



On Saturday, June 6, 2020, Governor Baker announced that Massachusetts would be entering Phase 2 of its reopening plan on schedule. Phase 2, which itself is divided into two parts, includes the opening of retail stores, camps, day cares and outdoor dining. In the second part of Phase 2, close contact businesses such as nail salons and massage parlors will be allowed to open, and restaurants will be able to provide meals inside. As with Phase 1, the industries and businesses covered by Phase 2 must comply with both general and industry specific safety protocols. Notwithstanding these highly anticipated re-openings, there continue to be some concerns about employees returning to work. In addition, there remain no clear answers around what the 2020-21 school year will look like. In this Advisor we answer some of the common questions we are getting from clients, and share new guidance and legislation impacting cities, towns and schools.

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## **A. Return to Work FAQs**

### **1. How to Respond to Employees Who Are Afraid to Return to Work**

As employees return to work you will inevitably hear from a few who are hesitant - or outright refuse – to return to the workplace because of fear, underlying health conditions, concerns about a family member’s health, or child-care obligations. Addressing these concerns can be tricky, uncomfortable, and time-consuming. And while each situation requires an individual approach, there are certain steps that you can take to help have a fair and consistent response to these requests.

*What can I do when an employee says that s/he is afraid to return to the workplace because they are considered “high-risk” for contracting the virus?*

If an employee is unable or limited in their ability to return to work due to an underlying health condition, the employee is likely protected by the Americans With Disabilities Act (ADA) or the

Family and Medical Leave Act (FMLA). This means that when an employee asks to remain home or insists on continuing to work from home because of their condition, that request should be treated as a request for an accommodation under the ADA, or equivalent state or local law. The request triggers what is commonly referred to as the interactive process where the parties discuss reasonable accommodations. The employee does not need to refer to the ADA or say the words “reasonable accommodation” to trigger the interactive process.

Reasonable accommodations will vary based on the individual employee and his or her position and may include continuing to work from home. However, if the position requires an on-site presence (if it is not clear already, jobs that require an on-site presence should specify this in the job description), then continuing to work from home may not be an option and reasonable accommodations may include restructured working space, personal protective equipment (PPE), or staggered work hours. In all cases, but especially with remote work, the accommodations related to COVID-19 should be approved as temporary, with clear deadlines for re-evaluation as time passes or situations change.

When engaging in the interactive process, employers should be aware that the process or requirements for employers may have changed. Local orders and public health guidance may require or strongly encourage accommodations related to COVID-19 where ordinarily accommodations would not be necessary. For instance, in the Massachusetts reopening plan, employers are instructed to accommodate employees who are at high risk pursuant to the CDC guidance, which includes individuals 65 years of age and older. Also, it may be difficult to argue that an on-site presence is an essential function of a position if the person in that position has been performing the job remotely for the last 2-3 months. If none of the accommodations offered get the employee back to work, another option is looking at other vacancies (to the extent there are any) where the employee can work remotely or an unpaid leave of absence as a reasonable accommodation.

If there is no reasonable accommodation available that allows the employee to return to work and working remotely is not an option, the employee may qualify for FMLA. At this point the analysis turns to whether the underlying condition is a FMLA-qualifying “serious health condition” for which leave can be taken.

***What if the employee is afraid to return to the workplace because a family member or someone they live with is considered “high risk”?***

The ADA only requires that an employer accommodate the employee’s health condition. If the employee has family members or household members who are at high risk, that does not mean s/he gets the protections or accommodations for their own employment.

While accommodations are not required, it is worth keeping in mind that an alternative is that the employee may qualify for time off to care for a family member who is ill or needs treatment under the FFCRA or the FMLA.

***What if an employee says that he or she is unable to return to work due to a lack of child-care?***

The Families First Coronavirus Response Act (FFCRA) provides qualified employees with two options for partially paid leave due to the unavailability of a child’s school or childcare provider. The two options are 2-weeks of Emergency Paid Sick Leave (EPSL) and up to 12 weeks of leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA or FMLA+). EPSL is

available to all employees; to qualify for the FMLA+, an employee must have been employed for at least 30 days.

For employees with younger children, the start of Phase 2 means that Massachusetts child-care centers can reopen. While these centers could technically open as early as today, the necessary protocols and standards that need to be put into place in order to reopen make it unlikely that many centers were able to do that. However, over the next several days and weeks, these centers should be up and running.

Summer programs and camps are also allowed to open during Phase 2, but it is unclear how many of these usually seasonal programs will be able to reopen and run programs this summer.

***Is just being afraid to return to work enough?***

No. On its own, being afraid to return to work is not enough to qualify the employee for any special accommodations.

**2. Do teachers need to be notified by June 15 if they are going to be laid off?**

Not according to state statute. School districts must notify teachers without Professional Teacher Status (PTS) by June 15 if they are not being renewed for the following year pursuant to M.G.L. c. 71, §41. Failure to timely notify a non-PTS teacher of non-renewal results in their automatic re-appointment for the following year.

There is no statutory timeline for teacher layoffs. M.G.L. c. 71, §42 provides: “Nothing in this section or section 41 shall affect the right of a superintendent to lay off teachers pursuant to reductions in force or reorganization resulting from declining enrollment or other budgetary reasons.” Some contracts contain dates by which Districts must notify employees if they anticipate layoffs for the following year. The provisions presuppose that budgets for the following year will have been determined by the end of the previous year, which in many districts is not currently the case. In case of such a deadline the affected union should be consulted in advance of the deadline to work out a reasonable timeline for discussing layoffs. Generally speaking, the municipal employer has a management right to determine the level of services and the number of employees, which includes the right to lay off employees for economic reasons.

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.

**3. In June, my school district typically sends “Reasonable Assurance of Employment” letters to school year employees. Should these still be sent even if I still do not have a budget for next year?**

Yes. Unless you know for sure that you will not be rehiring someone for the 2020-2021 school year, regardless of the district’s budget, these letters can still be sent. The letters should clearly state that the position is subject to funding and that the letter does not constitute an employment contract.

## **B. Guidance From OSHA On Recording COVID-19 Cases In The Workplace.**

On May 19th, the Occupational Safety and Health Administration (OSHA) issued updated guidance regarding an employer's obligation to record work-related COVID-19 cases. The guidance outlines certain steps that an employer can take to determine whether a COVID-19 case is work-related.

All public sector employers in the Commonwealth are required to comply with the minimum OSHA safety and health standards, including work-related injury and illness reporting requirements. The Department of Labor Standards (DLS) also previously issued guidance in March to public sector employers reminding them of their obligation to report "work-related" COVID-19 cases in accordance with the OSHA regulations. As a reminder, employers are only obligated to report under the following conditions: 1) an employee has a confirmed COVID-19 case; 2) the COVID-19 case is work-related; and 3) the COVID-19 case results in medical treatment, missed time from work.

OSHA's prior guidance regarding employer obligations for reporting COVID-19 cases (issued in April), focused primarily on healthcare workers, first responders, and correctional institutions. The new OSHA guidance makes clear that the requirements apply to all employers going forward.

While OSHA acknowledges the difficulty of determining whether COVID-19 is work-related, the guidance requires employers to make a reasonable determination of whether an employee's COVID-19 case is work-related based on the evidence available to the employer. The OSHA guidance provides that employers should conduct a reasonable investigation, while keeping privacy concerns in mind, to determine whether a COVID-19 case is work-related. It suggests the following steps be taken:

- Ask the employee how they believe they contracted the illness;
- Discuss with the employee, while respecting the employee's privacy, any activities either at or outside of work that may have led to contracting the illness; and
- Review the employee's work environment for potential COVID-19 exposure.

A determination of whether a COVID-19 case is work-related should be based on information reasonably available to the employer at the time it made the determination. Employers should give due weight to any evidence regarding causation that is provided by medical providers, local health officials, or the employee. Additionally, an employer's practices to prevent the spread of COVID-19 in the workplace may be considered in the determination of whether an employee's COVID-19 case is work-related.

OSHA has identified certain criteria that may weigh in favor of a determination that a COVID-19 case is work-related, while again specifically acknowledging the difficulty of making such determinations. These criteria are:

- Several cases develop among workers who work closely together and there is no alternative explanation;

- The employee contracts COVID-19 shortly after a lengthy and close exposure to a particular customer or co-worker who has a confirmed case of COVID-19 and there is no alternative explanation; or
- The employee's job duties include frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

According to the guidance, COVID-19 cases are likely not work-related in the following circumstances:

- The employee is the only worker to contract COVID-19 and the employee's job duties do not include frequent contact with the general public;
- The employee closely and frequently associated with an individual (e.g. family member, significant other, or close friend) who:
  - has a confirmed case of COVID-19;
  - is not a co-worker; and
  - exposes the employee during the period where the individual is infectious.

The new OSHA enforcement guidance took effect on May 26, 2020 and can be found here: <https://www.osha.gov/memos/2020-05-19/revised-enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>

Should you have any questions about how the reporting requirements for work-related COVID-19 cases apply to your workplace please do not hesitate to contact our office.

## **C. School Updates**

### **1. Guidance on Required Safety Supplies for Re-Opening Schools**

On Friday, June 5, 2020, the Department of Elementary and Secondary Education (DESE) issued a memorandum with guidance for school districts on purchasing required safety supplies and implementing protocols as part of the yet to be revealed plan to re-open schools throughout the Commonwealth in the fall. Commissioner Riley directed all school districts to begin purchasing necessary supplies, including disposable masks and gloves, hand sanitizer, and other supplies needed to prevent the transmission of COVID-19 once schools re-open. The memo provides school districts with an estimated quantity of safety supplies needed for the first twelve (12) weeks of school. While additional guidance will likely be issued in the coming months as the start of school year approaches, the memo also outlined some of the protocols and measures that will be required before schools re-open based on the state and federal health and safety guidance currently available. The key points of memo are highlighted below.

#### **Entry requirements**

At this time, DESE is not recommending that schools conduct temperature checks for students when entering school because of the high number of false positive and negative results. However, all students and staff will be required to remain at home if they are feeling sick or experiencing any COVID-19 symptoms. As a result, schools will need to develop detailed policies for managing student and staff absences.

### Face coverings and masks

Students and staff must wear face coverings or masks while in school with certain exceptions for age, medical conditions, or other considerations. Students will be required to bring their own face coverings or masks to school; however, schools will be required to make disposable masks available for students who need them. Schools must also provide face coverings and masks for teachers and staff who do not bring their own.

### Social distancing protocols

All students and staff must maintain a distance of six (6) feet apart to the greatest extent possible. All desks must be spaced 6 feet apart and face the same direction. Schools must establish protocols for students to maintain appropriate distances when entering, exiting, and moving around the school.

### Smaller student-teacher ratios

To maintain effective social distancing protocols, schools will be required to implement smaller class sizes. Currently, class sizes will be limited to a maximum of ten (10) students, and a maximum of twelve (12) individuals, including students and staff, in each room. The guidance also recommends consistently assigning one teacher to individual groups of students consistently, where practicable.

### Isolation protocols for sick students

Schools will be required to develop plans for the isolation and discharge of students who become ill during the school day. Additionally, schools will be required to designate a specific room for students with COVID-19 symptoms that is separate from the school nurse's office. School nurses will need additional specialized supplies to treat students with COVID-19 symptoms.

### Frequent hand washing and sanitizing

All students and staff must engage in frequent hand washing upon arrival at school, before and after meals, after bathroom use, after coughing or sneezing, and before dismissal. If hand washing is not feasible, schools may substitute hand sanitizer with at least 60 percent alcohol content.

### Regular cleaning, sanitizing, and disinfecting protocols

Schools must develop new protocols to ensure that their facilities are regularly cleaned, sanitized, and disinfected in accordance with state and federal health and safety guidelines. Custodians will need to be equipped with appropriate masks, gloves, and proper waste disposal equipment.

## **2. Emergency Educator Licenses**

On June 5, 2020, Governor Baker signed into law Chapter 92 of the Acts of 2020: *An Act Relative to Municipal Governance During the COVID-19 Emergency* (see below), which included among other things a provision granting “emergency educator licenses” to be issued by the Commissioner of Elementary and Secondary Education in light of the COVID-19 disruptions to educator license renewals. The new legislation provides as follows:

## *Eligibility*

In order to be eligible for the emergency educator license, individuals must possess a bachelor's degree and must have been prevented from completing testing, demonstration of subject matter knowledge, coursework or program requirement for an educator's license as a result of the COVID-19 outbreak or Massachusetts' state of emergency. Individuals meeting these requirements may be granted the emergency educator license upon application to the Commissioner.

Emergency educator licenses may be issued during the current state of emergency declaration and for 180 days following the end of the state of emergency. The emergency license shall be valid through June 30, 2021, or a time specified by the Commissioner. The Commissioner will have the authority to suspend the license or revoke it for cause in accordance with requirements and procedures to be established by the Board of Elementary and Secondary Education.

The Commissioner may only grant emergency educator licenses to individuals seeking their first Massachusetts academic and vocational teacher, specialist teacher, administrator, or professional support license. If the regulations require an underlying educator license, then the emergency educator license shall be available in that field only to individuals with the underlying license.

## *Service Toward Professional Teacher Status (PTS)*

Individuals who obtain an emergency educator license shall not have their service time under the emergency license counted toward acquiring PTS and service time under the emergency license does not confer any other rights under M.G.L. c. 71, § 41.

However, if/when an individual obtains a temporary, initial, provisional or professional educator's license in the same field as the emergency educator license by June 30, 2021, or a different deadline as determined by the Commissioner, and continues to work for the same employer under that newly acquired license, then the service time completed under the emergency educator license **will count toward PTS.**

The Commissioner may issue guidance or regulations regarding the implementation of emergency educator licenses.

## **D. Chapter 92 of the Acts of 2020: An Act Relative to Municipal Governance During the COVID-19 Emergency**

As stated above, on June 5, 2020, Governor Baker signed into law Chapter 92 of the Acts of 2020: *An Act Relative to Municipal Governance During the COVID-19 Emergency*. This Act provides a number of important and significant provisions designed to provide relief and flexibility to municipalities and school districts related to the ongoing COVID-19 outbreak. Below is a summary of the provisions that implicate labor, employment, or school issues.

1. Contract Services (Section 12 and 13): These sections allow cities, towns, and school committees (including regional school committees) to pay for contracted services when the vendor is prohibited from providing the services as a result of the COVID-19 state of emergency. A common question when school first closed was whether districts could,

should or were required to pay for services like transportation or food services when the service providers were not actually providing services (see MGL c. 41 s. 56). Under this Act, payment for these services is allowed provided that:

(i) the underlying service contract was in effect before March 10, 2020 and the service contractor was unable to perform services under the contract as a result of the disruption caused by the outbreak of the 2019 novel coronavirus, also known as COVID-19 and effects of the governor’s March 10, 2020 declaration of a state of emergency; and (ii) there are sufficient unencumbered available funds remaining for such payment in the appropriation for the purpose.

Prior to payment, the company or vendor must disclose any grants, discounted loans or other financial support it has received, and any payments made for services under these sections must not exceed “the total amount to which the service contractor is eligible under the service contract less the amount the service contractor received in such grants, discounted loans, or other financial support....”

2. Emergency Educator Licenses (Section 14): Under this section, the Commissioner of Education is authorized to issue emergency educator licenses to individuals who apply for a period up to 180 days after the termination of the state of emergency. Additional information regarding this provision is summarized above.

Other provisions not included in this summary include: Extensions to Municipal Elections; Reduced Quorums for Town Meeting; Remote Representation for Town Meeting; Geographic Limits for Town Meeting; City Budget Extension; and FY21 Suspension of Municipal Revenue Dedication and Appropriation from Stabilization Funds. A summary is available on the Division of Local Services website.

#### **D. 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)). The following is a list of the new materials added since our last Advisor:

- DOE Issues Guidance on Providing Services to EL During COVID-19
- DESE Required Safety Supplies for Re-Opening Schools
- DESE Guidance About Summer 2020 Special Education Services

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

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