COLLEGE OF LABOR AND EMPLOYMENT LAWYERS

IN THE COVID-19 TRENCHES: NAVIGATING PRIVACY, CONCERTED ACTIVITY, BARGAINING AND EMPLOYEE GAG ISSUES FOR THE LABOR LAW PRACTITIONER

September 29, 2020

Marshall Babson, William Frumkin, Mark Gaston Pearce, Alan Symonette, Gwynne A. Wilcox

I. NLRB General Counsel Memoranda and General Counsel Advice Memoranda during the COVID-19 Pandemic

A. GC Memo 20-14, Summaries of Advice Merit Determinations Related to COVID-19 Issues (9/18/2020)

On September 18, 2020, the **GC Memorandum 20-14** was published regarding the impact of the coronavirus pandemic and the summary of cases that were found to have merit or otherwise explained the General Counsel's position on critical issues. The cases were not cited due to pending litigation. Unlike the GC Memorandum 20-04 that issued on March 27, 2020 outlining bargaining cases in other public or individual emergencies that might provide guidance during the COVID-19 pandemic, this GC Memorandum references a variety of cases that actually arose during this pandemic and how they were addressed:

• **Protected Concerted Activity** – Two cases were referenced:

> Health Care Provider: In response to a letter from employees, the employer engaged in unlawful conduct - - interrogated one of the letter drafters, threatened her with discharge, the impression of surveillance and constructive discharge conditioning continued employment upon her agreeing not to engaged in protected concerted activity. (The Litigation Branch was considering a 10(j) recommendation upon a submission by the Region.)
>
> Food Delivery business: After a group of employees protested the employer's lack of PPE (gloves, masks and sanitizers) and failure to enforce social distancing guidelines, all employees took leaves without pay but were permitted to return to work. However, the employer unlawfully refused to allow 2 employees, including the leader of the protest, to return to work. (The Litigation Branch was considering the 10(j) recommendation upon a submission by the Region.)

• **Weingarten** — An employer in the casino industry unlawfully questioned a bargaining unit employee, wearing a face mask in guest areas, about limiting the wearing of a face

mask when only required by work duties, after the employee asserted *Weingarten* rights. The resulting suspension of the employee for the rest of the day and discipline for his response during the investigative interview were unlawful.

• **Discriminatory Layoff** — When the pandemic caused the facility's closure, the employer's unlawful layoff of 2-persons in the recently certified unit, but not other employees, was consistent with the employer's statement at the bargaining table to erode the bargaining unit.

• **Discriminatory Recall** — A hotel discriminatorily refused to recall 20 unit employees it permanently laid off in March, a large majority being known union supporters, but offered recall rights to 12 other employees who were temporarily laid off, a large majority not being union supporters, after the employer having expressed anti-union animus during a recent campaign. (The Litigation Branch was considering a 10(j) recommendation upon submission by the Region).

• **Bargaining** — Three cases were referenced:

> Schools: Pursuant to a Governor's order that certain schools be closed, the employer moved to a remote learning environment. Since the decision by the employer was reasonably related to the emergency pandemic situation mandated by the state, the employer could act unilaterally; but, the Region was directed to investigate whether the changes related to that decision were reasonably related to the pandemic emergency and whether the changes were material, substantial and significant adjustments to employees' preexisting terms.
>
> Nursing Home: The employer's failure to bargain from mid-March to mid-May, its failure to respond to the union's proposals over email for over two months and its failure to consider or discuss a proposal for hazard pay during the pandemic, in the absence of a contract being in effect, were unlawful failures to bargain.
>
> Cultural Institution: The employer's failure to bargain over the unilateral elimination of furloughed employees' health insurance and vacation leave balances was unlawful, because the employer had ample time to bargain over the discrete changes at issue, when it continued to shoulder health insurance costs for more than three weeks after it implemented its decision, even though its revenue was down by 60% and there were severe restrictions on reopening.

• **Refusal to Provide Information** — In the context of a COVID-19 layoff, the employer's failure to provide relevant information was unlawful: a seniority list, paid time off accruals, communications to the bargaining unit members, the expected return

date, information concerning the basis of the layoff decision and communications with clients concerning the layoff.

The full memo can be accessed here, along with all other GC memos.

Additionally, Attachment A to the GC Memorandum 20-14 provides a list of twelve (12) cases that were either dismissed or withdrawn due to Advice memoranda or case-closing emails covering COVID-19 matters:

B. 2020 Advice Memoranda and Case-Closing Emails:

Bargaining:

Mercy Health Partners 07-CA-258220 (Issuance date 8/11/2020; Release Date 9/15/2020): The employer's unilateral implementation of new policies and benefits that are reasonably related to the emergency situation are lawful. Also, the employer's policy restricting the use of PPE that was not employer-issued equipment that applied to both union and non-union employees at this facility was lawful, especially, since that was the policy at hundreds of other health facilities. In this instance, the employer's *MV Transportation* defense (368 NLRB No. 66) (September 10, 2019) failed because the CBA had expired, including the management rights clause, and there was no extension agreement.

Memphis Ready Mix, 15-CA-259794 (Issuance date 7/31/20; Release Date 8/13/20): Due to the COVID-19 pandemic, the union proposed paid sick leave and hazard pay during the COVID-19 pandemic, but, the employer had no obligation to engage in midterm bargaining as a result of the zipper clause in the CBA.

Comcast Cable, 22-CA-25903 (Issuance date 7/29/2020; Release Date 8/13/20): The employer was lawfully permitted to unilaterally implement home garaging for installation and service technicians for safety purposes due to COVID-19 under its management rights clause, relying upon *MV Transportation*, 368 NLRB No. 66 (Sept. 10, 2019). Further, there was a finding that the employer bargained to impasse over the effects of the decision.

Children School Services, 5-CA-258669 (Issuance date 6/30/20; Release date 7/15/20): In response to the closing of D.C. schools due to COVID-19, a government contractor that supplied nursing services in the D.C. public schools was lawfully permitted to unilaterally layoff of nurses under *MV Transportation.* Regarding related offers of temporary work assignments to perform COVID testing and/or contact tracing in lieu of layoffs, the broad zipper clause in contract foreclosed any bargaining obligation and even if a bargaining obligation existed, it was satisfied by the pre-implementation bargaining over both issues under the exigent circumstances at issue.

Mercy Health General Campus, Issuance date 6/10/20; Release date 7/15/20): The employer's unilaterally implemented work-from-home policy did not apply to bargaining unit employees, so there were no changes to the unit employees' terms and

conditions of employment, even though Advice would have found that the employer could make unilateral decisions reasonably related to the pandemic. Also, there was no violation where the union initiated a COVID-19 attendance policy proposal, which the employer essentially adopted without having responded to the union. It was noted that the parties continued to bargain over the effects of pandemic-related proposals as they arose.

Protected Concerted Activity:

Hornell Gardens, *LLC,* 03-CA-258740 and 03-CA-258966 (Issuance date 7/31/20; Release Date 8/13/2020): The employees' protected concerted activity which included: a refusal to follow gown sharing protocol, refusal to work a certain shift, and the reading of a pro-union statement to co-workers, were aimed at personal gain, not concerted activity, and the terminations related to the employees' job performance. The employer's threat to blackball the employees in a statement published in an online news site were "taken out of context and not complete as reported," relying upon *Walmart Stores, Inc.*, 368 NLRB No. 24, slip op. at 34 (July 25, 2019).

Marek Brothers Drywall, 16-CA-258507 (Issuance date 7/20/20; Release Date 8/13/20): After a group safety meeting, the employer laid off the employee who engaged in protected concerted activity by suggesting that the employer's protocols in response to COVID-19 were insufficient to keep employees safe, but since the employer lacked knowledge and anti-union animus, the lay-off was not considered discriminatory.

Larry Peel Co., 16-CA-259403 (Issuance date 6/15/20; Release date 7/15/20): The employee who was discharged did not engage in protected concerted activity when he texted the employer's controller on their personal cellphones about his COVID-related health and safety concerns, if the controller was a supervisor or manager. Assuming the controller was an employee, there was no evidence that the employer knew about the texts that were an individual request, not concerted, or that the employer exhibited any animus. Further, it was likely that the decision to discharge the employee was before the request was made to change work location.

Failure to Provide Information:

Crowne Plaza O'Hare, 13-CA-259749 (Issuance date 7/20/20; Release Date 08/13/20): In response to the employer's decision to temporarily layoff bellmen and airport shuttle drivers due to the temporary closing of the hotel as a result of the pandemic, the union requested information relating to its grievance contesting the employer's failure to bargain over the decision and the effects of the decision. Under *First National Maintenance Corp. v NLRB*, 452 U.S. 666, 677-677-79, 686 (1982), the decision to close was due to entrepreneurial decisions that are not subject to mandatory bargaining. Additionally, the employer's failure to provide financial information to the union as to "whether the Employer had applied for any government payroll assistance programs" was not unlawful, where the employer did not claim insolvency.

ABM Business, 13-CA-259139 (Memo date 7/9/20; Release date 8/13/2020): The information, such as company communications and a document retention policy, were not presumptively relevant or justified by the union.

Access:

RS Electric Corp., 14-CA-260142 (6/19/20; Release date 7/15/20): The employer and union had a dispute as to the interpretation of the access provision in the CBA that provided for union access to job sites "at any reasonable time." There was no violation where the employer asserted that it needed one hour advance notice for safe access during the pandemic and the union did not seek bargaining to challenge the employer's position of reasonableness.

United States Postal Service, 14-CA-258516 (Issuance date 6/3/20; Release date 7/15/20): The denial of access on a single occasion during the pandemic due to a misunderstanding between the parties that was quickly resolved on the same day lacked merit.

The full list of GC Advice Memoranda and case-closing emails during the COVID-19 pandemic may be accessed here.

C. GC Memo 20-04, Case Summaries Pertaining to the Duty to Bargain in Emergency Situations (03/27/2020)

On March 27, 2020, the **GC Memorandum 20-04** was published in response to the coronavirus pandemic to provide guidance on how the Board has addressed other public or individual emergencies and the duty to bargain under Section 8(a)(5) of the Act.

The memo highlights four (4) cases that touch on the duty to bargain during public non-COVID emergency situations:

- *Port Printing & Specialties*, 351 NLRB 1269 (2007) (hurricane), enforced, 589 F.3d 812 (5th Cir. 2009): The Board held that an employer can lay-off union employees without first bargaining with the union when "extraordinary exigencies compel[led] prompt action." The Board defined this exception narrowly to only include "extraordinary events which are unforeseen occurrence, having a major economic effect requiring the company to take immediate action."

- *K-Mart Corp.,* 341 NLRB 702, 720 (2004) (9/11): A business' economic fallout post-9/11 was categorized by the Board as "extraordinary unforeseen events having a major economic effect that required the employer to take immediate action."

- *Dynatron/Bondo Corp.,* 324 NLRB 572, 578-79 (1997) (hurricane): The Board held that an employer committed a Section 8(a)(5) violation when during a two-day power outage caused by a hurricane, the employer unilaterally and unlawfully implemented a new policy concerning employee compensation during the hurricane, and notified the Union two weeks after implementation.

- *Gannet Rochester Newspapers,* 319 NLRB 215 (1995) (ice storm): The Board held the employer did not violate Section 8(a)(3) nor 8(a)(5) for upholding past practices of not paying employees during lost work time due to weather and for requiring employees to take personal days or go uncompensated. However, the Board did find that the wages for lost time due to a weather emergency are a mandatory subject of bargaining, and given that those employees were at the time working without a contract, the employer was obligated to afford the union notice and opportunity to bargain prior to acting—thus resulting in an 8(a)(5) violation.

More specifically, the memo highlights five (5) cases concerning the duty to bargain during emergency situations particular to an individual employer:

- *Cyclone Fence, Inc*., 330 NLRB 1354 (2000) (lack of financial credit): The Board held that while the "emergency situation" the employer confronted might excuse its failure to bargain with respect to the decision to close its operations, it did not excuse the employer's failure to bargain over the effects of the closing.

- *Hankins Lumber Co*., 316 NLRB 837 (1995) (log shortage): The Board held that unilateral decision to lay off employees due to a log shortage was a Section 8(a)(5) violation because this was a chronic problem and there was no "precipitate worsening" such that there was a need for immediate employer action.

- *Brooks-Scanlon, Inc.*, 247 NLRB 476 (1979) (log shortage), petition for review denied, 654 F.2d 730 (9th Cir. 1981) (table): The Board held that the employer did not commit a Section 8(a)(5) violation by closing part of its plant without bargaining with the union. This determination was fact-specific and the Board found that the facts showed "economic factors so compelling that bargaining could not alter them[.]"

- *Raskin Packing Company*, 246 NLRB 78 (1979) (lack of financial credit): Here the Board held that the employer, while not required to bargain over the decision to abruptly close operations, nevertheless violated Section 8(a)(5) by failing to bargain over the effects of the closure.

- *Virginia Mason Hospital*, 357 NLRB 564 (2011): The Board held that an employer violated Section 8(a)(5) by unilaterally implementing a flu-prevention policy without affording the Union notice and an opportunity to bargain, rejecting the ALJ determination that the employer be excused from its bargaining obligation based upon the test set forth in *Peerless Publications*, 283 NLRB 334 (1987), as to whether: (1) the policy went directly to the employer's core purpose: to protect patient's health; (2) the policy was narrowly tailored to prevent the spread of influenza; and, (3) the employer limited the requirement to nurses who refused to be immunized. The Board remanded the case to the ALJ to consider the remaining unilateral change defenses to Section 8(a)(5).

The full memo can be accessed here, along with all other GC memos.

II. Other Relevant "Duty To Bargain" Decisions Prior To the COVID-19 Pandemic

- *Bottom Line Enterprises*, 302 NLRB 373 (1991) (The NLRB recognized that the duty to bargain may be excused if "economic exigencies compel prompt action." 302 NLRB at 374. However, in this case the NLRB found that the employer did not satisfy this standard and, thus, violated their duty to bargain by determining there was an impasse (when there was not) and unilaterally deciding to cease funding the trust funds. *Id.* at 375.))

- *Merck, Shark & Dohme Corp.*, 367 NLRB No. 122 (2019) (The Board supported an employer's right to treat union versus non-union employees differently if, and only if, that different treatment is a result of fair, collective bargaining and not based on union animus or retaliation for engaging in protected concerted activities.)

- *Nathan Yorke, Trustee*, 259 NLRB 819 (1981) (The NLRB found that the employer unlawfully failed to bargain with the Union about the effects of the closure, which was caused by economic fallout. The Board also provided the remedy of backpay for the employees who were still actively working for the employer. The Board found support for the remedy of backpay through the holding in *Transmarine Navigation Corporation and its subsidiary, International Terminals Inc.*, 170 NLRB 389 (1968).)

- *Peerless Publications, Inc.*, 283 NLRB No. 54 (1987) (The Board creates a standard for employers to satisfy if they want to overcome the presumption that matters related to "terms and conditions of employment" are mandatory subjects of bargaining. 283 NLRB at 335. This standard requires that the subject matter that the employer is addressing be "(1) narrowly tailored in terms of substance, to meet with particularity only the employer's legitimate and necessary objective, without being overly broad, vague, or ambiguous; and (2) appropriately limited in its applicability to affected employees to accomplish the necessarily limited objectives." *Id.* In this case, the Board found that the employer's rules did not satisfy the standards such that it was narrowly tailored enough to not infringe on union member rights.)

- *RBE Electronics of S.D.*, 320 NLRB 80 (1995) (This decision expands the *Bottom Line* test to create a new gray area where the employer's duty to bargain can be excused or reduced given certain circumstances. The Board found that when "an employer is confronted with an economic exigency compelling prompt action short of the type relieving the employer of its obligation by providing the union with adequate notice and an opportunity to bargain. In that event, consistent with established Board law in situations where negotiations are not in progress, the employer can unilaterally if either the union waives it right to bargain or the parties reach impasse on the matter proposed for change." 320 NLRB at 82. Applying that analysis, the Board remanded the case to the ALJ to determine whether the employer unlawfully refused to bargain over the layoff and recall of employees and its reduction of hours.)

- *Seaport Printing & Specialties*, 351 NLRB 1269 (2007) (The NLRB held that an employer can lay-off union employees without first bargaining with the union when "extraordinary exigencies compel[led] prompt action." The Board defined this

exception narrowly to only include "extraordinary events which are unforeseen occurrence, having a major economic effect requiring the company to take immediate action.")

III. LMRA Section 502

A. Comparing LMRA Section 502 and NLRA Section 7

Supplementing employee protection during work stoppages under Section 7 of the NLRA, Section 502 of the Labor Management Relations Act, 29 U.S.C. Section 143, also provides protections for employees refusing to work based on beliefs of unsafe working conditions.

Test for Section 502:

For a work stoppage to be protected under Section 502, the employee must show:

(1) the employees believed in good faith that their working conditions were abnormally dangerous;
(2) their belief was a contributing cause of the work stoppage;
(3) the employees' belief is supported by ascertainable, objective evidence; and
(4) the perceived danger posed an immediate threat of harm to employee health or safety.

TNS, Inc., 329 NLRB 601 (1999); *see also Roadway Express*, 217 N.L.R.B. 278, 280 (1975) (an experienced truck driver's opinion that a truck was unsafe, when that opinion was shared by other drivers, was "objective enough" evidence under § 502 "to lead a person to reasonably determine that he should not drive such a truck").

The Board has found "abnormally dangerous" working conditions under Section 502 only rarely. *TNS, Inc*., 329 NLRB 601 (1999) ("Indeed, in over 40 years since the passage of Section 502, the Board has found abnormally dangerous working conditions in only six contested cases"). Though the burden of proof is heavy for workers seeking protection under Section 502, employees are not required to "prove that conditions were in fact abnormally dangerous at the time of the walkout or that employees were actually manifesting physical injury or on the verge of doing." *Id.*

Workers who participate in a protected safety strike are entitled to reinstatement when they unconditionally offer to return to work. Workers who are disciplined or discharged for discussing or advocating for such a work action may be protected under Section 8(a)(1) and Section 7 of the National Labor Relations Act. *TNS, Inc*., 296 F.3d 384 (6th Cir. 2002).

However, unlike Section 7, Section 502 can protect one employee acting alone who stops work because of abnormally dangerous conditions because Section 502 does not require concerted activity and also imposes a heavier burden on employees to establish dangerous

conditions, requiring the employee to "present ascertainable, objective evidence supporting …[a] conclusion that an abnormally dangerous condition for work exists." *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 387 (1974); See also *TNS, Inc*., 329 NLRB 602 (1999), vacated on other grounds, 296 F.3d 384 (6th Cir. 2002) (noting that to be protected by section 502, employees "must demonstrate by a preponderance of the evidence that [they] believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that [their] belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety.") (vacated on other grounds by TNS, Inc. v. N.L.R.B., 296 F.3d 384, 393 (6th Cir. 2002)).

Since a valid work stoppage under Section 502 is not considered a strike, no-strike provisions in collective bargaining agreements may not prevent Section 502 work stoppages. *Gateway Coal*, 414 U.S. at 385 ("This section provides a limited exception to an express or implied no-strike obligation" thereby insulating participants from injunctions, liability for damages, or termination when a cessation of work is necessary "to protect employees from immediate danger.")

COVID WORKPLACE BARGAINING AND PRIVACY ISSUES

COLLEGE OF LABOR AND EMPLOYMENT LAWYERS

Mark Gaston Pearce

WORKERS' RIGHTS INSTITUTE
GEORGETOWN LAW SCHOOL
Sept 29, 2020

INTRODUCTION

As employers are calling people back to work, there are many questions in the areas of safety, privacy, and the duty to bargain that must be addressed.

Private sector unions and employees covered by a cba will be well advised to review the cba with an eye on provisions that relate even remotely to COVID and the return to work:

- Management Rights and the Right to Establish Reasonable Rules
  - (Although an employer still has a duty under the law to meet and confer with the Union, recent NLRB decisions gives employer greater ability to act without bargaining with the union*) See MV Transportation*[1]
  - Unions might seek contractual assurances to curtail what they perceive as overly expansive management rights clauses.

  - Both parties are likely to meticulously examine the existing language and take a strong position regarding interpretation. *These interpretations may have to be resolved through arbitration.*

Health and Safety Language and Contractual Rights to Refuse Work

Section 502 of the LMRA *gives workers the right to refuse to work under abnormally dangerous working conditions*

Note that In order to establish that a work stoppage is protected under Section 502 (of the Labor Management Relations Act), the General Counsel must demonstrate. . . that the employees believed in good-faith that their working conditions were abnormally dangerous; that their belief was a contributing cause of the work stoppage; that the

[1] 368 NLRB No. 66 (2019), the National Labor Relations Board abandoned the previous standard, which required the employer to bargain over any material changes to a mandatory subject of bargaining not addressed in the cba, unless the union gave a "clear and unmistakable waiver" of its right to bargain. Instead, the Board adopted the broader "contract coverage" standard for determining whether a unionized employer's unilateral change in a term or condition of employment violates the National Labor Relations Act ("NLRA").

employees' belief is supported by ascertainable, objective evidence; and that the perceived danger posed an immediate threat of harm to employee health or safety. See *TNS, Inc.,* 329 NLRB No. 61 (Sept. 30, 1999)

Exempt and Essential Employers

o When a jurisdiction has been fully or partially shut down and an employer claims to be exempt or essential – union has the right to ask for verification and negotiate safety conditions.

Unilateral changes in terms and conditions by an employer in response to COVID

- . ***Duty to meet and confer with the union is a required under the National Labor Relations Act.***

- **Private sector employer generally has the duty to bargain over such changes except where economic exigencies are present**
    - they are defined as "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Hankins Lumber Co*., 316 NLRB 837, 838 (1995).
    - The NLRB historically has applied the **"economic exigency**" exception only narrowly and only in situations where unforeseen events caused a major economic impact on the employer's business. Given the NLRB's statement that COVID-19 is an "unprecedented situation," this pandemic may present such a situation.
        - Note that on March 27, 2020 the NLRB General Counsel issued Memorandum GC-20-04 to provide guidance on employers' obligation to bargain during emergency situations such as the current pandemic. while it does not specifically address employers' bargaining obligations during the current pandemic, it provides specific case examples in the categories of (1) cases concerning the duty to bargain during public emergency situations and (2) cases concerning the duty to bargain during emergency situations particular to an individual employer.

Government Orders Overriding Collective Bargaining Agreement

Given the increasing level of government intervention related to the COVID-19 outbreak, it is also possible that certain government directives may override collective bargaining agreements.

If a government order takes employment changes out of the hands of employers and unions, the parties may have an obligation to bargain over the effects of the order.

- **Effects Bargaining even in the wake of Government Orders** - Where the employer is mandated by law or regulations to set COVID policies that may be an intrusion on privacy or the need to bargain over the decision – employees through a union can negotiate the effects of the policy.
    - employer claims of legal requirements or exigency, may be met with a union demand for detailed support (Employer has duty to honor legitimate requests for information)
    - Unions are likely to pursue and employers should prepare to respond to requests bargaining over the effects of proposed changes, effects of any new legislation or other government edicts
    - Active insistence on bargaining is expected, given the way NLRB law is currently being interpreted. Unions are cautious about creating precedent by implying a waiver of a right to bargain.
- **Protect against interrogations in violation of the NLRB and the ADA**
    - Which means be familiar with the employer's privacy obligations through seeking information from these agencies

Privacy considerations

Privacy rights in the workplace are and have always been the product of a delicate balance between the right of employers to run their businesses and ensure safety and order in their workplaces, and the right of employees to keep their employers out of their private lives.

The balance between the employer's NEED to keep the workplace safe for its employees is tipping in favor of increased intrusion into matters related to employees' health given the threat presented by COVID-19 in the workplace.

Unions have a healthy concern that COVID might be used as the get out of jail free card for employer intrusion.

Employer discretion/Obligation

("OSHA") issued a memorandum regarding ***employers' obligation to record cases*** of COVID-19 in the workplace, updating previous guidance which **went into effect May 26, 2020.**

- Previous guidance rescinded -, which exempted employers that were not healthcare or emergency response or correctional, from keeping records is rescinded and OSHA's the key provisions of which are summarized below.
- All employers subject to OSHA recordkeeping requirements will now have to determine whether employees' COVID-19 cases are work-related and,
- if so, record such cases on the employer's OSHA Form 300 log. from having to record cases of COVID-19 unless there was "objective evidence" that the illness was work-related.

Specifically, the updated guidance provides that all employers that are not exempted from OSHA's recordkeeping requirements must resume recording cases of COVID-19 where:

1. The case is a confirmed case of COVID-19 as defined by the Centers for Disease Control and Prevention ("CDC");
2. The case is work-related; and
3. The case involves one or more of the general recording criteria set forth in 29 C.F.R. § 1904.7.

Considerations for Assessing Work-Relatedness

Although, OSHA acknowledged that determining whether a case of COVID-19 is work-related may be difficult, the agency will consider the following in assessing an employer's determination of work-relatedness:

1. The reasonableness of the employer's investigation into work-relatedness;

   OSHA 's view of a reasonable and sufficient investigation is where the employer:

   (a) asks the employee how they believe they contracted the illness;

   (b) *while respecting employee privacy, discusses with the employee* their work and out-of-work activities which may have led to the employee contracting the illness;

   This is very problematic as it could lead to *unlawful interrogation*

   - A company can violate the NLRA by asking workers questions

about employee union activity or about communications workers have had with their coworkers about their working conditions.

- Not all company questions of this kind are unlawful. However under the guise of "work relatedness" much intel can be gathered about who employees are associating with and the possible union activity of other employees
- Unions with concerns about the potential for unlawful conduct are likely to negotiate having a union representative present in the event that the employer goes over the line with questions
    - note that this representation may not be deemed the same as a Weingarten right, but could be as a result of effects bargaining to guard against an unlawful interrogation.

(c) reviews the employee's work environment for potential COVID-19 exposure, keeping in mind whether other employees in that environment have contracted the illness.

2. The evidence available to the employer; and
3. The evidence that a case of COVID-19 was contracted at work.

As for the second consideration, the guidance states that ***evidence of work-relatedness should be considered based on information reasonably available to the employer when it made its determination.*** However, in assessing the reasonableness of an employer's work-relatedness determination, OSHA will also **take into account any information the employer learned after making its initial determination**.

Does that mean that the employer can inquire about the home life of the employee? What is meant by respecting the employee's privacy?

Finally, with regard to the third consideration, absent an alternative explanation for the illness, evidence that indicates work-relatedness may include, among other things:

- Incidence of COVID-19 among several employees who work in close proximity to one another.
- An employee contracting the illness after lengthy, close exposure to a customer or co-worker who has a confirmed case of COVID-19; and
- The fact that an employee's job duties include having frequent, close contact with the general public in an area with ongoing community transmission.

Conversely, the following evidence may weigh against a finding of work-relatedness:

- An employee is the only worker to contract COVID-19 in their vicinity and the employee's job duties do not include having frequent contact with the general public; and
- An employee frequently associates with a non-coworker outside of work who has COVID-19, including during the time the individual is likely infectious.
    - This is also problematic - Unlawful surveillance - The NLRB has found that a company violated the law by monitoring workers' union activity or workers' communications with their coworkers about their working conditions. The key things to determine are whether workers knew about the surveillance and whether the company is keeping track of things that are public or things that workers believed were private.

If the employer conducts a good-faith inquiry and still cannot determine whether it is more likely than not that an employee's COVID-19 illness was work-related, the employer need not record that COVID-19 illness.

Confidentiality

Employers are not covered by HIPAA

- HIPAA imposes obligations to safeguard protected health information (PHI) only on *covered entities*, which are defined to include health plans, health care clearinghouses, and health care providers. An employer acting in its capacity as an employer is not subject to HIPAA.
- Other laws, such as the **Americans with Disabilities Act (ADA)** or state confidentiality laws, may apply.
    - The ADA prohibits ***the discloser of the identity of an employee who has tested positive for, or otherwise been diagnosed with, COVID-19 to co-workers who were in close contact with the infected employee during the relevant 14-day period***.
    - However, the employer can provide co-workers with information that would help them evaluate the risk of infection

Union Obligations regarding Confidentiality

During a recent group discussion, several union attorneys were presented with the following scenario:

> *A member told his local union that he tested positive for COVID-19. The member called out sick from work, but has refused to tell his employer that he tested positive despite the union encouraging him to do so.*

Is there anything prohibiting the union from telling the employer that the member tested positive for COVID-19 so that other employees and members are not put at risk?

Ans 1 ***Union should not disclose because unions may be liable under Title I of the ADA***. Given the EEOC's guidance on not disclosing the identity of those who test positive (albeit with employers rather than unions in mind) the union should be cautioned against doing this.

Ans 2 ***Unions should disclose in order to protect the workforce it represents***.

- Because the union has already suggested to the employee that he should report this to the employer right away, the union should advise the employee to report the test result to the employer as soon as possible.
- The employee should be further advised that failure to do so puts others at risk, and could be a basis for serious employer discipline.
- Moreover, the employee should be told that if he doesn't make the report, the union would have to disclose the information to the employer because:
    - it has an obligation to protect the employees in the bargaining unit to make them aware of safety and health concerns relating to their jobs and
    - it could be exposed to possible financial claims by others who become ill with COVID because of contacts with the employee, of which the union had knowledge.
- **The employee should be assured that the union will advocate on behalf of the employee if the employer retaliates against him because of the COVID condition**, but may not be able to help if he is discharged or otherwise disciplined because he failed to report his COVID condition.
- **Concerns by the union about actual liability to this member based on some type of ADA or other non-disclosure obligation are far outweighed** by: (1) concerns about the health of others at the workplace if there is no disclosure; (2) the risks of probable significant liability claims if any of them contract COVID because of contacts with him and the discovery that the union knew of this risk but failed to make it known.
- **Finally, Failure by the union to disclose this knowledge would make decertification efforts by others in the bargaining unit are extremely likely** if it becomes known the union hid the risk of COVID from them.

Checking Temperatures

As much as companies need to protect an employee's privacy, there is also an obligation to keep other employees safe. Based on COVID-19's ability to spread

throughout the community and the prevalence of fevers in infected persons, **the EEOC has expressly permitted employers to measure employee body temperatures during this pandemic.**

One of the most common steps employers have taken to identify individuals who may have contracted COVID-19 is the use of ***temperature checks in the workplace***.

- Employees may be asked to take their own temperature, or
- temperatures may be taken by employers using **touchless thermometers** in the workplace.
- Some employers have also employed **facial scanners** with infrared sensors that allow them to measure an employee's temperature.

Some employees may hide the condition because they can't afford to be out of work. (especially now, when stimulus funds have expired)

- if employers suspect an employee is hiding the condition**, according to** EEOC's March 18, 2020 guidelines <u>they have the right to take someone's temperature.</u>
    - Not only are employers are legally permitted, they are encouraged by the CDC, to take employee temperatures amidst the current pandemic

- The employer nevertheless still must do a non-discrimination/ privacy analysis to steer clear of a potential ADA claim
    - Who is going to take the temperatures?
    - Are they qualified?
    - Where will the test be administered?
    - How and who will be watching?
    - How will that person's privacy be protected when there is a line of other employees' present waiting to have their temperature taken?
    - How will the employer protect the safety of the person taking the temperatures?
    - If someone has a high temperature, what happens next?
    - Will temperature information be recorded?
    - How will it be kept confidential?

- **The aforementioned are examples of when union is present the aforementioned concerns can be addressed because it can demand bargaining on these matters.**

- **In an unrepresented work environment, employees may have the wherewithal to concertedly make these demands**
    - **Or at least contact EEOC the agency that enforces the ADA**

Testing Requirements - Tests are now more readily available. Can an employer require that for return to work employees?

- ***On*** June 17, 2020 EEOC again updated its COVID-19 related technical assistance for employers – focusing on return to work issue.
    - Currently, an employer may be able to require testing for the virus as a condition of returning to work**.**
    - **Diagnostic Testing-** Many employers have turned to diagnostic testing to keep infected employees out of the workplace.
        - Diagnostic tests use nasal or saliva samples to screen for the presence of genetic material associated with SARS-CoV-2, a virus believed to cause COVID-19.
        - Positive tests indicate that an individual is currently infected with COVID-19, while negative tests demonstrate the absence of a current infection. A negative test result, however, does not ensure that an employee could not contract the virus at a later time.
    - **Antibody Testing.** Antibody testing, theoretically, would enable employers to determine whether certain individuals may be immune from further COVID-19 infections, allowing those employees to return to the workplace sooner, and with fewer necessary precautions in terms of social distancing and the use of protective equipment. ***The tests are performed by health care professionals through blood samples*** that are examined to determine whether an individual has developed antibodies against the virus**.**
    - **However, requiring employees to undergo antibody testing before re-entry to work violates the ADA**
    - EEOC on June 17 2020 updated its guidelines, which relies on CDC guideline, warnings that antibody testing should not be used to determine immune status in individuals as presence and duration of immunity has not yet been established and the study is evolving.
        - Accordingly, employers are not permitted to conduct antibody testing as a condition of permitting employees to re-enter the workplace.

- Specifically, the EEOC stated that it believes that such testing, at this time, does not meet the "job related and consistent business necessity" requirements for medical testing under the ADA. Therefore, **mandatory antibody testing is not an option at this time for employers seeking to screen employees prior to their return to work**.

Anti-Privacy Tech Weaponing Trend

> According to some recent news articles, Whole Foods has been building a "heat map" to track whether workers at its stores might try to organize a union. In addition, Whole Foods may be using the "Work Day" app to track workers' communications with each other and/or the union.

Contact Tracing

May 20, 2020 according to the ***Health IT Security*** blog - Contact tracing app initiatives have emerged in the wake of the COVID-19 pandemic, as a modern enhancement to traditional methods for tracking the spread of the virus, finding new infections.

> Contact tracing apps, which are used to alert people when they've been exposed to an infected person, generally use these media while loosely adhering to a common design. They include approaches focusing on privacy and security, or precise distance measurements using sound outside of the human hearing range.

Privacy Concerns Relating to the Use of Monitoring Software

Can an Employer require employees to install contact tracing software?

Yes and no - In general, private employers likely could lawfully mandate that employees utilize a contact-tracing app, provided that the mandatory program is administered in a manner that is no more intrusive than necessary to meet the legitimate business concern.

Permissibility may vary based on differing employment settings, the employer's business necessity for employee proximity, and whether the employer can implement less intrusive measures to provide a safe environment. EG

- *Do the employees work remotely (like a private equity company) where contact is not a concern or is in person contact required of the job like in a meatpacking plant*
- *Is the policy being administered in a non-discriminatory manner*

Employer-based contact tracing implicates a variety of laws, including workplace laws like the Americans with Disabilities Act ("ADA"), other federal and state employment and civil rights laws, privacy and consumer protections, and—particularly with respect to public employers—federal and state constitutional issues.

- Federal and state constitutional and statutory prohibitions render state-mandated apps challenging to implement in the United States.
- Many states, including Pennsylvania, have various statutes and common law rules that allow individuals, including employees, ***to bring a private right of action for privacy violations*** if it is determined that the individual has **a "reasonable expectation of privacy" in the identified area**.[2]
- Employers carefully consider the technology behind any monitoring system, to determine how it tracks activity and what information is collected and stored.
    - Technologies that employ geolocation data may implicate GPS tracking laws, as well as off-duty conduct laws that exist in many states. To reduce these risks, employers may wish to consider devices that employ Bluetooth technology, and ensure that any monitoring is limited to the workplace and does not extend to out-of-office activity. [3]

Voluntary, employer-adopted contact-tracing programs that mandate (or, alternatively, strongly encourage) employee participation are more promising from an implementation perspective.

1. Employers looking to introduce these apps may point to their duty under the Occupational Safety and Health Act ("OSHA") to furnish to workers "employment

[2] What Employers Need to Know About Workplace Privacy in Wake of COVID-19
By Risa Boerner and Luke McDaniels | Law.com July 16, 2020
[3] Ibid

and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."[4]

2. Many employers already require health screening for various conditions, and some jobs mandate ongoing health checks, consistent with OSHA standards and subject to ADA restrictions and safeguards.

Employers considering the use of contact-tracing applications on a cellphone should do the following:

- detail to employees the information that will be collected and the purpose for the collection.
- update their employee handbooks to reflect this policy and
- ask employees to provide a written acknowledgement and consent to the installation and use of the application.

Other considerations

- Employers may pre-install apps on employer-issued devices, and, once the apps are installed, the devices may have an ability to monitor adherence to the employer's policy. However, employers will face practical difficulties actually forcing their employees to install apps on their personal devices, and, on all devices, they will have little ability to force employees to actively review—much less use—any information the apps provide.
- Apps driven by the device holder's own self-reported COVID-19 diagnosis (as opposed to an app driven by direct reports from laboratories of COVID-19-infected persons and their mobile phone number), the app algorithm functions only as well as the integrity of the input—meaning that a noncompliant employee who reports a COVID-19 diagnosis late or not at all would obviate the successful functioning of the app.
- Adoption and adherence will likely depend on cooperation and employee "buy-in." The necessity of a cooperative approach also has precedent in the employee social media context—as several states prohibit employers from requiring employees to provide social media account usernames and passwords.
- Employers need to figure out how to address employees who may not own a mobile device for the app to be installed, or who are required to store personal devices or are otherwise not permitted to use them at a worksite.

[4] See section 5(a)(1) of the Occupational Safety and Health Act of 1970.

Access to contact tracing apps.

- This technology is readily available and commonly used in Asia. Not yet prevalent in the United States. But things will be changing soon. Microsoft has partnered with the University of **Washington** on a new app designed to help public health agencies.
- Google and Apple – two unlikely bedfellows, have planned use of ***Bluetooth Low Energy technology*** to inform individuals when they've been exposed to someone who has COVID-19. (the obvious question is, who else is getting this information and where will it be stored?)
    - ACLU and groups concerned about overreach and discrimination demanding a sunset on this technology after the pandemic, as there has been no exit plan being presented
    - Google and Apple have responded to those concerns with a transparent list outlining its **practices**, as well as its plans to disable the service at the end of the pandemic. ***And if you believe that one, I got a bridge to sell, going cheap.***

IN THE COVID-19 TRENCHES: NAVIGATING PRIVACY, CONCERTED ACTIVITY, BARGAINING AND EMPLOYEE ISSUES FOR RETURNING TO WORK.

The Arbitration Perspective: An Outline

Alan Symonette

Symonette ADR Services, Inc.

1. Introduction
    a. The purpose of discussion is to identify potential issues that may arise before an arbitrator because of bargaining unit employees being called back to work. These actions may have a significant impact on the bargaining unit and individual employee rights and benefits.
2. Arbitration Process
    a. In order to reach a prompt resolution of a return to work issue, parties may agree to expedite arbitration absent contract provisions. I have informally polled many of my colleagues who are engaged in expedited dispute resolution. There is a pattern. Currently arbitrators have been asked to expedite matters in:
        i. Health Care Industry:
            1. Disputes over PPE and hazard pay.
            2. For example: 1199 SEIU and health care institutions in NJ want to expedite the resolution of disputes related to pay for COVID 19 related absences [arbitrator said that there have been requests for early dates but to date none have gone forward to a hearing. They have settled most so far.]
        ii. Education
            1. Example: City of Chicago and Chicago Teachers Union. The portion of the bargaining unit consisting of School Clerks and Technology Coordinators being mandated to report in person. In this case the Union is challenging the decision based on the Health and Safety provisions of the CBA. Union wanted the arbitrator to issue a bench decision but agreed to brief the issue due to the presentation of expert testimony. That case is pending.
    b. Where there is no system to expedite dispute resolution it may take some time to have a arbitrator hear a case. In many instances it may take time to find an arbitrator who can take an immediate case and it becomes more difficult if the parties are insisting on an in-person hearing.
    c. Will certainly involve issues that the parties did not anticipate when the contract was negotiated.
3. Issues involving the entire bargaining unit.
    a. Nature of the dispute is dependent on the CBA and how the language will apply under the circumstances.

i. General rules of contract interpretation are designed to determine the intent of parties in adopting certain language. Issue however is that no one anticipated the impact of a pandemic on the relationship.
ii. Generally, management rights
    1. Employers have some discretion regarding the operations depending on contract language.
    2. Can Determine when and how employees are to be recalled to work.
    3. Question whether the layoff and recall language would be applicable.
    4. The Employer, absent contract language may Implement safety rules to address exposure concerns.
iii. Role of past practice - practice of dealing with emergencies may be relevant and a standard that an arbitrator may look to in interpreting employer action.
iv. What is the impact of any health and safety language in the CBA - unions have contested whether management has adequately protected the safety and health of employees?
    1. Where there is contract language, it usually creates an obligation on the employer to provide a safe workplace. Contract clauses requiring the company to make every reasonable effort to provide necessary and practicable safety measures has been construed as constituting the minimum obligation that the company had assumed for the safety and health of employee.
v. Decision to shrink the size of the workforce is usually a management right unless prohibited by contractual language.
vi. Impact on wages, benefit accrual and allocation
    1. Hazardous duty pay: In one example, in an instance where the contract provides for an environmental differential and hazardous duty pay, the employer was ordered to pay extra compensation to employees who were exposed to asbestos.
    2. What of those employees who remain absent because they are unsure the workplace is safe of they have been exposed and must quarantine?
        a. Are employees allowed to take paid vacation if they do not want to come immediately back to work?
        b. Issues of short- and long-term disability and the benefit's applicability to employees who
        c. Leaves of absence.

4. Issues pertinent to individual workers.
    a. Individual employee refuses to come to work results in the discipline of the employee.
        i. Insubordination and its elements. [Based on the principle that the employee should "obey now, grieve later."]
            - Defined as the refusal by an employee to work or obey an order given by the employee's superior.
            - Must be conscious willful and deliberate.
            - Order must be both specific and understandable

- Order must be both reasonable and work related.
- Given by someone in authority
- Aware of the consequences
- If practical employee must be provided time to correct behavior. exception of legitimate safety concerns
- Employee is not obligated to follow an order that threatens the employee's health and safety
    - In many cases, arbitrators have found that if the employee has a reasonable belief to fear for their safety, the discipline is not appropriate.

      The employer may not impose discipline. If the individual employee refuses to come to work, the employer may place the employee on leave (paid or unpaid)

Can employees be compelled to exhaust leave benefits if they decide to stay out of the facility.

Job abandonment

May depend on company policy of contract language.

Such language may be found in the seniority clause of the contract where language determines the circumstances when seniority is lost.