COVID-19: Bargaining the Impacts and Effects with Your Education Employee Unions

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With the implementation of Governor Newsom’s COVID-19 Executive Orders and the enactment of the federal Families First Coronavirus Response Act (“FFCRA”), K-12 school districts, community college districts, and county offices of education (referred to collectively as “Education Employers”) are responding to a new and never-before faced set of challenges to execute their educational mission. As Education Employers maneuver through this rapidly changing environment, maintaining essential operations, feeding the neediest children, and providing distance learning alternatives to students, shaping the parameters of what must be negotiated is critical.

Many exclusive bargaining unit representatives have presented demands to negotiate regarding working conditions during the pandemic and associated closures. This alert provides an update on the collective bargaining issues commonly faced, and currently being faced, by Education Employers.

Emergency Responses and Collective Bargaining

One initial question Education Employers have is whether they have an obligation to bargain the implementation of emergency measures in response to COVID-19. Under normal circumstances, the Educational Employment Relations Act (“EERA” (Gov. Code § 3540 et seq.)) obligates an Education Employer to meet and negotiate in good faith with representatives of employee organizations concerning matters within the scope of representation. (EERA, § 3543.3.) The scope of representation includes “matters relating to wages, hours of employment, and other terms and conditions of employment.” (EERA § 3453.2, subd. (a)(1).) When not coping with a series of emergency decisions, any change to matters within the scope of representation...
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without notice and an opportunity to negotiate could constitute a unilateral change of working conditions in violation of the EERA.

However, the Public Employment Relations Board ("PERB"), the quasi-judicial body that enforces the EERA, has recognized that under exceptionally limited circumstances, an employer may be excused from negotiating where a true emergency exists. The emergency provides a basis for claiming that a business necessity excuses a unilateral change.[1] However, to establish "operational necessity" or "business necessity" as a defense to a unilateral change, the employer must establish an actual financial or other emergency that leaves no alternative to the action taken and allows no time for meaningful negotiations before taking action.[2] The alleged necessity must be the unavoidable result of a sudden change in circumstance beyond the employer’s control.[3]

The State of Emergency declared at the state and national level, coupled with the Governor’s Statewide “Stay At Home” Order, would fall within PERB’s contemplation of a true emergency. Education Employers also have to react in real-time to rapid changes in the legal and rapidly changing public health landscape, making meaningful pre-implementation negotiations exceedingly difficult when compared with the urgent need to act to keep students, staff, and the community safe. Accordingly, under the EERA, unilateral changes to working conditions are likely permitted under these extreme circumstances. This is not a blanket authorization to unilaterally implement all decisions during an emergency; to the contrary, Education Employers should negotiate as much as is reasonably possible before implementing an emergency response, and should clearly convey to labor organizations a continued willingness to meet and negotiate on subjects of bargaining, or identifiable impacts/effects of non-negotiable decisions, even after implementation of such emergency responses.

Existing Authority to Make Critical Decisions

Many collective bargaining agreements reserve the right for Education Employers to act in emergencies. This language is typically found in management rights articles and often provides that the employer has, “the exclusive right . . . to take action on any matter in the event of an emergency." Many Education Employers therefore already have
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negotiated emergency language that employers can rely on to take action during a declared emergency.

Typical collective bargaining agreements also include language known as “zipper” clauses, which close negotiations during the term of the contract, except for mutually agreed upon reopener negotiations. This provides Education Employers some flexibility in choosing how to approach negotiations during the term of the agreement.

Board policies, administrative regulations, and other locally adopted rules should also be reviewed to determine whether there are emergency provisions. These sources of authority contribute to the ability of Education Employers to assert authority under previously expressed rules for which bargaining obligations have already been met.

More recently, some Education Employers have also adopted emergency resolutions, covering a variety of provisions allowing administrators to continue critical operations and make rapid decisions without a need to convene a meeting of the governing board.

Finally, if necessary, Education Employers can invoke Government Code section 3100, which declares all public employees of the state of California “to be disaster service workers subject to such disaster service activities as may be assigned to them by their superiors or by law.”

Read together, these sources of law contribute to Education Employers ability to make emergency decisions, and implement a variety of actions prior to the completion of meeting and negotiating.

Efforts to Negotiate Should Be Maintained

Despite the authority supporting the right of Education Employers to implement emergency measures without negotiating the changes to working conditions, employers should nevertheless reach out to their labor unions to include them in establishing emergency measures in response to COVID-19. The reasons for doing so are threefold: (1) employers cannot maintain essential operations without cooperation and support from their labor partners; (2) most employers have already received requests from exclusive bargaining unit representatives to immediately bargain the effects of the employer’s response to COVID-19 and the implementation of District emergency procedures; and (3) the EERA not only requires employers to provide unions with the notice and opportunity to negotiate working conditions, but also requires negotiations regarding the impacts or effects on working conditions. Employers also have to provide notice to exclusive representatives on nonnegotiable decisions that have negotiable impacts/effects. Despite more recent guidance compelling social distancing, employers and unions may conduct negotiations electronically and/or through remote technologies, such as Zoom, Skype or conference calls. Negotiations can be conducted rapidly through these platforms.

Where employers do not have the time to negotiate with their labor partners, notice should be provided to unions that necessary emergency plans to continue essential operations will be implemented immediately, but the employer is willing to meet to negotiate the effects as soon as reasonably practical. In such
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circumstances, Education Employers are not refusing to negotiate, but rather ensuring they deal with emergency situations and decisions first before engaging in negotiations. During the instant crisis, the circumstances and guidance has evolved rapidly in recent weeks, and will likely continue to evolve rapidly, calling for similarly rapid responses by Education Employers.

Education Employers must also keep in mind that a declared emergency does not, however, give the employer carte blanche to take any action it desires. Violations of the EERA can be addressed by PERB using its broad remedial authority. For instance, if an employer unilaterally decided it would reduce employee pay rates during the emergency, PERB could order backpay as a remedy for affected employees.

Working Conditions and Health and Safety

Education Employers will have to consider which of its functions are essential and whether to have essential personnel return to worksites in order to perform necessary operations, such as purchasing and payroll, or see if these functions can be performed remotely. Other typical issues negotiated with unions in the current pandemic include the impacts and effects of performing medical screenings on employees prior to them starting on-site duty. Some employers are using trained health care staff to perform these screenings and utilizing the screening protocols recommended by their county health departments. Disinfecting and sanitizing the work areas for essential personnel is also a consideration prior to return of essential personnel. Where essential functions are being kept to a minimum, the hours of essential personnel should also be considered. Some employers have found that a rotation of available employees to perform essential functions may reduce potential exposure and prevent burnout.

Employers should keep in mind, before committing to any inflexible contract or side agreement language, that the situation with the COVID-19 pandemic is ever-changing.

Hazard Pay or Premium Pay for Essential Employees Needed to Work On-Site

Most Education Employers have had the cooperation of their bargaining units to be able to continue essential functions and distance learning without providing additional compensation. However, some units have requested double time, time-and-a-half or compensatory time off as additional compensation due to the risks presented in reporting to worksites. While we acknowledge each Education Employer has different dynamics, and may use discretion when considering whether premium pay is appropriate for their workforce, there is no legal requirement for this discretionary type of extra compensation.

Refusals to Work

While the vast majority of employees recognize that the essential infrastructure of the school systems must be maintained, including other ancillary functions such as keeping students and children fed, there are employees who will either refuse to work or are afraid to return to work.
Other employees may heed current guidance to socially isolate if they are over 65 or have a chronic health condition. Some employees assert that they are unable to work due to the unavailability of their regular childcare/children’s schools. In certain circumstances, Education Employers should provide employees reasonable accommodation to comply with employee rights. Recent changes to Federal leave laws will also impact how these employees will be treated with respect to available paid leaves.

Despite the potential multitude of obstacles in compelling employees to report to work or perform work, under the law, public employees are disaster service workers and can be required to work during this emergency. Employers should nevertheless consider whether there are any indications, based on actual evidence, that returning to worksites presents a greater risk of exposure for that particular employee or all employees, such as confirmed cases of COVID-19 for employees or students at the worksite. Absent such evidence, and if another legal accommodation is not required, employees can also be subject to disciplinary action for failure to perform their responsibilities. Education Employers should consult legal counsel should they encounter employees refusing to work. Employees over 65 or with chronic health conditions, for example, would not be disciplined for failing to report to work during this emergency.

The Road Ahead

Education Employers are taking unprecedented proactive measures to provide distance learning, feeding the neediest children, and securing funding to pay their employees. It is incumbent upon employers to implement these programs quickly, and at the same time keep their labor organizations informed and follow collective bargaining laws, which includes meeting and negotiating the impacts of these decisions once they can. This is a fluid and rapidly evolving situation where communication to employees and labor partners is key.

Our AALRR attorneys are always available to assist clients in navigating their course through these uncertain times.


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