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ACT NOW ADVISORY

NLRB Issues Guidance on the Duty to Bargain During a Pandemic and Other Emergency Situations

March 30, 2020

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The COVID-19 pandemic and its sharp impact on the U.S. economy has presented a unique set of issues for employers with union-represented employees, including not only those employers that are parties to collective bargaining agreements ("CBAs") but also those that are negotiating first contracts. The General Counsel of the National Labor Relations Board ("Board" or "NLRB") has now provided some useful guidance for employers (and unions) confronting the need to address the pandemic, issuing General Counsel Memorandum 20-04, entitled "Case Summaries Pertaining to the Duty to Bargain in Emergency Situations" ("Memorandum").

As the Memorandum notes, employers and unions are now facing a wide range of "questions regarding the rights and obligations of both employers and labor organizations, particularly in light of responsive measures taken to contain the virus," including both "measures taken out of prudence" and others that "have been required by state, local or federal authorities."

The Memorandum notes that while the Board has not previously faced the unique facts and challenges presented by COVID-19, it has over the years considered how the duty to bargain is impacted by a range of other emergency situations:

> Regardless of the reason for any given response to the spread of the virus, many parties are considering the impact on the duty to bargain. Although we are in an unprecedented situation, I wish to make the public aware of several cases in which the Board considered the duty to bargain during emergencies. These include public emergencies as well as emergencies unique to a particular employer. Accordingly, the following case summaries are divided into those two categories. It is my hope that these summaries prove useful to those considering this issue during these challenging times.

The two categories of cases summarized in the Memorandum are those touching on the duty to bargain during public emergency situations and those touching on the duty to bargain during emergency situations particular to an individual employer. Both groups of

cases are instructive to employers facing the need to respond to circumstances that were not foreseen when they negotiated their CBAs.

In this regard, many employers with heavily unionized operations, such as health care systems, are under tremendous stress to make changes in the way that they provide and allocate services, as well as where they provide them, because of the pandemic. These changes may involve, among others, changes in assignments, asking employees to perform services outside of their normal duties, changes in hours and shifts, relocating services, and adding temporary locations that need to be staffed. For facilities with union-represented workforces, many of these issues would normally require bargaining with the unions representing their employees.

Hospitals and other health care employers seeking to meet the needs of patients and prepare responses are, in many instances, facing contract language that may limit their need to forge and implement responses in the face of contract terms that restrict a hospital's need for flexibility. Employers providing other essential services are confronting comparable contractual restrictions as well as union resistance to employer implementation of such changes needed to meet the most exigent of circumstances. Such contract provisions may impact the employers' ability to make unilateral changes and their obligations to bargain with the unions.

The NLRB's Exigent Circumstances Rules

As explained in the Memorandum's summary of the Board's decision in *Port Printing & Specialties*, 351 NLRB 1269 (2007), the NLRB recognizes an exigency exception to the duty to bargain before implementing unilateral changes; this exception applies in narrow circumstances. The Board has held that this exception is recognized only with regard to extraordinary events that are unforeseen and "having a major economic effect requiring the company to take immediate action." The NLRB has also described the exception as requiring "compelling business justification." Once the immediate emergency is passed, bargaining over continuing the change may be required.

There is also the issue of timing here. The NLRB may require notice and some bargaining where there is some time between when the need for the change is recognized and the date of implementation, and on the issues of continuing the changes post-emergency and the effects of the changes. The Board will also require bargaining over changes made during an emergency that are not needed as a response to the emergency.

The Memorandum divides the cases between those involving public emergencies and those involving specific circumstances involving a single employer. While the decisions covered have varying results, what is clear is that the analysis is highly fact-based so that employers looking to make unilateral changes beyond those covered by the language of the applicable CBA need to do a careful review.

One case cited in the Memorandum, *Gannett Rochester Newspapers*, 319 NLRB 215 (1995), involves the duty to bargain over the terms of pay for union employees for time lost during a shutdown due to an ice storm. The employer decided to pay all of the non-union employees for the time lost but not the union-represented employees. The Board

found that payment to union employees for time lost due to the storm was a mandatory subject of bargaining for a unit with an expired CBA but was not for a second unit with no clause requiring payment for time missed due to storms and a zipper clause.

How Arbitrators Look at These Types of Matters

While beyond the scope of the Memorandum, also relevant are the ways that arbitrators view changes made in response to such emergencies when they may be beyond the scope of the language of the applicable CBA. Arbitrators have, in many cases, found that contractual obligations imposed on employers by typical CBA provisions that may hinder the response to emergencies, such as the current pandemic (e.g., transfers, posting of positions, and assignment of work to non-unit employees) may yield to the demands of emergency situations. The extent to which arbitrators defer to employer actions that are potentially at odds with specific contractual requirements depends upon the latitude employers possess under the relevant CBA, such as the terms of the applicable management rights clause, the nature and extent of the emergency situation, and whether the requirements of a CBA may be contrary to applicable laws.

What Employers Should Do Now

The COVID-19 pandemic is forcing employers to look at a broad range of actions that are necessary to serve patients, customers, and others while they balance the need to ensure both the survival of their businesses and compliance with an ever-expanding patchwork of federal, state, and local laws, orders, and directives. While time for long deliberations may not be possible, a review of the facts, contracts, and specific circumstances, as well as available alternatives, will be essential. Also essential will be the development and implementation of effective communications with the union representative and employees.

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