2019-2020 DEVELOPMENTS IN THE SUPREME COURT, LOWER COURTS, NLRB, PERB, CAMPAIGN FINANCE POINTERS, AND COVID-19 IMPACTS

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INTRODUCTION

"DUMPSTER FIRE"

The online Urban Dictionary defines the term "dumpster fire" as "a complete disaster." There is simply no better or more accurate way in which to define the Trump Presidency and the Reynolds Administration, especially since the last Iowa Federation of Labor Convention.

The COVID-19 Pandemic has revealed our worst fears of the Trump and Reynolds Administrations – complete lack of leadership, and when leadership exists, the leadership is aimed at bolstering the pockets of the wealthy elite rather than working Americans. For example, instead of developing a testing apparatus for COVID-19 at the University of Iowa, Governor Reynolds awarded a no-bid contract to a Utah firm. Similarly, rather than invoking the Defense Production Act to help obtain PPE and other medical equipment to better combat the COVID-19 virus, the President left every state to fend for itself, which drove up prices, padding the pockets of corporate elites, while at the same time, placing a higher burden on taxpayers, especially working Americans.

More grotesque, however, is the complete disregard for worker safety. The Occupational Health and Safety Administration (OSHA) could act to impose uniform requirements to make American's workplaces safer. OSHA has refused to act, and instead, it relies upon guidelines, which are unenforceable. More troublesome, however, instead of relying upon OSHA, the Iowa Occupational Safety and Health Administration (IOSHA) could act to impose uniform requirements for Iowa's workplaces. Again, a refusal to act. But, it gets worse. In Iowa, the Iowa Legislature passed a bill in June limiting liability for businesses if a person contracts COVID-19. Majority Leader McConnell and President Trump are advocating for similar measures at the federal level.

Meanwhile, while most working people are concerned with paying bills, sending their children to safe schools, and reporting to safe workplaces, the Trump Administration continues to pack the federal courts with conservative and anti-Union judges and undermine the U.S. Postal Service, while at the same time, the NLRB's conservative majority continues to do everything in its power to gut the NLRA. And, Governor Reynolds continues to play games with the COVID-19 numbers while mandating schools re-open for in-person instruction, for at least fifty-percent of the time, disregarding the local control that Republicans used to tout.

It is not an understatement to say that 2020 has been a "dumpster fire." It also not a stretch to also say that the entire administrations of Trump and Reynolds have also been a "dumpster fire."

The only hope, then, for survival of the Labor Movement, and possibly the Republic itself as we have known it, is the election on November 3. It will be difficult for the Labor Movement to survive another four years of a Trump Presidency. And, it will be difficult for the Labor Movement to continue to persevere in Iowa, unless the Democrats capture, at least, one chamber of the statehouse. From now until November 3, the Labor Movement must work to

energize its members, educate its members, and help ensure that its members vote for Labor friendly candidates. Unless we do the work, there is no guarantee that we will be able to put out this "dumpster fire."

PART I: ELECTION LAW REMINDERS 2020

FEDERAL ELECTIONS AND CANDIDATES
SIX SIMPLE RULES AND RECOMMENDATIONS

The laws regarding political activities by labor unions in regard to federal elections are complex. It is easy for a Local Union to unintentionally violate the law, particularly when under pressure by its political friends to assist in a federal candidate's campaign efforts. ***The basic rule is always think about potential violations of the federal law and consult with the National Union before making any commitments to the candidate.*** Rules 1 through 6 below deal with specific activities but carry the same basic message.

Rule 1: It is a ***federal crime*** for a labor union to make a contribution of Union funds or other assets to a federal candidate or to the federal PAC of a state party. Contribution means ***anything*** of value. ***The Local Union should let its National Union handle contributions to federal candidates.***

Rule 2: Union members can make voluntary contributions out of their own pockets to candidates for federal office (President, Senate, and Congress).

A Local Union can establish its own federal PAC, which is funded totally by voluntary member contributions. Doing so, however, triggers reporting requirements to the Federal Election Commission (FEC) and contributions from the PAC are included in the computation of the $5,000 contribution limit along with other contributions to the same candidate by the national union and all other locals of the same international.

For example, if a National Union makes contribution to Candidate X of $3,000, and Local 1 of the National Union contributes $3,000 to Candidate X, both the National Union and Local 1 have violated the $5,000 limit subjecting them to penalties imposed by the FEC.

A local union should encourage its members to make voluntary contributions to its National Union's Federal PAC or directly to federal candidates. It is simplest and safest not to establish its own Federal PAC.

Rule 3: Local Unions can use their general treasury funds (dues money) to make partisan communications (e.g. "Vote for Biden") to its members and their immediate families and to engage in some voter registration and get-out-the-votes activities among their members. The communications, however, can trigger reporting obligations to the FEC.

A Local Union is encouraged to educate its members about and to urge its members to vote for labor endorsed candidates for federal office. ***The Local Union, however,***

should obtain guidance from its national union regarding the best way to communicate political messages with its members.

Rule 4: Officers and employees of a Local Union ***cannot*** engage in partisan political activities on behalf or in support of a federal candidate on union time. ***A Local Union should consult with its national union to determine the permissible limits of an officer's involvement in partisan activities in support of a federal candidate.***

Rule 5: A Local Union can host a "members only" meeting or political event for a federal candidate. The Local Union, however, cannot solicit contributions for the candidate at the meeting. But, the candidate can. ***Again, a Local Union should contact its National Union if it wants to host or is requested by a federal candidate to host a "members only" event.***

Rule 6: A Local Union ***can rent*** space in its offices or use of Union equipment to a federal candidate. The rental, however, needs to be in writing and the rental price needs to be at fair market value. Rental of a meeting room needs to be at the same rate the local would normally rent it to a non-member. If there is no rate for non-members, the Local Union needs to calculate a rate comparable to rates charged by other entities for similarly sized rooms. ***A Local Union should request assistance from its National Union regarding the proper terms of a rental agreement with a federal candidate.***

Rules 1 through 6 are based on the requirements and restrictions of the federal election laws applicable to most unions. ***There are special, more restrictive laws and rules that apply to federal government employees and their unions, which are not dealt with in this Report.*** A Local Union's National Union may have additional requirements or restrictions in regard to a Local Union's federal elections activity. If so, a Local Union needs to know what they are and follow them.

STATE AND LOCAL ELECTIONS AND CANDIDATES IN IOWA

In Iowa, Local Unions may lawfully make contributions from general treasury funds which consist of dues money of private sector employee members. There is no limit on the amount of money which a Local Union can contribute. Chapter 20 of the Iowa Code, however, does prohibit the use of dues money or other assets of a public employee organization to make contributions to candidates for state and local offices. Public employees, however, can make voluntary contributions out of their own pockets to state and local candidates for office. (*There are special rules for employees of the federal government which are not dealt with here).* Making contributions does trigger reporting obligations to the Iowa Campaign Finance Board for the Local Union and potential federal income tax liability and reporting.

THE SIMPLEST WAY FOR LOCAL UNIONS TO MAKE CONTRIBUTIONS TO STATE CANDIDATES IS BY PAYING PER CAPITA FEES ON ALL THEIR MEMBERS TO THE IOWA FEDERATION OF LABOR.

The IFL's COPE Fund is funded by a percentage of the per capita fees it receives from its affiliates and takes care of reporting requirements under Iowa law and federal tax laws.

For a Local Union that may wish to make contributions to state candidates in addition to those made by the IFL COPE FUND or to local candidates, the Iowa law requires the local to establish a "separate, segregated political fund" (PAC). Establishment and operation of the PAC, including the amount of regular contributions to it by the Local Union, must be done through resolution or other formal action of the union in a manner provided for under the union's constitution and by-laws. The PAC can be administered by the Local's officers or other members/employees of the Union. ***The PAC must register with the Iowa Campaign Finance Board and electronically file reports of its receipts and expenditures on a regular basis.*** The registration and reporting procedures are relatively simple and are set-out in detail at the Board's website. (If the local's PAC is likely to receive $25,000 or more in contributions during a calendar year, the local must also file a registration form with the IRS).

The Local Union's PAC is considered a separate entity from the Local Union as such for federal income tax purposes. As a separate entity, the PAC can be subject to federal income tax at a 21% rate on the lesser of the amount of contributions it makes in a calendar year and the amount of its investment income (e.g. interest on checking and savings accounts held by the PAC). Accordingly, the Local Union needs to establish its PAC using a non-interest bearing account. Because it, then, has no investment income, the PAC would not be required to file an income tax return or pay any federal income taxes.

IMPORTANT IOWA RULES

Rule 1: Because the Local Union and its PAC are considered to be separate entities for federal income tax purposes, the IRS rules mandate that the funds of the two entities not be "comingled" (i.e. pooled together in any manner). Since the PAC will be funded by members' dues, the Local Union can avoid improper comingling of its and the PAC's funds in one of the following two ways: (1) when dues money is received by the local, a split deposit of the money should be made with part of the money going into the Local Union's general fund account and part of the money going into the PAC account; or (2) the Local Union may deposit the entire amount of the dues money into its general fund account, but immediately (within 24 hours) write a check from its general treasury account and depositing it in the PAC account.

Rule 2: Local Unions with both private sector and public sector employees as members can use its treasury funds to fund its PAC. But to do so, the union must ensure the dues of its public sector employees are not placed in the PAC bank account. Accordingly, the Local Union needs to place only the dues of private sector members into the PAC fund and to track the specific dues placed in PAC fund in its books (e.g. deposit for 8/1/XXXX consisted of dues check-off check from Private Company, Inc.).

This cursory review of the law regarding contributions by unions to state and local candidates in Iowa may raise numerous questions about what a local union may do or needs to do to be politically active. ***If a Local Union affiliate has questions about political activity in regard to candidates for state and local offices, they should convey them to the IFL, which will***

answer them for the Local Union or direct the Union to competent legal counsel who can provide answers to them.

PART II: CASE LAW UPDATE

UNITED STATES SUPREME COURT

Fortunately, the United States Supreme Court did not weigh-in on any traditional labor law issues during the past year. But, it did decide cases arising under the civil rights statutes and ERISA in four decisions. Three of the four rulings were anti-worker. Only one of the cases was a clear victory for employees.

Most notably and the subject of much public interest, *Bostock v. Clayton County Georgia*, 140 S. Ct. 1731 (2020) involved three cases in which an employer had admittedly discharged or failed to hire individuals because of their identification as GLTBQ. At core, the decision determined whether employment discrimination against GLTBQ employees constitutes discrimination on the basis of "sex" as the term is used in Title VII of the Civil Rights Act. The Court held it is.

The Court concluded that an employee's sexual orientation or gender identity was inextricably related with an individual's sex. And, in each of the cases before it, the Court held that without regard to the existence of other legitimate reasons for the employers' actions, an employer violates Title VII if it would not have taken the complained about action had an employee not identified as GLBTQ or took the action against a GLBTQ employee for conduct it had tolerated in non-GLBTQ workers. The Court's ruling is consistent with earlier decisions giving an expansive reading to the anti-discrimination provisions of Title VII, such as finding same sex workplace harassment or discrimination are unlawful under the statute.

Section 1981 of Title 42 of the United States Code codified the constitutional requirement that citizens of color have the same rights to contract as white citizens. Invoking the federal statute, the National Association of African American Owned Media sued Comcast Corporation (the cable people) for refusing to enter into deals to include TV channels owned by the Association in its line-up. *Comcast Corp. v. Nat'l. Assn. of African American-Owned Media*, 140 S. Ct. 1009 (2020). The Association attempted at numerous times to reach an agreement with Comcast. Comcast, however, refused to air the channels contending the channels offered by the Association did not have sufficient audiences and were not similar to its news and sports slanted programming. The Association contended that while Comcast's asserted reasons might have been motivating factors in its refusal to deal with it, the race of the Association's members was also a motive underlying Comcast's actions.

The Association contended that, like Title VII of the Civil Rights Acts, it was sufficient under Section 1981 to establish that race was simply ***a*** factor in Comcast's refusals to enter agreements with its members. Comcast argued the Association had to show that race was the "but for" cause of its actions, which it was not, because it had legitimate business reasons for its conduct. The District Court agreed with Comcast. The Ninth Circuit U.S. Court of Appeals reversed the District Court's ruling. On review by the Supreme Court, the Court upheld the

District Court's decision. The effect of the Court's ruling is to make it more difficult for anyone asserting a discrimination claim under Section 1981 to prevail on the merits.

The two other decisions of note issued by the Supreme Court dealt with issues arising under the Employee Retirement Income Security Act (ERISA). Both rulings dealt with alleged mismanagement of employer pension plans.

In *Thole v. U.S. Bank NA*, 140 S. Ct. 1615 (2020), Thole and another former employee of U.S. Bank had been participants in the company's "defined benefit" retirement plan. As a refresher, "defined benefit" plans guarantee an eligible retired employee a fixed amount of monthly benefits; a "defined contribution" plan provides for fixed amount of employee and employer contributions to a plan (e.g. 401k). The stock market and other investment performance directly impact the amount of benefits on retirement under a "defined contribution" plan.

On their retirement, both employees applied for and were receiving the amount of benefits they were entitled to under the terms of the defined benefit plan documents. The employees, however, filed a suit against the employer claiming the assets of the pension funds had been mismanaged. The employees did not claim that the mismanagement had in any way adversely affected their pensions.

The Supreme Court concluded the employees did not have the right under ERISA to pursue a claim of breach of fiduciary duties based on the alleged mismanagement of the fund's assets because they were receiving and apparently would continue to receive the benefits they were entitled to under the terms of the plan. Obviously, the Court's decision provides protection to pension fund administrators even if they have engaged in improper conduct in managing the assets of the fund. Missing from the Court's analysis is recognition that all participants in a "defined benefit" plan have a shared interest in ensuring the assets of the fund are managed properly. Put simply, at least in the context of collective bargaining, the more money available to the fund the better position a union is in to negotiate improved pension benefits. In the Court's view, however, employers have sufficient interest in eliminating misconduct in handling pension funds because any money lost due to mismanagement if recovered reverts to them unless the benefits guaranteed under the plan are not being paid.

Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020) had a somewhat better result for participants in an ERISA retirement plan. ERISA provides that a plan participant must institute an action based on a breach of administrators' fiduciary duties within three years the participant has "actual knowledge" of the improper acts. Sulyma had invested in two company sponsored retirement plans. Notably, the fund had invested in "alternative assets" (i.e. investments other than regular stocks and mutual funds) during the run-up to the 2008 market crash. The market decline had adverse impacts on Sulyma's and other participants' ultimate pension benefits.

Sulyman sued the plans' administrators claiming they had breached their fiduciary duties by "over-investing" in alternative assets. There is no dispute that the administrators regularly provided web-based reports regarding the activity of the funds including their

investment in the "alternative assets." In turn, the administrators argued that Sulyma's lawsuit should be dismissed because he had or should have had actual knowledge of their alleged improper investments and, therefore, the suit was not timely because it was filed more than three years after the administrators had disclosed the investments on the employee website. Significantly, in a deposition, Sulyma testified that while he visited the fund website at numerous times, he did not recall seeing the disclosures or remember their content. Accordingly, Sulyma contended he did not have "actual knowledge of the claimed mismanagement until much later. As a result, his lawsuit was timely filed. The Supreme Court agreed. Of particular interest to employees and other small investors, it appears disclosures in the small print of fund reports to participants do not provide plan administrators an easy defense to a claim of mismanagement of a retirement fund. And, employees and other small investors will not be penalized for failing to read closely, or at all, the entirety of plan reports.

NATIONAL LABOR RELATIONS BOARD

It is an understatement, at least, to say the Trump Board during the past year continued its ravaging of employee rights. The onslaught included decisions undermining employees' ability to organize unions, making representation procedures more employer friendly, narrowing the scope of Section 7 protections for workers, and granting employers more leeway in seeking to make unilateral changes in working conditions. The review of the Board's activities begins with rulings affecting union organizational efforts.

Kroger Limited Partnership I Mid-Atlantic, 368 NLRB No. 64 (9/6/19) dealt with a consumer boycott of Kroger's non-union stores. Union agents, who were not employees of Kroger, began hand billing customers who entered the store asking them not to patronize Kroger. They were doing the hand billing on a sidewalk and parking lot area in front of the entrance to the store, which were leased to Kroger. Not liking the hand billing, Kroger instructed the union agents to leave its property. The agents filed charges with the Board claiming Kroger could not enforce its rules against soliciting on its property because in the past Kroger had allowed other groups such as the Girl Scouts and the Salvation Army to solicit sales or contributions on the same property.

The Board dismissed the charge. In doing so, the Board set out the following rules: a property owner "may deny access to non-employees seeking to engage in protected activities on its property while allowing non-employees access for a wide range of charitable, civic and commercial activities that are not similar in nature to protected activities. Additionally, an employer may ban non-employee access for union organizational activities if it also bans comparable organizational activities by groups other than unions." The Board left unclear what specific or general types of activities it considered "similar in nature" to union organizational activities.

In a similar context, the Board, in *Bexar County Performing Arts Foundation*, 368 NLRB No. 46 (8/23/19), considered whether and when a property owner must grant access to its property to off-duty employees of an outside contractor. In *Bexar*, the foundation, which owned the county's performing arts center, ordered employees of the county's symphony orchestra to cease hand billing patrons of the art center on the outside walkways to the entrance of the arts

center. (The symphony employees were upset because some performances at the center had been presented by firms which did not use the symphony to provide music for the performances). Notably, there was a public sidewalk across the street from the entrance to the arts center, which the symphony employees were also using to spread their message to the general public.

In dismissing unfair labor practice charges against the foundation, the Board held "that a property owner may exclude from its property off-duty contractor employees seeking access to engage in Section 7 activities unless (1) the employees work both regularly and exclusively on the property, and (2) the property owner fails to show that they have one or more reasonable non-trespassory alternative means to communicate their message." The Board went on to state that "regularly" means the contractor regularly conducts business on the property and "exclusively" means the employees perform all the work they do for the contract on the property involved. Because the employees of the symphony had performed work for the contractor at other locations, the employees did not work "exclusively" on the Foundation's property. In turn, the Board found the foundation lawfully kicked the hand billers off its private sidewalks.

Further interfering with the ability of employees to organize or otherwise exercise Section 7 rights, in *Caesar's Entertainment d/b/a All Suites Hotel and Casino*, 368 NLRB No. 143 (12/16/19), the Board essentially stripped employees of any statutory right to utilize employer IT equipment, including email systems, to engage in any kind of Section 7 activities. At issue was an employer rule prohibiting employees from using its email system for "non-business" purposes.

The Board upheld the rule. The Board held "an employer does not violate the Act by restricting non-business use of its IT resources absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other or proof of discrimination." The Board expressly stated that other reasonable means of communicating with other employees was satisfied by rules allowing oral solicitation by employees on non-work time and literature distribution rules permitting distribution on non-work time in non-work areas at the job site. Significantly, the Board specifically did not address the impact of its ruling in the Kroger case above regarding the meaning of discrimination under its ruling in this case.

The final decision directly affecting union organizational activities was issued in *Wynn Las Vegas LLC*, 369 NLRB No. 91 (5/29/20). The facts were straight forward. The guards at the casino were in the midst of a union organizational drive. A dealer, who was a member of a different union, while off-duty stopped to urge the guard to support union representation in the upcoming election. The guard, who was on duty, and the dealer talked about the effects of "captive audience" meetings being held by casino managers on union success in the election for about three minutes. The casino issued the dealer a disciplinary warning for violating its rule against engaging in union solicitation on work time. The union representing the dealer filed an unfair labor practice charge challenging the issuance of the warning.

The Board dismissed the charge. In doing so, the Board expanded the meaning of "union solicitation" under the Act and employer no-solicitation rules. It held that solicitation included asking a worker to join a union or sign an authorization car ***and*** encompassed encouraging an employee to vote for or against union representation. Further, in the Board's

view, the lawfulness of the discipline for violation of an employer rule was not determined by whether the solicitation actually interfered with an employee performing his or her work; rather engaging in the solicitation was sufficient to establish a rule violation.

As noted in earlier Reports, after extensive public hearings, the Obama Board adopted administrative rules aimed at expediting Representation Elections. With essentially no public input, the Trump Board issued revised RC rules with provisions which essentially gutted the Obama Board's rules. The national AFL-CIO challenged the issuance of the revised rules. *AFL v. NLRB*, 2020 WL 3041384 (District Court District of Columbia 2020). The Court agreed with the AFL-CIO regarding five aspects of the revised rules.[1] The Court found the remaining challenges had no merit. The AFL-CIO has appealed the Court's failure to find the revised rules as a whole improperly adopted to the Circuit Court of Appeals. The Board commenced enforcement of the rules upheld by the Court on July 31, 2020. The revised rules can be found in full at the NLRB website: www.nlrb.gov.

Providence Health & Services-Oregon d/b/a Providence Portland Medical Center, 369 NLRB No. 78 (5/13/20) dealt with issues arising from a "dual marked" representation election ballot. The Board overturned a regional director's decision to count a challenged ballot of an employees who had placed an "X" in the yes box of the ballot and also placed a diagonal line in the no box. In the past, the Board had dealt with such situations by attempting to determine the likely intent of the voter (e.g. did the employee attempt to erase or cross-out one of the markings). The Board rejected the prior law and stated: "we now hold that where a ballot includes markings in more than one square or box, it is void." As a result of the Board's ruling, the union lost the election by a single vote.

The only redeeming aspect of the decision is that the Board directed that future election ballots contain the following information for prospective voters: that they should only put a mark in the box of their choice and that, if they make a mark inside or around more than one box, they should request a new ballot from the Board agent conducting the election otherwise their ballot will not be counted. Local Unions involved in elections need to make sure the new information is, in fact, on the ballot and should make a special effort to make clear to prospective supporters what they need to do in order to insure their vote is counted.

It is basic law that "independent contractors" do not enjoy the protections of many employment laws, such as the NLRA and FLSA. As a result, some employers attempt to classify persons who are actually their employees as independent contractors. In *Velox Express, Inc.*, 368 NLRB No. 61 (8/29/19), the employer did exactly that and informed its delivery drivers it was treating them as independent contractors. When an employee raised with the employer her and her co-workers' questions and complaints about the classification, Velox fired her. An unfair labor practice charge followed which alleged the employer had violated Section 8(a)(1) of the

[1] Specifically, the Court found the following aspects of the revised rules improperly adopted: (1) the requirement to hold pre-election hearings on bargaining unit scope, voter eligibility and supervisory status; (2) delaying the holding of elections to no earlier than 20 days after the direction of election; (3) changing 2 business days to 5 for providing the voter eligibility list; (4) requiring observers to be members of the voting unit, and (5) staying certification pending a request for review of a regional direction of election.

NLRA both by classifying the employees as independent contractors and by discharging the employee for disputing the classification.

In regard to the erroneous misclassification of the drivers, the employee argued the employer informing the workers that it was dealing with them as independent contractors violated Section 8(a)(1) because doing so coerced them into thinking they did not enjoy the protections of the Act. The Board rejected the argument. In its view, the employer was merely informing its workers of its legal opinion regarding their legal status. In turn, the company's action was protected free speech under the statute. The Board noted: it is "too far for us to conclude an employer coerces its workers…whenever it informs them that they are independent contractors if the Board ultimately determines that the employer is mistaken." The Board reinstated the discharged driver but refused to order the employer to reclassify its drivers as employees.

In addition to ransacking employee organizational rights, the Board narrowed employer bargaining obligations toward its organized employees in a trio of decisions. As background, the United States Supreme Court long ago held the NLRA prohibited an organized employer from making a unilateral change in a working condition which was a mandatory subject of bargaining under the Act without first giving the employees' union notice of the change and an opportunity to bargain about it – unless the union had clearly waived its statutory right to bargain about the subject of the change. Thus, during both the term of a collective bargaining agreement and at its expiration, an employer had to maintain the status quo until it had bargained to impasse with the union regarding the change – again unless the union had clearly waived its statutory right to bargain about the proposed changes in working conditions. When an employer had bargained to impasse on the proposed change, the employer absent agreement with the union could unilaterally impose the change unless the change conflicted with contract language.

In *MV Transportation, Inc.*, 368 NLRB No. 66 (9/10/19), the Board dealt with an employer's attempt to make changes in numerous work rules mid-contract term without providing the incumbent union notice of the proposed changes and the opportunity to bargain over them. The Board found the changes did not violate the Act over the objections of the union that it had not waived its statutory right to notice and an opportunity to bargain about them. In upholding the company's actions, the Board held that the question of whether the union had waived its right to bargain was secondary to whether the parties' contract granted the employer the right to make the proposed changes. Only if it determined that the contract did not contain provisions granting the employer the right to make the changes did the issue of whether the union waived its right to bargain need to be decided. The Board concluded various provisions of the parties' contract, including the management rights clause, authorized the company to make the proposed changes without bargaining with the union

Notably under the prior law, the Board had not found that the union's agreement to language in a standard management rights clause in a contract (e.g. one granting the employer to make reasonable rules) constituted a waiver of the union's statutory bargaining rights. The clear lessons for local unions are twofold: (1) review the management rights clause in their contracts to determine how easily it can be read to allow mid-term changes and (2) be careful in

negotiating other provisions of the agreement not to agree to language giving the employer too much "flexibility" in applying the provisions. Since it is unlikely an employer will give-up its management rights provision or that a union would strike over changing it, local unions need to consider negotiating language into other provisions which indicate the union's intent to restrict attempts by the employer to change practices under them during the contract term.

The Board did not permit an employer to make unilateral changes at the expiration of a collective bargaining agreement *in Nexstar Broadcasting, Inc d/b/a KOIN-TV*, 369 NLRB No. 61 (4/21/20), but in doing so, the Board articulated some bad law. After the collective bargaining agreement expired, the company unilaterally changed the circumstances as spelled out in the contract in which it would require a driving background check on its employees and ceased posting work schedules four months in advance as it had under the provisions of the contract. The union, of course, challenged the employer's actions on the grounds the company was obligated to maintain the terms of the expired contract until it bargained over the changes with the union.

The Board acknowledged that the company had a ***statutory*** obligation to maintain the status quo post contract expiration. But, the Board held, "provisions in expired collective bargaining agreements do not cover post expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration." As a result, an employer can lawfully make unilateral changes to the express terms of a contract after it expires as long as it has bargained with the union regarding the changes to impasse ***unless*** the provision of the contract involved granted the employer the right to make unilateral changes ***or*** the parties have agreed the contract provision involved survives contract expiration. The import of the decision seems to suggest that the terms of an expired contract do not necessarily establish the "status quo" for statutory bargaining purposes unless the parties have provided so in the contract. At this point, the impact of the ruling on established law regarding employer implementation of its offers at impasse in negotiations is unclear. However, it is clear is that absent an agreement to extend a provision of a contract post expiration, the Board will have virtually unfettered leeway in determining what an employer's statutory obligations to bargain over a change may be.

A precursor to the Nexstar decision was *Valley Hospital Medical Center, Inc.*, 369 NLRB No. 139 (12/16/19). Ending a long and tortuous litigation history on the issue, the Board settled the issue regarding whether consistent with its statutory duty to maintain the status quo upon expiration of a contract, an employer in a right to work state can cease making dues check-offs. In short, the Board concluded it could unless the check-off provisions contained express language indicating the provisions survived the expiration of the contract.

800 River Road Operating Co., LLC d/b/a Care One at New Milford, 369 NLRB No. 109 (6/23/20) presented another opportunity for the Trump Board to free employers from bargaining obligations. The Obama Board had held that an employer with a bargaining relationship with a union prior to reaching agreement on an initial contract had an obligation to bargain with the union about its intent to impose significant discipline (discharge/suspension) on a bargaining unit employee prior to imposing the discipline. An aim of the ruling among others was to provide employees whose union had won a representation election some protection

against subtle retaliation against known or suspected union supporters. In *800 River Road*, the Board overturned the prior precedent and flatly stated: "upon commencement of a collective-bargaining relationship, employers do not have an obligation…to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice."

The tenor and effects of the Trump Board's rulings reflect the Board's anti-union and anti-employee views. Another four years of Trump and his Board would simply be devastating for the labor movement.

IOWA COURTS AND PERB

Thankfully, the Iowa Supreme Court failed to issue any decisions of particular interest to the Labor Movement in the last year after the bloodbath that occurred last year. The most important issue to arise out of the Iowa Supreme Court this year was the appointment of Matt McDermott to the Iowa Supreme Court by Governor Reynolds. Justice McDermott argued for the State in both the *AFSCME and ISEA* cases that were reported on in last year's Legal Report. The appointment of Justice McDermott occurred after the retirement of Justice Wiggins. With the appointment of Justice McDermott, Governors Branstad and Reynolds have now, with the exception of Justice Appel, appointed six of the seven members of Iowa's Supreme Court.

The Iowa Court of Appeals, however, did issue one decision of interest to the Labor Movement, *Kleppe v. Fort Dodge Police Dept.*, 2020 WL 1548519 (Iowa App. Ct. 2020). Kleppe was a former police officer for the City of Fort Dodge. Kleppe's employment was covered by a collective bargaining agreement between the City and PPME. The Union filed a grievance on Kleppe's behalf alleging that Kleppe was not properly compensated for overtime due to the time he spent training his service dog. The grievance was not processed through all of the grievance steps.

Instead of processing the grievance through all of the steps, Kleppe instituted an action in district court seeking unpaid wages under Iowa Code Chapter 91A. The City raised an affirmative defense that Kleppe failed to exhaust the grievance procedures in the collective bargaining agreement. The district court granted the City's motion for summary judgment.

On appeal, the Iowa Court of Appeals affirmed the district court's decision. In doing so, the Iowa Court of Appeals rejected Kleppe's argument that his claim for unpaid wages under Iowa Code Chapter 91A constituted a separate cause of action outside of the collective bargaining agreement. Instead, relying upon the terms of the collective bargaining agreement, the Court held that Kleppe's claim for unpaid wages was precluded in the district court because Kleppe failed to exhaust the administrative remedies provided in the contract. Local Unions should be careful when processing claims for unpaid wages under collective bargaining agreements to ensure that a bargaining member's claim for unpaid wages is not waived if the Local Union decides not to pursue a particular grievance through each step of the grievance procedure.

Similar to the Iowa Courts, PERB did not issue many decisions of note over the course of the past year. However, the Local Unions should note the following decisions. First,

in *AFSCME, Iowa Council 61*, 2020 PERB Case No. 100813 (PERB 2020), the Board made a final ruling on a negotiability dispute between AFSCME, Iowa Council 61 and the Department of Administrative Services. The petition was filed shortly after the enactment of the amendments contained in HF 291 to Iowa Code Chapter 20 regarding proposals made by AFSCME, which concerned a bargaining unit that was not made up of at least thirty-percent public safety employees. In a 121-page decision, the Board ruled on fifty-nine proposals. The decision is of value to Local Unions in that it provides further guidance for public sector unions regarding permissive and illegal subjects of bargaining for non-public safety bargaining units under the amendments contained in HF 291.

Second, the Board also issued a decision in Greater Regional Medical Center, 2020 PERB Case No. 102390 (PERB 2020). In this case, SEIU represented various employees of GRMC. In August 2019, PERB began filing the necessary documents to conduct a retention and recertification election. As part of its campaign to garner votes to be retained, SEIU emailed bargaining unit members to their work email addresses on four occasions. GRMC's email security system quarantines mass emails, and as a result, each recipient received a message that the messages were "Cisco Spam Quarantine." If the recipient clicked on the message, the recipient could view who the message was from and the information line. Apparently, SEIU became aware of this problem with the email messages but failed to notify GRMC. SEIU lost the retention and recertification election by virtue of not reaching the majority threshold for "yes" votes by fifteen votes. Following the election, SEIU filed a timely objection to the election.

Before the Board, SEIU alleged that circumstances other than misconduct prevented the bargaining unit from freely expressing their preference due to the issue with the email. The Board rejected SEIU's assertion. The Board primarily relied upon three facts: (1) GRMC did not actively quarantine the email messages; (2) SEIU failed to take any action to alert GRMC of the problems; and (3) SEIU had other ways in which to contact bargaining unit members. The Board noted, however, that it may have been a different case if GRMC had actively blocked SEIU's email messages. The important lesson for Local Unions in this case is that if there is a problem with email communications to bargaining unit members in a retention and recertification case, the Local Union should alert the employer and try to resolve the issue prior to the end of the election.

PART III: COVID-19 IMPACTS UPON THE LABOR MOVEMENT

The COVID-19 Pandemic has created a crisis in this country that few Americans have experienced in their lifetimes. If nothing else, the COVID-19 pandemic has demonstrated that the need for greater legal protections and a social safety net are critical to dealing with this crisis and protecting workers.

As was the case in March, when we provided initial guidance to the Labor Movement regarding the issues confronting it as a result of the COVID-19 Pandemic, the issues confronting the Labor Movement continue to change on a daily, if not, hourly basis. The purpose of this portion of the Legal Report is to serve as a starting point for Local Unions and their members during this difficult time. Local Unions should consult their Legal Counsel to

make sure circumstances have not changed after receipt of this Report, and this portion of the Legal Report is not intended to offer any legal advice.

IOWA PUBLIC EMPLOYEMNT RELATIONS BOARD

PERB has issued three Orders related to COVID-19 that dealt with the operations of the Agency during this time. The most recent Order was issued on July 8, 2020. It is our expectation that PERB will issue another Order prior to the end of August. In pertinent part, the July 8, 2020 Order provided the following:

- No person who has an elevated risk of transmitting COVID-19 may personally attend any of the following: PERB office, hearing, conference, board meeting, or other proceeding without prior authorization from PERB.
- All oral arguments/non-evidentiary hearings set to commence no earlier than June 15 have been continued to a date no earlier than June 25 or conducted by telephone, at the discretion of the Board or Administrative Law Judge.
- Evidentiary hearings set to commence before August 3 have been continued to to a date no earlier than August 3.
- Any mediation set to occur before June 1 has been continued or directed to occur by videoconference or telephone, at the discretion of the Board.
- PERB may conduct conferences and hearings using video or phone conferencing when it believes it would be practical and efficient to do so.

Please continue to monitor the PERB website for updated guidance.

NATIONAL LABOR RELATIONS BOARD

The NLRB issued an order on March 16, 2020 ordering all staff to telework, other than minimal staffing to handle mail, until April 1, 2020.

Currently, the NLRB has opened most offices. The NLRB, however, asks that a person call prior to reporting to the office and some offices remain closed to the public. Local Unions can check the status of local offices at the following website: https://www.nlrb.gov/field-office-status.

Immediately after the decision to require staff to telework, the NLRB also delayed elections. The NLRB has since recommenced elections, and on July 6, 2020, the General Counsel for the NLRB issued Memorandum GC 20-10 regarding "Suggested Manual Election Protocols." The Protocols include the following:

Election Arrangements to be Included in Election Agreement or Direction of Election

- The employer must provide:

- Plexiglass barriers of sufficient size to separate observers, the Board Agent, and voters from each other;
- Masks, hand sanitizer, gloves, and wipes for observers;
- Markings on the floors to remind/reinforce social distancing;
- Disposable pens without erasers for each voter;
- Glue sticks or tape to seal challenge ballot envelopes.

- The NLRB must provide a mask, face shield, hand sanitizer, gloves, disinfectant wipes, and disposable clothes (if requested) to the Board Agent conducting the election.

- The election location must:

    - Contain spacious polling areas sufficient to accommodate social distancing to ensure proper separation of observers, Board Agents, and voters;
    - Have a separate entrance and exit for voters in the polling area;
    - Have separate tables spaced six-feet apart for the Board Agent, observers, ballot booth, and ballot box.

- All voters, observers, party representatives, and other participants should wear CDC-conforming masks in all phases of the election.

Election Mechanics

- Polling times and procedures for releasing voters must be sufficient to accommodate social distancing and cleaning requirements. Tables and voting booths must maintain proper social distancing.
- Any Election Agreement or Direction of Election should specify the maximum number of representatives who can attend the pre-election conference, whether there will be a voter release schedule, the number of voter lists, and the number of observers per party (which should be limited to one where feasible).
- Only one voter is allowed to approach the voter booth at a time. After clearance by the observer, the Board Agent will place an individual ballot on the table for the voter.

Certifications Required

- Each party or party representative participating in the pre-election conference, serving as an observer, or participating in the ballot count must certify in writing that within the preceding fourteen days:

    - The party or representative has not tested positive for COVID-19 or have been directed by a medical professional to proceed as if they have tested positive for COVID-19;

        - Are not awaiting results of a COVID-19 test;
        - Have not had any direct contact with anyone who has tested positive for COVID-19 in the preceding fourteen days;
        - Individuals who do not provide such certification will not be permitted to be physically present at the pre-election conference, to serve as an observer, or be present at the ballot count;
        - Individuals who are not a party, party representative, or an observer must stay at least fifteen feet away from the Board Agent at the pre-election conference or ballot count.

    - 24-48 hours prior to the election, the Employer must certify in writing:

        - That the polling area has been cleaned in accordance with CDC hygiene and safety standards.
        - How many individuals present at the facility within the preceding fourteen days have:
            - Tested positive for COVID-19 or have been directed by a medical professional to proceed as if they have tested positive for COVID-19;
            - Are awaiting results of a COVID-19 test;
            - Are exhibiting symptoms of COVID-19;
            - Had any direct contact with anyone who has tested positive for COVID-19 in the preceding 14 days;
            - The Regional Director will consider whether the election should be held as scheduled if the appropriate certification is provided;
            - If the appropriate certification is not timely provided to the Regional Director, the Regional Director has discretion to cancel the election.

    - All parties must agree in writing to notify the Regional Director within fourteen days after the election if any individuals who were present at the facility on the day of the election have:
            - Tested positive for COVID-19 or have been directed by a medical professional to proceed as if they have tested positive for COVID-19;
            - Are awaiting results of a COVID-19 test;
            - Are exhibiting symptoms of COVID-19;
            - Had any direct contact with anyone who has tested positive for COVID-19 in the preceding fourteen days.

Due to the onset of the COVID-19 Pandemic, there may be more opportunities for Local Unions to engage in organizing drives and workers recognize the potential protections afforded by a Union contract. Local Unions need to be cognizant of the COVID-19 Election Protocols as well as the changing election rules, which is noted above in Part II of the Legal Report.

Union Elections

The LMRDA requires that all national and international labor unions elect their officers at least every five years. Officers of intermediate bodies, such as general committees, system boards, joint boards, joint councils, conferences, and certain districts, district councils and similar organizations, must be elected at least every four years, and officers of local labor unions at least every three years.

OLMS has stated the following with respect to internal union elections:

- Labor Unions affected by COVID-19 must still make a good faith effort to conduct officer elections within LMRDA timeframes.
- OLMS retains jurisdiction to file a civil enforcement action concerning a failure to hold a timely election after receipt of a complaint from a union member who has first sought a remedy from his or her union.
- If OLMS receives a complaint from a union member solely regarding a union's failure to hold an election within LMRDA timeframes, but the election has been completed prior to OLMS receipt of the complaint, then OLMS will take no enforcement action.
- If OLMS receives a complaint regarding a union's ongoing failure to hold an election, and the failure was attributable to COVID-19, OLMS will promptly seek a voluntary compliance agreement with the union.
- The agreement would require the union to hold the election when practicable on a certain date. With such an agreement, OLMS will not seek a civil enforcement action based on the complaint, provided the election is held in conformance with the agreement.

Based upon this guidance, Local Unions will continue to have to have officer elections. Local Unions should consult with their International Unions and counsel as to the manner in which the elections should be conducted.

Public Disclosures Reports – e.g. LM-2s, etc.

Under current law, there is no mechanism to seek an extension to file an LM-2 Report or other required filings with OLMS. These filings must be made within ninety days of the end of the Local Union's fiscal year.

Failure to file a timely and complete report is an ongoing violation of the LMRDA. OLMS has jurisdiction to file a civil enforcement action concerning a failure to meet reporting requirements.

However, OLMS will not pursue a civil enforcement action with regard to a delinquent or deficient report when these reporting violations are attributable to COVID-19.

Local Unions wishing to take advantage of this enforcement policy should contact OLMS before the report is due, describe the circumstances necessitating additional time, and provide a date certain by which the report can be reasonably submitted. Under these circumstances, OLMS will not lodge a civil enforcement to obtain the delinquent or deficient report.

The point is – if a Local Union cannot meet its filing deadline due to COVID-19 (for many Local Unions it is March 30), the Local Union should notify OLMS and provide a date when the Local Union believes that the report can be submitted.

Union Meetings

Under the LMRDA, Local Unions must make a good faith effort to hold Union meetings. At various points since March, there have been limits upon gatherings of more than ten people. As of the current date, there is not such a limitation upon gatherings in Iowa. However, in the event that such a limitation is again put into place, Local Unions should first consult with their International to determine whether special permission must be given to cancel or postpone a meeting. And, if a Local Union must schedule a meeting, the Local Union may choose to explore whether holding such a meeting electronically or by conference call is preferred.

THE ADA AND EMPLOYER RELATED INQUIRIES

Prior to the start of the COVID-19 Pandemic, the ADA prohibited inquiries into the medical history of employees and medical examinations of employees once an employee had begun work, subject to the exceptions for business necessity or if the condition was obvious (e.g. an employee has a broken arm, the employer could ask questions).

Title I of the ADA applies to private employers with 15 or more employees. It also applies to state and local government employers, employment agencies, and labor unions. All nondiscrimination standards of Title I also apply to federal agency under Section 501 of the Rehabilitation Act.

Following the onset of the current Pandemic, the EEOC issued updated guidance regarding the interplay between COVID-19 and the ADA. For the most part, Local Unions are likely to encounter a significant amount of questions related to disability related inquiries and medical exams. Below is a summary of likely questions that may be raised.

Permitted Screening and Other Issues

Question No. 1 – How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce during the COVID-19 pandemic?

During the Pandemic, employer may ask questions related to whether employees are experiencing symptoms of COVID-19. These symptoms include fevers, chills, cough,

shortness of breath, or sore throat. The employee must maintain all information about an employee's illness as a confidential medical record in compliance with the ADA.

The list of symptoms that an employer may ask an employee about regarding COVID-19 may be expanded based upon guidance from the CDC, other public health authorities, and reputable medical sources for guidance on emerging symptoms associated with the disease. Examples of such symptoms include new loss of smell or taste as well as gastrointestinal problems.

Question No. 2 – When may an employer take the body temperatures of employees during the COVID-19 pandemic?

Typically, measuring an employee's body temperature is a medical examination. However, due to the community spread of COVID-19 and the issued guidance regarding attendant precautions, an employer may measure an employee's body temperature.

Question No. 3 – Does the ADA permit employers to require employees to stay home if they have symptoms of COVID-19?

Yes, relying upon the guidance from the CDC, the EEOC has determined that employers may require employees to stay home if they become ill with COVID-19.

The issue that arises for Local Unions is how an employee is compensated if the employee is sent home with either symptoms of COVID-19 or the disease itself. Local Unions should examine their collective bargaining agreements to determine whether employees are entitled to regular pay, sick leave pay, vacation leave pay, FMLA leave, or short-term disability. In some cases, a Local Union may consider filing a grievance if there is disagreement regarding the appropriate manner in which the employee is to be compensated.

Question No. 4 – When an employee returns to work, does the ADA allow employers to require a physician's note certifying fitness for duty?

Yes. Such inquiries are permitted under the ADA because the inquiries are not disability-related, and alternatively, if the Pandemic was more severe, such inquiries would be justified under the ADA standards for disability-related inquiries of employees.

For Local Unions, there is a practical problem that may face employees. Due to the Pandemic, many health care professionals are either not providing such notes, or there may be significant delays in the ability of employees to obtain such documentation. In turn, Local Unions need to be cognizant of these issues and work to assist bargaining unit members in the event that bargaining unit members are unable to obtain such documentation.

Question No. 5 – May an employer administer a COVID-19 test (a test to detect the presence of the COVID-19 virus) before permitting employees to enter the workplace?

The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." The EEOC has determined that application of this standard permits such testing. In this regard, the EEOC Guidance states the following:

> Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 tests to employees before they enter the workplace to determine if they have the virus.

However, the EEOC Guidance notes that employers should ensure the tests are accurate and reliable. And, the EEOC Guidance should consider the incidence of false-positives or false-negatives associated with a particular test.

Question No. 6 – Under the ADA, may an employer require antibody testing before permitting employees to re-enter the workplace?

No. The EEOC's Guidance states that an antibody test constitutes a medical examination under the ADA.

Question No. 7 – If an employer requires all employees to have a daily temperature check before entering the workplace, may the employer maintain a log of the results?

Yes. However, the employer needs to maintain the confidentiality of this information.

Question No. 8 – May an employee disclose the name of an employee to a public health agency when it learns that the employee has COVID-19?

Yes.

Question No. 9 – May an employer postpone the start date or withdraw a job offer because the individual is 65 years of age or older or pregnant, both of which place them at higher risk from COVID-19?

No. The fact that the CDC has identified those who are 65 years of age or older, or pregnant women, as being at greater risk does not justify unilaterally postponing the start date or withdrawing a job offer. However, an employer may choose to allow telework or to discuss with these individuals if they would like to postpone the start date.

Improper Screening – Possible ADA Violations

The following are examples of issues that may violate the ADA:

- Asking asymptomatic employees if they have medical conditions that would make them especially vulnerable;
- Compelling employees to take vaccine if they have a medical condition that prevents doing so safely;
- Failing to share medical information only with those who have a need to know.

Depending upon the industry in which a Local Union may represent employees, screenings may differ. However, Local Unions should work with employers to help mitigate the spread of the virus, but Local Unions need to also be vigilant to protect against potential abuses and violations of contractual terms and the ADA. And, if an employee needs an accommodation, Local Unions need to be ready to assist collective bargaining unit members in the interactive accommodation process.

COLLECTIVE BARGAINING AGREEMENT ISSUES

Contract Terms

There is a myriad of issues for Labor Unions with respect the COVID-19 pandemic and collective bargaining agreements. At the outset, Labor Unions need to familiarize themselves with the following types of provisions contained in their CBAs:

- Sick Leave and Other Paid Leave Provisions;
- Vacation Policies;
- Seniority and Layoff;
- Sickness and Accident Benefits;
- Management Rights and the Right to Establish Reasonable Rules;
- Hour Guarantees;
- Health and Safety Language and Contractual Rights to Refuse to Work;
- Act of God, emergency, etc. provisions.

As a general proposition, collective bargaining agreements are likely to provide better benefits than those that were just passed by the United States Congress this past Spring.

However, the difficult aspect of the current pandemic is three-fold. First, the pandemic has not changed the labor-relations maxim – obey now, grieve later. Second, at this point, getting to an arbitration hearing is likely going to take a significant amount of time, many arbitrators are postponing hearings and are delaying hearings due to the pandemic. Finally, even if a Local Union may get to a hearing, an arbitrator may find that, given the circumstances of the pandemic, the employer was permitted to act in the manner in which the employer acted.

Nonetheless, despite the foregoing, Local Unions need to continue to file and process grievances. Local Unions should consider holding grievance meetings telephonically and/or electronically. Local Unions' duty of fair representation has not been impacted by the pandemic, and as a result, Local Unions need to continue to police the contract.

Bargaining

Section 8(d) of the NLRA obligates the parties to "meet at reasonable times and confer in good faith." Again, if a Local Union has a contract that is set to open during the pandemic, the Local Union continues to have an obligation to bargain, which includes notifying FMCS of the opening of the contract by submitting the F-7 Notice to the Agency.[2]

Under current law, face to face bargaining is required. *See*, *Fountain Lodge*, 269 NLRB 674, 674 (NLRB 1984); *Redway Carriers, Inc.*, 274 NLRB 1359, 1377 (NLRB 1985) ("face to face negotiations between the bargaining principals is an elementary and essential condition of bona fide bargaining.")

In turn, employers cannot insist on bargaining by mail or by telephone. *See*, *Success Village Apartments*, 347 NLRB 1065, 1080 (NLRB 2006); *Beverly Farm Foundation, Inc.*, 323 NLRB 787 (NLRB 1997); *Fountain Lodge*, 269 NLRB 674, 674 (NLRB 1984).

As to videoconferencing, a 2003 Advice Memorandum, *United Restoration*, 36-CA-9318 (Oct. 30, 2003), concluded that:

> Videoconferencing is an inadequate substitute for face-to-face meetings and recommended issuance of complaint against an employer insisting upon such bargaining.

Similarly, a 2019 ALJ decision concluded that an offer to bargain via videoconference was insufficient to satisfy its obligation to bargain, at least in the context of the employer's overall dilatory tactics. *Rhino N.W., LLC*, 2019 WL 5565134 (Oct. 28, 2019). The ALJ decision was not appealed.

The question, then, becomes whether a party can insist upon meeting only by conference call or video conference. In this regard, Local Unions should be cognizant of the following cases:

> "The procedure of collective bargaining requires that the employer make his representatives available for conferences at reasonable times and places and in such a manner that personal negotiations are practicable." *Lorillard, P., Co., Inc.*, 16 NLRB 684, 696 (NLRB 1939).
>
> "The Board does not take a per se approach to deciding where bargaining should take place and instead considers all the relevant circumstances bearing on the issue." *Somerville Mills*, 308 NLRB 425, 426 (1992) (rejecting ALJ view that law requires presumption that parties are to meet at or near the place where unit employees work).
>
> The "determining factors" identified in *Somerville Mills* are "whether the proposed bargaining location is unreasonable, burdensome, or designated

[2] According to the FMCS website, all F-7 notices must be submitted electronically.

> to frustrate bargaining, and whether the proponent has been intransigent and in bad faith." *Somerville Mills*, 308 NLRB at 426.

Given the current circumstances – e.g. the current Pandemic and the current nature of the Board, Local Unions should work with their employers to determine (1) whether an extension is possible and/or in the best interest of the membership; (2) whether the Union is in a position to engage in telephonic and/or electronic bargaining; and (3) whether current orders from the Government would allow the parties to meet in person.

Moreover, Local Unions should be cognizant of the current law regarding unilateral changes during bargaining. In *Hartford Head Start Agency, Inc. & Local 517m, Serv. Employees Int.'l Union,* 354 NLRB 164 NLRB 2009), two exceptions to the rule prohibiting unilateral changes during bargaining were stated:

1. When a union engages in bargaining delay tactics and
2. "[W]hen economic exigencies compel prompt action."

Citing *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

Economic exigencies are "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Hankins Lumber Co.*, 316 NLRB 837, 838 (NLRB 1995).

The following cases address economic exigencies. "Absent a dire financial emergency, economic events such as . . . operation at a competitive disadvantage . . . do not justify unilateral action." *RBE Electronics*, 320 NLRB 80, 81 (1995). Additionally, an employer can "satisfy its statutory bargaining obligation by providing . . . adequate notice an opportunity to bargain over the changes it proposes to respond to the exigency and by bargaining to impasse over the particular matter. In such time sensitive circumstances, however, bargaining to be in good faith, need not be protracted." *See also*, *Naperville Ready Mix, Inc.*, 329 NLRB 174, 182-184 (1999).

Further, Local Unions should also note the following. "In defining the less compelling type of economic exigency, the Board in *RBE Electronics* made clear that the exception will be limited only to those exigencies in which time is of the essence and which demand prompt action. The Board will require an employer to show a need that the particular action proposed be implemented properly. Consistent with the requirement that an employer prove that its proposed changes were "compelled," the employer must also show the exigency was caused by external events, was beyond its control, or was not reasonably foreseeable." *Hartford Head Start*, 354 NLRB at 187-88 (2009).

Finally, Local Unions need to be prepared to require bargaining over unilateral changes. In this regard, Local Unions need to proactively request bargaining over proposed changes, the effects of any new legislation, or other government edicts. The importance of this is that Local Unions should attempt to avoid creating precedent by implying a waiver by failing to

act.[3] To this end, if the employer claims there is a legal requirement or exigency, the Local Union should ask for detailed support.

Benefit Issues

There are several issues on the benefits front that Local Unions should be aware of moving forward. First, state insurance departments have directed carriers to cover tests and other services at 100% with no cost sharing. Second, states have also directed pharmacy benefit managers (PBMs) to provide flexibility with refills and other pharmacy issues. Finally, Local Unions should note that state laws would not apply to self-insured plans, therefore, third-party administrators have been asking self-insured plans to opt-in (or opt-out) of coverage rules similar to those in state insurance laws.

Further, the Families First Coronavirus Response Act took several steps related to COVID-19. The Act requires group health plans (and insurers) to cover specific services related to testing for the virus that causes COVID-19. The Act applies to all group health plans, including self-insured plans, and grandfathered plans under the Affordable Care Act. The Act became effective on March 18, 2020 and applies during the currently declared national emergency.

The following applies for COVID-19 testing. Group health plans and insurers must provide coverage for and not charge any cost sharing for the following services:

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[3] Local Unions should review *MV Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019), which is cited above in PART II of the Legal Report. In that case, the Board stated the following:

> Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. For example, if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate Section 8(a)(5) and (1) by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies. In both instances, the employer will have made changes within the compass or scope of a contract provision granting it the right to act without further bargaining. In other words, under contract coverage the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement.
>
> On the other hand, if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. Thus, under the contract coverage test we adopt today, the Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does *not* come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.

(1) Diagnostic tests to detect the virus that are approved or authorized by the FDA, including the administration of such tests; and

(2) Items and services furnished to individuals during provider office visits (whether in-person or via telehealth), urgent care visits, and emergency room visits that result in an order for, or the administration of, the test described above, but only to the extent such items or services relate to the furnishing or administration of the test or the evaluation of whether the person needs the test.

The prohibition on cost sharing means that these services cannot be subject to a deductible or to copayments and coinsurance. And, plans and insurers are also prohibited from imposing prior authorization or other medical management requirements for these services. Finally, for Qualified High Deductible Health Plans (HDHP), the HDHP will not fail to be considered a HDHP merely because the health plan provides health benefits associated with testing for and treatment of COVID-19 without a deductible, or with a deductible below the minimum deductible (self-only or family) for an HDHP.[4]

Finally, the Department of Health and Human Services has stated that it will not penalize healthcare providers that use telecommunication methods that may not fully comply with HIPPA.[5] The HHS guidance is intended to make it easier for individuals to seek virtual care from their current provider.

FEDERAL MEDIATION AND CONCILIATION SERVICES (FMCS)

We note the following with respect to how FMCS is handling the COVID-19 pandemic. First, as noted above, all F-7 filings must be submitted electronically.

Second, FMCS is working to expand its electronic mediation services. Please review the FMCS website for further guidance on this issue.

Finally, FMCS provided the following advice to arbitrators as to how to handle the situation.

> Arbitration and COVID-19
> The short answer regarding how to deal with the situation as far as this Office is concerned is: use your best judgment; it is up to your discretion how to handle any given case under the circumstances. FMCS cannot be in the position of offering medical advice, other than to suggest you check on appropriate website sources of information, such as the Centers for

[4] The IRS Notice 2020-15 that provided for the treatment of HDHP at this time appears to be written broadly to apply to any benefits associated with testing for and treatment of COVID-19.

[5] We remind Local Unions that there is no private right of action under HIPPA for a violation of HIPPA's privacy rules. Additionally, we note that not all employers are subject to HIPPA requirements – only those who would be considered a "covered entity" under the HIPPA rules.

> Disease Control, and health departments for your state and locality, as well as with your own physician, if you have any doubts or questions. A few things to make clear from our perspective:
>
> We will not be second-guessing any determination that you make as far as scheduling, postponing, or canceling hearings under the circumstances.
>
> Among options you may wish to consider in any given case are:
>
> (1) Postponing the hearing until the situation improves
>
> (2) Offering the possibility of appointing a different arbitrator: if you do this, let the parties know we will happily issue a new panel at no additional charge
>
> (3) Offering to hold the hearing via video (e.g., Skype)
>
> If you know you would be postponing the scheduling of hearings in all cases or in cases involving air travel or other mass transportation, we ask that you please go into your account and make yourself unavailable for all cases, or for cases not falling within a particular geographic area that you specify; the alternative, if you prefer, is to immediately let the parties know upon your appointment that you will not be able to schedule the case any time in the near future based on the pandemic situation, and provide them with options.

Based upon the above direction from FMCS to arbitrators, it is likely that many arbitrators will postpone hearings or delay their availability. Local Unions should check their collective bargaining agreements to make sure that if the agreement provides for a hearing within a period of time that Local Unions reach an agreement with the employer to extend the deadline. And, if agreements provide for a limiting of backpay, Local Unions should consider seeking a MOU or LOA with the employer to expand the time for a backpay award, if necessary.

OSHA

OSHA does not have specific standards pertaining to COVID-19. To this end, at the Federal level, the government has refused to issue specific standards. And, in Iowa to date, the Labor Commissioner has also refused to issue standards for workplace protections. Instead, OSHA has issued general "guidance" with respect to industries as a whole as well as specific industries. We recommend that Local Unions review the OSHA website located at https://www.osha.gov to review both the general and specific "guidance."

Despite the lack of specific standards, Local Unions should be aware of the general standards and OSHA's position regarding record keeping. In terms of the general standards, there are three standards which are of particular import. Specifically, Local Unions should be aware of the following three requirements:

(1) OSHA's Personal Protective Equipment (PPE) standards (in general industry, 29 C.F.R. 1910 Subpart I), which require using gloves, eye and face protection, and respiratory protection.

(2) The General Duty Clause, Section 5(a)(1) of the Occupational Safety and Health (OSH) Act of 1970, 29 U.S.C. 654(a)(1), which requires employers to furnish to each worker "employment and place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."

(3) OSHA's Bloodborne Pathogens standard (29 CFR 1910.1030) applies to occupational exposure to human blood and other potentially infectious materials that typically do not include respiratory secretions that may transmit COVID-19. However, the provisions of the standard offer a framework that may help control some sources of the virus, including exposures to body fluids (e.g. respiratory secretions) not covered by the standard.

Local Unions should note that it is unlikely that OSHA is going to utilize any of these requirements to provide workplace protections for COVID-19. Rather, it is more likely that OSHA is going to treat the current pandemic in a manner similar to a natural disaster. For example, in the case of a natural disaster, an OSHA investigator may come to a work site on two occasions, find potential violations, and not issue a violation. However, if the OSHA investigator came to the work site a third time and found the same violation, the OSHA investigator would only then issue a citation. Put simply, the current OSHA standards do little to protect workers facing a pandemic such as COVID-19.

The other issue that Local Unions need be cognizant of with respect to OSHA is the record keeping requirement. As Governor Reynolds' continues to be less than transparent with respect to outbreaks in workplaces, it is important for Local Unions to understand OSHA's stance with regard to record keeping requirements.

In late May, 2020, OSHA issued guidance regarding how to determine whether a case of COVID-19 was work related. Specifically, OSHA stated the following:

> If, after the reasonable and good faith inquiry, the employer cannot determine whether it is more likely than not that exposure in the workplace played a causal role with respect to a particular case of COVID-19, the employer does not need to record that COVID-19 illness.

Based upon this statement, employers have a great deal of leeway in making the decision as to whether a COVID-19 illness is work-related, and thus, whether the illness is an OSHA recordable event.

Under OSHA's recordkeeping requirements, then, a COVID-19 illness is a recordable illness requiring an employer to record the illness if:

(1) The case is a confirmed case of COVID-19, as defined by the Centers for Disease Control and Prevention (CDC);

(2) The case involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7:

> Under 29 C.F.R. § 1904.7, an employer must consider an injury or illness to meet the general recording criteria, and therefore to be recordable, if it results in any of the following: death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness. An employer must also consider a case to meet the general recording criteria if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.

(3) The case is work-related as defined by 29 C.F.R. § 1904.5.

Due to the difficulty determining whether a case of COVID-19 is work-related, OSHA is exercising enforcement discretion to assess employers' efforts in making work-related determinations. The factors used to determine whether a case of COVID-19 is work-related include the following:

(1) There are several cases that developed among workers who work closely together, and there is no alternative explanation.

(2) An employee became ill with COVID-19 shortly after an exposure to a customer or co-worker who has a confirmed case of COVID-19, and there is no alternative explanation.

(3) The employee's job duties include frequent, close exposure to the general public in a locality with ongoing community transmission, and there is no alternative explanation.

However, COVID-19 is unlikely to be found to have been work-related in the following two contexts:

(1) The employee is the only worker to contract COVID-19 in her vicinity and the employee's job duties do not include having frequent contact with the general public, regardless of the rate of community spread.

(2) Outside of the workplace, the employee closely and frequently associates with someone (e.g. a family member, significant other, or friend) who (A)

has COVID-19; (B) is not a co-worker; and (3) exposes the employee during the period in which the individual is likely infectious.

Under 29 C.F.R. § 1904.25, Local Unions have a right to copies of employers' OSHA 300 logs. However, given the uncertainty regarding whether employers will record COVID-19 cases as an OSHA recordable incident, Local Unions should examine their collective bargaining agreements to determine whether there is an avenue to obtain absence data to try to determine whether there is a COVID-19 outbreak in the facility.

For example, Local Unions could request the following information:

(1) The number of employees absent from work on a daily basis;
(2) The number of employees absent from work on daily basis due to a COVID-19 positive test;
(3) The number of employees absent from work on a daily basis due to self-quarantining reasons as a result of COVID-19;
(4) The number of employees absent from work on a daily basis due to other types of approved leave; and
(5) The number of employees absent from work on a daily basis that failed to provide a reason for their absence.

As long as a Local Union does not request specific identifying information related to individual employees, but rather requests the information in the aggregate, the Local Union has a strong argument that the employer is required to provide the information under the NLRA. In turn, if a Local Union is concerned that there may be an outbreak in the workplace, a Local Union should consider additional methods beyond just OSHA 300 logs to obtain information related to a COVID-19 outbreak.

Finally, in terms of workplace safety, due to the absence of specific standards, Local Unions should consider whether employers with whom they have bargaining relationships have adopted sufficient safety standards. Specifically, Local Unions should consider the following:

(1) Does the employer have a Disease Preparedness Response plan?
(2) Is the employer requiring screening for employees?
(3) How is the employer requiring employees to enter/exit the workplace?
(4) How is the employer handling restroom breaks?
(5) How is the employer handling meal breaks?
(6) How is the employer dealing with social distancing in the workplace?
(7) Is the employer requiring face shields or face coverings?

Many collective bargaining agreements provide for Joint Safety Committees. At a minimum, Local Unions should be addressing these issues in the Joint Safety Committee meetings or should be considering demanding to bargain over the issues.

WORKERS' COMPENSATION

There are at least two significant issues facing employees with respect to the COVID-19 Pandemic. First, if an employee is injured at work, the employee should continue to report the injury, seek assistance from their Local Union, and seek legal counsel if needed. Throughout this Pandemic, many industries continue to operate, and it is critical that Local Unions continue to help injured workers obtain medical treatment and benefits when they are injured on the job.

Second, to the extent that an employee contracts COVID-19 in the workplace, there is no current standard that presumes the illness is work-related. However, in the event that an employee believes that the employee has contracted COVID-19 due to workplace exposure, the employee should report the illness and treat the illness as a workplace injury. Please note that this is a developing area of the law, but Local Unions and their members should act to preserve potential coverage under the Workers' Compensation statute.

Finally, we note that there have been several workers' compensation claims filed in Iowa. At this time, we are not aware of any decisions yet regarding these claims. However, Local Unions should attempt to stay informed regarding developments in this area as Local Unions may be able to provide evidence that is critical in efforts to secure benefits for bargaining unit members who become ill with the disease.

THE FAMILIES FIRST CORONAVIRUS ACT

The Families First Coronavirus Act became effective on April 1, 2020, and it applies to leave taken between April 1, 2020 and December 31, 2020. The Act applies to employers with fewer than 500 employees. Critically, the 500 employee threshold applies to all of an employer's sites, rather than, simply one location. There is an exception in the Act for some small businesses who have less than fifty employees.

Short Summary of the Act's Provisions

- Two weeks (or 10 work days) of emergency paid sick leave for employees of employers with 500 employees or fewer.
    - Sick leave is paid by the employer at full wage replacement for personal care if one is ill with COVID-19, to quarantine, or to seek a diagnosis or preventative care for COVID-19.
    - Leave is paid at 2/3 wage replacement to care for a family member for the purposes as above, or to care for a child whose school has closed or whose child care provider is unavailable due to COVID-19.
    - Part time workers are entitled to paid sick leave for the amount of hours that they typically work in a two week period.

- 12 weeks of job-protected emergency paid family and medical leave for employees of employers with 500 employees or fewer and government

employers, who have been on the job for at least thirty days, paid at 2/3 wage replacement to:

- Care for a child whose school or place of care has been closed, or whose child care provider is unavailable due to COVID-19.
- Note that the first fourteen days are unpaid (so as not to duplicate paid sick leave).
- Both forms of leave can be immediately taken and paid for by the employer. Employers (other than government employers) can seek reimbursement via tax credit from the federal government, up to a cap.
- These provisions sunset on December 31, 2020.

Emergency Family and Medical Leave Expansion

- Until December 31, 2020, the Act adds "a qualifying need related to a public health emergency" to the list of FMLA leave purposes. This means leave that an employee needs in order to:
  - Comply with a recommendation or order by a public official or health care provider on the basis that the employee's exposure to or exhibition of symptoms of coronavirus, and the employee cannot both perform the functions of their position and comply with the recommendation or order;
  - To care for a family member whose presence in the community a public official or health care provider determines would jeopardize the health of others due to the family member's exposure to or exhibition of symptoms of COVID-19; or
  - To care for the employee's child if the child's school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.

- Up to 12 weeks of leave.
  - First 14 days of leave may be unpaid, subsequent days of leave, employer must provide paid leave at a rate of 2/3 of the employee's regular pay.

- Employees are eligible if they have worked for their employer for at least thirty calendar days.
  - U.S. Department of Labor has discretion to exempt small businesses with fewer than 50 employees if providing leave would jeopardize the viability of the business as a going concern.

- Family members for whom leave can be taken:
  - Parent
  - Spouse
  - Minor Child
  - An individual who is pregnant, senior citizen, individual with a disability, or has access or functional needs and is the employee's (1) child of any age; (2) next of kin; (3) grandparent; or (4) grandchild.

Emergency Paid Sick Leave

- Paid sick leave can be taken:
    - To self-isolate because the employee is diagnosed with COVID-19;
    - To obtain a medical diagnosis or care if employee is experiencing symptoms of COVID-19;
    - To comply with a recommendation or order from a public official that the physical presence of the employee would jeopardize the health of others;
    - To care for a family member who (1) has COVID-19 or (2) is experiencing symptoms of COVID-19 and needs to obtain a medical diagnosis – the employee will be paid at 2/3 of the employee's usual rate.
    - To care for a child if the child's school or place of care has been closed due to COVID-19 – the employee will be paid at 2/3 of the employee's usual rate.
    - Full-time employees are entitled to 80 hours (10 days) of paid sick time and Part-time employees are entitled to a number of paid sick leave hours equal to the number of hours they work, on average, over a two-week period.

- Employer policies
    - For employers with existing policies, the paid sick time afforded under the bill must be made available to workers in addition to any employer provided leave. (An employer cannot require that a worker use accrued sick time before being allowed to use the paid sick leave).
    - Employer may not require workers to find replacement workers to cover those hours they will be on leave.
    - Employers may not discharge, discriminate, or discipline workers who take leave in accordance with the Act and have filed a complaint.

The Department of Labor has developed an extensive Question and Answer Document regarding questions arising under the Families First Coronavirus Response Act. The Q & As can be found at the DOL's website at the following address: https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

UNEMPLOYMENT COMPENSATION

There are two things that Local Unions need to be cognizant of when assisting bargaining unit members with obtaining unemployment insurance. First, as of the current date, the normal rules governing unemployment insurance for separations from employment for non-COVID-19 related reasons continue to apply.

Second, there are new rules pertaining to applicants for unemployment who find themselves unemployed due to the COVID-19 pandemic. In turn, Local Unions should be cognizant of the following.

- While Iowa Workforce Development is encouraging employers to provide paid leave to employees unable to work as a result of COVID-19, but Iowa Workforce Development is not requiring employers to have employees utilize all of their paid leave.
- Employers may require employees to stay home during the COVID-19 incubation period. However, if an employer has less than 500 employees, the employer may be required to provide paid leave under the Families First Coronavirus Act. If not, Local Unions should examine their collective bargaining agreements to determine whether the employer can mandate the use of paid leave.
- If an employee has an underlying medical condition or a pre-existing condition and believes that the workplace is unsafe, the employee should consult with his or her physician to determine whether the physician believes it is safe for the employee to work. The employee should also consult with the employer to determine whether the employer can provide a reasonable accommodation based upon the physician's advice.
- Fear or a non-documented reason is not enough to fail to report to work and obtain unemployment benefits.
- Employees are not eligible for state unemployment benefits if they choose to stay home due a family member who is at high-risk of contracting COVID-19.

Local Unions should continue to consult the Iowa Workforce Development website as the guidance from Iowa Workforce Development has changed. The website is the following: https://www.iowaworkforcedevelopment.gov.

Finally, the $600.00 per week addition benefit expired on July 25, 2020. The President authorized by Executive Order a $400.00 additional weekly benefit on Friday, August 7, 2020. However, at this time, it is not clear as to whether the President may take such action nor is it clear how Iowa Workforce Development intends to deal with the Executive Order.

PART IV. PERB BARGAINING AND ELECTIONS

SIGNIFICANT CHANGES TO CHAPTER 20

HF 291 made significant changes to Chapter 20. The changes included the prohibition on the right to bargain regarding certain matters that previously existed. It created two classes of public employees and curtailed mandatory bargaining rights for the vast majority of public employees. And, it contained a requirement that labor organizations undergo a recertification/retention election upon the expiration of a contract or at least every five years.

Significant Change No. 1 – New Prohibitions Upon Bargaining Rights

HF 291 outlawed several topics of bargaining. The new prohibitions are aimed at weakening the political and financial clout of labor organizations. Specifically, HF 291 prohibits bargaining with respect to the following:

(1) dues deductions;

(2) any payroll deductions for political action committees; and
(3) political contributions or political activities. Iowa Code §20.9(3).

Since the enactment of HF 291, PERB has issued guidance regarding the issue of dues deduction. PERB's position on the dues deduction provisions is the following:

(1) The prohibition on dues deduction does not apply to existing agreements agreed to prior to February 17, 2017. In turn, if there is a dues deduction provision contained in a collective bargaining agreement, public employers are required to abide by that provision until the expiration of the agreement.

(2) Any new contracts cannot contain a dues deduction provision, even if both management and labor agree to such a provision.

(3) The prohibition on dues deduction applies to any contract extension. In turn, even if a public employer and labor organization agree to extend a contract that was effective prior to February 2017 and expired after February 2017, the extension cannot include dues deduction language if the extension occurred after February 17, 2017.

Significant Change No. 2 – The Creation of Two Classes of Public Employees

In an effort to limit public outcry from the sweeping changes contained in HF 291, the Legislature exempted certain changes from bargaining units containing thirty percent or more public safety employees.[6] In doing so, HF 291 created two types of bargaining units: (1) a non-public safety bargaining unit and (2) a public safety bargaining unit. Public safety bargaining units are made up of bargaining units comprised of thirty percent or more public safety employees as defined by the Act.

Iowa Code Section 20.3(10A) defines public safety employees as follows:

(a) A sheriff's regular deputy.
(b) A marshal or police officer of a city, township, or special-purpose district or authority who is a member of a paid police department.
(c) A member, except a non-peace officer member, of the division of state patrol, narcotics enforcement, state fire marshal, or criminal investigation, including but not limited to a gaming enforcement officer, who was been duly appointed by the department of public safety in accordance with section 80.15.
(d) A conservation officer or park ranger as authorized by section 456A.13.
(e) A permanent or full-time fire fighter of a city, township, or special-purpose district or authority who is a member of a paid fire department.
(f) A peace officer designated by the department of transportation under section 321.477 who is subject to mandated law enforcement training.

[6] The thirty percent cutoff appears to be intended to deal with existing bargaining units that contain a mixture of public safety employees and other employees. However, we note that there was no policy argument as to why the cutoff was placed at thirty percent.

Notably, the definition provided for in Section 20.3(10A) excludes many other public employees who perform public safety functions such as nurses, jailors, and 911 dispatchers. As explained below, public safety employees, as defined under Section 20.3(10A), are entitled to a significant number of bargaining rights that are no longer afforded to non-public safety bargaining units.

Significant Change No. 3 – Mandatory, Permissive, and Illegal Subjects of Bargaining

HF 291's creation of non-public safety and public safety bargaining units coincided with different bargaining rights depending upon the type of bargaining unit covered by the contract.

Non-Public Safety Bargaining Units – Mandatory Subjects of Bargaining

Base Wages. Iowa Code §20.9(1).

Non-Public Safety Bargaining Units – Permissive Subjects of Bargaining

Other matters mutually agreed upon. Iowa Code §20.9(1).

Non-Public Safety Bargaining Units – Illegal Subjects of Bargaining

All retirement systems, dues checkoffs, and other payroll deductions for political action committees or other political contributions or political activities, insurance, leaves of absence for political activities, supplemental pay, transfer procedures, evaluation procedures, procedures for staff reduction, and subcontracting public services. Iowa Code §20.9(3).

Public Safety Bargaining Units – Mandatory Subjects of Bargaining

Wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reduction, in-service training, grievance procedures for resolving any questions arising under the agreement, and other matters mutually agreed upon. Iowa Code Section 20.9(1).

Public Safety Bargaining Units – Permissive Subjects of Bargaining

Other matters mutually agreed upon. Iowa Code §20.9(1).

Public Safety Bargaining Units – Illegal Subjects of Bargaining

All retirement systems, dues checkoffs, and other payroll deductions for political action committees, or other political contributions or political activities. Iowa Code §20.9(3).

Significant Change No. 4 – Arbitration

HF 291 modified the factors an arbitrator can consider when issuing an award pursuant to Iowa Code Section 20.22. Again, as with the mandatory topics of bargaining, HF 291 also drew a distinction between the factors an arbitrator can consider based upon whether the bargaining unit in question constitutes a non-public safety or public safety bargaining.

Factors Considered by an Arbitrator for Non-Public Safety Bargaining Units

The following factors may be considered by an arbitrator for non-public safety bargaining units:

(1) Comparison of base wages, hours, and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved. To the extent adequate, applicable data is available, the arbitrator shall also compare base wages, hours, and conditions of employment of the involved public employees with those of *private sector employees* doing comparable work, giving consideration of factors peculiar to the area and the classifications involved. Iowa Code §20.22(7A)(a)(1).

(2) The interests and welfare of the public. Iowa Code §20.22(7A)(a)(2).

(3) The financial ability of the employer to meet the cost of an offer in light of the current economic conditions of the public employer. The arbitrator shall give substantial weight to evidence that the public employer's ability to utilize funds is restricted to special purposes or circumstances by state or federal law, rules, regulations, or grant requirements. Iowa Code §20.22(7A)(a)(3).

However, an arbitrator may not consider the following:

(1) Past collective bargaining agreements between the parties or bargaining that led to such agreements. Iowa Code §20.22(7A)(b)(1).

(2) The public employer's ability to fund an award through the increase or imposition of new taxes, fees, or charges, or to develop other sources of revenues. Iowa Code §20.22(7A)(b)(2).

Iowa Code Section 20.22(9)(b)(1) limits the ability of an arbitrator with respect to the amount of a wage increase that may be awarded. Under the statute the arbitrator may only award the lesser of the following percentages:

(1) Three percent. Iowa Code §20.22(9)(b)(1)(a).

(2) A percentage equal to the increase in the consumer price index for all urban consumers for the Midwest region, if any, as determined by the United States department of labor, bureau of labor statistics, or a successor index. Such percentage shall be the change in the consumer price index for the twelve-month period beginning eighteen months prior to the month in which the impasse items regarding base wages was submitted to the arbitrator and ending six months prior to the month in which the impasse item regarding base wages was submitted to the arbitrator. Iowa Code §20.22(9)(b)(1)(b).

Factors Considered by an Arbitrator for Public Safety Bargaining Units

An arbitrator may consider the following factors for public safety bargaining units:

(1) Past collective bargaining contracts between the parties including the bargaining that led up to such contracts. Iowa Code §20.22(7)(a).

(2) Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved. Iowa Code §20.22(7)(b).

(3) The interests of and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the normal standard of service. Iowa Code §20.22(7)(c).

Significant Change No. 5 – Retention/Recertification Elections

In addition to making significant changes to collective bargaining, HF 291 also created a requirement that an election be held to determine whether the labor organization representing a bargaining unit be retained. HF 291's retention/recertification requirement requires labor organizations to pay for the cost of the election. And, HF 291 requires the Union to win a majority of ***all*** members of the bargaining unit – not just those who choose to participate in the election.

For contracts expiring on June 30, the retention/recertification election shall be held between June 1 and November 1, in the year prior to the expiration date. Iowa Code §20.15(2)(a).

So, for example, if a labor organization's contract with a public employer expires on June 30, 2021, the retention/recertification election will be held between June 1 and November 1, 2020.

For contracts with other expiration dates, the retention/recertification elections are to be held between three hundred sixty-five and two hundred seventy days prior to the expiration date. Iowa Code §20.15(2)(a).

PERB'S EMERGENCY AND NOW FINAL RULES IMPLEMENTING HF 291

In late July and early August 2017, PERB issued emergency rules to implement the changes to Chapter 20 required by HF 291. Prior to adopting the emergency rules, PERB held three public meetings regarding the proposed emergency rules. Several unions appeared and objected to the proposed emergency rules. Nonetheless, PERB felt compelled by the changes to Chapter 20 required by HF 291 to adopt the proposed emergency rules.

Since August 2017, PERB has continued to "tweak" the Rules. In the course of "tweaking" the Rules throughout the last two years, the Labor Movement requested and received several public hearings with PERB for the purpose of raising concerns regarding the Emergency Rules. To a certain extent, PERB was receptive to the suggestions made by the Labor Movement. Significantly, following significant protest by the Labor Movement in 2018, PERB backed away in late March/early April 2018 from requiring "voter registration."

Subsequently, as a result of its decision to not require "voter registration," PERB opened its contract with the vendor up for bid. Following the bidding period, PERB decided to enter into a contract with Election America d/b/a YesElections. YesElections will not require "voter registration." Further, after significant feedback from the Labor Movement regarding telephonic voting problems, PERB has assured the Labor Movement that YesElections will provide a more simplified telephonic voting process. Given the new vendor, PERB did raise the price per voter to $1.50.

Finally, in late 2018 and early 2019, PERB made some additional changes to the Rules including separating out the Retention/Recertification Election Rules from the Rules pertaining to other types of elections. At this point, PERB is not planning on changing any of the Rules prior to the 2020 elections. The following is a summary of the Rules that follow should assist Local Unions with preparing for and navigating the Fall 2020 Retention/Recertification cycle.

Rule 1.6(14) – defines supplemental pay, which is an illegal subject of bargaining for non-public safety bargaining units as follows:

> a payment of moneys or other thing of value that is in addition to compensation received pursuant to any other permitted subject of negotiation specified in Iowa Code section 20.9 as amended by 2017 Iowa Acts, House File 291, section 6, and is related to the employment relationship.

Notice by the Employer – generally – Throughout the rules, PERB adopted a broader notice requirement for public employers for elections, etc. Under the rules, the public employer not only has to post notices for employees (as was true under the prior rules) "in the manner and locations customarily used for the posting of information to employees," but if the public employer also communicates with employees by distributing hard copies of information to employees or by email, the public employer now must also provide notice to employees by hard copy and/or email as well.

Chapter 4 of the Rules – Bargaining Unit and Bargaining Representative Determinations

Rule 4.3(3) – Showing of Interest – Certification – Decertification - Intervention – PERB modified the requirements for a showing of interest in two respects. First, PERB now requires that the signatures on the showing of interest not be more than one year old. This change codifies the prior informal rule and the unwritten rule followed by the NLRB. Second, each signature must be accompanied by the job classification of the signatory, and a statement by the signatory that he or she is a member of the employee organization or has authorized it to bargain collectively on the signatory's behalf. Finally, we note that, while not a change in from the 2018 modified rules, the rules now require intervenors to provide a showing of interest of thirty percent of the bargaining unit as opposed to ten percent.

Rules 4.9 and 4.10 – Mergers and Amendments of Unit – In the latest round of rule changes in 2019, PERB also put forth new rules regarding mergers and amendments of existing bargaining units. We do not discuss those changes here, but if a Local Union has questions regarding mergers and amendments of existing bargaining units, we recommend that the Local Union speak to its legal counsel.

Chapter 5 of the Rules – Elections

One of the biggest changes to the rules encompass the moving of the retention and recertification rules to Chapter 15 of the Administrative Rules. Later in PART IV of the Legal Report, we will discuss the changes contained in Chapter 15. Below, however, is a summary of the rules applicable to all non-retention and recertification elections.

Rule 5.1(20) – General Procedures. This rule now requires that the parties file electronically all documents in the applicable adjudicatory case file electronically.

Rule 5(1) – Defines the types of elections as follows: (1) certification; (2) retention and recertification (which are now specifically addressed in Chapter 15); (3) decertification; (4) professional and non-professional; and (5) amendment of unit election.

Rule 5.2(a) – Requires the union to prepay the election fee for certification and decertification elections. If there is an intervenor, the intervenor is required to pay a proportionate share of the election fee.

Rule 5.1(2)(b) – Unions may file a ***written request*** with PERB for an extension of time to pay the election fees. If the union requests an extension, the request must be made ***no later than seven days after the agency's filing of an order directing an election.***

Rule 5.1(2)(c) – A union may choose not to pay the fee for a decertification election. If the union chooses not to pay the fee, the union must indicate its intent to do so no later than ***seven days*** after PERB's filing of an order for a decertification election.

The notice must state that (1) the union is not going to pay the fee, (2) an acknowledgement that PERB will not conduct an election, and (3) the union's certification will be revoked. The notice also must be signed by an authorized representative of the organization.

Rule 5.1(2)(d)(1) – Election Fees.

If there are ten or less eligible voters, the fee is ***$15.00.***

If there are more than ten eligible voters, the fee is ***$1.50*** per eligible voter. If there is an increase of more than ten voters, the union must make additional payment to the agency. If there is a decrease of ten voters, PERB will refund the overpayment.

Rule 5.1(2)(d)(2) – Election Fees – Limited Refunds

PERB will not refund an election fee if the fee is paid and PERB has performed duties to conduct an election but an election does not occur.

Rule 5.1(3) – The date of the election is the date on which ballots are counted.

Rule 5.2 – Voter Eligibility Lists

Rule 5.2(1) – Eligible Voters (all non-retention and recertification elections) are employees who (1) were employed and included in the bargaining unit on the date of the order directing an election, unless a different date was agreed upon by the parties and agency, and (2) were employed on the date of the election.

Rule 5.2(2) – Voter Lists

PERB will determine the election fee based on the initial employer-provided list of employees used to verify the showing of interest. Subsequently, when PERB files an order that an election will be conducted, the employer has seven days to provide PERB with an alphabetical list of the names, addresses, email addresses, if known, telephone numbers, and job classifications of the employees eligible to vote. In cases of telephonic/web-based elections, the employer shall also provide the date of birth and last for digits of each employee's social security number. Upon receipt of the list, PERB will file the list of names and job classifications, which will become the official voting list for the election.

Unions and employers may also email proposed additions or deletions of employees' names, changes in job classifications, addresses, contact information, or other eligible voter changes to the agency and to the other party. The parties may amend the list by agreement.

Rule 5.2(3)(a) – Voter Eligibility Challenge

Either party may challenge, for good cause, the eligibility of any voter. PERB will attempt to resolve the challenge. A hearing will be held if the challenge(s) are outcome determinative. Following the hearing, PERB may, if necessary, order a new election, and the costs may be taxed to the non-prevailing party.

Rule 5.2(3)(b) – Methods and Timing of Voter Eligibility Challenges

1. In Person Elections – Challenges must be made prior to the time the voter deposits the ballot in the ballot box.

2. Mail Ballot Elections – Challenges must be made prior to the time the outer envelope containing the voter's secret envelope and ballot is opened.

3. Telephonic/Web-Based Elections – Challenges must be made prior to the end of the election period.

Rule 5.3 – Methods of Voting

PERB may conduct an election, in whole or in part, in person, by mail ballot, or through a telephonic/web-based system.

Rule 5.3(1) and Rule 5.3(2) – In Person Election and Mail Ballot Elections

These types of elections will continue to be similar in manner and form to the in-person and mail ballot elections PERB previously conducted. However, it should be noted that for in-person elections, employees may request an absentee ballot. Further, PERB now has a rule that permits it to utilize voting machines to assist with the casting or tabulating of votes.

Rule 5.3(3) – Telephonic/Web-Based Elections

Rule 5.3(3)(a) – Notice of Election shall include the telephone number the voter is to call to cast a ballot and the website for web-based voting. The Notice of Election shall also include the script of the ballot or sample ballot.

Rule 5.3(3)(c) – Inoperable Voting System – PERB may extend the period of the election due to inoperable voting systems.

Rule 5.3(4) – Alternative Voting Method – When a voter promptly informs PERB of the voter's inability to cast a ballot using the designated methods of voting, PERB shall assist the voter in using an alternative method to cast a ballot.

Rule 5.4 – Objections to an Election

Written objections may be filed by any party or public employee. Objection to an election must be filed ***within ten days*** of the filing of the tally of ballots. The objections must identify the objecting party; provide the objecting party's mailing address, telephone number, email address, if available, and contain a statement of facts upon which the objections are made.

Rule 5.5 – Certification Elections

Rule 5.5(2) – The union must pay the election fee either with the certification petition or no later than seven days after the agency's filing of an order directing an election, unless an extension of time is made in writing and is granted by the agency. In the absence of payment, PERB will not conduct an election. The election fee shall be paid by check payable to PERB and is deemed paid upon receipt, or if submitted by mail, on the date the U.S. Postal Service postmark affixed to the envelope in which the payment was mailed.

Rule 5.5(6)(c) – Within ninety days of a successful election, the successful union must comply with Iowa Code Section 20.25, which requires the filings of various reports with PERB. Failure to file the report will result in non-certification, provided however, PERB may grant extensions of time to file the report upon good cause shown.

Rule 5.5(7)(a) – Bars to certification elections. A certification election will not be held unless of period of ***two years*** has elapsed from the date of any of the following:

(1) the last certification election in which a union was not certified;

(2) the last retention/recertification election in which a union was not retained/recertified; or

(3) the last decertification election in which a union was decertified as the exclusive representative of the bargaining unit.

Rule 5.6 – Decertification Elections

Rule 5.6(1) – If a petition for decertification is filed with a proper showing of interest, PERB shall file an order directing an election to be conducted not less than 150 days prior to the expiration date of the collective bargaining agreement, unless barred by Rule 5.6(6). PERB may not conduct an election if it determines that it cannot conduct an election at least 150 before the expiration date of the bargaining unit's collective bargaining agreement.

Rule 5.6(2) – After the filing of a decertification petition, but no later than seven days after PERB's filing of an order of election, the union must pay the applicable election fee,

unless an extension of time is granted. Fees must be paid in the same manner as for retention/recertification elections.

If the union fails to pay the election fee in a timely manner, the union's certification will be revoked.

Rule 5.6(5) – If the union is not successful in the decertification election, PERB will file an order decertifying the union.

Rule 5.6(6) – Bars to Decertification Elections.

Rule 5.6(6)(a) – PERB will not consider a petition for decertification unless the collective bargaining agreement exceeds two years in duration or during the pendency of a retention/recertification election.

Rule 5.6(6)(b) – PERB will not consider a decertification petition during the pendency of a retention and recertification proceeding.

Rule 5.6(6)(c) – PERB shall not schedule a decertification election within one year of a prior certification, retention/recertification, or decertification election.

Rule 5.7 – Professional and Nonprofessional Election.

Rule 5.7(1) – If PERB determines, in any case, that professional and nonprofessional employees are appropriately included in the same bargaining unit, PERB shall file an order directing that an election be conducted to determine whether those professional and nonprofessional employees agree to be represented in a single bargaining unit and requiring the employer to submit by email separate lists of eligible professional and nonprofessional employees.

Rule 5.7(2) – This Rule requires the public employer to supply the list of employees in the professional and nonprofessional categories to PERB within seven days of PERB's order. The Rules regarding the lists are the same as for other types of elections.

Rule 5.7(3) – Once the public employer has submitted the list to PERB, PERB shall file a notice of election containing a sample ballot for each category of employee and setting forth the date, time, place, method, and purpose of the election, and such additional information as PERB may deem appropriate. The public employer must then post and distribute the notice.

Rule 5.7(4) – There is no election fee assessed for a professional/nonprofessional election.

Rule 5.8 – Amendment of Unit Elections.

Rule 5.8(1) – If PERB determines that a job classification or classifications are appropriately amended into a bargaining unit, but that those classifications existed at the time the employee organization was certified and would separately constitute an appropriate unit, PERB shall file an order directing an election to be conducted. The election will determine whether a majority of employees in those classifications wish to be represented by the existing employee organization.

Rule 5.8(2) – The public employer then has seven days to email the list of eligible voters to PERB. The Rules regarding the lists are the same as for other types of elections.

Rule 5.8(3) – Once the public employer has submitted the list to PERB, PERB shall file a notice of election containing a sample ballot for each category of employee and setting forth the date, time, place, method, and purpose of the election, and such additional information as PERB may deem appropriate. The public employer must then post and distribute the notice.

Rule 5.8(4) – There is no election fee associated with this type of election.

Rule 5.9(20) – Destruction of Ballots – In the absence of litigation over the validity or outcome of an election and after sixty days have elapsed from the date of the filing of an order of certification, noncertification, recertification, decertification, or continued certification of an employee organization pursuant to the election, PERB will cause the ballots cast in the election to be destroyed.

Rule 6.4 – Public Safety Unit Determination

Rule 6.4(1) – This rule applies to bargaining units with at least ***one*** public safety employee.

Rule 6.4(2) – A public safety unit is a bargaining unit with at least thirty percent of the employees who are public safety employees.

Rule 6.4(3) – A bargaining unit will constitute a public safety bargaining unit if at least thirty percent of the employees in the unit were public safety employees at ***any one time in the six months*** preceding the applicable date identified in Rule 6.4(7).

Under Rule 6.4(3), then, even if a potential bargaining unit consisted of public safety employees of at least thirty percent for ***one day*** in the applicable time frame, the union has a strong argument that Rule 6.4(3) applies, and the bargaining unit in question should be considered a public safety bargaining unit.

Rule 6.4(4) – This rule requires the parties engaging in negotiations for a collective bargaining agreement to "endeavor" to agree upon and stipulate to the question of

whether a particular bargaining unit is a "public safety bargaining unit" or a non-public safety bargaining unit.

Rule 6.5(5) – If the parties agree to a stipulation regarding the type of unit, the parties shall complete a stipulation form provided by PERB and deliver it to PERB.

Rule 6.4(6) – Petition, Response, and Hearing of Public Safety or Non-Public Safety Unit Status

Rule 6.4(6)(a) – If the parties fail to reach agreement, the party ***asserting public safety unit status*** shall file a petition for determination of the unit status, on the PERB prescribed-form and file it electronically with PERB. The party must do so within the dates specified in Rule 6.4(7).

Rule 6.4(6)(b) – The party, who has taken the position that the unit is not a public safety unit, within ***ten days*** of the filing of the petition for determination, must provide a response for its position detailing the basis for its position.

Rule 6.4(6)(c) – Hearings will then be conducted under the applicable rules. The public employer presents its evidence first.

Rule 6.4(7) – *Deadlines* – Stipulations regarding public safety bargaining units or petitions for unit determinations shall be submitted on or before the dates indicated.

(a) August 1 for contracts that expire January 1 to March 31 of the subsequent year.

(b) November 1 for contracts that expire April 1 to June 30 of the subsequent year.

(c) February 1 for contracts that expire July 1 to September 30 of the same year.

(d) May 1 for contracts that expire October 1 to December 30 of the same year.

Under Rule 6.4(7), then, if an agreement expires January 1, 2022 and there are at least some members of the bargaining unit that are public safety employees as defined by Iowa Code Section 20.3(10A) and PERB Rule 1.6 (which is the same as Section 20.3(10A)), the parties must file a stipulation as to the status of the unit as a public safety or non-public safety bargaining unit by August 1, 2021.

Further, unions should note that the stipulation or petition for unit determination must be filed under the parameters in Rule 6.4(7) prior the expiration of each collective bargaining agreement.

Rule 6.6(20) – The public employer is required to submit a copy of the collective bargaining agreement entered into by the parties within ten days of the date on which the agreement is entered into by the parties.

Rule 7.5(7) – Arbitration involving a bargaining unit that has at least thirty percent of member who are public safety employees.

This Rule simply codifies in the rules Iowa Code Section 20.22(7)(a-c) noted above with respect to factors that an arbitrator may consider for arbitrations involving public safety bargaining units.

Rule 7.5(8) – Arbitration involving a bargaining unit that does not have at least thirty percent of members who are public safety employees.

This Rule simply codifies in the rules Iowa Code Sections 20.22(7A)(a)(1) –(3), 20.22(7A)(b)(1) – (2), and 20.22(9)(b)(1)(a) – (b) with respect to factors that an arbitrator may consider for arbitrations involving non-public safety bargaining units and the limits upon base wage awards.

Rule 8.7(1) – Upon Completion of a Valid Certification Election – If an employee organization fails to file a registration report, constitution and bylaws, or annual report or otherwise comply with the rules or Iowa Code Section 20.25 within ninety days following the completion of a valid election, PERB will not certify the employee organization and will serve notice of noncertification. PERB may grant extensions of time for good cause.

Chapter 15 of the Rules – Retention and Recertification Elections

Rule 15.1 – New Provision

This Rule requires the parties to electronically file all documents in the respective "BU" case file in the electronic filing system unless otherwise specified by the Rules. Employers and ***unions*** must have a representative or agent for service listed in the applicable BU case electronic filing system.

Employers and ***unions have a continuing duty*** to keep updated the representative or agent for service in each BU case file. In turn, if there is a change in leadership in a local union, the new leadership must update who is the representative is in the electronic filing system.

Rule 15.1(1)(a) – The union is responsible for and shall prepay the election fee.

Rule 15.1(1)(b) – A union may request an extension of time to pay the fee. The request must be made no later than the date the fee is due, which is contained in the notice of intent to conduct an election.

Rule 15.1(1)(c) – A union may file a notice of nonpayment of the fee. The notice of nonpayment may be filed at any time, but it must be filed no later than ***thirty days*** prior to the

commencement of the election period. The notice must be signed by an authorized representative of the union, state the union will not pay the fee, acknowledge PERB will not conduct an election, and also acknowledge that the employee organization's certification will be revoked.

Rule 15.1(1)(d) – Applicable fees are based upon the number of eligible voters. If there are fewer than ten voters, the fee is ***$15.00***. If there are more than ten voters, the fee is ***$1.50*** per voter. If the number of voters increases or decreases by ten or more, a union may be required to pay additional funds (in the case of an increase) or be entitled to a refund (in the case of a decrease). PERB will not make any refund in the event the election fee is paid, and PERB has performed duties to conduct the election but the election does not occur.

Rule 15.1(2) – The date of the election shall be the date on which the ballots were tallied.

Rule 15.1(3) – The Election Period begins at the time and on the date PERB sets for when eligible voters may first cast a ballot and ends at the time and on the date the agency sets for the tally of the ballots.

Rule 15.2 – Eligibility – Voter Eligibility Lists.

Rule 15.2(1)(a) – Eligible voters are those employees who were employed and included in the bargaining unit on the date of the order directing the election, or were employed on another date or dates agreed upon by the parties and PERB.

Rule 15.2(1)(b) – The employer is responsible for ensuring the accuracy of the list after its submission and throughout the election period. The employer is responsible for promptly notifying the union whenever an eligible voter leaves employment and is no longer in the bargaining unit prior to the close of the election or election period.

Rule 15.2(2)(a) – List for Determining Fees

When PERB files the notice of intent to conduct a retention and recertification election, the employer has seven days to email PERB a list of employees along with the information required for other types of elections – e.g. classification, contact information, etc. The employer is also required to separately email the union to confirm that the employer provided the list to PERB. The employer's notification must contain the date the list was emailed to PERB and the number of employees on the list.

Subsequently, PERB will file the list of eligible voters by name and job classification. PERB shall then provide to the union the voter list containing the employees' contact information.

Rule 15.2(2)(b) – Final Voter List

When PERB filed an order that the retention and recertification election be conducted, the employer has the obligation to email PERB a second list of voters including the information required for other types of elections e.g. classification, contact information, etc. The employer is not required to submit a second list if the original list would be the same as a second list. The second list, or the unchanged first list, shall become the official eligible voter list for the election. PERB will then provide the list to the union.

Once the final list has been submitted, the employer shall not add or delete from the list any employee. However, by contacting the employer, the union may propose additions or deletions from the list prior to the date of election for in-person elections, prior to the date the ballots are mailed for mail ballot elections, or seven days prior to the commencement of the election period for telephonic/web-based elections.

The parties may amend the list by agreement, subject to the time restrictions listed above for the various types of elections.

Rule 15.2(3) – Voter Eligibility Challenges

Rule 15.2(3)(a) – Either party may challenge, for good cause, the eligibility of any voter. PERB will attempt to resolve the challenge. A hearing will be held if the challenge(s) are outcome determinative. Following the hearing, PERB may, if necessary, order a new election, and the cost may be taxed to the non-prevailing party.

Rule 15.2(3)(b) – The following are the methods for challenging the eligibility of a voter ***prior to*** the election:

1. In Person Elections – Challenges must be made prior to the time the voter deposits the ballot in the ballot box.

2. Mail Ballot Elections – Challenges must be made prior to the time the outer envelope containing the voter's secret envelope and ballot is opened.

3. Telephonic/Web-Based Elections – Challenges must be made ***at least seven days prior to the commencement*** of the election period.

Rule 15.2(4) – Post Election Challenges

A union may make postelection challenges to the total number of bargaining unit employees for a retention and recertification election. In order to make such challenge, the following must occur:

1. An eligible voter must have left employment and no longer be employed by the public employer prior to the close of the election or election period.

2. The union must file the postelection challenge within ***ten days of the filing of the tally of ballots.***

If these two conditions are met, PERB will attempt to resolve the dispute. If the postelection challenges are outcome determinative, a hearing will be held. Following the hearing the Board may make appropriate adjustments to the tally or order a new election.

**** Important Note*** – The difference between Voter Eligibility Challenges and Post Election Challenges is the following. Voter Eligibility Challenges challenge the inclusion of an employee in the bargaining unit in which an election is to be held. Conversely, for Post Election Challenges, the voter was properly included in the bargaining unit, but left employment with the public employer prior to the closing of the election.

Rule 15.5 – Retention and Recertification Election Process

Rule 15.5(1) – Timing of Election Periods.

Rule 15.5(1)(b) – If a collective bargaining agreement expires on June 30, PERB will conduct the retention/recertification election between June 1 and November 1 in the year prior to the expiration of the agreement.

For contracts expiring June 30, 2021, PERB will conduct telephonic/web-based retention/recertification elections during the period of October 15 through October 29, 2020.

Rule 15.5(1)(c) – For collective bargaining agreements with other expiration dates, retention/recertification elections will be held no earlier than 365 days and no later than 270 days prior to the expiration of the agreement.

Rule 15.5(1)(d) – If an employee organization has paid the applicable election fee in a timely manner, the union's status will not be adversely affected if the election is not concluded or if the election is not certified.

Rule 15.5(1)(e) – New Provision

The public employer is required to email to PERB the collective bargaining agreement within ten days upon which it was entered into by the parties.

However, for retention and recertification elections, all collective bargaining agreements must be submitted to PERB at least ***fifty days*** prior to the commencement of the retention and recertification election period.

There will be no election if ***the employer and union are not parties to a collective bargaining agreement or if the collective bargaining agreement is submitted less than fifty days prior to the commencement period of the retention and recertification election.***

When scheduling a retention and recertification election, if a collective bargaining agreement indicates that the agreement is for a term of one year, but does not contain specific commencement and termination dates, PERB will presume an effective date of July 1 and a termination date of June 30. In turn, unions should ensure that the duration dates are included in the contract.

Rule 15.5(1)(f) – Contract Extensions

PERB will recognize a contract extension so as to alter the timing of a retention and recertification election only if the parties have reached an agreement on the extension and notified PERB of the extension prior to the date the election fee is due.

If a contract exceeds five years or two years duration, including any extensions, PERB will nonetheless conduct any election within five years or two years, whichever is applicable.

Rule 15.5(2) – General Procedure

Rule 15.5(2)(a) – If a retention and recertification election is required, PERB shall file a Notice of Intent to Conduct an Election. The Notice of Intent shall contain the dates of the election period; the place, method, and purpose of the election; the date the voter list for determining fees is due; and the date upon which the union shall pay the applicable fee.

Rule 15.5(2)(b) – After the list of eligible voters is provided and the election fee is paid, PERB will file an order directing a retention and recertification election and notice of election. The public employer must post the list, and if the public employer communicates information to employees by other means such as email or mail, the employee must distribute the information in the same manner. The notices shall contain (1) a sample ballot or script; (2) set forth the dates of the election period; and (3) the time, place, method, and purpose of the election.

Rule 15.5(3) – Objection and Notice Regarding Notice of Intent to Conduct an Election – Modified Provisions

Rule 15.5(3)(a) – The public employer or union may file an objection asserting that the elections should not be conducted. The objection must be in writing and electronically filed ***no later than seven days*** following the date of the Notice of Intent to Conduct the Election. PERB may hold an election to resolve the objection. The objecting party shall present evidence first.

Rule 15.5(3)(b) – If PERB ***fails to file a Notice of Intent to Conduct an Election***, the public employer or the union may file a notice with PERB asserting the reasons that that an

election should occur. The notice shall be in writing and electronically filed no later than seven days following the date of the Notice of Intent to Conduct an Election. The parties shall submit all information requesting by PERB. PERB shall conduct an investigation to determine whether the election is required by statute or rule.

Rule 15.5(4)(a) – Eligible Voter List for Determining Election Fee – This Rule conforms to the Rules for other types of elections regarding the information required. However, it should be noted that the employer has seven days from the Notice of Intent to Conduct an Election to provide the initial list.

Rule 15.5(4)(b) – If the public employer ***fails*** to submit the list of eligible voters to PERB by the deadline set in the Notice of Intent to Conduct an Election, PERB ***will not*** conduct an election and will file an order recertifying the employee organization.

Rule 15.5(5) – Payment of Fee – The union must pay the applicable election fee as set forth in the Notice of Intent to Conduct the Election. The election fee shall be paid by check payable to PERB and is deemed paid upon receipt by PERB, or if submitted by mail, on the date the U.S. Postal Service postmark affixed to the envelope in which the payment was made.

PERB may grant a union's written request for an extension of time to pay the fee for good cause if the request is filed as set forth in the Notice of Intent to Conduct the Election.

Rule 15.5(6) – Final Voter Eligibility List

Rule 15.5(6)(a) – When PERB files an order that an election will be conducted, the employer has seven days to provide PERB with an alphabetical list of the names, addresses, email addresses, if known, telephone numbers, and job classifications of the employees eligible to vote. In cases of telephonic/web-based elections, the employer shall also provide the date of birth and last for digits of each employee's social security number. Upon receipt of the list, PERB will file the list of names and job classifications, which will become the official voting list for the election.

Rule 15.5(6)(b) – Unions and employers may also email proposed additions or deletions of employees' names, changes in job classifications, addresses, contact information, or other eligible voter changes to the agency and to the other party. The parties may amend the list by agreement.

Rule 15.5(7) – The ballot shall contain the question:

> Do you want [name of certified organization] to be retained and recertified and continue to be your exclusive bargaining representative?

The question shall be followed by the choices "Yes" or "No."

Rule 15.5(8) – A union must receive a majority of those employees in the bargaining unit to be retain and recertified. If a union does not receive a majority of those employees in the bargaining unit choosing to retain and recertify the union, PERB will issue an order decertifying the union.

Rule 15.5(9) – Elections for School Districts, Area Education Agencies, and Community College – If a Union represents employees of a school district, AEA, or community college that would otherwise be scheduled for a retention/recertification election to be held between May 1 and September 30, PERB will postpone those elections until October of that calendar year.

CONCLUSION

We note that the guidance provided in this Report may change between receipt of the report and when an issue may arise. If a Local Union confronts a situation that appears to involve similar facts to those in one of the cases cited above, the Union should consult with its national organization or competent legal counsel to determine if the decision applies. Finally, in this regard, if a Local Union has questions concerning any of the topics covered in this report, the Local Union should consult with its national organization or competent legal counsel to determine the current legal landscape.

APPENDICES

Appendix A - Breakdown of Bargaining Unit Subjects for Non-Public Safety Units

Appendix B – Breakdown of Bargaining Unit Subjects for Public Safety Units

Appendix C – Elections Matrix

Appendix D – Misc. Reminders Re: New and Modified Rules

Appendix E – Sample PERB Notices

1. **Fall 2020 Retention/Recertification Dates**
2. **Sample Notice of Intent to Conduct An Election**
3. **Sample Voting Schedule**
4. **Sample Election Fee Schedule**
5. **Sample Voter List**
6. **Sample Bargaining Unit Description**
7. **Sample Notice to Employees**
8. **Sample Order Directing Retention and Recertification Election**

Appendix A

Non-Public Safety Unit – Breakdown of Subjects of Bargaining

Mandatory Subjects of Bargaining	Permissive Subjects of Bargaining	Illegal Subjects of Bargaining
Base Wages. Iowa Code §20.9(1)	Other matters mutually agreed upon. Iowa Code §20.9(1)	Retirement Systems Dues Checkoffs Payroll Deductions for PACs Other Political Contributions or Political Activities Insurance Leaves of Absence for Political Activities Supplemental Pay* Transfer Procedures Evaluation Procedures Procedures for Staff Reduction Subcontracting Public Services Iowa Code §20.9(3)

* PERB Rule 1.6(15) defines supplemental pay as follows: a payment of moneys or other thing of value that is in addition to compensation received pursuant to any other permitted subject of negotiation specified in Iowa Code section 20.9 as amended by 2017 Iowa Acts, House File 291, section 6, and is related to the employment relationship.

Appendix B

Public Safety Unit – Breakdown of Subjects of Bargaining

Mandatory Subjects of Bargaining	**Permissive Subjects of Bargaining**	**Illegal Subjects of Bargaining**
Wages Hours Vacations Insurance Holidays Leaves of Absence Shift Differentials Overtime Compensation Supplemental Pay Seniority Transfer Procedures Job Classifications Health and Safety Matters Evaluation Procedures Procedures for Staff Reduction In-Service Training Grievance Procedures for resolving any questions arising under the agreement Iowa Code Section 20.9(1)	Other matters mutually agreed upon. Iowa Code §20.9(1)	Retirement Systems Dues Checkoffs Payroll Deductions for PACs Other Political Contributions or Political Activities Iowa Code §20.9(3)

Appendix C

Elections

Type of Election	Election Fee	Election Fee Due	Result of Fee Non-Payment	Employer Duty to Provide Voter List	Effect of Failure to Provide Voter List	Objections to Election
Certification	Yes	Upon filing of certification petition, or no later than 7 days after PERB's Order Directing the Election.	Dismissal of Petition.	Within 7 days following an Order by PERB directing the election.		Within ten days of the filing of the tally of ballots.
Retention/Recertification	Yes	By the date set forth in the Notice of Intent to Conduct the Election.	Decertification.	Within 7 days of filing of the Notice to Conduct an Election.	An Election will not be conducted.	Within ten days of the filing of the tally of ballots.
Decertification	Yes	After the filing of a decert. petition but no later than seven days after PERB's filing of an Order for Election.	Decertification.	Within 7 days following an Order by PERB directing the election.		Within ten days of the filing of the tally of ballots.
Professional/Non-Professional	No	N/A	N/A	Within 7 days of filing of the Notice to Conduct an Election.		Within ten days of the filing of the tally of ballots.
Amendment of Unit	No	N/A	N/A	Within 7 days of filing of the Notice to Conduct an Election.		Within ten days of the filing of the tally of ballots.

Appendix D

Misc. Reminders

- *Public Safety Unit Determinations*
    - PERB Rule 6.4 applies to all bargaining units with at least one public safety employee.
    - Upon the filing of a petition, a stipulation must be filed or a petition for a unit determination.
    - Prior the expiration of a contract, as required by Rule 6.4, a stipulation or petition for unit determination must be filed within the deadlines described in Rule 6.4(7).

- *Submission of Contracts*
    - It is the public employer's duty to submit contracts within ten days of the contract's effective date.
    - If a public employer fails to do so, PERB will assume that the duration of the contract is five years or two years, whichever is applicable.

- *Retention/Recertification Elections*
    - If the public employer *does not* submit the voter list within seven days of the Notice of Intent to conduct an election, PERB will not conduct an election and the union will be recertified. Public Employers must now email Public Sector Unions that it has submitted the list to PERB. Public Sector Unions must pay attention to determine whether the public employer abides by this requirement.
    - Public Sector Unions may chose not to pay the fee for a retention/recertification election or a decertification election if it provides notice to PERB of its intent to due so no later than seven days after PERB's filing of an order for a decertification election or thirty days prior to the commencement of a retention/recertification election.

- *Required Filings by Unions*
    - Public sector unions must file a registration report, constitution and bylaws, or annual report within ninety days of a successful election. Otherwise, the union will not be certified.

- *Challenges to Voters*
    - Challenges regarding whether a voter is properly included on the list in retention/recertification elections must be made seven days prior to the start of the retention/recertification election.
    - Challenges regarding whether a voter was still employed by the public employer following the retention/recertification election must be made within ten days of the tally of the vote.

- *Effect of Losing a Retention/Recertification or Decertification Election*
    - PERB's position is that if a public sector union loses a retention/recertification or decertification election, the public sector union's certification is revoked.

SCHEDULE FOR FALL 2020 RETENTION/RECERTIFICATION ELECTION

Type of Employer	**Collective bargaining agreement expiration date**	**Employer must submit collective bargaining agreement by this date for election to be scheduled**	**PERB eFiles Notice of Intent to Conduct Election**	**Employer must email employee list by this date**	**CEO fee payment/ request for extension of payment due**	**PERB eFiles Direction of Election/ Notice of Election**	**Election Period**
All employers AEAs, K/12, Community Colleges	June 30, 2021 June 30 – August 31, 2021	August 24, 2020	August 26, 2020	September 2, 2020	September 14, 2020	September 16, 2020	October 13 – October 27, 2020

Fall 2020 Retention and Recertification Election Schedule (telephone/web-based)

All Employers: Contracts with Expiration Date of June 30, 2021
AEAs, K/12, Community Colleges with Expiration Date of June 30-August 31, 2021.

PERB will conduct a retention and recertification election by telephonic and web-based ballot. The schedule for this telephonic/web-based election is as follows:

August 24, 2020	All collective bargaining agreements must be emailed to the agency by this date.
August 26, 2020	PERB eFiles Notice of Intent. Employers may begin sending PERB initial voter lists to determine election fees.
September 2, 2020	Last day for Employer to submit initial list to determine the election fee. Last day for parties to object to Notice of Intent or, if no Notice of Intent was filed, to notify agency that an election should be conducted.
September 14, 2020	Last day for Employee Organization to pay the election fee. Last day to provide PERB with sufficient evidence of contract extension.
September 16, 2020	Direction/Notice of Election filed. Voter must be employed on this date in the bargaining unit to be an eligible voter unless the parties agree on a different eligibility date. Employers may begin sending PERB updated voter lists. Employer must notify Employee Organization when employees leave the bargaining unit.
September 23, 2020	Last day for Employer to update voter eligibility list.
October 6, 2020	Last day for Employee Organization to propose additions or deletions from voter list. Last day for the parties to mutually agree on any changes in the voter eligibility list. Last day for a party to challenge a voter's eligibility.
October 13, 2020 7:00a.m.	Beginning of election period. Voters may begin to cast their ballots by calling the toll-free number or logging on to the voting website. The number and website will be provided in the Notice of Election.
October 27, 2020 9:00a.m.	End of election period. Voters must cast their ballot by phone or online prior to this time and date in order for the ballot to be counted. A PERB election agent will review the tally of the results at PERB's office.
November 8, 2020	Last day to eFile objections to the election. Last day to eFile postelection challenges.

STATE OF IOWA
PUBLIC EMPLOYMENT RELATIONS BOARD

Cheryl K. Arnold, Chairperson
Mary T, Gannon, Member
Erik Helland, Member

RE: BU-XXXX–EMPLOYER/CERTIFIED EMPLOYEE ORGANIZATION
Notice of Intent to Conduct a Retention and Recertification Election
(1) Employer to post and distribute Notice to Employees.
(2) Employer to submit initial voter list to PERB by September 2, 2020.
(3) Employee Organization to pay election fee by September 14, 2020.

Dear Representatives:

The Public Employment Relations Board (PERB) intends to conduct a retention and recertification election pursuant to Iowa Code section 20.15(2) and Chapter 15 of PERB's administrative rules. The purpose of this election is to determine whether certain employees of EMPLOYER wish to retain CERTIFIED EMPLOYEE ORGANIZATION as their exclusive bargaining representative for the bargaining unit described at the end of this document.

According to our records, the expiration date of the collective bargaining agreement between EMPLOYER and CERTIFIED EMPLOYEE ORGANIZATION requires an election be held in the fall of 2020 pursuant to Iowa Code section 20.15(2) and PERB rule 621—15.5(20).

By **September 2, 2020,** please let us know if we have incorrectly determined the expiration date of the collective bargaining agreement. If you would like to formally object to this Notice of Intent to Conduct an Election, you may do so by filing the objection through PERB's electronic filing system in case number BU-XXXX.

By **September 2, 2020**, the **Employer shall e-mail an Excel spreadsheet** of the names of the employees in the bargaining unit in alphabetical order by last name, their job classifications, their dates of birth (MM/DD/YYYY), the last four digits of their social security number, their home addresses, their work and personal email-addresses, if known, and their work and personal telephone numbers, if known, to iaperb@iowa.gov with the **subject line: BU-XXXX-EMPLOYER/CERTIFIED EMPLOYEE ORGANIZATION Voter Eligibility List**.

If the employer would prefer to submit the voter list to PERB through a Citrix ShareFile portal, the employer must email iaperb@iowa.gov and request a link to a portal by **4:30 p.m. on August 31, 2020**. The agency will email the Employer a link to a Citrix ShareFile portal. By **September 2, 2020**, the Employer must submit the Voter Eligibility List to PERB through the portal **and the Excel spreadsheet must be titled BU-XXXX EMPLOYER/CERTIFIED EMPLOYEE ORGANIZATION Voter Eligibility List**.

After submitting the list to the agency (either via email or via Sharefile), the **Employer shall send a separate email to the Certified Employee Organization** confirming the Employer provided PERB with the voter list, the date the list was submitted to PERB, and the number of

employees on the list. **When emailing the Certified Employee Organization, do not forward the voter list as it contains confidential information**.

A sample voter list is included at the end of this document for your review. Failure to provide the voter list to the agency by September 2, 2020, will result in the recertification of the employee organization without the process of the retention and recertification election.

By **September 14, 2020**, the **Employee Organization** shall submit a check to PERB pursuant to Iowa Code section 20.6(7) and PERB subrules 15.1(1) and 15.5(5). See the fee schedule included with this Notice to determine the amount owed. **The check shall be made out to the Public Employment Relations Board and must include on the check the Certified Employee Organization's name, the Employer's name, and the BU number [BU-XXXX] for the voting unit**. If paying for multiple elections, the employee organization may provide one check, but attach a list to the check with the BU numbers, Employer Name, Certified Employee Organization name, the number of employees in each unit, and the amount paid for each unit. An Employee Organization may make a written request to PERB for an extension of time in which to pay its election fee. That request must be submitted by 11 a.m. on September 14, 2020.

Failure to pay the required fee or failure to request an extension by September 14, 2020 shall result in the employee organization's certification being revoked. Upon PERB's revocation of the employee organization's certification, the collective bargaining agreement may become void and the terms of the agreement may become unenforceable.

Filed in a separate document in the case is a Notice to Employees. The **Employer shall promptly post the Notice to Employees** in the manner and locations customarily used for posting. That notice shall remain posted until **September 16, 2020**. If the Employer customarily distributes information to employees by additional means, such as by e-mail or hard copy, the **Employer shall promptly distribute the Notice to Employees** to the affected employees through those means as well.

PERB will hold the retention and recertification election on the schedule provided later in this document.

Thank you for your attention to this matter. Feel free to contact me with any questions.

Sincerely,

/s/ Susan M. Bolte
Administrative Law Judge

Electronically filed.
Served via eFlex.

VOTING SCHEDULE

PERB will conduct a retention and recertification election for this bargaining unit by telephone and web-based ballot. The schedule for this telephone/web-based election is as follows:

September 2, 2020	Last day for the Employer to submit the Voter Eligibility List by **e-mail to iaperb@iowa.gov or by ShareFile** in **Excel** format with the bargaining unit employees' names in alphabetical order by last name, job classifications, dates of birth (MM/DD/YYYY), last four digits of social security number, home addresses, their work and personal e-mail addresses, if known, and work and personal telephone numbers, if known. Employer shall send a separate email to the Certified Employee Organization confirming the date the list was sent to PERB and the number of employees on the list. Employer should not forward the voter list to the Certified Employee Organization as it contains confidential information. Last day for parties to object to Notice of Intent to Conduct an Election.
September 14, 2020	Last day for the Certified Employee Organization to pay the election fee according to the attached fee schedule. Any request for an extension to pay the fee shall be submitted by 11 a.m. on September 14, 2020.
October 13 2020 7:00 a.m.	Telephone and web-based voting begins. Voters may cast their ballot by calling the toll-free number or logging on to the website. The Notice of Election filed by PERB on or around September 16 will contain the voting phone number and website address.
October 27, 2020 9:00 a.m.	Telephone and web-based voting ends. Voters must cast their ballot by calling the toll-free number or logging on to the website prior to this time in order for the ballot to be counted. PERB will e-file the tally on the electronic document management system.

ELECTION FEE SCHEDULE

# of Eligible Voters on Initial Voter Eligibility List**	Election Fee
10 or fewer	$15.00
10 or more	$1.50 per eligible voter

**Any overpayment or underpayment resulting from changes to the voter list due to the supplemental list, mutual agreement of parties, or challenges upheld by the Board will be handled pursuant to PERB subrule 621—15.1(1).

Make payment by check made out to the Public Employment Relations Board.

If writing a check for an individual unit, please include the Certified Employee Organization's name, employer's name, and BU number [BU-XXXX] on the check.

If writing one check for multiple units, attach a document with the check that lists the employee organization name, employer name, BU number, the number of employees in the unit, and the amount paid for each unit for which you are paying.

SAMPLE VOTER LIST

The Voter Eligibility List shall be organized in alphabetical order by the employees' last names.

The Employer needs to provide the following for all employees in the bargaining unit:

1. First Name
2. Last Name
3. Job classification
4. Date of birth (MM/DD/YYYY)
5. Last four digits of social security number
6. Home address (in one cell)
7. Work e-mail address, if available
8. Personal e-mail address, if known
9. Work telephone number, if available
10. Personal telephone number, if known

SAMPLE

Employer	
Employee Organization	
BU #	

First Name	Last Name	Job Classification	Birth Date	Last 4 Digits of Social Security #	Home Address	Work E-mail Address	Personal E-mail Address	Work Phone #	Personal Phone #
Anderson	James	Worker 1	01/02/1960	1111	111 Ash Street, Des Moines, IA 50317	janderson@city.gov	Unknown	111-111-1111	111-111-1111
Miller	Tina	Worker 1	04/08/1960	2222	222 Birch Street, Adair, IA 50002	tmiller@county.gov	Unknown	222-222-2222	222-222-2222
Olson	Donna	Worker 3	08/16/1970	3333	333 Cedar Ave., Winterset, IA 50273	dolson@city.gov	dolson@homeemail.com	333-333-3333	333-333-3333
Peterson	Kelly	Worker 1	12/24/1990	4444	444 Dogwood Blvd., Newton, IA 50208	kpeters@school.edu	kpeters@homeemail.com	444-444-4444	Unknown

THE EMPLOYER MUST PROVIDE THE VOTER ELIGIBILITY LIST IN **EXCEL FORMAT BY E-MAIL TO IAPERB@IOWA.GOV OR SUBMIT THROUGH SHAREFILE

Please provide one worksheet per unit, No multiple tabs

E-mail Subject Line or Document Title (If Through ShareFile):
BU-XXXX–EMPLOYER/CERTIFIED EMPLOYEE ORGANIZATION Voter Eligibility List

BARGAINING UNIT OF EMPLOYEES OF EMPLOYER

**The unit description below is subject to the mutual agreement between the parties concerning who is eligible to vote in the upcoming recertification election.

THE EMPLOYER SHALL PROMPTLY POST THIS NOTICE IN THE MANNER AND AT THE LOCATIONS CUSTOMARILY USED FOR POSTING. THIS NOTICE SHALL REMAIN POSTED UNTIL WEDNESDAY, SEPTEMBER 16, 2020.

IF THE EMPLOYER CUSTOMARILY DISTRIBUTES INFORMATION TO EMPLOYEES BY ADDITIONAL MEANS, SUCH AS BY E-MAIL OR HARD COPY, THE EMPLOYER SHALL PROMPTLY DISTRIBUTE THIS NOTICE TO THE AFFECTED EMPLOYEES THROUGH THOSE MEANS AS WELL.

NOTICE TO EMPLOYEES

FROM THE
PUBLIC EMPLOYMENT RELATIONS BOARD

Pursuant to the Public Employment Relations Act, Iowa Code chapter 20, the Public Employment Relations Board (PERB) certified CERTIFIED EMPLOYEE ORGANIZATION as the exclusive bargaining representative for the bargaining unit of EMPLOYER employees described at the end of this document.

Iowa Code section 20.15(2) requires PERB to conduct a retention and recertification election. In this election PERB will ask the employees in the bargaining unit whether you wish to retain and recertify CERTIFIED EMPLOYEE ORGANIZATION as your exclusive bargaining representative for purposes of collective bargaining.

Iowa Code section 20.6(7) and PERB subrules 621—15.1(1) and 15.5(5) require that CERTIFIED EMPLOYEE ORGANIZATION pay an election fee. This fee must be paid by Monday, September 14, 2020.

If CERTIFIED EMPLOYEE ORGANIZATION fails to pay the required election fee, PERB will revoke its certification. If PERB revokes the certification of CERTIFIED EMPLOYEE ORGANIZATION your collective bargaining agreement may become void and the terms of the agreement may become unenforceable.

IF AN ELECTION IS HELD, your employer shall post and distribute, in mid-September, a Notice of Election giving details on how and when to vote. The election period will be from 7:00 a.m. on Tuesday, October 13, 2020 to 9:00 a.m. on Tuesday, October 27, 2020. The election will be conducted by the Public Employment Relations Board and your right to a secret ballot and a free choice will be protected.

THE PUBLIC EMPLOYMENT RELATIONS BOARD DOES NOT ENDORSE ANY CHOICE IN ANY ELECTION CONDUCTED.

Any questions should be directed to:

Public Employment Relations Board
510 East 12th Street • Suite 1B
Des Moines IA 50319-0203
515/281-4414
https://iowaperb.iowa.gov
iaperb@iowa.gov

THE EMPLOYER SHALL PROMPTLY POST THIS NOTICE IN THE MANNER AND AT THE LOCATIONS CUSTOMARILY USED FOR POSTING. THIS NOTICE SHALL REMAIN POSTED UNTIL WEDNESDAY, SEPTEMBER 16, 2020.

IF THE EMPLOYER CUSTOMARILY DISTRIBUTES INFORMATION TO EMPLOYEES BY ADDITIONAL MEANS, SUCH AS BY E-MAIL OR HARD COPY, THE EMPLOYER SHALL PROMPTLY DISTRIBUTE THIS NOTICE TO THE AFFECTED EMPLOYEES THROUGH THOSE MEANS AS WELL.

[BU-XXXX]

BARGAINING UNIT OF EMPLOYEES OF EMPLOYER

**The unit description below is subject to the mutual agreement between the parties concerning who is eligible to vote in the upcoming recertification election.

STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:	)	
	)	BU-XXXX
EMPLOYER,	)	
Public Employer,	)	ORDER DIRECTING
	)	RETENTION AND
and	)	RECERTIFICATION ELECTION
	)	
EMPLOYEE ORGANIZATION,	)	
Certified Employee Organization.	)	
	)	

The Public Employment Relations Board (PERB) has previously determined that the grouping of employees of EMPLOYER as described and attached at the end of this document constitutes an appropriate bargaining unit for purposes of collective bargaining pursuant to Iowa Code chapter 20.

Pursuant to Iowa Code section 20.15(2) and Chapter 15 of PERB's administrative rules, PERB must conduct a retention and recertification election prior to the expiration of the collective bargaining agreement to determine whether CERTIFIED EMPLOYEE ORGANIZATION will be retained and recertified as the exclusive collective bargaining representative for the unit of employees described at the end of this document. Having determined that an election is required pursuant to Iowa Code section 20.15(2) and PERB rule 621—15.5(20), and having received payment from the employee organization pursuant to Iowa Code section 20.6(7) and PERB subrules 15.1(1) and 15.5(5), PERB finds that such retention and recertification election should be conducted.

IT IS THEREFORE ORDERED that a retention and recertification election be conducted under the supervision and direction of the Public Employment Relations Board from 7:00 a.m. on Tuesday, October 13, 2020 to 9:00 a.m. on Tuesday, October 27, 2020. Eligible to vote are all employees in the bargaining unit who were employed in the unit on the date of this order, September 16, 2020.

IT IS FURTHER ORDERED that if the previously provided employee list needs to be updated or corrected, EMPLOYER shall email to iaperb@iowa.gov or submit through ShareFile the voter list in an Excel spreadsheet by September 23, 2020. The spreadsheet shall include all names of the eligible voters (employees in the unit on September 16) in alphabetical order by last name, their job classifications, their date of birth (MM/DD/YYYY), the last four digits of their social security number, their home addresses, their work and personal email addresses, if known, and their work and personal telephone numbers, if known. This is the same format you previously used. The subject line (if emailed) or title of the Excel spreadsheet (if through ShareFile) shall be BU-XXXX EMPLOYER/CERTIFIED EMPLOYEE ORGANIZATION Voter Eligibility List-Updated.

EMPLOYER has a continuing duty to inform CERTIFIED EMPLOYEE ORGANIZATION if any eligible voter leaves employment prior to the conclusion of the election.

EMPLOYER shall immediately post and distribute copies of the attached Notice of Election, **Voting Schedule, Voting Instructions, and Unit Description** in the manner customarily used for the posting and distribution of information to employees. If EMPLOYER customarily distributes information to employees by additional means, such as by email or hard copy, then EMPLOYER shall also do the same with the attached Notice of Election, Voting Schedule, Voting Instructions, and Unit Description. The notices should remain posted until EMPLOYER receives notification of the tally of the ballots at the conclusion of the election.

DATED at Des Moines, Iowa, this 16th day of September 2020.

THE EMPLOYER SHALL PROMPTLY POST THIS NOTICE AND ATTACHED DOCUMENTS IN THE MANNER AND LOCATIONS CUSTOMARILY USED FOR POSTING. THESE NOTICES SHALL REMAIN POSTED UNTIL THE EMPLOYER RECEIVES NOTIFICATION OF THE TALLY OF BALLOTS AT THE CONCLUSION OF THE ELECTION.

IF THE EMPLOYER CUSTOMARILY DISTRIBUTES INFORMATION TO EMPLOYEES BY ADDITIONAL MEANS, SUCH AS BY E-MAIL OR HARD COPY, THE EMPLOYER SHALL PROMPTLY DISTRIBUTE THESE NOTICES AND ATTACHED DOCUMENTS TO THE AFFECTED EMPLOYEES THROUGH THOSE MEANS AS WELL.

NOTICE OF TELEPHONE AND WEB-BASED RETENTION AND RECERTIFICATION ELECTION

The Public Employment Relations Board (PERB) has ordered that a retention and recertification election be conducted to determine whether CERTIFIED EMPLOYEE ORGANIZATION will be retained and recertified as the exclusive collective bargaining representative for the employees of EMPLOYER in the bargaining unit described at the end of this document. It has been determined that this election will be conducted by telephone and online with the assistance of YesElections, an internationally recognized neutral election service corporation. During the election period, which begins October 13 at 7:00 a.m. and ends October 27 at 9:00 a.m., voters can either go online (https://vote.yeselections.com/iaperb/) or call in (toll free at 877-639-7161) to cast a ballot.

The script of the ballot question and ballot options are shown below.

Retention and Recertification Election
for Certain Employees of
EMPLOYER

DO YOU WANT CERTIFIED EMPLOYEE ORGANIZATION TO BE RETAINED AND RECERTIFIED AND CONTINUE TO BE YOUR EXCLUSIVE BARGAINING REPRESENTATIVE?
Yes. No.

VOTING SCHEDULE

PERB will conduct a telephone and web-based retention and recertification election for this voting unit. The schedule for this telephone and web-based election is as follows:

October 13, 2020 7:00 a.m.	Telephone and web-based voting begins.
October 27, 2020 9:00 a.m.	Telephone and web-based voting ends. Voters must cast their ballot by logging on to the website or calling the toll-free number prior to this time in order for the ballot to be counted. YesElections will provide PERB with the results and PERB will e-file the tally on the electronic document management system.

You can vote online (https://vote.yeselections.com/iaperb/) or by phone (toll free at 877-639-7161). The voting system is in operation 24 hours a day, 7 days a week during the voting period. Please see the attached voting instructions.

EMPLOYEE ORGANIZATION will be retained and recertified if CERTIFIED EMPLOYEE ORGANIZATION receives a "yes" vote from a majority of eligible voters. An eligible voter's choice not to vote is the same as casting a "no" vote.

The Public Employment Relations Board does not endorse any choice in the election.

YesElections Help Desk

If you experience any problems with the voting system or need special assistance in voting, call TBD.

PERB

If you have questions about the election process, email PERB at iaperb@iowa.gov or call PERB at 515-281-4414.

VOTING INSTRUCTIONS

Voting Begins Tuesday, October 13 at 7:00 a.m.
Voting Ends Tuesday, October 27 at 9:00 a.m.

To Vote by Phone:

1. Call 877-639-7161 toll-free.
2. Be prepared to provide your birth date (MM/DD/YYYY) and the last four digits of your Social Security number.
3. Follow the instructions provided to you on the phone.
4. You will be asked, "Do you want CERTIFIED EMPLOYEE ORGANIZATION to be retained and recertified and continue to be your exclusive bargaining representative?
5. After you vote, you will be asked to confirm your choice for your vote to be counted. You MUST CONFIRM your choice for your vote to be counted.

To Vote by Internet

1. Go to https://vote.yeselections.com/iaperb/.
2. Be prepared to provide your birth date (MM/DD/YYYY) and the last four digits of your Social Security number.
3. Follow the instructions provided to you.
4. You will be asked, "Do you want CERTIFIED EMPLOYEE ORGANIZATION to be retained and recertified and continue to be your exclusive bargaining representative? Select either "Yes" or "No" Then submit your selection.
5. After you vote, you will be asked to confirm your choice for your vote to be counted. You MUST CONFIRM your choice for your vote to be counted.

If you receive a message saying you have already voted and you have not done so, please contact PERB.

YesElections Help Desk
If you experience any problems with the voting system or need special assistance in voting, call TBD.

PERB
If you have questions about the election process, e-mail PERB at iaperb@iowa.gov or call PERB at 515-281-4414.

BARGAINING UNIT OF EMPLOYEES OF EMPLOYER**

**The unit description below is subject to the mutual agreement between the parties concerning who is eligible to vote in the upcoming recertification election.