



# 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.

## Fall Edition

*Welcome to Fall! We hope you are all well in this time of uncertainty and pandemic.*

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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/>

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### FINANCIAL TOOLKIT

The NYS Comptroller's website is chockfull of useful information concerning local government/school district financial matters. Go to <https://www.osc.state.ny.us/> and click on the menu to "Local Government" – access the "New Financial Toolkit for Local Officials for 2020 and Beyond" where you will find "links to guidance, tools, training and reports ... to assist you during these troubling times."

See, also, Chapter 157, L. 2020 (A10492/S08417) – legislation introduced by the NYS Comptroller to address the COVID-19 financial impact that would (pursuant to the Bill Memo):

- extend the "rollover" period for Bond Anticipation notes issued in the calendar years 2015-2021;
- authorize local government and school districts to spend or temporarily transfer monies in reserve funds for COVID-19 pandemic related expenses; and
- permit repayment of inter-fund advances made for COVID-19 pandemic related expenses by the end of the next succeeding fiscal year or later, RATHER THAN [by] the end of the current fiscal year.

The new law went into effect immediately upon signing – August 24, 2020.

## **TELEWORK**

Many of you have received requests for, or are directing your workforce to engage in remote/telework – working from home and outside of the traditional office environment. Some of you have developed a policy and “telework agreement.”

In Field Assistance Bulletin No. 2020-5, the U.S. Department of Labor’s Wage and Hour Division detailed the “employer’s obligation under the FLSA to track the number of hours of compensable work performed by employees who are teleworking or otherwise working remotely away from any worksite or premises controlled by their employer.” The guidance encourages the employer to exercise “due diligence” in tracking hours of remote work. In this regard, the employer may want to develop a “reasonable reporting procedure for non-scheduled time and then compensate employees for all reported hours of work.” Note that if, for some reason, a teleworking employee does not report non-scheduled hours, it is not an employer’s obligation “to undergo impractical efforts to investigate further to uncover unreported hours of work and provide compensation for those hours.” The test will be whether the “employer knew of, or had reason to believe the teleworking employee is performing work for the employer.” If so, the employee must be compensated.

## **EMPLOYER POLICY TO CHECK EMPLOYEE TEMPERATURE**

To ensure workplace COVID-19 safety, many employers have initiated a policy whereby employees must answer certain COVID-19-related questions and/or have their temperature checked upon entering the workplace. So, what to do if an employee refuses to permit the taking of his/her temperature? In its “Technical Assistance Q&A” most recently updated September 8, 2020, the EEOC gives good hands-on guidance:

A.11. What may an employer do under the ADA if an employee refuses to permit the employer to take his temperature or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19? (9/8/20; adapted from 3/27/20 Webinar Question 2)

Under the circumstances existing currently, the ADA allows an employer to bar an employee from physical presence in the workplace if he refuses to have his temperature taken or refuses to answer questions about whether he has COVID-19, has symptoms associated with COVID-19, or has been tested for COVID-19. To gain the cooperation of employees, however, employers may wish to ask the reasons for the employee’s refusal. The employer may be able to provide information or reassurance that they are taking these steps to ensure the safety of everyone in the workplace, and that these steps are consistent with health screening recommendations from CDC. Sometimes, employees are reluctant to provide medical information because they fear an employer may widely spread such personal medical information throughout the workplace. The ADA prohibits such broad disclosures. Alternatively, if an employee requests reasonable accommodation with respect to screening, the usual accommodation process should be followed.

## **NYS PAID SICK LEAVE**

**NOTE:** NYS Paid Sick Leave is not applicable to public entities unless the employer, upon request from, and negotiation with a Union, opts into offering this State program.

## **TRAINING 2020-2021**

For retainer clients of RWGM:

Because of the continuation of the COVID-19 pandemic we believe it is essential that we all consider the virtual training option. RWGM can offer you the capability of utilizing WebEx, Teams, or another video training access option.

We will work with you and your IT personnel to coordinate the training sessions. This will allow both our attorneys and your employees to receive training in a safe environment.

Using a virtual training format should prove no different than in-person training. The use of the video capabilities provides opportunity to simultaneously train people who are in different locations and who will be able to “join in” to the presentation. The sessions will remain interactive, allowing for presentation of real-life examples and the chance for any questions to be answered.

In addition to maintaining a safe environment for all concerned, virtual training will allow for more flexibility in scheduling. We will be able to split training days in order to better accommodate your needs and those of your employees.

We hope that you will agree that until COVID-19 is no longer a safety issue, training virtually is the best option for all concerned.

**Remember, Sexual Harassment Prevention and Workplace Violence trainings are state-mandated for annual updates for the entire workforce.**

## **RECORDS RETENTION**

### **AND DISPOSITION SCHEDULE FOR NEW YORK LOCAL GOVERNMENT**

Effective August 1, 2020, the NYS Archives, together with the State’s Education Department has revised the schedule of documents that local entities must retain, as well as the timeframe for retention

Before any records listed on the Retention and Disposition Schedule ... may be disposed of and even if the local government previously adopted Schedule CO-2, MU-1 and/or ED-1, the governing body must formally adopt the Schedule by passing a resolution.  
[emphasis added]

The resolution must be adopted no later than January 1, 2021 “to continue to legally destroy records.” Included in the coverage are all NYS local governments, including:

- cities
- towns
- villages
- counties
- fire districts
- school districts
- BOCES

and several other entities.

The goal of this revision to the longstanding retention of records policy, in addition to the preservation of historical documents, is to

Consolidate multiple, disparate retention schedules for different types of local governments ... to ensure consistent retention and disposition ... for records that are common to multiple types of local government.

For specific details and for model resolutions and retention schedules for each type of agency see, “NYS Archives” and search “2021 Records Retention and Disposition.”

### **PUBLIC HEALTH EMERGENCY OPERATIONS PLAN (CH.168, L.2020)**

On September 7, 2020, the Governor signed into law Chapter 168 – an addition to the NYS Labor Law (§ 27-c) that requires all local governments, among others, to prepare a continuous operations plan in the event of a future communicable disease(s) – related public health emergency. As explained in the Memorandum in Support (see, A10832/S8617B), the law

mandate[es] that employers across the state work with employee organizations to draft and publish contingency plans for [Governor] declared public health emergencies before they hit.

The plans must include, at a minimum, a thoughtful explanation of who is and is not essential, a description of what the employer will do to ensure maximum telecommuting for those who are able to do so and for those [who cannot].

Once the plan is drafted the employer “shall present [it] to all applicable duly recognized or certified representatives of the employer’s employees.” An opportunity must be given for comment and recommendations to which the employer “must consider and respond ... in writing within a reasonable timeframe.” Upon finality, the plan is to be published for ease of employee reference (website of employers, internal internet access, and/or Employee Handbook).

The law sets up a complaint mechanism for employer non-compliance and provides for employee protection from retaliation.

The Operations Plans are to be “submitted to unions and labor management committees within 150 days [on September 7] and need to be finalized by April 1, 2021.” (Governor’s comments – see <https://www.governor.ny.gov/news/labor-day-governor-cuomo-signs-legislation-requiring-plans-protect-public-workers-future-health>)