

COVID-19 and the Duty to Bargain

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Jef Fagan, NECA General Counsel

This legal alert is provided with the caveat and reminder that bargaining is local. It is impossible for NECA at the national level to know all local facts and counsel individual employers on many local issues. As can be seen by the included memo from the General Counsel of the NLRB, the Board itself has been back and forth on what constitutes an emergency, when it ends, and what an employer is permitted to do. The record is full of you were right to do it in this case, you were wrong to do it in that case, and in the other case part of what you did is okay, and part violates the law. NECA cannot say with certainty that acting in a particular way would be found legal in all cases. Indeed, two contractors in the same town doing essentially the same thing could find themselves with differing results to a union challenge based on factors unique to each company. What we can say is consult with your local legal counsel and your chapter manager. The chapter may already have posed these questions to the union or the local trust funds and developed an understanding. If you must act immediately, tell the union what you are going to do and offer to talk with the union about it, give the union a deadline, and consider your options. If you cannot wait, act, document, and remain open to the union to work out any issues.

The Duty to Bargain — Generally

The National Labor Relations Act (NLRA) imposes on NECA local chapters and contractors the duty to bargain in good faith with unions over mandatory subjects of bargaining such as wages, hours, and other terms and conditions of employment (mandatory bargaining subjects). Relevant to the current COVID-19 pandemic, if contractors implement COVID-19 safety, HR or work rules concerning work assignments, procedures for travel and quarantining as a result of exposure or potential exposure, they may implicate mandatory bargaining subjects. Certain responses to government directives – such as the FFCRA and CARES Act compliance or government closures and work restrictions and orders - may also implicate mandatory bargaining subjects.

In general, the NLRA provides that chapters and contractors who make material changes to mandatory bargaining subjects without bargaining with a union run the risk of unfair labor practice charges. That risk *could* apply in emergency situations such as the COVID-19 pandemic. However, in an unprecedented emergency like COVID-19, union bargaining obligations *may* be relaxed either based on the terms of the CBA, or under the NLRA.

Collective Bargaining Agreement Language

A contractor must first look to the local NECA CBA. Most NECA CBAs contain a Management Rights clause that reads (or is similar to) as follows:

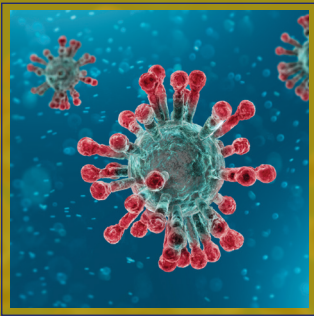
MANAGEMENT RIGHTS:

Section 2.02. The Union understands the Employer is responsible to perform the work required by the owner. The Employer shall, therefore, have no restrictions except those specifically provided for in the collective bargaining agreement, in planning, directing and controlling the operation of all his work, in deciding the number and kind of employees to properly perform the work, in hiring and laying off employees, in transferring employees from job to job within



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the Local Union's geographical jurisdiction, in determining the need and number as well as the person who will act as Foreman, in requiring all employees to observe the Employer's and/or owner's rules and regulations not inconsistent with this Agreement, in requiring all employees to observe all safety regulations, and in discharging employees for proper cause.

This Management Rights clause allows a chapter and contractor flexibility in determining management rights, layoffs, subcontracting, closures, relocations, work assignments, scheduling, leaves of absences, paid time off, sick leave, and health and safety, among others, not inconsistent with the CBA or the current state of the law. This clause *may* give contractors the right to proceed unilaterally without bargaining with the union under *MV Transportation*, 368 NLRB No. 66 (2019) and related cases. However, for certain kinds of major workplace changes like plant closures and relocations, contractors have the duty to bargain over the “decision,” as well as the “effects” of the decision (or “implementation” of that decision). The NDERA was circulated to deal with some of these “effects,” such as furloughs and recalls.

In light of the unprecedented nature of the COVID-19 pandemic, it is fair to say that a contractor's primary concern is the safety and welfare of its employees. Most NECA CBAs contain a clause related to management rights that is specific to the issue of safety:

EMPLOYER'S RESPONSIBILITY:

Section 10.10. It is the Employer's exclusive responsibility to ensure the safety of its employees and their compliance with these safety rules and standards.

This clause, while directed to OSHA requirements, certainly strengthens the argument that a contractor has the unilateral right to implement changes that are directed at workplace safety and compliance with current best practices and directives related to COVID-19.

The FFCRA, CARES Act and other Government Orders — Impact on CBAs

Certain government directives may override the CBA. The FFCRA, requiring additional paid sick and family leave for certain employees, in addition to and as amplified by the CARES Act, *requires* certain actions by contractors. So may the OSHA and CDC guidance and directives, which seem to come at us on a weekly basis. State and local governments have also issued orders that require the temporary closing or cessation of work at some operations, as well as mass stay at home orders for non-essential business. These kinds of orders potentially may leave contractors and unions with no choice but to make alterations to the workplace not contemplated in any CBA. However, even if these orders do leave contractors with no choice but to make unilateral changes, contractors do have an obligation to bargain over the “effects” of the order and discretionary aspects of implementation.

Compelling Economic Exigencies

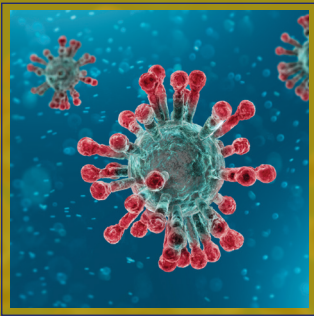
Even when a chapter and contractor determine they have a duty to bargain, timing may be an issue. The general duty to bargain over mandatory bargaining subjects may be suspended where “compelling economic exigencies” compel prompt action. *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enf.*, 15 F.3d 1087 (9th Cir. 1994). The NLRB has applied this exception only in very narrow circumstances, and it views “compelling economic exigencies” as “extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the employer to take immediate action.” To use this exception, a contractor will need to demonstrate not only that the proposed change was “compelled” but also that “the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable.”



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Although an outbreak like COVID-19 and certain government orders issued in response to COVID-19 would seem to fit the description of “compelling economic exigencies,” thus relieving a contractor of bargaining with a union, **this will be different for every contractor and will depend on the timing and specific nature of the exigency.** It is certainly conceivable that while COVID-19 might suspend the duty to bargain for a contractor who is ordered by federal, state or local governments to close immediately, or for a contractor with a facility that has an actual COVID-19 infection, it might not suspend the duty for a contractor that has merely lost business or suffered a financial decline as a result of the outbreak. Likewise, it might not suspend the duty to bargain over the “effects” of those orders and discretionary aspects of implementation. *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

The duty to bargain analysis is fact-based and cannot be applied uniformly to all contractors in all situations. Contractors and chapters should be prepared to justify the economic exigency, demonstrate why immediate action is required, and demonstrate that any changes are implemented only for immediately required responses, and not to be continued later on, once the exigency has diminished.

Conclusion

In general, chapters and contractors should consider providing the union notice of intended changes and seek to discuss them, even if those discussions must happen quickly and the contractor must take immediate and decisive action. If that is the situation, contractors should consider being clear with the union about the required timing of the change, the reason for it, and the timeline that the union must respond before the contractor implements. If a contractor must act immediately without notifying and/or discussing with the union, it should be prepared to communicate with the union after such changes as soon as practicable under the circumstances.

Best Practice Advice

- Even when bargaining is not required because of economic exigency, legal mandates, or management rights, chapters and contractors should consider meeting with the union to discuss a solution to problems caused by COVID-19. This may avoid a conflict over the changes, even if the contractor is within its right to make them unilaterally.
- **Local solutions are always the best solutions and NECA National cannot anticipate every specific fact scenario.**
- Document the specific need for proposed changes – the safety emergency or compelling economic exigency.
- Plan for the “effects” or impact of the implementation and open that to bargaining.
- **Sample question 1:** May I implement a COVID-19 employee questionnaire designed to promote workplace safety that may include health or fitness for duty questions without bargaining?

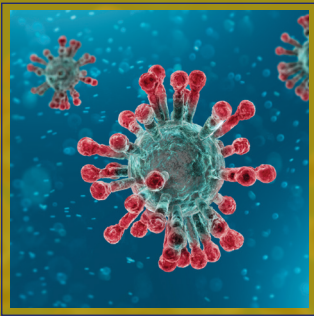
Answer No.1: If the timing and emergency nature of the implementation require prompt action, best practice would be to provide notice and request immediate response from the union. If the response is delayed or is negative, and you believe the questionnaire is sound and necessary from a safety perspective, implement and document your rationale. In *Virginia Mason Hospital*, 357 NLRB 564 (2011), the hospital implemented a policy requiring both union and non-union nurses who had not received a flu shot to either take antiviral medication or wear a protective mask. The ALJ found that the employer’s policy was excused by an exception to the duty to bargain set forth in *Peerless Publications*, 283 NLRB 334 (1987).



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because the employer's policy (1) went directly to its core purpose of protecting patients' health; (2) was narrowly tailored to achieve the aim of reducing the spread of influenza; and (3) was limited to registered nurses who declined other flu-prevention options.

- **Sample question No. 2:** What direction do we have from the DOL on the payment of fringe benefits under the FFCRA?

Answer No. 2: While specific instructions on the payment of fringe benefits under FFCRA (EPSL and FMLA) have not been provided by the DOL, some general guidelines can be inferred. The law specifically requires the continuance of healthcare coverage and as such, it is reasonable to assume that payments into the healthcare funds should be paid if continuing coverage is not available under the applicable Health Plan in order for coverage to be maintained during the term of this leave. There is no mention or direction on the continuance of other fringe benefits and as such it is not unreasonable to assume that they are not required to be paid, particularly if they are on an hours worked or hours paid basis. However, as with the case of NEBF (that has been historically paid on sick leave benefits), it is best to look to the CBA and the local trust funds for guidance. We would encourage the local parties and trustees to work together and craft appropriate guidelines at the local level to address these issues until such time as we receive any additional direction from the DOL.

- In light of the highly fact-intensive nature of the above referenced bargaining obligations, to the extent possible, contractors should consult with local labor counsel prior to taking action.

Attached to this Legal Alert as Exhibit A is a memorandum from the NLRB General Counsel that provides a summary of some existing cases on bargaining during emergencies similar to COVID-19.

This material is for informational purposes only. The material is general and is not intended to be legal advice. It should not be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, applicable CBAs, prime contracts, subcontracts, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.



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**OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management**

MEMORANDUM GC 20-04

March 27, 2020

TO: Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Peter B. Robb, General Counsel

SUBJECT: Case Summaries Pertaining to the Duty to Bargain in Emergency Situations

The Coronavirus pandemic has prompted many questions regarding the rights and obligations of both employers and labor organizations, particularly in light of responsive measures taken to contain the virus. Sometimes these measures have been taken out of prudence; other times they have been required by state, local or federal orders.

Regardless of the reason for any given response to the spread of the virus, many parties are considering the impact on the duty to bargain. Although we are in an unprecedented situation, I wish to make the public aware of several cases in which the Board considered the duty to bargain during emergencies. These include public emergencies as well as emergencies unique to a particular employer. Accordingly, the following case summaries are divided into those two categories. It is my hope that these summaries prove useful to those considering this issue during these challenging times.¹

Case Summaries Touching on Duty to Bargain During Public Emergency Situations

Port Printing & Specialties, 351 NLRB 1269 (2007) (hurricane), *enforced*, 589 F.3d 812 (5th Cir. 2009): Where the parties did not have an existing collective-bargaining agreement, the Board found the employer did not violate Section 8(a)(5) by laying off several employees without affording the union notice or an opportunity to bargain, but did violate Section 8(a)(5) by subsequently using non-unit employees, including a supervisor, to perform unit work. The employer was a commercial printer located in Lake Charles, Louisiana. On September 22, 2005, the mayor of Lake Charles ordered a mandatory evacuation of the city in anticipation of the impending arrival of Hurricane Rita. The employer closed operations and laid off all employees, without affording the union notice or an opportunity to bargain. In the weeks after the hurricane, the employer worked to repair the damage done to its facility and fulfill what client orders remained, using some unit employees but also non-unit employees and a supervisor. Approximately a month after the hurricane, the employer sent unit employees a letter permanently confirming their layoffs. At no time did the employer provide the union notice or an opportunity to bargain over these matters. Citing *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), the Board explained that an exception to the duty to bargain exists where the employer can demonstrate that “economic exigencies compell[ed] prompt action.” (Brackets in the original.) The Board stressed that this exception is limited to “extraordinary events which are an unforeseen

¹ The case summaries herein are limited to the duty to bargain. This memorandum does not discuss other NLRA issues that may arise during the course of emergency situations.

occurrence, having a major economic effect requiring the company to take immediate action” (quoting *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995)). Applying this rule, the Board found that the impending hurricane and the mandatory citywide evacuation were uniquely exigent circumstances that privileged the employer to lay off unit employees without bargaining with the union. However, the Board also concluded that the employer violated Section 8(a)(5) by failing to bargain over the effects of the layoff after the hurricane, and by failing to bargain over the use of non-unit employees to perform unit work (Member Schaumber dissented on this point). Thus, the Board explained, when the employer made those decisions, the exigency due to the hurricane had passed.

K-Mart Corp., 341 NLRB 702, 720 (2004) (9/11): The ALJ concluded the employer’s layoff after September 11, 2001 where the employer’s anticipated business volume plunged 60 percent and caused it to file bankruptcy by January 2002, was privileged by *Bottom Line*. The ALJ determined the economic fallout resulted in “extraordinary unforeseen events having a major economic effect that required the employer to take immediate action” as contemplated by that Board decision. The ALJ also found the employer gave adequate notice of its need to lay off unit employees to the union, which had failed to request bargaining. However, the issue of the layoff was not presented to the Board on exceptions.

Dynatron/Bondo Corp., 324 NLRB 572, 578-79 (1997) (hurricane), *enforcement denied in relevant part*, 176 F.3d 1310 (11th Cir. 1999): Board adopted ALJ’s conclusion that, during a two-day power outage caused by a hurricane, the employer unilaterally and unlawfully implemented a new policy concerning employee compensation during the hurricane in violation of Section 8(a)(5). It was undisputed that the employer did not attempt to bargain with the union over this compensation structure, and the union only learned of it approximately two weeks later during a bargaining session.

Gannet Rochester Newspapers, 319 NLRB 215 (1995) (ice storm): After employees were required to miss two days of work because local officials banned nonessential travel during a severe ice storm, the employer decided to pay non-represented employees, in accordance with the company’s handbook, for the time they missed. However, the employer required represented employees to either take personal days or go uncompensated. There were two unions representing different units at the employer’s facility: one collective-bargaining agreement in effect at the time of the ice storm was silent regarding compensation for missed work due to weather emergencies, and had a “zipper” clause privileging the employer’s refusal to bargain on uncovered subjects during the life of the contract, whereas the other collective-bargaining agreement, which was likewise silent on compensation for missed work due to weather emergencies, had expired by the time of the ice storm and the parties were negotiating a new agreement. Initially, the Board adopted the ALJ’s conclusion that, inasmuch as the employer had no past practice of paying represented employees for absences due to weather emergencies, the employer did not violate Section 8(a)(3) by paying non-represented employees in accordance with its handbook but refraining from doing so for represented employees. The Board also concluded that the employer did not violate Section 8(a)(5) by requiring represented employees working under the extant collective-bargaining agreement to take personal days or go uncompensated, since that agreement did not address payment for absences due to weather emergencies and the zipper clause indicated the parties’ intent to allow the employer to take unilateral action on items uncovered by the agreement. However, the Board did conclude that the employer violated Section 8(a)(5) with respect to employees covered by the expired contract. The Board observed that wages for lost time due to a weather emergency are a mandatory subject of bargaining, and given that those unit employees were currently working without a contract, the

employer was obligated to afford the union notice and an opportunity to bargain prior to acting unilaterally regarding a mandatory subject of bargaining.

Case Summaries Touching on the Duty to Bargain During Emergency Situations Particular to an Individual Employer

Cyclone Fence, Inc., 330 NLRB 1354 (2000) (lack of financial credit): The Board granted the General Counsel's Motion for Summary Judgment and found that the employer, which was in bankruptcy, violated Section 8(a)(5) by unilaterally closing one of its facilities, terminating all employees who worked there, and failing to pay their wages and fringe benefits after discovering that its lender had terminated its line of credit. The Board, citing *Nathan Yorke, Trustee*, 259 NLRB 819 (1981), concluded that while the "emergency situation" the employer confronted might excuse its failure to bargain with respect to the decision to close its operations, it did not excuse the employer's failure to bargain over the closing's effects.

Hankins Lumber Co., 316 NLRB 837 (1995) (log shortage): The Board determined, *inter alia*, the employer violated Section 8(a)(5) by unilaterally laying off employees at a lumber mill due to a log shortage. The Board determined the log shortage had been a chronic problem and there was no "precipitate worsening" of the problem that required immediate action prior to bargaining with the union. The Board noted that the case was distinguishable from *Brooks-Scanlon, Inc.*, 247 NLRB 476 (1979) for several reasons, among which were the fact that the employer in *Hankins* had initially offered to bargain over the permanent layoffs before retracting that offer and proceeding with the layoffs unilaterally.

Brooks-Scanlon, Inc., 247 NLRB 476 (1979) (log shortage), *petition for review denied*, 654 F.2d 730 (9th Cir. 1981) (table): The Board determined the employer did not violate Section 8(a)(5) by closing part of its plant—the sawmill—without bargaining with the union, with which it had a current collective-bargaining agreement. Thus, the employer determined that a projected decline in the amount of harvestable pine trees in the surrounding forests warranted shuttering the sawmill. Notwithstanding that the employer determined to close its operation nearly two months in advance of actually doing so, the Board concluded that a variety of factors—including the activities of conservation groups and the anticipated needs of other area lumber companies—created a set of "economic factors so compelling that bargaining could not alter them." The employer did, however, negotiate with the union regarding the effects of the partial closure.

Raskin Packing Company, 246 NLRB 78 (1979) (lack of financial credit): The Board determined that an employer, while not required to bargain over the decision to abruptly close operations, nevertheless violated Section 8(a)(5) by failing to bargain over the effects of the closure. The employer was a slaughterhouse in Sioux City, Iowa. On October 21, 1977, the employer, after discovering its credit line was discontinued, decided to immediately close the plant, and notified the union shortly afterwards. The employer then held talks with employees, with the union's knowledge, about potentially selling the plant to the employees. After these initial talks, the union notified the employer that it was requesting bargaining with respect to employees' terms and conditions of employment that would be involved in any reopening of the plant. The employer ignored the bargaining request and held another meeting with employees regarding a potential reopening of the plant. The Board determined that the employer did not violate Section 8(a)(5) by having initial discussions with the employees because the union did not initially object to those discussions, but was in violation of 8(a)(5) after it continued to discuss reopening the plant after the union's bargaining demand.

Virginia Mason Hospital, 357 NLRB 564 (2011): The Board held that an employer violated Section 8(a)(5) by unilaterally implementing a flu-prevention policy without affording the Union notice and an opportunity to bargain. The employer was an acute care hospital in Seattle, with approximately 5,000 employees, approximately 600 of whom were registered nurses represented by the union. The employer unilaterally implemented a policy, during the term of the parties' collective-bargaining agreement, requiring all nurses who had not received a flu immunization shot to either take antiviral medication or wear a protective mask. The ALJ held the employer to be excused from its bargaining obligation based on the test set forth in *Peerless Publications*, 283 NLRB 334 (1987), as: (1) the policy went directly to the employer's core purpose: to protect patient's health; (2) the policy was narrowly tailored to prevent the spread of influenza; and (3) the employer limited the requirement to nurses who refused to be immunized. The Board reversed, noting that the Board had, since the issuance of *Peerless*, sharply limited its applicability outside of its specific factual context. Thus, the employer in *Peerless* was a newspaper, and the unilaterally implemented policy in that case—a code of ethics—implicated the newspaper's First Amendment rights. Therefore, the Board determined, that case "injected a constitutional element" into the analysis that was simply missing in the healthcare context. Member Hayes, dissenting, explained that he did not believe *Peerless* "has been—or should be—limited to its facts[.]" and that the *Peerless* test merely expressed in broad terms when an employer may unilaterally establish rules that are designed to protect the "core purpose of its enterprise." In Member Hayes' view, the employer's flu-prevention policy satisfied this test for the reasons articulated by the ALJ.

/s/
P.B.R.