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# DONATING, RESEARCHING AND DEVELOPING: ABBVIE JOINS THE FIGHT AGAINST COVID-19

# AFTER THE PANDEMIC: GETTING BACK ON TRACK WITH UNION EMPLOYEES

VEDDER PRICE LLP

As stay-at-home orders relating to the COVID-19 pandemic are relaxed, employers seeking to establish a new normal in their businesses have to consider the role labor unions will or could come to play in their organizations.

Employers whose workforces are already represented by labor unions are likely to face bargaining demands over issues such as the recall of employees, health screenings, additional pay, scheduling, paid time off and/or staffing reductions. Employers who do not currently have labor unions could face a different set of challenges as labor unions seek to exploit the pandemic for organizing.

## Unionized Employers

Create a Plan to Measure Against Your CBA. The starting point for every unionized employer is an operational plan for reopening. Your plan needs to consider a wide range of issues, including changing schedules (for social distancing or other operational reasons), wellness checks, PPE, layoffs, and any other potential issues. That game plan then needs to be measured against the benchmark of your collective bargaining agreement to determine what you can do on your own and what needs to be bargained. Even if you do not want or need to make changes, unions and the employees they represent may have different ideas and demand to bargain over issues such as additional pay (often called hazard or "hero" pay), additional leave time for those who may need testing, and/or PPE and other measures to reduce the ongoing risk of infection. Whether employers are obligated to bargain over union issues (or want to bargain even if not required) turns on an analysis of your interests and contract rights.

Compare your plan to CBA requirements. Start by comparing what you want to do with fixed rules in the CBA. Is there something that the CBA expressly prohibits? Such rules can be found throughout the CBA, and generally override more general management rights. For example, early starts to avoid overlapping shifts can conflict with rules fix-

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ing shift times. Hours reductions could violate minimum hours guarantees. Furloughs might be contrary to layoff provisions.

Approach your union for relief if you need it. When express rules limit your ability to act, you must follow the contract rule or approach your labor union before acting to discuss temporary relief. For example, it is rare that employers can reduce pay on their own. Plan for those conversations. If you explain your needs and how they could benefit employees, many unions will grant temporary contract relief or trade for it. But coming to a union only after you have made a change you did not have the right to make rarely goes well and can lead to backpay or other remedies in arbitration. Be proactive.

Even if your CBA is silent, make sure you have an express right to act unilaterally. Even if your CBA does not limit your right to make changes, make sure that it affirmatively grants you the right to act on your own. Under federal labor law, employers are obligated to bargain before making changes to terms and conditions of employment unless a reasonably clear CBA provision grants employers the right to make changes. These can be found in a management rights clause but are often sprinkled elsewhere in a CBA as well. For example, a safety clause may provide a basis for conducting temperature checks. A bidding clause may give rights to change start times. But beware management rights clauses that afford you only a generalized right to "run the business" or "manage the operation." General statements like these, without more, are rarely enough.

Bargaining does not have to be onerous. Many employers shy away from asking unions for changes they need. But midterm bargaining is often straightforward. Even if it is not and the union declines to agree, employers may be able to act where the CBA is silent after completing bargaining. There are some limitations. Ensure your CBA does not contain a zipper clause waiving the union's obligation to bargain during the term of the CBA. You must also bargain to what is called an "impasse" which requires you give the union a chance to be heard and answer its questions. But it does not require actual agreement.

Keep the union informed of controversial changes even if you do not have to bargain. Often it makes sense to keep your union informed of your plans. You can often get the union on board and avoid issues if employees later call the union to complain. Even if the union disagrees, it may help you identify issues and prepare for grievances.

What if the union has demands? In many cases, unions will have their own demands when employers restart or reconfigure. Take your time reviewing these and evaluate what is in your interest.

As to subjects already addressed in the CBA, employers rarely have an obligation to agree or even to bargain. That is particularly true for matters such as hazard pay and expanded sick leave, since pay and benefits were already bargained. But that does not mean that you should always say no. In some industries, your competitors may be offering those benefits. You may need to make changes to retain employees or calm fears. They key is deciding what is best for your business.

If you are open to something, it is also important to consider asking the union for what you need in return. Unions have a transactional view of labor relations. Trading hazard pay or expanded leave for something you want can make it easier for the union to give you relief on other needs.

If agreement is not possible, consider whether the union has other ways to force you to act. For example, unions can and often are filing complaints with OSHA where they feel PPE, social distancing, physical barriers, and/or wellness screening by employers is inadequate. Unions can also file grievances and arbitrate safety under some CBA provisions. Again, the best practice is to proceed thoughtfully after reviewing the issues and the reasonableness of the request.

Can employees strike? Both represented and unrepresented employees may have the right to walk off the job in some circumstances, particularly if they face unreasonable working conditions. When conditions are dangerous, that can be true even if you have a current no-strike clause. But not every concern rises to that level. Represented employees covered by a no-strike clause would have to prove both that the conditions they faced were unreasonably dangerous and that they subjectively feared for their safety. A strike by represented employees to extort additional wage or benefit concessions would likely not be protected.

Do you have to provide information to unions? Many unions are requesting information about employer pandemic responses and will continue to do so, particularly if there is a second outbreak. In general, unionized employers have a broad obligation to provide information about members of the bargaining unit, including information about PPE and other measures implemented to prevent infection and the identity of employees who have been infected. Rather than simply saying no, use these opportunities to educate the union on what you are doing and how well you are doing it.

## Don't Forget about Your Non-Union Employees

Unrepresented employers also need to be vigilant regarding unions. Unions are always looking to expand. And the pandemic allows unions to play on employee fear, uncertainty, and desire for concessions such as hazard pay to create unrest and obtain support for representation elections.

Non-union employers should carefully evaluate their vulnerabilities to unionization and whether they can and should get in front of the union on core issues. The keys to avoiding unionization risks are well known. Most importantly, keep your employees informed and engaged in what you are doing. Listen. Be visible and responsive when concerns are raised. Address legitimate concerns about issues such as PPE, social distancing, and scheduling. Explain why when you say no. Employees most often turn to a union when they perceive that management is not listening and/or acting unreasonably.

In the event that a union files a representation petition, the good news for employers is that the National Labor Relations Board, the federal agency that runs elections, recently enacted changes to the election process. The upshot of the new rules, which became effective on June 1, 2020, is that there is a longer period of time between the filing of a petition and an election. That will give employers additional time for campaigning, which is already difficult when you are socially distancing.

In the event of repeated outbreaks, appropriately planning now will give employers a blueprint for effective responses in both unionized and non-union workplaces. ◆