NLRB Addresses Labor Issues Arising from COVID-19

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Since the beginning of the COVID-19 pandemic, U.S. employers have struggled with how to address the unanticipated ramifications of the pandemic while at the same time meeting their obligations under federal labor law. Recently, the National Labor Relations Board's Division of Advice issued several advice memoranda that provide employer clarity on the legal obligations on COVID-19-related issues. The memoranda, which stem from unfair labor practice charges brought against various employers arising from the pandemic, suggest that the NLRB will continue to apply its pre-pandemic analytical framework to COVID-19 issues rather than creating new doctrine to address pandemic-related labor law disputes.

Protected Concerted Activity

Two of the five cases addressed by the NLRB dealt with allegations of retaliatory terminations in response to COVID-19-related employee actions that potentially constituted protected concerted activity. In *Marek Brothers Drywall Co.* an employee raised concerns regarding a lack of handwashing and hand-sanitizing resources during a group safety meeting, and was subsequently discharged. In *Hornell Gardens*, two employees at a health care facility were terminated – one who refused to work in light of a policy requiring employees to share isolation gowns, and another who refused to work because the employee was self-quarantining based on a potential exposure at a second place of work.

The Division of Advice applied a legal framework dating back to the 1980s, looked to the nature and context of the employees' concerns, and dismissed both cases. Because the employee in the *Marek Brothers Drywall Co.* raised group concerns in a group meeting, the Division of Advice found that this was protected concerted activity, but recommended dismissal based on a lack of evidence of retaliatory termination. On the other hand, the Division of Advice found that the employees in *Hornell Gardens* were raising concerns related only to themselves, rather than a broader group, and thus were not engaged in protected concerted activity. In neither case did the Division of Advice treat the expressed concerns any differently simply because they related to the pandemic. Employers – whether with unionized or non-unionized workforces – will as always need to be aware that employee-raised concerns may constitute protected concerted activity, and that the NLRB continues to approach such questions on a case-by-case basis.

Information Requests

Two cases dealt with union information requests in the context of COVID-19-related layoffs. In *ABM Business & Industry* and *Crowne Plaza O'Hare*, the employers implemented layoffs in response to a downturn in business brought about by the pandemic. In each case, the union filed grievances and sought information the union asserted was relevant to the layoffs. In both cases, the union sought communications between the employer and other business entities regarding the employer's need to lay off workers. And in both cases, the Division of Advice concluded that such communications were not presumptively relevant, because they did not relate to the employees' terms and conditions of employment.

In *Crowne Plaza O'Hare*, the union additionally sought information regarding whether the employer had applied for payroll assistance loans. The Division of Advice found that this information too was not presumptively relevant, as the employer had stated that the layoffs were taking place "due to loss of business" rather than an actual inability to pay the employees, and the loans did not otherwise have to do with the employees' terms and conditions of employment.

As with the cases relating to protected concerted activity, the Division of Advice's approach in these cases suggests that the NLRB is not broadening its approach to determining relevance with respect to information requests in light of the pandemic, but rather relying on its

time-tested analytical framework for resolving disputes concerning information requests. For example, in *Crowne Plaza O'Hare*, the Division of Advice found the decision to close due to the COVID-19 downturn directly analogous to previous cases where employers had closed down due to "poor market conditions."

Midterm Bargaining Over COVID-19 Issues

The fifth case – *Memphis Ready Mix* – dealt with a union's request, and employer's refusal, to bargain over new union proposals for paid sick leave and hazard pay, in light of the pandemic. The Division of Advice found that because the parties' collective bargaining agreement was still in force, covered leave-of-absence and wage issues, and included broad management rights and zipper clauses, the employer was not obligated to bargain over the union's proposals.

Foley Hoag has formed a firm-wide, multi-disciplinary task force dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our Resource Portal or contact your Foley Hoag attorney.

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