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NLRB Memo Reminds Employers: COVID-19 Does Not Excuse Labor Law Violations

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The COVID-19 pandemic continues to cause uncertainty for employers across the country, but, as the National Labor Relations Board reiterated on September 18, it does not excuse labor law violations.

NLRB General Counsel Peter Robb issued General Counsel Memo 20-14 to summarize the types of COVID-related complaints that he has advised the agency to pursue since March 2020. The theme is clear: in the vast majority of cases, the traditional rules of the National Labor Relations Act apply, even during a pandemic.

Protected Concerted Activity

When employees express concerns about workplace safety in cooperation with or on behalf of co-workers, they may be engaged in protected concerted activity under Section 7 of the NLRA. The General Counsel memo referenced two matters involving such activity, when employees spoke up about the employer's response to COVID-19 and subsequently faced adverse action. The rules in this area are straightforward – if employees present concerns about terms and conditions of employment, including the employer's COVID-19 response, it is unlawful for the employer to discipline them because of that activity. It is also unlawful to coerce or threaten employees into ceasing such conduct, or to require employees to discuss their concerns one-on-one with management rather than as a group.

It is important to remember that Section 7 rights apply in non-union and union environments. The absence of a union does not protect an employer from potential liability under the NLRA or from the enforcement interests of the NLRB if the employer restricts protected concerted activity.

Discriminatory Staffing Decisions

The NLRA also protects employees from discrimination based on their union activities. In two cases discussed in the memo, the General Counsel believed the employer may have used COVID-19-related layoffs to attempt to hide anti-union animus against particular employees. In one

case, the employer laid off both members of a two-person bargaining unit, purportedly because of the pandemic. But other evidence suggested the employer may have actually been motivated by a desire to eliminate the unit. In another case, the employer recalled a portion of its previously laid off staff, but appeared to grant preferential treatment to employees who did not support the union. If the allegations in either cases were proven, they would violate the Act's anti-discrimination provisions.

In the case of layoffs, recalls or other employment actions, the employer's decision cannot reflect anti-union attitudes. Even if an employer may be permitted to conduct layoffs or limited recalls because of economic conditions caused by COVID-19, those decisions must occur on a non-discriminatory basis.

Collective Bargaining

As we have covered in previous blog posts, and as the General Counsel discussed in an earlier memo, certain emergency situations may suspend or alter an employer's duty to bargain with a union. But in the cases highlighted by the latest General Counsel memo, government orders and economic stressors did not relieve employers of their obligation to negotiate changes with their respective unions.

In one matter, a school operations employer switched to remote learning without bargaining because of an order from the state's governor. While the General Counsel determined that initial change was appropriate, he also found the employer had a duty to bargain over the decision and its effects within a reasonable time after making it. The General Counsel advised issuance of a complaint to investigate whether the changes made in response to the governor's order were, in fact, reasonably related to the COVID-19 emergency, and whether the changes caused material, substantial and significant changes to the employees' terms and conditions of employment.

The memo also addressed changes caused by economic hardship. The General Counsel recommend pursuing allegations against an employer for unilaterally eliminating employee health insurance and vacation leave balances because of uncertainty caused by the pandemic. The employer was operating at a monthly loss and lost about 60% of its revenue, but the General Counsel still determined the employer had a duty to bargain over the changes.

In another case, the employer simply stopped bargaining over a collective bargaining agreement because of COVID-19. The General Counsel suggested that the pandemic did not privilege the employer to stop bargaining, even if the sessions needed to be held by teleconference rather than in-person. In essence, although the form might be different, the General Counsel indicated the substance of an employer's bargaining obligation remained intact.

In sum, while some exceptions exist to excuse an employer's bargaining obligations in emergency situations, the memo reminds employers that those exceptions are narrow, and employers should prepare to bargain over mandatory subjects even in difficult circumstances.

Conclusion

General Counsel Memo 20-14 does not provide any groundbreaking legal analysis, but it reiterates the important point that an employer's obligations under the NLRA continue even in hard times. As the country continues to live with the "new normal" of life during COVID-19, it is unlikely that the pandemic will provide a strong legal defense in the context of traditional labor law. Employers should operate under the assumption that the regular rules apply, and if they think that COVID-19 has

created a situation that may excuse an NLRA obligation, they should consult qualified counsel before leaping to that conclusion.

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