

APRIL 2020

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Higher Education Unionized Employers Contending with the Impact of COVID-19

SUMMARY

Saul Ewing Arnstein & Lehr's Higher Education Practice continues to monitor the impact of the COVID-19 pandemic on the higher education industry. The below summarizes some recent issues being contended with unionized employers.

1. Compliance With Government Mandates

All covered employers are struggling to comply with the federal Families First Coronavirus Response Act, CARES Act, and state and local legislation and executive orders. These mandates may directly impact terms and conditions of employment (e.g., the FFCRA) or indirectly impact them (e.g., state-level "stay-at-home" orders and essential business designations), necessitating changes to those terms and conditions. Where many unionized employers are getting into trouble is the understandable but ultimately erroneous belief that their duty to comply with the government mandate totally excuses them from their duty to bargain over changes to terms and conditions of employment. In reality, the NLRB has long held that the duty to bargain still applies to any discretionary aspects of changes that are made to comply with government mandates. Public sector bargaining statutes generally take the same approach. It is therefore critical to identify those discretionary aspects – which are not always obvious – before taking unilateral action; otherwise, the employer may face an unfair labor practice charge seeking damages and/or an order rolling back the employer's actions.

2. Bargaining in Exigent Circumstances

In an emergency, the duty to bargain may be loosened, and in some circumstances excused altogether, under what's often called the "economic exigency" doctrine. But what many do not realize is that this doctrine is highly nuanced and rarely provides a complete defense to a failure to bargain charge. Before relying on the "economic exigency" to bypass bargaining over major actions like layoffs, reductions in work hours, and compensation reductions, employers should understand the parameters of the "economic exigency" doctrine and analyze how it may or may not apply to their planned course of action. Again, the consequences of a misstep can be significant – e.g., back pay to affected employees, often coupled with a rolling back of the employer's action.

3. Health and Safety Issues

Obviously, employee health and safety is at the forefront of everyone's mind in the midst of this pandemic. Workers have been voicing their concerns with increasing intensity – for example, the recent reported "sick-

outs” at Amazon and Whole Foods. Even where an employer is fully adhering to the latest guidance from the CDC and other public health authorities, employee complaints about their safety may constitute protected activity under the NLRA – whether or not those employees are represented by a union. Employer responses to these issues should take into account the extent of employees’ statutory protections. Unionized employees, moreover, may be able to invoke CBA processes for raising safety complaints – which might also privilege a refusal to perform work based on safety concerns – with recourse to the grievance/arbitration procedure if they feel these contractual rights are not being honored. Proactive assessment of these provisions and their limitations should be undertaken to minimize unwarranted operational disruptions.

4. Hazardous Duty Pay

Unions are claiming that their members are entitled to various pay differentials related to hazardous duty while working under current conditions. In some instances, the unions point to CBA provisions or handbook policies that relate to working during inclement weather and other natural disasters (and sometimes unions are making the claim without any contractual basis). A successful grievance challenging the denial of special pay could result in large back pay liability for the employer. Conversely, granting special pay where it is not required (which some employers are doing out of empathy) could potentially grow into a binding obligation. Accordingly, these claims should be given careful consideration before responding.

Please do not hesitate to call on us if you have any questions relating to these issues.

This alert was written by Daniel Altchek, a member of the Firm’s Labor and Employment Practice. Daniel can be reached at (410) 332-8635 or at Dan.Altchek@saul.com.

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