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The Duty To Bargain During the COVID-19 Pandemic

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One of the most daunting challenges for employers during the COVID-19 pandemic has been selecting the optimal course to address and respond to unforeseeable circumstances arising in the workplace. For example, many employers have been required to implement new social distancing measures or contact tracing policies, take the temperature of employees, or altogether restrict access to visitors. Given the dearth of extant action plans serving as precedent to guide them through this type of emergency, employers have frequently been required to make decisions more expeditiously than they would like. And, where a labor union represents the employer's workers, the employer's legal obligation to notify and bargain with the union adds an additional layer of complication to the decision making process.

Under the National Labor Relations Act ("NLRA"), employers must notify their employees' unions and provide an opportunity for meaningful bargaining before implementing any material change to the terms and conditions of employment. An important exception to that bargaining obligation exists where the employer's authority to act is spelled out in a provision of a collective bargaining agreement ("CBA"), for example, in the agreement's so-called management rights clause. As discussed below, in a very narrow range of situations, the National Labor Relations Board ("NLRB") also recognizes the right of employers to act unilaterally when faced with certain emergencies even where the CBA is silent on the issue, and even without first notifying and bargaining with the union.

This article discusses where the NLRB's Division of Advice (the "Division") has drawn the line between unilateral actions employers may take pursuant to their CBAs or to address exigent circumstances and actions which employers cannot take without first bargaining with the union.

Background

An employer with a unionized workforce may act unilaterally to effect "a material, substantial, and significant change" in terms and conditions of employment if such action is taken in accordance with the express terms of a CBA. *See MV Transportation*, 368 NLRB No. 66, slip op. at *5 (Sept. 10, 2019). Similarly, an employer need not bargain over requests from the union concerning issues previously bargained for and provided in an existing CBA. *Local Union No. 47, Int'l Bhd. of Elec. Workers, AFL-CIO, CLC v. N.L.R.B.*, 927 F.2d 635, 640 (D.C. Cir. 1991) (observing that a "union may exercise its right to bargain about a particular subject by negotiating for a provision in the

collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject"); *accord Connecticut Power Co.*, 271 NLRB 766, 766-67 (1984).

In *MV Transportation*, the NLRB adopted the "contract coverage" standard to determine whether an issue is covered by the CBA. *Id*. at *2. Under that standard, an employer's unilateral action (or inaction) is lawful if taken within the compass or scope of the language in the CBA purporting to grant the employer the right to act unilaterally in that regard. Indeed, the CBA need not "specifically mention, refer to or address the employer decision at issue." *Id*. at *17. If the "contract language covers the act in question," the employer may act unilaterally. *Id*. For instance, "if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not violate §8(a)(5) and (1) by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies." *Id*. at *2.

In the absence of an applicable contractual provision, the employer still may act unilaterally where economic exigencies compel prompt action. *Seaport Printing & Ad Specialties*, 351 NLRB 1269, 1269 (2007), *enfd*. 589 F.3d 812 (5th Cir. 2009). However, the NLRB "has consistently maintained a narrow view" of that rule, allowing unilateral action only in the face of "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *Id*. at 1269-70 (quoting *Rbe Elecs. of S.D.*, 320 NLRB 80, 81 (1995)). The NLRB has stated that "loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages" do not create qualifying economic exigencies. *Id*. at 1270 (quoting *Rbe Elecs.*, 320 NLRB at 81). Instead, in *Seaport Printing*, for example, the NLRB found economic exigency to be properly prompted by an impending hurricane and citywide evacuation. *Id*.

Covered by the Contract

In June, the Division released an advice memo in the context of the COVID-19 pandemic where the union alleged that a government contractor supplying nursing services to public schools in Washington, D.C. violated the NLRA. NLRB Adv. Mem. 05-CA-258669 (June 30, 2020). Specifically, the union alleged that, in response to D.C.'s closure of public schools in March for the remainder of the school year due to the pandemic, the contractor illegally fired and subsequently offered only temporary work assignments to its employee-nurses.

The Division concluded that the contractor's actions were lawful under *MV Transportation* because the CBAs at issue contained "an entire article devoted to layoffs" and the management rights clauses therein "also contained a general right to lay off." Accordingly, the Division reasoned that "the decision to lay off the nurses while school was out was within the compass or scope of contract provisions granting the [contractor] the right to act unilaterally." The Division further stated that the breadth of the CBAs' zipper clauses, which waived the right to bargain over matters not covered by the CBA, relieved the contractor of any obligation to bargain over its related offer of temporary work assignments to the nurses.

Related to the Pandemic

In August, the Division released an advice memo in connection with the decision by an operator of health facilities to institute new policies and benefits in response to the COVID-19 pandemic. NLRB Adv. Mem. 07-CA-258220, 07-CA-258340 (Aug. 11, 2020). The union protested that, among other things, the employer unilaterally implemented policies restricting the use of personal protective equipment to employer-issued equipment only, restricting visitors, reimbursing travel to support social distancing, providing for COVID-19-related paid leave, and instituting safety protocols for immunocompromised or pregnant staff.

The Division ultimately recommended dismissal of the charges. As the Division explained, in COVID-19 related cases, "an employer should be permitted to, at least initially, act unilaterally during the pandemic so long as its actions are reasonably related to the emergency situation." And thereafter, "to the extent there is a decisional bargaining obligation," the employer must negotiate over the decision. Therefore, the employer properly acted without notifying the

union because its actions were either mandated by state law or reasonably related to the COVID-19 pandemic. The Division further found that the employer satisfied its post-implementation bargaining obligation by negotiating or, at the least, communicating its position on each issue after implementation, and the parties continued to negotiate pandemic-related issues on a weekly basis.

Practice Suggestions

Employers are not required by law to bargain over mandatory subjects of bargaining where those issues are within the "compass or scope" of an existing CBA. *MV Transportation*, 368 NLRB No. 66, slip op. at *2. That means employers may take action unilaterally or implement policies related to the COVID-19 pandemic where permitted under the CBA, and refuse to bargain over requests for greater benefits from the union which are already provided for by the CBA. Likewise, where the CBA has expired or does not cover the employer's proposed action, and there is a bargaining obligation related thereto, then, according to the Division, the employer may still undertake that action if it is reasonably related to the pandemic so long as the employer satisfies its bargaining obligation thereafter.

Where a CBA does not contain a provision specifically providing authority for the employer to act in response to the COVID-19 pandemic, the employer should consider the scope of the agreement's management rights clause. If the management rights clause is broad enough, the employer may have sufficient authority to take unilateral action to protect its employees. *See Huber Specialty Hydrates*, 369 NLRB No. 32 (Feb. 25, 2020) (finding that employer's unilateral changes to attendance policy were proper because they were covered by management rights clause allowing employer to adopt "reasonable rules and policies"). Of course, employers relying on a management rights clause must be careful to ensure their proposed action is, in fact, covered by the terms therein. Cf. *N.L.R.B. v. Solutia*, 699 F.3d 50, 55 (1st Cir. 2012) (ruling that management rights clause granting employer right to govern "the operation of the plant, including but not limited to the right to employ, promote, lay-off, discipline or discharge for just cause" covered routine employment actions, not decision to consolidate product testing labs resulting in certain layoffs).

Zipper clauses present another avenue for employers to properly reject bargaining requests from the union over benefits and perquisites that are not provided for in the CBA. Specifically, an employer can refuse to bargain where the union "clearly and unequivocally" waived its right to bargain over them. *See GTE Automatic Electric*, 261 NLRB 1491, 1491 (1982). A CBA's zipper clause, or a provision waiving the parties' rights to bargain over subject matter not covered in the CBA, can preclude the union from later demanding that the employer bargain over such matters. *Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers, AFL-CIO v. Murata Erie N. Am.*, 980 F.2d 889, 903 (3d Cir. 1992). Indeed, "[z]ipper clauses that are broadly and conclusively worded can serve to 'shield,' from a refusal to bargain charge, a party on whom a mid-term bargaining demand is made." *Am. Benefit & Teamsters Local Union No. 505, Affiliated with the Int'l Bhd. of Teamsters*, 354 NLRB 1039, 1049 (2010). Exemplifying that point, certain recent advice memoranda promulgated by the Division in connection with the COVID-19 pandemic have approved of employers' refusal to bargain based on the presence of a zipper clause in the parties' CBA. *See* NLRB Adv. Mem. 15-CA-259794 (July 31, 2020); (finding employer's refusal to negotiate over union's request for sick leave and hazard pay proper because zipper clause constituted unambiguous waiver over of bargaining obligation over those issues); NLRB Adv. Mem. 05-CA-258669 (June 30, 2020) (determining that employer's unilateral offer of temporary work assignments to employees terminated in response to the COVID-19 pandemic was lawful given breadth of zipper clause).

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