As employers everywhere grapple with the COVID-19 crisis and its impact upon their employees and operations, questions have arisen regarding union contracts that expire on or about March 31, 2020. Although every labor contract and bargaining relationship is unique, established federal labor law principles can be applied to guide employers during this difficult time. Some common issues related to contract expiration are discussed below.

**Question 1. What happens if an employer’s union contract expires without a new agreement?**
Answer 1. If a contract expires without a new agreement, most terms and conditions of employment continue by operation of law, under the requirement to maintain the status quo. These include wages, paid time off, seniority, etc. Generally speaking, changes to mandatory subjects of bargaining require agreement with the union or a valid impasse in negotiations. Bargaining over a successor contract continues, regardless of whether the contract expires or the parties agree to extend it.

Q2. What if an employer’s health and welfare plan is up for renewal when the contract expires and no agreement is reached?

A2. Under the National Labor Relations Board’s (NLRB) Raytheon case, if an employer has a past practice of making unilateral adjustments to benefits (or other terms and conditions of employment), it may continue that past practice even during bargaining for a successor agreement because the past practice represents the so-called “dynamic status quo.”

Q3. Which contract provisions are no longer effective upon expiration of the contract?

A3. Several significant contract terms do not continue following expiration. These include the no strike/no lockout clause, the obligation to deduct and remit union dues under dues checkoff clauses, and the obligation to arbitrate disputes arising post expiration.

Q4. If an employer is not required to arbitrate disputes that arise after expiration, what happens to grievances?

A4. While the duty to arbitrate disputes that arise post-expiration expires with the contract, under the National Labor Relations Act (NLRA), an employer must process grievances through the earlier steps in the grievance process. Given the current situation, employers and unions can discuss appropriate limitations on the number of participants in grievance meetings as well as alternatives to in person meetings such as conference calls, virtual meetings, etc.

Q5. Do all of the government restrictions on large gatherings prohibit unions from striking?

A5. No. In the absence of a no strike clause, unions (and employees) maintain the right to strike—meaning a concerted refusal to work or withholding of labor. The restrictions on large gatherings do impact any union demonstrations or picketing that is underway or contemplated. Nevertheless, many unions are recognizing the need to work together with employers to protect the health of the business during this very difficult time.

Q6. Given social distancing requirements, are there alternatives to face-to-face bargaining sessions?

A6. Yes. Employers and unions can discuss and bargain over alternatives such as
exchanging proposals via email, telephone conference calls, and virtual meetings. The Federal Mediation and Conciliation Service has some technology available and may be able to assist the parties as well.

Q7. If members of the management team are quarantined or dealing with COVID-19 emergency response measures how does that impact the duty to bargain a successor contract?

A7. Although the general duty to negotiate a new contract remains, unions should understand that the current situation is not business as usual. Many unions already have agreed to extend labor agreements for between 30 to 90 days to de-escalate tensions and allow employers to assess the impact of changing conditions on their business.

Q8. What if a union insists on meeting?

A8. Employers whose management team is not available due to the emergency may bargain with the union over cancelling and rescheduling bargaining sessions or other actions necessary to balance competing needs. While bargaining parties have a duty to meet at regular times, an employer has the right to balance its competing needs and still meet its general bargaining obligations. Employers in this situation should communicate the reasons they cannot meet and/or need to reschedule a bargaining session. A union cannot compel a management team to meet in person in violation of any government orders or health recommendations.

Q9. Can employers and unions revisit contract proposals that no longer make sense as a result of the pandemic?

A9. Parties in negotiations generally are entitled to adjust their contract proposals based upon changed circumstances. Employers impacted by the COVID-19 crisis may have to reassess whether to modify proposals based upon changed business conditions, future economic outlook, and the current overall health of the business.

Q10. If an employer is in bargaining, but needs to make immediate changes to address the current crisis, can it do so?

A10. Employers in this situation should first check their labor agreements to see if they either privilege the employer to make changes unilaterally or prohibit the changes being considered. If the contract does not address the issue, the employer still may be able to proceed by providing notice to and bargaining with the union. NLRB case law may allow an employer currently in contract bargaining to bargain to impasse over a single issue, and to do so quickly, if it can demonstrate exigent circumstances.

Q11. If an employer’s contract is not expiring anytime soon, can it seek midterm modifications to an existing labor agreement to react to a business downturn?
A11. Employers should first carefully review their labor agreements to determine whether they permit unilateral changes. On items such as wages and benefits, unilateral action may pose a challenge. Either way, employers and unions can always discuss and agree to mid-term modifications necessary to maintain the continued viability of the business. For example, a union may be willing to relax contractual manning levels, spread available work more evenly among bargaining unit employees, or agree to reductions in pay and benefits. Employers considering these measures should be prepared to explain the need for the change, how long it might be expected to last and share relevant information with the union.

Q12. If a unionized employer must do a large layoff, or is required to cease operations by government order, are there other issues it should consider?

A12. Yes. An employer in that situation needs to consider a variety of issues. In addition to potential bargaining obligations, employers should consider whether ceasing contributions or significantly reducing contributions to a multi-employer pension plan may generate withdrawal liability, and whether it has notice obligations under the Worker Adjustment and Retraining Notification (WARN) Act (state and/or federal). Ogletree Deakins’ comprehensive list of answers to frequently asked questions (FAQs), “COVID-19: FAQs on Federal Labor and Employment Laws,” addresses these and many other issues employers are facing during this unprecedented time.

Key Takeaways

All employers are facing a host of legal, economic and operational challenges as they navigate a business environment that is changing day-by-day, and sometimes hour-by hour. Those with unionized workforces have additional NLRA obligations to consider. The federal labor law principles necessary to address these challenges are in place and can be applied by savvy counsel to assist employers in developing appropriate solutions. In addition to issues surrounding contract expiration discussed above, other important labor relations concerns are covered in our March 9, 2020 article, “Labor Relations During a Pandemic: Employer Duties Under the NLRA in the Wake of COVID-19.” Ogletree Deakins will continue to monitor and report on developments with respect to the COVID-19 pandemic and will post updates in the firm’s
