Employee Relations
LAW JOURNAL

Collective Bargaining in the Aftermath of COVID-19

Henry E. Farber and Nicole Mormilo

The authors identify and explore issues stemming from COVID-19 that they expect to arise during labor negotiations.

Even with the effects of COVID-19 still reverberating across the economy, collective bargaining agreements will expire, new units will gain bargaining rights, and the National Labor Relations Act ("NLRA") will still require good faith bargaining by both parties. The financial turbulence caused by COVID-19 will heighten tensions and create significant disruption in upcoming labor negotiations. In this article, we will identify and explore issues stemming from the parties' experiences with COVID-19 that we expect to arise during labor negotiations.

Looking past how COVID-19 may or may not change the process of collective bargaining, our discussion will instead concern the subjects of those negotiations. We do not intend to determine how these issues should or can be resolved, but only to identify them so that employers can prepare for these discussions. Those issues include:

- Management rights;
- Economics;
- Employer flexibility to adjust workforce;

Henry E. Farber, a partner in Davis Wright Tremaine LLP, represents employers in labor negotiations, arbitrations and National Labor Relations Board cases. Nicole Mormilo is an associate in the firm's employment services group. The authors may be contacted at *henryfarber@dwt.com* and *nicolemormilo@dwt.com*, respectively.

- Benefits;
- Employee health and safety; and
- *Force majeure* clauses.

MANAGEMENT RIGHTS

Management rights clauses are often among the most fiercely debated topics at the bargaining table. Generally, employers may act unilaterally – such as by implementing or revising company rules and polies – as long as their action falls within the "compass or scope" of a bargained-for management rights clause. Negotiations over specific management-rights language will be contentious.

Management Rights Clauses

Unions will seek contractual assurances to curtail what they perceive as overly expansive management rights clauses and will run a fine-toothed comb through the precise language of existing and proposed clauses.

Unions might seek to add "declaration of emergency" language, cabining management's reserved right to make certain unilateral changes where a defined governmental entity declares an emergency. While a union may acknowledge that a global pandemic justifies an employer's rapid operational changes, it may be less accepting of such changes in the face of other "emergency" situations and thus wish for specific contract language defining that term.

Employers will enter negotiations with the desire to expand or maintain broad management rights language, such as to facilitate mid-term rescissions to scheduled wage increases or to redeploy staff to different areas of the business in response to increased and/or changing demands. Employers should contemplate other bargaining topics they are willing to compromise on in order to reserve expansive management rights.

Staffing as an Illustrative Example

As noted, one key area where employers will wish to retain expansive rights is staffing. For example, hospitals have been on the front lines of the COVID-19 pandemic and have had to make rapid staffing changes, including redeployment of their nurses both within a single facility and between their facilities. Once the crisis abates, hospitals may seek to preserve an unfettered right to modify staffing.

As we have discussed, though, unions will be eager to curtail management rights clauses. Employers may consider contractual concessions limiting their ability to change certain aspects of staffing.

Sticking with healthcare, employers might consider redefining or clarifying specific nurse floating procedures for non-emergency times. Alternatively, the parties could negotiate spot awards or hazard pay for redeployment.

Notice to the Union

Coming off the operational impact of COVID-19, unions may also wish to revisit and/or add certain notice provisions to the contract. For example, unions may wish to delineate notice requirements that employers must follow prior to implementing a staffing change. Employers should consider the value of such provisions, to the extent they delineate union point people and methods of communication (for example, phone or email).

Insofar as unions propose firm timelines, employers should consider more general language such that they will provide notice and opportunity for effects bargaining "as soon as practicable." Such language would be particularly valuable if a second wave of COVID-19 comes to pass.

Ability to Use Non-Unit Personnel in an Emergency

Concerned about future emergency situations, employers may propose specific contract provisions that permit their use of non-unit personnel during emergencies. Remembering their members' reluctance to work during the COVID-19 crisis, unions may be open to such a provision.

The parties should consider the parameters of such a clause, such as which unit jobs employers can fill with non-unit personnel, for how long, and how unit employees will transition back to work after the emergency.

Reopening the Contract

As reopener clauses appear at the bargaining table with increased frequency, employers should consider, among other things: (a) whether one or both parties will have the right to demand reopening, and (b) whether to set a period of time during which, or certain circumstances under which, a party may demand reopening.

The parties should remember that once a contract is reopened, they bargain as though there is no agreement in place. If that makes a party uncomfortable, it should consider the value of bargaining a narrow

reopener clause, such as one that limits the scope of negotiations and/or use of economic weapons (e.g., strikes).

ECONOMICS

Undoubtedly, the economic uncertainty caused by COVID-19 will cause ripples – or, more likely, waves – throughout all labor negotiations. In almost every industry, employers have been shut down or have had to reduce operations drastically, and revenue has dropped precipitously. In sectors that have not been closed, expenses to address the health emergency have increased.

State and local governments have been doubly hit; having had to spend unanticipated funds to help their communities, along with a dramatic decline in tax revenues. On the other hand, many workers have lost income during this time, and their finances may be strained. The result may be difficult negotiations over pay.

EMPLOYER FLEXIBILITY TO ADJUST WORKFORCE

Employers may seek greater ability to scale workforces to their revenue or production needs. During the Great Recession in 2008, many employers negotiated the ability to furlough employees under certain circumstances. We may see employers desire that ability again or to expand the circumstances in which furloughs can be done.

The discussions may center on what could trigger furloughs, whether non-unit employees must be treated similarly, and the duration and terms of the furloughs. Employers that need this ability should consider the impact of furloughs on production schedules, their ability to retain valued employees, and whether a layoff would prove to be more beneficial in the long term.

Layoffs

Employers and unions will face questions about how to handle large numbers of substantial layoffs. Employers may seek the ability to focus on performance or production when choosing which employees to layoff; as workforces shrink, proven results become even more important.

Recognition that an economic downturn may be long lasting will lead to efforts to preserve employees' ability to return. Unions may seek greater reliance on seniority but also may demand longer periods before recall rights expire, along with fixed severance pay for layoffs.

Employers will have to weigh whether longer recall rights will hamstring their future recruitment efforts or might give them the ability to retain experienced employees. Those employers forced into layoffs to

preserve financial resources should be reluctant to commit to severance pay that will reduce those resources.

Pay Differentials

COVID-19 has already raised proposals for "hazard pay" or "hero pay" for essential workers. Those concepts may lead to demands for additional pay, in general, for workers in essential services.

Unions may also propose to capture the pay differentials that have already been provided to ensure they will continue under subsequent emergency circumstances. These will be difficult for employers to evaluate as the conditions for future emergencies cannot be predicted.

Employers certainly recognize the dedication of employees who continue to serve during this time, but will likely be unwilling to make firm commitments to additional differentials without knowing the future application.

Wages

Wage rates will likely be the most contentious issue in negotiations this year. Employers who have seen their businesses and industries collapse may seek to reduce wages to allow their operations to get on solid footing. We have already seen salary and wage reductions by many employers.

Employers who have seen revenue streams diminish may propose that wage increases be delayed or eliminated. Almost all employers – in both the private and public sectors – will be able to say, with justification, that the financial foundation for pay rates previously negotiated has materially changed.

Of course, workers also suffered financial harm during COVID-19, even if they have not lost their jobs. Some have been furloughed and lost weeks of pay, while others have lost overtime or other pay components on which they count. In either case, their families may also have lost income.

So how will these conflicting tensions be resolved? Each negotiation will develop its own solution, but potential elements of a solution can be:

- Transparency about the employer's financial condition, particularly if the employer is on the precipice of bankruptcy. Employers are required, if asked, to disclose financial records if they claim an inability to pay. Perhaps greater information about the employer's financial status will be helpful, even if there is no inability to pay and required disclosure.

- Understanding of the relevant labor market. Are other employers hiring or have they imposed hiring freezes or layoffs? The employer must determine whether it can still retain a trained workforce with its current wage rates.

- If wage reductions are considered, will they be indefinite? The parties must discuss whether pay rates will snap back, perhaps upon achievement of a specific goal.

- Consideration of delaying the normal timing of wage increases. Is a wage freeze a better solution?

- Evaluating tying wage increases to a performance goal. If the performance goal is tied to revenue or margin, the employees may earn those increases.

BENEFITS

Over the last few months, discussions about benefits at governmental levels have focused on providing leave for COVID-19 circumstances and access to health insurance. Those subjects will continue to be raised at the bargaining table, particularly if a second wave of COVID-19 is expected.

Additional Paid Sick Leave

As federal and state supplemental paid sick leave provisions aimed at COVID-19 expire, unions may seek to incorporate similar terms into collective bargaining agreements ("CBAs"). They may propose additional paid sick leave in general, additional paid sick leave during an emergency, or – in healthcare – additional paid sick leave for those exposed at work to a contagious disease.

As is always the case, employers must consider these ideas in coordination with any state or local paid sick leave laws. For these new demands, employers should review what they chose to do during the pandemic and the potential costs of providing additional leave.

Further, employers should calculate the amount of paid sick leave used, analyze whether it was used for the employee's illness or for care for others such as family members, and determine whether more leave will create staffing issues. Where there are shortages of employees or applicants, providing or expanding leave may result in significant holes in an employer's production or service.

Access to Extended Illness Banks

Many employers provide extended illness banks in which paid leave is deposited for limited purposes. At the height of COVID-19, questions arose whether employers would allow employees access to extended illness banks for new purposes, such as when quarantined after exposure but before the employee received test results.

With this experience, unions may propose to make the extended illness banks available for more purposes. Employers will consider these proposals in the context of their full paid leave offerings and whether greater usage of extended illness banks will disturb budgetary or staffing models. Employers may also consider the likelihood of higher usage if the additional access is limited to pandemic or emergency situations.

Continuation of Health Insurance

The last few months have demonstrated that employers are willing to continue health insurance in situations that they may not have considered before: when employees are no longer working due to furloughs or layoffs during a pandemic. This was likely appropriate during a health emergency, but unions may now seek to expand the situations in which employers continue health insurance, such as during layoffs or furloughs unrelated to a community health emergency.

When evaluating these proposals, employers must first determine whether their health insurance plans will permit such expansion. If so, they should weigh the cost of such an additional investment in the context of current offerings to laid off or furloughed employees.

Greater Coverage for Trauma

Many healthcare workers suffered difficult circumstances when caring for COVID-19 patients and may have continued symptoms of trauma. Unions may seek additional coverage – paid leave or greater insurance coverage – for these circumstances. Employers will have to determine their existing coverage, especially when integrated with Workers Compensation benefits, and the cost of additional benefits.

EMPLOYEE HEALTH AND SAFETY

With the eventual return to work comes increased concern about maintaining a safe and healthful workplace. What follows is a non-exhaustive list of health and safety topics that will likely prompt discussion at the bargaining table.

Information About Protective Gear

Personal protective equipment ("PPE") is undoubtedly a 2020 buzzword. The demand for PPE has often dramatically exceeded supply during COVID-19 and fueled tensions between unions and management.

The need for PPE will remain high as employees begin to return to their workplaces in broad swaths, particularly as social-distancing mandates remain in play. Unions will be eager to access information about an employer's PPE, including about inventory levels and the quality of equipment provided to employees.

As with our discussion of financial transparency, employers should consider being reasonably forthcoming in their disclosures about PPE; such information is likely presumptively relevant for contract administration and negotiations.

Safety Committees

During and after COVID-19, employers may seek to work directly with employees on health and safety issues but are wise to avoid direct dealing with employees to the exclusion of their bargaining representative.

Instead, both unions and employers may wish to revisit workplace safety committees. For example, the parties might agree to develop information-sharing mechanisms to ensure both parties receive employees' health and safety-related feedback in a timely fashion.

As employers create new or revise preexisting safety committees, they should keep a close eye on their level of involvement; these committees should not be dominated by management or serve as employees' advocate for changing terms and conditions of employment. Employers will not wish to add allegations of an unlawful employer-sponsored union to their post-pandemic plate.

Employer Monitoring

When COVID-19 subsides, we anticipate the legal restrictions on employers' health-monitoring abilities will return. For example, it is unlikely that post-pandemic employers will be permitted to take employees' temperatures as readily as they may have done during the crisis.

Despite that shift though, employers will still be interested in monitoring employees' health to maintain a healthful workplace. COVID-19-inspired technological developments will afford employers quick and efficient means for such monitoring, such as perhaps using thermal body scanners to screen employees' temperatures before they enter the workplace.

We do not explore the extent to which the use of such monitoring tools may implicate federal statutes governing workplace discrimination, such as Title VII of the Civil Rights Act of 1964 or the Americans with Disabilities Act, or the extent to which privacy-related concerns will arise with the collection of biometric data. Rather, we emphasize that both employers and unions will need to make room for technological advancements aimed at ensuring workplace health and safety. We also

surmise that employees will return to work with new expectations of health-related precautions their employers can take to keep them safe on the job.

We thus encourage employers to consider important questions before they enter negotiations over employer monitoring. For example, employers should be able to articulate how the monitoring tool serves to keep the workplace free from hazards and the effect it will have on employees' workplace privacy rights, such as how much medical information the tool will access and collect, how that information will be used, and how the employer will ensure that medical information remains confidential – all of which unions will be eager to discuss.

Refusals to Work

Another hot topic during COVID-19 has been employees' refusals to work. To the extent that employees' health and safety concerns do not quickly dissipate, employers may continue to experience post-pandemic refusals to work. Such refusals may be protected at the federal level under the NLRA, Labor Management Relations Act, and Occupational Safety and Health Act.

Unions may seek to negotiate additional contractual protections in this space, such as adding "right to refuse work" clauses that protect employees who refuse to perform unsafe or unhealthful work without fear of an adverse employment action.

Employers considering such clauses should pay close attention to the amount of discretion employees are contractually granted to determine what constitutes "unsafe" work. For example, can an employee refuse work if they "reasonably believe" serious physical harm may occur? Or does the clause include more specific language on the likelihood of harm, that is, does it require a "substantial probability" that serious physical harm may occur? Negotiations on this topic should also consider whether an employee must be assigned alternative work upon their refusal and, if so, if the reassignment must be the same type of work originally assigned.

Employers reluctant to create a freestanding refusal clause may counter-propose revisions to the CBA's "just cause" provision, such as including an express carveout for refusals to perform unsafe or unhealthful work.

Union Ability to Negotiate Additional Protections During an Emergency

During COVID-19, unions watched employers make quick decisions on important topics, like whether and how to provide essential employees with on-site showers or hotel rooms so they did not risk transmitting

the disease to their families by returning home after a shift. Employers also had to address dramatic increases in parking needs as people stopped using public transportation.

In many instances, employers may have acted quickly on these topics, buoyed by a management rights clause, and unions may have been prevented from requesting bargaining because of a zipper clause.

When unions come to the post-pandemic bargaining table, they will likely be resentful of such restrictions and push to narrow management rights clauses and/or eliminate zipper clauses. Alternatively, unions may seek to carve out certain issues that would be subject to mid-contract negotiations during a subsequent crisis.

Employers should be reluctant to limit their management rights clause but, to the extent they are willing, to consider union input. They should make sure that the process does not prevent reactions to urgent situations.

FORCE MAJEURE CLAUSES

You may not see a *force majeure* clause in your high school yearbook, but we anticipate this provision will be another top contender for the superlative "most likely to be introduced at the bargaining table" during post-pandemic negotiations.

As employers consider this topic, they should seek to avoid contract language that could inspire litigation. For example, if a clause is broad, e.g., it defines *force majeure* events as "Acts of God" or "events outside the parties' control," the parties may face a protracted dispute over whether a particular emergency falls within the scope. Employers may thus wish to specifically delineate and/or define certain events in the clause, like pandemics or epidemics.

We also foresee intense debate over the economic implications of invoking this clause. Among other things, employers should consider how much notice will be required to invoke the clause, whether invocation will trigger a renegotiation and/or reduction in salaries, and whether invocation will excuse nonperformance completely or only during the pendency of the *force majeure* event.

CONCLUSION

COVID-19 will undoubtedly reshape life as we know it, but labor relations will persist. To that end, we hope that our non-exhaustive list of topics and concerns will motivate employers to thoughtfully prepare for post-pandemic negotiations.