Published on *The National Law Review* https://natlawreview.com

Labor Issues Concerning COVID-19 and Government "Stay at Home" Orders

Article By:

Keahn N. Morris

The National Labor Relations Act ("NLRA") is a federal law that applies to nearly all employers in the United States. In the wake of COVID-19, there are numerous issues implicating the NLRA, including but not limited to employees engaging in protected concerted activities including work stoppages, the potential duty to bargain with unions concerning COVID-19 programs/policies, layoffs and plant closures in response to government directives and orders, union information requests, and union inspections. The COVID-19 outbreak presents a virtually unprecedented situation for employers. The appropriate responses to these issues depend on a variety of different factors, including the timing, specific employer, the particular industry involved, the employer's collective bargaining agreement ("CBA"), and the status of guidance and orders from federal, state and local governments and agencies concerning COVID-19 (with guidance and recommendations not necessarily having the same weight as orders and laws). Whereas a particular response may be appropriate for healthcare employers, airlines, employers in the supply chain, or employers impacted by "stay at home" orders (like in California), that same response may not be appropriate for other industries and employers.

The Duty to Bargain – Unionized Workforces

The NLRA imposes on employers the duty to bargain in good faith with unions over mandatory subjects of bargaining such as wages, hours, and other terms and conditions of employment (mandatory bargaining subjects). For example, if employers implement COVID-19 programs/policies concerning work assignments, procedures for travel and quarantining as a result of exposure or potential exposure, and procedures for how to pay employees who are furloughed or otherwise quarantined they may implicate mandatory bargaining subjects. Certain plant closures and relocations of bargaining unit work in response to government directives and orders may also implicate mandatory bargaining subjects. Generally speaking, employers who make material changes to mandatory bargaining subjects without bargaining with a union run the risk of unfair labor practice charges that potentially could apply in emergency situations such as the COVID-19 pandemic. In an unprecedented emergency like the COVID-19, union bargaining obligations may be relaxed either based on the terms of the collective bargaining agreement, or under the NLRA. As employers are forced to make difficult decisions in the face of COVID-19, here are some issues unionized businesses should consider when contemplating major workplace changes.

Collective Bargaining Agreement Language

Many collective bargaining agreements contain provisions that allow for employer flexibility in determining management rights, layoffs, subcontracting, closures, relocations, work assignments, scheduling, leaves of absences, paid time off, sick leave, and health and safety, among others. These types of collective bargaining provisions may give employers the right to proceed unilaterally without bargaining with the union under MV Transportation, 368 NLRB No. 66 (2019) and related cases. For certain kinds of major workplace changes like plant closures and relocations, employers should also consider whether the collective bargaining agreement addresses both the duty to bargain over the "decision," as well as the "effects" of the decision (or "implementation" of that decision), which could include items like severance, order of layoffs, unemployment eligibility, accrued benefits, reemployment, recall, etc.

In addition, a force majeure clause in a collective bargaining agreement may potentially permit unilateral action. A force majeure clause is a provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impactable, illegal, or impossible. Whether COVID-19 triggers the force majeure clause in a contract, and the effect of that clause on the provisions of the contract, will vary significantly with each employer, the level of community spread or prevalence of the virus outbreak in an employer's region, the employer's industry, and on current governmental directives, declarations, and orders. If an employer intends to utilize a force majeure provision to make a unilateral change or otherwise deviate from the terms of a collective bargaining agreement, employers should consider providing notice to the union first, if practicable, or as reasonably soon after the change has been made as practicable. Even when bargaining is not required, employers should consider meeting with the union to discuss a solution to problems caused by COVID-19 may avoid a conflict over the changes, even if the employer is within its right to make them unilaterally.

Government Orders and Impact on Collective Bargaining Agreements

In light of the increasing level of government intervention related to COVID-19, it is also possible that certain government directives may override collective bargaining agreements. By way of example, Congress passed HR 6201, requiring additional paid sick and family leave for certain employees with fewer than 500 employees. State and local governments have also issued orders that may require the temporary closing or cessation of work at some operations. For example, on March 19, 2020, the Governor of California issued a Statewide Executive Order directing individuals living in the State of California to stay at home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors. These kinds of orders potentially may leave employers and unions with no choice but to make alterations to the workplace not contemplated in any CBA. However, even if these orders do leave employers with no choice but to make unilateral changes, employers should consider whether they have an obligation to bargain over the "effects" of the order and discretionary aspects of implementation.

Extraordinary Events That Cause Economic Exigencies

If a collective bargaining agreement does not authorize the employer to act unilaterally and the employer determines that it has a duty to bargain, timing may be an issue. The general duty to bargain over mandatory bargaining subjects may be suspended where "compelling economic exigencies" compel prompt action. *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enf.*, 15 F.3d 1087 (9th Cir. 1994) The NLRB has applied this exception exceedingly narrowly in the past. The NLRB views "compelling economic exigencies" as "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the employer to take immediate action." To find shelter with this exception, however, the employer may need to demonstrate not only that the

proposed change was “compelled” but also that “the exigency was caused by external events, was beyond the employer’s control, or was not reasonably foreseeable.”

Although an outbreak like COVID-19 and certain government orders issued in response to COVID-19 would seem to fit the description of “compelling economic exigencies,” relieving the employer of bargaining with a union, this will be different for every employer and will depend on the timing and specific nature of the exigency. Accordingly, it is conceivable that while COVID-19 might suspend the duty to bargain for an employer who is ordered by federal, state or local governments to close immediately, or for an employer with a facility that has an actual COVID-19 infection, it might not suspend the duty for an employer that has merely lost business or suffered a financial decline as a result of the outbreak. Likewise, it might not suspend the duty to bargain over the “effects” of those orders and discretionary aspects of implementation. The analysis is fact-based and cannot be applied uniformly to all businesses. Employers should be prepared to justify the economic exigency, demonstrate why immediate action is required, and demonstrate that any changes are implemented only for immediately required responses, and not to be continued later on, once the exigency has diminished.

In addition, there are other economic exigencies, though not sufficiently compelling to excuse bargaining altogether, that fall under the exigency exception to *Bottom Line Enterprises*. An employer confronted with an economic exigency compelling prompt action short of the type which would entirely relieve the employer of its obligations to bargain will satisfy its statutory obligation by providing the union with adequate notice and opportunity to bargain over the particular matter (at least, over the effects). *RBE Electronics of S.D.*, 320 NLRB 80 (1995). Bargaining in good faith in such time-sensitive circumstances need not be protracted, and the employer could proceed to implementation of the particular matter after reaching impasse on the matter or after a waiver of bargaining by the union. Thus, in general, employers should consider providing the union notice of intended changes and seek to discuss them, even if those discussions must happen quickly and the employer must take immediate and decisive action. If that is the situation, employers should consider being clear with the union about the required timing of the change, the reason for it, and the timeline that the Union must respond before the employer implements. If an employer must act immediately without notifying and/or discussing with the union, it should be prepared to communicate with the union after such changes as soon as practicable under the circumstances.

Obviously, the COVID-19 outbreak is an unprecedented event in history and employers should be analyzing whether its impact on their particular operation triggers this exception. In most cases, continued communication with union representatives, and good faith efforts to reach cooperative solutions, will allow employers to present more defenses in the event there is litigation. In light of the highly fact-intensive nature of the above referenced bargaining obligations, to the extent possible, employers should consult with labor counsel prior to taking action.

Union Information Requests Concerning COVID-19 – Unionized Workforces

The NLRA imposes on unionized employers the duty to provide information to a union if it is “relevant” to the union’s duty to represent its members. Unions have burdened employers with extensive information requests regarding employer’s responses to COVID-19, including requests relating to health and safety concerns, absences resulting from COVID-19, contemplated and implemented COVID-19 programs/policies, and contemplated and implemented layoffs and plant closures based on government orders. While some of this information may be relevant, employers should keep in mind the following principles when responding to union information requests:

- The definition of “relevant” under the NLRA is very broad. In general, a union is entitled to information needed for contract negotiations, to evaluate grievances, and the catch-all, “for contract administration.” Typically, all information related to bargaining unit employees and their terms and conditions of employment is presumptively relevant.

- Objections to information requests should be raised in a timely fashion.

- An employer should not only timely raise objections, but should substantiate its defense.

- Typically, the duty to provide information applies to information that already exists. Thus, employers are typically not required to speculate or create information they do not have.

- The collective bargaining agreement may limit the employer’s obligations to produce information.

- If the request involves specific questions, and a document or policy such as a COVID-19 program/policy provides the answers, then providing the document or policy to the union may potentially satisfy the employer’s duty to respond.

- Employee medical information is confidential.

- In general, employers should consider offering an accommodation to a union if an objection is raised. Rarely will raising a timely objection and explaining the basis for that objection be sufficient in the NLRB’s eyes for meeting an employer’s obligations under the NLRA. For example, if the objection is “confidentiality,” employers may consider offering to produce the information after sensitive data is redacted, or after the union agrees to a confidentiality agreement limiting the use and dissemination of the information. If the objection is “unduly burdensome,” employers may consider offering to provide snapshots or a sampling of requested information, or consider offering to hire temporary personnel to gather the information if the union assumes or shares in the cost. Even information that is objected to on the basis of irrelevancy may potentially warrant an offer of accommodation. If information requested contains both irrelevant and relevant information, offer to produce the information with irrelevant information redacted.

- Keep in mind that for information that remains in development, such as a COVID-19 program/policy, there may be a continuing duty to provide the program/policy to the union when it becomes available.

Union Inspections Concerning COVID-19 – Unionized Workforces

Unions may have a right to enter a workforce to inspect it to review health and safety issues. Typically, the collective bargaining agreement will address these issues and govern the procedures for requesting access. In general, an employer is entitled to know the reason for the request and the qualifications of the individuals conducting the inspection. There may also be a need to further restrict access by unions depending on the employer, industry, and the status of directives from federal, state and local governments/agencies concerning COVID-19.

Protected Concerted Activities in Union and Non-Union Environments

Section 7 of the NLRA protects employees who engage in union activities. Section 7 also protects the right to engage in "concerted activities for the purpose of…mutual aid or protection," otherwise known as "protected concerted activity" or "PCA." PCA applies both to union and union-free settings. It applies to statements made in the workplace, as well as statements made outside of the workplace, such as on Twitter, Facebook or Instagram.

While the "concerted" prong of PCA normally requires two or more employees to act together in some joint or cooperative fashion, the NLRB has found that a single employee's conduct can be "concerted" if it is engaged in "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493, 496 (1984). Circumstances under which a single employee's actions could be "concerted" include cases where individual employees "seek to initiate or to prepare for group action" or bring "truly group complaints to the attention of management." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986). Likewise, concerns expressed by an individual employee "which are the logical outgrowth of concerns expressed by a group" may also be concerted. However, individual griping in the presence of other employees or a supervisor, may not necessarily qualify as PCA. Alstate Maintenance, 367 NLRB No. 68 (2019).

Some common examples of PCA may potentially include:

- Employees discussing terms and conditions of employment with co-workers and outsiders, including the media, in an attempt to improve terms and conditions of work (e.g., an employer's implementation of COVID-19 protocols or lack thereof).

- A single employee speaking out on behalf of other co-workers to improve their terms and conditions of employment (e.g., to change Employer's COVID-19 protocols). On the other hand, an employee's single post on social media complaining about the workplace may or may not constitute PCA. These are highly fact dependent and often come down to whether the employee was initiating or inducing or preparing for group action in relation to his position in the workplace.

- Soliciting others to join in group action to improve their terms and conditions of employment (e.g., filing a complaint with the Occupational Safety and Health Administration ("OSHA")).

- Employees distributing materials relating to terms and conditions of employment during certain times and areas of the workplace (e.g., CDC and WHO guidance concerning COVID-19).

- Employees investigating and asking questions about terms and conditions of employment in order to improve their working conditions.

- Concerted complaints – to co-workers and even to outsiders – about the company, its managers/supervision and working conditions including on social media (e.g. employer's handling of a suspected outbreak). Even negative and arguably disparaging statements made against an employer may sometimes constitute PCA. There may be arguments that disparaging and derogatory statements towards co-workers or the company are not necessarily protected but whether or not they constitute PCA is highly fact dependent.

- Speaking out in favor of co-workers who have been treated adversely or unlawfully (e.g., potentially an employer discriminating against people of Asian descent who do not live in or

have not recently been in an area of ongoing spread of the virus that causes COVID-19, or have not been in contact with a person who is a confirmed or suspected case of COVID-19).

- A refusal by two or more employees to accept a work assignment or work under unsafe working conditions (e.g., based on a safety-related fear concerning exposure to COVID-19 in the workplace). Generally, the refusal must be reasonable and based on a good faith belief that working conditions are unsafe. Nevertheless, a refusal may potentially remain protected if the employees are honestly mistaken about the risk.

- A single employee refusing to accept a work assignment or work under unsafe working conditions. There may be arguments that this conduct does not involve PCA. Nevertheless, employers should review carefully because it could be deemed concerted if it is determined to be bringing forward a group complaint. Whenever an employee refuses an assignment as a result of a stated safety concern, a careful analysis of whether such refusal is protected maybe in order.

- Safety-related protests and strikes. There may be arguments that this conduct is unlawful for employees covered by a collective bargaining agreement's no-strike clause.

If an employer concludes that an employee's conduct does not involve PCA, employers should also consider the PR associated with an employer's response to conduct which might otherwise be unprotected. Sometimes an employer's reaction or potential overreaction may exacerbate the situation and/or create labor relations issues.

National Law Review, Volume X, Number 80