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From: Arnold and Kadjan, LLP
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RE: Union Response to Coronavirus and Pending Legislation

Many international unions have issued guidelines relating to the Coronavirus. Some of those guidelines predate the *Family First Coronavirus Response Act* (HR 6201), which was passed by the House Representatives on March 14, 2020. The following are suggestions and responses to issues that the trades will face in the coming weeks. Please be advised that the legislation is pending, and changes may occur before it is signed into law.

Most Union members, particularly those in the construction trades, do not have the option of transitioning into telework. They are required to be on the work site. Their boots on the ground each and every day. Due to employers' existing attendance policies and lack of paid vacation and sick days in the construction industry, infected employees may find their selves without sufficient paid time off (pto) or unable to afford to take unpaid medical leave.

In order to keep their jobs and livelihoods, the same infected employees may likely report to work. Should this scenario play out, the virus could and quickly spread throughout the work force.

Accordingly, Unions should ask employers to do the following to protect its members:

- Change its attendance policy during this crisis to excuse all union employee absences for the foreseeable future, for those who may need to take time off to care for a sick family member exposed to COVID019 or to care for children attending schools or daycares that have closed due to the virus.

- Provide up to 14 days of paid leave for employees exposed or quarantined due to COVID-19 or for those who must care for a sick family member who is exposed or quarantined due to COVID-19.
- Provide paid leave, without impact on employees' leave balances and benefits for employees who are unable to work due to public health or required quarantine
- If layoffs are being considered due to reduced business, consider accepting volunteers for layoffs first before mandatory layoff by seniority.
- Grant employees additional paid time off for a finite period of time during the COVID-19 epidemic to be taken due to quarantine, care for a sick family member, care for a child during school closing, offset time lost due to reduced hours or layoff scenarios.
- Setup a rapid response system to share communications with employees

OSHA AND THE VIRUS

OSHA has no standards related to communicable diseases. It is likely that OSHA would invoke its general duty clause, a catchall relating to health and safety. There is no requirement that employees notify OSHA, the CDC or its workman's compensation carrier. Employers will dispute that the exposure occurred on the job or is job related. It is impossible to say how and when exposure occurred.

OSHA's General Duty clause requires employers to mitigate or eliminate workplace hazards that could cause serious harm to employees. The nature of the workplace affects the type and level of response that may be required. For example, health care facilities and organizations entrusted with care for vulnerable populations may need to implement heightened protection standards. OSHA's main function here is to educate. The Union's mission is the same.

Unions should remind members to take common-sense precautions such as staying home if they are sick, greeting others in ways other than hand-shaking, and minimizing the risk of infection by conscientious hand-washing and sneezing and coughing into a sleeve or tissue. Employers should required to provide plentiful supplies such as hand sanitizer and antiseptic wipes and avoid holding meetings in close quarters. Employers should assign someone, often a

member of HR or Employee Health and Safety, to regularly monitor information posted by the CDC and OSHA for guidance on appropriate measures.

UNIONIZED WORKFORCE WITH CONCERNS ABOUT THE CORONAVIRUS. ARE THEY ARBITRABLE?

In unionized facilities, employers under a collective bargaining agreements (CBAs) must consider whether their responses to coronavirus concerns constitute unilateral changes of existing work conditions or procedures. Despite employer desires to act for the safety and benefit of their employees, implementing changes to working conditions in response to coronavirus concerns without bargaining with the union could result in 8(a)(5) unfair labor practices under the National Labor Relations Act (NLRA). Employers and Unions must carefully assess the language in their CBAs so that bargaining obligations are fulfilled and to determine what management rights support their ability to appropriately respond to coronavirus concerns. Moreover, are virus related matters arbitrable under the collective bargaining agreement? Most collective bargaining agreements restrict grievances to application of the terms arising under the agreement. Under the Family First Coronavirus Act now in Congress, it is advisable to amend the collective bargaining agreement to include such issues.

Even in non-unionized facilities, employers should consider NLRA implications if employees collectively raise concerns about working conditions or changes to work procedures/operations because of the coronavirus. Under Section 7 of the NLRA, employees have the right "to engage in [concerted] activities for the purpose of … mutual aid or protection…." This includes employees raising group concerns about safety and health, such as by requesting additional personal protective equipment (PPE) because of potential exposure to the coronavirus. Under these magnified circumstances, employers must avoid retaliatory, threatening or discriminatory responses to employee group concerns about the coronavirus.

Moreover, under HIPAA, employers are restricted in the information they can convey. Under no circumstances should the identity of a member be revealed.

DEMANDS TO EMPLOYER SHOULD INCLUDE, BUT ARE NOT LIMITED TO

- Provide each worker:

  Protective gloves and N95 fitted facemasks.
  A 2 oz. bottle of at least 60% alcohol-based sanitizing gel for hands.
  Sterilizing wipes for wiping down work area surfaces.

- Provide each worker:

  Protective gloves.
  Protective goggles.
  Fitted N95 facemasks.

- Clean, sanitize, and disinfect construction site office(s) and vehicles shared tools, control panels, and other high traffic areas on at least a daily basis.

- Pandemic paid leave policy up to 15 days and no penalty for calling in sick which will be modified under the New Federal Act.

- Free testing and treatment for all employees whether they exhibit symptoms or not.

EMPLOYER'S OBLIGATIONS TO PREVENT HARASSMENT OF THOSE SUSPECTED OF BEING INFECTED?

Unions must remind Employers to take steps to prevent discrimination and harassment against individuals who are disabled or perceived as disabled because they are exhibiting symptoms suggestive of having contracted coronavirus. To accomplish this, Unions and Employers should ensure the confidentiality of all employees' medical information and work-leave details to prevent harassment and potential HIPAA disclosure violations. Unions should consider reminding members of anti-harassment and discrimination policies. Unions must be vigilant about promptly responding to and investigating any complaints of harassment or bullying in the workplace.

CAN EMPLOYERS TAKE THE TEMPERATURE OF EMPLOYEES WHO ARE COMING TO WORK?

Generally, no. Normally, requiring employees to submit to temperature checks would be considered an overly broad medical examination/inquiry in violation of the ADA and the Illinois Biometric Act. However, based on guidance the EEOC issued in 2009 in connection with the Swine Flu H1N1 influenza virus pandemic, this possibly could be permissible under the ADA where COVID-19 is widespread in the community, or when symptoms become more severe than those experienced during the seasonal flu or the H1N1 virus in the spring/summer of 2009, as assessed by state or local health authorities, or by the CDC. In sum, such checks should not be required unless guidance or directives from the applicable local, state or federal public health authorities mandate or recommend temperature checks of current employees specifically with regard to COVID-19. However, employers may choose to recommend that employees with low-risk exposure check their own temperature as part of an effort to ensure they are still asymptomatic before arriving at the workplace.

DOES OSHA REQUIRE NON-HEALTHCARE EMPLOYEES TO WEAR RESPIRATORS?

At this time, there is no general requirement for non-healthcare employees to wear respirators or other types of personal protective equipment (PPE). The CDC has issued guidance regarding the use of PPE only for healthcare personnel caring for patients with confirmed or possible COVID-19. The CDC stresses:

> "This guidance is not intended for non-healthcare settings (*e.g.*, schools) OR to persons outside of healthcare settings."

At this time, the CDC is not recommending use of facemasks or any other protective equipment by the general public.

CAN AN EMPLOYER PREVENT EMPLOYEES FROM WEARING A SURGICAL MASK OR RESPIRATOR?

Many workers are understandably concerned about transmission of the virus. However, employers have an interest in limiting fear and not causing client or customer alarm. Under OSHA's rule regarding personal protective equipment,

> "A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee . . . . An employer may provide respirators at the request of employees or permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard." 29 C.F.R. § 1910.134.

At this time, the CDC is NOT recommending use of surgical masks or respirators by the general public, except as recommended by a healthcare professional or by persons infected with COVID-19 or caring for someone who is infected or suspected to be infected. As this PPE has not been deemed necessary to protect health and safety at this time, employers have discretion as to whether to allow their usage.

WHAT IF AN EMPLOYEE REQUESTS TO WEAR SOME TYPE OF MASK AS AN ACCOMMODATION?

The CDC does not recommend that people who are well wear some type of mask to protect themselves from respiratory disease, including COVID-19. The CDC does recommend that surgical masks should be used by people who show symptoms of COVID-19. If an employee shows symptoms or has been diagnosed with COVID-19, however, the CDC recommends that the employee be separated from other employees and be sent home immediately, thus negating the need for a mask as an accommodation.

IF ONE A MEMBER IS QUARANTINED, WHAT INFORMATION CAN BE SHARED WITH OUR MEMBERS? WHO CAN WE SHARE IT WITH?

If a member is confirmed to have COVID-19, employers should inform fellow employees of their possible exposure to COVID-19 in the workplace. Neither the Union nor the Employers should disclose to members or co-workers the identity of the quarantined employee because confidentiality requirements under federal law, such as the Americans with Disabilities Act (ADA), or state law, such as California's Confidentiality of Medical Information Act (CMIA), may apply.

PRIVACY CONCERNS UNION MUST BE AWARE OF WHEN ASKING FOR HEALTH INFORMATION OF ITS MEMBERS IN ORDER TO EVALUATE WHETHER THE NEED FOR QUARANTINE

Unions and employers may ask employees if they are experiencing COVID-19 symptoms such as fever, tiredness, cough, and shortness of breath. Federal or state law may require them to handle the employee's response as a confidential medical record. To help mitigate this risk, the Union should request employers to maintain the information in a separate, confidential medical file and limit access to those with a business need to know as done with drug test information.

NATIONAL ORIGIN/RACE ISSUES UNIONS SHOULD BE AWARE OF

Title VII and state law prohibit discrimination based on race, color, national origin, and other protected classifications. The CDC has advised in this context:

> "To prevent stigma and discrimination in the workplace, use only the guidance described below [provided by the CDC] to determine risk of COVID-19. Do not make determinations of risk based on race or country of origin, and be sure to maintain confidentiality of people with confirmed COVID-19."

CDC, Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), February 2020. Unions must advise Employers to be careful not to

exclude any person from work or work-related activities, as well as from any type of customer or client interaction, based purely on race or national origin, without evidence of illness or recent travel to a high-risk area. Finally, Unions should ensure that any Employer communicable disease or travel policies do not implicate anti-discrimination laws, not only based on race, color, age, pregnancy, or national origin, but also on disability or other prohibited bases.

Any communicable illness policy should address all communicable illnesses and not just one that disproportionately affects a particular protected class of individuals. Similarly, Employers should be sure that any travel restrictions and other Employer-mandated policies are imposed impartially.

EMPLOYER-INSTITUTED QUARANTINES OR TEMPORARY SHUTDOWNS OR MASS LAYOFFS ENTITLE WORKERS TO UNEMPLOYMENT BENEFITS

Yes, workers are generally entitled to unemployment insurance if they are furloughed when a business temporarily shuts down and all other unemployment requirements are met. Depending on the size and length of the temporary shutdown, the jurisdiction may require notification to the applicable unemployment department as a mass separation and if large enough, reportable under the WARN Act (29 U.S.C. §2101 et seq.).

This is provided as general information and not as legal advice or opinion in any particular situation. Professional judgment as an attorney will be given to the client on itemized and individual bases. We will update you as changes in the coronavirus situation as they develop.