



# **NLRB Issues Two More COVID-19 Advice Memos On Remote Bargaining And Hazard Pay**

Insights

12.23.20

The NLRB recently issued a pair of advice memos governing the obligation of parties to engage in remote collective bargaining and to negotiate over the concept of hazard pay in the context of the COVID-19 pandemic. These memos offer a glimpse into how the agency may address similar issues moving forward, and are thus valuable sources of information for employers. While the letters were both issued in mid-November, they were not released to the public until December 14. What can employers learn from these advice memos?

## **Good Faith Bargaining May Not Require Remote Negotiations**

In a November 18 advice memo, the NLRB considered whether a union representing nurses and nurse practitioners failed to bargain in good faith for a successor agreement. Just before contract expiration, the parties agreed to an extension in anticipation of a proposed merger between the employer and another entity. The extension provided for continuation of the existing agreement “while negotiations continue” for a period of one year, allowing either party to terminate it upon 30 days’ written notice.

The union subsequently declined to meet virtually, stating that it was unable to do so due to other pandemic-related demands. The parties did, however, exchange substantive contract proposals via email, and conferred by phone with a mediator. The union ultimately gave notice of its intent to terminate the extension and proposed in-person meeting dates to continue the bargaining process in the interim.

The employer responded with bad faith bargaining charges, but the NLRB concluded that while the extension agreement “anticipated that negotiations would continue,” the union fulfilled its legal obligations in this case. Specifically, the agency found that, although the union declined to bargain remotely on two separate occasions, the parties effectively bargained by email (and by virtue of a telephone conference with the mediator).

The agency went on to find that the parties subsequently resumed face-to-face negotiations after the union gave notice of its intent to terminate the extension. Therefore, the NLRB concluded that the union satisfied its duty to bargain in good faith and recommended dismissal of the charge.

## **Employer Need Not Agree To Reopen Contract For Hazard Pay Negotiations**

In another recent advice memo issued on November 13, the agency found no violation of the duty to bargain in good faith when an Arkansas pipe maker refused a union request to negotiate over hazard pay for bargaining unit members. The agency found the employer had no obligation to engage in midterm bargaining over the union's proposals because the collective bargaining agreement specifically addressed wages.

Referring to long-standing precedent, the NLRB noted that parties to a collective bargaining agreement need not negotiate over issues that are expressly covered in that agreement, absent express "reopener" language empowering the parties to insist upon midterm negotiations. This means that one party is under no obligation to accede to demands of the other to bargain over covered issues during the life of the agreement.

Additionally, parties often negotiate "zipper clauses" into a collective-bargaining agreement – thereby waiving their right to demand midterm bargaining over matters not otherwise covered by the contract. In this case, the NLRB found that the collective bargaining agreement already addressed wages, and even to the extent that the wage provision arguably left open the subject of hazard pay, a zipper clause effectively blocked further negotiations.

However, the NLRB made clear that these factors did not operate to permanently bar the union from demanding bargaining, as the contract may nonetheless permit either party to reopen by serving notice on the other prior to contract expiration. If the union timely provides such notice (generally within 60 to 90 days), the employer would then be required to negotiate over hazard pay on the basis that it otherwise constitutes a mandatory subject of bargaining.

### **Where Will The NLRB Go From Here?**

These most recent advice memos represent yet another step toward evaluating the bargaining obligations of parties in the midst of the pandemic. This past March, the NLRB's office of the General Counsel issued guidance pertaining to rights and duties of employers to bargain with unions over COVID-19 related challenges under the agency's "exigent circumstances" standard.

As the agency ultimately shifts to Democratic control over the next several months, it remains to be seen whether it will continue moving in this same direction in the short term and beyond. Fisher Phillips will continue to monitor these developments over the next four years and provide updates as appropriate. In the meantime, make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For assistance with these and related issues confronting unionized employers, we would encourage you to consult with your Fisher Phillips attorney or any other member of our Labor Relations Practice Group.

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*This Legal Alert provides an overview of specific developments. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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