



# Labor & Employment Issues Client Alert

Pitta LLP  
For Clients  
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## WORKERS STRIKE OVER COVID-19 CONDITIONS

Citing unsafe and poor working conditions, workers at Amazon's Staten Island warehouse, grocery couriers at Instacart's national network, and Whole Foods workers in New York City have staged work stoppages and strikes. The workers are seeking improvements in their working conditions to protect them from the COVID-19 virus.

The strike at Amazon's Staten Island warehouse started after several workers tested positive for COVID-19 and the company failed to inform the workers about the spread of the virus throughout the facility. The workers demanded that Amazon shut down its warehouse so that it could be sanitized.

Gig Workers Collective, a group of gig worker activists, joined with Instacart grocery couriers (called Shoppers) to demand that the company provide its workers with protective equipment, hazard pay and expanded paid time off for workers. On Monday, March 30, the Shoppers walked off their jobs to press their demands.

The Whole Worker, an organizing group for workers at Whole Foods, demanded paid leave for workers who isolate or self-quarantine and other benefits. Other companies that are experiencing labor disputes related to COVID-19 include McDonald's, Family Dollar, Walmart and Perdue.

## NATIONAL LABOR RELATIONS BOARD ISSUES GUIDANCE ON "CRISIS BARGAINING"

On March 27, 2020, the National Labor Relations Board General Counsel, Peter Robb, issued guidance concerning the duty to bargain during emergencies. In Memorandum GC-20-04, the General Counsel reviewed a history of NLRB decisions addressing "crisis bargaining" scenarios while acknowledging that "we are [currently] in an unprecedented situation."

Ultimately, the memo addressed the question of how, if at all, an employer's duty to bargain under NLRA Section 8(d) may be affected by emergencies impacting the public at large versus emergencies impacting a particular employer. First, Robb addresses the Economic Exigency Exception to the Duty to Bargain. Generally, layoffs and reductions of hours are subjects of bargaining unless there is clear management rights languages or other provisions in a collective bargaining agreement. Ordinarily, this bargaining obligation extends to both the decision to lay off and its effects on the employees.

Robb finds exceptions to this general rule in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) and *RBE Electronics of S.D.*, 320 NLR 80, 81 (1995), where he noted that an exception to the general rule may exist if the employer can demonstrate that "economic exigencies compel[led] prompt action," emphasizing that the exception is limited to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *Port Printing & Specialties*, 351 NLRB 1269 (2007).

The employer must be able to show that the emergency was caused by external events beyond its control or were not reasonably foreseeable. The analysis is very fact-specific, with particular attention given to the exigent circumstances and whether bargaining over the employer's decision was possible or would have been useful. He emphasizes that even if the employer were excused from decision bargaining, "effects" bargaining will be required. However, when time is of the essence, negotiations "need not be protracted" to discharge the employer's duty. *RBE Electronics of S.D.*, 320 NLRB at 82.

Typically, long simmering financial problems do not qualify as such exigent circumstances. Thus, in *Hankins Lumber Co.*, 316 NLRB 837 (1995), the Board found that the employer violated its duty to bargain by unilaterally laying off employees at a lumber mill due to a months-long log shortage. The Board found that there was no "precipitate worsening" of the problem that required immediate action.

Conversely, the Board found economic exigencies sufficient to create a "dire financial emergency" excusing the employer's duty to engage in decision bargaining in the context of a public emergency similar to the COVID-19 pandemic. In the aftermath of 9/11, the Board held, in *K-Mart Corp.*, 341 NLRB 702 (2004), that the precipitating, unforeseen business impact on the retailer excused its duty to bargain over the resulting layoffs. In this case, the retailer experienced a 60% drop in business at one facility and overall losses so devastating that it was forced to file for bankruptcy by the start of 2002. The Board held that these circumstances were sufficient to excuse K-Mart's failure to bargain over its decision to lay off employees under the *Bottom Line* test.

Again, the duty to engage in effects bargaining remains even if the employer is relieved of the duty to bargain over the layoff itself. This is because while a decision to lay-off employees may be required to stem losses due to an imminent emergency, there is often ample time to discuss a layoff's effects after the emergency has been addressed.

Though the Board traditionally has applied the "economic exigency" exception to the duty to bargain narrowly, it has been satisfied where unforeseen events caused a major economic effect on the employer, such as a hurricane, 9/11, major sudden downturn in business, or loss of credit. General Counsel Robb is sending the message in this guidance that the current pandemic will very likely satisfy this standard and give employers a much lower bargaining obligation. Moreover, the mandatory effects bargaining need not be protracted.

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