

# What Businesses Need to Know about the Duty to Bargain with Unions During COVID-19

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Since early March, businesses in Oregon and across the country have dealt with an unprecedented series of challenges due to COVID-19. These challenges have arisen from a variety of sources: health concerns for employees and customers, government mandates and business necessity, to name only a few. Businesses of all sizes and across all industries have been forced to make a number of complex and consequential decisions within a short timeframe. And with the course of the pandemic remaining uncertain, businesses will likely be required to make consequential decisions quickly and amidst uncertainty for the foreseeable future.

For businesses with unionized employees, these difficult decisions come with an added level of complexity — whether there is a duty to bargain with the union during an unprecedented public health emergency. Fortunately, the General Counsel of the National Labor Relations Board (NLRB), Peter B. Robb, has provided some helpful guidance in an advice memorandum. The memorandum outlines the relevant NLRB decisions about unionized employers' duty to bargain in emergency situations. While it does not include guidance specific to COVID-19, the memorandum's case summaries provide insight into how the NLRB may address unilateral decisions by employers during the current public health emergency to comply with government orders, protect employees or ensure the survival of a business.

## The Duty to Bargain Under the NLRA

Under the National Labor Relations Act (NLRA), an employer is obligated to bargain with a union representing its employees over changes in mandatory subjects of bargaining. Mandatory subjects include wages, hours and working conditions. These broad categories include issues such as layoffs, reductions in hours, sick leave, furloughs, safety rules and health screenings, to name only a few. This means that under normal circumstances, employers may not take unilateral action regarding mandatory subjects without first bargaining with the union.



The NLRB has treated the duty to bargain differently during certain emergency situations. The General Counsel's memorandum summarizes significant emergency cases in two distinct contexts: the duty to bargain during public emergency situations, and the duty to bargain during emergency situations particular to an individual employer. Both categories of cases may be relevant to employers as they respond to COVID-19, and provide useful insight into how the NLRB may treat the duty to bargain during the current public health emergency.

## The Duty to Bargain During Public Emergency Situations

The memorandum summarizes five cases dealing with the duty to bargain during public emergencies such as hurricanes, an ice storm and the terrorist attacks of September 11, 2001. In order to avoid the general duty to bargain over a unilateral change to a mandatory subject during an emergency, an employer must show that "economic exigencies compelled prompt action." This exception is limited to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." While this emergency standard may alleviate an employer's duty to bargain during "extraordinary events," the Board has held that an employer may still be required to bargain over the effects of the decision after the emergency has subsided. For example, in a 2007 case, the Board held that an evacuation order due to an incoming hurricane constituted an extraordinary event allowing the employer to lay off employees without bargaining with the union, but the employer was still obligated to bargain with the union over the effects of the layoffs after the hurricane.

The General Counsel's memorandum also summarizes cases dealing with employer-specific emergencies such as a loss of financial credit or raw materials. In the cases where the loss of credit or raw materials was unexpected, the Board found an emergency situation

that excused the duty to bargain over layoffs, but found there was a duty to bargain with the union over the effects. In the current pandemic, a loss of business due to a steep decline in tourism or a government mandated closure would likely be deemed an employer-specific emergency that alleviates the duty to bargain, but there may be a subsequent duty to bargain over the effects of an emergency decision.

## Business Takeaways

As the public health situation and government mandates change rapidly, employers will be required to make difficult and complicated decisions quickly to protect employees, customers and their businesses. While the General Counsel's memorandum highlights cases in which emergencies excused employers' duty to bargain over mandatory subjects, unionized employers should still consider the following when making any change to a mandatory subject:

- Determine whether a decision implicates a mandatory subject of bargaining.
- Determine whether the collective bargaining agreement allows for the employer to take unilateral action.
- If the current public health emergency or a mandate from the local, state or federal government requires immediate action without bargaining, provide notification to the union of the change as soon as possible. Early communication often alleviates a later dispute (this applies to non-unionized employers as well).
- Remember that even when the duty to bargain is excused by an emergency, there may still be a duty to bargain with the union over the effects of the unilateral change after the fact.
- When in doubt, discuss these issues with your labor and employment attorney before taking action.

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