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Labor & Employment Alert
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Bargaining and Protected Concerted Activities in the Time of COVID-19: Guidance and Lessons for Employers

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The recent need to make difficult and sometimes time-sensitive decisions during the pandemic has raised the question of bargaining and other obligations under federal and state labor law. Whether or not you have a unionized workforce, the National Labor Relations Act ("NLRA" or the "Act") for covered private sector employers and Massachusetts state law, M.G.L. c. 150E, for public sector employers in Massachusetts, protects employees' rights to engage in protected concerted activities. Moreover, for those employers with organized workforces, employers are generally obligated to bargain before making changes to employees' wages, hours, working conditions, or other mandatory subjects of bargaining. Failure to do so may constitute an unlawful unilateral change and result in a finding that the employer committed an unfair labor practice.

Protected Concerted Activities

Employers are well advised to remember that even in non-union shops, employees generally have a right to engage in what is known as "protected concerted activities." This right is protected under Section 7 of the NLRA for covered private employers, and also under Massachusetts state law. What this means in short is that with some exceptions, employees have a right to work together for mutual aid or protection regarding their terms and conditions of employment. Employers are generally prohibited from interfering with this right or retaliating against employees for lawfully exercising it. Some examples of protected concerted activity could include: two or more employees talking about working conditions, two or more employees requesting a safer working environment, an employee bringing group complaints to an employer's attention, and activities directed at organizing efforts. And with more and more changes affecting the workplace, employers should expect more employees to engage in concerted activities to question, request, or oppose changes to working conditions. Employers should also recognize that the right to engage in protected, concerted activity can extend outside the work place, including to social media platforms – a scenario becoming increasingly prevalent where more work is being performed remotely and away from the physical workplace.

For Employers with Organized Workforces, the Requirement to Bargain:

Recently, the Office of the General Counsel of the National Labor Relations Board ("NLRB" or the "Board") and the Massachusetts Department of Labor Relations ("DLR") have each issued guidance documents regarding the duty to bargain in emergency or other unforeseeable situations where time is of the essence. Whether in the public or private sector, the question of whether such

decisions must be bargained with the union is a complicated and fact-specific determination which may turn on many factors, including specific language in the collective bargaining agreement, the underlying need driving the change (*e.g*., whether economic or safety-related), the timing of the change, and whether the circumstances were foreseeable.

Private Employers Under the NLRA

The recent Board Guidance provides a summary of nine (9) different cases in which the question of the duty to bargain arose in the context of an emergency or other unexpected change affecting business operations. ***While each case is highly fact specific, a consistent theme throughout is the importance of analyzing the foreseeability of the change and making efforts to bargain to the extent possible in most situations.*** In many cases, the Board found that notwithstanding the emergency, the employer is still required to bargain. Outlined below are a few illustrative examples from the guidance.

Layoffs Due to Impending Hurricane – In the case of an impending hurricane and a state order to evacuate, an employer closed operations and laid off employees without first bargaining to impasse. The Board found that while the employer did not have a duty to bargain with the union regarding the layoffs given the unforeseeable and emergent situation, the employer did have a duty to bargain with the union about the impacts of the layoffs following the hurricane. The Board explained that the hurricane and mandatory evacuation were "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." However, the Board also found in this circumstance that the employer failed to bargain in violation of the Act when shortly after the hurricane had passed, it utilized non-unit employees, including a supervisor, to assist filling remaining orders from its customers.

Economic Fallout Due to the Events of September 11 – Following the economic fallout of the events of September 11, 2001, an administrative law judge ("ALJ") for the NLRB determined that a 60% drop in business volume causing the company to enter bankruptcy in January of 2002 was an extraordinary, unforeseen event requiring the employer's immediate action and, thus, relieved the employer of the ordinary duty to bargain prior to a layoff. However, it is important to note that the ALJ also found that in this case, the employer had given the union notice of its need to lay off bargaining unit members, and the union had failed adequately to request bargaining over the issue.

Layoffs Due to Supply Shortage – In another example, the Board found an unlawful failure to bargain where, in the midst of a log shortage, a lumber company laid-off its employees without first notifying the union and bargaining to resolution or impasse. The Board found that the company violated the Act by failing to bargain and noted, among other things, that the log shortage had been a chronic issue and there was no "precipitate worsening" of the problem that required immediate action.

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Implementing New Pay Policy Following Unexpected Ice Storm – In another case, involving an ice storm necessitating the closure of operations for two days, an employer unilaterally implemented a new pay policy for two different bargaining units and its non-represented employees, requiring represented employees to utilize available paid time off for the two days in order to be paid, while paying outright its non-represented employees consistent with its current handbook language related to closures. While the Board found that the "zipper clause" in one of the unit's CBA forgave the employer's failure to bargain over the issue of compensation for missed days of work in this circumstance, the Board found an unlawful failure to bargain regarding the other unit where its CBA had recently expired and the parties were in the midst of renegotiating a successor agreement. As the Board explained, the issue of wages is a mandatory subject of bargaining and, absent specific contractual language as existed with the other unit, the employer was obligated to provide notice and an opportunity to bargain prior to acting.

A copy of the NLRB Guidance can be found here: https://www.nlrb.gov/es/guidance/memos-research/general-counsel-memos

Public Employers in Massachusetts

The Massachusetts Department of Labor Relations (DLR) has also published guidance related to bargaining obligations for public employers. Similar to the Board's guidance under the NLRA, the DLR has stated that an employer's obligation to bargain remains unchanged throughout the COVID pandemic. The significant, but narrow, exception to this is where there are "exigent circumstances beyond the employer's control [that] require an employer to act quickly." In these circumstances, the DLR explains that "an employer may implement changes involving mandatory subjects of bargaining without bargaining to resolution or impasse as long it can demonstrate that: 1) circumstances beyond its control required the imposition of a deadline for negotiations; 2) the union was notified of those circumstances and the deadline; and 3) the deadline imposed was reasonable and necessary." It is important to note here that even where unique circumstances might justify taking unilateral action, the DLR expects the employer to attempt to bargain by setting and communicating a bargaining deadline, even if it is a short one. Also importantly, the DLR notes that even after the change is implemented, the duty to bargain continues until the parties reach resolution or impasse.

While case law on this subject from the DLR primarily focuses on unexpected economic exigency, the lessons from the private sector likely extend to the public sector as well. An employer's duty to bargain over mandatory subjects remains during the pandemic. The DLR will closely scrutinize any failure to bargain. The timing of the claimed unexpected circumstances, specific contract language, and good faith attempts to bargain and set a negotiation deadline before taking action, are relevant factors to consider.

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A copy of the Department of Labor Relation's guidance can be found here: https://www.mass.gov/alerts/dlr-guidance-regarding-rights-and-obligations-during-covid-19-outbreak#1466191

Bargaining obligations for covered employers – with a few limited exceptions – generally remain. And while the facts and circumstances will control in each specific instance, employers should keep in mind that the longer the pandemic continues, the harder it will be to justify a failure to bargain due to unexpected or exigent circumstances. Whether addressing bargaining obligations or employees' rights to engage in protected concerted activities, employers are encouraged to seek legal advice from experienced labor counsel.

This Client Alert was prepared by Rachel Mills and Kier Wachterhauser. This Alert was reviewed with Nan O'Neill, Michael Maccaro, and Katherine Hesse. If you have any questions about this issue, please contact Kier Wachterhauser or the attorney responsible for your account, or call (617) 479-5000.

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