MEMO

March 16, 2020
To: Jim Lampke, Mass. Municipal Lawyers Association
From: Atty. John M. (Jack) Collins, Martha's Vineyard, MA,
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Re: LABOR RELATIONS ASPECTS OF COVID19 VIRUS

As requested, I have hastily prepared this Memo to provide some guidance to municipal attorneys on the kind of questions they are likely to receive about the labor relations impact of the so-called Corona Virus. The speed at which municipalities are being forced to respond to containment efforts makes any assessment of the labor relations impacts speculative at best.

Interaction with Unions

Employers can anticipate requests for information as well as demands to bargain from unions representing municipal workers.

Information Requests

Unions are entitled to information that might be useful in fulfilling their duty to represent bargaining unit members. This includes copies of plans, policies or other documents that have been developed, but not those simply under discussion. (Individual employee medical records, of course, are not included.)

Traditional standards of the reasonableness of how quickly such material must be provided may be challenged by the union. Any delay in turning over copies of existing documents may be seen as a lack of good faith. However, the remedy involves a very lengthy process (many months) at the Department of Labor Relations and typically results in an order to produce documents, possibly coupled with a requirement to post a notice acknowledging the failure and promising to do better in the future. This is likely to make the union more open to compromise.

Demands to Bargain

Before implementing changes that involve or even impact on mandatory subjects of bargaining (wages, hours, terms and conditions of employment and standards of productivity and performance) an employer must engage in good faith negotiations with the union if a timely demand to bargain is received. Ordinarily, any proposed change must be delayed until the parties reach either agreement or impasse. Such traditional rules are likely to be modified where a true emergency is involved. Even where prompt action is required, the duty to bargain remains, meaning the parties should continue to negotiate in good faith even after a new policy or procedure has been implemented.

Often a well-crafted Management Rights article allows the employer to take action unilaterally in an emergency. Even in the absence of such specific authorization, it is likely that the DLR will recognize that expedited action was allowed especially if the employer can demonstrate the need and the reasonableness of its efforts to involve the union before and after making the change.

Care should be taken, however, when it comes to compensation or attendance issues that are addressed in the collective bargaining agreement. Where possible, adherence to the contract's provisions is the way to proceed. Many changes that are seen as beneficial to employees might be quickly discussed with the union, possibly even over the phone. That way the union can take some credit and not lose face with its members.

Some changes may be seen as favorable to both employees and the Union. But implementing them without any consultation – even a phone call - with the Union might force the union to file a Complaint at the DLR. Where the employer concludes that any delay is seriously detrimental, and no reduction of pay or other benefits is involved, the risk of acting without any union involvement may be seen as reasonable. Allowing employees to work from home, or to be granted a paid leave of absence, for example, is not likely to incur the wrath of the union. Nor are such actions likely to result in a monetary award from the DLR even if a Complaint at such agency results in an adverse decision.

Where changes might involve a reduction in benefits, or possibly even an assignment that places an employee at risk for contracting the virus, a much more cautious approach is needed. Disciplining an employee for refusing a hazardous assignment will likely result in a lengthy and costly appeal process where the outcome may involve an analysis of the reasonableness of the refusal in light of factors that are presently unknown. Carefully documenting the refusal, as well as the employer's offers to discuss concerns and to provide protective clothing, equipment and the like, is essential.

A municipal employer may decide to pay its workers while they are at home and not working. Although governmental employers rarely do so, requiring workers to take vacation leave during a time when the employer shuts down operations is common in the private sector. With the uncertainty of the duration of any anticipated shutdown, this action is problematic. However, that does not mean it is not an option. Neither the Federal Fair Labor Standards Act (FLSA) not the Massachusetts Wage Act requires workers to be paid during a time when they are not working. Suspending operations is a managerial prerogative. Doing so for a few weeks at a time is worth considering, rather than a prolonged suspension before the duration and scope of the virus situation is fully understood. Moreover, instructing employees not to come to work without pay, especially for an extended period will trigger Unemployment benefits.

Consideration should be given to agreeing with the union that no past practice will be established and that any evidence of such changes will not be admissible in any forum.

Use of Sick Leave

Whether a worker qualifies for sick leave is determined by the wording of the collective bargaining agreement for unionized workers or by the Personnel By-Law or Ordinance for non-bargaining unit employees. Most sick leave provisions limit the use of sick leave to instances where the employee is physically unable to perform their job. Unless a worker has been diagnosed with the virus, an individual's decision to self-quarantine by staying home is not likely to qualify for use of accrued sick leave. (And if the decision is not based on sound reasoning, it may subject the employee to discipline or even termination.)

A situation where a member of an employee's household has been told to self-quarantine, but has not been diagnosed with the virus, will present a challenge. Strictly speaking, a worker that remains home under such conditions will not qualify for sick leave. (This does not mean an employer may not agree with the Union to make a limited-time exception. As noted elsewhere in this Memo, an agreement with the union that no past practice will be created and that evidence of any such changes will not be admissible in any forum.)

An individual that has tested positive who decides to self-quarantine or is ordered to do so by health officials is eligible to use accrued sick leave. However, where the employee is ordered by the municipal employer to remain out of work but has not tested positive, the use of sick leave is not required. In such case, unless a different agreement has been reached with the union, for example, placing the worker on paid administrative leave is the most logical option.

Now that Massachusetts has become a so-called "OSHA State", it is possible that reference to Section 13(a) of that law may be cited by unions or employees as a basis to refuse to come to work because of fear of infection. This is not likely to prevail. That section defines "imminent danger" to include "any conditions or practices in any place of employment which are such that a danger exists which can reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided by this Act."

Confidentiality

There is no obligation to report an employee's virus condition to the CDC, the Mass Department of Public Health or other health agency. In fact, employers should keep health information about their workers confidential. The Americans with Disabilities Act (ADA) requires the same and mandates a separate file or folder be used. An exception applies, however, where a co-worker or third party is likely to be exposed to an infected employee. For example, if an infected worker needs to be transported by EMS personnel to a medical facility, an employer should let them know of the virus condition even if the worker prefers not to do so. And, certainly, an infected employee should not be allowed to remain at work in any event.

Work-related Illness Claims

Although proving how an individual contracted the virus will often be problematic, coverage for those infected by Covid19 is available under the Workers' Compensation Law (MGL c. 152) and the Police/Fire IOD statute (MGL c. 41, s. 111F). Unlike heart problems for both police officers and firefighters, or cancer for firefighters, there is no presumption of work-relatedness for Covid19. This means that the burden is on the employee to show any Corona virus infection was more likely than not a result of a work situation. Unless and until a medical report indicates this is the case, an employer may properly refuse to place a person on Workers' Comp or 111F leave. Charging lost time to accrued sick leave is the appropriate way to handle any such absence until eligibility under either of the two laws is established. Re-crediting sick leave accrual is possible once coverage under WC or 111F is established.

Family and Medical Leave Act Coverage

The federal Family and Medical Leave Act (FMLA) provides protection for a serious health condition which makes an eligible employee (one who actually worked for 1250 hours or more in the past year) unable to perform the functions of his or her job. It also affords coverage to care for a member of the employee's immediate family (son, daughter, spouse or parent). Up to 12 weeks of leave is provided which, unless the employee has accrued sick or other leave available, is unpaid. And where the sick person is not the employee, the use of sick leave will depend on the employer's policy.

Coverage under the FMLA does not depend on an employee's request. In fact, wherever an employer becomes aware that an employee is likely to be out 5 or more days, the employer should issue an FMLA designation (preferably using a DOL form). And if the employer so chooses, any time may be paid from accrued sick, vacation or other available leave, even over the employee's objection.

If an employer intends to require a fitness for duty exam as a condition for an employee's return to work, this must be included in the Designation notice (check of the box if using the DOL form.) Medical certification may be required in all cases, and at least 15 days must be allowed to supply such documentation.

While 30 day's notice is ordinarily required where an employee has advance knowledge of the need for FMLA leave, that would not apply where a Covid19 infection was the reason.

An often-misunderstood aspect of FMLA leave is that it applies to persons on Workers' Comp or 111F leave as well. Designation and other notice forms should be provided to such persons.

Massachusetts has its own FMLA. Massachusetts employers are subject to the MassFMLA if they have at least 50 employees for at least 20 weeks in the current or previous year. In cases involving Covid19, there do not appear to be any additional benefits available under the Massachusetts law beyond those provided under the federal FMLA.

Americans with Disabilities Act (ADA)

Since both the President and Governor have declared a state of emergency, there is no prohibition on telling an employee they cannot come to work either because they have the virus or as a precautionary measure. Nor is there any restriction on notifying appropriate public health officials of an employee's serious medical condition where an employer is aware of the person's infection with the Corona virus.

If an employee has been out on FMLA leave and has exhausted the 12-week period, an employer should keep an open mind about whether to extend any unpaid leave before terminating such worker. Consultation with municipal labor counsel is appropriate, as offering extended leave may be seen as a reasonable accommodation under the ADA.

Recommendations

- Municipal employers should respond promptly to any union requests for information as well as any demands to bargain over any actions the employer might take in response to the Covid19 virus. In fact, reaching out to the unions and offering to discuss options may avoid unnecessary disputes. (See attached form.)
- Infected employees should not be allowed to work. Unless and until their condition is shown to be the result of a work-related event, such individuals may be carried on sick leave. Persons not allowed to work that are not infected need not be paid, but may use available paid leave such as vacation or personal days.
- FMLA Designation, Notice of Rights and Medical Certification forms should be provided to any employee that is absent on account of their own or a close family member's illness.
- Where operations are suspended and employees are not allowed to come to work, although a decision whether to pay such persons might be a managerial prerogative, it is better to consult the affected union in an effort to reach agreement (or impasse) after good faith discussions. As a practical matter, it is likely that most employers will reach agreement with the unions to continue to pay persons during – at least for a short while - any time the town department where they work is shut down.
- Where an employer becomes aware that an individual has tested positive for Covid19, informing those with a "need to know" is allowed. Such persons should not be allowed to work. They may be ordered to stay home – and their travel may be restricted as well.

SAMPLE NOTICE FORM

TO: Union President

FROM:

DATE:

RE: Change in Rule or Practice - Offer to Bargain Impact

As you know, the entire nation is trying to cope with the so-called Corona Virus. We are considering a variety of options and would welcome the Union's input. Because time is of the essence, perhaps a phone call will suffice, but I ask that the Union let me know immediately if it wants to meet and discuss any of the following:

- Suspending or curtailing operations of one or more municipal departments or facilities
- Evaluating whether some employees might be able to perform their jobs from home
- Requiring employees to use some or all of their accrued leave time when not required or allowed to work at their usual job site
- Other : _____

Since the current situation is unique, any changes agreed upon or implemented will be without any binding precedent and will not be admissible in any forum as evidence of a past practice.

The following dates and times are available:

_____
_____
_____

Please select one (or more) date(s) and include such selection in your written reply as well. If you are unable to meet on any of the dates offered, please supply me with three (3) alternatives (during normal business hours), the last of which should be no later than _____, 2020.

If I have not received a written request for bargaining within three (3) days, I will consider this a waiver and implement changes in rules, policy or practices which the municipal employer deems in the best interest of all concerned. Regardless, we will still meet and bargain in good faith after such implementation if requested.