



Labor & Employment Issues Client Alert

Pitta LLP
For Clients
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BARGAINING IN THE SHADOW OF COVID-19

On Friday, NLRB General Counsel Robb issued Memorandum GC 20-04 to the various NLRB Regional Directors, allegedly prompted by questions concerning bargaining obligations in light of COVID-19. The memo consists of summaries of Board decisions concerning bargaining obligations in alleged emergencies, divided into sections for public emergencies and individual employer emergencies.

While employers typically must bargain over changes to mandatory subjects of bargaining, an exception exists if an employer can demonstrate that “economic exigencies compelled prompt action.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The exception is narrow, limited to “extraordinary events which are an unforeseen occurrence, having major economic effect requiring the company to take immediate action.” *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). “Absent a dire financial emergency . . . economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action.” *Id.* Thus, employers are required “to show a need that the particular action proposed be implemented promptly.” *Id.* at 82.

The memo cites cases applying this standard to authorize layoffs and terminations of operations without bargaining. Cited cases, however, found violations of the NLRA when circumstances were not sufficiently extraordinary or involved a failure to bargain after the emergency ended. Another case, involving an employer’s modification to compensation during a hurricane, found a violation without clear consideration of the emergency exception.

The memo also refers to *Peerless Publications*, which exempts rules from mandatory bargaining that are: (1) “at the core purpose of the enterprise”; (2) narrowly tailored in terms of substance to meet with particularity only the employer’s legitimate and necessary objectives, without being overly broad, vague, or ambiguous; and (3) appropriately limited in applicability to affected employees to accomplish the necessarily limited objectives. 283 NLRB 334 (1987). GC Robb refers to an Obama Board decision declining to apply *Peerless* in the context of a hospital rule requiring nurses to take an antiviral medication or wear masks for flu-prevention. GC Robb’s summary includes reference to Member Hayes’ dissent seeking wider enforcement of *Peerless*, perhaps signaling GC Robb’s desire to do the same.

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