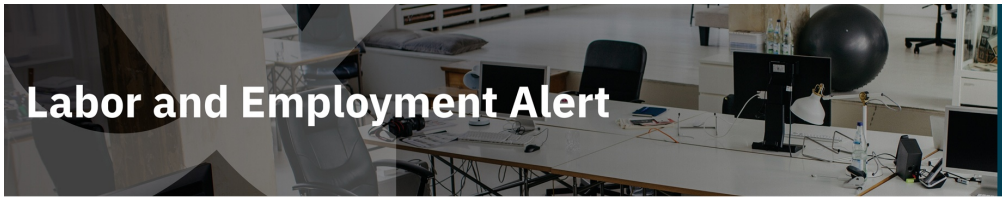

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Public Sector Collective Bargaining in the Time of COVID-19

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by William R. Connon

This Alert is intended to provide guidance for Connecticut municipal employers, including boards of education, that are now being asked by various unions, to enter into mid-term negotiations to produce a Memorandum of Understanding (MOU) in response to workplace changes necessitated by recent Executive Orders, and other state and federal COVID-19 government responses. By way of background, mid-term negotiations occur when parties agree to enter into negotiations before required successor negotiations commence, typically during the term of a multi-year contract. Under the Municipal Employees Relations Act (MERA), the timetable and process to be followed is set forth in Connecticut General Statutes section 7-473c(b)-(d). It begins "within 30 days after the date the parties to an existing collective bargaining agreement commence negotiations to revise said agreement on any matter affecting wages, hours and other conditions of employment." For certified employees employed by boards of education, the timetable and process are set forth in the Teacher Negotiation Act (TNA), Connecticut General Statutes section 10-153f(e). Under this law, the mid-term or MOU negotiations occur when the parties "mutually agree to negotiate during the term of the agreement." The parties are required to notify the Commissioner of Education within five days after commencement of said negotiations and must follow the statutory dispute resolution process set forth in detail in Connecticut General Statutes Section 10-153f, including "arbitration pursuant to the provisions of subsections (a), (c), and (d)" of 10-153f.

Both statutory dispute resolution processes involve negotiation, mediation, arbitration, and possible community rejection of an arbitration award. From start to finish it can take over one hundred days to complete. Even if the parties could somehow agree upon a virtual negotiation approach that avoids in-person negotiations, convening and participating in tripartite interest arbitration under the circumstances of COVID-19, would appear, at least, to be unwise, if not

explicitly prohibited by existing Executive Orders. It makes no difference whether the parties are engaging in impact negotiations or fundamental negotiations of terms and conditions of employment, the underlying premise for an employer to enter these MOU negotiations is the perception that management cannot act unilaterally, it must first satisfy its obligation to negotiate.

Happily, in an emergency, there is an exception to this obligation that has been recognized by the Connecticut State Board of Labor Relations for more than forty years. In *Board of Education of the City of Hartford, and Hartford Principals' and Supervisors' Association, Local No. 22, AFSA, AFL-CIO*, Case No. TPP-4489, Decision No. 1777 (1979) the State Board of Labor Relations (commonly referred to as the Labor Board) was concerned with a situation involving the unilateral assignment of bargaining unit members to work outside of their classifications and outside of their bargaining unit assignments. As the Labor Board explained in that case "[i]f these assignments had been made under ordinary circumstances many of them, at least, would have concerned the employees' work assignments in such a way as to constitute mandatory subjects of bargaining. Respondent does not contest this proposition. It urges, rather, that the assignments were temporarily made to meet an emergency and that under these circumstances they might be made unilaterally under the general law and also under the provisions of the contract and the job descriptions." (p.4) The union, the decision goes on to note, also "recognizes that unilateral assignments might be made to meet an emergency" but contended that the evidence failed to show that an emergency existed because it did not constitute the kind of emergency that would warrant the closing of schools. The Labor Board, led by its renowned chairman, Fleming James, Jr., agreed with the Respondent:

We agree with the Respondent; the record shows that the situation it faced ...warranted its unilateral temporary assignments even though it would not have justified the closing of schools . . . In formulating our rule we are concerned with the kind of emergency that would justify unilateral assignment of an employee to work outside of his classification ....

In the present case we find that the situation obtaining in the Hartford high and middle schools during the corridor monitors' strike was what we meant by an emergency when we formulated the rule defining legitimate unilateral action. This had nothing to do with the closing of schools but with the exigencies that might beset the operation of open schools . . . we find that the situation created by the strike did justify the unilateral assignments on a temporary basis. (emphasis added)

Based on this reasoning, the union's complaint was dismissed. This "rule defining legitimate unilateral action" is a good reason why some municipal and board of education employers may find it prudent to politely decline a union's request, or misguided demand, to enter into midterm MOU negotiations. Instead, exercise managerial discretion in a reasonable and fair manner, though not necessarily in a manner addressed by the collective bargaining agreement.

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Other practical concerns relate to the fact that many agencies have multiple union contracts. Negotiating one MOU midterm with one union (as described above), would be daunting but how do you negotiate five or six at the same time under the current circumstances, and how can you select just one, or some unions, but not all? Isn't everyone affected? And beware of the slippery slope aka "off the record" discussions. There is a considerable body of case law that addresses whether a party, through its actions, agreed to negotiate and then, when things didn't go well, attempted to backtrack. Remain open to suggestions and insights from your union representatives – they can be an invaluable resource, so long as you are perfectly clear from the outset that such discussions do not constitute bargaining. Once an employer commits to negotiate working conditions, and/or the impact a unilateral change has upon working conditions, due to COVID-19 Executive Orders, it has set out on a journey that can take more than three months to conclude **before** it can act. Considering that fifteen Executive Orders have been issued in the past 15 days, can your agency wait that long to act? And what if you negotiate and come to an agreement, only to find that another Executive Order materially alters the landscape again. At that point, have you committed to returning to the negotiating table?

Regarding MERA contracts that expire 6/30/20, the parties are supposed to be in successor negotiations right now. Around the start of August, the Department of Labor's State Board of Mediation and Arbitration would normally inform them it's time to pick an arbitrator if no agreement has been reached. The parties can agree to suspend the MERA time frames, even if there is no future Executive Order that suspends or postpones that process. But under the TNA, commencement of negotiations is tied to a municipality's' budget submission date. Some boards of education will be starting those negotiations in June or July; many more boards will be required to commence negotiations soon after. Those timeframes cannot be extended by agreement. Given the purposes served and the expanding scope of Executive Orders 7-7N (at the time of this Alert) it would not be unreasonable to expect a future Executive Order will address these successor negotiation mandates; even more reason not to enter into unnecessary, midterm, MOU negotiations.

During these unprecedented times it is important for Connecticut public-sector employers to keep two things in mind: first that your agency's unilateral changes are temporary and second, that in a crisis, decision making becomes more centralized because rapid responses can save lives.

Pullman & Comley attorneys have been closely monitoring the many developing implications of the COVID-19 pandemic for businesses and for professionals, including law firms. We have been responding, and will continue to respond, to a wide range of risk management questions. The firm's FOCUS page for the latest COVID-19 advisories may be found here.