Coronavirus Considerations for Employers with a Unionized Workforce

Article By
Adam S. Forman
Michael S. Ferrell
Steven M. Swirsky
Elizabeth “Libby” Martin
Epstein Becker & Green, P.C.
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As we have discussed in prior Advisories, the 2019 Novel Coronavirus (“Coronavirus” or “COVID-19”) public health emergency is raising important issues for employers addressing rapidly developing disruptions to the workplace and the lives of employees with mass school closures, workplace closings, the need to reduce staff and expenses, etc. Employers with unionized workforces must take certain additional considerations into account when developing and implementing response plans to the current crisis.

Under the National Labor Relations Act (“NLRA” or “Act”), employers have a legal duty to bargain with labor unions representing their employees regarding the employees’ wages, hours and other conditions of employment. In addition, many employers are party to collective bargaining agreements (“CBA”) with the unions
that represent their employees that contain provisions directly relevant to the types of adjustments that may be necessary for businesses to respond to the unprecedented challenges this pandemic and its broad effect on society and commerce presents. Absent language in a CBA recognizing an employer’s right to act, either by adjusting schedules, reducing the numbers of employees working, modifying pay and/or benefits, employers generally may not make unilateral changes to these terms without first providing their employees’ union representatives with reasonable notice and an opportunity to bargain over the same. The current public health emergency does not eliminate these legal obligations of employers, although it certainly affects what may be deemed reasonable notice and an opportunity to bargain given the ongoing emergency.

Accordingly, unionized employers planning their responses to Coronavirus should consider the following factors:

- **Have a Plan**
  - Regardless of whether an employer’s employees are represented by a union, leading healthcare experts all agree that employers should have a preparedness and response plan (guidance on preparedness for employers is available from [the CDC](https://www.cdc.gov) and [WHO](https://www.who.int)).

- **Review CBA and Work Rules**
  - Assess whether the current CBA includes language permitting, or prohibiting, the employer from take certain of the actions called for by response plan to protect the health and safety its workforce. For example:
    - Is there a “force majeure” or other public emergency clause that may apply;
    - What do the existing CBA and applicable employer policies provide regarding the prevention of ill or contagious employees coming to the workplace, or being sent home from the workplace;
    - What do the CBA or existing policies provide regarding the permissible or mandatory usage of, or restrictions on using, paid sick leave, paid time off, vacation, short term disability, and Family and Medical Leave in instances where employees are infected, caring for an infected family member or quarantined due to possible exposure to COVID-19; What restrictions are in place regarding the potential use of salaried supervisors and managers, outside contractors, and/or temporary workers for potentially filling temporary workforce vacancies created by the current public health emergency.
    - What restrictions, if any, does the CBA provide concerning reducing hours and/or days of employment, modifying pay and benefits, reducing staffing levels and other contingencies.
  - Identify elements of your proposed/draft Coronavirus Response Plan that
may conflict with the terms of your CBA, and those that conflict with existing policies and/or practices that are in effect outside of the CBA.

- Proposed changes in the CBA will require notice to the union and/or the union’s written consent to avoid a contract breach, even if for a temporary change, while changes in policies and practices outside of the CBA require notice and a reasonable opportunity (under the circumstances) to bargain over changes – either to agreement or impasse before implementation.

- Contact union leadership regarding the immediate need implement a COVID-19 response plan, and management’s need and availability to meet as soon as possible to discuss and resolve the same. While there is no fixed period for what is reasonable notice, given the current public health emergency it may be reasonable to require the union to meet potentially the same day or at least by the following day, but the point is it need not be notice where the union is provided one or two weeks or more to respond or bargain.

- **Meeting with Union Leadership**

  - Union leaders are under pressure from their members for answers regarding development of a Coronavirus Response Plan, and may welcome the opportunity to learn of the Company’s proposed plan, and to have input into the same. In this regard, once a Coronavirus Response Plan is finalized, the union leadership may prove to be a valuable additional resource in communicating the same to employees, and to identifying for management question and issues that employees raise that neither management nor the union anticipated.

  - Examples of appropriate topics to discuss with union leadership include:
    - Usage of paid sick leave, paid time off, and other forms of paid and unpaid leave in instances where workers are infected or quarantined;
    - Obligations for an employee to disclose if he or she has been infected with or exposed to COVID-19, or has recently traveled to a “high risk” country as designated by the CDC;
    - Criteria for an employee’s return to work; and
    - Possibility of shutdown by government, public health officials or management, which may involve the need to make a temporary layoff, possibly including a voluntary layoff or relaxing strict compliance with existing layoff procedures, or include invoking total and/or partial plant closure language in a CBA, etc.

  - As the Coronavirus crisis continues to develop, it will be important to keep union leadership informed of any needed changes to the Coronavirus Response Plan. This ongoing dialogue will serve to help provide the union leadership with timely notice of any particular issues affecting the workplace as they arise, and rapid completion of the employer’s obligation.
to bargain with the union over the same prior to implementing further changes in employees’ terms and conditions.

- **Monitor Legal and Regulatory Developments**
  - Stay up to date on actions being taken by your federal, state and local governments, as well as regulatory updates from the CDC and OSHA, and timely share such notices that potentially affect your workforce with the union leadership.

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