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COVID-19 UPDATE

Client Advisor

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On May 18, 2020, Governor Baker provided some additional detail regarding the state's highly anticipated four-phase reopening plan. Each phase will last a minimum of three weeks – with Phase one starting May 18 – but the phases could last longer depending on the data and health trends. The plan also calls for reverting to an earlier phase if health trends begin moving in the wrong direction. The plan ends at some unknown point in the future, probably when a vaccine or successful treatment has been identified. As expected, the state's reopening plan is a gradual one and it requires careful planning and compliance with new general and industry specific safety protocols.

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A. Preparing to Return to Work

1. Safer At Home Advisory and Phase 1 of the Reopening Roadmap

Earlier today, Governor Baker issued the “Safer At Home” advisory and announced additional details regarding Phase 1 of his four-phase plan to reopen the Commonwealth. The Baker Administration previously announced the phased reopening along with mandatory workplace safety standards applicable to workplaces in all sectors and industries. Phase 1 allows workplaces, such as general office buildings to reopen with certain restrictions, while keeping in place other existing restrictions, such as wearing of face coverings and prohibiting gatherings with over 10 people. Each phase will last for approximately three weeks, but may be extended, if necessary, based on public health metrics. No date has been set yet for the start of Phase 2.

Which businesses are covered under Phase 1 and when are they allowed to open?

Under Phase 1 of the plan, manufacturing, construction, and places of worship may resume operations with certain restrictions starting on May 18th. Beginning on May 25th, general use office buildings may reopen (excluding the City of Boston, scheduled to reopen on June 1). Offices that reopen should restrict employee presence to less than 25% of its maximum capacity. The Administration, however, strongly encouraged employers to continue to allow employees to work from home, if possible. Reopening businesses and workplaces will not be subject to the 10-person

limitation on gatherings provided that the businesses comply with social distancing protocols and other applicable limitations. Hair salons and barber shops may also open on May 25 in limited capacity or by appointment. Beaches will be allowed to open on May 25 – Memorial Day – but under a range of restrictions including 12 feet of distancing between groups and no organized games. Only essential businesses and services and businesses that have been identified as part of Phase 1 may reopen.

What steps must a business identified in Phase 1 take to reopen?

In order to reopen or continue operating, each business or workplace must begin complying with all general workplace safety standards and all applicable sector specific guidelines. Additionally, each business must: 1) develop a written COVID-19 safety plan that describes how the business will prevent the spread of COVID-19; 2) self-certify that the business will operate in compliance with all general workplace safety standards and sector specific guidance and make the self-certification available for inspection by DPH and local boards of health; and 3) post signage visible to the public both certifying that it has a COVID-19 safety plan in place and describing its social distancing, hygiene, cleaning, and disinfecting protocols.

All essential businesses that have remained in operation will have until May 25th to comply with the new workplace safety standards. Other businesses must comply with these requirements prior to reopening.

Who is responsible for enforcing the new safety standards?

The new workplace safety standards will be jointly enforced by the Division of Labor Standards (DLS), the Department of Public Health (DPH), and local boards of health. However, it is not expected that DLS, DPH, and local boards of health will conduct inspections of businesses and work sites as they reopen. Violations of the DLS and DPH regulations for workplace safety standards may result in civil fines of up to \$300 per violation.

Were any updates provided on summer programs, day cares or summer learning?

The Administration stated that it has directed DPH, in conjunction with local boards of health, to develop guidelines for safe reopening of recreational summer camps. Lt. Governor Polito stated that such camps could possibly reopen in Phase 2 with these limitations and safety standards in place. The phased reopening order does not apply to municipal legislative bodies or public and private elementary and secondary schools (K-12), which remain closed for the remainder of the year. The Administration is expected to announce plans for summer learning and the 2020-2021 school year in the coming weeks.

The plan for reopening day cares remains unclear. The Baker administration announced that the state continues to provide emergency day care to essential workers and that only about 3,500 or the 10,000 seats available are currently being used. Regular daycare programs are closed under a previous order until June 29, 2020.

Where can I find copies of the relevant orders and reports?

Attached are the Reopening Massachusetts Report, Sector Specific Safety Standards for Office Spaces, and Governor Baker's signed Executive Order. These materials are also available on our website and www.mass.gov.

2. DUA Issues New Guide for Employers regarding Unemployment Insurance Benefits and Returning to Work

Last week, the Department of Unemployment Assistance (“DUA”) updated its guidance regarding the eligibility of UI benefits as the Commonwealth moves toward reopening. The guidance covers topics such as employees who refuse to return to work, obligations of employees who return to work, how employers should communicate return-to-work offers, and how those situations impact eligibility for UI benefits. The highlights of the updated guidance can be found below.

What if an employee refuses to return to work?

The DUA guidance provides that employees who may work remotely, but refuse to do so, may be denied UI benefits. Similarly, employees who leave their job solely to obtain UI benefits will be ineligible for such benefits. Additionally, the guidance states that employers may lawfully terminate employees who refuse to return to work if the employee’s work requires them to be physically present in the workplace.

While the DUA guidance provides that an employer may lawfully terminate an employee who refuses to return to work when the employee’s job functions require his or her presence at the work site, we recommend consulting with labor counsel before taking such action. Employees, especially those with underlying health conditions who are at increased risk for severe illness from COVID-19 may be entitled to reasonable accommodations at the worksite to reduce their risk of contracting the virus.

What if an employee refuses to return to work because of an underlying health condition?

According to the DUA, an employee who has a “reasonable justification” for refusing to return to work may continue to be eligible for UI benefits. Whether an employee has reasonable justification for refusing to return to work will be determined on a case-by-case basis, by considering certain factors such as, the employee’s specific health condition, the employee’s job requirements, the job offered by the employer, and whether employees are required to interact with the public.

What information should an employer provide when returning employees to work?

Employers should clearly communicate the details regarding an employee’s return to work. The DUA guidance recommends that this information include:

- the employee’s start date;
- full-time/part-time designation;
- wages;
- type of work;
- hours to be worked;
- conditions of the position; and
- general work location.

Furthermore, the DUA guidance recommends that when employers communicate with employees about returning to work, they clearly state their intention to offer work rather than initiate a general discussion on the work options that may be available to the employee. Providing a clearly

communicated offer to return to work may assist the employer in establishing that an employee unreasonably refused an offer to work and is ineligible for continued UI benefits.

Can an employer report an employee who refuses an offer to return to work?

Yes, an employer can report refusals to return to work to the DUA. The employer should include a description of the details of how the offer to return to work was communicated to the employee, when the offer was made, when the employee would have returned to work, and the employee's reason(s) for refusing. The employer should also note whether the employee is being recalled to perform the same type of work previously performed, and if not, include a description of the former working conditions.

What happens to an employee's UI benefits if they return to part-time work?

Depending on the number of hours worked, an employee may still be eligible for partial UI benefits. The weekly UI benefit amount of returning part-time employees would be adjusted based on the wages they reported. Once a part-time employee returns to work on a full-time work or consistently earns wages over their weekly UI benefit amount, they will no longer be eligible for such benefits and must stop filing the weekly certification.

How does a part-time employee returning to work affect their \$600 Federal Pandemic Unemployment Compensation (FPUC) payment?

Employees must be eligible for some amount of weekly UI benefits to receive the additional \$600 weekly FPUC payment. Employees who become ineligible for regular UI benefits will not be eligible for the additional weekly \$600 FPUC payment.

What happens if an employer provides back pay to employees?

Employees who filed for UI benefits and later receive retroactive pay for time not worked as a result of a furlough or reduction in hours are required to report that they received back pay to the DUA. Employees who fail to report this to DUA may be subject to penalties or criminal prosecution. Employees who are required to repay UI benefits as a result of back pay will also be required to repay the \$600 FPUC benefit for any weeks it was received.

What impact does COVID-19 related UI claims have on an employer's experience rating?

Employers' experience rates will not be impacted by COVID-19 claims unless they are self-insured. Government entities using the reimbursable method will be responsible for funding 50% of an employee's UI claim when an employee continues to receive UI benefits because of a COVID-19 related issue such as an underlying health condition. According to the DUA guidance, the additional \$600 FPUC payment and 13-week extension of benefits are entirely federally funded.

B. Updates on Pending Legislation- H.R. 6800- Health and Economic Recovery Omnibus Emergency Solutions Act (HEROES Act)

On May 15, the U.S. House of Representatives passed its version of the HEROES Act, which would represent the fourth phase of COVID-19 related legislation and provide up to \$3 trillion in

additional economic relief for employers and employees. Notably, the bill proposes several amendments to the existing EPSL and EFMLEA (commonly referred to as FMLA+) provisions of the FFCRA, including:

- Eliminating the health care, first responder, and small employer exemptions provided in the FFCRA;
- Extending the EPSL and EFLMLA provisions until December 31, 2021, as opposed to December 31, 2020;
- Expanding eligibility for EFMLEA beyond the only current qualifying reason - caring for a child because of COVID-19 related school closures and child-care unavailability;
- Eliminating requirement that EFMLEA leave count toward an employee's 12-week allotment of regular FMLA leave;
- Allowing employees to take EPSL and EFMLEA leave intermittently or on a reduced schedule upon the employee's request. Presently, it is up to an employer whether they will allow FFCRA leave to be taken intermittently;
- Making up to 80 hours of EPSL available to employees once every 12 months. Currently, EPSL is only available for one-time use through December 31, 2020;
- Increasing the maximum cap to \$511 per day of EPSL used for any qualifying reason. Under the FFCRA, use of EPSL for qualifying reasons four through six are capped at \$200 per day.
- Requiring EFMLEA leave to be paid beginning on the first day. Currently, the first two weeks of EFMLEA leave is unpaid unless the employee substitutes EPSL or other paid leave;
- Prohibiting employers from requesting documentation from employees unless the employee takes more than three consecutive days of EPSL and allows employees up to seven days' to provide documentation after returning from leave. Similarly, employers are prohibited from requesting documentation from employees taking EFMLEA leave for five weeks after the first date of such leave; and
- Prohibiting employers from requiring an employee to substitute vacation, sick, or other paid leave during EFMLEA leave. Employees, however, may elect to substitute their own paid leave if they choose.

Some of the other highlights of the current version of the bill include:

- Extending the \$600 weekly FPUC benefit through January 31, 2021, and additional UI benefits through March 31, 2021;
- Creating a "COVID-19 HEROES Fund," which would allow employers in certain industries to apply for Federal grants to provide hazard pay to essential workers. Under the bill, emergency responders would be considered essential workers eligible for premium pay. Note that Massachusetts has already proposed legislation to provide premium pay to essential workers;
- Requiring OSHA to develop emergency temporary standards for workplace safety relating to COVID-19 for certain occupations, including first responders;
- Providing additional stimulus checks up to \$1,200 per individual; and

- Allocating \$500 billion in funds for state and local governments and up to \$90 billion for school districts and contract tracing.

It appears unlikely, however, that the Senate will adopt the bill as it is currently written. We will keep you updated on any developments with this legislation, especially those relating to amendments to FFCRA leave, as they occur.

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:

- Unemployment Insurance Benefits and Returning to Work: Employer Guide
- 10 Steps to Minimize Liability When Reducing Staff

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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