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Agenda – Legal Committee Regular Meeting

Notice Date: March 27, 2020
Meeting Date: **April 2, 2020 Legal Committee Regular Meeting**
Location: 651 Commerce Drive, Roseville, CA, and via Posted Teleconference Location
Time: 8:30 a.m. PST

In compliance with the Executive Department, State of California, Executive Order N-29-20, and the Brown Act, you may participate in the meeting via teleconference by:

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Or

**You may attend in person at the Northern California Power Agency Headquarters' Office,
Located at 651 Commerce Drive, Roseville, CA 95678**

Persons requiring accommodations in accordance with the Americans with Disabilities Act in order to attend or participate in this meeting are requested to contact the NCPA Secretary at 916.781.3636 in advance of the meeting to arrange for such accommodations.

- **Review Safety Procedures – NCPA Headquarters Facility**

- 1. CALL MEETING TO ORDER AND ROLL CALL**

- 2. PUBLIC COMMENT**

Any member of the public who desires to address the NCPA Legal Committee on any item considered by the Legal Committee at this meeting, before or during the Committee's consideration of that item, shall so advise the Chair and shall thereupon be given an opportunity to do so. Any member of the public who desires to address the NCPA Legal Committee on any item within the jurisdiction of the Legal Committee and not listed on the Agenda may do so at this time.

- 3. APPROVAL OF MEETING MINUTES** - Seeking approval of February 6, 2020, regular meeting minutes.

- 4. COVID-19 LEGISLATION, PRESIDENTIAL PROCLAMATIONS, EXECUTIVE ORDERS AND RELATED ACTIONS** – Discussion of recent federal and state actions in response to the COVID-19 outbreak and their implications for NCPA Members.

5. GENERAL COUNSEL UPDATES

NCPA's General Counsel will update the Committee on miscellaneous business matters of interest.

6. ADJOURNMENT



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Minutes – Legal Committee Meeting

To: NCPA Legal Committee

From: Linda Stone

Subject: February 6, 2020 NCPA Legal Committee Meeting Minutes

1. Call Meeting to Order and Roll Call

The meeting was called to order at 8:35 a.m. by Chair Barry DeWalt. At roll call the following members were present by telephone at the posted teleconference locations listed on the agenda and at the NCPA headquarters office, 651 Commerce Drive, Roseville, California:

Alameda-Alan Cohen, Healdsburg-Samantha Zutler, Lodi-Janice Magdich, Lompoc-Joe Pannone, Palo Alto-Amy Bartell, Plumas-Sierra-Michael Vergara, Port of Oakland-Catrina Fobian, Redding-Barry DeWalt, Roseville-Joe Mandell, and Ukiah-David Rapport. A quorum was present. Also present were Jake Baldwin from Redding, NCPA General Counsel Jane Luckhardt, NCPA Legislative and Regulatory Assistant General Manager Jane Cirrincione, and administrative support Linda Stone.

2. Public Comment

There was no public comment.

3. Approval of Meeting Minutes

Meeting minutes from the September 25, 2019, annual (regular meeting) and special meeting held on November 21, 2019, were presented for approval. A motion was made by Alan Cohen (Alameda) and seconded by Joe Mandell (Roseville) recommending approval of the Legal Committee meeting minutes listed above, and filing of the Notes for the October 17, 2019, special meeting which was noticed but where a quorum of members was not present. All members present were in favor. The motion passed: 10 Yes, 0 Noes, 0 Abstain, 6 Absent.

4. Closed Session

At 8:38 a.m. the Committee convened to Closed Session. NCPA General Manager Randy Howard was also present on the call during closed session. The Legal Committee returned to Open Session at 8:53 a.m.

5. Report from Closed Session

General Counsel Jane Luckhardt reported that no reportable action was taken during closed session.

6. Status Update Regarding Clean Fuel Reward Program Governance Agreement

General Counsel Jane Luckhardt introduced this item. The committee was provided a copy of the final CFR Governance Agreement which includes the Joinder exhibit for POUs to sign. The program has now been approved by the CPUC. For Medium POUs, the deadline to sign the Agreement is May 2020 to continue earning base residential credits. The deadline for Small POUs is December 31, 2022, to continue earning base residential credits. There remains the issue to be solved of establishing the mechanism to handle the monetary aspects of the program. One option being considered is using CVP Corp; however, an invoice must be provided. As a taxable entity, SCE cannot handle the transactions, but has indicated it will work with us regarding invoicing. Emily Lemei of NCPA's Legislative & Regulatory division is following up on this issue.

7. Community Solar Development and Consistency with the Surplus Lands Act (Cal. Gov. Code Section 54220 et seq.)

Discussion was had regarding recent legislation, AB 2135, which adds provisions to further promote the use of surplus lands for low and moderate income housing and provides first priority for use of the surplus land for low income housing. Alan Cohen (Alameda) led the discussion noting the changes which went into effect January 1, 2020, create cumbersome issues regarding affordable housing when entities wish to sell-off or lease real estate. The committee discussed some exceptions, including 'agency use', and talked about examples of how other agencies are handling these types of transactions. Randy Howard provided input about how LADWP handled similar issues. Joe Mandell (Roseville) also shared his experience with these issues. Both Randy and Joe said they will see what examples or forms they may have which would be beneficial to the group. Jane Luckhardt will receive the materials and distribute them to the committee members. Alan indicated he was very appreciative of the discussion and sharing of information.

8. Status Update Regarding NCPA's Support Services Program

Jane Luckhardt provided the group with an update and report about NCPA's Support Services Program since its inception in 2016. Through the program, signatory members to the Support Services Program Agreement are able to access various of NCPA's and SCPPA's agreements with its vendors. One recent change Jane highlighted for the committee is the modified indemnification language included in Task Orders executed among NCPA, SCPPA, vendor, and the member taking services under a SCPPA agreement. Members taking services are now also asked to sign the Task Orders acknowledging the indemnification provision. Randy Howard noted that two members had requested access to Power Management renewable services, however those types of transactions are not included in the scope of the Support Services Program. He said Tony Zimmer's group is putting out a Request for Proposals for these services.

9. General Counsel Updates

Jane Luckhardt had no further updates not already discussed.

10. Adjournment

The meeting was adjourned at 9:29 a.m.

Respectfully submitted,
Linda Stone



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CONGRESS PASSES HR 6201, WHICH INCLUDES DIVISION C, THE “EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT” AND DIVISION D, THE “EMERGENCY PAID SICK LEAVE ACT”

March 18, 2020

On March 18, 2020, the U. S. Senate passed HR 6201, a bill passed by the U. S. House of Representatives on March 16, 2020. This bill enacts a number of relief measures related to the COVID-19 pandemic. This legal alert discusses two aspects of the bill: the “Emergency Family and Medical Leave Expansion Act,” Division C of the bill, and the “Emergency Paid Sick Leave Act,” Division D of the bill. These two divisions of HR 6201 impose significant new requirements on employers to provide employees with paid leave benefits for absences occasioned by COVID-19 related circumstances.

Emergency Paid Sick Leave Act

The Emergency Paid Sick Leave Act (Act) provides employees with paid leave benefits for absences occasioned by COVID-19 related conditions. The features of the Act are as follows:

- The Act defines an “Employee” by borrowing the definition of that term in the federal Fair Labor and Standards Act (FLSA). The FLSA defines “employee” as “any individual employed by an employer.” In other words, this definition is broad and comprehensive and includes all employees of an employer, whether full- or part-time.
- The Act defines “Employer” as (a) for private sector employers, “an individual with fewer than 500 employees” and (b) for public sector employers, “any entity or individual that employs 1 or more employees.”

Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.

- **Conditions Under Which An Employee Is Entitled to Paid Sick Leave:** An employee is entitled to paid sick leave due to the inability to work because of any of the following conditions:
 - The employee is subject to a federal, state, or local quarantine order related to COVID-19.
 - The employee has been advised by a health care provider to stay home due to concerns related to COVID-19.
 - The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
 - The employee is caring for an individual who is subject to an order described in item 1 above or has received advice as described above.
 - The employee is caring for a son or daughter because the son’s or daughter’s school or place of care has been closed due to COVID-19 precautions.
 - The employee is experiencing “any other substantially similar condition” specified by the Secretary of Health and Human Services.
- **Amount of Paid Sick Leave Available:** Eighty (80) hours for full-time employees. Part-time employees are eligible for paid sick leave in an amount equal to the average number of hours they work over a 12-month period.
- **Cap on Amount of Sick Leave Pay:** Paid sick leave is to be calculated at the employee’s regular rate of pay or the applicable federal, state, or local minimum wage, whichever is greater, but in no event shall the annual leave pay exceed \$511 per day and \$5,110 in the aggregate for leave taken for items numbers 1, 2, and 3 above and \$200 per day and \$2,000 in aggregate for leave taken for items 4, 5, and 6 above.
- **Sequencing:** Employees are entitled to utilize the paid sick leave provided by the Act before they can be required to utilize any other benefit (vacation, sick leave, PTO) provided by the employer.
- **Effective Dates of Act:** The Act takes effect fifteen (15) days from passage (March 17, 2020) and sunsets on December 31, 2020.
- **Prohibited Actions:** Employers are prohibited from taking any adverse employment action against an employee due to the employee’s use of the benefits provided by the Act.
- **Penalties:** An employer who violates the provisions of the Act will be liable to have violated the minimum wage requirements of the FLSA and be subject to unpaid wages, liquidated damages, and penalties as provided in the FLSA for such a violation.
- **Posting:** Employers are required to post notice of the Act in the workplace. A model notice will be provided by the Secretary of Labor within 30 days of enactment of the Act.

Emergency Family and Medical Leave Expansion Act

The Emergency Family and Medical Leave Expansion Act (Act) amends the federal Family and Medical Leave Act (FMLA) to address a limited set of COVID-19 related conditions. Key features of this Act are as follows:

- **Revised FMLA Definition of “Employee”:** The FMLA currently defines an eligible employee as an individual who (1) has been employed by the employer for twelve (12) months; (2) has worked at least One Thousand Five Hundred (1,500) hours in the twelve (12)-month period immediately preceding a leave request, and (3) works at a location at which fifty (50) or more employees are employed or within seventy five (75) miles of that location. This Act revises that definition such that an eligible employee is now defined as an individual who has been employed for at least thirty (30) calendar days by the employer from whom FMLA leave is requested.
- **Revised FMLA Definition of “Covered Employer”:** The FMLA currently defines a covered employer as an individual or entity that employs fifty (50) or more employees for twenty (20) or more workweeks in this or the preceding calendar year. This Act revises that definition such that a covered employer is now defined as an individual or entity employing fewer than 500 employees.
- **New Basis for Taking FMLA Leave:** In addition to the qualifying conditions for taking leave already found in the FMLA, this Act adds an additional basis for taking leave identified in the Act as a “qualifying need related to a public health emergency.” That phrase is defined in this Act as a situation in which an “employee is unable to work (or telework) due to a need for leave to care for a son or daughter under eighteen (18) years of age because the son or daughter’s school or place of care has been closed due to a public health emergency related to COVID-19.”
- **Paid/Unpaid Leave:** Leave taken due to a “qualifying need related to a public health emergency” as defined in the paragraph above, is unpaid for the first ten (10) days of the leave. Thereafter, the leave is paid. The paid amount that the employee is entitled to is an amount that is not less than two-thirds (2/3) of the employee’s regular rate of pay multiplied by the number of hours the employee would normally have worked absent the “qualifying need related to a public health emergency,” but in no event shall the amount of pay exceed \$200 per day and \$10,000 in the aggregate.
- **Coordination With Other Paid Leave Benefits:** An employee who takes leave due to a “qualifying need related to a public health emergency,” may use, but cannot be compelled to use, other paid leave benefits (such as vacation or PTO) provided by the employer.
- **Job Restoration Rights:** An employer with fewer than twenty five (25) employees is not required to restore an employee who takes leave due to a “qualifying need related to a public health emergency” to the employee’s job and same benefits if the following conditions are met:

- The position held by the employee no longer exists due to economic conditions or other changes in the employer’s operating conditions from the public health emergency.
- The employer makes a reasonable effort to restore the employee to an equivalent position with equivalent pay and benefits.
- If the reasonable efforts to restore the employee are unsuccessful, the employer must make reasonable efforts to contact the employee to fill any equivalent position that becomes open during the one-year period beginning on the earlier of the date on which the “qualifying need for a public health emergency” ends or the date that is twelve (12) months after the date on which the employee’s leave commences.
- **Effective Dates of Act:** The Act takes effect fifteen days from its enactment (March 17, 2020) and sunsets on December 31, 2020.

There is one other related provision contained in HR 6201. Division C provides employers with certain tax credits for paid sick leave and paid family and medical leave as described above. The tax treatment of these provisions is beyond the scope of this current Legal Alert.

The impact of COVID-19 continues to be unprecedented. The two provisions above are just one aspect of the impact this pandemic is having. The attorneys at Kronick are committed to assisting our clients in dealing with the many challenges created by the current health crisis.

Questions

If you have any questions concerning this Legal Alert, please contact us directly following from our office, or the attorney with whom you normally c

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Announcements

Circular Letter

March 18, 2020

Circular Letter: 200-015-20

Distribution: IV, V, VI, X, XII, XVI

To: All CalPERS Employers
Subject: Governor's Executive Order N-25-20

Purpose

The purpose of this Circular Letter is to inform you of the impact of Executive Order N-25-20 on CalPERS retirees employed as retired annuitants with all CalPERS employers.

Work Hour Limitation Exceptions

On March 4, 2020, Governor Gavin Newsom declared a statewide state of emergency due to the COVID-19 pandemic. Governor Newsom issued Executive Order N-25-20 to further enhance California's ability to respond to COVID-19. Consistent with applicable federal law, and to ensure adequate state staffing to expedite emergency response and recovery, the work hour limitations for retired annuitants are suspended from the date the state of emergency was declared until the state of emergency is lifted.

The intent of the executive order is to suspend reinstatement and the retired annuitant work hour limitation of 960 hours per fiscal year during the state of emergency. Any hours worked by a retired annuitant to ensure adequate staffing during the state of emergency will not be counted toward the 960-hour limit for the fiscal year.

Wait Period Exceptions

Under this executive order, the 180-day break in service requirement under Government Code section 7522.56(f) is also suspended for retired annuitants hired to ensure adequate staffing during the state of emergency.

In addition, under subdivision (c) of section 586.2 of Title 2 of the California Code of Regulations (CCR), the declaration of a state of emergency exempts retired annuitants from the 60-day separation in service requirement under subdivision (a)(2) of CCR section 586.2. However, please be aware, the prohibition under subdivision (a)(1) of CCR section 586.2 on any predetermined agreement between an employer and an impending retiree who has not attained normal retirement age, continues to remain in effect, consistent with federal law.

Timeline

The start date for the state of emergency was March 4, 2020. The suspension of the retired annuitant work hour limitation and wait period exceptions will remain in place until the state of emergency is lifted.

Continued Compliance

Agencies must continue to enroll, and report retired annuitants to CalPERS. The remaining working after retirement provisions in Government Code sections 21221(h), 21224(a), and 7522.56(e) will continue to apply:

- Compensation for the appointment shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a publicly available pay schedule divided by 173.333 to equal an hourly rate.
- A retired annuitant shall not receive any benefit, incentive, compensation in lieu of benefits, or other form of compensation in addition to the hourly pay rate.

The emergency proclamation applies to work performed by a retired annuitant hired to ensure adequate staffing during the state of emergency. You must notify the director of the California Department of Human Resources of any individual employed pursuant to these waivers.

Notification should be sent to CAStateofEmergency@calhr.ca.gov.

CalPERS will continue to monitor the work hours for retired annuitants covered by this order and send communication to confirm when a violation is found and whether it complies with these exceptions.

Questions

If you have any questions, call our CalPERS Customer Contact Center at **888 CalPERS** (or **888-225-7377**).

Renee Ostrander, Chief
Employer Account Management Division

HR 6201

Link to the text of the bill that was signed into law this week that allows certain employers to provide Emergency Paid Sick Leave (EPSL) and paid family leave to their employees and receive a payroll tax credit as a way to get reimbursed: <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>

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