

The Duty to Bargain During the COVID-19 Pandemic

Labor & Employment Law Update

By Beverly Alfon on March 31, 2020

Businesses with a unionized workforce need to consider whether their responses to the COVID-19 pandemic constitute *unilateral changes* under existing work terms and conditions. An employer's duty to bargain in good faith with its employees' union encompasses many obligations, including the duty to not make certain changes to work terms and conditions without bargaining with the union. While a union is not likely to bring an unfair labor practice charge against an employer for "benevolent" unilateral changes, a union generally has a solid basis to bring an unfair labor practice charge against an employer that initiates adverse actions such as furloughs and layoffs, without notice and an opportunity to bargain.

Recognizing the "unprecedented situation" created by the COVID-19 pandemic, the National Labor Relations Board (NLRB) General Counsel (GC) issued a memorandum on March 27 to address its impact on the duty to bargain. The memorandum does not direct the NLRB's regional offices to take any specific action, but it does summarize cases in which the Board previously considered the duty to bargain during emergencies. The cases cited in the memorandum involve unilateral changes ranging from implementation of a flu prevention policy to layoff/facility closure prompted by an abrupt reduction in an employer's business volume.

Bottom line

- You need to evaluate the language of your CBA with the union in order to determine what is already covered by the agreement (including your Management Rights clause) to support the actions that you take in response to the pandemic.
- If you make unilateral changes such as furloughs/layoffs – that are not already supported by the CBA – you must be ready to demonstrate that "economic exigencies compel[led] prompt action." Currently, any exception to the duty to bargain before implementing unilateral change is limited to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action."
- Keep in mind that failure to bargain with the union over the *effects* of the company's decision to take the unilateral action, can also lead to another

violation of the NLRA.

The Duty to
Bargain
During the
COVID-19 P-
andemic