LABOR & EMPLOYMENT ALERT

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

By: Howard L. Bernstein, Gerald A. Golden and Jason C. Kim

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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.

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 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.

Part 3: The Duty to Provide Information

In addition to the obligation an employer may have to bargain over any decision to change the way it operates or any duty to bargain over the effects of such changes, the employer may also have a duty to provide the union with information it may request that is "relevant and necessary for the union to perform its duties as the employees' bargaining representative." In times of uncertainty and instability, it is very common for unions to request vast amounts of information relevant to the employer's current situation as well as any plans it may have to impose changes.

For example, the union may initially request copies of all of the employer's policies, practices, and rules regarding safety, including information on how the employer has enforced its safety programs in the past. The union may request information regarding how the employer intends to comply with government safety mandates or guidelines. The union may also request information regarding incidents of illness or injury (subject to rules regarding employee medical information as confidential).

Since the information requested is relevant to the union performing its obligations and the employees' bargaining representative, the employer is obligated to furnish it. However, there are some limitations. The employer is only obligated to furnish such information *if* it has it. It is not obligated to create information it does not have. Likewise, although the employer is obligated to furnish the information in a timely manner, the union cannot place an arbitrary deadline on when the information must be furnished. If the union's deadline is unrealistic, the employer should simply notify the union of when it reasonably believes it can provide the information. And, if the requested information is voluminous or will take an extraordinary effort to compile and/or copy, the employer can consider inviting the union to the facility to review the information, or it can expect the union to pay some or all of the cost of compiling and duplicating the information.

Coupled with a request for relevant information, the union may also "insist" that the employer impose certain changes and safeguards to protect the health and safety of its employees. Whether or not the employer is obligated to make such changes or even to bargain about them should be carefully reviewed in the same manner as the employer would determine if it had a duty to bargain over employer-proposed changes.

Part 4: Work Stoppages

In a non-union setting, employees have the right to strike or otherwise refuse to work for almost any reason and they cannot normally be retaliated against for doing so. Although they can be "replaced," either permanently or temporarily depending on the type of work stoppage, they usually cannot be terminated. A work stoppage does not have to be a "safety strike."

In the unionized setting, the same rules apply if there is no collective bargaining agreement in place. For example, if the union contract has expired and no new agreement has been reached, the employees remain free to strike for almost any reason without being terminated. However, if the parties' contract is in effect, then whether or not the employees have the right to engage in a work stoppage may depend on the provisions of that contract.

Because of the nature of a pandemic or other health-related circumstances, work stoppages, as well as bargaining or discussions of working conditions, often involve the potential for safety-related work stoppages or other job actions.

Protections for a "Safety" Strike

In both union and non-union situations, and whether or not there is a union contract in place prohibiting strikes, there is a special provision in the National Labor Relations Act that protects employees who "quit labor" because of abnormally dangerous conditions of work. Such a quitting of labor is deemed to not be a strike, but the refusal to work must be in good faith and supported by ascertainable, objective evidence that the working conditions are abnormally dangerous.

Likewise, OSHA finds that an employee has the right to refuse to work if, and only if, all of the following conditions are met:

- A real, imminent danger of death or serious injury exists. The danger must be one that the employee reasonably and in good faith believes is present and that a "reasonable person" would believe is present;
- Where possible, the employee has asked the employer to eliminate the danger;
- The employer has failed to do so;
- The employee refuses to work because the employee genuinely believes that an imminent danger of death or serious injury exists, rather than a subterfuge to pressure the employer or disrupt the business; and
- There is not enough time to get the hazard corrected through regular enforcement channels.

This approach presents a sincere attempt to recognize and balance legitimate refusals to work under legitimate fear of imminent harm with the risk that, under the guise of a safety issue, employees will overreach to pressure employers to react.

Violations of "No-Strike" Clause

As indicated above, generally unless a strike is a legitimate "safety" strike entitled to special protections, a strike or work stoppage during the term of a union contract may nonetheless be prohibited and may subject striking employees to discipline, including termination, even if the strike is because the employees are concerned about their safety. However, the employer must read the no-strike clause carefully to determine whether or not the work stoppage does, in fact, violate the contractual prohibitions. For example, does the clause allow "safety" strikes that may have a more liberal definition that the NLRB or OSHA standard? Does the clause permit "sympathy" strikes (strikes in support of other employees even if the striking employees are not in any imminent safety danger)? Does the clause allow strikes of short duration (for example, for 24 hours) before any adverse action can be taken?

Intermittent Work Stoppages, Sit Down Strikes, Partial Strikes

Generally, while employees are permitted to engage in work stoppages designed to put pressure on employers to try to influence change, that right is balanced with the general right of the employer to use certain economic weapons and other tactics in order to remain in operation. Many of the tactics developed by unions over the years have attempted to create such pressure while, at the same time, depriving the employer of the right to operate and, therefore, have been found by the NLRB to be unlawful.

One such tactic is the intermittent work stoppage, a device where the union or a group of employees strikes for a short period of time, perhaps a few hours or a few days, then returns to work. The employees will then work for several more days and then, without warning, will engage in another work stoppage lasting only a few hours or a few days. In each instance, the work stoppage is timed to effectively prevent the employer from planning or engaging in a normal course of business.

An intermittent work stoppage is unprotected, and employees who engage in the tactic can be disciplined. The difficulty with intermittent work stoppages is that the NLRB has been somewhat inconsistent in how many times the employees can engage in the tactic before it loses its protection. However, several short work stoppages that were part of a common strategy to harass the employer were unprotected. But, several short work stoppages, each to publicize different grievances, remained protected.

A partial strike is another tactic designed to put maximum pressure on the employer yet make it difficult for the employer to conduct business as usual. A partial strike is one where employees will perform some, but less than all, of their jobs. For example, employees may work during their normal scheduled hours but may refuse all overtime. Or, they may perform some tasks but refuse to perform others. Or, they may engage in a slowdown or "work to rules" tactics where they perform exactly (but the minimum of) what is required of them. In such cases, the NLRB again tries to enforce the balance between the employees' right to pressure the employer with the inability of the employer to conduct normal business operations.

Sit down strikes are, as their name suggests, circumstances where employees simply refuse to perform any work yet they refuse to leave the employer's property when directed to do so, thereby depriving the employer of productive use of its own property. Sit down strikes have routinely been found to be unlawful although there are cases where employees have briefly refused to return to work, insisting that they are only refusing to work pending a meeting with management to discuss a serious issue. At that point, the employer can either agree to meet with the employees and then direct them to return to work; or, the employer can refuse such meeting and direct them to return to work. In either case, once the employees have been directed to return to work, they must either do so or leave the property and convert their activities into a real strike.

In each of the above examples of non-conventional work stoppages or in whatever other tactic the union and employees may adopt, the employer should try to remain calm, not overreact, review the potentially applicable provisions of the union contract, and promptly seek the advice of labor counsel.

Part 5: Issues Unique to Cares Act

Under the recently-enacted CARES Act, "mid-sized" employers (between 500 and 10,000 employees) can qualify for favorable loans. However, the loans come with some significant strings attached. For example, the employer must enter into a "good faith certification" agreeing to use the funds to retain at least 90 percent of its workforce at full compensation and benefits until September 30, 2020, and must restore its workforce to not less than 90% of its February 1, 2020, level and restore all compensation and benefits to its employees no later than four months after termination of the public health emergency. The employer must also refrain from outsourcing or offshoring jobs for the entire term of the loan plus two years after completing repayment of the loan.

Neutrality

As part of the "certificate of good faith", the employer must also agree that it will "remain neutral in any organizing effort for the term of the loan." The law does not define "neutrality" or give any guidance as to what activities may be engaged in by a targeted employer. Must the employer remain silent on the subject of unionization? Can the employer communicate with employees on the subject as long as the employer remains "neutral"? Can the employer distribute written or visual material on the subject? Can the employer provide factual, accurate information or answer employee questions on the possible impact of unionization on the employees' pay or benefits or job security? Can the employer communicate or campaign aggressively before an actual organizing drive is underway? Must the employer provide the union with employee personal contact information or access to the employees at the workplace? Can the employer hold group meetings or one-on-one discussions with employees about their rights?

The neutrality requirement certainly affects an employer's ability to communicate effectively with its employees on the important question of unionization, and it deprives the employees of valuable and necessary information to assist them in making their choice. For that reason, many believe that the neutrality requirement of the CARES Act may violate the First Amendment prohibition on laws that interfere with free speech.

Abrogation of Union Contracts

The CARES Act also requires that, as a condition for a favorable loan, the employer certify that it "will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan." As with the term "neutrality," the term "abrogate" is not defined in the Act, nor does the Act provide any guidance whatsoever as to the meaning and intent of the condition.

- Does this provision make it unlawful for an employer to violate the terms of an existing collective bargaining agreement? If so, how is that different from an ordinary grievance or unfair labor practice allegation? Does the mere commission of a grievance act or unfair labor practice make the offending employer vulnerable to immediate repayment of the loan? Who will decide?
- Does this provision mean that the contract will remain a "bar" for the whole term of the loan plus two years to any decertification election or withdrawal of recognition even if to do so would deprive employees of their statutory right to remove the union as their representative or to change from one union to a different union?
- Does this provision mean that, when the contract expires and is being renegotiated, the employer cannot propose concessions or other less-favorable terms and conditions of employment than those in the expiring contract?
- Does this provision mean that, during bargaining, the employer cannot implement its proposals even if the parties reach a lawful impasse?
- Is the employer prohibited from seeking bankruptcy court approval to reject an onerous union contract?
- Is the employer prohibited from selling its business unless it requires the purchaser to assume the existing union contract?

While the CARES Act creates many desirable, even necessary, benefits for struggling companies, before agreeing to such a loan—indeed, before signing the required "certificate of good faith"—an employer should seek guidance to assure that it understands the terms and conditions attached to the loan, especially where so many of the conditions related to its workforce are steeped in uncertainty and vagueness.

Conclusion

This summary of some of the implications of the COVID19 pandemic is, by its nature, not meant to convey specific legal advice. Rather, it is meant as a brief attempt to highlight some of the most significant situations that may affect an employer's ability to make timely and meaningful decisions about the future of its business, especially in the context of its relationship with the union that represents its employees. It is meant to highlight the employer obligations to bargain with the union under normal circumstances while also underscoring the special obligations created by the COVID19 pandemic and other extraordinary circumstances.

As issues created by the pandemic and by the specific provisions of the CARES Act further develop, we will attempt to update our thoughts and our guidance.

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This alert was authored by

Howard L. Bernstein | 312-269-8447 | hbernstein@nge.com
Gerald A. Golden | 312-269-8008 | ggolden@nge.com
Jason C. Kim | 312-269-8019 | jkim@nge.com

If you have any questions regarding labor and employment issues, please do not hesitate to contact Howard Bernstein, Gerald Golden, Jason Kim or your Neal Gerber Eisenberg attorney.