LABOR & EMPLOYMENT ALERT

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Back to Basics: Managing Through COVID-19 with Traditional Labor Law | Part 1

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This alert is part one 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.

Like no other phenomenon, the COVID-19 pandemic has disrupted the operations of virtually every business, causing each entity to reevaluate every facet of how it operates. Specifically, each entity has been forced to review its operating procedures, its staffing, its work rules, and its wages and benefits. In addition, the federal, state, and local governments have reacted by imposing limitations on how companies can operate and by mandating the payment of benefits such as paid leaves of absence. In many instances, for all of these reasons, companies have been required to change the way they operate.

Almost immediately, companies affected by the pandemic are faced with decisions. For "non-essential" companies, immediate layoffs and cost-cutting measures are at the forefront. For "essential" operations, those that will keep operating either normally or in some modified fashion, they must confront decisions regarding staffing, special safety measures, absenteeism, and fundamental issues about how they must modify their operations to conform to government directives.

For companies that have employees represented by a union, identifying what changes are necessary to help the business survive is just the start of the analysis. The real challenge comes in determining whether or not those changes can be lawfully implemented without first bargaining with the union or whether the union has the ability to delay or prevent meaningful, even necessary, change. Although many of the issues raised during the pandemic cause unionized employers to search for guidance in what seems like unfamiliar territory, the fact is that for the vast majority of circumstances these employers face, the guidance already exists using traditional and established concepts and resources. Throughout this five-part series, NGE's labor attorneys will explore how traditional labor law principles and strategies can assist employers in managing their workforces as we navigate the current and potential impacts of COVID-19.

Part 1: Communicating With Employees

Good communication between employer and employees is essential to maintaining a healthy relationship, even in the best of times. So, of course, in the midst of the chaos and uncertainty created by a pandemic, maintaining that link is vital. Even unionized employers are free to communicate with their employees about such important subjects. However, there are some prohibitions and limitations on what and when the unionized employer may lawfully communicate with its employees.

The general prohibition on employer communication is that the employer cannot engage in "direct dealing" with its employees. That is, the employer cannot "bargain" directly with its employees but rather must bargain only with the union. For example, during the pandemic, if the employer wants to discuss altering some term or condition of employment (such as altered work schedules, layoffs, or a changed attendance policy or special safety procedures), it cannot discuss those issues directly with the employees but must notify the union of its proposal for change and then

meet with the union to bargain over those issues. Since the union is the employees' bargaining representative, any bargaining directly with the employees would be unlawful.

So, the employer is free to communicate with its employees as long as it does not negotiate—engage in a give and take—directly with the employees. The employer certainly can keep the employees informed of any facts or issues that affect them. But, in doing so, the employer is also prohibited from denigrating ("bad mouthing") the union or its leadership.

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