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Does the Current Pandemic Entitle an Employer to Take Emergency Action Without Bargaining with the Union?

The coronavirus epidemic has prompted many employers to consider whether the current emergency may allow them to take certain actions without first bargaining with the union representing their employees. Cases in which the National Labor Relations Board (NLRB) has considered issues of this type are rare (none arise in a pandemic such as this one) and they fall into two basic categories: public emergencies such as hurricanes affecting an entire community or emergencies affecting a particular employer. When considering these decisions, it is important to keep in mind the distinction between the duty to bargain over the “decision” whether certain action may be taken and bargaining over the “effects” or impact of that decision.

In the first category of cases arising out of a general emergency, the NLRB has held that an exception to the general duty to bargain may exist where the employer can demonstrate that “economic emergencies” compel prompt action such as a layoff. The Board has also cited the existence of a “zipper” clause in a labor contract entitling the employer to take unilateral action on matters not covered by the labor agreement as a basis for finding no duty to engage in decision bargaining. In the category of emergencies affecting only a particular employer, the Board has recognized an exception to the duty to bargain over a decision such as a plant closing where there is no time for bargaining or where the

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employer can demonstrate that bargaining could not alter the economic factors necessitating an employer taking action such as a plant closing.

It is important to bear in mind, however, that aside from these rare cases where exigent circumstances exist, employers must normally bargain over decisions involving matters such as layoffs, the use of outside contractors or changes to working conditions. This is particularly the case if notice to the union and time for bargaining is available. The terms of any applicable labor contract should also be reviewed when considering bargaining obligations. Equally important, even where the employer is free to make and implement the decision without bargaining, the employer must always notify the union as promptly as possible and must usually be willing to bargain over the effects of such action.

The current health emergency and resulting economic impact are without precedent and likely will generate subsequent NLRB rulings on whether employers under particular circumstances may be relieved of their bargaining duties. In the meantime, employers should review their labor contracts for applicable provisions and carefully consider whether they can demonstrate they faced emergency circumstances to such an extent that they were compelled to take unilateral action without prior notice and bargaining. As always, we are happy to discuss individual circumstances in order to evaluate the risks of taking unilateral action such as layoffs, outsourcing or changes to working conditions in response to the crisis employers now face.

If you have any questions about union bargaining or other labor and employment issues, please do not hesitate to contact Gerald Golden or your Neal Gerber Eisenberg attorney.

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