



## Management Rights Newsletter

A Labor Relations newsletter for our clients designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

### Summer 2020 Edition

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The RWGM Newsletter is published every quarter. All past and present Newsletters are available on our website at <http://rwgmlaw.com/news/labor-newsletters/>

For any further information about the articles in this newsletter, please call Elayne Gold at (518) 464-8291.

13 Columbia Circle  
Albany, New York 12203  
[www.rwgmlaw.com](http://www.rwgmlaw.com)

#### RETURN WORK POST COVID-19

An employee is set to return to work after these many long weeks out of the office, is of a certain age, or is known to have a compromised immune system or other at-risk condition. Can the Employer prohibit these workers from returning to the office environment to perform the duties of their job? The short answer is “no.” Barring older workers or those with conditions that are more susceptible to COVID-19 will be viewed as an act of age and/or disability discrimination.

The Americans with Disabilities Act and the Federal Age Discrimination in Employment Act (as well as clear recent EEOC guidelines) prohibit the Employer from inquiring as to whether an accommodation is needed. It will be up to and the responsibility of the employee to request any needed accommodation. In those instances, the Employer would be obligated to consider the options for accommodation(s), such as continued telework, office relocation, and social distancing options in the workplace such as barriers between desks, etc... The exception to the rule that these workers should be allowed to return (and the standard to meet it is quite high), is that the employee’s presence at the worksite would pose a “direct threat” to the employee’s health unresolvable via a reasonable accommodation, and/or that the employee’s condition poses “a significant risk of substantial harm” to the employee.

Best practice: in the communication to ALL employees as to return to the workplace, be clear that the Employer is willing to review options to ensure the health and safety of all the employees. The communication should identify who an employee may contact with any questions or concerns about returning to work. And lastly, be clear that all such conversations will be kept confidential.

#### PUBLIC NUISANCE

It will be incumbent upon the Employer to ensure a workplace that has safe working conditions for a return of the workforce and the public it serves. There have been claims (McDonald’s and Amazon to date, among others in the private sector) where employees and/or

their Unions have filed claims of “unsafe working conditions” constituting a public nuisance in violations of federal, state, and/or local laws or COVID-19 rules (think OSHA, CDC, PESH). Whether a claim for “public nuisance” is viable remains to be seen, certainly in light of the NYS Workers’ Compensation Law and its exclusivity on remedy for “injury or illness arising out of the course of employment.” The “public nuisance” argument states that the employer failed to take the necessary steps to safeguard the workforce from the spread of the disease; arguably by failing or neglecting to follow the state and local health department guidelines as to safety protocols for workers and visitors to the worksite. Stay tuned to these pages for an update as these “public nuisance” cases wind their way through the courts.

### **COVID-19 RELATED DEATH BENEFITS FOR SURVIVORS**

The NYS Legislature recently enacted an amendment to the death benefit provisions of the NYS Retirement and Social Security law to afford certain benefits to survivors of front line/essential public sector workers who died due to the COVID-19 pandemic (A.10528/S.8427).

To be eligible for the death benefits, the employee:

- Would have worked at their normal worksite or at another location (but not their home), as may have been directed by the Employer, on or after March 1, 2020;
- Contracted COVID-19 within 45 days of the last day that the employee reported to work;
- Died on or before December 31, 2020;
- Died as a result of COVID-19 or COVID-19 contributed to the death.

The law would not require a beneficiary to actual prove that the deceased contracted COVID-19 at the work location but would maintain that one doctor, NP or Physicians' Assistant had diagnosed COVID-19 or same was confirmed by a diagnostic test for Covid-19; AND either the death certificate states COVID -19 caused or contributed to death OR a doctor, NP or Physician’s Assistant certifies that COVID -19 caused or contributed to death. These benefits apply to all members of the NYS Retirement System, including but not limited to those members who belong to the Police and Fire Retirement System and the NYS Teachers’ Retirement System. The legislation makes no distinction as to job title or retirement tier.

Finally, the statute ensures that if an employee (who was a member of a NYS Retirement System) was working as of March 1, 2020 but retired prior to July 1, 2020, and if this individual meets all of the above requirements, then any service or disability retirement may be converted, at the option of the survivor, to a COVID-19 accidental death benefit.

These modifications to the law remain in effect through and including December 31, 2020.

### **CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT**

In March 2020, President Trump signed into the law the Coronavirus Aid, Relief, and Economic Security Act, or the CARES Act. As part of the Act, the Federal Government added \$600 a week to a State’s existing unemployment benefits (known as Federal Pandemic Unemployment Compensation or FPUC), which included New York. The Act set the last day to pay the additional \$600 as Friday, July 31, 2020.

Some states pay out unemployment benefits on weeks that end on Saturdays or Sundays which would extend the payment beyond July 31, 2020. Under a statement recently issued by the United States

Department of Labor, this technicality can result in the \$600 benefit ending earlier than July 31, 2020. Specifically, the Act provides that the benefit will end “on or before July 31, 2020.”

The US DOL has advised that for those states that would not have a complete benefit week ending on July 31, 2020 the payment will end on the date of the last full week of benefits before July 31, 2020. New York’s unemployment week ends on a Sunday. Under these terms, New York's benefit week goes beyond the time period allowed by law. As such, New York's payment of the federal benefit will END ON JULY 26, 2020.

For further information please go to the following link: <https://labor.ny.gov/ui/pdfs/cares-act-need-to-know.pdf>

### **SUPREME COURT HOLDS FEDERAL EMPLOYMENT DISCRIMINATION LAWS TO PROTECT GAY AND TRANSGENDER WORKERS**

The Supreme Court issued a landmark decision on June 15, 2020, holding that the federal law (Title VII of the Civil Rights Act of 1964) which prohibits employment discrimination and harassment in the workplace on the basis of sex also prohibits such discrimination and harassment on the basis of sexual orientation and transgender status. Although the EEOC and courts in New York had interpreted the law in this way, there was division among courts in other states whether these protections applied on the federal level.

While New York State Human Rights Law already protects these categories, the Supreme Court case means that these protections apply in all states throughout the country. Although employers in New York should already have incorporated these protected classes into their policies and training, the case offers a good opportunity to reinforce the employer’s commitment to these protections with its employees and supervisors.

### **RWGM COVID-19 BULLETINS**

Please refer to the previously forwarded RWGM Client Bulletin updates for the latest on the impact of any Executive Orders, EEO Return- to -Work Guidance, CDC Protocols, etc.

AS ALWAYS, please contact RWGM with any question or concerns.  
STAY SAFE AND CONTINUE TO BE WELL.