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Employment Law Note

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Dealing with Unions During a Pandemic

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The coronavirus emergency has hit every employer hard, none more so than unionized employers who must deal with their unions while also considering significant and immediate operational changes. This raises the simple question: As a unionized employer, how must and should you deal with your unions during this pandemic crisis?

There are several key principles to remember when dealing with unions during this crisis:

- Employers have an obligation to bargain with a union over "mandatory subjects of bargaining," *i.e.*, employee wages, benefits and other terms and conditions of employment. The law provides some leeway for employers if there is an "economic exigency." The coronavirus pandemic would likely be an "economic exigency" that would allow an employer to make immediate operational changes without first bargaining with the union. Though the employer would not have to bargain with the union over, say, the *decision* to furlough employees, it would still have to bargain over the *impact (or effects)* of the decision (*e.g.*, the order of furlough, whether there would be paid leave during the furlough, etc.).
- Your collective bargaining agreement may already allow changes to employee pay, benefits, leaves, etc. Or, there may be contract language, such as your layoff provisions, that already require you to handle these issues in certain ways. An economic exigency, such as a financial inability prompted by the crisis, or a partial closure requiring layoffs out of seniority, may allow you to bypass the contract if you are not able to comply with its provisions.
- Once the immediate need to make changes is over, the employer at that time will have to negotiate over the impact of its decisions on union-represented employees.

Cases dealing with bargaining obligations during emergencies

On March 27, 2020, in response to the coronavirus emergency, the General Counsel for the NLRB issued to the NLRB regional offices General Counsel Memorandum 20-04, which highlights NLRB decisions on bargaining obligations during unforeseen emergencies. These cases held:

- An exception to the duty to bargain exists where the employer can demonstrate that "economic exigencies compel[led] prompt action." The NLRB has defined this to mean "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).
- Employers may close an operation and lay off employees in response to a government order following a natural disaster without first bargaining with the union. An employer cannot, however, refuse to bargain over the impact on employees once the crisis is over. *Port Printing & Specialties*, 351 NLRB 1269 (2007) (Employer unlawfully refused to bargain with the union after it continued using non-unit employees to do unit work weeks after a hurricane while also issuing a permanent layoff notice to employees).
- Post-9/11 economic fallout causing "extraordinary unforeseen events having a major economic effect" that required the employer to lay off

employees allowed the employer to impose the layoffs without bargaining.

- Employers must bargain over the impact of their decision to send employees home without pay during a weather emergency if there is no contract in effect. If there is a contract in effect, the employer must follow its terms. If the contract terms do not address the particular emergency, past practice and a "zipper" clause in which the union waives its right to bargain over matters not covered by the collective bargaining agreement apply. *Gannet Rochester Newspapers*, 319 NLRB 215 (1995) (ice storm).
- Other NLRB decisions make clear that there must be a true emergency requiring immediate action. Chronic problems with no "precipitate worsening" requiring immediate action prior to bargaining do not constitute an "economic exigency." *Hankins Lumber Co.*, 316 NLRB 837 (1995) (log shortage).
- For healthcare employers, the General Counsel opened the door for arguing that implementation of rules for health reasons may overcome the bargaining obligation. The General Counsel's memorandum addresses *Virginia Mason Hospital*, 357 NLRB 564 (2011), in which the majority found that Virginia Mason unlawfully refused to bargain with the union representing its nurses over the hospital's implementation of a flu policy in a non-emergency situation. In referencing this case, the General Counsel gave special emphasis to the dissent, which argued the hospital acted lawfully because: (1) the policy [that nurses be immunized or wear masks in lieu of immunization] went directly to the employer's core purpose—to protect patients' health; (2) the policy was narrowly tailored to prevent the spread of influenza; and (3) the employer limited the requirement to nurses who refused to be immunized. For healthcare employers, this may signal the General Counsel's willingness to argue for the NLRB to overrule *Virginia Mason*, or at least to apply the dissent's standard for hospital policies implemented without bargaining in response to the coronavirus emergency.

Bottom line: Employers do not have to bargain with a union over the decision to lay off or change their operations if there is an unforeseen emergency having a major economic effect that requires prompt action. Employers must, however, bargain with the union over the impact (or effects) of that decision as soon as practicable. Healthcare employers may have the additional argument that there is no requirement to bargain over a narrowly tailored business change or policy designed to meet its core purpose of protecting patients' health.

Consult your collective bargaining agreement

Your collective bargaining agreement may already allow you to make changes without bargaining with the union.

In *MV Transportation, Inc.*, 368 NLRB No. 66 (2019), the NLRB overruled precedent and held that the Board will examine the plain language of the parties' collective bargaining agreement to determine whether a change made by the employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. If it was, the Board will honor the plain terms of the parties' agreement and the employer will not have violated the Act by making the change without bargaining. If the agreement does not cover the employer's disputed action, the employer will have violated the Act unless it demonstrates that the union waived its right to bargain over the change or that it was privileged to act unilaterally for some other reason (which can include compelling economic reasons). Based on this recent case law, employers should scrutinize their contracts carefully to determine if the contract already allows prompt unilateral action in response to the coronavirus crisis.

The first place to look is the **management rights** clause, which is a broad statement of an employer's rights to manage its operations. Unless otherwise limited by the contract, a statement of a right to take a certain action—such as the right to determine the means and methods of production, establish work schedules, determine staffing requirements, close

units or departments, etc.—will allow an employer to take immediate action without bargaining with the union.

Next, is there a ***force majeure*** provision? These clauses give the employer (and the union) the right to bypass the contract's provisions in the event of an act of God, declaration of war or other unforeseen major emergency. As an example, a provision reviewed recently by the author granting the employer the right "to take whatever action it deems necessary in response to an emergency or for some other reason beyond the control of the employer" likely allows the employer to act quickly to make operational changes in the current emergency without first bargaining with its union.

Finally, if neither your management rights nor a *force majeure* clause allows you to take unilateral action, review contract provisions that may apply to your desired operational changes, including provisions addressing **layoff and seniority, work schedules, work assignments, paid and unpaid leaves, recall, the ability of non-unit staff to perform unit work, and other provisions**. There might be flexibility in that language, but if there is not you will need to negotiate with the union to deviate from contract requirements. In addition, the wording of a "zipper" clause—which states that the parties waive the right to bargain over matters not addressed in the collective bargaining agreement—may serve as a union waiver of the right to bargain over emergency changes. You will need to review carefully the wording of a zipper clause before relying on such language, as the specific wording may not serve as a clear and unmistakable union waiver of its right to negotiate changes. Or, the zipper clause may limit an employer's ability to deviate from the contract.

Remember that if your contract has expired, you must maintain the *status quo* pending contract negotiations. The above analysis remains applicable after a contract has expired.

If you need additional assistance in addressing union issues related to the current crisis, you are invited to contact Matt Lynch (mlynch@sebrisbusto.com) or Mara Vinnedge (mvinnedge@sebrisbusto.com) with your questions.

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