Seyfarth

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Labor-Management Issues For Unionized Facilities

Introduction

This document and the FAQs are intended to provide general information for unionized California hospital regarding practical labor-management issues associated with the 2019 Novel Coronavirus disease, also known as COVID-19. It does not constitute legal advice.

This document is not intended to be exhaustive and we encourage you to supplement your knowledge by visiting the California Department of Public Health website at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx or one of the other government websites containing information about the labor and employment issues associated with COVID-19.

The following information is provided based upon currently known information. The progress of this disease is constantly evolving. The foregoing information is subject to change based upon such evolving information.

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(a) What obligations exist to notify or negotiate with a union regarding Coronavirus policies, including leave due to quarantine?

Under the NLRA employers with a union-represented workforce have a duty to bargain with the union regarding wages, benefits, and other terms and conditions of employment. A potential, narrow limitation to this duty to bargain may arise where there are "compelling economic exigencies" requiring prompt action. The NLRA limits compelling economic exigencies to extraordinary, unforeseen events having a major economic impact on the employer that compels the employer to act immediately and unilaterally to change certain employment terms or working conditions. Even in the highly narrow circumstances where economic exigencies arguably exist, an employer typically still must afford as much notice and opportunity to bargain as is practicable under the circumstances. Moreover, such exigencies do not permit an employer to ignore contractual commitments in a collective bargaining agreement, i.e., changing existing terms (as opposed to filling gaps in terms) typically cannot be undertaken unilaterally.

An employer's duty to bargain otherwise will turn on the specific language of the CBA, including management-rights and force-majeure language. Depending on the CBA's terms, an employer may have more--or less--latitude to act unilaterally under these circumstances.

(b) If I have union-represented employees, how does COVID-19 impact my duty to bargain with the union before making any changes to terms and conditions of employment?

The COVID-19 pandemic is causing many health care employers to assess whether changes in employment terms and working conditions are necessary or desirable to directly combat the virus or to maintain operations. Examples of such changes include mandatory testing, questionnaires regarding travel, sending employees home, modifying schedules, applying attendance policies, PPE requirements, pay adjustments, and the like.

Under the National Labor Relations Act (NLRA or Act), an employer ordinarily is obligated to provide a union with notice and a reasonably opportunity to bargain over wages, hours, and other material employment terms and working conditions. These are known under the Act as "mandatory subjects of bargaining." It is possible that an existing collective bargaining agreement (CBA) does not address certain mandatory subjects, and they are open and unresolved. If so, the employer must bargain over them to the point of an agreement or a lawful bargaining impasse (i.e., exhausting all reasonable possibilities of an agreement with negotiations conducted in an atmosphere free of employer unfair labor practices).

However, if there is a CBA in effect, its terms already may "cover" the subject of the change. This most commonly occurs where the CBA contains an expansive management rights article affording the employer discretion to make unilateral changes -- to the extent they do not conflict with other express terms of the CBA. An employer's management rights will be stronger where the CBA explicitly affords it those rights. There is more likely to be a contract dispute if the employer is relying upon broader and more general (and vaguer) rights.

An employer should recognize that even if it wants to make changes that are improvements to existing terms and conditions, unless the CBA already grants the employer the right to act unilaterally, legally it cannot do so, and still must provide the union with notice of the proposed changes and a bargaining opportunity. Of course, if the proposed changes indeed are improvements, the union likely will agree to them.

Most CBAs do not contain force majeure provisions which allow an employer to repudiate or modify existing contract terms. Where such force majeure language does not exist, an employer should recognize that it is bound by its contractual commitments unless it can persuade the union that the ultimate alternative to change could be unfavorable. If the union cannot be persuaded, it is not obligated to bargain over modifications to previously agreed-upon terms.

Generally, in first contract situations, or successor CBA bargaining, an employer cannot simply reach a lawful bargaining impasse on discrete subjects apart from the overall deal, and then implement only those changes. Rather, it would have to wait for the final, comprehensive CBA to be agreed upon. However, a narrow and highly limited exception to this principle arises where there are "compelling [economic] exigencies" requiring immediate action. The National Labor Relations Board (NLRB) has limited such exigencies to extraordinary, unforeseen events having a major economic impact on the employer that compels it to act immediately (or with very little lead time) and unilaterally to change certain aspects of employment. The existence of "exigent circumstances" is generally disfavored by the NLRB; however, such circumstances are more likely to be recognized with respect to health-related issues, particularly where an employer is attempting to follow government or established public-health standards, e.g.. CDC/OSHA/WHO.

To the extent that an employer is compelled by a government mandate to take certain actions, if there is discretion/are options as to how the mandate can be carried out, the employer is obligated to bargain over the effects of the directive, i.e., the possible compliance approaches.

Similarly, to the extent that the government may enact legislation that provides greater or different benefits than in a CBA (e.g., as may be the case with the Families First Coronavirus Response Act), and there is no carve out to simply maintain the terms or benefits that are in the CBA, then to the extent that the improvements/differences are a clear mandate, there likely is no bargaining obligation. However, to the extent the changes have effects on other terms and conditions, an employer must provide notice to the union and a reasonable opportunity to effects bargain.

(c) What COVID-19 specific issues might an employer expect a union to raise?

The possibilities are numerous, including the following:

- Comprehensive contingency plans to address the crisis
- Unions insisting that employers provide paid sick leave for any reason, including when an employee's parent must stay home due to cancelled schools. Unions may also ask for an employer to provide for childcare or childcare-assistance under such circumstances.
- Unions urging employers to provide full protective gear to employees, including hazmat suits, N95 respirators, or face masks, or otherwise raising concerns about PPE. This is particularly common among healthcare employers.
- Unions maintaining that employers provide wage increases for employees to facilitate those employees being able to stay home when sick or obtain and pay for emergency childcare
- Modifications to attendance policies
- Protocols for when employees can refuse to work without loss of pay or potential discipline
- Hazardous duty-type pay increases or bonuses
- Subsidized alternatives to public transportation

(d) Should employers prepare for union information requests on this topic?

Yes. As part of bargaining, CBA administration, or adequately representing its members, a union has the right under the NLRA to request information from an employer that is relevant to its performing its responsibilities in those areas. Given the current situation, an increasing number of unions are making wide-ranging information requests so they can understand how the employer is addressing certain situations. You should anticipate receiving such requests, and should consider how you can rapidly respond. An employer's failure to promptly and sufficiently respond to information requests can be an unfair labor practice, and can prevent the employer from reaching a lawful bargaining impasse where one is needed to undertake unilateral changes.

We are aware of an increasing number of unions making such requests. Employers should be prepared to answer questions regarding its contingency plans, safety protocols, safeguards for customer-facing employees, how payment to employees might be handled in the event of a shutdown, and how the employer plans to treat coronavirus-related absences, among others.

(e) Can we rely on a CBA no-strike clause to discipline or discharge union employees if they refuse to work because of COVID-19?

In many circumstances, no. Section 502 of the Taft-Hartley Act provides that it is not a "strike" for employees to refuse to work in "abnormally dangerous conditions." Under NLRB case law, if employees have a reasonable belief they are in danger, and such belief has at least some objective basis, they may refuse to work. An emergency situation such as a confirmed

outbreak/global pandemic, and in which the employees objectively could be exposed to COVID-19, may well satisfy Section 502. Accordingly, an employer should take whatever steps it can to educate employees about the extent of any dangers and to ameliorate them. Of course, as with a strike, employees are not required to be compensated if they do not perform work unless there is a contractual basis for doing so, e.g., their absence qualifies for paid leave.

(f) Our CBA expires at the end of the month. Can--or should--we insist that the union continue meeting for face-to-face bargaining? What about conducting grievance meetings?

These are unusual times and all of our clients are concerned about the increased likelihood of contagion associated with travel and large-group meetings. NLRB case law holds that a party may not unilaterally insist on remote bargaining. However, where possible, and with the union's consent, conducting bargaining via phone and over e-mail is advisable. We have also seen clients and unions agree on contract extensions to defer bargaining until a later--and safer--date. Likewise, it may be advisable to try to agree that grievance meetings -- especially involving union business agents or other non-employee personnel -- be conducted remotely.

(g) What if an employer has to lay employees off?

Most CBAs have provisions that allow an employer to lay off (at least under certain conditions) according to particular rules (e.g., seniority), and likewise describe how recalls are to take place. To the extent an employer wants to depart from such provisions where they exist, it will have to convince the union to modify CBA terms, which the union can refuse to do. If an employer is in a first contract situation, ordinarily it cannot lay off -- at least outside the boundaries of an established, status quo practice -- until the overall CBA is reached. An exception may be if exigent circumstances exist. See No. 1 above.

If the CBA does not address whether or not a laid off employee is entitled to benefits, or if this subject was not clearly addressed in CBA bargaining, the employer may have to engage in bargaining over the effects of the layoff (not the decision itself if the decision is covered by the CBA). Effects bargaining also would be required to the extent there is no CBA in place. In such circumstances, the union should be given as much advance notice as possible of the layoffs and an opportunity to effects bargain. As with other forms of bargaining under the NLRA, an employer is not required to agree to all -- or even any -- of the union's proposals. Rather, it just must negotiate in good faith consistent with those standards under the NLRA.

(h) What if an employer has to temporarily or permanently close a facility, department, or function, or desires to transfer operations to another location?

Those decisions are mandatory bargaining subjects unless an employer's CBA covers their ability to undertake those actions unilaterally, or the union otherwise has waived its decision bargaining rights. Many CBA management rights provisions address such restructuring actions and should be consulted.

Even where, e.g., a CBA management rights provision gives an employer the ability to implement such a decision, ordinarily the employer still must engage in timely and adequate bargaining over the effects of the decision upon union-represented employees. In effects bargaining, a union is free to raise virtually subject it chooses, e.g., severance pay, health insurance continuation, transfer rights, to the extent it is not already covered by the CBA. However, as with any effects bargaining, an employer does not have to agree to all or any of the union's proposals, but must bargain in good faith consistent with NLRA standards.

(i) What are some other rules regarding strikes by union-represented and non-union employees in the healthcare industry?

In the healthcare industry, if it has a reasonable belief that a strike will occur, for staffing purposes, it may ask employees whether they intend to work or strike.

If a strike is not prohibited by a CBA no-strike provision (but see No. 6 above), Section 8(g) of the NLRA prohibits a union from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days' notice in writing to the institution and the Federal Mediation and Conciliation Service. Importantly, however, Section 8(g) does not apply to non-union employees, and such employees can engage in a Taft-Hartley Section 502 safety action (see No. 6 above), or other concerted activity protected by the NLRA. Employees cannot be treated adversely for undertaking such actions, but do not need to be compensated for time when they refuse to work unless it is pursuant to some type of contractual guarantee or vested right.

(j) What steps can an employer take to maintain the best-possible relationship with a union during this crisis?

An employer's relationship with the union will continue after the current crisis has passed, so we recommend that employers endeavor to preserve a good faith, open, and constructive bargaining relationship. Along those lines, we recommend that employers:

- Follow standard good faith bargaining principles as much as possible, e.g., meet, listen to the union with an open mind, promptly respond to union information requests, consider whether any compromises make sense, be prepared to explain why you disagree.

- Even where exigent circumstances arguably exist, be prepared to provide as much advance notice of proposed changes as possible. Also try to anticipate and have the resources to rapidly respond to union information requests. To the extent practicable, consider providing certain types of information in advance of negotiations/without being asked that you would want to see if you were on the other side of the table.

- Tell the union that you are willing and able to meet at any time to address questions (and via phone if agreed to by the union).

- If there is a genuine impasse that needs a quick resolution, consider whether proposing FMCS or other mediation is desirable.

(k) Should I consider quarantining bargaining unit employees, or having employees remain off work, who have recently returned from areas heavily affected by COVID-19?

Again, in many circumstances the answer will depend on the specific language of the CBA.

Where permitted under the CBA (or presently agreed to in bargaining with the union), you should consider telling any employee returning from areas heavily affected by COVID-19, that they should remain away from work for fourteen (14) days after their return. Since this list of affected countries is likely to change, please refer to the CDC website at https://www.cdc.gov/coronavirus/2019-ncov/locations-confirmed-cases.html for the current listing. You can also consider telling employees to self-monitor for any symptoms of COVID-19. If any symptoms occur, the employee should consider self-quarantine and being evaluated by a healthcare provider. Further, even if not symptomatic, employees may also want to consult a healthcare provider to confirm that the employee is not infectious before returning to work. For union-represented employees, applicable CBAs should be consulted regarding employment terms relevant to such actions.

(l) How should an employer respond to a union's request for the identity of an employee who has tested positive for COVID-19?

As outlined elsewhere in these FAQs, employers should avoid divulging the identity of an employee with a COVID-19 diagnosis, even where requested by the union. Similar to other requests for confidential information, an employer should work with the union to accommodate its request--for example, agreeing to solicit the consent of individual employees to disclose their identities to the union or agreeing to provide as much information as possible without identifying specific individuals.