



# COVID-19 Guidance And FAQs For Unionized Employers

Insights

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The Fisher Phillips COVID-19 Taskforce has assembled this guidance document, containing answers to a series of Frequently Asked Questions, especially designed for unionized employers. The Taskforce also maintains a [Comprehensive And Updated FAQs For Employers On The COVID-19 Coronavirus](#) on a daily basis for other workplace-related issues.

## GENERAL ISSUES

**My workforce is unionized. Can my company make changes to unionized employees work schedules or duties in response to the COVID-19 coronavirus?**

The National Labor Relations Act (NLRA) imposes on employers the duty to bargain in good faith over mandatory subjects of bargaining such as wages, hours, and terms and conditions of employment. Generally speaking, employers who make unilateral changes to these facets of employment may be subject to unfair labor practice charges that would apply even in emergency situations such as this one, unless your collective bargaining agreement provides otherwise. Many collective bargaining agreements contain provisions that allow for employer flexibility in determining work assignments, scheduling, and layoffs. The first authority for determining your rights and obligations is your own collective bargaining agreement.

**I have a “force majeure” clause in my contract. Does it cover an outbreak such as the COVID-19 coronavirus?**

Possibly. A “force majeure” clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. Whether an outbreak like the COVID-19 coronavirus triggers the force majeure clause in a contract, and the effect of that clause on the provisions of the contract, will vary significantly with each employer.

**There is no force majeure clause in my contract. Does that mean I still have to abide by all of the contract provisions during the outbreak?**

The general duty to bargain over changes in contractual terms may be suspended where compelling economic exigencies compel prompt action. The law views “compelling economic exigencies” as extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action and make a unilateral change.

Although an outbreak like the COVID-19 coronavirus would seem to fit the description of a “compelling economic exigency,” realize that its effect will be different for every employer. That is, while it may suspend the duty to bargain for one employer whose only facility was infected, it will likely not suspend the duty for an employer that has lost significant accounts or contracts as a result of the outbreak. In practice, the safest course of action (and the one most likely to avoid future litigation) is to notify the union in all cases, even if you believe that your particular situation fits into the “compelling economic exigency” category.

### **How much notice do I have to give the union before I make a change to my contract?**

The law requires employers to give the union “adequate” notice of a proposed change to the collective bargaining agreement, so as to engage in meaningful bargaining over that change on request. There is no hard and fast rule as to how much notice is adequate. But where an employer can show a need for a prompt change and time is of the essence, a notice period as short as a couple of days might be considered adequate under the circumstances.

### **Wouldn't our no-strike clause prohibit bargaining unit members from refusing to work?**

That would likely depend on a host of factors ranging from the articulated rationale for withholding services to specific language within the no-strike clause itself. Most such provisions effectively preclude covered employees from striking or otherwise refusing to perform work as scheduled. By the same token, long-standing labor relations doctrine generally requires bargaining unit members to, “work now, and grieve later.”

That being said, such provisions do not necessarily trump those aspects within Section 13(a) of the OSH Act entitling all employees to refuse to work if they reasonably believe they are in imminent danger, and compelling employees (particularly in high risk industries) to report for work under such circumstances may also present adverse public relations implications. Consequently, circumstances like these are best examined on a case-by-case basis under advice of counsel and – in some circumstances, following dialogue with the authorized bargaining representative.

### **Can the union strike if we refuse to make any changes to our CBA in light of the COVID-19 crisis?**

Probably not. Most collective-bargaining agreements (CBAs) contain no-strike provisions prohibiting unions from striking in support of demands for changes to the agreement. Because parties are not required to make mid-term CBA changes, it typically would be illegal for a union to strike under these circumstances.

### **We need to modify employee schedules and work hours in response to the COVID-19 pandemic, but our CBA appears to prohibit us from doing so. What can we do to implement these necessary changes?**

In the absence of CBA language expressly allowing unilateral modification of such policies, the employer may do so only with the union’s consent. While it is acceptable for either party to propose mid-term modifications, the other side is not required to agree (or even bargain over it). Importantly, in times like these, you should stress to the union how critical it is to secure necessary changes to avoid the prospect of potential layoffs or shutdowns in the short term.

**The union is asking us to sign Letters of Understanding and related documents that would require us to make changes to things like our attendance and layoff policies. Do we have to sign these? How should we respond?**

You should carefully scrutinize any union demand to change existing policies (even under the current circumstances), especially if those policies are outlined in a CBA. Employers generally do not have an obligation to bargain over policy changes mid-term and therefore would have no obligation to sign a Letter of Understanding changing such policies on demand. While either party may propose a mid-term contract modification, the other side is not required to agree (or even bargain over it) at that stage of the process.

If, on the other hand, the union is responding to new policies addressing COVID-19 concerns, and the subject matter falls outside the CBA, the union would potentially retain the right to bargain over implementation and the effects on unit employees. If no CBA is in effect and you are confronted with a union proposal to change existing policies, you will most likely be obligated to bargain in good faith over the proposed change but not to automatically make any changes on demand.

## **WITHDRAWAL LIABILITY**

### **UPDATED QUESTION & ANSWER (March 23, 2020)**

**We are laying off many of our bargaining unit employees who participate in a multiemployer pension plan. Will this result in withdrawal liability?**

Probably not. A withdrawal is normally not triggered unless an employer *permanently* ceases contributions to a multiemployer pension plan on behalf of its bargaining unit employees. A temporary layoff would not be a “permanent” cessation.

However, care must be taken if the employer does not intend to rehire some of the bargaining unit, or if it plans to close a contributing facility or shift production to other locations that do not contribute to the plan. A combination of these actions can trigger a partial withdrawal and partial withdrawal liability if the employer is not careful. Partial withdrawals can also take place if an employer’s contributory hours or weeks fall by more than 70%. However, this reduction must continue for three years before a partial withdrawal is triggered.

## **BARGAINING**

**We are now bargaining for a new CBA. Are we obligated to continue meeting at reasonable times and places for bargaining purposes?**

Yes. Absent any emergency guidance by the NLRB, the parties are generally required to continue engaging in good faith negotiations for a new agreement. The good faith requirement, however, does not impose a minimum standard in terms of frequency, duration, or even nature of bargaining sessions, and things such as schedules, safety concerns, and inability to travel may be taken into account if the NLRB is ever called upon to evaluate whether a party engaged in good faith bargaining during the COVID-19 pandemic.

To best protect your interests under these unique circumstances, you are encouraged to regularly communicate with the union regarding your desire to further the bargaining process and explain any operational or business challenges that may pose constraints on the ability to meet and negotiate. As always, if the union suggests a bargaining date that does not work from a logistical or operational standpoint, be sure to articulate (preferably in writing) why, and be prepared to consider alternatives, including telephonic conferences or Skype sessions. The key to avoiding bad faith bargaining allegations is to stay engaged and communicate on a proactive basis.

## **UNION ELECTIONS**

### **UPDATED ANSWER (April 2, 2020)**

**Our organization recently received a union representation petition, and the NLRB has since scheduled a secret ballot election. Is that election likely to go forward as scheduled?**

On April 1, 2020, the NLRB announced that it would not extend its temporary suspension of representation elections beyond April 3, 2020, and will instead resume conducting elections beginning Monday, April 6, 2020.

On March 19, the NLRB had ordered that all representation elections (including mail ballot elections) scheduled for the following two weeks were suspended until April 4 due to circumstances surrounding the COVID-19 pandemic. The NLRB's most recent announcement states that appropriate measures are available to permit elections to resume in a safe and effective manner, as determined at the discretion of the local Regional Directors administering the elections. The NLRB offered no further guidance as to how the Regional Directors will exercise this discretion. Therefore, employers are encouraged to closely monitor this situation for further developments.

## **UNFAIR LABOR PRACTICE CHARGES**

**We are in the process of responding to an unfair labor practice charge. Will the NLRB continue to investigate it during the COVID-19 crisis?**

Yes, but the field investigator will not conduct any on-site or in-person activities at this time. On March 16, the Board announced agency-wide telework for most employees until at least April 1, 2020, and as with its order on representation elections, the agency may extend this one as well.

Most Regional offices currently remain open to the public, but only for limited hours (10:00 a.m.-2:00 p.m.) with sufficient staff to handle incoming and outgoing mail. The agent investigating your unfair labor practice charge may request telephonic affidavits, and they will likely continue to send letters and make phone calls asking for information related to the charge. If your business is shut down, you may be able to secure deadline extensions, but there are no assurances that such requests will be granted.

## **INFORMATION REQUESTS**

**A labor union representing some of our workers has sent us an information request seeking a number of items, ranging from a copy of our COVID-19 business plan to detailed information about how we intend to manage the crisis. Are we required to respond?**

If you maintain unprivileged documents fitting these descriptions, you would likely have to furnish them to the extent they otherwise relate to employment terms and conditions. Therefore, you should consider consulting with legal counsel before embarking upon the development of any strategic plans to address COVID-19 issues. If you have already developed a plan and no privilege applies, it may still raise certain confidentiality concerns, especially within the healthcare industry (where patient privacy laws may also apply).

## **NEW FEDERAL LEGISLATION ON FMLA AND PAID SICK LEAVE**

**Does our CBA exempt us from complying with new federal emergency FMLA expansion and paid leave requirements or related federal provisions that may soon be implemented?**

Probably not. The [Families First Coronavirus Response Act](#) (which applies to employers with less than 500 employees) states that its provisions may not operate to “diminish” benefits within pending CBAs. It does not, however, exempt those CBAs from meeting the new legal requirements. This is consistent with how the FMLA and other employment-related statutes such as Title VII operate.

Generally speaking, a CBA can provide greater protection than that afforded by law, but it cannot provide less protection. Nonetheless, the [Families First Coronavirus Response Act](#) does permit employers covered by multiemployer bargaining agreements to make additional contributions to their multiemployer trust or benefit plans in lieu of offering the new paid leave.

## **CONCLUSION**

For now, we will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our [Labor Relations Practice Group](#), or [any member of our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

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

## **Related People**







**Steven M. Bernstein**  
Regional Managing Partner and Labor Relations Group Co-Chair  
813.769.7513  
[Email](#)

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**Michael D. Carrouth**  
Partner  
803.255.0000  
[Email](#)

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**Clyde H. Jacob, III**  
Senior Counsel  
504.312.4424  
[Email](#)



**Reyburn W. Lominack, III**

Partner

803.255.0000

Email



**Todd A. Lyon**

Partner and Labor Relations Group Co-Chair

503.205.8095

Email



**Stephen C. Mitchell**  
Regional Managing Partner  
803.255.0000  
Email

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