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Blog Post

The NLRB's Division of Advice Has Spoken on COVID-19 in the Workplace, Providing Flexibility to Employers During the Pandemic

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As employers continue to navigate these chaotic times, on July 15, the National Labor Relations Board (NLRB), through its Division of Advice (Advice), issued its first guidance regarding the COVID-19 pandemic and the workplace. In the form of five letters from Advice relating to the pandemic, the previously silent NLRB brought some beneficial clarity to employers who have no doubt been struggling with the effects of COVID-19 on their businesses and their workforce.

It should be noted that while most of these letters are binding only as to the parties involved in each related litigation, but were issued by Advice to provide the public with some guidance as to how to handle analogous situations in their workplaces. In sum, those letters provided the following (pro-employer) guidance, especially helpful for those employers now struggling with COVID-19 related issues:

Flexibility in the Duty to Bargain Over Unilateral Changes

Most notably, one agency letter stated that a hospital employer could unilaterally alter job conditions, including the employers' remote work and

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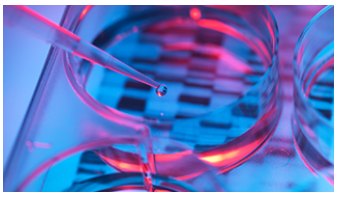
attendance policies, without approval from its union. Although any changes to these policies are clearly a mandatory subject of bargaining, requiring negotiation prior to any unilateral action, Advice stated that, due to the pandemic and related emergent concerns, the employer was afforded some leeway in altering its policies. The letter stated explicitly that, "[i]t is the General Counsel's view that an employer should be permitted to, at least initially, act unilaterally during emergencies such as COVID-19 so long as its actions are reasonably related to the emergency situation."



Despite this letters' ruling, employers cannot escape the duty to bargain indefinitely. The Advice guidance requires that employers negotiate with their workers' union over any changes to work conditions "within a reasonable time" of the change. Although a vague caveat, it nonetheless makes clear that while employers may have some leeway in engaging in typical bargaining protocols, employers are not entirely excused from their obligations.

No Duty to Bargain Over COVID-19 Layoffs

In a separate COVID-19 related letter, Advice held that a nursing services contractor did not violate any labor law when it unilaterally laid off employees in response to COVID-19 related school closures. The Advice letter further found that offering employees temporary assignments, involving perform testing and contract tracing work, rather than laying them off was permitted under the collective bargaining agreement between the employer and the union.

Permission to Limit Access to Worksites

Another memo issued last week by Advice provided employers with the right to deny union representatives access to worksites due to safety concerns. An electric employer, according to Advice, correctly interpreted a contract by prohibiting immediate and unrestricted access to union representatives who wished to enter the site. Advice held that the employer acted reasonably in denying

access, due to the safety concerns of the COVID-19 pandemic and its spread.

A separate Advice letter stated that the U.S. Postal Service (USPS) did not violate any national labor law when it refused a union access to its facility due to COVID-19. The NLRB letter attributed the denial of access in this situation here to "an apparent misunderstanding" and declined to bring suit against USPS here.

Failure to Find Discriminatory Conduct

Through another agency letter, Advice found that an employee did not engage in protected, concerted activity when he texted the employer's controller about health and safety issues. The agency memo stated that because the controller was a supervisor/manager, this text was not protected under the National Labor Relations Act.

In another similar case, Advice found that an employee's WhatsApp message to former co-workers that the individual suffered food poisoning due to a co-worker's failure to wear protective gloves was not protected, concerted activity because (i) the message did not refer to any employer policy/working conditions, or seek to initiate concerted action; and (ii) merely referring to health and safety did not make the comment "inherently concerted."

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Employers should be aware that these guidance letters from the Advice Division, although much appreciated by employers operating during the pandemic, are not binding NLRB precedent. As always, Akerman attorneys will continue to monitor NLRB decisions regarding COVID-19 issues for more concrete guidance for employers during these tumultuous times. For any labor or workforce concerns, contact your Akerman labor attorney for further information and guidance.