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Must an Employer Bargain with Its Union Now over Changes to Terms and Conditions of Employment?

An employer's desire or need to react quickly to respond to the Coronavirus pandemic may result in a "refusal to bargain" unfair labor practice charge under the National Labor Relations Act. Generally, an employer has a duty to notify the union and give the union an opportunity to bargain before making changes to terms and conditions of employment. However, to determine whether or not such a duty exists, the employer should consider several things.

First, do a careful review of the current collective bargaining agreement for provisions that either expressly grant the employer the right to make the change without bargaining or expressly prohibit the employer from making the change. Second, look for provisions that may excuse the bargaining obligation in certain circumstances. Provisions such as "force majeure" clauses or clauses that excuse compliance in emergency situations or circumstances involving safety and health, or even provisions that may excuse bargaining during periods of "economic exigencies" may override the general duty to bargain. Government mandates or directives may also impact the duty to bargain.

But, in virtually every situation, the best approach is for the employer to decide on what changes are necessary and then promptly contact the union to discuss the proposal before unilaterally making the change or

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announcing it to the employees. The employer may not need to negotiate to a final agreement before acting, but at least giving the union an opportunity to weigh in will probably provide the best defense and the best outcome.

If you have any questions regarding union negotiations or other Labor and Employment issues, please do not hesitate to contact Howard Bernstein or your Neal Gerber Eisenberg attorney.

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