



Do You Have To Bargain With Your Union Over Your Coronavirus Response Measures?

March 19, 2020 | [Labor And Employment, Unions And Union Membership](#)



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Wow. The pace at which we are seeing things evolve in workplaces around the country in the face of the coronavirus pandemic is unprecedented – at least in our lifetimes. The rapidly changing landscape is posing challenges for all employers. Companies with unions may face even more hurdles they need to navigate. In a unionized workplace setting, employers are generally [required to bargain](#) with the union representative of their employees over changes to practices, new policies, or other “terms and conditions of employment.” However, an employer generally has no decision bargaining obligation where a union has “waived” its right to bargain over certain changes.

Waivers

Waivers typically arise in one of three ways:

1. Language in a collective bargaining agreement
2. Past practice
3. Acquiescence after being notified of a change

The most common example of a waiver of the union’s right to bargain is found when the union agrees to contractual language specifically waiving its right to bargain over a particular matter. For these contract waivers, the [NLRB](#)

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will examine the plain language of the parties' collective bargaining agreement to determine whether the change made by the employer was within the scope of contractual language granting the employer the right to act unilaterally. If it was, the NLRB will honor the plain terms of the parties' agreement and the employer will not have violated the National Labor Relations Act by making the change without bargaining. These types of waivers are often found in "management rights" clauses that permit the employer to take certain actions, but they also may be found in many other clauses (or even side letters and memorandums of understanding).

Second, waiver can be found if the employer can demonstrate a past practice of making the subject change unilaterally. For example, if a company always has altered the plan design of its insurance benefits offerings prior to open enrollment each year, it likely would be found that a union has waived its ability to demand bargaining over plan design changes that are of a similar nature and scope as were done in prior years.

Third, waiver can be established if the union fails to protest the unilateral action after receiving notice. For example, if the employer notified the union that it intended to change a safety rule and the union failed to demand to bargain, waiver may result. This often is referred to as "waiver by acquiescence."

Common Coronavirus Issues That Likely Require Bargaining

The threat of COVID-19 presents employers with numerous challenges. Employers bound to a collective bargaining agreement may run into situations where prompt action is needed. Some actions needed by a company that likely implicate a duty to bargain with the union (absent a waiver) include:

- **Layoffs:** Laying off employees would require bargaining with the union. Many employers may have a contractual waiver here based on CBA language, but even in that situation, the employer may be required to bargain with the union over the effects of the layoff.
- **Health and Safety Rules:** Changes to existing health and safety rules, or implementation of new rules, are a term or condition of employment that generally require bargaining. Employers wishing to increase the use of personal protective equipment or require certain handwashing or sanitary workplace guidelines likely need to first bargain over those changes.
- **Changes in Hours:** Even if a layoff is not needed, employers may need to reduce the amount of hours being worked, change employees' schedules, or perhaps even offer unpaid leave. This is an issue that requires bargaining.
- **Wage Freezes or Healthcare Changes:** Depending on the length of the COVID-19 disruption, employers may find it necessary to seek a reduction in wages or changes to expensive healthcare plans. As this is likely an area that is covered by the collective bargaining agreement, making changes in this area would require the union to agree to engage in mid-term negotiations.

Labor law draws a distinction between needing to bargain over the "decision"

and the “effects” of that decision. As noted above with regard to layoffs, even if an employer can establish a waiver over a certain decision, it still may have an obligation to bargain over the “effects” of a unilateral decision (unless, of course, the waiver at issue also explicitly covers effects bargaining). For example, if a layoff is contractually allowed, an employer can make that decision unilaterally but must still bargain over effects, such as severance, continuation of benefits, effect of seniority, reinstatement rights, etc. This duty is important for employers to keep in mind as they navigate this minefield.

COVID-19 has presented numerous challenges to managing the workplace, but unionized employers should remain cognizant of the obligations they owe to their unions as they go forward in these uncharted waters.