

NLRB Releases More Employer-Friendly COVID Advice

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The National Labor Relations Board's ("NLRB" or Board") Division of Advice^[1] recently released five memos dealing with issues related to the COVID-19 pandemic—concluding in all five that dismissal of the pending unfair labor practice charge ("ULP" or "charge") against the employer was warranted. These advice memos come on the heels of a [series of advice memos issued by the Division of Advice in July](#), which also recommended the dismissal of COVID-19-related charges filed against employers. Although these advice memoranda do not carry the same weight as a Board decision, they shed light on how the regional offices may view these matters going forward and can be used as a roadmap for employers who are undoubtedly navigating similar issues in their businesses during the pandemic.

The advice memorandum dealt with the following topics:

- 1. An Employer's Ability to Refuse to Engage in Midterm Bargaining Over COVID-19-Related Policies:** In [Memphis Ready Mix](#), Case 15-CA-259794, the Division of Advice recommended the dismissal of a charge alleging that the employer refused to bargain over the union's proposal for paid sick leave and hazard pay during the pandemic. The advice memo first cited the general principle that parties to a collective bargaining agreement are not required to bargain over topics that are covered by the CBA and suggested that because the CBA already addressed issues related to leaves of absences and wages, midterm bargaining was not required. However, even if the CBA was found *not* to cover the topics of sick leave and hazard pay, Advice stated that midterm bargaining was not required due to the broad zipper clause^[2] that waived either party's right to demand midterm bargaining over a topic not covered by the CBA. Of course, Advice noted the employer would be required to negotiate over paid sick leave and hazard pay when the contract can be reopened in the Fall, as these are mandatory subjects of bargaining.
- 2. Information Requests Related to the Decision to Layoff Employees:** Two of the recent advice memos dealt with information requests related to an employer's decision to layoff employees during the pandemic. The first memo, [ABM Business and Industry](#), 13-CA-259139, reiterates the principle that when an information request does not deal directly with the terms and conditions of employment of bargaining unit employees (such as a request for communications between an employer and its clients supporting the layoff decision), the

burden is on the *union* to demonstrate the relevance of the requested information—and the Board expects that the union will engage in an interactive process with the employer to explain why the information sought is relevant before filing a charge.

The second advice memo, [*Crown Plaza O'Hare*](#), Case 13-CA-259749, similarly found that the employer, a hotel near Chicago's O'Hare airport, was not required to further respond to the union's request for information related to the decision to furlough employees after it provided documents showing the drop in hotel occupancy levels after the pandemic hit. Specifically, Advice found that the hotel's financial documents were not relevant because the employer did not claim that the layoff was due to its inability to pay employees. [As we have noted previously](#), an employer's delivery of bad economic news at the bargaining table is not synonymous with a plea of poverty. Indeed, an employer may rely on external market conditions to justify a tough bargaining position without having to open its books to a union—provided, of course, the employer does not also claim a financial inability to meet a union's bargaining demands. Advice also examined an issue that will undoubtedly confront many employers over the next year: whether the union had a right to request information related to applications for emergency payroll relief funds filed by the employer. First, it found that the entrepreneurial business decision to temporarily close the hotel due to loss of business was not subject to mandatory bargaining because it was motivated by a decrease in hotel guests, not the desire to reduce labor costs of the represented bellmen and airport shuttle drivers; therefore, the requested information was not relevant to the union's statutory duties as the bargaining representative.

Advice then examined whether the union was entitled to the requested information to fulfill its duties during bargaining over the effects of the decision to temporarily close the hotel (which would include the layoffs). After noting that the employer “*arguably*” had no obligation to engage in effects bargaining over the layoffs, as they were an “inevitable consequence” of the decision to temporarily close the entire hotel, Advice also found that the union's requests for information were not relevant for bargaining over other effects of the closure because the hotel never alleged that its decision to close the hotel was motivated by an inability to pay employees.

- 3. Protected Concerted Activity During the Pandemic:** The remaining two advice memos, [*Marek Bros. Drywall Co.*](#), 16-CA-258507, and [*Hornell Gardens, LLC*](#), 03-CA-258740 & 03-CA-258966, addressed whether employees were discharged in retaliation for engaging in protected concerted activity (defined as action taken by more than one employee for their mutual aid and/or common protection). In *Marek Bros. Drywall*, the Board found that the charging party who raised concerns in a safety meeting about employees' inability to wash or sanitize their hands while at work had engaged in protected concerted activity—but dismissal of the charge was warranted because the charging party was unable to establish the other elements needed to show that the employee's discharge was discriminatory (the employer's knowledge of the protected concerted activity and union animus). In *Hornell Gardens*, however, Advice found that a nurse who raised concerns about the fact that nurses had to share gowns during the pandemic had not engaged in protected concerted activity: although she had discussed her concerns with a co-worker, Advice concluded there was no evidence the purpose of the conversation was to initiate, induce, or prepare for group action in the interest of employees.

As you are aware, things are changing quickly and there is a lack of clear-cut authority or bright line rules on implementation. This article is not intended to be an unequivocal, one-size fits all guidance,

but instead represents our interpretation of where things currently and generally stand. This article does not address the potential impacts of the numerous other local, state and federal orders that have been issued in response to the COVID-19 pandemic, including, without limitation, potential liability should an employee become ill, requirements regarding family leave, sick pay and other issues.

FOOTNOTES

[1] The Division of Advice within the NLRB General Counsel's office issues guidance to the various regional offices regarding the merits of unfair labor practice charges that involve novel issues of law.

[2] The zipper clause stated as follows: It is agreed that all matters deemed by the parties to be proper subjects for collective bargaining between them are included in this Agreement; and during the term of this Agreement including any extension term, no further or other matters shall be subject to further collective bargaining.

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