



Taming the COVID-19 Chaos: What Employers Need to Know Part 7- Union Management Relations Issues

Webinar Attendees:

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Taming the COVID-19 Chaos:
What Employers Need to Know
Part 7: Union-Management Relations Issues

Presented by Adam Belzberg, John Dudrey and Tim O'Connell
Labor & Employment Practice Group
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Today's Topics

- COVID-19 Effects on NLRB Elections
- COVID-19 Related Demands to Bargain
- COVID-19 Related Work Stoppages
- Quick NLRB Case Update

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COVID-19 Effects on NLRB Elections

Initial Delay and Return to “Normal”

- All elections postponed on March 19
- Elections back on the calendar effective April 6
- RDs have discretion how to process

New Employee Protection Rules

- Blocking charge reform, and more

Status of New NLRB Election Rules

- Replacement for Obama-era “quickie” election rules slated to go into effect April 16; now July 31
- Pending legal challenge in D.C. District Court

Even newer rules?

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COVID-19 Related Demands to Bargain

- NLRB General Counsel Memorandum Addressing Bargaining Obligations
- Role of Management Rights Provisions
- Union Information Requests

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COVID-19 Related Demands to Bargain

NLRB General Counsel Memorandum Addressing Bargaining Obligations

- “Economic exigency” exception to duty to bargain
- Limited to unexpected external events that precipitate a crisis, ex: Hurricane Rita, Sept. 11
- Employer still must bargain effects
- If no “economic exigency,” regular bargaining rules apply

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COVID-19 Related Demands To Bargain

Role of Management Rights Provisions

- *M.V. Transportation*: “contract coverage” standard for assessing duty to bargain
- COVID-19 issues likely encompassed by management rights provisions:
 - Whether to continue operations
 - Workplace social distancing rules
 - PPE requirements
 - Furloughs/temporary layoffs

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COVID-19 Related Demands to Bargain

Union Information Requests

- No special rules for information requests in a pandemic or emergency
- Likely relevant topics: layoffs, wages/benefits during continuing operations or furloughs, workplace safety plans, telework policies
- Employer's duty to respond not unlimited, ok to push back on overbroad requests or unreasonable timelines.

COVID-19 Related Work Stoppages

- Current CBA with No-Strike Provision
- Section 502 "Safety Strikes"

COVID-19 Related Work Stoppages

Current CBA with No-Strike Provision

- Employers can enforce the plain terms of the no-strike provisions.
- Depending on the language, this may include enforcement against formal strikes and less formal work stoppages.

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COVID-19 Related Work Stoppages

Section 502 “Abnormally Dangerous Conditions” Strikes

Four elements

- Belief that working conditions are abnormally dangerous
- Belief is the contributing cause of the work stoppage
- Belief is supported by objective evidence
- Working conditions pose an immediate threat of harm

Rights of Section 502 strikers

- Reinstatement upon offer of unconditional return to work
- Discharge/failure to reinstate is a Section 8(a)(3) ULP
- Section 502 strikes are protected even if CBA has a no-strike provision

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COVID-19 Related Work Stoppages

Section 502 “Abnormally Dangerous Conditions” Strikes (Cont’d)

Likely factors in a proper Section 502 strike

- Direct exposure to at-risk populations (e.g., health care workers)
- Lack of effective PPE
- Lack of effective social-distancing requirements
- Actual evidence of exposure to COVID-19 (e.g., positive tests)

Practical tips

- First priority is safety. Second priority is returning employees to work. Third priority is determining whether a work stoppage is protected or not.
- Do you really want to be in front of the NLRB on a COVID-19 related ULP right now?

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Significant NLRB Cases

Notice Posting During Shutdowns

- Following ULP settlement or decision, notice of rights must be posted for 60 days, usually within 14 days of service by the Board.
- *Danbury Ambulance Svcs.*:
 - For companies closed due to pandemic, 14-day period runs from date company reopens and “substantial complement” of employees return to work.
 - No clear guidance on “substantial complement”

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Significant NLRB Cases

Mandatory Arbitration Clauses

- *Epic Systems Corp.*: U.S. Supreme Court says mandatory arbitration clauses with class action waivers ok under NLRA.
 - Linger issues:
 - Restricting access to NLRB process, remedies (*Kelly Services*)
 - Inadequate savings clauses (*Cedars Sinai*)
 - Best practices:
 - Be explicit about excluding agency charges from the agreement
 - Use plain language, not legalese

Questions?



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