

NLRB General Counsel: Pandemic Not a Reason to Bypass the National Labor Relations Act

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On September 18, 2020, the National Labor Relations Board's (NLRB) General Counsel (GC) issued a memorandum providing broad guidance reminding employers of their obligations under the National Labor Relations Act (Act), emphasizing that the conditions created by the COVID-19 Pandemic may not be used to override an employer's legal obligations. In a detailed [memorandum](#) explaining his rationale for issuing or refusing to issue a complaint in numerous cases, the GC stressed the need for employers to bargain over changes seemingly mandated by government orders, warned employers that he would examine such changes to determine whether the employer had seized on the pandemic to otherwise hide anti-union motives, and reminded employers of the longstanding requirements to provide requested information and include a union-representative during investigatory interviews (Weingarten rights). The GC's memorandum provides timely and useful reminders of the scope of the Act.

Duty to Bargain Continues Notwithstanding the Pandemic

The GC examined the duty to bargain in three scenarios. First, the GC emphasized that the duty to meet (including by teleconference) and bargain (including via email) remains in place, even for those employers most impacted by the coronavirus pandemic, e.g., nursing homes. The GC stressed that the COVID-19 pandemic does not protect an employer's refusal to bargain or failure to respond to union bargaining proposals. Also, the GC stated that it would examine whether an employer's unilateral changes purportedly related to a decision necessitated by a government order were, in fact, reasonably related to the pandemic and whether those changes warranted bargaining. Finally, the GC noted that even though an employer may be experiencing significant financial pressure because of the pandemic, the circumstances may still require that the employer bargain before implementing changes unilaterally and without reaching impasse.

Protected Concerted Activity & Discrimination

Citing two different scenarios, the GC again reminded employers that employees have a federally-protected right to act together with other employees to address workplace concerns related to the pandemic. In one case, the GC determined that the employer coercively questioned an employee about how she became involved with a letter in which employees sought input about providing in-person therapy services during the pandemic. In another case, the GC indicated that it may seek

injunctive relief after an employer discharged an employee who led a protest about the employer's alleged failure to provide personal protective equipment (PPE). In other cases, the GC took issue with pandemic-related layoff and recall decisions that appeared to target union supporters.

Other NLRA Obligations: Weingarten & The Duty to Provide Information

Finally, the GC listed several other requirements of the Act that remain in place during the pandemic. Thus, an employer allegedly violated a bargaining unit employee's Weingarten rights by continuing to question the employee about wearing a mask after the employee asserted his right to union representation. Also, the GC directed that a complaint be issued after an employer failed to provide information that a union requested about a COVID-related layoff.

These scenarios offer guidance for employers concerning how the GC will approach issues arising during the pandemic, even employment decisions made in the midst of and purportedly driven by the pandemic.

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