TO: Susan Ceglowski, Executive Director, Vermont School Boards Association

FROM: Christopher B. Leopold, Esq. & Joseph E. McNeil, Esq.
McNeil, Leddy & Sheahan, P.C.

DATE: September 9, 2021
Updated August 25, 2021

RE: Payments in Lieu of Health Insurance and Act 7, 2021

Questions Presented

The passage and implementation of the provisions of Act 7, 2021 prohibiting a school employee from receiving a cash payment in lieu of health insurance ("CIL") while receiving health care benefits from a school employer has raised several issues and questions. You have requested a legal opinion addressing the following questions:

1. Do the CLI provisions of Act 7 "trump" the master agreement districts have in place?
2. What if CIL payments have already been paid out since the effective April 9 effective date of the applicable provisions of Act 7?
3. What if CIL payments are scheduled to be paid in the next several weeks?
4. Can Districts begin applying the law July 1?
5. Are there any repercussions for beginning July 1?
6. Do the CIL provisions of Act 7 apply to dependents (covered children also eligible for benefits as a school employee)
7. Do the CIL provisions of Act 7 only apply to public schools and therefore not applicable if one of the schools is private?
8. Are retired teachers who receive health insurance through the Vermont State Teachers Retirement System eligible to receive a CIL when employed by a school district in a paraprofessional or other position consistent with the teacher's "retired" status?
9. Should school employers as defined under 16 V.S.A.§2101(3) attempt to recoup improper CIL payments that were made prior to the school employer becoming aware of the prohibitions in Act 7?

Brief Answer

The CIL prohibition in Section 4 of Act 7 amends 16 V.S.A.§2103(f) to prohibit a "school employee" as defined in §2101 from receiving a CIL if the employee obtains their health care benefits from a "school employer" as defined in §2101. This prohibition makes CIL payments to school employee covered by the provision illegal under Vermont law. It therefore "trumps" or limits the application any master agreement provision regarding CIL payments to school

employees. Section 7 of Act 7 provides for the specific effective dates of the various sections of the Act. With the exception of Sections 5a and 6a related to negotiations and dispute resolution, all other provisions of the law are effective on the date of passage – in this case April 9. As such, the application of the amended provisions of 16 V.S.A.§2103(f) limiting CIL payments to school employees became Vermont law on April 9, 2021. If a school employee is covered by the terms of §2103(f), such payments are illegal under Vermont. The application of the law cannot be postponed to July 1 or other date more convenient for the school employer. If payments already been made to employees since April 9 realistically, school employers cannot readily recover the funds, but should be aware that such payments did not comply with Vermont law. If an individual is a school employee as defined in the law and receives health care benefits from a school employer, the CIL prohibition in §2103(f) applies even if when the school employee receives such health coverage as a dependent. Under 16 V.S.A §2101(3) a school employer is defined as a supervisory union or school district under 16 V.S.A.§11.

Analysis

Act 7 amended various provisions of Title 16, Chapter 61, the Commission of Public School Employee Health Benefits, 16 V.S.A.§2101 – 2108. The applicable statutory provisions as amended by Act 7 provide as follows:

16 V.S.A.§2101

(2) "School employee" ~~means~~:

(A) includes the following individuals:

~~(A)~~(i) an individual employed by a ~~supervisory union or~~ school ~~district~~ employer as a teacher or administrator as defined in section 1981 of this title; ~~or~~

~~(B)~~(ii) a municipal school employee as defined in 21 V.S.A. § 1722;

(iii) an individual employed as a supervisor as defined in 21 V.S.A. § 1502;

(iv) a confidential employee as defined in 21 V.S.A. § 1722;

(v) a certified employee of a school employer; and

(vi) any other permanent employee of a school employer not covered by subdivisions (i)–(v) of this subdivision (2); and

(B) notwithstanding subdivision (A) of this subdivision (2), excludes individuals who serve in the role of superintendent.

(3) "School employer" means a supervisory union or school district as those terms are defined in section 11 of this title.

16 V.S.A §2103:

(f) In no case shall a school employee receive cash in lieu of receipt of healthcare benefits from one school employer while simultaneously receiving health care benefits from the same or another school employer.

A. Local Collective Bargaining Agreements.

As noted above, new CIL prohibition in Section 4 of Act 7 amends 16 V.S.A.§2103(f) to prohibit a "school employee" as defined in §2101 from receiving a CIL if the employee obtains their health care benefits from a "school employer" as defined in §2101. The legal effect of this prohibition is that CIL payments to such covered school employees are illegal under Vermont law. This statutory prohibition overrides or limits the provision of any local school district or supervisory union collective bargaining agreement providing for a CIL payment to a school employee who is prohibited from receiving such payment under the provisions of §2103(f). In effect it does "trump" those provisions that would otherwise require payment to such school employees.

Many local collective bargaining agreements include provisions that require the parties to meet and confer if any provision of the agreement is declared void or unenforceable by a court, or through federal or state law. It is recommended that districts with such provisions consult with legal counsel regarding this obligation. If a school district has an obligation to meet under such a provision, it should not postpone implementation of complying with Act 7 pending such meeting.

B. Implementation Date.

As previously noted, Section 7 of Act 7 provides for the specific effective dates of the various sections of the Act. The effective date applicable provisions relating to the CIL prohibition all have an effective date of April 9, 2021. As such, the application of the amended provision of 16 V.S.A.§2103(f) specifically limiting CIL payments to school employees became Vermont law on April 9th. If a school employee is covered by the terms of §2103(f), such payments are illegal under Vermont as of April 9th. There is no statutory mechanism or allowance to postpone the application of the law to July 1 or another date more convenient for school employers. Once school employers become aware of the prohibition is §2103(f) to covered school employees, payments to such individuals should be halted immediately. If payments already been made to employees since April 9, it is our opinion that school employers cannot readily or realistically recover such funds, but the school employer should be aware that such past payments did not comply with Vermont law. There is no penalty for violating §2103(f), however, a CIL payment made to a school employee in violation of Act 7 after an official or employee of a school employer is aware of the Act 7 prohibition may constitute a violation of the individual's fiduciary duties to the school employer.

C. Dependents

It is important to note that specific wording of §2103(f) clearly *envisions* that there *are* school employees who receive their health benefits from "the same or another school employer", but are not the employee who is paying the premium contribution and enabling the coverage. This may occur in several circumstances, including two spouses or domestic partners working for the same or different school employers. It may also happen when a school employee's dependent child

(up to age 26) is a school employee for the same or a different school employer. In each of these circumstances, §2103(f) prohibits a cash in lieu payment to such school employee.

D. Private Schools

The CIL prohibition in §2103(f) is only applicable when both school employees are employed by public school employers. A school employer is defined as "…a supervisory union or school district as those terms are defined in section 11 of this title." The definition in §11 includes the following legislatively established governance models for our public schools in Vermont:

> A "school district" means town school districts, union school districts, interstate school districts, city school districts, unified union districts, and incorporated school districts, each of which is governed by a publicly elected board.

Section 2103(f) only prohibits a CIL payment when a school employee as defined in §2101(3) obtains their health care benefits through another school employer as defined above. The intent of the statute is to prohibit public school education funds from paying an individual when they "elect" to decline the health care benefit from their public school employer while at the same time the individual actually receives health care benefits from the same or different public school employer. Consequently, a school employee is not prohibited from receiving a CIL payment if the source of their health coverage is through a spouse, domestic partner or parent employed by an independent school or private school or the health coverage is through VSTRS.

E. Retired Teachers

The legal analysis of the eligibility of retired teachers who receive their health insurance through the VSTRS to receive a CIL payment when employed by a school district as a paraprofessional is similar to the Private School analysis above. As previously noted, §1103(f) only prohibits a CIL payment when a school employee as defined under Act 7 obtains their health care benefits through another school employer as defined in § above. Since VSTRS is a pension system and provides benefits to retired teachers and their dependents, it not a school employer as defined by the statute. Retired teachers employed by a covered school employer are eligible for CIL payments while at the same time receiving their health coverage through VSTRS as a component of their retirement benefit from the retirement system.

F. Recouping Payments

Numerous school employers, as defined by Act 7 and noted herein, were unaware of the passage and/or the effective date of the Act resulting in CIL payments being issued to school employees who are ineligible for such payments under the Act's provisions. The question has been posed whether such school employers should attempt to recoup improper CIL payments that were made prior to the school employer becoming aware of the prohibitions in Act 7. School employers should carefully evaluate the number and amount of CIL payments made to ineligible employees under Act 7. Following such evaluation, the school employer may determine to regard such CIL payments as a payroll overpayment and seek recoupment of the payment(s) in a manner generally consistent with its practices on such matters. It is understanding that school employers

typically provide for recoupment of such payroll overpayments over the course of a number of pay periods. The number of pay periods is usually dependent on the amount of the overpayment relative to the employee's wages. Since school employers may be in very different circumstances relative to employment contracts, collective bargaining agreements and the obligation to bargain over issues arising from Act 7, we recommend that school employers consult with their own labor counsel to discuss their options regarding recoupment, including prior consultation with the local bargaining representative(s) and assessing the likelihood of grievances and related claims.