School Client Conference Webinar Series 2021


John Alessi


Luisa Bostick


Peter Bradley


Emily Dinsmore


Andrew Drilling


Ryan Everhart


Patrick Fitzsimmons


Andrew Freedman

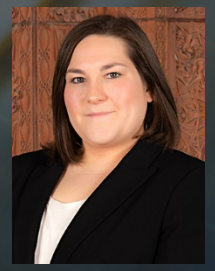

Julia Hilliker


Elizabeth Holden


Elizabeth McPhail


Lindsay Menasco


Paul Meosky

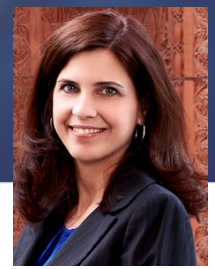

Kinsey O'Brien


Michael Risman


Jeffrey Stone


Jeffrey Swiatek


Brianne Szopinski


Marla Waiss


Amy Walters

Albany | Buffalo | Hackensack | New York City | Palm Beach | Saratoga Springs | Toronto

www.hodgsonruss.com

Hodgson Russ LLP ATTORNEYS

Need Some Time? COVID-19 Edition

Strategies for navigating the complicated web of pandemic-related leave and accommodation rules

School Client Conference Webinar Series
January 15, 2021

Luisa D. Bostick, Esq.
Kinsey A. O'Brien, Esq.

Agenda

- Families First Coronavirus Response Act ("FFCRA") and Coronavirus Response and Relief Supplemental Applications Act ("CRRSAA")
- New York State COVID-19 Paid Sick Leave Law
- Family and Medical Leave Act ("FMLA")
- ADA/NYSHRL Reasonable Accommodations
- Other Sources of Leave Rights
- Hypotheticals

FFRCA

- The Families First Coronavirus Response Act (FFCRA) contains two paid leave laws:
  - Emergency Paid Sick Leave Act (EPSLA)
  - Emergency Family and Medical Leave Expansion Act (EFMLEA)
- Effective April 1, 2020.
- While effective, applied to public employers of any size.
- Sunset December 31, 2020.
  - The Coronavirus Response and Relief Supplemental Applications Act (CRRSAA) adopted in December did not extend FFCRA.
  - CRRSAA did extend the availability of certain tax credits for private entities that choose to voluntarily provide continued FFCRA leave from January 1 – March 31, 2021. However, public entities are not eligible for those tax credits.

FFCRA – EPSLA

- Covered employers were required to provide all employees with up to two weeks of paid leave for the following reasons:
  1. The employee is subject to a federal, state, or local quarantine or isolation due to concerns related to COVID-19;
  2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  3. The employee is experiencing symptoms of COVID-19 and seeking medical diagnosis;
  4. The employee is caring for an individual who is subject to a federal, state, or local quarantine or isolation due to concerns related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  5. The employee is caring for his or her son or daughter (as defined under the FMLA) if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions; or
  6. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

FFCRA – EPSLA

- EPSLA taken for the first three qualifying reasons was required to be paid at the employee's regular rate of pay or the applicable minimum wage rate (whichever is greater), capped at **$511 per day and $5,110 in the aggregate** per employee.
- EPSLA taken for the last three qualifying reasons was required to be paid at two-thirds of the employee's regular rate of pay or the applicable minimum wage rate (whichever is greater), capped at **$200 per day and $2,000 in the aggregate** per employee.
- Employers could elect to exclude employees who are health care providers or emergency responders from the provisions of the paid sick leave law.
- Employers could not require an employee to use other paid leave before this paid sick leave.
- Unused time was not subject to carry over and if not used has now expired.

FFCRA – EFMLEA

- Expanded FMLA to apply when an employee needs leave to care for his or her minor child because the child's school or place of care has been closed, or the child's child care provider is unavailable, because an emergency has been declared by a federal, state, or local authority with respect to COVID-19.
- For this qualifying reason:
  - Covered employees were those who have been employed by the employer for at least 30 days.
  - The first 10 days could be unpaid.
  - After 10 days, the leave was required to be paid by the employer at two-thirds the employee's regular rate of pay, with benefits capped at **$200 per day and $10,000** in the aggregate for each employee.

FFCRA – EFMLEA

- The EFMLEA was an expansion of the FMLA.
- If an employee had already used a portion of his or her FMLA leave entitlement prior to taking leave under the EFMLEA, the amount of FMLA leave taken is subtracted from their total EFMLEA entitlement.
- If an employee took EFMLEA leave and later during their applicable twelve (12) month FMLA leave period is approved for FMLA leave, the EFMLEA leave they used is subtracted from their FMLA leave entitlement.
- While EPSLA leave could be used by an employee to supplement the first two weeks of EFMLEA leave enabling the employee to receive pay for such leave, EPSLA leave when used for reasons 1, 2, 3, 4, or 6 does not count against the employee's annual allotment (12 weeks) of FMLA leave.

NYS COVID-19 Paid Sick Leave

- Guarantees leave to employees who are **subject to a mandatory or precautionary order of quarantine or isolation** issued by New York State, the Department of Health, the local board of health, or any other authorized governmental entity due to COVID-19.
- Public employers of any size must provide **14 days** of paid sick leave.
  - "14 days" mean calendar days.
  - The pay must represent the amount of money the employee would have otherwise received for that 14 day period.
- Leave must be provided without loss of the employee's accrued sick leave.
  - What about vacation, PTO, and other time off banks not designated as "sick leave"?
- The legislation also made PFL available when an employee's minor child is subject to a mandatory or precautionary order of quarantine or isolation issued by New York State, the Department of Health, the local board of health, or any other authorized governmental entity due to COVID-19.

NYS COVID-19 Paid Sick Leave

- Does not apply where the employee is asymptomatic or has not yet been diagnosed with any other medical condition and is physically able to work while under the quarantine/isolation order through remote access or other similar means.
- An employee is not eligible for paid benefits if quarantined after returning to the United States from non-work-related travel to a country for which the CDC had issued a Level 2 or Level 3 travel notice or a non-contiguous state for more than 24 hours.
  - If the employee was notified of the CDC's travel notice and the unavailability of paid benefits following such travel prior to the travel.
  - Even under these circumstances, the employee must be permitted to use any accrued leave, followed by unpaid leave, for the absence.
- While FFCRA was effective, it ran concurrently with EPSLA but was not subject to the EPSLA pay caps.

Hodgson Russ LLP ATTORNEYS

NYS Post-Travel Quarantine

- New York's travel restrictions, embodied in Executive Order 205.2 and guidance adopted under it, applies to individuals entering New York from or after travel to another state.
- Travelers from Connecticut, Massachusetts, New Jersey, Pennsylvania, or Vermont (contiguous states) are largely exempt:
  - No quarantine or testing requirements.
  - Must complete Traveler Health Form.

NYS Post-Travel Quarantine

- Out-of-state for less than 24 hours:
  - Must complete Traveler Health Form.
  - Not required to quarantine upon return to NYS.
  - On fourth day after arrival in NYS, must take COVID-19 test.
- Out-of-state for more than 24 hours:
  - Must take COVID-19 test within three days before arrival in NYS.
  - Must complete Traveler Health Form.
  - Must quarantine upon return to NYS.
  - On fourth day after arrival in NYS, must take COVID-19 test.
  - Must continue to quarantine until both test results come back negative.
- If an employee does not test, the full 14 day quarantine applies.

NYS Post-Travel Quarantine

- The restrictions contain an exception for “essential workers” that allows them to avoid quarantine (but still requires a diagnostic test on the fourth day after arrival).
- However, Department of Health Guidance indicates that school staff are not “essential workers” for this purpose and cannot take advantage of this exemption.
- According to Executive Order 205.2 and guidance adopted under it, a quarantine resulting from an employee’s non-essential personal travel to another state does not qualify for NYS COVID-19 Paid Sick Leave.
  - While FFCRA was in effect, likely qualified under EPSLA.

FMLA

- The FMLA allows eligible employees of covered employers to take up to 12 weeks of unpaid job-protected leave during a 52-week period for, among other reasons:
  - To care for his/her spouse, child, or parent who has a serious health condition;
  - For a serious health condition that makes the employee unable to perform the essential functions of his or her job.
- Applies to employers with "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year."
- Eligible employees are those who:
  - Have been employed by the employer for at least 12 months;
  - Have worked at least 1,250 hours for the employer during the 12 month period preceding the leave; and
  - Work in a location where the employer has 50 or more employees in a 75 mile radius.

Hodgson Russ LLP ATTORNEYS

FMLA

- "Serious health condition" is an illness, injury, impairment, or physical or mental condition that involves:
  - *Inpatient care* in a hospital, hospice or residential care facility; or
    - "Inpatient care" is defined as "an overnight stay in a hospital, hospice, or residential medical facility, including any period of incapacity… or subsequent treatment in connection with such inpatient care."
  - *Continuing treatment* by a health care provider.
    - "Continuing treatment" is defined to include, among other things, "a period of incapacity… of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves… treatment two or more times by a health care provider… or by a provider of health care services under orders of, or on referral by, a health care provider."
    - The term "treatment" includes examinations to determine whether a serious health condition exits and evaluations of the condition, but excludes routine physical examinations.

Reasonable Accommodations

- Under the Americans with Disabilities Act ("ADA") and New York State Human Rights Law ("NYSHRL"), employers are required to provide reasonable accommodations for qualified individuals with disabilities, except where doing so would result in undue hardship.
  - Under the ADA, an "individual with a disability" is "any person who (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment."
  - NYSHRL standard is broader and includes "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function *or* is demonstrable by medically accepted clinical or laboratory diagnostic techniques."

Reasonable Accommodations

- Employees with underlying medical conditions that render them more susceptible to COVID-19 infection, or more likely to develop severe complications from such an infection, may request accommodations such as:
  - On-the-job modifications (e.g., isolation or significant social distancing from co-workers and the public).
  - Telework.
  - Leave.
- Employees who become infected with COVID-19 may be entitled to job-protected time off, even if they are not eligible for or have exhausted leave under the laws described above.
- A person's age, or the fact that a person resides with a person with a disability, do not alone trigger accommodation obligations.
- Obligation is to accommodate the employee not their spouse or other relative.

Reasonable Accommodations

- An employer has a defense to providing a reasonable accommodation if the accommodation would impose an "undue hardship".
- "Undue hardship" is defined as "significant difficulty or expense incurred" by the employer. Factors considered include:
  - The nature and net cost of the accommodation, taking into consideration the availability of tax credits and deductions, and/or outside funding;
  - The overall financial resources of the facility or facilities, the number of persons employed at such facility, and the effect on expenses and resources;
  - The overall financial resources of the employer, the overall size of its business, the number of its employees, and the number, type and location of its facilities;
  - The type of operation or operations of the employer, including the composition, structure and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer; and
  - The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.
- Undue hardship of the specifically requested accommodation may not be enough.

Other Sources of Leave Rights

- Collective Bargaining Agreements
  - Sick leave;
  - Family sick leave;
  - Personal time;
  - Discretionary leave of absence.

  *** Critical that CBA carefully define purposes for which each leave category can be used. ****

- District Policies can also create leave rights if they award time off not addressed by CBAs, etc.

Hypothetical 1

Kinsey is a tenured high school teacher. In January 2021, just before school resumes, she takes a 3-day trip to Florida. Pursuant to New York's travel restrictions, she is required to quarantine while waiting for the results of her two COVID-19 tests, the second of which she cannot take until the fourth day after she returns to NYS.

Question: Can the District require Kinsey to use her accruals to cover her absences quarantine?

Yes or No?

Hypothetical 2

Luisa is an administrator for a large school district. Luisa is subject to a quarantine order after having close contact with someone who tested positive for COVID-19.

Question: Is Luisa eligible to take NYS COVID-19 Paid Sick Leave for herself?

Yes or No?

Hypothetical 3

Lindsay is a first year teacher in the 2019 – 2020 school year. Lindsay's mom typically provides childcare to Lindsay's one-year-old daughter. Because Lindsay's mom has a weakened immune system, she was not able to care for Lindsay's daughter starting in **April 2020**.

Question 1: Was Lindsay entitled to leave to care for her daughter?

Yes or No?

Hypothetical 3

Lindsay took 12 weeks of EFMLEA in 2020. In February 2021, she asks for 10 weeks of leave for her own serious health condition (unrelated to COVID-19).

Question 3: Is Lindsay entitled to take FMLA leave as requested?

Yes or No?

Hypothetical 4

Liz is a Special Education teacher. Her son tests positive for COVID-19 and is under a mandatory order of isolation as a result.

Question: Liz is entitled to job protected leave to care for her son while he is under the order of isolation.

True or False?

Hypothetical 5

Jeff works in the Personnel Department of a school district. He has an underlying respiratory condition that he and his physician feel exposes him to a greater risk of contracting COVID-19 or developing severe complications if exposed to the virus. He tells his boss that his doctor has advised him to self-quarantine and work from home until the pandemic emergency ends.

Question: The District does not need to consider such an open-ended and long-term request.

True or False?

QUESTIONS?

Break

Next session: Issues in Collective Bargaining

Hodgson Russ LLP ATTORNEYS

Issues in Collective Bargaining

36th Annual School Client Conference
January 15, 2021

Presented by:
Elizabeth D. McPhail, Esq.
Jeffrey F. Swiatek, Esq.

Agenda

- Continued Financial Realities
  - Local, State (and Federal) Funding Uncertainty
  - Upward Pressure on Expenses
  - Impact of COVID-Related Paid leave Laws
- Front-End Bargaining Considerations
  - What is Our Starting Point?
  - What Do We have to Bargain?
  - What is our approach?

Agenda

- Topics of Negotiations
  - Distance Learning
  - Health and Safety Issues
  - Leave
  - Money
- Impasse and Communications Issues

Tax Levy Cap Inflation Factor

Source: *Office of the State Comptroller, December 2020*

Inflation Factors and Allowable Levy Growth Factors by Fiscal Year

Fiscal Year	Fiscal Years Beginning									
	2017		2018		2019		2020		2021	
	Inflation Factor	Allowable Levy Growth Factor	Inflation Factor	Allowable Levy Growth Factor	Inflation Factor	Allowable Levy Growth Factor	Inflation Factor	Allowable Levy Growth Factor	Inflation Factor	Allowable Levy Growth Factor
Jan 1 - Dec 31	0.68%	1.0068	1.84%	1.0184	2.25%	1.0200	2.07%	1.0200	1.56%	1.0156
Mar 1- Feb 28	0.80%	1.0080	1.99%	1.0199	2.42%	1.0200	1.90%	1.0190	1.46%	1.0146
Apr 1 - Mar 31	0.93%	1.0093	2.05%	1.0200	2.42%	1.0200	1.85%	1.0185	1.43%	1.0143
Jun 1 - May 31	1.15%	1.0115	2.13%	1.0200	2.46%	1.0200	1.78%	1.0178	1.31%	1.0131
Jul 1 - Jun 30	1.26%	1.0126	2.13%	1.0200	2.44%	1.0200	1.81%	1.0181	1.23% Announced	
Aug 1 - Jul 31	1.36%	1.0136	2.09%	1.0200	2.40%	1.0200	1.89%	1.0189		
Sep 1 - Aug 31	N/A	N/A	N/A	N/A	N/A	N/A	1.96%	1.0196		
Oct 1 - Sep 30	1.63%	1.0163	2.05%	1.0200	2.30%	1.0200	1.93%	1.0193		

Hodgson Russ LLP ATTORNEYS

Retirement System Rates

The following chart summarizes the TRS Employer Contribution Rate over a 20-year period:

2002-2003	0.36	2012-2013	11.84
2003-2004	2.52	2013-2014	16.25
2004-2005	5.63	2014-2015	17.53
2005-2006	7.97	2015-2016	13.26
2006-2007	8.60	2016-2017	11.72
2007-2008	8.73	2017-2018	9.80
2008-2009	7.63	2018-2019	10.62
2009-2010	6.19	2019-2020	8.86
2010-2011	8.62	2020-2021	9.53
2011-2012 expected	11.11	2021-2022	9.50-10%

Source: *New York State Teachers' Retirement System July 2019 Actuarial Valuation Report; Administrative Bulletin 2020-8.*

Financial Impact of FFCRA

- FFCRA -- Federal Family Coronavirus Relief Act ("FFCRA") inclusive of the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency Family and Medical Leave Extension Act ("EFMLEA").
  - EPSLA (up to 80 hours)
  - EFMLEA (up to 12 weeks)
  - Sunset December 31, 2020
- New York State Coronavirus Paid Sick Leave
  - Public Sector employer must provide 14 days of paid sick leave for an employee subject to a mandatory or precautionary order of quarantine or isolation due to COVID-19
  - No sunset

Know Your Starting Point When Negotiating

- **The Triborough Amendment**. (Civ. Serv. L. 209-a(1)(e)). Requires a municipality to continue *most* terms of the collective negotiations agreement until a new agreement is reached.
- **The Sunset Doctrine**. The parties may themselves preclude the application of the Triborough Amendment by using language that causes a contractual term to "sunset" or expire at the conclusion of the agreement or at some other point in time.
- **Bargaining: Mandatory, Permissive, and Illegal**. PERB has a well-developed framework for the status of various topics of bargaining.
- **The Conversion Doctrine**. Under PERB's "conversion theory," if a non-mandatory subject is incorporated into the contract, it can convert to a mandatory subject.

Know Your Starting Point When Negotiating

- "**Past Practice**." Certain past practices may be enforceable either through specific contract language protecting such practices, or through PERB's improper practice procedures for those practices which are unequivocal, consistently long-standing and for which there is a reasonable expectation that the practice would continue.
- **Management Rights and Current Contract language**. Be sure to fully assess your current right to implement changes based on current contract language. Be careful not to underestimate or overestimate your authority.
- **Obligation to Bargain in Good Faith**. Hard bargaining, surface bargaining, regressive bargaining.

Unilateral Change to a Mandatory Subject of Negotiations

- If a subject of bargaining is mandatory and not contained within a CBA, the District may change the *status quo* after negotiating the subject in good faith to true impasse and by continuing to negotiate after the unilateral change has been made. The District must have a compelling reason to make the change at that time (e.g. program implementation)–not just to save money. *Wappingers CSD 5 PERB*¶3074 (1972)

Distance Learning and the Duty to Bargain

- **Number of classes instructed** – Non-mandatory subject to District discretion, unless converted to mandatory status through a CBA provision. *Greece CSD 22 PERB*¶3005(2000)

- **Method of Instruction** – Non-mandatory (e.g. synchronous, asynchronous, chat rooms, office hours, etc.) *Somers CSD, 9 PERB* ¶3014 (1976); *Waverly CSD 10 PERB*¶3103(1977)

Distance Learning and the Duty to Bargain (Cont'd)

Was there a duty to negotiate the implementation of a distance learning "Continuity of Learning Plan"?

- No. Executive Order 202.2 mandated distance learning making it a prohibited subject of bargaining. Bd. of Educ.[City of New York] v. PERB, 75 N.Y.2d.660(1990).
- This executive order called upon SED to establish guidance regarding the requisites of distance learning. SED left the methods of delivering instruction to local school districts and BOCES.

Distance Learning and the Duty to Bargain (Cont'd)

Is instructing from home a mandatory subject of bargaining?

- While there are no PERB or court decisions directly on point regarding the implementation of distance learning classes from home, the determination to have work performed from off-campus locations had been determined to be a non-mandatory subject of negotiations. *Orange County Community College*, 9 PERB¶3068(1976)
- The alternative to instructing from home is instructing from a school building, as allowed Executive Order 202.4

Distance Learning and the Duty to Bargain (Cont'd)

- BOTTOM LINE: Distance learning is a non-mandatory subject of bargaining – unless a school has converted it to a mandatory subject by negotiating terms related to distance learning and/or method of instruction in to a mandatory term (check your CBA for old distancing learning language).

- PERB - *Peekskill Faculty Association 16* PERB 4568 - right to alter assignments consistent with the essential functions of teachers.

Safe Workplace and Potential Work Stoppage (Cont'd)

The Health and Safety Exception to the Duty to Work

- *Ferreri v. N.Y.S. Thruway Authority*, 62 N.Y.2d 855, 856(1984)
- Employees are expected to work as directed, unless there is a clear contract provision to the contrary ("work now, grieve later" doctrine) or compliance with the work directive "would present an unusual threat to health and safety."

Safe Workplace and Potential Work Stoppage (Cont'd)

Strike Activity: Any strike or any other concerted stoppage of work or slowdown by public employees (§201[9], Civil Service Law).

- Failure to attend parent –teacher conferences and participate in field trips (Pearl River UFSD, 11 PERB ¶3065);
- Refusal to work scheduled hours (Caso v. Katz, 67 Misc. 2d 793, aff'd 38 AD2d 691);
- Resignation from extra-curricular assignments (Plainedge Federation of Teachers, 11 PERB ¶3060; Pen Yan Teachers' Assn.,13 PERB ¶3046);
- Refusal to attend and/or participate in faculty meetings (Plainedge Federation of Teachers, 11 PERB ¶3060; 13 PERB ¶3040).

Mandatory Immunization

- Guidance from the EEOC re: Mandatory Immunization:

On December 16, 2020, the EEOC issued updated guidance for employers in light of the FDA's recent authorization of Pfizer's COVID-19 vaccine for emergency use.

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

The guidance evaluated mandatory COVID-19 vaccinations and potential implications under the Americans with Disabilities Act ("ADA"), Title VII of the Civil Rights Act ("Title VII") and the Genetic Information Nondiscrimination Act ("GINA").

The EEOC's position that vaccination is not a "medical examination" under the ADA gives private employer's the green light (generally) to implement COVID-19 vaccine policies and require employees to be vaccinated as a condition to continue employment or, at the very least, as a condition to returning to the physical workplace.

The requirement for vaccination does not give employer's the ability to otherwise ignore disabilities issues (i.e. an employee who has a medical condition that prohibits them from being vaccinated) or a sincerely held religious belief.

- Duty to Bargain?

Impact of Pandemic Related Agreements

- Some districts returned to the bargaining table with teachers' unions to negotiate short-term fixes to CBAs that allowed for more flexibility to implement distance learning (especially if a district's CBA already converted this to a mandatory subject of bargaining.

- These contract changes focused on several areas of the CBA, including compensation, workload, nonteaching duties, evaluation, special education, extra curricular activities, professional development, leave, and technology.

- Districts have to give consideration to any lasting impact of these short-term solutions, including if our current circumstances change or in light of future disruptive conditions.

State and Federal COVID-19 Sick Leave Legislation and Contractual Leave Provisions

- Three Sources of Leave Time for COVID-19 Related Health Issues:
  - FFCRA – EPSLA and EFMLEA
  - NYS COVID-19 Paid Sick Leave Act.
  - Collective Bargaining Agreement Provisions (Sick Leave, Personal Leave and Vacation Leave).
  - Anticipate union proposals for increases in the amount of leave, but also for increased flexibility in the permissible uses for time off.

Bargaining Strategies

- Use what you have:
  - Budget realities and tax rate impacts
  - Area economic/demographic data
  - Comparables (?)
- Show analysis of fixed costs and revenue uncertainties (i.e., tax cap limit, health insurance premiums, retirement contributions, new health and safety costs, etc.).
- Health insurance trend information and GASB 45/75 numbers
- Consider whether wage proposals and other significant financial items must be “conditional” in some way.

Bargaining Strategies

- Consider contract "re-openers."
- "Regressive" proposals?
- Consider public and/or union member communication approaches during bargaining.
- Don't concede retroactivity
- Portray the union's choice as being between your offer and the *status quo*
- Remember: Language matters

Integrate the Possibility of Impasse into Your Strategy

- Impasse: If good faith negotiations with respect to a mandatory subject of negotiations fail to yield an agreement, the Taylor Law sets forth a detailed procedure for impasse resolution. (Civ. Serv. L., § 209).

- Normal part of the process – does not mean failure

- Impasse strategies

Confidentiality

- The New York Open Meetings Law (Public Officers Law §§ 100-111) permits a board to move to executive session to discuss contract negotiations (*see*, § 105, *id*).

- Section 805-a(1)(b) of the General Municipal Law states that no municipal officer may "disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests," which includes disclosure of confidential information obtained at an executive session.

Public Communications

- A school district may communicate directly with union members and/or the general public to explain its bargaining positions and/or to respond to inaccurate statements by the union – depending on the community's overall response, the district's response to the pandemic may either be helpful or harmful in the context of considering such communications.
- However, any such communications which are deemed to constitute "direct-dealing" with employees, or which threaten reprisals for protected activity, may be improper under the Taylor Law. e.g., *City of Rochester,* 9 PERB ¶ 4542; *County of Onondaga*, 14 PERB ¶ 4503.
- Be factual (e.g., permissible to publish a union's proposals in local newspaper together with analysis of impact on tax rate [*Brookhaven CSD*, 6 PERB ¶ 3018]).

QUESTIONS?

Presented By:

Jeffrey F. Swiatek, Esq.
Partner
Hodgson Russ LLP
jswiatek@hodgsonruss.com
716-848-1449

Elizabeth D. McPhail, Esq.
Partner
Hodgson Russ LLP
emcphail@hodgsonruss.com
716-848-1530

Break

Next session: Employee Benefits Update

Hodgson Russ LLP ATTORNEYS

Employee Benefits Update

January 15, 2021

Peter K. Bradley & Amy P. Walters

403(b) Plan Update

- 2021 Contribution Limits
  - Elective deferral: $19,500 (same as 2020)
  - Age 50 and over catch-up: $6,500 (same as 2020)
  - Annual compensation limit: $290,000 ($285,000 in 2020)
  - Section 415(c) maximum annual contribution: $58,000 ($57,000 in 2020)

403(b) Plan Update (Continued)

- 403(b) Retirement Plan Restatement Deadline
  - The IRS required 403(b) retirement plan sponsors to adopt necessary amendments and correct defects in their plan documents – both individually-designed and pre-approved plan documents – to retroactively comply with 403(b) plan document requirements.
    - Original deadline: March 31, 2020
    - **Extended deadline: June 30, 2020 – there has been no further extension**
  - Late Amender Correction
    - Voluntary Correction Program (VCP) Application
      - File VCP application, including the relevant compliance fee
      - Request approval to retroactively adopt a written/updated plan document
      - Receive IRS Compliance Statement

403(b) Plan Update (Continued)

- Continuing Document Maintenance
  - Maintaining a Compliant Written Plan Going Forward
    - When 403(b) plans need further amendment depends on various factors
      - Restatements of Pre-Approved Plans: Six-year restatement cycles
        - Cycle 1 ended 6/30/2020; Cycle 2 began 7/1/2020
      - Interim Amendments: Required vs. Discretionary Amendments

403(b) Plan Update (Continued)

- SECURE Act Re-Visited
  - Required Minimum Distributions Commence at Age 72 (formerly Age 70½)
    - Applies to participants who attain age 70½ after 12/31/2019
  - Penalty-Free Distributions for Qualified Births/Adoption (Permissive)
    - New in-service distribution option
    - IRS published helpful FAQs in September 2020 – Notice 2020-68
  - In-Kind Distributions of Custodial Accounts Permitted upon Termination of 403(b) Plan
    - IRS directed to issue guidance allowing such distributions
    - IRS issued Revenue Ruling 2020-23 in November 2020

403(b) Plan Update (Continued)

- SECURE Act Re-Visited (cont'd)
  - Lifetime Income Disclosures
    - Benefit statements provided to 403(b) plan participants must include a lifetime income disclosure at least annually.
      - Requirement is effective for benefit statements issued one year after the Department of Labor has issued a model disclosure and other required guidance.
    - Interim Final Rule (IFR) Published September 2020
      - Lifetime income illustrations (LIIs) must be made at lease once per year.
      - LIIs must express the benefit under the 403(b) plan as –
        - Monthly payments in the form of a single life annuity (SLA)
        - Monthly payments in the form of a qualified joint & survivor annuity (QJSA)

403(b) Plan Update (Continued)

- SECURE Act Re-Visited (cont'd)
  - LII Interim Final Rule (IFR) Published September 2020 (cont'd)
    - New disclosure rules do ***not*** actually mandate that plans offer annuities as an optional form of benefit – the disclosures merely illustrate the lifetime monthly benefit a participant's plan account balance can produce.
    - Assumptions Used for LIIs:
      - Payments assumed to begin on the last day of the benefit statement period
      - Account balance is 100% vested
      - Age = 67 or actual age, if older
      - If participant is married, participant is assumed to be married to spouse of equal age
      - Prescribed interest and mortality assumptions
      - Plan loans assume to have been fully repaid (unless in default)

403(b) Plan Update (Continued)

- SECURE Act Re-Visited (cont'd)
  - LII Interim Final Rule (IFR) Published September 2020 (cont'd)
    - Required explanations/disclosures are prescribed
      - The IFR provides model language that may be used for each of the required explanations.
      - Generally, a plan fiduciary, plan sponsor, or other person will *not* be liable under ERISA for providing a lifetime income illustration that satisfies the requirements of the IFR.
  - Amendment Deadline
    - Plan amendment deadline to reflect SECURE Act changes generally is the last day of the 2022 plan year (or 2024 plan year for governmental plans), provided the plan is operated in accordance with each applicable provision beginning on its effective date.

403(b) Plan Update (Continued)

- CARES Act
  - Special 2020 Distribution Provisions
    - Coronavirus-related distributions (CRDs)
      - CRDs are distributions by plans, including 403(b) plans, to certain *qualified individuals* negatively impacted by COVID.
        - Qualified individual definition expanded by IRS Notice 2020-50
      - **Deadline for receiving CRDs: December 31, 2020**
      - $100,000 cap
      - Special tax treatment
        - Income Inclusion Allowed Over Three-Year Period
        - Tax-Deferred Rollover Treatment if Distribution Is Repaid
          - **CRDs may be recontributed to the plan or an IRA within three years from the date of distribution.**
      - **Availability of CRDs has not been extended beyond 2020, but re-contribution period remains open.**

403(b) Plan Update (Continued)

- CARES Act - Special 2020 Distribution Provisions (cont'd)
  - Temporary Plan Loan Relief
    - Increased loan limits
      - *Qualified individuals* only
      - Higher loan limits available for loans ***taken by 9/22/2020***
      - $50,000 and 50% account balance restrictions *temporarily replaced with* $100,000 and 100% account balance restrictions

403(b) Plan Update (Continued)

- CARES Act - Special 2020 Distribution Provisions (cont'd)
  - Temporary Suspension of 2020 Loan Repayments
    - For certain loan repayment amounts having a due date that occurs during the balance of 2020, the due date will be delayed for one year.
      - Relief was made available only for loan repayments owed *qualified individuals.*
    - Notice 2020-50 provides a safe harbor for administering CARES Act plan loan suspensions:
      - Qualified individual's obligation to repay a plan loan is suspended under the plan for any period beginning not earlier than March 27, 2020, and ending not later than December 31, 2020 ("suspension period").
      - Loan repayments must resume after the end of the suspension period, and the term of the loan may be extended by up to 1 year from the date the loan was originally due to be repaid.
      - Interest accruing during the suspension period must be added to the remaining principal of the loan. A plan satisfies this rule if the loan is reamortized and repaid in substantially level installments over the remaining period of the loan, plus up to 1 year from the date the loan was originally due to be repaid.

403(b) Plan Update (Continued)

- CARES Act - Special 2020 Distribution Provisions (cont'd)
  - Temporary Required Minimum Distribution (RMD) Waiver for 2020
    - Relief available to taxpayers with benefits payable by 403(b) plans
    - **RMDs must resume in 2021**
  - Amendment Deadline
    - Plan amendment deadline to reflect CARES Act changes generally is the last day of the 2022 plan year (or 2024 plan year for governmental plans), provided the plan is operated in accordance with each applicable provision beginning on its effective date.

403(b) Plan Update (Continued)

- Consolidated Appropriations Act, 2021
  - Partial Plan Terminations
  - Disaster Relief Provisions (disaster declaration needed)
    - Qualified disaster distribution (similar to CRDs)
    - Re-contribution of certain hardship withdrawals
    - Temporarily increased loan limits

Welfare Plan Update

- **Requirement to Cover COVID-19 Diagnostic Testing and Certain Related Items and Services without Cost-Sharing or Medical Management**
  - The Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) generally require group health plans offering group or individual health insurance coverage to provide benefits for certain items and services related to diagnostic testing for the detection of SARSCoV-2 or the diagnosis of COVID-19.
  - Plans must provide this coverage without imposing any cost-sharing requirements (including deductibles, copayments, and coinsurance) or prior authorization or other medical management requirements.

Welfare Plan Update (Continued)

- **Requirement to Cover COVID-19 Diagnostic Testing and Certain Related Items and Services without Cost-Sharing or Medical Management**
  - Non-Federal governmental plans, whether grandfathered or non-grandfathered, are group health plans subject to these requirements under the FFCRA and the CARES Act.
  - In addition to complying with the COVID-19 diagnostic testing-related requirements under the FFCRA and CARES Act, CMS issued a letter on June 5, 2020, encouraging all non-Federal governmental plans to offer services related to the treatment of COVID-19 without cost-sharing and without prior authorization or other medical management restrictions.

Welfare Plan Deadlines Under Joint DOL/IRS Final Rule

- Last Spring, the DOL and IRS issued a Final Rule extending multiple deadlines respecting the administration of HIPAA special enrollment periods and COBRA continuation coverage.
- The extensions apply with respect to the period from March 1, 2020 until 60 days after the announced end of the national emergency period (or a later date to be announced in subsequent guidance). This period of time is referred to in the Final Rule as the "Outbreak Period."
- Concurrently, HHS released a memorandum making clear that:

  "While the extension of time frames [specified in the Joint Notice] is not mandatory for non-Federal governmental plans, CMS encourages plan sponsors of non-Federal governmental plans to provide relief to participants and beneficiaries similar to that specified in the Joint Federal Register Notice…"

Welfare Plan Deadlines Under Joint DOL/IRS Final Rule (Continued)

- The joint Final Rule states that employee benefit plans "must disregard" the Outbreak Period for all participants and beneficiaries when determining the following welfare plan deadlines:
  - *HIPAA Special Enrollment*. The 30-day period (or 60-day period applicable to CHIP special enrollments) to provide notice of a special enrollment event is extended.
  - *COBRA Election, Payment and Notices*. Multiple deadlines for COBRA-related group health plan continuation elections and notifications have been extended, including:
    - The 60-day period for electing COBRA continuation coverage;
    - The date for making COBRA premium payments (45 days for initial premiums, and 30 days for subsequent premiums);
    - The date for individuals to notify the plan of a qualifying event or determination of disability; and
    - The deadline for employers to provide COBRA election notices.
- To the extent a plan sponsor of a non-Federal governmental plan chooses to adopt one or more of these extended deadlines, plan participants should be notified of applicable relief, but there is no model disclosure.

Welfare Plan Deadlines Under Joint DOL/IRS Final Rule (Continued)

- Action Items:
  - Coordinate with insurance/stop-loss carriers regarding optional extensions.
  - Track individuals who have:
    - Experienced a COBRA qualifying event or HIPAA special enrollment event since March 1, 2020; or
    - Terminated COBRA coverage since March 1, 2020 because of premium non-payment.
  - Notify individuals after the national emergency is declared over of their rights to elect and pay for coverage.

Health and Dependent Care FSA Relief

- On December 27, 2020, the Taxpayer Certainty and Disaster Tax Relief Act, which is part of the Consolidated Appropriations Act of 2021 (CAA) was enacted, making temporary relief available for cafeteria plan participants with underspent dependent care and health flexible spending accounts (FSAs).
- Relief is at the option of the plan sponsor.
- In general, FSAs are subject to a "use-it-or-lose-it" rule, requiring participants to forfeit any unused balance at the end of the plan year with limited exceptions for health FSAs, which may permit a limited carryover or a grace period.

Health and Dependent Care FSA Relief (Continued)

- **Carryovers**
  - Under prior law, health FSAs may allow participants to carryover a limited amount of their unspent FSA balance (up to $550 for 2020 and $560 for 2021) into the next plan year.
  - Under prior law, no carryover permitted for dependent care FSAs.
  - CAA allows plan sponsors to amend their cafeteria plans to permit participants to carryover the full amount of any unspent health or dependent care FSA balance for plan years ending in 2020 or 2021.
    - Non-calendar year plan sponsors may only be able to implement this as a practical matter form the first day of the plan year in 2020 to the end of the plan year in 2021, then for the 2021 plan year ending in 2022.
- **Grace Period Extension**
  - Under prior law, a health FSA that does not permit carryovers may allow participants a grace period within which they may incur expenses for up to 2½ months beyond the end of the plan year.
  - Under prior law, no grace period is permitted for dependent care FSAs.
  - CAA allows both health and dependent care FSAs to be amended to allow participants a grace period of up to 12 months following the end of plan years ending in 2020 or 2021.

Health and Dependent Care FSA Relief (Continued)

- **FSA Election Changes**
  - Under prior law, participant elections to make pre-tax FSA contributions under a cafeteria plan are irrevocable during the plan year with permitted exceptions for certain changes in status.
  - CAA allows plan sponsors to amend their cafeteria plans to permit prospective midyear election changes for any reason for plan years ending in 2021.
- **Health FSA Post-Employment Reimbursement**
  - Under prior law, health FSA participants may not be reimbursed for expenses incurred after they have terminated employment, except in cases where they have elected and paid for COBRA coverage.
  - CAA allows plan sponsors to amend their cafeteria plans to permit employees terminated in 2020-21 with underspent health FSA balance to be reimbursed for expenses incurred after they have terminated employment through the end of the plan year in which participation ended (including any grace period).

Health and Dependent Care FSA Relief (Continued)

- **Dependent Care FSA Age Extension**
  - Under prior law, dependent care FSA plan sponsors are not permitted to reimburse participants for expenses incurred by their children after they attain age 13.
  - CAA allows plan sponsors to reimburse dependent care FSA expenses incurred after a child's 13th birthday until the later of end of the of 2020 plan year, or until the child's 14th birthday if there is money remaining at the end of the 2020 plan year.
- **Plan Amendment Deadline**
  - Plan sponsors are not required to adopt any of these relief provisions.
  - If adopted, plans must be amended by the last day of the calendar year following the plan year in which the amendment becomes effective.

ACA Reporting Deadlines

Reporting Deadlines 2021

- Furnish Individuals with IRS Form 1095-C
  - ~~**January 31st**~~
  - **March 2nd**
- File Forms 1094-C and 1095-C with IRS
  - **February 28th** (for paper filers)
  - **March 31st** (for electronic filers)
- The IRS also extended the good faith transition relief for 2020 reporting – No penalties will be imposed if employer makes good faith effort to comply. This is the last year the Treasury Department and the IRS intend to provide good faith compliance relief. (IRS Notice 2020-76)

PCORI Fee

- Employers sponsoring self-insured medical plans must pay a Patient Centered Outcome Research Institute fee (PCORI).
- This is a small fee of $2.66 for the 2021 plan year (up from $2.54 for 2020) paid to the IRS at the end of July each year.
- This fee is paid using IRS Form 720.
- The PCORI fee is now extended to plan years ending on or before September 30, 2029.

ACA Enforcement – Letter 226J

IRS Letter 226J includes:

- A brief explanation of IRC Section 4980H.
- An itemized summary and explanation of the proposed employer shared responsibility payment, indicating for each month if the liability is under Section 4980H(a), Section 4980H(b), or neither.
- Form 14764, "ESRP Response": an employer shared responsibility response form.
- Form 14765, "Employee Premium Tax Credit (PTC) List": a statement that lists, by month, the employer's assessable full-time employees.
- Employers have 30 days to respond.
- The IRS will then issue Letter 227, to which the employer may request a conference within 30 days to avoid any assessable penalties.

Presented by:

Peter K. Bradley

pbradley@hodgsonruss.com

716.848.1446

Amy P. Walters, Esq.

awalters@hodgsonruss.com

716.848.1481

Hodgson Russ LLP ATTORNEYS

Thank you!

Next Webinar - Friday, January 22nd: Finance & Facilities Track

Hodgson Russ LLP ATTORNEYS