LONG & DiPIETRO, LLP
ATTORNEYS AT LAW
175 Derby Street
Unit 17
Hingham, MA 02043
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www.long-law.com

MICHAEL J. LONG
ROSANN DiPIETRO
KELLY T. GONZALEZ
LESLIE C. CAREY

JOSEPH P. LONG
OF COUNSEL

TELEPHONE (781) 749-0021
FACSIMILE (781) 749-1121
email@long-law.com

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LEGAL ADVISORY: Massachusetts Legislature Reponds to U.S. Supreme Court *Janus* Decision by Authorizing Payroll Deductions, Expanding Union Rigths to Access Information and School Buildings

I. INTRODUCTION

On September 23, 2019, the Massachusetts House and Senate overrode a veto by Governor Charlie Baker and passed into law Chapter 73 of the Acts of 2019, "An Act Relative to Collective Bargaining Dues." In its introductory paragraphs, Chapter 73 was declared to be "an emergency law, necessary for the immediate preservation of the public convenience." The reader will be forgiven for asking: "How do we define public convenience?" The law contains six sections[1] which will be discussed separately.

II. DISCUSSION OF RELEVANT SECTIONS

Section 1: Expansion of Union Access to Employee Information

Chapter 73 amends Section 1B of Chapter 66 of the General Laws, generally referred to as the Public Records Act, by making the:

> home address, personal email address, home telephone number or mobile telephone number of an employee of [a] … political subdivision thereof, … subject to disclosure only to an employee organization intending to represent public employees in the collective bargaining agreement.

This information is otherwise not a public record and need not be produced in response to a public records request.

Some may be concerned that the expansive scope of this information may result in invasions of privacy, but the legislature did take steps to protect from disclosure such information contained in the record if it is that of a member of the employee's family. By

[1] Section 4 of Chapter 73 relates to the operation of the MBTA and will not be discussed here. Section 6 repeals Sections 17C, 17E and 17G of chapter 180.

amending Chapter 66, which defines public records and by excluding from "public records" any information about family members, the new law treats requests by unions for this information like any other public records request. As a practical matter, this information must be redacted by the custodian of the record when such information is produced to the employee organization. Thus, we believe the custodian of the record may charge the employee organization a reasonable fee for copying, search, segregation and redaction time in connection with this information. We expect the Supervisor of Public Records may issue an advisory in connection with this matter.

Section 2: No "Free Riders"

In Section 2 of the law, the legislature amended Section 5 of Chapter 150E. Section 5 articulates union responsibilities in the collective bargaining process and in the matter of representing employees. Following the *Janus* decision, which determined non-consensual agency fee agreements violated of the First Amendment, many union advocates argued against the concept that individuals could withhold agency fees and/or union dues. These people were referred to as "free riders," legally entitled to representation and services at no cost to them. While it was never clear in Massachusetts whether the so called "free rider" objection was applied to more than a handful of public employees, the legislature has now determined that a union;

> may require a non-member to pay for the reasonable costs and fees, including arbitrator fees and related attorney fees, for grieving or arbitrating a matter arising under" a collective bargaining agreement, if the grievance or arbitration was "brought at the non-member's request.

In addition to arbitrator and legal fees, the union may require a non-member to pay the proportional costs and fees prior to a grievance and arbitration hearing. Thus, the bill that many of you receive from the American Arbitration Association for initial administration of the demand for arbitration, and as a pass through for arbitrator costs, may be subject to pre-payment by the employee at the union's prerogative.

To further protect the unions from claims by non-members or disgruntled members, the legislature specifically defined the union's duty of fair representation to be "limited to the negotiations and enforcement of the terms of agreements with the public employer." Under the new law, the unions have the discretion to provide "only to [their] members legal, economic or job-related services or benefits outside of the collective bargaining agreement."

Section 3: Unions Given Broad Access to Employees on Work Time and to Public Buildings

In Section 3, the legislature effectively invalidated decades of practice which restricted the unions' access to employees during work hours. Now, access includes "but shall not be limited to" a union right to meet with individual employees on the premises (schools) of the public employer "during the work day to investigate and discuss grievances, workplace related complaints" and other workplace issues. The legislature did not define what the phrase "during the work day" meant; we are certain that there will be disputes about this, particularly as employers and administrators attempt to schedule these meetings, for example, around an

employee's prep time, rather than removing a teacher from instructional time. Additionally, unions now have the right:

> to conduct worksite meetings during lunch breaks and other non-work breaks and before and after the workday on the employer's premises to discuss workplace issues, collective bargaining negotiations, the administration of collective bargaining agreements, other matters related to the duties of an exclusive representative and internal union matters…

As regards a union's right of access to new employees, employers must provide access to newly hired employees:

> for not less than 30 minutes, not later than 10 calendar days after the date of hire during new employee orientation or, [if there is no new employee orientation] at and individual or group meeting.

To facilitate this access to new employees, employers

> shall notify the [union] of a hiring decision not later than 10 calendar days after the date a prospective employee accepts an offer of employment and shall provide to the [union] the employee contact information…

The notice to the union must include the following information: the name, job/position, title, worksite location, home address, work telephone number, home and personal cellular telephone numbers on file with the public employer, the date of hire, work email address, and a personal email address on file. To protect from disclosure union communications with members or prospective members the legislature conceded that "home addresses, home and personal cellular telephone numbers, personal email addresses, dates of birth, bargaining units and groupings of employees and emails or other communications between employee organizations and their members shall not be public records" except as provided by two provisions of Chapter 4 of the General Laws, which define public records.

First, the personal information may be disclosed under M.G.L. c. 4, §7, cl. 26(o) to an employee organization. Effectively, this exception means that all of this personally identifiable information must be provided (assuming compliance with public records laws on payment, if requested) to an employee organization on request, notwithstanding the general rule against disclosure. Second, information about a family member of a public employee contained within the information which must be disclosed to a union may be withheld pursuant to M.G.L. c. 4, §7, cl. 26(p).

Meetings in school during the work day, meetings with the newly hired, and provision of personal identification to unions will be aided by provisions in the law which affirmatively state a union:

> shall have the right to use the email system of a public employer [to facilitate communication with union members on union

> business] provided, however, that the use does not create an unreasonable burden on network capability or system administration.

This language appears to expand on employee rights to utilize in-school communication systems first discussed in *Perry Education Association*, 460 U.S. 37 (1983). In *Perry*, the United States Supreme Court recognized, among other aspects of the decision, that unions could not be prohibited from using school mailboxes if the mailboxes were made available to other entities or organizations. It is not clear from the new provisions of Chapter 73 relative to email access what would constitute an unreasonable burden on network capability (for example, if the system were flooded or overwhelmed with emails) or what constitutes a burden on system administration. Many of you have already experienced a burden on system administration resulting from, for example, public records requests seeking access to various documents or emails. Whether we will be subject to voluminous requests of a harassing nature from the unions remains to be seen. Customary appeal procedures involving the Supervisor of Public Records may be utilized.

Finally, the new law requires that public employers provide unions access to their buildings and facilities:

> to conduct meetings with unit members regarding bargaining negotiations, the administration of collective bargaining agreements, the investigation of grievances, and other workplace related complaints and issues.

Chapter 73 identifies as permissible topics for on campus meetings internal union matters involving governance or union business. Again, the legislature staked out a protection for abuse, noting that these uses must "not interfere with governmental operations." One wonders how long it will take for a dispute to arise concerning the time, place and manner of use of public buildings by union groups and the criteria to be used to determine whether such use interferes with governmental operations. Employers may offset costs of <u>additional</u> maintenance and security if required for such activities and if such costs would not otherwise be incurred.

An employer's failure to provide the information, access and time required by these various amendments to Chapter 150E will constitute a violation of Section 10(a)(5) of Chapter 150E. Section 10(a)(5) prohibits an employer from refusing to bargain in good faith with employee representatives.

Section 5: <u>Payroll Deduction Procedures Post-*Janus*</u>

Section 5 of Chapter 73 is a direct response on the *Janus* decision and the Supreme Court's recognition of employee First Amendment rights against compelled payment of agency fees. The new law re-writes Section 17A of Chapter 80 relative to payroll deductions. Section 5 is a local option provision. If adopted by the city or town, Section 17A permits a salary deduction in an amount specified in writing by the employee. The authorization from the employee may be forwarded to the employee or the employee representative. The payroll deduction authorization "may be irrevocable… for a period of not more than 1 year after the authorization." Upon receipt of an authorization to implement a deduction the employer's

treasurer must "transmit the sum so deducted to the treasurer of the employee organization" after the treasurer of the employee organization has posted a bond acceptable to the Commissioner of Revenue.

The authorization is revocable "solely pursuant to the terms of revocation specified in the employee authorization." An employer must accept the authorization if it is written consistent with the provisions of the chapter. As to revocation, the treasurer of the employee organization will notify the appropriate office of the employer to revoke authorization not later than 15 days after it is received. If the authorization does not specify the terms for revocation it may be withdrawn by the employee upon provision of not less than 60 days notice to the employer.

The provisions of the law relative to authorization and revocation of authorization for payroll deductions are effective on a local option basis. That is, if you wish to recognize your employees' right to authorize or revoke payment of union dues and/or fees, you must specifically accept the provisions of Section 5 of Chapter 73 of the Acts of 2019. According to the terms of Section 5, it may be permitted in a county by a vote of county commissioners, in a city with a Plan D or Plan E charter by a majority vote of the city council and in any other city by a vote of the city council with approval of the mayor. Finally, in a town the approval of Section 5 must be done by the board of selectmen. The local option aspect of the revocation provisions also references Chapter 740 of the Acts of 1950. Chapter 740 of the Acts of 1950 makes local acceptance subject to a town meeting vote. Section 5 is silent as to regional schools.

III. CONCLUSION

For many the provisions of Chapter 73 will not substantially change school operations. Union access to employees, and provision of meeting space is commonplace. We all will assess the impact of public records requests and utilization of email. In light of the complexities around the authorization and revocation provisions, and due to the potential breadth of the impact on school operations of various provisions of Chapter 73, we suggest you review with your local counsel how this new law will affect your operations.