropriate union officials. We recommend involving the union early in the process.

### ***Can exempt employees participate in a WorkShare plan?***

Yes, provided that both the employee's hours and pay are reduced, and the minimum weekly salary requirement under the FLSA is met. Also keep in mind that as part of a WorkShare plan an employer must keep track of their employee's hours, which is not typically done with salaried or exempt employees.

### ***What needs to be included in a WorkShare plan?***

WorkShare plans need to be approved by the DUA. Employers must certify that the reduction in hours is part of a plan in lieu of or necessary to avoid layoffs. Plans are valid for up to fifty-two (52) weeks.

Employees who participate in a WorkShare plan must be part of the same department, group, or unit. At least two employees must be listed on a plan. Employees may only be listed on one plan; however, an employer may submit multiple WorkShare plans for different departments or job

functions. Employers should carefully consider the scope of their potential WorkShare plan and specifically identify which groups will be affected.

The reduction in hours must be shared equally by all employees in the department or working group, and fall between 10% and 60%.

***What happens if an employee does not work the set amount of hours under the plan?***

Once DUA approves a WorkShare plan, participating employees must work the number of hours outlined on the plan each week. If an employee works fewer than the set amount of hours listed in the plan, the employee may substitute paid leave for the missed hours. However, if an employee does not substitute leave for the missed hours then the employee may not be eligible for WorkShare benefits that week. Employees are not permitted to work more than their set hours as it may jeopardize the employer's eligibility for WorkShare program. Employers are responsible for reporting any discrepancy in the number of hours worked to DUA.

***What about discontinuing a WorkShare plan?***

Employers may discontinue an approved WorkShare plan at any time. Employers should also be aware that DUA may revoke a WorkShare plan for good cause, which may include an employer's failure to comply with the requirements of the plan, or any other conduct or occurrences that are intended to defeat the purpose and effective operation of the plan.

**B. Massachusetts Schools Closed Through 2019-2020 School Year**

On April 21, Governor Baker issued an order extending the closure of all public schools for the remainder of the school year, and the closure of all non-emergency childcare programs through June 29, 2020. The order does not apply to residential special education schools. The Department of Early Education and Care issued guidance giving priority access to emergency child-care to the children of families working in health care, public health, and human services and law enforcement, public safety, and first responder fields.

Additionally, as a result of the order, Department of Elementary and Secondary Education (DESE) is expected to issue additional guidance very soon regarding remote learning for the remainder of the school year.

While it is unlikely that Massachusetts businesses will be reopening on May 5, it is important to consider and plan for the impact the school and day care closures will have on employees now responsible for the care and supervision of their children during the day once normal business operations resume. Some options to consider include:

- Allow employees to work at home even once the state's stay-at-home order is lifted
- Allow employees access to intermittent paid FFCRA leave
- Allow use of paid time off
- Provide employees the opportunity to participate in a WorkShare
- Allow employees to alter or modify their schedule or work hours

Overall, the best practice, as it has been throughout the entirety of this outbreak so far, is to be flexible. While an exact plan is not necessary right now, and actual approaches may vary, beginning to discuss this matter and soliciting suggestions from employees may help alleviate one source of stress or uncertainty facing some of your employees since Governor Baker's announcement last Tuesday.

### **C. United States Department of Education (DOE) Announces the Elementary and Secondary School Education Relief (ESSER) Fund**

The United States Department of Education (DOE) announced on Thursday that \$13.2 billion in emergency funding is now available to state and local education agencies as part of the Elementary and Secondary School Education Relief (ESSER) Fund to support continued learning in light of COVID-19 related disruptions. These funds were allocated as part of the CARES Act and may be used to address immediate needs, such as resources for distance education, student health and safety, and developing and implementing plans for the 2020-2021 school year.

Section 18003(b) of the CARES Act requires the Department to allocate ESSER funds based in the proportion of the amount each state received in FY19 under Title I, Part A of the Elementary and Secondary Education Act of 2011. State Educational Agencies (SEAs) must allocate 90% of the ESSER funds to Local Educational Agencies (LEAs), including public charter schools, within their state. Massachusetts is expected to receive \$214,894,317 in ESSER funds, of which a minimum of \$193,404,885 must be distributed to LEAs across the Commonwealth.

LEAs may determine how to use the ESSER funds, provided that the funds are used in ways that comply with federal education laws. SEAs may retain up to the remaining 10% of the funds to address COVID-19 related issues. SEAs must return any funds that are not awarded after one year.

#### ***How and when will SEAs receive the funds?***

The Department will attempt to make these funds available as quickly as possible, streamlining the process for SEAs to apply for and receive the ESSER funds. In order to receive ESSER funds, the SEA must complete and submit a Certification and Agreement form to the Department of Education, which will be processed within three business days once received. SEAs have until July 1, 2020, to apply for the ESSER funds.

### **D. Federal and State Laws Affecting Employers (as of April 24, 2020)**

#### **NEW: Paycheck Protection Program and Health Care Enhancement Act**

On Friday, April 24, 2020, President Trump signed the Paycheck Protection Program and Health Care Enhancement Act (Act), which provides an additional \$484 billion in relief aid following the CARES Act enacted last month. The Act increases funding for the Paycheck Protection Program, from \$349 billion to \$659 billion and provides an additional \$10 billion in funding for economic injury disaster loans (EIDL) through the Small Business Administration. Additionally, the provisions of the Act appropriate \$75 billion in funding for hospitals and healthcare providers and

\$25 billion to cover expenses needed to research, develop, manufacture, and administer COVID-19 testing. Part of the \$25 billion will be allocated to states, localities, and territories for these purposes.

With the enactment of the above legislation, we note that Congress will likely turn its efforts in the coming weeks towards negotiations for another spending package, the so-called “phase four of coronavirus relief.” Based on recent reports and statements from legislators, this relief bill is expected to provide needed emergency funding to assist state and local governments. We expect to have more to report regarding this anticipated legislation in next week’s Advisor.

#### **E. Pending Legislation (As of April 24, 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 April 6, 2020.

##### **UPDATE: H4631-An Act Relative to State Employees Performing Core Functions**

The bill, currently before the Joint Committee on Public Service, would retroactively compensate any employee of the Commonwealth or its political subdivisions who was required to report to a work location outside their homes during the state of emergency at a rate of one and a half times of their regular pay for each day they were required to report to work. Alternatively, such employees may choose to receive one half day of compensatory leave for each day worked, in lieu of compensation. A joint hearing on the bill was held (electronically) on April 21, 2020.

#### **F. 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:

- Massachusetts Schools (Physically) Closed for the Remainder of the School Year
- Zoom Makes Privacy and Security Fixes
- BSEA Special Education Practice in a Time of School Closure (Webinar)

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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