

BOMA Chicago Reaches MOA with SEIU Local 1 and Updates on Federal Stimulus Law

JEREMY GLENN

JULIE TRESTER



Agenda

1. Backdrop to the BOMA Chicago – SEIU Local 1 Memorandum of Agreement (“MOA”)
2. Specific Language of the MOA and related Tolling Agreement
3. IUOE Local 399 CBA
4. Recall provisions
5. Federal Stimulus Laws – the FFCRA (March 18) and the CARES Act (March 27)

Backdrop

- On March 18, 2020 the Regional Advisory Board (RAB) and SEIU Local 32BJ entered into a short-term agreement in response to COVID-19 outbreak in New York City
- That agreement provided for extended health insurance to laid-off workers, two weeks COVID-19 sick leave, employer flexibility in layoff notices and termination pay, and agreement to try to reassign workers to residential buildings.



BOMA Chicago MOA

- On March 23, 2020, SEIU Local 1 contacted BOMA Chicago and proposed a memorandum of agreement similar to the RAB agreement.
 - Recognize disruption in the workflow
 - Minimize upheaval to the service workers
 - Common sense approach to unprecedented time
- BOMA Chicago's Labor Committee negotiated an agreement that is similar to NYC but tailored to the Chicago market.

“Whereas, certain buildings are experiencing reductions in physical occupancy as a result of COVID-19 and it is anticipated that these reductions in physical occupancy will be temporary in duration”

Paragraph 1

Employees who were laid off or lost work on or after March 12, 2020 have health insurance through the SEIU Local 1 and Participating Employers Health Trust for an additional thirty (30) days from the date of their layoff or loss of eligibility.
(approved by Trustees on 3/27/20)

- In effect until April 25 unless mutually extended
- Paid by the Health Trust
- “This will not result in any additional cost to or contribution from the Employer”

* e.g., if employee laid off on March 27, then coverage through April 30.

* e.g., if employee laid off on April 10, then coverage through May 31.

Paragraph 2

If employee is unable to report to work due to circumstances related to the pandemic, including childcare obligations and vulnerable medical conditions, “Employers shall make reasonable efforts to utilize employees’ paid time off,” unless employee chooses to take the time unpaid, in writing. (emphasis added)



Paragraph 3

If Employer directs an employee to self-quarantine or self-isolate because of worksite exposure to COVID-19, such employee shall be paid up to two (2) weeks of paid time-off. (emphasis added)

For any other self-quarantine or self-isolation, the Employee may elect to utilize their PTO or statutory paid leave, if available.

Paragraph 4

If operations at a building are suspended or reduced for reasons related to the pandemic:

- 10-day advance notice of a RIF or a reduction in hours is suspended for 30 days (until April 25)
- Employer shall provide the Union with prompt notice of reduction, including identifying the affected employees and the reason for reduction.
- Also, Employer may reduce employees' hours in appropriate circumstances for reasons related to the pandemic, and advance notice requirements are waived.

Paragraph 5

If changes are being implemented for reasons related to the pandemic:

- Waiver of advance notice of schedule changes
- In effect for next 30 days (until April 25)
- Give prompt notice of such changes to the Union.

Paragraphs 6 - 7

We may see additional legislation from Federal, State or City of Chicago.

An ad hoc work group will coordinate on issues related to the pandemic including reductions and redeployment. This is designed to identify issues before they become grievances.

The parties shall meet and confer with respect to the implementation of new laws.

Paragraph 8 – Critical Trades

The Governor's Stay at Home Executive Order is in effect from March 20 until 11:59 pm on Tuesday, April 7 (subject to extension)

“Critical Trades”: Building and Construction Tradesmen and Tradeswomen, and other trades including but not limited to plumbers, electricians, exterminators, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses and Operations.

Tolling Agreement – 30-day pause for grievances

For the next 30 days, the usual 10-day period to file a grievance is paused in order to prevent an influx of grievances that may be resolved by changing circumstances or government action.

Joint Labor-Management Committee meetings will be stayed for 30 days.
Arbitration hearings stayed for 30 days.

Local 399 Engineer's CBA

1. Can the Employer change the schedule of the engineers from a Mon-Fri to Tues-Sat if the Employer wants to lessen the chance of the engineers being exposed to carriers of the coronavirus?

Answer: **Yes**, with two (2) weeks' notice to the employee and Union. Section 10 of the CBA provides that the workweek begins at 12:01 a.m. on Monday and ends at 12:00 midnight the following Sunday. Within the defined workweek, the regular schedule for engineers consists of five consecutive days of eight consecutive hours of work. This section also requires that 2 weeks advance notice must be given of "shift" changes to the Union and the affected employees but is silent as to whether the same notice must be given for changes in the employee's schedule. However, the Union undoubtedly would take the position that the same two weeks' advance notice must be given if an employee's schedule is changed.

Local 399 Engineer's CBA

2. Can the Employer reduce the weekly hours of an engineer (e.g. from 40 hours per week to 32 or 24 hours per week)?

Answer: **Probably not**, without the Union's consent. Section 10 of the CBA requires that an engineer's work schedule must consist of five consecutive days of eight consecutive hours each. Even assuming the Union were willing to waive the 40 hour per week requirement, the Health and Welfare contribution required by Section 18 would remain the same since it is based on a specified amount per week for each employee covered by the CBA, unlike pension contributions which per Section 17 are based on hours worked.

Local 399 Engineer's CBA

3. Assuming the reduced physical occupancy of the building is a temporary situation, is there a furlough option that would permit the Employer to place an engineer on inactive status for a 30 day period?

Answer: **Possibly.** Section 6 of the CBA gives the Employer the exclusive right to layoff for cause, although the Union has the right to challenge the layoff through the grievance procedure. The Employer is required to give ten days' advance notice of discharges (subject to exceptions), but the CBA does not require advance notice of a layoff for cause. In conducting layoffs, Section 9 (D) of the CBA requires that employees must be laid off by seniority within classification. Additionally, employees must be recalled in seniority order.

Local 399 Engineer's CBA

4. If an engineer's employment is terminated due to reduced physical occupancy in the building due to coronavirus, what are the severance payments owed to that engineer?

Answer: According to Section 6(C) of the CBA, if an employee with more than one year of service is permanently terminated because a building closes, he is entitled to severance pay equal to 1% of his straight time earnings during the preceding 12 months multiplied by the number of the employee's full years of continuous service with the Employer as of the date of separation. Although the CBA is unclear on this point, an argument could be made that if a building does not close, but instead has lower tenant physical occupancy caused by the coronavirus, any engineers who were terminated due to reduced tenant needs would not be entitled to severance pay. Such employees, however, would be entitled to ten days' additional pay in lieu of notice per Section 6(B) of the CBA.

Restoring the Workforce

Janitorial CBA: Layoffs and Recalls are based on seniority. “Employees with seniority shall be recalled in reverse order in which they were laid off, subject to qualifications to perform the job.” One week’s notice to last known address. *Art. 16, Sec. 2*

Security CBA: Layoffs and Recalls are based on consideration of seniority, knowledge, training, ability, skill and efficiency to satisfactorily perform the work available. One week’s notice to last known address. *Art. 15, Sec. 2-3*

Engineers CBA: Layoffs and Recalls are based on seniority. “Laid off employees shall be recalled in seniority order.” *Section 9(D)*

PAUSE FOR QUESTIONS



Families First Coronavirus Response Act

- ❑ Signed into law by President on March 18, 2020
- ❑ Goes into effect on April 1, 2020, and will be effective through December 31, 2020.
- ❑ Emergency FMLA Expansion Act
- ❑ Emergency Paid Sick Leave Act
- ❑ Provides employer tax credits for emergency paid sick leave and extended FMLA leave
- ❑ Applies to companies with fewer than 500 employees



Emergency Family and Medical Leave Expansion Act – What is New?

Through December 31, 2020, employees of employers with fewer than 500 employees, who have been on the job for at least 30 days, have the right to take up to 12 weeks of job-protected leave because their child's school has been closed, or the child care provider is unavailable due to coronavirus.



Emergency Family and Medical Leave Expansion Act

- Expands FMLA qualifying reason for leave to include employees who are unable to work (or telework) due to a need for leave to care for a child because school has been closed, or the child care provider is unavailable, due to the coronavirus;
- Requires that leave taken for such reason be paid at 2/3 the employee's regular rate, subject to certain caps; and
- Changes the definition of "covered employer" and "covered employee" for leave taken for this purpose



Who is an “employer” under the new law?

A covered employer is any person engaged in commerce or in any industry or activity affecting commerce who employs **fewer than 500 employees**

This new definition of “covered employer” only applies to leave taken the new Act:

- All employees, whether part-time or full time, and even temporary workers, are included in the employee count.
- Employees on a leave of absence or suspension likely are counted towards the threshold as long as there is a reasonable expectation that the employee will return to work.
- However, it is likely that the following individuals would not be counted:
 - Volunteers (if not on the employer's payroll)
 - Employees employed outside the United States, the District of Columbia, or United States territories
 - Laid-off employees
- Joint employment and integrated employer considerations

Who is an “employee” under the new law?



To be eligible, employees must simply have worked for at least 30 calendar days by the employer (does not need to be consecutive)

The employee must be unable to work (or telework, if made available by the employer) due to a need to care for their son or daughter under 18 years old, if

- 1) the school or place of care has been closed, or
- 2) the child care provider of the son or daughter is unavailable due to a declared COVID-19 public health emergency

When the necessity for leave is foreseeable, an employee shall provide the employer with notice of leave as soon as practicable.

Paid Leave Under the Family Medical Leave Expansion Act

- The first 10 days of leave under the FMLA Expansion may be unpaid
 - During this time, an employee may elect to substitute any accrued vacation leave, personal leave, medical or sick leave for unpaid leave
 - Keep state and local leave laws in mind
- The remainder of this leave must be paid at the rate of at least two-thirds (2/3) the employee's regular rate of pay (not to exceed \$200 per day and \$10,000 in the aggregate).
- While an employer can pay more than what is required, they will not receive a tax credit greater than \$200 per day and \$10,000 in the aggregate, for leave paid pursuant to this section of the Act.



This New FMLA Leave



- Employers may opt to allow employees to take this leave intermittently or on a reduced leave schedule.
- The Act does not expand an eligible employee's FMLA leave entitlement to greater than 12 workweeks (or 26 workweeks where applicable) during any 12-month period.
- Accordingly, an employee that has otherwise exhausted FMLA leave during the 12-month period is not entitled to an additional 12 weeks of leave under FMLA.
- Generally, when an employee returns from FMLA leave, the employee must be restored to the same job or to an "equivalent job."

Emergency Paid Sick Leave Act

Summary: During the limited period outlined by the Act (Apr. 1-Dec. 31), covered employers are required to provide eligible employees with two weeks of paid sick leave.



Emergency Paid Sick Leave – Requirement



Paid Sick time must be provided by an employer to an employee who is unable to work (or telework) for the following reasons:

1. To self-isolate if the employee is diagnosed with Coronavirus
2. To obtain a medical diagnosis or care if the employee is experiencing the symptoms of Coronavirus

Emergency Paid Sick Leave – Requirements (cont'd)



3. To comply with a recommendation of a health care provider or public official that the employee self-isolate due to coronavirus concerns

4. The employee is caring for an individual who is quarantined or advised to self-isolate

Emergency Paid Sick Leave – Requirements (cont'd)



5. The employee is caring for a son or daughter if the school or place of care has been closed, or the child care provider is unavailable due to coronavirus

6. The employee is experiencing substantially similar conditions as specified by the Secretary of Health and Human Services

Emergency Paid Sick Leave – Compensation

- Covered employers must provide an eligible employee with up to two weeks of paid sick leave for any qualifying reason.
- For a full-time employee, this is 80 hours/two weeks' salary.
- For a part-time employee, this is the number of hours worked on average over a two-week period.

Emergency Paid Sick Leave – Compensation (cont'd)

The compensation has limitations:

- Paid sick time is capped at \$511 per day (\$5,110 in the aggregate) for requirements related to the individual employee.
- Paid sick time is capped at 2/3 of the employee's regular rate and \$200 per day (\$2,000 in the aggregate) for requirements related to care for another individual, or care for son or daughter when school or child care is closed (reasons 4, 5 or 6).

Emergency Paid Sick Leave – Compensation (cont'd)

- Carryover is not provided under the Act.
- Paid Sick Leave is in addition to any existing paid leave benefit provided by the employer as of the date of enactment.
- The employer cannot require the employee to find their own replacement.

Emergency Paid Sick Leave - Enforcement

- Employers may not discipline or otherwise discriminate against employees taking leave in accordance with the Act, or employees who file a complaint under the Act.
- A failure to comply with the Act will be treated as a violation of the minimum wage provisions of FLSA, and are subject to penalties thereof.

Notice Requirements

- Under the Act, employers must post and keep posted in conspicuous places on the premises of the employer, where notices are customarily posted, a notice prepared by the Secretary of Labor
- DOL issued the Notice late last week
- https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf



Emergency Paid Sick Leave - Exceptions

- Small businesses with fewer than 50 employees may be exempt from EPSL when the imposition would jeopardize the viability of the business.
- Please see FAQ #58-59 at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Tax Credits

The legislation provides for a series of refundable tax credits for employers who are required to provide the benefits outlined above.

- Up to \$200 per day per employee is credited with respect to FMLA leave, and
- Up to \$511 per day per employee for Paid Sick Leave
- Subject to certain caps, employers may recover 100% of the qualified benefits paid.

Coronavirus Aid, Relief, and Economic Security (“CARES”) Act

- \$2-plus trillion aid and stimulus package
- Broad range of financial assistance and other relief for employers and employees affected by COVID-19
 - Measures to help ensure that employers can meet their financial obligations to provide paid leave pursuant to FFCRA
 - A 50% tax credit for qualified wages paid during the crisis
 - Short-term, enhanced unemployment benefits for affected workers
 - Forgivable loans for qualified employers.



Expanded Unemployment Benefits

- Pandemic Unemployment Assistance Program – provides up to 39 weeks of UI benefits to people not otherwise eligible for regular unemployment compensation (including independent contractors and self-employed individuals)
- Federal Pandemic Unemployment Compensation Program – provides most individuals who are unable to work due to COVID-19 unemployment benefits of \$600 per week above and beyond benefits provided under state law (through July 31, 2020)
- Pandemic Emergency Unemployment Compensation Program – provides 13 weeks of emergency unemployment benefits for individuals who have exhausted the maximum benefits under state law at no cost to employers or the state
- FAQs and guidance available on Illinois Department of Employment Security's website (<https://www2.illinois.gov/ides/Pages/COVID-19-and-Unemployment-Benefits.aspx>)



What Should Employers Be Planning for Next?

- Determine how your company will handle employee leave requests
- Plan for increased employee absenteeism
- Plan for telework and other restrictions that are likely to last for months, not weeks
- Keep your workforce educated and informed
- Monitor and stay up to date with recommendations from the CDC, WHO and local public health authorities



Jeremy J. Glenn
312-474-7981 (phone)
jglenn@cozen.com (email)

Julie L. Trester
312-474-7960 (phone)
jtrestre@cozen.com (email)

QUESTIONS?

