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UPDATE: Legal Issues Related to the COVID-19 Pandemic

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The COVID-19 pandemic continues to escalate with devastating impacts on working families. Federal, state and local governments continue to respond to the evolving situation, which affects virtually every aspect of employment law. The purpose of this brief review, which updates the one issued on March 22, is to alert local unions to legal developments affecting them and their membership. This update should not constitute legal advice, and unions are encouraged to contact their internationals or a lawyer to address specific legal questions. Moreover, it is important to regularly check governmental agency websites for updates and new information.

I. Unemployment Insurance (UI)

A. State Unemployment Insurance

Unemployment insurance provides regular payments to eligible workers. 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. In North Carolina, the maximum weekly benefit available is \$350. Benefits may be received for a maximum of 12 to 20 weeks depending on the state's unemployment rate. For more information about general eligibility requirements, visit the NC Division of Employment Security (DES) website at: <https://des.nc.gov/need-help/faqs/unemployment-insurance-faqs>.

The North Carolina legislature dramatically reduced unemployment insurance 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. 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 insurance.

B. Executive Order 118

On March 19, 2020, Governor Roy Cooper signed Executive Order 118 to address rising unemployment in the wake of the COVID-19 crisis. The Executive Order expands unemployment insurance 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 unemployment insurance 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 unemployment insurance.

Currently, the DES encourages individuals to apply for unemployment insurance through their website at: <https://des.nc.gov/>. Individuals may also file claims 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.

The DES is receiving 100 times the volume of applications for unemployment seen in a usual week. In a response to this increase in claims, the DES is adding more than 350 people to help workers and employers with processing claims, contracting with an additional call center, adding computer servers, doubling printing and mail capacity, and purchasing more than 500 new computers to assist in processing claims. In the meantime, it is recommended that applicants try using the online application during non-business hours.

C. Federal Coronavirus Aid, Relief, and Economic Security (CARES) Act

On March 26, 2020, the CARES Act was signed into law. Part of a nearly \$2 trillion economic stimulus package, the Act provides an estimated \$260 billion in expanded unemployment insurance. The CARES Act creates three new unemployment insurance programs, which are all federally funded. North Carolina has entered an agreement with the federal government to receive this funding. Therefore, workers can apply for these benefits through the NC DES office as discussed above.

Pandemic Unemployment Compensation (PUC) provides individuals with \$600 in addition to any state unemployment insurance benefits, including partial unemployment benefits. PUC is a flat amount that must be paid on a weekly basis. PUC assistance is available through July 31, 2020.

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

Pandemic Emergency Unemployment Compensation (PEUC) provides an additional 13 weeks of state unemployment insurance benefits. These benefits become available after an individual exhausts their regular state unemployment insurance benefits. The vast majority of states offer 26 weeks of unemployment insurance benefits. North Carolina does not. In order to receive PEUC, claimants must be actively seeking work, but states can be flexible with this requirement in light of COVID-19.

Pandemic Unemployment Assistance (PUA) provides unemployment insurance for workers typically left out of state unemployment insurance programs, or for those who have exhausted their state unemployment insurance 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.

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.

PUA claimants will also be eligible to receive the weekly \$600 PUC amount. 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 less than they customarily worked, 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.

It is notable that, in addition to expanding unemployment insurance, the CARES Act also provides direct payments to tens of millions of Americans. Individual tax filers 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 \$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, then a paper check will be sent to the address on the tax return. More information may be found here: <https://www.irs.gov/newsroom/economic-impact-payments-what-you-need-to-know>.

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.

Because the CARES Act is a federal law, we encourage local unions to reach out to their international offices for further guidance.

II. 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.

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 OSHA here: www.osha.gov/SLTC/covid-19/standards.html.

While there is no 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.

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, 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>.

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>.

III. 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, 2020, Congress passed the Families First Coronavirus Response Act, which contains some emergency leave provisions. The Families First Coronavirus Response Act covers public agencies and only private sector employers with fewer than 500 employees. The U.S. Department of Labor (DOL) has issued regulations allowing employers to count its employees nationwide in determining whether they have 500 or more employees. As a result, most of our affiliates' employers are not covered.

There are two other 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 DOL can exempt health providers and emergency responders.

Generally, under FFCRA, 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.

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: <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

On April 1, 2020, the DOL issued new guidance exempting employers with fewer than 50 employees from providing the 12 weeks of leave that FFCRA requires for workers whose children are at home due to COVID-related school or childcare closures.

IV. National Labor Relations Board Response

A number of regional offices across the country have closed. Subregion 11 in Winston-Salem, whose jurisdiction includes North Carolina, initially remained open from 10 am- 2 pm each day. Because so few were physically visiting the office, those hours have been eliminated. The Subregion's staff continues to work remotely. Calls to the Subregion's main office number are being routed to the Subregion's administrative professionals, all of whom are teleworking. Subregion 11 is part of Region 10 of the NLRB, which is headquartered in Atlanta. The official-in-charge of Subregion 11, Scott Thompson, is also currently the Acting Regional Director for all of Region 10.

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, because there must be a period for the NLRB to take comments, the decision to issue the rules drew considerable outrage, not just because of the content of the rules but because of the timing of the announcement and because how the NLRB was using its resources during the pandemic. 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. Whether to hold hearings and how and whether to conduct elections and how has been delegated to Regional Directors. Our understanding is that Regions will be experimenting with various technologies when it comes to hearings. Also unclear, for example, 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.

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

V. 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 where they work at other workplaces, as in a typical office environment as one example.

VI. 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 guidance addressing how COVID-19 affects ADA requirements, which can be found here:

https://www.eeoc.gov/laws/guidance/upload/pandemic_flu.pdf.

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 Asian American communities is escalating at a rapid pace around the world. 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.

VII. 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, if your international union has not yet advised on these issues, 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. Our understanding is that 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

VIII. 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.

This brief update has touched only partially 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.