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MEMORANDUM

TO: Phil Rumore

FROM: Matthew E. Bergeron
Clayton E. Eichelberger

DATE: October 29, 2021

SUBJECT: Buffalo Teachers' Federation – Testing Consent and Waiver (COVID-19) (New Matter No.: 30395)

It was a pleasure talking to you, Mr. Montante, Ms. Pordum, Mr. Kibler, and Ms. Burke yesterday. Given the time sensitivity of your questions, we have conducted research and wanted to get you our findings as soon as possible. We will continue to look at these issues and if additional information is uncovered, we will draft a supplemental memo for you.

Facts

We understand the facts as follows. By email dated October 22, 2021, the District advised the school community of the mandated proof-of-vaccination and testing required by the State. Beginning the week of November 5, according to the email, staff would need to either submit proof of vaccination, or weekly test results. The deadline to submit proof of vaccination is November 5, 2021 and for those who have not done so, "Starting the week of November 8, 2021, staff who have not demonstrated that they are fully vaccinated will have to upload weekly testing information via the district online portal."

As far as testing goes, according to the District, "It is the unvaccinated staff member's responsibility to submit weekly testing results through the online portal. **School staff cannot rely on receiving their weekly COVID-19 surveillance test at their respective schools**. If available, COVID-19 testing in schools may only be accessed during either lunch or planning period. Find a Test Site Near You -- https://coronavirus.health.ny.gov/find-test-site-near-you" *Emphasis added.* We are advised that the "COVID-19 Testing Consent Form" that has been provided for our review is exclusively related to the vendor the District is using in its schools to provide testing. It is unknown whether any waiver is required if the employee has testing completed outside of the District. In terms of the consent form's language, the concern is that it states: "I … further agree that I and my heirs, executors and assigns hereby release CEI, Affinity Empowering,

and other reference laboratories, including their respective employees, agents and contractors, from any and all liability and claims."

Legal Analysis and Recommended Action

As we discussed during our "Zoom" yesterday, the most important piece is to demand that the District engage in impact bargaining over its implementation of the testing mandate. *See, Matter of Utica Prof. Firefighters Assn.*, 32 PERB ¶3056 (1999) (requiring bargaining over the impact on terms and conditions of employment caused by the implementation of a fitness exam). An employer's duty to bargain is not triggered until demanded by the union. We understand that a demand to bargain impact of the consent form was made by the BTF yesterday by letter, and a previous, more broad impact bargaining demand was made by letter dated October 25, 2021.

In the interim while impact bargaining is taking place, PERB case law states that such a demand does not forestall implementation of the employer's action, i.e. the testing mandate and arguably the related consent form. *See, U.F.T.,* 21 PERB ¶4514 (1988). Thus, the individual must undergo testing and, if it is done at one of the school locations that requires the consent form, they should sign the form. We must caution that members should not be advised to refuse to be tested or to sign the form, as this may constitute an unlawful work stoppage. Instead, we offer two suggestions. First, the individuals can get testing at a non-District site which does not require a waiver. Second, if they choose to get tested at a District site, they can attempt to cross out the waiver language, or sign it "under protest."

As for the waiver language itself, New York law states that such waivers are limited only to negligence; New York's public policy invalidates any purported waiver of another person's "gross negligence," which "smack[s] of intentional wrongdoing." *Abacus Fed. Sav. Bank v. ADT Sec. Svcs.*, 18 N.Y.3d 675, 682-683 (2012), *internal citations omitted.* However, for even a waiver of another's *negligence* to be effective, the waiver language must be "clear and unmistakable" to that effect. The waiver language "must clearly appear that the 'limitation of liability extends to [the] negligence or other fault of the party attempting to shed his ordinary responsibility,'" *Abramowitz. v. N.Y.U. Dental Ctr.*, 110 A.D.2d 343, 345-46 (2d Dep't 1985). Applying this standard, the court have found purported releases ineffective where they have said "**any and all claims** … that [the student] … may have against [the instructor, etc.] … for any personal injuries or property damage that [the student] may sustain or which may arise out of [his] learning," *emphasis added*; "'**any and all responsibility** or liability of any nature whatsoever for any…personal injury occurring on this trip," *emphasis added*; and language that said the party was not "in any way responsible for any consequences…resulting from the giving of such blood or from any of the tests, examinations or procedures incident thereto, and…releas[ing] and discharg[ing] [said defendant]…**from all claims and demands whatsoever**…against them…by reason of any matter related or incident to such donation of blood," *emphasis added*. *Abramowitz, internal citations omitted.*

Based on the above cases, we believe that there is a strong argument that, even if the waivers provided by the District's vendor were signed, they would be unenforceable as a matter

of law because they merely say that they purport to "release … [the entities] from any and all liability and claims" and do not clearly and unmistakably reference negligence.

If you have any follow-up questions, please let us know. And if any further relevant information becomes available to you, please send it along.

MEB:kab

c: Michael Deeley
Jennifer N. Coffey
Jenna Burke
Matthew Kibler