

# Memorandum

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**Coronavirus Disease (COVID-19):  
Suspension of the 180 Day Requirement and  
Effect of Governor's Executive Order 202.4  
Addressing Treatment of Non-Essential Personnel**

**-Seventh Update-**

**March 17, 2020**

**VIA ELECTRONIC TRANSMISSION**

To: **Boards of Education & Board of Cooperative Educational Services**  
*(Via Email to District Clerks for Distribution to Members of the Board)*

**Superintendents of Schools, District Superintendent,  
Business Officials & Assistant Superintendents**

From: Ingerman Smith, LLP

Re: **Coronavirus Disease 2019 (COVID-19):  
Suspension of the 180 Day Requirement and Effect of Governor's Executive  
Order 202.4 Addressing Treatment of Non-Essential Personnel  
-Seventh Update-**

Date: March 17, 2020

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This memorandum is sent as a follow-up to our prior opinion letters concerning the Coronavirus Disease 2019 ("COVID-19") crisis and the impact of school closures on the requirement for school to be in session for 180 days.

**Distance Learning Considerations**

We have consistently advised that our clients not execute a memorandum of agreement with teacher and non-instructional bargaining units. As noted in our Fifth Update distributed yesterday, we advised that assignment to home and the requirement that teachers perform distance learning are both non-mandatory subjects of collective bargaining. Hence, a school district may refuse to enter into a memorandum of agreement addressing these issues.

We are cognizant that school districts are concerned that such a refusal may not be politically expedient with teacher unions and the faculty they represent. However, it can reasonably be expected that significant costs will be incurred by school districts during the foreseeable future while the COVID-19 crisis continues. Therefore, binding a school district under the terms of a memorandum of agreement, particularly in the absence of a determination that a day of distance learning will be deemed a day of attendance, is worrisome.

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Indeed, today during a State-wide conference call sponsored by New York State School Boards Association with school attorneys throughout the State, the Interim Commissioner of Education was unable to indicate when the New York State Education Department ("SED") will issue such guidance. (The Interim Commissioner did indicate that such guidance is under study.) Notwithstanding the absence of SED guidance regarding protocols and procedures for review of distance learning plans, the Interim Commissioner did emphasize that it is the Governor's and SED's policy determination that continuity of instruction be a first priority of school districts for as long as schools remain closed.

We advise that should you decide to consider the execution of such a memorandum of agreement that we be contacted and involved. There are alternatives to a binding memorandum of agreement that we can suggest should a school district feel constrained to provide some writing to its teachers' union.

#### **Suspension of 180 Day Requirement**

We also note that today the Governor has announced that for the two week period that he has directed the closure of schools, the 180 day requirement will be suspended in connection with the calculation of state aid. The Interim Commissioner reiterated during the telephone conference that school districts will not be held to the 180 day requirement for this two week period. We were advised that guidance will be received from the State to further clarify this issue.

#### **Effect of Governor's Executive Order 202.4 Addressing Treatment of Non-Essential Personnel**

In addition to the closure of schools for two weeks, the Executive Order provides for the reduction of staffing as follows:

*....Any local government or political subdivisions shall, effective March 17, 2020, allow non-essential personnel as determined by the local government, to be able to work from home or take leave without charging accruals, except for those personnel essential to the locality's response to the COVID-19 emergency. Such non-essential personnel shall total no less than fifty-percent (50%) of the total number of employees across the entire workforce of such local government or political subdivision....*

The Governor is exercising his authority pursuant to the powers granted to him by Article 2-B of the Executive Law. The term "political subdivision" includes school districts. (See Attorney

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General Opinion 1980-19).<sup>1</sup> As such, in addition to providing continuity of instruction, school districts are required to have non-essential personnel work from home and/or "take leave" without being required to utilize sick, vacation or personal time. The Order also requires that non-essential personnel who are required to report to work be less than 50% of the total employees in the school district, not 50% of the non-essential personnel. Up to 50% of the work force may be assigned to home, work from home or be on an approved leave of absence, but it appears that those employees are entitled to remain on payroll. Further the Order can reasonably be interpreted that school districts are without authority to furlough salaried or hourly employees without pay or lay off employees through April 15, 2020.

Hence, today's Executive Order negates our advice in Coronavirus Disease 2019 (COVID-19): Labor Issues - Fifth Update, issued on March 16, 2020 bearing the following two captions: "*Cessation of the payment of wages to employees who are not required to come to work and who are not required to work remotely from home*" and "*Compensation issues regarding hourly employees,*" appearing on pages 3 and 4. In addition, in light of the Order, no resolution is required to pay hourly employees.

We continue to stand ready to assist you further concerning compliance with this latest Order from the Governor. Please do not hesitate to contact an attorney with our Firm for assistance.

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<sup>1</sup> In telephone conference held today, the Interim Commissioner stated that she was unsure if school districts, for purposes of the Governor's Executive Order, were political subdivisions. She indicated she would verify the same in subsequent guidance.