Strategic Perspectives

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ON THE LABOR FRONT—Coronavirus and the NLRA

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Coronavirus. The word generates fear. The previously unidentified virus, believed to have passed from an animal to a human in China, is considered highly contagious. COVID-19—Corona-Virus-Disease-2019—is the disease caused by the virus.

Some degree of fear is warranted. The Director General of the World Health Organization in a recent COVID-19 report said it "is time to pull out all the stops." He told communities to "[g]et your hospitals ready." "People are afraid" and their being so is "normal and appropriate," he acknowledged.

Government and business responses to COVID-19 are affecting daily life. More and more universities have closed. Major business conferences and music festivals have been canceled. Fewer people are traveling or leaving their homes, and the travel, hospitality, and restaurant industries are suffering. "Social distancing" has entered the lexicon. The stock markets have been reeling.

COVID-19 and employment. Employers focus on the impact of COVID-19 on their employees, customers, and ability to carry on their businesses. Many are following advice from leading health organizations about steps to take to minimize the likelihood of introducing COVID-19 to the workplace.

Employer efforts to protect their workforce can implicate many federal, state, and local employment and health laws. One of these is the National Labor Relations Act (NLRA). Passed in 1935, the NLRA regulates the relationship among employers, unions, and employees in the private sector.

While most of the NLRA deals with issues that arise where employees are represented by or seeking to be represented by a union, some of the NLRA applies to nonunion workplaces as well. For this reason, all private sector employers (other than those involved in railroads and airlines, which are subject to the analogous Railway Labor Act) should consider their obligations and employee rights under the NLRA when in dealing with COVID-19 at the workplace A few NLRA provisions seem especially relevant.

Section 7 gives employees the right to engage concerted activity

Many scenarios can stoke employee fears of obtaining COVID-19 at work. A co-worker or that person's family or household member might have visited China or Italy, or another area where the virus is spreading. Or that person may have been at the same place locally as another individual who tested positive for COVID-19. For example, an Uber driver who tested positive may have given a ride to a co-worker or the co-worker's family or friend. The opportunities to spread the virus seem limitless.

Fears for their safety sometimes lead employees to refuse to work under what they believe to be unsafe working conditions. Do they have a legal right to refuse to work? Section 7 of the NLRA--the heart of the Act—gives non-supervisory and non-managerial employees the right to form, join, or assist a labor union, to bargain collectively, and "to engage in other *concerted* activities for the purpose of collective bargaining or *other mutual aid or protection*" and to refrain from such activities …" (emphasis added).

What is concerted? Concerted activity, a term undefined in the NLRA, generally "embraces the activities of employees who have joined together … to achieve common goals."[1] Employees who engage in such activity cannot be disciplined, discharged, or otherwise discriminated against for doing so.

Nearly 60 years ago, in *NLRB v. Washington Aluminum Company*, the Supreme Court of the United States held that Section 7 protects the right of employees to refuse to work in unsafe working conditions.[2] In that case, due to a "brutally cold" night in Baltimore and the breakdown of the furnace, day shift employees reported to a "bitingly cold" shop. Because it was "too damned cold to work," seven employees left work and went home. The company terminated them.

The NLRB held that the employees' refusal to work was protected by Section 7 and, by terminating them, the employer violated § 8(a)(1) of the Act, which prohibits employers from interfering with, restraining or coercing employees in the exercise of their Section 7 rights. The employer was ordered to reinstate the discharged workers and make them whole for their losses resulting from their termination. The NLRB has applied this *Washington Aluminum* principle many times when analyzing employee walkouts purportedly to protest unsafe working conditions.

A Section 502 variation for employees covered by a labor contract with a no-strike clause

Employers whose employees are covered by a labor contract have a variation of the typical Section 7 walkout due to unsafe working conditions to consider. Nearly all labor contracts have a no-strike clause. While their terms vary greatly, in general, a no-strike clause prohibits

bargaining unit employees from going on strike during the term of the agreement. The quid pro quo for the no-strike pledge is typically a grievance and arbitration procedure that provides a peaceful means of resolving disputes.

A fair reading of a no-strike clause is that employees covered by that agreement cannot strike over safety issues because that clause waives their right to do so. However, Section 502 of the Taft-Hartley Act, a 1947 amendment to the NLRA, creates a limited exception to that no-strike commitment.

Section 502 states, in part, that: "Nothing in this Act shall be construed … to make the quitting of labor by an employee or employees *in good faith* because of *abnormally dangerous conditions* for work … be *deemed* a strike under this Act." (emphasis added). According to this provision, the quitting of labor—a strike—called for the specified purpose shall not be deemed to be a strike.

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About 20 years ago, the NLRB itemized the requirements for a work stoppage to be protected by Section 502:

- the employee(s) must have a good-faith belief that the working conditions were abnormally dangerous;
- such belief is supported by ascertainable, objective evidence;
- such belief was a contributing cause of the work stoppage; and
- the perceived danger posed an immediate threat of harm to the employee health or safety.[3]

Would working with someone who has been exposed to COVID-19 satisfy those Section 502 requirements? Would co-workers have a good faith belief that working with this asymptomatic co-worker was abnormally dangerous? Is there "ascertainable objective evidence" to establish that? Does working with that individual "pose an immediate threat of harm to employee health or safety?"

Given the current state of knowledge about COVID-19, there are no clear answers to these questions. At a minimum, an employer faced with a walkout in the face of a no-strike clause

should talk with the employees and union to ascertain the nature and extent of their concerns and the information on which it is based. Providing accurate information about COVID-19 may assuage their concerns *and* the strike threat.

Unionized employers may have to bargain about preventive COVID-19 measures

An employer's collective bargaining agreement with the union embodies the negotiated terms and conditions of employment for bargaining unit members. An employer whose employees are represented by a union cannot make any "unilateral changes" to "wages, hours and working conditions." It is bad faith bargaining to do so. Section 8(a)(5) of the NLRA makes it unlawful for an employer to bargain in bad faith. (Such a change may also violate the labor contract.)

Let's assume an employer who is a party to a labor contract wants to be diligent in protecting the health of its workers and adopts the following prophylactic policy:

An employee who either has personally traveled to an area where COVID-19 is spreading or an employee who has a household member who has traveled to such an area must inform the employer about this travel and must stay home for the 14-day virus incubation period.

I suspect very few labor contracts have provisions that address requiring an asymptomatic employee to stay home because the employee or employee's household member has traveled to a certain part of the world. The employee leave provisions in most labor contracts address time off when an employee or family member has an illness or injury.

The mandatory leave during the incubation period raises a myriad of questions in addition to refusing to allow the employee to come to work. For example, must the employer pay the employee for the incubation period? If so, must the employer pay the employee for overtime the employee would have worked had the employee been at work during that period? May the employer require the employee to use available sick or vacation or PTO for the incubation period? Does the employee accrue sick or vacation time or PTO during the forced leave?

Very few labor contracts have provisions that address requiring an asymptomatic employee to stay home because the employee or employee's household member has traveled to a certain part of the world.

If neither the mandatory leave nor the myriad of related questions is addressed in the labor contract, the NLRB default rule is that the employer cannot unilaterally implement these preventive steps and make decisions on the related questions. These topics are within the scope of "wages, hours and working conditions," and the employer must give notice of the proposed changes to the union to enable the union to request to bargain if it desires to do so.

Pandemic preparedness. The NLRB's prohibition on employer's making unilateral changes applies even if another federal agency allows an employer to adopt certain responses to a pandemic. For example, amidst the H1N1—swine flu—outbreak in 2009, the Equal Employment Opportunity Commission (EEOC) issued guidance entitled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." [4]

In that Guidance, the EEOC assures employers they can take certain preventive steps if a pandemic were to be declared. A COVID-19 pandemic—a global epidemic—was declared March 11. For example, during a pandemic, that Guidance assures employers they could take the body temperatures of employees, which is a medical examination normally prohibited unless the employer could establish the examination was job-related and consistent with business necessity. The Guidance also allows employers to make otherwise prohibited medical inquiries if a pandemic were declared. Employee medical examinations and inquiries also are within the scope of "wages, hours and working conditions."

No more "clear and unmistakable" waiver. A frequent employer defense to a claim that it bargained in bad faith by unilaterally implementing some working condition is that the union, in the labor contract, had waived its right to bargain about the particular issue. An employer considering this defense has greater flexibility to make that argument than it had seven months ago. Until September 2019 and for more than seven decades before that, the NLRB required any such waiver be in "clear and unmistakable" language, a very high standard requiring specific and unequivocal words. Numerous federal courts, including the Court of Appeals for the District of Columbia Circuit, which is a possible venue for every appeal of an NLRB order, had criticized that standard.

On September 10, 2019, the NLRB abandoned the "clear and unmistakable" standard and replaced it with the "'contract coverage" standard.[5] Under that standard, the NLRB will analyze the parties' contract to determine whether the employer's allegedly unlawful unilateral change was "within the compass or scope" of the contract language. If so, the NLRB will not find the employer's unilateral change to be unlawful. Since the "compass and scope" standard is much broader that the "clear and unmistakable" standard, I anticipate employers making many more waiver arguments.

The NLRA requires an employer to provide relevant information to the union

The duty to bargain in good faith is a continuous one and includes providing a union with requested, relevant information to enable the union to fulfill its statutory duty as the representative of bargaining unit members. [6] Failure to do so is a per se violation of §8(a)(5).

A unionized employer with an employee about whom there is a COVID-19 concern should anticipate a union request for information about the identity and medical condition of that employee. The union may want this information to have informed discussions with the employer about the best approach to protect the workforce and may want to have its own medical resources

assess the risk associated with that employee. The fact the union has requested confidential medical records that implicate the employee's privacy interest is not a basis for the employer's outright refusal to provide it. Rather, the employer must raise those privacy concerns with the union and attempt to find a solution that both respects the individual's privacy yet gives the union the information it needs to perform its role.[7]

Conclusion

COVID-2019 is a unique virus presenting unique social challenges. Dealing with COVID-19 in the context of a collective bargaining relationship presents unique labor issues. A union may be as interested in protecting the workforce as the employer is and, if so, reaching agreement on the preventive steps may not be difficult. However, as anyone who has bargained labor contracts knows, reaching conceptual agreement on the big picture—here, the need to protect the workforce from COVID-19—is the first step. Reaching agreement on the related issues and reducing it all to specific words in a signed agreement is usually the greater challenge.

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[1] NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984).
[2] NLRB v. Washington Aluminum Company, 370 U.S. 9 (1962).
[3] TNS, Inc., 329 NLRB No. 61 (1999).
[4] https://www.eeoc.gov/facts/pandemic_flu.html
[5] https://www.nlrb.gov/news-outreach/news-story/board-adopts-contract-coverage-standard-determining-whether-unilateral; *MV Transportation, Inc.*, 368 NLRB No. 66.
[6] NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).
[7] Detroit Edison Co. v. NLRB, 440 U.S.301 (1979).