

# NATIONAL LABOR RELATIONS ACT AND COVID-19

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# OVERVIEW OF THE NLRA

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# THE NATIONAL LABOR RELATIONS ACT “NLRA”

- Guarantees employees the right to:
  - Form, join or assist labor organizations
  - Bargain collectively through representatives of their own choosing
  - Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection
  - Or refrain from doing so

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## SECTION 7 RIGHTS

- Section 7: “Employees shall have the right . . . To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
  - Non-supervisory employees have a right to discuss wages, hours and other terms and conditions of employment (“concerted activity”)
  - Protections extend to workplace conversations as well as those outside the workplace and outside working hours
  - Union and non-union employees
    - NOT supervisors, managers and executives

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## SECTION 7 RIGHTS (CONT.)

- Section 8(a)(1): “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7 of this Act”
- Employers must be careful not to interfere with protected activities, which may be exhibited by both union and non-union employees
- This obligation may come with special concerns during COVID-19

# PROTECTED ACTIVITY IN LIGHT OF COVID-19

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# NLRA – CONCERTED AND PROTECTED ACTIVITY

- Conduct must be protected by the NLRA
  - Right to organize
  - Statements or activity regarding an employee’s wages, working conditions, or other terms of employment
  - Right to strike
- Conduct must involve concerted activity
  - Concerted activity occurs when “the employee is engaged with or on the authority of other employees, and not solely on behalf of the employee himself;” or
  - “Where individual employees seek to initiate or to induce or to prepare for group action”

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# NLRA PROTECTIONS AND COVID-19

1. Refusal to enter the workplace due to concerns about contracting COVID-19
    - Employees have the right to refuse to perform unsafe work
  2. Refusal to work due to concerns about contracting COVID-19
    - May be protected and may not qualify as a strike under the CBA
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- Ceasing work “in good faith because of abnormally dangerous conditions” under Section 502 of the Labor Management Relations Act does not violate no-strike provisions



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## NLRA PROTECTIONS AND COVID-19 (CONT.)

- These activities may be protected concerted activities by union or non-union employees
  - May trigger protections under the Occupational Safety and Health Act (OSHA)—unsafe work conditions
  - May trigger employer's duty in CBA or duty to bargain before making changes in the workplace or policies
    - For example, implementing a social distancing policy may have implications for the number of workers, timing of breaks, etc. but may be necessary for safety and trigger duty to bargain
3. Complaining about employer's response to COVID-19
- May be protected if truly a group complaint being brought to the employer's attention
  - Consider the effects of workplace rules on what may be protected

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# TOP PRACTICAL CONSIDERATIONS OR ISSUES

- Should you discuss with the union in advance?
- What is your policy for someone who is doing an essential job?
  - Is this employee the only person who can perform the job?
  - Could there be a grievance arbitration issue if you have to implement a layoff or furlough?
  - Is there a potential effect on seniority?

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# WORK RULES AND THEIR IMPACT ON SECTION 7 RIGHTS

- The NLRB established a new test for determining whether a rule or policy interferes with employees' Section 7 rights in The Boeing Company, 365 NLRB No. 154 (12/14/17)
- New Balancing Test focuses on the balance between:
  - Negative impact on an employee's Section 7 rights; versus
  - Rules connection to an employer's right to maintain discipline and productivity
- The Boeing Company also:
  - Clarified that only rules that would (as opposed to could) be interpreted as covering Section 7 activity, would be deemed unlawful
  - Established three categories of rules

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# THREE CATEGORIES OF RULES

- Category 1 (Lawful)
  - When reasonably interpreted, it does not prohibit or interfere with the exercise of rights under the Act; and
  - Potential adverse impact on protected rights is outweighed by the need for the rule
- Category 2 (Individual Scrutiny)
  - Must analyze whether the rule would interfere with rights and, if so, whether adverse impact on NLRB-protected conduct is outweighed by legitimate justifications
- Category 3 (Unlawful)
  - Adverse impact on rights that is not outweighed by a legitimate need

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# TYPES OF RULES THAT MAY BE IMPLICATED IN COVID-19 RESPONSE

- Category 1
  - Rules against Insubordination, Non-Cooperation, or On-the-Job Conduct that Adversely Affects Operations, such as “insubordination to a manager or lack of cooperation with fellow employees or guests is prohibited”
  - Disruptive Behavior Rules, such as “creating a disturbance on company premises or creating discord with clients or fellow employees”

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# TYPES OF RULES THAT MAY BE IMPLICATED IN COVID-19 RESPONSE (CONT.)

- Category 2
  - Rules Regarding Disparagement or Criticism of the Employer (as opposed to civility rules regarding conduct toward other employees)
  - Rules Generally Restricting Speaking to the Media or Third Parties (as opposed to rules restricting speaking to the media *on the employer's behalf*)
  - Rules Banning Off-Duty Conduct That Might Harm the Employer (as opposed to rules banning insubordination or disruptive conduct at work)
  - Rules Against Making False or Inaccurate Statements (as opposed to rules against making defamatory statements)

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## EXAMPLE

- Employee is complaining on social media or as a general public criticism about the employer's handling of COVID-19
- Public criticisms of an employer lose the protection of the Act when they are disloyal and deliberately attack the quality of an employer's products or services
- Two very general rules for Social Media:
  1. Policy should not be so sweeping that it interferes with Section 7 rights
  2. Comments generally not protected if they are mere gripes not made in relation to group activity among employees
- The Board will analyze each provision of a Social Media Policy under the Boeing test and the General Counsel's June 6, 2018 Memorandum

# NLRB DURING COVID-19

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# **NATIONAL LABOR RELATIONS BOARD “NLRB”**

- Administrative agency that administers and enforces the NLRA
- Five member Board
- Political appointees
- Majority aligned with political party of current administration
- Network of 32 Regions

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# NLRB ELECTIONS

- The NLRB temporarily suspended elections through April 3
- On April 1, the NLRB announced that it would not be extending the suspension and would begin conducting elections again on April 6
- General Counsel announced that appropriate measures are now available to make elections possible, but the exact measures are to be decided by Regional Directors
- Three amendments to rules and regulations for union elections were scheduled to take effect on May 31, 2020, but have been delayed until July 31
  - Elimination of “Blocking Charge” policy
  - Immediate challenges to unions voluntarily recognized by the employer
  - Construction industry precedent overturned

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# THE AMENDMENTS

- Elections are no longer blocked when certain types of unfair labor practices are charged, such as those challenging the employees' petition or free and fair choice on representation; the results are impounded for 60 days. If a complaint is issued during the 60 days, ballots are impounded until the NLRB makes a final determination. Otherwise, ballots will be opened and counted.
- If an employer voluntarily recognizes a union as an exclusive bargaining representative, the employees can quickly petition for representation by a different union. The employer must provide impacted employees with a notice of the voluntary recognition and that the employees will have 45 days to petition the NLRB to recognize a different union.
- NLRA Section 8(f) allows construction industry employers to enter agreements with industry unions without a majority of worker support. Now, positive evidence of a showing of support from a majority of workers will be required for this to constitute voluntary recognition by the employer, and employees will have 45 days to file a petition.

# DUTY TO BARGAIN DURING COVID-19

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# NLRB GENERAL COUNSEL GUIDANCE

- General Counsel Memorandum 20-04 (March 27, 2020): Duty to Bargain in Emergency Situations
- Duty to bargain during public emergencies
  - *Port Printing & Specialties*: Parties did not have a CBA, so the employer did not violate the duty by implementing layoffs due to hurricane without union notice or opportunity to bargain, but did violate duty by not bargaining over the effects and using non-unit employees to perform unit work. There is an exception to the duty where the employer can show “economic exigencies compel[led] prompt action” (*Bottom Line Enterprises*) but this is limited to extraordinary events that are unforeseen and have a major economic effect so the company must take immediate action.
  - *K-Mart Corp.*: Employer’s unilateral layoff after 9/11 when the anticipated business volume plunged 60% and caused it to file bankruptcy was privileged by *Bottom Line*. The economic fallout caused extraordinary unforeseen events that had a major economic effect, and the company had to take immediate action. The employer gave adequate notice of the need for layoffs of union employees, and bargaining was not requested.

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## NLRB GENERAL COUNSEL GUIDANCE (CONT.)

- Duty to bargain during emergency situations particular to individual employers
  - *Cyclone Fence, Inc.*: Employer unilaterally closed a facility, terminated employees, and failed to pay wages and fringe benefits after lender terminated line of credit. An emergency situation may excuse failure to bargain on closing operations, but does not excuse failure to bargain over the effects.
  - *Hankins Lumber Co.*: Unilateral layoff at a lumber mill due to log shortage violated duty. The shortage was a chronic issue; there was no “precipitate worsening” requiring immediate action without bargaining; and the employer had initially offered to bargain, then retracted and made unilateral layoffs.
  - *Brooks-Scanlon, Inc.*: Employer did not violate duty by closing part of sawmill without bargaining. Projected decline in amount of harvestable trees surrounding the area. Employer determined it would close operations almost two months prior to doing so, there were a variety of factors creating compelling economic factors that would not be altered by bargaining, and the employer negotiated on the effects of partial closure.

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# COLLECTIVE BARGAINING AGREEMENTS- RESPONDING TO COVID-19

- If currently engaged in bargaining for a new CBA, the duty to continue bargaining in good faith remains—reasonable time and place
  - Keep in mind any state or local restrictions on in-person meetings; may need to make alternative meeting arrangements
  - Consider agreement on extension of bargaining or postponing
- Determine whether there is a provision allowing the employer to make unilateral changes or if the employer must give notice and opportunity to bargain under the current CBA for subjects of bargaining
  - A force majeure clause in a CBA may allow for certain unilateral decisions by the employer, but it will depend on the specific language

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# COLLECTIVE BARGAINING AGREEMENTS- RESPONDING TO COVID-19 (CONT.)

- Example subjects that may trigger bargaining depending on the CBA:
  - Changes in business operations that may relate to a COVID-19 response plan, keeping business running, reducing labor costs, etc. may be subjects of mandatory bargaining
    - Protocols for health and safety
    - Layoffs, shutdowns due to government designation as essential v. nonessential
    - Staffing ratios, shift scheduling
    - Pay reductions, benefits, leave usage



# THE CARES ACT AND COLLECTIVE BARGAINING AGREEMENTS

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# **CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES) – MID-SIZED BUSINESS ASSISTANCE**

- Employers with 500 to 10,000 employees
- Direct loans subject to no higher than 2% annualized interest rate
- No interest or principal is due or payable for the first six months after the direct loan is made or for a longer period if the Secretary determines
- 10 good faith certifications borrowers must make; some implicate collective bargaining

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# GOOD FAITH CERTIFICATIONS BY BORROWERS (1-8)

- Uncertain economic conditions make the loan request necessary for ongoing operations
- The funds will be used to retain 90% or more of the workforce at full compensation and benefits until September 30, 2020
- Intent to restore 90% or more of the workforce that existed as of February 1, 2020 and all compensation and benefits no later than 4 months after public health emergency terminates
- Domiciled in the US with significant operations and employees in US
- Not a debtor in bankruptcy proceeding
- Created or organized in US or under its laws with significant operations and employees in US
- Will not pay dividends on common stock of the eligible business or purchase equity security listed on national securities exchange of recipient or parent company while loan is outstanding except as required by contractual obligation effective as of date of this Act
- Will not offshore or outsource jobs for the term of the loan and two years after its repayment

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## GOOD FAITH CERTIFICATIONS BY BORROWERS (9-10)

- Two more requirements:
  - “(IX) the recipient will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan; and
  - (X) that the recipient will remain neutral in any union organizing effort for the term of the loan.”

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# THE CARES ACT AND COLLECTIVE BARGAINING

- This means that for the entire term of the loan and for an additional two years after repayment, the CBA in effect at the time of taking the loan will remain in effect
- Additionally, the recipient mid-sized business must remain neutral to unionizing efforts for the term of the loan, meaning the employer cannot campaign against the union to present information to employees
  - This could potentially result in higher levels of union campaigns after the loan is taken

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# QUESTIONS?



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# THANK YOU

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