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UPDATE: Legal Issues Related to the COVID-19 Pandemic

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The purpose of this brief review is to alert local unions to legal developments affecting them and their membership during the COVID-19 pandemic.¹ This review, which updates guidance distributed on April 15, 2020, provides further information regarding the right to refuse work and protected concerted activity. New sections are highlighted for your convenience.

I. Unemployment Insurance and the CARES Act

In response to growing unemployment claims, the state and federal governments have enacted measures to expand access to unemployment insurance (UI). This section covers expansion of state UI under Governor Cooper's executive orders. It also covers new federally-funded UI programs under the CARES Act.

Generally, individuals must meet four basic criteria to be eligible for unemployment benefits in North Carolina: 1) the individual must be unemployed due to no fault of their own, 2) must have earned sufficient wages to establish a claim, 3) must be physically able, available, and actively seeking work, and 4) must register for work with North Carolina's job service office.

B. State Executive Orders

On March 19, 2020, Governor Roy Cooper signed **Executive Order (EO) 118** to address rising unemployment. The EO expands UI eligibility to include workers who are laid off or have their hours reduced because of COVID-19. Pursuant to this order, DES waived the following requirements relating to state UI claims: 1) the one-week waiting period normally required following the filing of a claim, 2) the requirement that an individual be able and available for other work in order to receive benefits, and 3) the requirement that an individual actively seek other work in order to receive UI.

The DES is encouraging individuals to apply for UI through their website at: <https://des.nc.gov/>. We recommend that individuals apply online during non-business hours. Claims may also be filed by calling the customer call center at (888)-737-0259. Once a claim is filed, a claimant's last employer has ten days to respond.

¹ This update should not constitute legal advice, and unions are encouraged to contact their international or a lawyer to address specific legal questions.

On April 9, 2020, Governor Cooper issued **Executive Order 131**, which, among other things, relaxes requirements for employers to file “attached claims” for employees who may be affected by COVID-19. An attached claim is a claim filed by an employer on behalf of an employee who has been temporarily laid off or who has worked less than 60% of their customary scheduled full-time hours. More information on how employers can file attached claims is available here: <https://des.nc.gov/need-help/covid-19-information/covid-19-information-employers>.

On April 20, 2020, Governor Cooper issued **Executive Order 134** which allows employers to temporarily furlough employees and provide them with “COVID-19 Support Payments” without interfering with those employees’ eligibility for UI.

C. Federal Unemployment Programs

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law. The CARES Act creates three new UI programs, which are all federally funded. Individuals can apply for these benefits through the DES office as discussed above.

Pandemic Unemployment Compensation (PUC) provides individuals with a flat \$600 per week in addition to any regular UI benefits, including partial unemployment benefits. PUC assistance is available through July 31, 2020.²

Pandemic Emergency Unemployment Compensation (PEUC) extends state UI for 13 weeks. In order to receive PEUC, claimants must be actively seeking work, but states can be flexible with this requirement in light of COVID-19. PEUC recipients will continue to get PUC through July 31, 2020.

Pandemic Unemployment Assistance (PUA) provides up to 39 weeks of UI for workers typically left out of state UI programs, or for those who have already exhausted their state UI benefits. For example, self-employed workers, independent contractors, freelancers, workers seeking part-time work, and workers who do not have a long enough work history to qualify for state benefits may be eligible for PUA benefits. PUA recipients will also continue to get PUC through July 31, 2020.

Applicants for PUA benefits must be either partially or fully unemployed, or unable and unavailable to work because: (1) they have been diagnosed with COVID-19 or have symptoms and are seeking diagnosis, (2) a member of their household has been diagnosed with COVID-19, (3) they are providing care for a child or household member who can’t attend school or work because of COVID-19, (4) they have been quarantined or advised by a medical professional to self-quarantine, (5) they were scheduled to start work and do not have a job because of the COVID-19 outbreak, (6) they had to become the breadwinner for a household because the head of household died as a result of COVID-19, (7) their place of employment is closed as a result of COVID-19, or (8) they meet other criteria as established by the Secretary of Labor.

Workers are generally not eligible for PUA if they can telework with pay or are receiving paid sick days or leave. However, individuals who telework for reduced hours, or receive paid leave for less than their customary work week, may still be eligible for PUA if the reduction is due to one of the COVID-related reasons listed above. The PUA program expires on December 31, 2020. **The DES started processing PUA claims on April 24, 2020.**

² Unemployment insurance benefits are generally considered taxable income. However, PUC will not be considered as income when determining eligibility for public assistance programs.

The North Carolina legislature dramatically reduced UI benefits in 2013. As a result, North Carolina has among the lowest average weekly and lowest maximum weekly benefits, and the shortest duration of benefits in the country. In North Carolina, the maximum weekly benefit available is \$350. Currently, state benefits may be received for a maximum of 12 weeks.³ Therefore, even with the additional federal unemployment benefits described below, North Carolina workers will still be receiving less in benefits than workers in other states. The NC State AFL-CIO is working with the NC Justice Center and sympathetic legislators to urge the General Assembly to raise the maximum benefit amount and duration of benefits, as well as improve monetary eligibility standards for state unemployment benefits.

D. Other CARES Act Provisions

Stimulus Checks

In addition to expanding UI, the CARES Act also provides direct payments (also known as “stimulus checks”) to tens of millions of Americans. Individuals with an adjusted gross income of up to \$75,000 (up to \$150,00 for married couples filing joint returns), will receive \$1,200 (\$2,400 for married couples). Parents will receive an additional \$500 for each qualifying child. Tax filers with incomes between \$75,000 and \$99,000 (or up to \$198,000 for married couples) will receive a reduced payment.

Payments will be determined based on tax returns for 2019. If an individual has not yet filed their 2019 tax return, payment will be based on his or her 2018 tax returns. Money will be deposited directly into the same bank account identified in a taxpayer’s 2019 return. If there is no direct deposit listed on the individual’s tax return, or the individual did not file a tax return, then a paper check will be sent to the individual’s address. Stimulus checks are not taxable income and tax payers do not have to repay the stimulus check. More information may be found here:

<https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know>.

Employer Loans & Neutrality in Union Organizing

Under the CARES Act, employers with between 500 and 10,000 employees can apply for low-interest loans provided, among other things, they make good-faith certifications that they will retain 90% of their workforce until September 30, 2020, will refrain from offshoring for two years after completing repayment, will not “abrogate” collective bargaining agreements for the term of the loan plus two years, and will “remain neutral in any union organizing efforts for the term of the loan,” which can be up to five years.

II. Worker Safety

A. Occupational Safety and Health Administration (OSHA)

The AFL-CIO and other groups have urged OSHA to implement an Emergency Temporary Standard with requirements to protect healthcare and high-risk workers from exposure to COVID-19. To date, OSHA has not mandated any infectious disease standard or similar standard that directly addresses the safety issues caused by COVID-19.

³ The maximum duration of benefits may reach 20 weeks. The number of weeks of regular benefits received depends on the statewide unemployment rate.

In early March 2020, OSHA released *Guidance on Preparing Workplaces for COVID-19* (OSHA 399-03 2020), which provides guidance and best practices for reducing workplace exposure to COVID-19: <https://www.osha.gov/Publications/OSHA3990.pdf>. OSHA also provides an overview of COVID-19 and links regarding industry-specific standards here: www.osha.gov/SLTC/covid-19/standards.html. Interim guidance for healthcare workers may be found here: https://www.osha.gov/Publications/OSHA_pandemic_health.pdf.

While there is no federal standard that covers exposure to COVID-19, some existing OSHA requirements are relevant to those working during the pandemic. First, OSHA's "General Duty" standard requires employers to provide their employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. §654(a)(1); *see also* N.C.G.S § 95-126 (state standard). Second, OSHA's Personal Protective Equipment (PPE) standard requires use of gloves, eye and face protection, and respiratory protection where respirators are necessary to protect workers. 29 C.F.R. § 1910.134.

In early April 2020, OSHA released interim guidance relaxing the requirement that employers must notify OSHA when an employee gets COVID-19 from an exposure at work. The interim guidance can be found here: <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19>. Public health officials have expressed concern that this guidance could put workers and communities at greater risk.

B. NC Occupational Safety and Health Division (NC OSH)

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. The North Carolina Department of Labor (NC DOL), Occupational, Safety & Health Division (NC OSH) has not released any specific standard related to COVID-19. However, NC OSH continues to provide general information on COVID-19 here: <https://www.labor.nc.gov/coronavirus-disease-2019-covid-19>. The NC DOL has posted an FAQ on worker safety issues and COVID-19 here: <https://files.nc.gov/ncdol/documents/files/COVID19FAQNC4132020.pdf>.

Workers may report unsafe conditions related to COVID-19 or otherwise to the NC OSH by calling (919)-779-8560, or 1-800-NC-LABOR. Complaints may be also filed online at: <https://www.labor.nc.gov/safety-and-health/occupational-safety-and-health/safety-and-health-complaint-or-concern>.

C. Protection from Retaliation

It is unlawful under the federal Occupational Safety and Health Act (OSHA) and the North Carolina Retaliatory Employment Discrimination Act (REDA) for employers to retaliate against workers for complaining about or reporting safety issues in the workplace. Under federal law, if an employee, "with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person would conclude there is real danger of death or serious injury and that there is not sufficient time to eliminate the danger through regular statutory enforcement channels." *See* 29 C.F.R. § 1977.12. If possible, employees should have also sought from their employers, and unable to obtain, a correction of the

dangerous condition. **Note, however, that there is no private right of action under OSHA for refusal to work.**

An employee that has been discriminated against or faced retaliatory action from an employer for reporting or complaining about a safety violation should call (800)-625-2267 to request a complaint form. The employee should follow the instructions and return the form to the NC Retaliatory Employment Discrimination Bureau (REDB) within 180 days of the date of the last retaliatory or discriminatory act. For further information contact the REDB by email at ask.edb@labor.nc.gov or call 1-800-NCLABOR. Information can be accessed online here: <https://www.labor.nc.gov/workplace-rights/retaliatory-employment-discrimination>.

D. Center for Disease Control Interim Guidance

It is important to note that, despite above protections relating to worker safety during COVID-19, the Center for Disease Control recently issued interim guidance advising employers that critical infrastructure workers can be required to continue to work following a potential exposure to COVID-19 “provided they remain asymptomatic and additional precautions are implemented to protect the mand the community.” The interim guidance is available here: <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html>

III. Paid Sick and Family Leave

On March 18, 2020, Congress passed the **Families First Coronavirus Response Act (FFCRA)**, which contains some emergency leave provisions. The FFCRA covers public agencies and only private sector employers with fewer than 500 employees nationwide. As a result of this numeric threshold, most of our affiliates’ employers are not covered by the FFCRA.

Generally, under FFCRA’s **paid sick leave provisions**, full-time employees who are quarantined, have COVID-19 symptoms, or are seeking COVID-19 diagnosis may receive 10 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 2/3’s pay up to \$200 a day for 10 days.

The law also provides for 12 weeks extended **family leave** for parents, with two weeks unpaid or dove-tailed with paid sick days, and the remaining 10 weeks at 2/3’s pay up to \$200 a day. However, to be eligible for this last form of leave, parents must have worked for their employer for at least 30 days.

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.

A helpful summary of FFCRA provisions can be found here: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>. Detailed regulations concerning how to notify employers of leave, and what documentation is needed can be found here: <https://www.federalregister.gov/documents/2020/04/10/2020-07711/paid-leave-under-the-families-first-coronavirus-response-act-correction>.

IV. Protected Concerted Activity and Right to Refuse Work

Section 7 of the National Labor Relations Act (NLRA) gives workers the right to engage in “protected concerted activity for mutual aid and protection” free from employer retaliation. Protected concerted activity is when two or more employees take action for mutual aid or protection regarding their terms and conditions of employment. Some examples of protected concerted activity include: talking with one or more co-workers about working conditions, joining with co-workers to demand better working conditions, talking to a government agency about problems in the workplace, bringing group complaints to an employer’s attention, and organizing a union. In some circumstances, the NLRA may protect workers walking off the job due to critically unsafe working conditions.

The NLRA protects all workers regardless of immigration status, and a worker need not be part of a union to avail herself of Section 7 protections. It is unlawful for an employer to discharge, discipline, threaten, or interrogate employees about their protected concerted activity or union sentiments. If an employee’s rights under the NLRA are violated, then that employee can file an unfair labor practice charge with the National Labor Relations Board (NLRB), which is discussed below.

Importantly, in a collective bargaining agreement, some rights under Section 7 may have been waived, such as the right to strike. However, Section 502 of the Labor Management Relations Act protects work stoppages where employees believe in good-faith that their working conditions were abnormally dangerous, and those beliefs are supported by ascertainable, objective evidence, and that the perceived danger posed an immediate threat of harm to employee health or safety. The jurisdiction to enforce this protection lies solely with the NLRB.

The discipline of employees who refuse to work because they believe their work to be unreasonably dangerous could be challenged through a collective bargaining agreement’s grievance system. While the general rule is that an employee must obey management’s orders to perform work assignments and turn later to the grievance mechanism—“obey-now-grieve-later”—an exception exists where complying with an order would involve an unusual or abnormal safety hazard. The standards applied by arbitrators in evaluating such work refusals vary widely, though most seem to adopt some form of “reasonable person” approach where the facts and circumstances at the time of the incident would have caused a reasonable person to have feared for their safety.

It is recommended that local leadership discuss a potential strike or work stoppage with their international union or local counsel.

V. National Labor Relations Board Response

A number of regional offices across the country have closed. Staff in subregion 11 in Winston-Salem, whose jurisdiction includes North Carolina, continue to work remotely and may be reached by

phone at (336)-631-5201. Subregion 11 is part of Region 10 of the NLRB, which is headquartered in Atlanta. The current Acting Regional Director for all of Region 10 is **Terry Combs**.

On March 19, 2020, the NLRB suspended all representation elections, even by mail, through at least April 3, 2020. On March 31, 2020, the NLRB issued three final rules making it more difficult for employees to obtain union representation, both through an election and through voluntary recognition. Although the rules cannot go into effect immediately, as there must be a period for the NLRB to take comments, the decision to issue the rules drew considerable outrage, not only because of the content of the rules, but also because of the timing of the announcement and use of NLRB resources. Whether prompted by this response or not, the NLRB shortly thereafter announced that it would not suspend representation elections past April 3, 2020 and that they could commence again April 6, 2020.

The announcement by the NLRB did not offer much guidance and what will happen next is uncertain. The administration of hearings and elections has been delegated to Regional Directors. Our understanding is that Regions will be experimenting with various technologies when it comes to hearings. Also unclear is what will happen when one party objects to a mail ballot election when in-person elections are not practicable for various reasons. There are currently five petitions that have been filed in the jurisdiction covered by Subregion 11 that are affected. In one of these cases, there was a stipulated election agreement for a mail-ballot election and ballots were scheduled to be mailed this week.

VI. Local Union Governance

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)*. The Advisory addresses how local unions can avoid liability if they are unable to hold scheduled internal union elections and if they cannot timely file required disclosure reports. The Advisory can be found here: <https://www.dol.gov/olms/regs/compliance/coronavirus20.htm>.

The Advisory, which was most recently updated on March 25, 2020, states that those wishing to take advantage of this enforcement policy do not need to contact OLMS before the report is done, providing the requested information. Rather, OLMS will not pursue a civil enforcement action with regard to a delinquent or deficient report when these reporting violations are attributed to COVID-19 and the reporting deadline was prior to June 30, 2020. Any such reports must be filed by June 30, 2020, absent further notice from OLMS. We recommend that you reach out to your international union for further guidance on these issues.

A related issue arises when a union's constitution and/or bylaws requires regular in-person membership meetings. International unions are giving different instructions in this regard, and, again local unions should seek guidance from their respective internationals on this issue if they have not been advised already.

The CARE Act also allows some employers, including labor unions, to receive federal payroll tax credits in order to help retain employees. Eligibility for the credits depends on meeting certain criteria set out in the new law, as does the amount of relief that is available. In addition to the tax credits that maybe available to some unions, all unions with employees are eligible to delay paying 2020 payroll

taxes in order to help manage cash flow. For more information contact your accountant or your international.

VII. Collective Bargaining Agreement (CBA) Issues

The COVID-19 pandemic is presenting a host of new collective bargaining issues. Speaking generally, 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.

VIII. 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. However, COVID-19 may be covered as an occupational disease. Under current law, an employee would need to prove two factors to establish a valid claim. First, the employee must show that they were at an increased risk of exposure to COVID-19 than compared to general population. Second, the employee must show that their work actually caused them to become infected 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. Workers who fear exposure at work should document safety issues, report safety issues, and adopt and document practices at home to stay safe and avoid exposure.

IX. 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.

A. 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 updated 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.

B. 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>.

C. Race and National Origin Discrimination

COVID-related discrimination towards Chinese and individuals of Asian descent has increased in recent months. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “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.

X. Immigration Issues

The AFL-CIO is committed to ensuring that all workers are safe regardless of immigration status. Unfortunately, many gaps remain in federal responses to COVID-19 especially with respect to immigrant workers. For example, the undocumented population is largely excluded from unemployment insurance relief. Tax payers who file with individual tax identification numbers and not social security numbers will be ineligible for stimulus checks. AFL-CIO guidance on where things stand for immigrant workers across a range of issue areas at the federal level can be found here: <https://aflcio.org/sites/default/files/2020-04/COVID%2019%20and%20Immigrant%20Workers%20Fact%20Sheet.pdf>.

The NC Justice Center has published informational videos and fact sheets regarding access to healthcare benefits during the COVID-19 emergency: <https://www.ncjustice.org/publications/immigrant-access-to-health-care-benefits-in-time-of-emergency/>. The NC Justice Center website also has helpful information regarding immigration enforcement issues during COVID and the punitive public charge rule that went into effect in February

2020: <https://www.ncjustice.org/projects/immigrant-refugee-rights/project-resources/public-charge-rule/>.

As the growing season begins, it is expected that more migrant workers will come to North Carolina in weeks and months ahead. Migrant workers are particularly vulnerable to the impacts of COVID-19, and at a greater risk of exposure because of living conditions during growing season. The NC Department of Health and Human Services issued guidance for employers of migrant workers: https://files.nc.gov/ncdhhs/Interim%20Guidance%20for%20Migrant%20Farm%20Workers_031320.pdf. However, worker's rights and immigrant justice advocates are concerned these recommendations are not enough to ensure migrant worker safety.

XI. Consumer Protection Issues

The NC Department of Justice (NC DOJ) has warned consumers of scammers seeking to take advantage of the COVID-19 pandemic by using online scams, robocalls, and texts to access personal and financial information. The NC DOJ has received information from federal partners about robocalls and text message scams offering "miracle cures" or free at-home testing kits. If a company contacts you and you believe you have been the victim of a scam, report to the NC DOJ Consumer Protection Division at ncdoj.gov/file-a-complaint or 1-877-5-NO-SCAM.

Other information regarding consumer protection, as well as information on financial assistance such as mortgage and student loan debt relief is available here: <https://www.nc.gov/covid-19/family-community-covid-19-resources>.

This brief update has touched only on only some of the 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.