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**LEGAL ADVISORY:**

**CHANGES TO M.G.L. c. 71, § 42 RE. REDUCTION IN FORCE**

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**I. INTRODUCTION**

M.G.L. c. 71, § 42, which governs the dismissal and demotion of Massachusetts public school teachers and other professionals, including lay-offs due to a reduction in force (“RIF”) necessitated by “declining enrollment or other budgetary reasons,” was amended by the Acts of 2012, 131, Secs. 3 and 9. The amendment modifies RIF criteria applicable to teachers having professional teacher status (“PTS,” “tenure”). While probationary teachers will still be subject to a RIF prior to a teacher having PTS under the new law, the reduction of tenured teachers will be handled differently under the new § 42. Beginning September 1, 2016, qualifications/performance, rather than seniority, must be the primary consideration in a district’s RIF decision relative to PTS teachers, with seniority being a tie-breaker rather than a determinative factor.

**II. SUMMARY**

The long entrenched principle whereby probationary teachers, meaning those not yet having attained PTS status, must be dismissed prior to certified PTS teachers in a RIF scenario remains

unchanged by the amendment. Among PTS teachers, however, beginning September 1, 2016 qualifications/performance trumps seniority under the new law, with seniority serving only as a “tiebreaker” between equally performing PTS teachers having the relevant certification(s). In the past, seniority has been controlling relative to PTS teachers having the certification(s) required for a particular position, regardless of performance.

This change to § 42 relative to RIF, going into effect for the first time on September 1, will alter the layoff landscape in the 2016-2017 school year and beyond. It will result in districts and associations having to bargain for new RIF provisions to be incorporated into collective bargaining agreements.

#### **SAMPLE ANALYSIS UNDER CURRENT LAW:**

Assuming three equally certified/licensed teachers may be subject to a RIF, Teacher A without PTS, Teacher B with PTS having 7 years of service and Teacher C with PTS having 5 years of service, they must be reduced in that order regardless of performance and even if Teacher C’s performance is inferior to that of Teacher B.

#### **SAMPLE ANALYSIS UNDER AMENDED § 42:**

Assuming the same three equally certified/licensed teachers described above in the same RIF situation, Teacher A must still be reduced first due to a lack of PTS, but the principal shall decide who to reduce first out of Teachers A and B based upon “qualifications” – statutorily defined to include “performance” - rather than seniority. Beyond the question of PTS attainment, which is inherently impacted by years of service, under the new law seniority will only come into play if Teachers A and B are equally certified and qualified with equivalent work performance history and evaluations, at which point seniority status will be looked to as a tie-breaker. Under the new § 42, Teacher C may be reduced while Teacher B remains employed if both teachers have PTS and the required certification(s) / license(s), despite Teacher B being junior to Teacher C, if Teacher B’s performance history is superior to that of Teacher C and there are no contract provisions to the contrary.

### **III. AMENDED STATUTORY TEXT**

The full text of the relevant (seventh) paragraph of M.G.L. c. 71, § 42 is as follows, with the underlined text representing the text inserted by the amendment, effective September 1, 2016:

...

*Nothing in this section or section 41 shall affect the right of a superintendent to lay off teachers pursuant to reductions in force or reorganization resulting from declining enrollment or other budgetary reasons. No teacher with professional teacher status shall be laid off pursuant to a reduction in force or reorganization if there is a teacher without such status for whose position the covered employee is currently certified or if there is a less qualified teacher with such status holding the same or similar position for which the covered employee is currently certified. No teacher with such status shall be displaced in accordance with the terms of a collective bargaining agreement or otherwise by a more senior teacher with such status unless the more senior teacher is currently certified pursuant to section 38G and is at least as qualified for the position as the junior teacher holding the position. The criteria for determining a qualified teacher under this paragraph shall be subject to the collective bargaining provisions of chapter 150E; provided, however, that any such collectively bargained for qualifications shall include, as the primary factors, indicators of job performance, including overall ratings resulting from comprehensive evaluations conducted consistent with section 38 and the best interests of the students in the school or district; and provided further, that for the purposes of this paragraph, no distinction shall be made between the overall performance ratings established by the board of elementary and secondary education finding that the teacher has met or exceeded acceptable performance standards developed under said section 38 and that are defined by the board as proficient and exemplary. The school committee and the collective bargaining representative may negotiate for seniority or length of service only as a tie-breaker in personnel actions under this paragraph among teachers whose qualifications are no different using the qualifications collectively bargained for in accordance with this paragraph.*

#### **IV. CONCLUSION**

Going forward, school committees may only bargain with associations for RIF provisions of collective bargaining agreements implementing job qualifications / performance indicators as the primary determining factor, with seniority or longevity being used only as a tiebreaker in cases of equally qualified and performing teachers. For additional information, please review the full text of M.G.L. c. 71, § 42 and contact local counsel.

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