



NC STATE AFL-CIO

NORTH CAROLINA'S UNIONS

North Carolina State
American Federation
of Labor and
Congress of Industrial
Organizations

P.O. Box 10805
Raleigh, NC 27605
info@aflcionc.org
919-833-6678

MaryBe McMillan
President

Executive Board

Rick Armstrong, IBT
Rob Axford, IBEW
Janice Barnes, USW
Andre Barnett, UFCW
Harold Black, CWA
Daniel Dashman, IATSE
Jackie Davis, SEIU Workers
United
Terrence Dewberry, ATU
Randy Fulk, BCTGM
Vernon Gammon, IBT
Tim Godfrey, USW
Michael Gravinese, AFGE
Corey Hill, UAW
Ron Ingerick, SMART
Maureen Kelly, IAMAW
Ken Krebs, AFGE
Yvonne Kinston, CWA
Darla McGlamery, IATSE
Theodore McNeal, IAMAW
Denise Moore, OPEIU
Geneva Moore, AFGE
Jim Moore, AFSCME
Angelita Morrisroe, FLOC
Bob Riggins, UAW
Tim Rorie, Central Labor Councils
Craig Schadewald, NALC
Larry Sorrells, APWU
Scott Thrower, IBEW
Al Vincent, UFCW
Alvin Warwick, Building Trades
Grant Welch, CWA
Denicia Montford Williams,
Constituency Groups
Tony Wilson, APWU
Leticia Zavala, FLOC

March 22, 2020

UPDATE: Legal Issues Related to the COVID-19

Prepared by Mike Okun and Trisha Pande, Patterson Harkavy, Counsel to the NC State AFL-CIO

The unprecedented COVID-19 pandemic is rapidly escalating. The economic impact of the pandemic on working families is significant and will continue to worsen. Federal, state and local governments continue to try to respond to the evolving situation, which is already impacting virtually every aspect of employment law. As a result, any legal update on the status of governmental agency actions regarding labor and employment laws may quickly become outdated. Thus, it is important to regularly check governmental agency websites for new information. Additional guidance from other sources should also be forthcoming as we move forward.

The purpose of this brief review is to alert local unions to legal developments affecting them and their membership and unions in their status as employers. It should not on its own constitute legal advice, and unions are encouraged to contact their internationals or a lawyer to address specific legal questions.

National Labor Relations Board Response

A number of NLRB Regional Offices have closed. Subregion 11 in Winston-Salem, whose jurisdiction includes North Carolina, remains open from 10 a.m. – 2 p.m. As of now, the Subregion will continue to have a limited staff in the office each day, with other staff working remotely. Subregion 11 is part of Region 10 of the NLRB, which is headquartered in Atlanta. The officer-in-charge of Subregion 11, Scott Thompson, is also currently the Acting Regional Director for all of Region 10.

The NLRB has cancelled all elections, both in person and by mail through April 3, 2020, at which time the Board will reassess. All ALJ hearings are cancelled for the same period. The Subregion is continuing to conduct investigations of unfair labor practice charges by telephone.

New NLRB election rules are still scheduled to go into effect on April 16, 2020. The Subregion advises that it can provide speakers for any groups that want information on the changes by videoconference or telephone for now, or in person when normal operations have resumed.

For more information, you can visit the NLRB's website is www.nlr.gov, or call the Subregion 11 office at (336)-631-5201.

Industrial Commission Response

The North Carolina Industrial Commission has set out the changes it is making in procedures during the pandemic on its website at www.ic.nc.gov. Those who need to reach a member of the Claims Section can email claimsadmin@ic.nc.gov or call (919)-716-1734 and leave a detailed message. Those who need to reach an Information Specialist can email infospec@ic.nc.gov or call (919)-716-1727 and leave a detailed message.

Discussions about how and whether COVID-19 will be covered by workers' compensation are ongoing. COVID-19 may be covered as an occupational disease. Under current law, an employee would need to prove two things to establish a valid claim. First, the employee must show that they were at an increased risk of exposure to COVID-19 than was the general population. Second, the employee must show that their work actually caused them to come in contact with the virus. These factors may be easier to prove for first responders and healthcare workers as they are routinely exposed to the virus as part of their daily work. By contrast, because so many people contract the virus regardless of their work, it might be less likely that an employee would receive compensation if they are not a first responder or health care worker and for example, work in a typical office environment.

Unemployment Insurance (UI)

We have already issued a summary of the Governor's Executive Order 118 on unemployment insurance. The Division of Employment Security (DES) now has specific information regarding changes to the state's unemployment system due to the current impacts of COVID-19 on its website. These changes primarily concern individuals separated from employment or who have had their hours reduced due to COVID-19, and individuals prevented from working due to a medical condition or under direct quarantine orders. More information is available at: <https://des.nc.gov/need-help/covid-19-information>.

Notably, claims at the DES were so increased in the days following the Executive Order that the agency continues to be overwhelmed trying to handle a higher case volume and navigating how to apply the new Executive Order.

Paid Sick and Family Leave

North Carolina state law does not require either paid sick or family leave despite repeated calls for the General Assembly to do so over the years. The Family Medical Leave Act (FMLA) covers many employees in North Carolina. However, FMLA leave is typically unpaid unless the employee chooses, or employer requires, that earned paid sick leave or vacation time be burned.

On March 18, Congress passed the Families First Coronavirus Response Act, which contains some emergency leave provisions. Generally, under this new federal law, full-time employees who are quarantined, have COVID-19 symptoms, or are seeking COVID-19 diagnosis may receive ten paid sick days (usual hours worked for part-time workers) at 100% pay up to \$511 a day. Employees who are unable to work because they are caring for another individual in quarantine or because of illness, or because a child's school or childcare is closed, or where childcare is unavailable may receive two-thirds pay up to \$200 a day. The law also provides for twelve weeks extended school closure paid leave for parents, with two weeks unpaid or dove-tailed with paid sick days, at two-thirds pay up to \$200 a day.

The Families First Coronavirus Response Act covers public agencies and private employers with fewer than 500 employees. There are two notable exceptions. First, the Secretary of Labor can exempt employers with fifty or fewer employees from school closure leave if the viability of business can be compromised. Second, employers or the US Department of Labor can exempt health providers and emergency responders. Employers who contribute to a multi-employer fund will contribute required payments to the fund, and employees can receive benefits through the fund.

Employers may not discharge, discipline, or discriminate against any employee who takes paid sick leave or files a complaint or proceeding or testifies in any proceeding related to the benefits and protections provided by the law. Employers also may not require that an employee find another employee to cover the hours during which the employee is using such time. Employers who violate the sick leave requirements or retaliation provisions are subject to civil penalties under the Fair Labor Standards Act. The legislation will become effective within fifteen days (April 2, 2020) or sooner and extends through December 31, 2020.

More detailed explanations of the Families First Coronavirus Response Act – many aspects of which are still unclear – can be found online. A helpful summary can be found here: www.abetterbalance.org/resources/federal-coronavirus-proposal-the-families-first-coronavirus-response-act-h-r-6201/.

The text of the bill can be viewed at: www.congress.gov/116/bills/hr6201/BILLS-116hr6201enr.pdf

Local Union Governance

On March 19, the US Department of Labor's Office of Labor Management Standards (OLMS) issued an "Advisory on Officer Elections and Public Disclosure Reporting in Areas

Affected by the Coronavirus (COVID-19) (02-20).” The Advisory addresses how local unions can avoid liability if they are unable to hold scheduled internal union elections and if they cannot file required disclosure reports in a timely manner. The Advisory can be found at actionnetwork.org/user_files/user_files/000/040/222/original/OLMS_Advisory_on_Union_Officer_Elections_Updated_3-17-2020.pdf. It is also recommended, if your international union has not yet advised on these issues, that you reach out to your international union for further guidance relating to these issues.

A related issue arises when a union constitution and/or bylaws requires regular in-person membership meetings. Our understanding is that most international unions are instructing that the membership meetings be postponed, regardless of the specific language in the constitution and/or bylaws. Again, local unions should seek guidance from their respective internationals on this issue if they have not been advised already

Occupational Safety and Health Administration (OSHA)

Although the AFL-CIO has petitioned OSHA to establish an emergency standard to protect workers from COVID-19 and other infectious diseases, the Agency has not done so. OSHA did recently publish “Guidance on Preparing Workplaces for COVID-19 (OSHA 399-03 2020),” which may be found here: <https://www.osha.gov/Publications/OSHA3990.pdf>.

OSHA also provides an overview of COVID-19 and links regarding industry-specific OSHA here: www.osha.gov/SLTC/covid-19/standards.html. North Carolina is one of 28 states approved to run a state OSHA plan that must maintain standards and enforcement programs that are at least as effective as the federal program and which have the power to implement more stringent safety standards. We are unaware of any specific steps taken by N.C. OSHA other than placing on its website a general coronavirus alert linking to other websites

Title VII Discrimination

We anticipate an increase in employment discrimination in several areas under Title VII as the result of the COVID-19 pandemic. This brief overview focuses on discrimination based on disability, age, and race and national origin.

The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) generally prohibits employers of 15 or more employees from discriminating against employees with actual or perceived qualifying disabilities. The Equal Employment Opportunity Commission (EEOC) has issued guidance addressing how COVID-19 affects ADA requirements, which can be found here: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm.

Consistent with this EEOC guidance, employers will be permitted to perform certain screening measures in the wake of the pandemic. For example, employers may be able to ask

returning travelers about their potential exposure to COVID-19, require infection-control practices, require use of personal protective equipment, and taking employee temperatures or asking about symptoms.

The Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) was intended to protect older workers from age discrimination. While those over 65 are not any more likely to contract the coronavirus, the consequences of contraction can be much more severe for older workers. Many employers may take actions that are intentionally or unintentionally discriminatory against older workers. The EEOC guidance on age discrimination can be viewed at <https://www.eeoc.gov/laws/types/age.cfm>.

Race and National Origin Discrimination

COVID-related discrimination towards Chinese and Asian American communities is escalating at a rapid pace around the world. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on “race, color, religion, sex and national origin.” EEOC guidance on national origin discrimination can be found at <https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm> Guidance on race discrimination can be viewed at https://www.eeoc.gov/policy/docs/race_color.html.

Some EEOC offices, including Raleigh’s EEOC office, are closed for walk-ins. All current appointments scheduled are being conducted by phone. Those wishing to file charges may start the intake process at <https://publicportal.eeoc.gov/Portal/Login.aspx>, or call the Raleigh office at 1-800-669-4000.

Collective Bargaining Agreement (CBA) Issues

The COVID-19 pandemic presents a number of collective bargaining issues. Local unions can request information from employers about their plans to protect workers and seek to meet and discuss these plans and related issues. They can proactively request bargaining over proposed changes to work conditions and the effects of any new legislation or government orders. They should be careful not to waive (expressly or impliedly) any rights regarding “effects” bargaining in the event of layoffs or closures. CBA provisions regarding job protections and benefits should receive renewed attention.

Two issues regarding bargaining deserve particular attention. First, bargaining for CBAs has almost always been done in-person, and unions could insist upon having in-person bargaining sessions. This may change unless CBAs are extended until the pandemic is under control. Second, there will likely be an increase in unilateral changes made by management both during negotiations and mid-contract. Where an employer claims that any changes are the result of legal requirements or “economic exigencies,” and thus not a unilateral change,

unions should still demand to bargain about the change if it opposes the change and ask for detailed support for those claims.

This brief update has touched only partially on some of the many issues confronting unions and their members in the wake of this unprecedented crisis. Union lawyers across the country continue to seek further guidance and information on the rapidly changing legal landscape. Our firm will continue to do what we can to help unions and their memberships in the weeks and months ahead.