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NLRB General Counsel Issues Guidance on the Duty to Bargain During Emergencies

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On March 27, 2020, NLRB General Counsel Peter Robb issued Memorandum GC-20-04 to provide guidance to NLRB regional offices and the general public.

Acknowledging that "we are [currently] in an unprecedented situation," the General Counsel provided summaries of several NLRB decisions discussing how, if at all, an employer's duty to bargain under NLRA Section 8(d) may be affected by emergencies impacting the public at large and a particular employer.

GCM-20-04 is limited to the duty to bargain. It does not address other NLRA issues that may arise during an emergency and should not be relied on for other purposes. Additional guidance may be provided in the coming weeks.

The Economic Exigency Exception to the Duty to Bargain

During times of economic hardship, employers often consider layoffs and reductions of working hours. Unless permitted by the management rights clause or other provisions of a collective bargaining agreement, such decisions affecting unionized employees are mandatory subjects of bargaining, meaning that an employer must bargain to a good-faith impasse before implementation. Ordinarily, this bargaining obligation extends to both the *decision* to lay off and its *effects* on the employees.

Citing recent cases applying the principles set forth in *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991) and *RBE Electronics of S.D.*, 320 NLR 80, 81 (1995), the General Counsel noted that an exception to the general rule may exist if the employer can demonstrate that "economic exigencies compel[led] prompt action," emphasizing that the exception is limited to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *Port Printing & Specialties,* 351 NLRB 1269 (2007).

Broadly speaking, the cases teach that the employer must be able to demonstrate that the exigency was caused by external events beyond its control or were not reasonably foreseeable. The analysis is very fact-specific, with particular attention given to the exigent circumstances and whether bargaining over the employer's decision was possible or would be fruitful. Even if decision bargaining would be excused, "effects" bargaining will be required. However, when time is of the essence, negotiations "need not be protracted" to discharge the employer's duty. *RBE Electronics of S.D.*, 320 NLRB at 82.

What Qualifies as an Economic Exigency Sufficient to Excuse the Duty to Bargain

As already noted, the Board has generally taken a narrow approach in applying the economic exigency exception to an employer's decision bargaining obligation.

At one end of the spectrum, where an employer experienced acute financial difficulties that had been building over time the Board held that the duty to bargain over the layoffs was *not* excused. Thus, in *Hankins Lumber Co.*, 316 NLRB 837 (1995), the Board found that the employer violated its duty to bargain by unilaterally laying off employees at a lumber mill due to a months-long log shortage. Critical to that finding was that there was no "precipitate worsening" of the problem that required immediate action.

However, and possibly most on-point for the present circumstances, the Board found economic exigencies sufficient to create a "dire financial emergency" excusing the employer's duty to engage in decision bargaining in the context of a public emergency similar to the COVID-19 pandemic. In the aftermath of 9/11, the Board held, in *K-Mart Corp.*, 341 NLRB 702 (2004), that the precipitating, unforeseen business impact on the retailer excused its duty to bargain over the resulting layoffs. In this case, the retailer experienced a 60% drop in business at one facility and overall losses so devastating that it was forced to file for bankruptcy by the start of 2002. The ALJ held that these circumstances were sufficient to excuse K-Mart's failure to bargain over its decision to lay off employees under the *Bottom Line* test. The Board adopted the judge's findings and conclusions.

Notwithstanding Economic Exigencies, Employers Must Still Engage in Effects Bargaining

Even where the Board has held that exigent circumstances may justify an employer's unilateral action to implement a layoff, the duty to bargain regarding the *effects* of the layoff remains. This distinction, highlighted by several cases analyzed in GCM-20-04, is due to the fact that while a decision to lay-off employees may be required to stem losses due to an imminent emergency, there is often ample time to discuss a layoff's effects after the emergency has been addressed.

The distinction between the duty to bargain over the decision to lay off and its effects has been emphasized in cases involving public emergencies. In *Port Printing & Specialties*, 351 NLRB 1269 (2007), the employer closed operations and laid-off all employees in response to a mandatory evacuation due to Hurricane Rita. The Board found that the evacuation order compelled the employer's layoffs, but did not excuse it from failing to bargain over the effects of the layoff after the hurricane, including the employer's use of non-unit personnel to resume operations after the storm had passed.

The same holds true in situations where the economic exigency is specific to the employer, *e.g.*, the inability to secure financing necessary to continue operations. *See Cyclone Fence, Inc.*, 330 NLRB 1354 (2000); *Raskin Packing Company*, 246 NLRB 78 (1979).

The rationale of these cases is that even if exigent economic circumstances compel lay-offs or other unilateral action, the obligation to engage in effects bargaining is not extinguished.

Unilaterally Implementing Health-Related Policies

One case discussed in GCM-20-04 addresses the employer's ability to unilaterally implement health and safety policies in an emergency, which seems to bear particular relevance to the current challenging circumstances attendant to the COVID-19 pandemic.

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) 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. Although the ALJ found that the *Peerless* exception was satisfied here, the Board reversed, noting that the *Peerless* exception is limited to the facts of that case, which involved a newspaper's implementation of a code of ethics that related to First Amendment concerns, and should be narrowly applied given the constitutional issues in that case.

The General Counsel's inclusion of this decision is noteworthy, as is his reference to Member Hayes' dissenting opinion that the *Peerless* exception is designed to protect decisions related to the "core purpose of its enterprise," as here, and in this case the policy related to protecting patients and was narrowly tailored. This could foretell how a Republican Board may deal with a similar issue if presented today.

An additional limiting factor in *Virginia Mason Hospital* was that while the flu has always been a challenging healthcare issue, particularly in the hospital setting, it pales in comparison to the current COVID-19 pandemic; the dangers that exist if employees fail to take proper healthcare precautions; and the presence of federal, state and local guidelines that may require employers to take health-related precautions, mooting any bargaining obligation.

Takeaways

Though the Board traditionally has applied the "economic exigency" exception to the duty to bargain narrowly, it has been satisfied where unforeseen events caused a major economic effect on the employer, such as a hurricane, 9/11, major sudden downturn in business, or loss of credit. Reading between the lines of GCM-20-04, the General Counsel appears to have signaled that the current pandemic may satisfy this standard, having referred to the coronavirus as an "unprecedented situation." Nevertheless, each employer's obligation will depend on the impact of the pandemic and related federal, state and local orders affecting its particular business operations.

Even if the exception applies, employers must still provide notice and an opportunity to bargain over the *effects* of the employer's decisions, but such bargaining need not be protracted.

Employers should carefully evaluate whether they may implement health and safety policies without bargaining. GCM-20-04 highlights a decision where a hospital was found to have violated the Act by refusing to bargain over certain requirements imposed on nurses to prevent the spread of the flu. But the present circumstances may be far more exigent than in *Virginia Mason Hospital*, given the potential dangers of the spread of COVID-19 and employer obligations to implement health and safety requirements based on governing law.

Finally, employers must evaluate their bargaining obligations in the context of the governing CBAs for union employees, and any handbooks and past practices applicable to nonunion employees, to avoid the risk of disparate treatment claims based on union membership. Employers who act consistent with their written policies, CBAs and past practices will be more likely to prevail on such discrimination claims.

For more information on the Coronavirus, visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

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Related Professionals

- **Peter D. Conrad**
- **Joshua S. Fox**
  Senior Counsel
- **Scott S. Tan**
  Associate