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Back to Basics: Managing Through COVID-19 with Traditional Labor Law | Part 2

This alert is part two of our five-part series: "Back to Basics: Managing Through COVID-19 with Traditional Labor Law." The rest of the series will be posted each day this week.

Part 2: The Duty to Bargain Over Decisions to Change

The threshold issue facing an employer contemplating changes in its operation is whether or not the employer is free to implement those changes without first bargaining with the union.

It is an unfair labor practice for an employer to refuse to bargain with the union that represents its employees. The duty to bargain (which exists for both the employer and the union) includes the obligation to meet at reasonable times and to "confer in good faith" with respect to wages, hours, and other terms and conditions of employment. However, the duty to bargain in good faith means that the employer must be attempting to reach an agreement, not avoid reaching an agreement. But the duty does not require that either party make any concessions or agree to any terms proposed by the other party. Indeed, if the parties bargain to a lawful "impasse"—a deadlock in bargaining where there is no likelihood that either side will change its position—then

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the employer may be free to implement all or part of its proposal—even without the union's agreement.

Subjects of Bargaining

What must the employer bargain about? Although some exceptions are mentioned below, generally, employers are obligated to bargain over any DECISION to CHANGE "wages, hours, and other terms and conditions of employment." Examples of mandatory subjects include wage rates, health insurance benefits and cost sharing, work rules, attendance policies, safety rules and procedures, premium pay, and virtually any topic that is impacting—or can impact—an employee's pay or benefits or working conditions. These broad categories are "mandatory" subjects and are generally subject to bargaining.

During crisis situations such as the current pandemic, mandatory subjects that will normally require bargaining before a change can be implemented include such things as requiring employees to take special safety precautions (such as requiring them to wear masks, engage in "social distancing," report their health condition or that of family members, special sanitation procedures) or changing work schedules or job duties. Even adding additional compensation such as an attendance bonus or hazardous duty bonus may require bargaining.

A second category of subjects is referred to as "permissive" subjects. This category includes subjects that neither party is required to bargain over, and either party can simply inform the other party that it has no desire to discuss the subject. It is not an unfair labor practice to refuse to bargain over a permissive subject. On the other hand, if both parties are willing to bargain over a permissive subject, bargaining can take place and, if the parties reach agreement on that subject, that agreement is binding. Permissive subjects include such things as pay

and benefits for non-bargaining unit individuals such as supervisors, adding or deleting job classifications to or from the bargaining unit, internal union affairs, and settlement of unfair labor practice charges.

A third category of subjects are "illegal" subjects. Even if the parties are willing to bargain over these subjects and even if they reach agreement on an illegal subject, that agreement is not enforceable. Likewise, it is not an unfair labor practice for either party simply to refuse to bargain over an illegal subject. Illegal subjects include such things as contractually requiring the company or the employees or union do something that is clearly unlawful, requiring mandatory union membership in a right to work state, classifying employees by race or sex or other prohibited categories, or giving preference in any way based on union membership.

Bargaining Over Decision Versus Effects of that Decision

In determining whether or not the employer has a duty to bargain, it is important to start the analysis by deciding if the employer must bargain over the decision to make the change. For example, suppose the employer decides it would be beneficial to change its shift starting times or to eliminate one shift altogether. For one of the reasons below (for example, favorable contract language expressly permitting the employer to make the desired changes), it is determined that the employer does not have to bargain over that decision. It can simply make the change because the union has already contractually waived its right to bargain on that subject. However, although the employer is free to make the change, it must nonetheless bargain with the union over the effect or impact of that change on the employees. For example, will that change result in a change in compensation? Will it result in layoffs and, if so, will the laid off employees receive any severance pay, continued insurance, or other compensation or benefits? How will the employer staff the two remaining shifts? If these or

other effects issues are not already addressed in the union contract, the employer must at least bargain over those issues even though it is free to implement the basic decision.

Exceptions to the Duty to Bargain

Major Business Decisions

During a pandemic, as at other less stressful times, an employer may be faced with decisions about the overall nature and direction of its business. Should the business remain open or simply close? Should the company continue to provide some or all its current services or products? Should the company consolidate operations due to overcapacity resulting from lost business? Should the company simply subcontract some or all of its current functions? Should the company sell its business or merge with another company?

Over the years, the NLRB has vacillated in determining which such decisions are subject to bargaining and which can be made without bargaining. But generally, if the decision is a change in the nature and direction of the business—a decision to be in business and, if so, what business to be in—then the company need not bargain over that decision. However, if the decision is merely to change the way that business is conducted, without fundamentally changing the nature of the business, then the decision will be subject to bargaining.

In addition, if the decision—whether to subcontract, whether to relocate, whether to discontinue certain product lines—turns on labor costs, then the employer must bargain over the decision. In other words, if the decision turns on a cost where the union could offer some cost relief sufficient to possibly change the employer's mind, then the employer must at least give the union the opportunity to "bid" to keep the work.

Even if the employer has no duty to bargain over the major business decision, it will almost always still have the duty to bargain over the effects of that decision on the employees.

Waiver of the Right to Bargain

Assuming the subject is a mandatory subject and must normally be the subject of negotiations before the decision can be made and implemented, the employer may nonetheless be excused from bargaining if the union has "waived" its right to bargain. Such a waiver can arise in several ways.

Waiver by Specific Contract Language

In deciding whether or not there is a duty to bargain over a particular contemplated change, the employer should always start with a careful review of the current collective bargaining agreement. Although the union may normally have the right to request bargaining over a particular subject, very often during normal bargaining the union will have waived its right to bargain over that subject by agreeing to very specific language. For example, the contract may contain an express provision giving the employer the unilateral right to change shift schedules, to discontinue a shift, to subcontract or relocate work, to implement and change reasonable rules for attendance, safety, and health, or addressing other specific operational issues. In other words, the employer may already possess the contractual right to make the contemplated change without the necessity of bargaining with the union.

Waiver by General Language

Even if the contract does not contain express language that clearly waives the union's right to bargain over a subject, more general language may create the same waiver result. For example, a strong management rights

clause is often effective to create such a waiver. The management rights clause usually lists numerous general subjects over which the employer has retained the right to act without bargaining. For example, the management rights clause may expressly give the employer the right to decide on the size and composition of the workforce, the right to discipline for just cause, the right to adopt, implement, enforce, and modify work and safety rules, and the right to determine and redetermine the number of shifts and the shift hours. Likewise, a "reserved rights" clause has been found to be an effective waiver. Such a clause typically contains a provision stating that "The right to manage includes, but is not limited to, the right to…" In other words, language in the management rights or reserved rights clauses support the employer's position that unless the contract expressly prohibits the employer from acting or from acting in a particular way, the employer has retained the right to do so without bargaining.

Past Practice

If a dispute arises over whether or not ambiguous contract language contains an effective waiver of the union's right to bargain, that dispute may be resolved by carefully reviewing the parties' "past practice" in that area. In other words, if the employer has acted unilaterally in a particular area before without union insistence on the right to bargain, that past practice may constitute a current waiver of bargaining. However, to be binding, the past practice must be consistent, long standing, and well known to both parties.

Acquiesce

Finally, an employer may be excused from any bargaining obligation if the employer notifies the union that it is contemplating making a change and invites the union to bargain over the change. If the union fails or refuses to demand bargaining on the subject, at some

point the employer will normally be free to implement the proposed change.

It should be emphasized, however, that while the employer may have several arguments (above) for why it is free to make the contemplated change without bargaining, if the current contract contains language expressly prohibiting or limiting the change, then the employer is bound by the existing language and cannot move forward without the union's agreement.

Emergency Situations, Exigent Circumstances, Impossibility of Performance, Government Directives or Mandates

During the pandemic, employers have been forced to endure and react to rapidly changing circumstances. Some of those circumstances have been foisted upon them by the natural impact of the virus. For example, higher rates of absenteeism, delays in receipt of raw materials or the ability to deliver its own products or services and financial hardships resulting from lower sales have all required employers to react. In addition, heightened safety concerns may compel changes. Finally, government directives and mandates have dictated that employers act in ways that may be in direct conflict with its union contract. Under such circumstances, does the employer still have a duty to bargain over changes before it can react?

Once again, the starting point is a careful review of the union contract to determine whether or not the contract already gives the employer the flexibility to make the necessary changes without bargaining. Express contract language, a strong management rights clause, a "force majeure" or "act of God" clause, an "emergency circumstances" or physical impossibility clause or similar clauses may excuse the employer from any bargaining obligations.

But if a clear answer cannot be found in the union contract, then what other guidance is available? Cases in which the NLRB has considered the issue are rare and fall into two categories: public emergencies such as hurricanes affecting an entire community or emergencies affecting a particular employer.

In cases arising out of a general emergency, the NLRB has found no duty to bargain where the employer can demonstrate that "economic emergencies or exigencies" compel prompt action such as a layoff. If the emergency affects only a particular employer, the NLRB has found no duty to bargain where there is no time for bargaining or where the economic factors necessitating the action are so compelling that bargaining could not realistically change the result. The NLRB's determination of whether or not there is a duty to bargain over a management decision to implement change is a factual determination made on a case-by-case basis, requiring the employer to demonstrate that the need to make the change without bargaining outweighs the potential benefit of the delay that bargaining may require.

Of course, if a government mandate requires a change in the company's operations, such as a mandatory closing or layoff or the granting of leaves of absence under certain circumstances, such mandates must be complied with even if to do so would violate the union contract.

Whether or not the circumstances are severe enough to permit the employer to implement changes without bargaining, the employer must nonetheless communicate its proposed changes to the union as soon as possible and must also be prepared to bargain over the effects of the contemplated change.

Tomorrow we continue this series with Part 3, where we will detail the duty to provide information. If you have any questions regarding labor and employment issues, please do not hesitate to contact Howard Bernstein,

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Gerald Golden, Jason Kim or your Neal Gerber Eisenberg attorney.

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