

LEGISLATIVE AND LEGAL UPDATE

Melissa R. Murray, Esq., MBA

Partner

Norris, Murray & Peloquin, LLC

Lisa C. Adams, Esq.

Senior Legislative Analyst

Massachusetts Municipal Association

THE BUDGET: THREE FISCAL YEARS

FY18

Ended June 30 with tax collections increasing by 8.6% and \$1.1 billion over FY18 forecast

Above-target collection due mostly to taxes on capital gains and other non-withholding income

\$700 million deposited in the stabilization fund, bringing total to \$2 billion

FY18 supplemental deficiency budget filed Monday to close out FY18- on Governor's desk

FY19

Tax collections for first quarter increased nearly 10% over FY18 collections and are running ahead of the Q1 projection by \$323 million

Still early, but economic signs are positive

FY20

Governor's staff will start on FY20 budget. Consensus revenue hearing in December

Governor's budget recommendation due January 23, 2019.

RETIREE LEGISLATION

MMA OPPOSED TWO AMENDMENTS TO SENATE BUDGET BILL

1

- Permanently grandfather in all retirees at contribution ratio in effect at date of retirement
- Not included in bill

2

- Extend temporary freeze on retiree health insurance contribution percentages for cities or towns that used sections 22 or 23 of Chapter 32B to implement plan design changes or join the GIC
- Municipal health insurance reform in 2011- moratorium on changes until July 1, 2014
- Extended 2 more years to 2016
- Extended 2 more years to 2018
- Amendment extended freeze to July 1, 2020
- Moratorium has expired

RETIREE CASE: PERAC V. CRAB & OTHERS

- Supreme Judicial Court determined effective date of retirement for public employees receiving workers' compensation benefits and supplemental pay
- Employee worked at public works department for 27 years, injured on job June 30, 2010, and began receiving workers' compensation benefits same day
- Also received 2 hours of sick and vacation pay per week
- Town filed application for accidental disability on February 1, 2012 (board approved)
- Employee received WC benefits and supplemental pay until July 7, 2012
- Court held effective date of retirement is 6 months before filing of accidental disability application
- Changed PERAC's longstanding practice of using date on which employee last received regular compensation, which included supplemental pay
- Court said sick and vacation pay received while unable to work is not regular compensation when used to supplement WC benefits
- PERAC memo: create new pay code
- PERAC memo: decision retroactive to January 1, 1946
- PERAC memo: individuals must self-identify to have allowance recalculated

PENSIONERS WORKING LEGISLATION

- Increased time public retiree collecting a pension may work for a government entity from 960 hours to 1,200 hours per year
- Gov. sent back proposed revision to raise cap from 960 to 975
- Legislature overrode bill and reinstated increase from 960 to 1,200
- Governor vetoed the bill
- Keeps cap intact at 960 hours
- “While I support the idea of providing municipalities with increased flexibility to make appropriate staffing decisions, this legislation goes too far in allowing employees to work nearly full-time while collecting a pension without any corresponding changes to improve the current practice.” Gov. Baker, Veto Letter, August 6, 2018

CHANGES TO HIRING PROCEDURE FOR VETERANS

- Gov. Baker signed BRAVE Act on August 28, 2018 → Chapter 218 of Acts of 2018
- Section 4 amends Chapter 31, §26 (eligible lists; veteran's preference)
- Prohibits appointing authority from requiring, requesting or accepting, or imposing a term or condition on a disabled veteran to obtain or retain employment, to require a military medical record or military personnel service record for the purpose of employment
- May require, request or accept and impose a term or condition of employment requiring individual to present a DD-214 form (report of separation)
- May require military service records if individual was discharged with anything other than honorable record

TOBACCO SMOKING: POLICE OFFICERS & FIREFIGHTERS

Old Law

- Chapter 41, Section 101A
- Anyone eligible for appointment or appointed as a police officer or firefighter after January 1, 1988 who smokes tobacco products is subject to termination
- Originally enacted as part of a deal to provide disability pensions to police officers and firefighters under heart, lung and cancer presumptions

New Law

- Chapter 210 of the Acts of 2018
- An Act Providing Firefighters and Police Officers With the Opportunity to Enter a Smoking Cessation Program Prior to Termination
- No immediate termination
- Subsequent violations “cause” for dismissal

NEW INJURED-ON-DUTY LEAVE LAW FOR FIREFIGHTERS

- An Act regulating the disability benefits provided to certain police officers and firefighters
- Chapter 148 of the Acts of 2018
- Extends Chapter 32, Section 94B presumption that cancer arose in the line of duty for paid leave upon cancer diagnosis
- Adds breast cancer and reproductive cancers to list of cancers in Chapter 32, Section 94B
- No loss of pay for period of incapacity
- Paid leave law → statute does not mention medical expenses

WHAT TYPES OF CANCERS ARE COVERED?

Skin

Breast

Reproductive system

Central nervous system

Lymphatic system

Digestive system

Hematological system

Skeletal system

Urinary

Oral

Prostate

Lung or respiratory tract



any condition of cancer which may result from exposure to heat or radiation or to a known or suspected carcinogen as determined by the International Agency for Research on Cancer (IARC)

AND

the incidence of which is found by regulation by the commissioner of the department of public health to have a statistically significant correlation with fire service

WHO PAYS THE MEDICAL BILLS?

Q: If a firefighter takes leave for cancer under §111F, and §111F is an injured-on-duty leave law, and insurance carriers don't pay injured-on-duty claims, then aren't municipalities on the hook for medical expenses?

A: It depends...

- BCBS will continue to cover cancer presumption claims unless it can be shown that the cancer is job-related
- If cancer is deemed job-related, the municipality pays under Chapter 41, Section 100
- Talk to insurance carrier if other than BCBS
- Might see further legislation in new legislative session

FIREFIGHTER REGISTRY

On July 9, 2018, President Trump signed legislation requiring the CDC to set up a registry of firefighters to track links between workplace exposures and cancer

National Institute for Occupational Safety and Health (NIOSH) will establish the registry

PREGNANT WORKERS FAIRNESS ACT

- Effective April 1, 2018.
- Amends c. 151B, s. 4 to prohibit discrimination due to pregnancy and pregnancy-related conditions (lactation)
- Cannot treat employees or job applicants less favorably/different, refuse to hire, or take any adverse action.
- Obligation to provide reasonable accommodation. Must engage in interactive process. Reasonable accommodation cannot create “undue hardship” (significant difficulty or expense).
- Cannot require medical documentation for certain accommodations: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting no more than 20 pounds; and (iv) private, non-bathroom space for expressing breast milk. Medical documentation can be requested for other accommodations.
- Employee not required to accept a particular accommodation, or take a leave of absence, if another reasonable accommodation would allow employee to perform the essential functions of the job without an undue hardship. Not required to discharge or transfer another employee or promote an unqualified employee as an accommodation.
- Notice must be posted and provided to employees. Separate notice to employee required within 10 days of employer being made aware employee is pregnant.

PAY EQUITY

- Effective July 1, 2018
- Analysis is whether jobs are “substantially similar” in: skill, effort, responsibility, and working conditions.
- Six nondiscriminatory reasons for different compensation which avoid liability: (1) seniority; (2) merit; (3) commissions; (4) geographic location; (5) education, training and experience, if reasonably related to the job; and (6) travel (if regular/necessary condition of the job).
- Differences in pay and benefits due to decades of collective bargaining is not a defense.
- Extraordinary damages. Liability is doubled: Liquidated damages equal to the shortfall in “wages” are automatically granted.
- **Safe Harbor For Avoiding Or Limiting Liability.** Employers who complete a self-evaluation of pay practices (within 3 years and prior to a lawsuit), and “demonstrate progress” toward eliminating wage differentials based on gender for comparable work, have a defense to liability if the self-evaluation is “reasonable in scope and detail.” Even incomplete evaluations can avoid some damages.
- **What To Do.** Initiate the self-evaluation, starting with job descriptions, but always looking at actual duties and functions and the frequency of each essential task, as well as environmental circumstances and hazards.

WORKPLACE SAFETY STANDARDS (OSHA)

M.G.L. c. 149, §6½

- Extends federal OSHA standards to all public sector employers
- Provides at least level of protection provided under OSHA
- Department of Labor Standards will enforce statute (not OSHA)
- DLS will be issuing regulations

Employer duties:

- Provide employees a place of employment free from recognized hazards that are likely to cause death or serious physical harm
- Comply with OSHA standards

Employee duties:

- Comply with OSHA standards

DLS INSPECTIONS & ENFORCEMENT

Inspections

- Imminent danger
- Accident or fatality
- Voluntary inspection
- Complaint
- Planned Program Inspection
- 5-10% of complaints result in inspection

Enforcement

- Announced visits
- Fines for repeat, willful violations or failure to abate
- Find the root cause without blame
- Prevent the next accident
- Provide solutions in reports
- Safety first, compliance second

WORKPLACE SAFETY

Effective date is February 1, 2019

What should you do.

Review and update existing policies; draft new policies to fill gaps

Employee training

Bargain (when necessary) with union over new obligations under law

Establish a safety committee

Implement corrective actions (often less than \$1,000)

DLS trainings (separate trainings for firefighters)

Mock inspections

Quarterly updates from DLS on citations issued

DLS website; New England Education Center (Keene State is official OSHA training center); DIA grant program - awards up to \$25K to fund workplace safety training (safety@dia.state.ma.us); OSHA.gov

JANUS V. AFSCME

- On June 27, 2018, SCOTUS ruled that mandatory union agency fees violate the free speech rights of employees under the First Amendment
- Agency fees cover costs associated with collective bargaining, contract administration, and representing employees in grievances and arbitrations
- Agency fees don't include union's lobbying or political activities
- Employees may stop paying agency fees if they are not union members

JANUS LEGISLATION

- Janus bill passed Senate, but did not reach House floor for a vote before end of session
- Union disagreement over whether bargaining unit employees should benefit from collective bargaining if they don't pay agency fees
- MMA will support narrowly-tailored legislation that specifically addresses agency fee issue raised by Janus
- Anticipate a bill in new legislative session

IMPACT OF JANUS

- Talk to unions!
- **Stop payroll deductions** for agency fees for non-union members in all bargaining units and notify unions
- Mandatory agency fee no longer allowed; nonmember employees must clearly and affirmatively consent to payroll deductions going forward
- Review compulsory fee clauses in collective bargaining agreements; remove or revise
- Review employee consents or payroll deductions on file (audit)

MARIJUANA

HOST COMMUNITY AGREEMENTS

- To be licensed, a Marijuana Establishment must execute a Host Community Agreement (“HCA”) with the municipality in which it intends to be located
- Whether HCAs can include clauses for additional amounts of money above the 3% cap on community impact fees
- Representative Cusak and Senator Jehlen want Cannabis Control Commission (“CCC”) to review the terms of HCAs
- CCC adopted guidance on HCAs that discusses the legality of fees
- CCC voted not to review HCAs - stay tuned for more on this!

UP FOR COMMENT

- Colocation of medical and recreational establishments
- Medical regulations

DOR LOCAL FINANCE OPINION: MARIJUANA

- Accounting treatment of local option excises on retail sales of marijuana for adult use and impact fees and any other payments required or received from marijuana establishments and treatment centers
- Local impact tax on retail sale by accepting G.L. c. 64N, §3 (majority vote of legislative body)
- Maximum excise rate 3% (amounts also subject to local excise)
- All revenues generated belong to the general fund and can only be spent by appropriation
- Accounting officer must credit all collections from local option excises on retail sales and payments made by marijuana establishments regardless of the characterization of the payments
- Municipality may use location option to dedicate all or a portion of at least 25% of collections of excise on retail sales or payments to a general or special purpose stabilization fund established under G.L. c. 40, §5B
- Bureau of Accounts will close balance sheet reservations of payments from marijuana establishments or medical marijuana treatment centers when calculating the available funds of a municipality

MARIJUANA & THE WORKPLACE

Barbuto v. Advantage Sales and Marketing, 477 Mass. 456 (2017)

- SJC said employee terminated for medical marijuana use may have viable claim of handicap discrimination under c. 151B.
- The SJC ruled that the employer owed the employee an obligation “to participate in the interactive process to explore with her whether there was an alternative, equally effective medication which she could use that was not prohibited by the employer’s drug policy” under G.L. c. 151B § 4(16).
- The SJC left open that the employer may still show at summary judgment or trial that the plaintiff’s use of medical marijuana is not a reasonable accommodation, because it would impose an undue hardship on the defendant’s business.
- The Court refused to recognize an implied private right of action under the medical marijuana statute.

PAID FAMILY MEDICAL LEAVE ACT

- M.G.L. c. 175M as added by St. 2018, c. 121
- Passed on June 20, 2018; signed by Governor June 28, 2018
- Part of “Grand Bargain” that provides increase in the state’s minimum wage and employees with paid Leave.
- Bill was a compromise among legislators, the business community, labor unions and community groups designed to eliminate three potential November ballot questions on proposals concerning paid leave, the minimum wage, and a reduction in the state sales tax.
- Ambitious plan with timetable starting in 2019, with leave available January, 2021
- **LOCAL OPTION**

NOTE: Municipal employees are not covered by the minimum wage increase because the state has different wage and hour laws for public employees. Public employers will continue to follow the federal minimum wage law.

PAID FAMILY MEDICAL LEAVE ACT

FAMILY AND MEDICAL LEAVE TIMETABLE	
Date	Requirement
March 31, 2019	Proposed regulations published
July 1, 2019	Begin collection of tax of 0.63 percent
January 1, 2021	Begin to pay leave benefits

QUESTIONS?
