March 27, 2020

TO ALL LIUNA AFFILIATES IN THE UNITED STATES AND CANADA

Re: Responding to COVID-19 through Legislation and Collective Bargaining

Dear Brothers and Sisters:

LIUNA and its affiliated District Councils and Local Unions are confronted with novel issues as we attempt to address the rapid changes imposed by the COVID-19 health emergency. This letter discusses recent legislation in the United States affecting sick leave, and other collective bargaining matters that you may be facing in both the United States and Canada.

On March 18, 2020, a law was enacted that requires most employers in the United States to provide sick and family medical leave to employees for certain COVID-19 related problems. The Families First Coronavirus Response Act (“FFCRA”) is the second piece of legislation passed by Congress in response to the Coronavirus/COVID-19 public health and economic crisis. A third, massive response measure is being developed and negotiated in Congress.

This letter first answers the most pressing questions about FFCRA that LIUNA representatives may have. (Also attached is a roadmap to FFCRA’s many detailed provisions that are the source of the changes relevant to LIUNA, its affiliates, and multiemployer health plans.)

We must also consider whether and how to negotiate modifications or clarifications of our collective bargaining agreements to address such issues as jobsite safety, guarantees that healthy members are given access to work, and the effects of layoffs and government-mandated changes. Accordingly, this letter discusses those questions as well.

WHAT DOES FFCRA PROVIDE?

FFCRA requires dramatic changes in employer-provided sick leave. Among other provisions FFCRA requires: (1) emergency paid sick leave for COVID-19-related illness; (2) paid emergency family and medical leave; (3) enhanced unemployment insurance benefits; (4) health care provisions that relate to employer-provided health insurance coverage; and (5) employer tax credits for the emergency leave. Regulations implementing these new provisions are expected shortly, but the basics
of the law are important for you to understand immediately as the law will go into effect on April 1, 2020.

Please note that many questions about this new law remain unanswered. The Department of Labor is developing regulations that will have a significant impact on how the law is applied. We will advise you when relevant regulations are issued, but in the meantime additional information about FFCRA may be found at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions.

Which employers are required to provide this leave?

- Private-sector employers (including construction contractors) with fewer than 500 employees.
- Government employers of any size.

Possible exemption for small businesses: the U.S. Secretary of Labor can exempt small businesses with fewer than 50 employees from this requirement when imposing this requirement would jeopardize the viability of the business as a going concern.

What kind of emergency leave must be provided?

Two kinds of leave are required. Emergency paid sick leave is the most widely available leave of the two kinds, but is provided for only two weeks. Emergency family leave is available for a longer period, but only in very limited circumstances when a parent needs to care for a child. An employee generally would take emergency paid sick leave before taking emergency family leave.

Which employees are eligible for this leave?

- Emergency paid sick leave: any employee, regardless of hours of work or length of service.
- Emergency family and medical leave: only employees who have been employed for at least 30 calendar days by their employer. The Department of Labor’s current guidance says: “You are considered to have been employed by your employer for at least 30 calendar days if your employer had you on its payroll for the 30 calendar days immediately prior to the day your leave would begin. For example, if you want to take leave on April 1, 2020, you would need to have been on your employer’s payroll as of March 2, 2020.”

Exclusion of certain health care providers and emergency responders: an employer can deny either kind of leave to employees who are health care providers or first
responders. Also, the U.S. Secretary of Labor can issue regulations excluding these workers from eligibility.

For what reasons can an employee take leave?

Emergency paid sick leave is available only when an employee is unable to work (or to telework) due to any of the following reasons related to COVID-19:

1. The employee is under an official quarantine or isolation order.
2. The employee has been advised by a health care provider to self-quarantine.
3. The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis.
4. The employee is caring for an individual who is under an official quarantine or isolation order or who has been advised by a health care provider to self-quarantine.
5. The employee is caring for a son or daughter under 18 years old if the child’s school or place of care has been closed, or childcare provider is unavailable, due to COVID-19 precautions.
6. Other conditions substantially similar to those listed above, as may be specified in the future by the U.S. Secretary of Health and Human Services.

Emergency family leave is also available when an employee is unable to work in order to care for the employee’s child under 18 years old, if the child’s school or place of care has been closed, or the childcare provider is unavailable. But unlike the paid sick leave, an employee is entitled to this extended leave only when the closure or unavailability is due to an officially declared COVID-19 public health emergency. (By comparison, emergency paid sick leave, point 5 above, is available when the closure or childcare provider’s unavailability is due to COVID-19 precautions.)

How long is the leave?

Emergency paid sick leave can be taken for up to two weeks. For a full-time employee, this means 80 hours. For a part-time employee, it is the average of hours worked over a 2-week period.

Emergency family leave can be taken for up to 12 weeks. While the first two weeks (i.e., 10 days) of it may be unpaid, the expectation is that an employee will take emergency paid sick leave during that time.
How much does an employee get paid while on leave?

When taking emergency paid sick leave to care for oneself (reasons 1–3 under “For what reasons can an employee take leave?”), an employee is paid 100% of the employee’s regular rate of pay multiplied by the number of hours the employee would normally be scheduled to work. Pay is capped at $511 per day and $5,110 total.

When taking this leave to care for others or for other reasons (reasons 4–6), an employee is paid two-thirds of the employee’s regular rate of pay multiplied by the number of hours. Pay is capped at $200 per day and $2,000 total.

(Whether this pay also triggers an employer’s obligation to make fringe benefit contributions for the leave time will likely depend on the language of your collective bargaining agreements.)

After the first 10 days of emergency family leave, an employee is paid two-thirds of the employee’s regular rate of pay multiplied by the number of hours the employee would normally be scheduled to work. Pay is capped at $200 per day and $10,000 total.

What happens when the leave is over?

An employee who takes public health emergency leave must be restored back to his or her position, or to an equivalent position, when he or she returns to work. However, this job protection provision does not apply to employees of employers with fewer than 25 employees if the following conditions are met: (1) the position held by the employee before the employee took leave does not exist due to economic conditions or other changes by the employer that are caused by the public health emergency; (2) the employer makes reasonable efforts to restore the employee to an equivalent position; and (3) if those reasonable efforts fail, the employer makes reasonable efforts to contact the employee if an equivalent position becomes available within one year. (It is unclear to what extent construction employers may have an obligation to reinstate workers on a job following significant changes in the workforce.)

How do these new leave requirements relate to existing leave provided for under collective bargaining agreements, employer policies or other laws?

Both the emergency paid sick and family leave are on top of any other paid leave to which an employee has a right. The FFCRA does not diminish an employee’s rights or benefits under any other law, collective bargaining agreement or existing employer policy. An employer is prohibited from changing its leave policy to get around that requirement. An employee can choose to take emergency paid sick leave before taking any other kind of paid leave, and an employer cannot require
an employee to take other employer-provided paid leave before taking this emergency leave. Any employee who separates from employment is not entitled to payment for any unused emergency paid sick leave.

An employee can choose to take any accrued vacation leave, personal leave or medical or sick leave for the unpaid first two weeks of emergency family leave. Generally, an employee would be likely to take emergency paid sick leave during that period. An employer cannot require an employee to take other kinds of accrued leave instead of the emergency family leave.

**Since this new leave is temporary, when will eligible employees have a right to this leave?**

These temporary requirements are in effect from April 1, 2020, through December 31, 2020. The law does not create a right to pay for leave taken before or after the effective dates.

**Does the federal government provide any financial assistance to help employers pay for this leave?**

The financial burden on employers is not nearly as great as it initially seems because of significant tax benefits extended to private-sector employers. The new law does not provide any financial assistance to government employers even though all government employers are required to provide this paid leave. The benefits provided to private-sector employers include:

- Refundable tax credits that generally cover the cost of the leave, the cost of an employee’s health benefits paid by the employer during the leave period and the amount the employer pays in Medicare payroll tax on the leave pay.
- An exemption from paying the employer share of the Social Security payroll tax on the employee’s pay during the leave period.

**RESPONDING TO COVID-19 THROUGH COLLECTIVE BARGAINING**

The FFCRA is not the only change or potential change that directly impacts the legal rights of workers affected by the current crisis. You might also consider—or be asked by your signatory employers to consider—changes to your collective bargaining agreements. As we grapple with these matters, please keep the following points in mind.

**The Duty to Bargain**

The existence of a duty of bargain about COVID-19-related issues midterm during an existing collective bargaining agreement is a question about which lawyers may
argue. That is not to say that affiliates should hesitate to approach contractors with bargaining demands. To the contrary, we expect signatory contractors to welcome the opportunity to address a number of coronavirus issues directly. Affiliates should therefore consider whether and how to negotiate modifications or clarifications of our collective bargaining agreements to address such issues as jobsite safety, guaranteeing healthy jobsites for working members, and the effects of layoffs and government-mandated changes that affect our worksites.

Separate and apart from bargaining, Unions have the right to information about employers’ COVID-19 planning. Affiliates may legally demand information about and discuss employer plans to protect workers, address scenarios and related issues. You should also review collective bargaining agreements or memoranda of understanding for provisions related to management’s rights to take unilateral action in emergency situations, including the ability to alter shift schedules, extend hours of work or reassign duties.

Note that governmental mandates imposed during the COVID-19 emergency may dictate or constrain an employer’s business/operational decisions, but they do not suggest that labor organizations and unions should refrain from bargaining over the “effects” on employees, which can include the way in which a given mandate will be satisfied, as well as redress for adversely affected employees.

Possible Issues for Bargaining

1. Right of workers to engage in work compared to right to leave from working.

We have a duty to represent all laborers covered by our agreements. While employers may want greater freedom to screen out, or send home, workers may have interests that differ from each other, as well as their employer. There may be workers who appear ill or who may have been exposed to COVID-19, but who want to work. Other workers may want to limit their workplace exposure to COVID-19 to the greatest extent possible.

Our job is to balance these interests in a way that is fair and reasonable, to put our members to work while protecting their right to a healthy working environment. Reasonable people may disagree about where this balance lies. Fortunately, our duty of fair representation gives us a wide range of discretion in negotiating agreements. Accordingly, our negotiations should be guided by close adherence to guidance issued by the Center for Disease Control (“CDC”) and state and local health agencies. I do not believe that we should accept employer discrimination against workers who want to work unless current CDC or health agency guidelines recommend their isolation or social distancing. [https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html).
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At present, CDC guidelines recommend such measures only when a person has had “close contact” with a “high or medium risk” person. “Close contact” means being within six feet of a high risk person for an extended period, such as living in the same premises or sharing a doctor’s waiting room. “High or medium risk” is presently defined as a person who has tested positive, who has symptoms of the virus, including a fever or “acute respiratory illness” (e.g. cough or difficulty breathing), and whose illness has not yet been identified; or those who have recently travelled to highly affected areas. These guidelines are evolving as the crisis develops, and state and local health directives may already have taken these limitations further. The most stringent applicable guidelines should be your touchstone.

You may demand bargaining and seek special emergency agreements over COVID-19 related issues, such as, quarantine, closure, layoff, furloughs, or reduced hours. While entitlement to leave may be established through a variety of sources, including the FFCRA or the collective bargaining agreement, it remains to be determined when leave can be triggered. Through the collective bargaining process, affiliates may seek to negotiate reasonable rules that specify when employers can deny work opportunities and when employees can take leave where, for example we may want to negotiate the rules that apply where:

- An employee has been exposed to an individual who has tested positive for COVID-19 (as confirmed by the CDC or other authorized body) and is directed to quarantine by a public health official;
- An employee has tested positive for COVID-19 (as confirmed by the CDC or other authorized body);
- A family member in the employee’s immediate household has tested positive for COVID-19 (as confirmed by the CDC or other authorized body); or
- An employee or a member of the employee’s immediate household has symptoms of flu-like illness or is recovering from flu-like symptoms.

Many statutory systems, including the Americans with Disabilities Act, prohibit discrimination against employees for actual or perceived disabilities. We should be watchful when an employer sends an employee home for fear of COVID-19. Many LIUNA collective bargaining agreements have explicit or implied “just cause” for discharge provisions. If and when workers are denied work opportunities because of unsupported claims that they present a risk of COVID-19 exposure, grievances may be necessary.

2. Right to refuse work.

Workers have a legal right to refuse to go to work, however, unreasonable refusals may have consequences, both in terms of immediate employment status and entitlement to future hiring hall referrals. Bargaining may be required to ensure
that workers who reasonably fear for their safety are treated fairly. For example, an affiliate might bargain over whether and when workers who refuse work due to the fear of a COVID-19 infection will be allowed reinstatement or the ability to seek unemployment compensation without employer opposition. Related bargaining topics are suggested herein below.

Separate and apart from the collective bargaining process, individual workers have a right to refuse work due to “abnormally dangerous” working conditions under LMRA Section 502 (29 U.S.C. Section 143) as well as OSHA regulations (29 C.F.R. Section 1977.12) on subjecting oneself to “serious injury or death arising from a hazardous condition at a workplace.” Note, these laws have been construed narrowly, so employee refusals must be based on evidence of a serious workplace hazard. As usual, two or more workers acting together may also have rights to take steps for “mutual aid and protection” under Section 7 of the National Labor Relations Act.

3. Health and Safety at Work

There are significant opportunities for bargaining that addresses health and safety issues created by COVID-19. Possible subjects for bargaining include:

- Establishing or activating health & safety or similar committees on preventative measures;
- Establishing an employer duty to notify the union of potential employee exposure to the coronavirus, including notification of the source of the exposure, to whom the notice will be provided and the timing of the notice;
- Creating an employer duty to pay for testing under specified conditions;
- Establishing the conditions under which someone diagnosed with COVID-19 may return to work;
- Establishing the information required of those refusing to work or demanding employer accommodation because of COVID-19 concerns;
- Establishing employer notification obligations before jobsites are closed down or there are other major changes in operations including furloughs, vacations or major changes in work assignments;
- Securing adequate health and safety equipment, such as hand washing or sanitizing stations, masks, goggles or other personal protective equipment (PPE);
- Creating a presumptive right to use sick leave usage without medical verification due to illness for COVID-19 or flu-like symptoms;
- Identification of essential and non-essential personnel related to teleworking options and other modified duty assignments;
- The ability to use accrued leave or borrow against future accruals to deal with sickness, family illnesses, and childcare;
Especially for non-construction settings, waiving leave accrual caps or providing cash-out options once caps are hit.

4. Effect of legislation providing paid and unpaid sick and family medical leave.

A variety of federal, state and local laws provide access to paid or unpaid leave for events associated with coronavirus, including an employee’s own illness, to care for sick family members, or public health emergencies. Of immediate importance, the Families First Coronavirus Response Act (“FFCRA”), discussed above. There are other laws, federal and provincial, applicable to Canadian affiliates. These laws supplement and often override benefits provided for under collective bargaining agreements.

I trust that you find this information useful. As developments are occurring at a rapid pace, you may want to consult with your own lawyers to address specific questions. We will update you with further legislative and collective bargaining information as matters warrant.

With kind regards, I am

Fraternally yours,

TERRY O’SULLIVAN
General President

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Attachment
A ROAD MAP TO RELEVANT PROVISIONS OF THE FFCRA

As explained above, FFCRA contains many separate parts regarding a wide variety of responses to the current public health crisis. It is the second such bill, and a third, which should offer substantial infrastructure spending, is forthcoming. What follows is a roadmap of FFCRA’s many parts which point you to relevant provisions, many of which are highlighted above.

I. “Emergency Paid Sick Leave Act” (Sections 5101 and following)

Creates a new requirement that employers of fewer than 500 employees must provide each employee with sick paid leave (Section 5110(2)(B)(i)(1)(aa)) if the employee is unable to work (including telework) due to: (a) a government order to quarantine or isolate related to COVID-19; (b) he was advised to self-quarantine by a health care provider; (c) he is experiencing COVID-19 symptoms and is seeking a medical diagnosis; (d) he is caring for an individual who is quarantined or self-quarantined, caring for children because schools or child caregivers are closed or unavailable due to COVID-19; or (e) other similar conditions specified by DHHS. Section 5102(a).

The required paid sick leave is limited to 80 hours for full-time employees. A part-time employee is entitled to paid sick leave for a number of hours equal to the number of hours he works on average over a 2-week period. Section 5102(b)(2).

The sick leave must be provided to employees regardless of how long they have been employed. Section 5110(1)(A)(i).

This new paid sick leave entitlement cannot be offset against other paid leave to which the employee may be entitled. Section 5107(1).

The amount of an employee’s pay for purposes of this leave requirement is 100% of his regular rate of pay, with limitations: (a) an employee is entitled to only 2/3 of his regular pay if the leave is to care for a family member; (b) if the leave is related to the employee’s illness or quarantine, a daily cap of $511 and total cap of $5,110; and (c) if the leave is to care for a child or others, a daily cap of $200 and a total cap of $2,000. Section 5110(5)(A)(ii).

The Labor Department is required to issue regulatory guidance within 15 days after enactment. The enforcement scheme of the Fair Labor Standards Act applies. Employers are prohibited from retaliating against employees who take the leave. Section 5104.

The Labor Department can, by regulation, exempt an employer with fewer than 50 employees if the leave mandates “would jeopardize the viability of the business as an ongoing concern.” Section 5111(2).

These sick leave provisions are effective April 1, 2020 through December 31, 2020. Sections 5108-5109.
II. “Emergency Family and Medical Leave Expansion Act” (Sections 3101 and following.)

Significantly expands the coverage and benefits of the federal Family and Medical Leave Act (FMLA) to make it applicable to all employers of less than 500 employees and all employees employed for at least 30 days, and to require paid leave. The Labor Department can, by regulation, exempt an employer with fewer than 50 employees if the leave mandates “would jeopardize the viability of the business as an ongoing concern.” Section 3102.

The law requires employers to grant employees up to 12 weeks of leave if they are unable to work (including telework) for reasons related to a public health emergency to care for a child under age 18 if the child’s school or caretaker has been closed or the child’s care provider is unavailable due to a public health emergency. Section 3102(b).

The first 10 days of leave may be unpaid leave, although employees are entitled to take accrued paid vacation leave, personal leave, or sick leave in place of the unpaid leave if they choose.

After the first 10 days, the remainder of the FMLA leave (up to 10 weeks) must be paid leave. The employee is entitled to be paid an amount not less than 2/3 of his regular pay (2/3 of his regular rate of pay and the number of hours he would normally be scheduled to work), with two caps. The caps are $200 per day and a total of $10,000. There are provisions for calculating the pay of employees whose work schedule varies from week to week. Section 3102(b).

The normal FMLA requirements regarding post-leave job restoration continue to apply for employers of 25 or more employees. An employer of fewer than 25 employees is not required to restore an employee to a position he held before taking the leave if the position does not exist due to economic conditions or changes in operations and the employer makes reasonable efforts to return the employee to an equivalent position. Failing that, the employer must make reasonable efforts to contact the employee if an equivalent position becomes available within a year after the leave. Section 3102(b).

These emergency FMLA provisions are effective April 1, 2020 through December 31, 2020.

III. Satisfying Paid Leave Mandates Through Multiemployer Funds

A separate section of the FFCRA expressly provides that an employer that is “signatory to a multiemployer collective bargaining agreement” may satisfy its FMLA and paid sick leave obligations under this law by “making contributions to a multiemployer fund, plan, or program based on the hours of paid sick time each of its employees is entitled to under this Act while working under the multiemployer collective bargaining agreement, provided that the fund, plan, or program enables employees to secure pay from such fund, plan, or program based on hours they have worked under the multiemployer collective bargaining agreement and for the
uses specified under section 2(a).” The provision entitles employees of such employers to collect benefits from the multiemployer fund to which their employer made contributions. Section 3103.

**Note:** At present, there is no clear pathway to providing these new benefits through multiemployer plans. The option created by these provisions would only work in situations where a health and welfare fund or other labor-management trust fund could provide substantial sick pay benefits without a commensurate source of funding.

**IV. Employer Tax Credits (Section 7001 and following)**

Entitles employers to tax credits (refundable) to offset the full cost of providing sick leave and FMLA required by the FFCRA. Employers could claim the credit against their share of the quarterly Social Security and Medicare taxes due. An additional credit may be claimed for costs associated with qualified health plan expenses related to the leave.

**V. “Emergency Unemployment Insurance Stability and Access Act” (Section 4101 and following)**

Provides administrative and eligibility relief regarding unemployment insurance:

**A.** Provides $1 billion in emergency administrative grants to State UI programs, conditioned on easing of State UI eligibility rules to provide easier access to UI benefits during COVID-19 emergency and the State making it easier to apply for UI benefits by phone or on-line. $500 million is reserved for States that experience a 10% increase in UI claims.

**B.** Waives Federal UI eligibility requirements relating to work search, waiting periods, quits for good cause, and employer tax assessments.

**C.** Provides 100% Federal funding for UI extended benefits (up to a total of 52 weeks) through December 31, 2020 (relieving States of their 50% share obligation) on certain conditions for States that experience a 10% increase in UI claims.

**VI. Health Plan Coverage of COVID-19 Testing Free of Charge (Section 6001 and following)**

Mandates all group health plans, including self-funded health and welfare funds, to provide coverage, without charge to eligible patients, of approved testing to detect the coronavirus (which causes the disease called COVID-19). The free coverage must include items and services furnished during medical office visits (in-person or telehealth), urgent care visits, and emergency room visits leading to or relating to the testing.

This mandate is effective as of March 18, 2020. Regulatory guidance may be issued by the Labor Department, HHS, and Treasury Department.