

Dealing with Emergency Situations in a Pandemic Under A Collective Bargaining Agreement

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Collective Bargaining Agreements



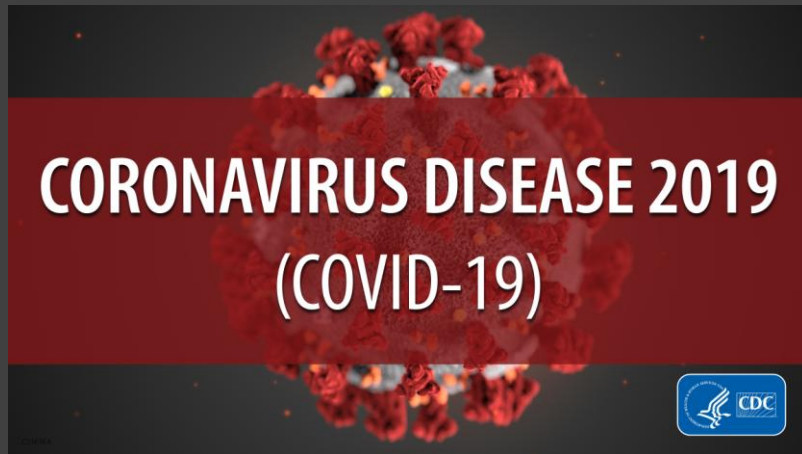
- A collective bargaining agreement (“CBA”) is a written contract between an employer and a union representing the employees.
- A CBA sets the terms and conditions of employment, such as: wages, working hours and conditions, employee benefits, grievance and arbitration procedures, limitations on strikes, the Union's rights and responsibilities, and Management's rights and responsibilities.

CBAAs and the Duty to Negotiate

- Under New Jersey's Employee-Employer Relations Act, *N.J.S.A. 34:13A-1 et seq.*, employers must notify their employees' unions and provide an opportunity for meaningful bargaining before implementing any material change to the terms and conditions of employment.
- Mandatorily negotiable topics include (among others): hours of work, working conditions, and wages.
- Exceptions to the bargaining obligation include: management rights clause, certain exigent situations



Ewing Lawrence Sewerage Authority v. Communications Workers of America, AFL-CIO, Local 132



- Decided by the New Jersey Public Employment Relations Commission (“Commission”) on a Motion for Reconsideration from Commission interim relief decision, I.R. NO. 2021-14.
- Deals with a unilateral change made by the Ewing Lawrence Sewerage Authority (“Authority”) to employees’ work schedules to comply with social distancing protocols required by Governor Phil Murphy’s Executive Order 192, dealing with health and safety measures related to the COVID-19 pandemic.
- The Interim Relief decision determined that the Authority was required to rescind a unilateral change in work schedule and was required to negotiate in good faith before changing these terms and conditions of employment.

Union/Management Positions

Union's Position	Authority's Position
<ul style="list-style-type: none">• Clearly established law requires that an employer negotiate over work schedules of employees.• The Authority cannot unilaterally take such action and must negotiate with the Union before addressing the emergency.	<ul style="list-style-type: none">• Executive Order 192 necessitated that immediate action be taken in light of the State of Emergency and the rapidly increasing amount of COVID cases.• The schedule change was temporary, consistent with the Executive Order, bore no negative impact on employee salary, and was intended to help minimize employee exposure to the COVID-19 virus by increasing the separation of employees typically deployed together.• Separation of its employees allows safe, effective and efficient operation while complying with regulatory and ethical responsibilities under the Executive Order.

Union/Management Support

Union's Support	Authority's Support
<ul style="list-style-type: none">• Executive Order 192 did not preempt negotiation over the employee's work schedules.• Executive Order 192 did not mandate the Authority's change in hours.• The Authority would suffer no harm or prejudice by negotiating in good faith, but the Union employees would because they would have been denied the assistance of their Union in protecting the negotiated terms/conditions of their employment.• Public interest is served by the prompt settlement of labor disputes/ avoidance of employee strife.	<ul style="list-style-type: none">• Modification of work schedules to separate the workforce during the pandemic has been recommended as an essential mitigation effort.• The "Management Rights" provision of the CBA allows the Authority to adjust work schedules "for the maintenance of order and efficiency."• The action taken by the Authority in unilaterally changing work schedules was consistent with Executive Order 192, and applicable law.• NLRB General Counsel Memo 20-04, entitled "Case Summaries Pertaining to the Duty to Bargain in Emergency Situations," which addresses exceptions to the duty to bargain over hours where an employer can demonstrate exigencies compelling prompt action.• The actions taken by the Authority would only benefit – not harm – the Union and its members.• The actions taken by the Authority serve the public interest by ensuring the health and safety of the public and public employees.• The Authority accommodated any employees who suffered hardship as a result of the change.

The Commission's Decision (P.E.R.C. NO. 2021-29)

The Authority was required to negotiate in good faith before implementing the schedule change.

Circumstances did not support the unilateral schedule change made by the Authority.

- Authority did not establish the necessity of unilaterally implementing its SOP rather than negotiating a less disruptive means of separating the crew to comply with the Governor's Executive Orders.
- Authority did not establish that its justifications for the unilateral work schedule change excuse it from having to negotiate prior to a desired change.
- The prospect of future unilateral changes being implemented causes instability that is harmful to the parties' labor relations.
- Authority's claim that only one employee suffered hardship is contradicted by the filing of the Union's grievance and Unfair Practice Charge, which indicates that Union members were aggrieved by the lack of negotiations over their new work schedule.
- Affected employees cannot be made whole by a subsequent remedy for the length of time they were required to work the unilateral shift change.
- Harm to affected employees' lives and labor relations outweighs the harm to the Authority of a potential delay in implementing a means of separating the crew.

Takeaways

- In light of COVID and the Commission's current stance, employers who are subject to CBAs should look at their CBAs to see if they have the power to make emergency changes unilaterally.
- In the event that the CBA currently in place does not provide the employer with such power, employers should try to negotiate amended terms with the Union.
 - Likewise, employers currently in the process of negotiating new CBAs should be sure to consider negotiating for such a term in their CBAs.
 - Language should be explicit as to this power to make unilateral changes in the event of an emergency so as to avoid potential Union claims that such a change was unlawful.



Questions?

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