Strategic Perspectives

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STRATEGIC PERSPECTIVES—Managing labor relations in a COVID-19 environment: Q&A with Fisher Phillips

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From bargaining negotiations and management rights, through return to work and protected concerted activity, managing labor relations has always required skill, tact, and a deep understanding of the law. Now, however, the unique challenges of managing in a COVID-19 environment—with no clear end in sight—have greatly complicated many aspects of the relationship between management and employees—whether or not the workplace is unionized.

Below, Fisher Phillips partners Kerry Martin and Letitia Silas answered a handful of questions posed by *Labor & Employment Law Daily* addressing these labor relations challenges.

Q. How is negotiating with a union and operating under a collective-bargaining agreement different during this COVID-19 pandemic? What are the top issues and concerns?

What do unions want? On the heels of the COVID-19 crisis, unionized employers are experiencing an uptick in petitions for enhanced terms and conditions of employment that are not embodied in a collective-bargaining agreement (CBA). Increasingly, unions are demanding mid-term contract modifications in the form of premium pay (sometimes referred to as "hazard pay"), additional leave, certain Personal Protective Equipment (PPE), and specific workplace safety measures.

Employers should refrain from summarily dismissing such demands. While a unionized employer need not accede to a union's every demand for mid-term contract modifications, it may be worthwhile to consider one-off, non-precedential departures from the CBA (generally memorialized in separate memoranda of understanding) – particularly in light of changed circumstances.

Meet and confer. It's also worth noting that the National Labor Relations Board has not relaxed the requirement to meet and confer with the union to reach a new or renewed collective-bargaining contract during the COVID-19 crisis. Shelter-in-Place and Stay-at-Home orders,

Centers for Disease Control (CDC) guidelines, and social distancing requirements have unquestionably impacted that process which is traditionally done in-person.

Virtual options. Faced with a "new normal" for conducting affairs, employers and unions are increasingly turning to virtual options for negotiations. For example, they are exchanging proposals by email and conducting bargaining sessions via teleconference or video-conference. These virtual options present their own set of unique challenges, and employers should carefully consider which option is best under the circumstances. Also, it is important to remember that remote negotiations may present some of the same issues that arise with in-person negotiations, such as questions concerning meeting times, ground rules, participation by additional committee members, and use of a mediator or court reporter.

Attempting to effectively manage a workforce under a collective-bargaining agreement negotiated in a pre-pandemic environment can be difficult and present many operational challenges for employers to the extent they now require greater operational flexibility.

Q. What kinds of unilateral actions are employers taking, and why? What are the risks, if any?

In response to the COVID-19 outbreak and extraordinary measures taken to prevent its spread, many unionized employers may have to take prompt action to comply with legal mandates (such as closure orders) or to safeguard the workplace against exposure. The unilateral action that these employers might take depends on a myriad of factors including: the type of business and needs involved, the specific facts prompting the action, the terms of an applicable CBA, and legal requirements.

Legal mandates. As the spread of the virus became a greater concern, some commonly reported unilateral actions include layoffs, change in work location and/or schedules, and the institution of rules requiring disclosure of COVID-19 infection or exposure, mandatory temperature checks or COVID-19 testing, and adherence to new or enhanced hygiene and sanitation requirements, including wearing PPE.

Depending on applicable CBA terms and the particular facts, unilateral action could expose an employer to significant legal risks including:

- Grievances for non-compliance with terms of the CBA
- Breach of contract (the CBA) claims
- Unfair labor practice charges under the National Labor Relations Act for failure to give the union notice and an opportunity to bargain over changes in terms and conditions of employment

Management rights. Unionized employers may be privileged to take unilateral action based on Management Rights or related CBA language. A typical Managements Rights provision reserves to the employer the right to change employment terms without engaging in decisional

bargaining. Additionally, the union may have agreed to CBA language waiving its right to bargain over certain decisions. Absent an additional waiver on "effects bargaining," however, an employer must still give the union advance notice and an opportunity to bargain over the effects of the change prior to implementation.

In some instances, an employer's unilateral action may be excused where it can demonstrate that economic exigencies compelled prompt action in response to extraordinary and unforeseen events. However, the law is also clear that once the economic exigency subsides, the employer must still give the union an opportunity to bargain over the effects of its decision.

Before taking unilateral action, legal counsel should therefore be consulted to strategize about the decision, courses of action, and whether or not the economic exigency exception is available.

Q. What are an employer's options if an employee refuses to return to work? What safety concerns might justify an employee's refusal to return to work? Is there a difference between what an employer is legally entitled to do and what actions are recommended?

The employer's options in response to a refusal to return to work depends on several factors, including the articulated basis for the refusal, the employer's policies, whether there is a CBA in place, and on applicable federal, state, and local law. For example, an employee might refuse to report to work because they are eligible for federally mandated emergency paid sick leave, emergency FMLA, or other leave required by law. They might refuse to report to work due to serious safety concerns. Or, they may refuse to report for work because the CBA permits them to do so.

Imminent danger. Under the Occupational Safety and Health Act, employees may refuse to work only if they reasonably believe they are in imminent danger of death or serious physical harm or have "a reasonable expectation that toxic substances or other health hazards are present and exposure to them will shorten life or cause substantial reduction in physical or mental efficiency." "Imminent," means that the employee reasonably believes that death or serious physical harm could occur within a short time, for example, before OSHA could investigate the problem. Requiring travel to high-risk and restricted geographic areas or to work with patients in a medical setting without personal protective equipment may meet this threshold.

Protected concerted activity. Under the NLRA, employees who raise common issues concerning wages, hours, or other working conditions are generally engaged in protected concerted activities (or "PCA") for mutual aid or protection – regardless of whether they are unionized. Against the backdrop of the COVID-19 pandemic, emerging forms of PCA include coordinated work stoppages and refusals to work. Non-union employees, as well as unionized employees operating without a "no-strike" provision, can lawfully engage in a collective work stoppage or refusal to work by simply articulating a generalized fear of contracting COVID-19 in the workplace.

On the other hand, unionized employees subject to a "no-strike" clause must demonstrate through "ascertainable, objective evidence" that "abnormally dangerous conditions" existed in order for their conduct to be protected. If an employee's refusal to work is not otherwise protected, an employer may consider disciplinary action up to and including termination. If the employee is covered by a CBA, the employer should nonetheless follow its disciplinary procedures. Where there is no CBA, the employer should adhere to its own policies and procedures. In all cases, employers should act consistently and ensure that disciplinary actions do not run afoul of federal, state, and local anti-discrimination laws.

Workplace safety. Many workplace safety precautions are recommendations as opposed to legal mandates. However, as states begin phases of reopening, some public officials have now mandated that workplaces adhere to certain safety and social distancing requirements.

This guidance is general, and employers should engage appropriate counsel to determine if circumstances exist that would protect an employee's refusal to return to work.

Q. When confronted with a workforce that is divided—some are effectively working from home, while others cannot do so and are desperately seeking a reopening of their jobs—how does an employer handle the possibility of protected concerted action on both sides of the issue of return to work?

As noted above, the NLRA extends the right to engage in PCA concerning employment terms and conditions. In addition to work stoppages and refusals to work discussed above, other prevalent forms of PCA during the COVID-19 crises have included demands for premium pay or improved working conditions, public protests, and other public appeals via news and social media. Whether unionized or not, all businesses operating during these unprecedented times should understand their legal rights and obligations when confronted with these pressure tactics.

Employers finding themselves with a workforce divided over issues related to returning to work must take care to avoid improper action against one group or the other because of protected activity. Disciplining or treating employees adversely in response to such activities is likely to constitute an unfair labor practice under the NLRA.

Q. What steps can employers take to minimize the potential for employee job actions, union organizing, or related activities resulting from COVID-19 anxiety about the safety of the workplace?

Many of the steps that can be taken will depend on your business, the job classifications involved, and the level of risk posed to employees based on those classifications. However, some general steps that all employers should consider include:

- **Develop a tailored safety plan and protocols:**

OSHA's recently published Guidance on Preparing Workplaces for COVID-19 is a great resource for developing your plan and safety protocols. Those steps include:

- ✓ Develop an infectious disease preparedness and response plan
- ✓ Prepare to implement basic infection prevention measures
- ✓ Develop policies and procedures for prompt identification and isolation of sick people, if appropriate
- ✓ Develop, implement, and communicate about workplace flexibilities and protections
- ✓ Implement workplace controls
- ✓ Follow existing OSHA standards

OSHA's guidance divides job tasks into four risk exposure levels and provides useful guidance for determining the appropriate engineering, administrative, and workplace practices, along with any necessary PPE for each risk level.

In addition to OSHA's guidance, you should also consider the following steps:

- **Communicate with employees and, where applicable, union representatives:** Employees want to see and recognize your commitment to workplace safety. Consider drafting a statement reinforcing that commitment. Keep the lines of communication open to stay informed about employee concerns and get ahead of matters before they escalate to job actions, union organizing, or other related activity. If your employees are represented by a union, consider scheduling collaborative labor-management meetings to discuss workplace safety concerns and issues.
- **Designate a taskforce:** Consider establishing a designated task force comprised of key leadership officials in your organization responsible for infection control and safety, employee relations (including concerns regarding availability and appropriateness of available PPE), and reporting confirmed or suspected COVID-19 cases to appropriate authorities.
- **Train leadership and employees:** All managers, staff, and employees should be trained on appropriate infection prevention and control, use of PPE, and adherence to safety rules and procedures.
- **Establish and/or update policies mitigating against transmission:** Establish and/or update policies that safeguard against transmission and spread of the COVID-19 virus. Relevant policies may include disclosure of COVID-19 infection or symptoms, mandatory testing, reporting non-compliance with safety protocols, telework, flexible work schedules (e.g. staggered shifts), facility access (visitors, etc.), shared equipment (e.g., computers, office printers, cell phones, etc.), and sick leave.

- **Enlist the assistance from legal counsel if necessary:** Federal and state guidance and mandates related to COVID-19 are constantly evolving. As states lift their stay-at-home orders and begin phased reopening, it is important to stay informed of legal rights and obligations in connection with efforts to minimize the risk of employee, staff, and client exposure.

Q. To what extent are employers actually implementing testing? (checking temperatures, testing for active infections, or testing for antibodies?) What would satisfy the reliability requirement in testing? What are the potential liabilities in testing?

There is no empirical data showing the extent to which employers are implementing COVID-19 testing at the present time. As they prepare to reopen, however, many employers are considering return-to-work testing measures. Any such testing raises a number of legal issues. On April 23, 2020, the Equal Employment Opportunity Commission updated its guidance on the Americans with Disabilities Act, stating that employers may administer tests for the presence of the virus if certain conditions are met. Specifically, employers should ensure that the testing is:

- **Consistent with the ADA.** Any mandatory viral testing for COVID-19 must be job-related and consistent with business necessity.
- **Accurate and reliable.** The EEOC encourages employers to consult the latest guidance from the Food and Drug Administration (FDA), the CDC and other public health authorities. For its part, the FDA has issued FAQs stating that it "is not aware of an antibody test that has been validated for diagnosis of COVID-19 infection. While FDA remains open to submissions of these tests for such uses, based on the underlying scientific principles of antibody tests, we do not expect that an antibody test can be shown to definitively diagnose or exclude COVID-19 infection."

Because viral testing only detects current infection, employers should still require that employees observe infection control practices (such as social distancing, regular hand-washing and other measures) at work to prevent transmission.

Q. How have you advised eligible firms to determine whether or not to participate in CARES Act loan forgiveness programs due to the requirements with respect to union neutrality and no "abrogation of collective bargaining agreements?"

Mid-sized employers with between 500 and 10,000 employees are eligible to apply for loan assistance under the Emergency Relief and Taxpayer protections portion of the CARES Act. An employer receiving this loan assistance must make a "good-faith certification" that it will comply with certain requirements including, among other things, that the borrowing employer:

(1) will not "abrogate" an existing collective bargaining agreement for the term of the loan and for two years after completing repayment of the loan; and

(2) will remain "neutral in any union organizing effort for the term of the loan."

Unlike the Paycheck Protection Program (which only applies to employers with 500 or fewer workers), this particular loan program does not provide for loan forgiveness.

Agreeing to the non-abrogation provision may impede an employer's efforts to engage in concessionary bargaining during the term of its collective-bargaining agreement. Additionally, agreeing to the "neutrality" provision could impose significant restrictions on an employer's conduct beyond those imposed by other federal labor laws and regulations imposed by agencies such as the NLRB. A business subjecting itself to these terms may therefore limit the extent to which it could otherwise resort to its lawful "free speech" rights under these circumstances.

An employer's decision to apply for and receive loan funds under the CARES Act will be based upon its unique business needs, objectives, and priorities. However, based on the far-reaching implications of the "non-abrogation" and "neutrality" certifications, employers should seek appropriate labor law counsel before agreeing to these provisions as a pre-condition to receiving loan funds under the mid-sized employers loan assistance program.

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About the attorneys:

Kerry Martin is a Labor Relations partner at the national labor and employment law firm Fisher Phillips. He represents employers in all aspects of traditional labor relations working with clients on everything from union avoidance advice and counseling to defending management in Unfair Labor Practice proceedings, and representation and decertification proceedings before the National Labor Relations Board.

Letitia Silas is a partner at the national labor and employment law firm Fisher Phillips where she is a member of the firm's Labor Relations and Healthcare teams. As the former Director of Labor Relations at Howard University and Howard University Hospital, she has extensive experience managing large complex workforces and leverages that unique skill to counsel her clients on workplace issues that arise amid the COVID-19 pandemic.