NLRA Implications Amid COVID-19

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Coronavirus Response Team

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The COVID-19 pandemic has raised many labor issues for employers dealing with their workforces. State issued stay-at-home orders have forced employers to make difficult and near-immediate decisions with respect to layoffs, wage reductions, plant closings and other issues. With the Centers for Disease Control and Prevention (CDC) recommending that social distancing guidelines remain in effect until the end of April, many states have or likely will, extend their stay-at-home orders – placing additional strain on employers. Employers with a unionized workforce should keep in mind their obligations under the National Labor Relations Act ("NLRA") when making decisions affecting their employees. Below are some of the most common issues employers are currently facing during the COVID-19 pandemic.

Duty to Bargain

Under the NLRA, employers with a unionized workforce have a duty to bargain over changes made effecting wages, hours and other terms and conditions of employment (i.e., mandatory subjects of bargaining). Even changes that benefit employees, such as requiring Personal Protective Equipment ("PPE") to contain the spread of the virus and keep employees safe, can be mandatory subjects of bargaining.

Before making a unilateral change, employers should thoroughly review their Collective Bargaining Agreements ("CBA"). The CBA will likely contain provisions addressing layoffs, shutdowns, assignment of work, paid time off, sick leave and other issues triggered during this time. Due to the recent Board decision in *MV Transportation*, 368 NLRB No. 66 (2019), employers may be able to make unilateral changes with respect to these provisions in the CBA. A unilateral change to a condition of employment that is "within the compass" or "scope" of the CBA provision is permitted, but each anticipated change must be analyzed carefully.

Reviewing the CBA language is also important because it may contain language for emergency situations or a *force majeure* clause. These provisions address situations that are out of the

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employer's control. Employers may have additional flexibility when making a unilateral change if such language is included in the CBA.

If the CBA provides no reprieve, then the general duty to bargain over changes in conditions of employment may be suspended where compelling economic exigencies require prompt action. The Board has decided several cases dealing with the economic exigency standard. The Board has found that economic exigencies are extraordinary, unforeseen events having a major economic effect that compelled the company to take immediate action and make a unilateral change. *RBE Electronics of S.D., Inc.,* 320 NLRB 80 (1995). Such events must be outside the scope of the employer's control. If the employer can meet the economic exigency standard, then it will satisfy the bargaining obligation by providing adequate notice to the union and an opportunity to bargain over the particular subject matter. Bargaining in good faith during time-sensitive circumstances need not be protracted. The employer carries the burden of proving an economic exigency and this has been described as a heavy burden.

Peter Robb, NLRB General Counsel, recently issued guidance regarding the duty to bargain in emergency situations. The General Counsel wrote that due to the "unprecedented situation" it was necessary to provide the public with summaries of decisions where the Board considered the duty to bargain during emergency situations. The memo cited to cases with the following emergency situations: hurricane, 9/11, ice storm, lack of financial credit and log shortage. These decisions are helpful when determining if unilateral action is permitted due to COVID-19.

Protected Concerted Activity

Even employers without a union should be aware of certain NLRA implications. Section 7 of the NLRA allows employees (regardless of whether they are represented by a union) to engage in concerted activity for mutual aid or protection. Thus, if two or more employees engage in concerted activity, then it may be protected by the NLRA. During the COVID-19 pandemic, employees may refuse to come to work, refuse to take certain work assignments, refuse to work without PPE, or take other action out of fear of COVID-19. If multiple

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employees engage in such conduct, it may be protected concerned activity under Section 7. Employers should seriously consider whether such activity is protected concerted activity before taking any action.

For more information please contact Richard Cleary, Brice Smallwood or any attorney in Frost Brown Todd's Labor & Employment practice group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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