

Recent COVID-19 NLRB Advice Memoranda

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

The NLRB's Division of Advice recently issued two employer-friendly decisions related to COVID-19 and management rights. Please remember that such memoranda are not law, but they may be used and cited as persuasive authority before the NLRB and the courts.

We have discussed the potential of using the management rights clause in your CBA for unilateral implementation of changes in working conditions and policies in the COVID-19 environment in prior Legal Alerts. The NLRB is now considering these issues and has addressed this practice in both of the decisions discussed below. As always, your particular facts and contract language should be discussed with competent local legal counsel.

[Comcast Cable 22-CA-259093](#)

In this case, the guidance issued by Advice provides a good example of when a NECA contractor and Chapter may decide to implement changes without bargaining in the face of COVID-19 challenges. The matter at issue was whether a contractual management-rights clause permitted Comcast to unilaterally require employees to garage their work trucks at their home location. The employer argued that the practice, which was a change in conditions, was necessitated by worker and workplace safety.

While the case turned on the specific language of the management-rights clause in the contract—which is often the case – the Board utilized the recent and broad “contract-coverage” doctrine set forth in [MV Transportation](#), 368 NLRB No. 66 (2019). The clause at issue authorized the employer “to make and enforce new work rules,” including “operational rules and procedures...and safety rules and procedures” as well as other strong language evidencing Comcast’s managerial discretion in its business operations. As a result, Advice concluded that Comcast had contractual authority to implement the policy to protect workers.

[Mercy Health Partners 07-CA-258-220](#)

The employer in this case, a hospital network with numerous sites, made a number of unilateral changes to its policies and benefits without first notifying the Union and providing an opportunity to bargain. In reaction to the COVID-19 pandemic, the employer changed its policies related to the use of personal protective equipment (“PPE”), workplace visitors, COVID-related paid leave and time away from work, delegation of ICU nurse duties to others, travel reimbursement (to encourage social distancing), event reporting processing for COVID-related events, and assignments/safety protocols for immunocompromised or pregnant staff.

The Union argued that these unilateral changes violated Sections 8(a)(5)[duty to bargain in good faith], 8(a)(1)[coercion and interference with rights] or 8(a)(3)[discrimination] of the NLRA. Advice concluded that the employer did not violate the NLRA because the unilateral changes were legally mandated by state executive orders, or they were reasonably related to the COVID-19 emergency. In this case – as we have advised in earlier Legal Alerts – Advice recognized the employer’s efforts to engage in “effects bargaining” with the union and noted the offer to meet weekly on COVID-19 required changes.

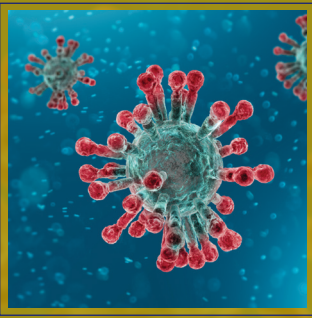


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Conclusion

While your facts may differ, these two cases may be used as persuasive authority and guidance on the use of your management rights clause during the pandemic.

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