Lathrop GPM

BLOGS
COVID-19;Labor & Unions

COVID-19, Employee Protected Concerted Activity, and Labor Unions

The COVID-19 pandemic has drastically changed the landscape for all employers. Most have had to lay off or furlough a significant number of employees and institute other cost-cutting measures, such as salary decreases, discontinuation of 401(k) matching programs, and hours reductions. For those still operating, they face the challenge of keeping their employees safe while still meeting their customers demands, priorities that are not always aligned.

In this environment, labor unions have been fighting to insert themselves into these critical management decisions in the name of protecting their members. Additionally, in non-unionized environments, employers need to be aware of employees rights to engage in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA). All employees, whether part of a union or not, have rights to engage in protected, concerted activity under the NLRA. This includes banding together with other employees to complain about wages, hours, and working conditions.

Recently, non-unionized workers at Amazon and Instacart engaged in unauthorized work stoppages to protest what the workers viewed as unsafe working conditions. Generally, such work stoppages are protected under the NLRA, meaning an employer cannot lawfully discipline employees for walking off the job. However, if these work stoppages place an employers operations in sudden peril, they may lose such protection. Similarly, health care workers who put patients lives in danger by engaging in a work stoppage may not receive the protection of the NLRA. Ultimately, the facts and circumstances of the work stoppage and the effect on an employers business will determine whether such mini-strikes are lawful. For unionized employees, most work stoppages will be unprotected under a No Strike clause in a collective bargaining agreement.

Many labor unions have tried to demand a say in employers decision-making processes during the COVID-19 crisis by claiming there is an obligation to bargain with them over the response to the pandemic. However, there is no emergency exception inherent in the duty to bargain. Whether management has a duty to bargain over implementing various employment-related decisionssuch as layoffs, salary cuts, and changes in benefitsis determined by the parties collective bargaining agreement. If there is no basis for re-opening matters that have already been collectively bargained, then an employer has no obligation to do so. Further, if the collective bargaining agreement provides an employer with flexibility on such items as scheduling, layoffs, and work assignments, then an employer may exercise its rights unilaterally. Of course, there may be situations where it would be prudent to at least advise the union before implementation, but there may be no automatic requirement.

Similarly, some unions have issued information requests related to the changes being implemented (or not implemented) in response to COVID-19. Here, while employers may have an obligation to properly respond to such requests if they pertain to the bargaining unit, but aside from providing information, there is no absolute duty to bargain over such changes.

Beyond a demand to bargain over the response to COVID-19, unions have also been active trying to put pressure to provide hazard pay or other non-standard benefits and premiums to workers. For example, the Service Employees

International Union (SEIU), has been circulating a petition asking hospitals to use their CARES Act funding to provide raises to nurses and other health care workers.

During this time of constant change and uncertainty, communication with employees will be crucial, whether union or non-union. Employers should develop a clear communication plan and quickly and completely respond to employee concerns. Employers should also avoid making rash, emotional decisions in response to employee protests, as such protests may be protected. And finally, consulting with experienced labor counsel as issues arise is always a prudent choice.