# CLIENT ALERT: The Duty to Bargain During the COVID-19 Pandemic

In response to the COVID-19 pandemic and its severe nationwide impact to the economy, employers have had to make many difficult and time-sensitive decisions regarding operations, finances, and staff.  These decisions can involve temporary or permanent changes to the employment status, pay, and benefits of employees. For unionized employers, the current pandemic has also prompted discussion of an employer's duty to bargain any changes made in response to unforeseen emergency situations that affect the terms and conditions of employment.

On March 27, 2020, the National Labor Relations Board ("Board"), through its General Counsel Peter B. Robb, issued a guidance memorandum (GC 20-04) detailing summaries of nine (9) prior Board decisions analyzing and interpreting the bargaining obligations of employers and unions during unforeseen emergency situations.  The memorandum divides the cases into two categories: (1) cases analyzing the duty to bargain during emergency situations and (2) cases analyzing the duty to bargain during emergency situations that are unique to a particular employer.  The cases encompass key themes relevant to the ongoing COVID-19 pandemic, including layoffs, plant closures, and the implementation of new employer policies and procedures. The memorandum recognizes that the COVID-19 pandemic has created "an unprecedented situation," which has raised questions about the right to bargain over protective and other responsive measures implemented in the workplace.

Generally, employers have a legal obligation to engage in good faith bargaining with the bargaining representative of its employees over the terms and conditions of employment, such as wages, hours, leaves, promotions, and overtime.  Even when the changes do not affect mandatory subjects of bargaining, there may still be a duty to bargain with the union over the impact of the changes. However, in extraordinary instances such as a national or local disaster or emergency situation unique to a particular employer or business sector, the obligation to bargain may be excused, thus permitting the employer to implement unilateral changes in response to the emergency situation without violating the National Labor Relations Act ("Act").

When assessing whether there is a duty to bargain over a proposed change in working conditions during the COVID-19 pandemic, the employer should first review any possible applicable provisions of the collective bargaining agreement. These include management rights and "zipper" clauses, as well as clauses which specifically reference unanticipated emergency situations (sometimes called "*force majeure*" or "Act of God" provisions).

If the collective bargaining agreement does not expressly authorize the employer to unilaterally institute changes, the employer must assess whether the contemplated change requires a duty to bargain over the change or its impact. If there is a bargaining obligation, the employer is generally required to provide the union with notice of the contemplated change and opportunity to bargain to agreement or impasse before implementing the change.

The employer's duty to bargain may be excused when an employer can establish that "economic exigencies compel[led] prompt action." *[1]* This limited exception only applies to "extraordinary unforeseen events having a major economic effect that required the employer to take immediate action." *[2]* For example, the cases summarized in the Board's memorandum address mandatory evacuation orders during a hurricane, the attacks on September 11, 2001, and a mandated travel ban during an ice storm.

For public sector employers in Massachusetts, Department of Labor Relations (DLR) case law under Chapter 150E similarly recognizes that an employer may have to act quickly in response to certain unforeseen exigent circumstances without satisfying its bargaining obligation if the employer can establish (1) the circumstances requiring the employer's unilateral action(s) were out of the employer's control; (2) the union was notified of those circumstances and the deadline by which the unilateral action(s) would be imposed; and (3) the deadline imposed by the employer was reasonable and necessary in light of the circumstances. *[3]*

Notably, in some of the decisions cited by the Board in its memorandum, an employer's decision during an "extraordinary unforeseen event" *[4]* does not necessarily excuse the employer's obligation to engage in impact bargaining. If an employer either fails to offer to engage in impact bargaining and/or refuses to impact bargain after a demand is made by the union, *[5]* the Board will likely find the employer in violation of Section 8(a)(5) of the Act.

Due to the pandemic, the Board has also temporarily closed some of its

regional offices and limited its operations, including suspending all representation elections, including mail ballot elections, from March 19 to April 3, 2020.

On April 7, the Board announced a two-month delay of a new election rule because of the coronavirus. This new rule will limit the ability of a party to delay or block an election by filing a "blocking charge." The rule will also allow employees to more easily oust a union through a decertification vote. This "blocking charge" rule, originally scheduled to take effect on June 1, 2020 will now be implemented on July 31, 2020.

Employers with questions about bargaining obligations or other labor relations issues arising during the course of the COVID-19 pandemic should consult with their MBJ attorney.

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*[1] Port Printing & Specialties, 351 NLRB 1269 (2007), enforced 589 F.3d 812 (5th Cir. 2009)*

*[2] K-Mart Corp., 341 NLRB 702, 720 (2004)*

*[3] See City of New Bedford, 38 MLC 239, 251 (MUP-09-5581 and MUP-09-5599) (April 12, 2012)*

*[4] K-Mart Corp., 341 NLRB 702, 720 (2004)*

*[5] Raskin Packing Co., 246 NLRB 78 (1979)*Customize the Author Byline?
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