COVID-19 Developments in Labor Relations: The CARES Act and the Duty to Bargain During Public Emergencies

By: John K. Baker
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The recently-enacted Coronavirus Aid, Relief and Economic Security Act (the CARES Act) poses potentially serious labor issues for mid-sized businesses that either have (a) an existing collective bargaining agreement with a labor organization or (b) are faced with a Petition for Representation filed with the National Labor Relations Board (NLRB). Additionally, days after Congress acted with the passage of the CARES Act, the NLRB's General Counsel offered historical guidance for employers dealing with layoffs of unionized workforces.

The CARES Act

The CARES Act contains labor-related provisions that mid-sized businesses (500-10,000 employees) that receive direct loans under the Emergency Relief and Tax Payor Protection provisions may later find troublesome.[1] While offering a lifeline to businesses in the form of loans, the Act contains conditions for the receipt of the loans. Two are significant regarding labor-management relations. First, a company must certify that it will remain "neutral in any union organizing effort for the term of the loan." While an employer during this COVID-19 crisis may be tempted to certify now and worry about it later, when a Petition for Representation is filed, the company would be prohibited from engaging in a typical election campaign to convince its employees to vote against a union – no more direct or "captive audience" appeals to the employees and no more educating employees about the risks of unionization. Obviously, it would be difficult to oppose such organizing efforts. Second, as a condition to the receipt of funds, an employer must certify that it will not abrogate existing collective bargaining agreements for the term of the loan (not to exceed five years) and for two years after completing repayment of the loan. These are serious consequences to accepting loan proceeds that may spell trouble for years.

The Duty to Bargain During Public Emergencies

Under the National Labor Relations Act (NLRA), each employer that has a union or unions representing its employees has a duty to bargain with the union over wages, terms and conditions of employment. Under this broad requirement, an employer would be required to bargain with a union over laying off employees. However, there is NLRB precedent finding that under certain public emergencies, the employer's duty to bargain may be excused.

On March 27, 2020, NLRB General Counsel Peter B. Robb published a summary of cases decided by the Board regarding the duty to bargain during public emergencies. Among them are two of particular importance:

- **Port Printing Specialties (Hurricane Rita).** In anticipation of the hurricane in 2005, the Mayor of Lake Charles, Louisiana ordered a mandatory evacuation of the city. Port Printing Specialties (Port Printing) closed operations and laid off all employees without bargaining with the union about the layoffs or the effects that the layoffs would have on the employees. The NLRB concluded that Port Printing did not commit an unfair labor practice by not negotiating over the layoffs since it could demonstrate that "economic emergencies compel[led] prompt action." Thus, the employer could lay employees off without negotiating with the union.
- **Kmart Corp. (9/11).** Layoffs were announced by Kmart soon after the terrorist attacks of September 11, 2001 when the company anticipated business volume to decrease by 60%. Kmart did not bargain with the union over the layoffs as normally required by the

NLRA. After the union filed an unfair labor practice charge, the Administrative Law Judge for the NLRB found that "extraordinary unforeseen events" created the economic emergency and required the employer to take immediate action. Therefore, the employer's failure to negotiate with the union was excused.

These cases were summarized by the General Counsel as a guide to employers facing emergencies due to COVID-19. While far from a guarantee, employers should consider the guidance a sign of how the NLRB would react when dealing with 'failure to negotiate' charges under the NLRA.

New developments during the COVID-19 pandemic will no doubt continue. Employers with unionized workforces should keep these two issues in mind when making critical decisions on the loan programs and with layoffs.

If you have questions or would like more information, please contact John K. Baker (bakerj@whiteandwilliams.com; 610.782.4913) or another member of the Labor and Employment Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates here.

[1] This Alert will not address how a company with other offices or affiliations will count the number of employees for the purposes of the loan programs.

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