Labor Relations During a Pandemic: Employer Duties Under the NLRA in the Wake of COVID-19

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The COVID-19 outbreak implicates many different laws for employers to consider as they develop and refine their responses to rapidly changing circumstances.

The National Labor Relations Act (NLRA) is just one of these laws. Some employer obligations under the NLRA are limited to unionized workforces, but aspects of the NLRA apply to all employers. As the COVID-19 outbreak has spread across the globe, many issues are arising that implicate the NLRA— including union requests for information and/or workplace health and safety inspections, union demands to bargain over new employer policies, employees refusing assignments because of fear of exposure, and questions about requiring confidentiality of certain information related to exposure.

The appropriate responses to these issues depend on a number of factors, including collective bargaining agreement provisions, the industry involved, and potentially applicable state laws. Healthcare employers may require different responses than non-healthcare employers. Here, we will focus on issues arising under the NLRA.

The Duty to Bargain

Employers with represented employees may have a duty to bargain over new policies developed to respond to COVID-19. For example, if employers develop a policy on whether and how to pay employees who are furloughed or otherwise quarantined as a result of an exposure or potential exposure, that policy likely involves a mandatory subject of bargaining. To determine if there is a duty to bargain as these issues arise, the first step is to review your collective bargaining agreement. Potentially relevant provisions include management rights, leaves of absence, paid time off, and health and safety. These provisions may give employers the right to proceed unilaterally, especially under the National Labor Relations Board’s (NLRB) new contract coverage standard announced in MV Transportation, Inc.

If the contract does not give the employer the right to proceed unilaterally, and the employer determines that it has a duty to bargain, timing may be an issue. During non-emergency situations, policies that require bargaining typically should be bargained—to agreement or impasse—prior to implementation. In this case, that may not be possible given the requirement for fast action. The duty to bargain in good faith allows employers to take into account external factors that require them to proceed quickly. If that is the situation, employers should be clear with the union of the required timing of the proposed change and the reason for it. In an emergency,
employers may need to proceed before agreement or impasse is reached. That does not, however, relieve employers of a duty to bargain—it may need to negotiate with the union after implementation.

**Union Information Requests**

Similarly, for employers with represented employees, many unions are seeking sometimes extensive information regarding the employer's response to the COVID-19 outbreak. That is especially true for healthcare employers. The main topics of these requests relate to real or perceived health and safety concerns, and how absences resulting from the outbreak will be addressed. Both of these topics involve mandatory subjects of bargaining and thus likely fall within the type of information that is presumptively relevant to the union's representation of employees. Keep in mind that the duty to respond to requests for information also may be covered in a collective bargaining agreement, so it is important to take a look there, too.

When responding to these types of requests, if you determine there is a duty to provide the requested information, keep the following general principles in mind:

1. The duty is to provide information that already exists. Employers are not required to speculate or create information that they do not have.

2. If the request involves specific questions, and a document or policy provides the answers, then providing the document or policy to the union satisfies the employer's duty to respond.

3. For information that remains in development, such as a policy relating to whether and/or how the employer plans to pay employees who cannot come to work due to an exposure or other quarantine, there may be a continuing duty to provide the policy to the union when it becomes available.

4. Some requests include a very fast turnaround time. There often is a tension between a fast response and a complete response. There are no hard and fast rules on how quickly employers must respond. Consider the reasonableness of any requested timing based on the circumstances, the amount of information requested, and competing responsibilities of those who have to gather the information.

5. Employee medical information remains confidential and not subject to disclosure to a union without a release.

**Health and Safety Inspections**

Unions may have a right to enter a workplace to inspect it to review health and safety issues. If an employer receives such a request, it is entitled to know the reason for the request and the qualifications of the individuals performing the inspection. In addition, it is entitled to limit the number of union representatives who participate. Union representatives performing such an inspection do not have a right to disrupt the workplace while they are present.

**Protected Concerted Activity**

Section 7 of the NLRA protects employees who engage in protected concerted activity (PCA), whether or not they are represented by a union. Specifically, the NLRA protects an employee from retaliation for engaging in "concerted activity" that is taken for "mutual aid or protection." Conduct is concerted under the NLRA if it is engaged in "with or on the authority of other employees" (i.e., two or more) and
“not solely by and on behalf of the employee themselves” “where individual employees seek to initiate or to induce or to prepare for group action,” or when “individual employees bring truly group complaints to the attention of management.” Concerns expressed by an individual employee “which are the logical outgrowth of concerns expressed by a group” may also be concerted.

Conduct is for mutual aid or protection when the employees are seeking “to improve terms and conditions of employment or otherwise improve their lot as employees.” Thus, a refusal by two or more employees to accept an assignment based on a safety-related fear related to COVID-19 may be PCA. Remember though that under the NLRA, the refusal must be reasonable and based on a good faith belief that working conditions are unsafe. Nevertheless, a refusal likely remains protected if the employees are honestly mistaken about the risk.

Another potential issue arises when a single employee refuses to accept an assignment purportedly because he or she is fearful about exposure to COVID-19. In such a case, there may be an argument that this does not involve concerted activity. Nevertheless, employers may want to review this 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.

Requests for Confidentiality

Some employers may ask employees to maintain confidentiality about issues involving COVID-19. In the healthcare industry, disclosure of patient health information (PHI) remains protected and not subject to disclosure—employees working in healthcare have a duty to protect PHI. But employers may want to be careful about requiring confidentiality of more general information. Employees have a Section 7 right to discuss wages, hours, and working conditions (including health and safety issues) with each other and with third parties.

Conclusion

Employers, especially those in healthcare, are working overtime to address all of the issues associated with COVID-19. Having to bargain and/or respond to information requests during this very busy time may present additional challenges. Ogletree Deakins has a multi-disciplinary team to assist employers as they sort through all of these issues. The team will continue to report on the most recent developments on the firm’s Coronavirus (COVID-19) Resource Center. We encourage you to seek assistance as circumstances continue to evolve.