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NLRA Issues for All Employers To Be Aware of During the COVID-19 Pandemic

In a very short time, the COVID-19 pandemic has affected almost every aspect of employers' operations, and for some, poses questions regarding continued viability. Employers making key decisions affecting union-represented workforces, participating in various proceedings relating to unions, or whose employees are engaging in safety-related protests face additional challenges under the National Labor Relations Act (NLRA).

Duty to Bargain With Unions Representing Employees

Employers experiencing business downturns may have no choice but to reduce employees' pay, change other terms and conditions of employment, or lay off employees. Employers in essential businesses may need to reduce employees' hours in light of reduced hours of operation, customer demand or supply chain issues, or increase wages to incentivize employees, especially those with significant contact with the public, to come to work. In these circumstances, employers of union-represented employees must be aware that the NLRA may require them to bargain with the union regarding any changes to employees' wages, benefits or other terms and conditions of employment.

To assist employers in this "unprecedented situation," on March 27 the National Labor Relations Board (NLRB) General Counsel issued a memo highlighting several of the NLRB's past decisions. Those decisions addressed employers' bargaining obligations during public emergencies (such as 9/11, hurricanes or ice storms) and when employers had particular difficulties (such as loss of credit), including when laying off employees, not paying employees for absences under emergency circumstances, supervisors performing bargaining unit work, and returning to work after the emergency has subsided. The memo also addresses the "economic exigencies" exception to the duty to bargain. Specifically, where an employer can demonstrate that compelling extraordinary unforeseen circumstances out of its control have a major economic effect on its business requiring it to make a unilateral change immediately, the employer may satisfy its bargaining obligation by providing notice to the union and an opportunity to bargain over the particular matter. Even if the union requests bargaining, such negotiations do not need to be protracted and could later be over the effects of the change when the emergency has subsided. It is important to note that the NLRB has traditionally construed this exception to the duty to bargain very narrowly, and will likely parse the facts at issue to determine whether there was, in fact, an economic exigency.

The language of the applicable collective bargaining agreement also is important in determining the duty to bargain. For instance, some collective bargaining agreements contain *force majeure* clauses relating to unforeseeable emergency situations out of the employer's control. These clauses can provide employers with greater flexibility in light of the national emergency created by the COVID-19 pandemic. A review of the specific collective bargaining agreement language, and a determination regarding whether the emergency in question truly prevented the employer from doing what it had previously contracted to do, is imperative.

Further, in September 2019 in *MV Transportation*, the NLRB ruled that employers were not necessarily obligated to bargain regarding issues, depending on the language contained in the applicable collective bargaining agreement, or other factors. In

that case, the NLRB transitioned from the "clear and unmistakable waiver" standard to a "contract coverage" standard. Under the contract coverage standard, if a "management's rights" clause or other collective bargaining agreement provision grants an employer a right (such as to implement furloughs or layoffs), the employer is free to take unilateral action consistent with such language, without bargaining. In the absence of applicable language, employers must be able to demonstrate that a union has waived its right to bargain regarding the employer's action or change. This is done through a clear and unmistakable waiver or based upon past practice or bargaining history (including the union's failure to arbitrate the employer's prior actions or to request bargaining when given notice of the employer's plan to implement a change).

Safety Protests

Both non-union and union employers should be aware of certain rights afforded all non-supervisory employees under federal labor laws. For instance, Section 7 of the NLRA protects all employees who engage in "concerted activity for mutual aid or protection." During the current crisis, such activity may include two or more employees refusing to perform certain work assignments or refusing to work without personal protective equipment resulting from fear of COVID-19, or a single employee claiming the need for personal protective equipment on behalf of himself and others.

Moreover, Section 502 of the Labor Management Relations Act (LMRA) protects employees who participate in a work stoppage based on a good-faith belief that their working conditions are abnormally dangerous, where ascertainable, objective evidence supports that belief, and the perceived danger poses an immediate threat of harm to employee health or safety. Notably, because employees who participate in Section 502 work stoppages are not traditional strikers, employers are not entitled to injunctive relief.

Negotiations and Arbitrations

Various union-related proceedings also present unusual challenges for employers during the COVID-19 pandemic. Indeed, employers and unions have had to agree to negotiate successor collective bargaining agreements via conference calls or videoconferencing, rather than via traditional face-to-face meetings, and employee ratification votes approving such agreements may now need to take place through alternate methods other than the traditional in-person group presentations and voting. Moreover, employers and unions have had to decide how to handle grievances, which may require in-person meetings within a set timeframe under the applicable collective bargaining agreement, and whether to postpone arbitrations, in some cases risking greater liability, or to proceed virtually with some logistical issues, including a potential for witness coaching.

Certification and Decertification Elections

The COVID-19 pandemic has affected the operations of the NLRB as well. With most of its staff working from home, on March 19, the NLRB suspended elections to certify or decertify unions as bargaining agents for employees. Due to pressure from organized labor, such elections resumed on April 6, with Regional Directors having discretion regarding when, where and whether an election will be conducted.

The implementation of several new NLRB rules relating to union representation of employees also has been delayed. In December 2019, the NLRB published new election rules, lengthening the time between the filing of a petition for employees to be represented by a union and the election taking place (this period had been shortened to be between 21 and 31 calendar days by 2015 "quickie election" rules). While the additional time would assist employers, especially during the period of the COVID-19 pandemic, the effective date of the new election procedure has been delayed 45 days, from April 16 to May 31, due to a legal challenge by the AFL-CIO.

As previously reported, in order to preserve employees' free choice regarding whether they want a union to represent them for the purpose of collective bargaining, the NLRB issued rules for public comment in August 2019. Those proposed rules

related to whether unions can block certification/decertification elections by filing unfair labor practice charges, the circumstances under which an employer's voluntary recognition of a union will bar employee elections, and whether a majority of employees in a unit in the construction industry wish to have a Section 9(a) arrangement. On April 1, the NLRB published its modified final rules on these topics. Most notably, the blocking charge final rule allows elections to occur, even with unfair labor practice charges pending. Depending on the nature of the alleged unfair labor practice, the NLRB will either count employees' votes or impound them until the charge is resolved. In any event, the NLRB will not certify the outcome of an election until it adjudicates the unfair labor practice charge and determines the effect of any unfair labor practice on the election. The final rules on these topics were to become effective May 31, but that date has been extended to July 31 due to the pandemic.

Given the above, during the challenges presented during the COVID-19 pandemic, as always, employers should confer with labor counsel to avoid the liability associated with violations of applicable law. Specifically, employers must determine whether they have a duty to bargain regarding their decisions (or the effects of those decisions) and whether their employees are engaging in protected activity for which they cannot be disciplined. Employers must also understand and work within the confines of the logistical difficulties currently presented and to reduce the risk of disputes once operations begin to normalize.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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