

Practical Tips When Negotiating a Successor Collective Bargaining Agreement in the Middle of a Global Pandemic

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2020 has taught us that the future is not always predictable. Union-represented employers have the unique challenge of navigating these unpredictable times under collective bargaining agreements that likely did not account for a global pandemic's effects on their business and workforce. The expiration of a collective bargaining agreement provides both employers and unions the opportunity to address COVID-19-related issues in a successor agreement. Parties negotiating a successor collective bargaining agreement should draft and negotiate proposals to preserve and strengthen their business in light of the pandemic and to ensure employees' health and safety. Parties also are urged to consider the "what ifs" the pandemic may present to their business and workforce in the years to come, and to seek additional flexibility at the bargaining table.

Workplace Safety

Workplace safety, especially amidst the COVID-19 pandemic, is undoubtedly of paramount concern for both employers and unions. If they have not done so, unions will likely push for additional safety protocols and assurances for the bargaining unit employees they represent during negotiations. In preparation for such negotiations, unions may seek information regarding COVID-19-related employee health and safety issues, especially in higher-risk healthcare settings and other essential businesses whose employees interact with the public. Under the National Labor Relations Act (NLRA), employers have a duty to provide to their employees' union(s) information that is presumptively relevant to the bargaining unit, including that relating to health and safety.

During negotiations, the parties may seek to establish a workplace safety committee, made up of both management and employee representatives, to share concerns about safety. Having such a committee would potentially provide greater flexibility for the employer to adapt quickly as circumstances change and guidance continues to develop.

Further, how the employer monitors employee health without infringing on employees' individual privacy rights, what tools might be used for monitoring, how the information would be collected and stored, and how such information would be used and protected are important points to be raised during negotiations. Employers also should consider raising the issue of whether they plan to urge or require employees to obtain a COVID-19 vaccine if one becomes available, and what any such plan would entail.

Paid Time Off

The pandemic also has highlighted employees' desire and/or need for greater paid time off. When considering proposals relating to paid time off, the parties should be aware of the paid and unpaid leaves available under federal and New Jersey state law to determine whether any additional contractual leave is warranted.

Employee leave entitlements that may be available under the Federal Families First Coronavirus Response Act, including two weeks of emergency paid sick time in a number of COVID-19-related circumstances and additional paid leave to care for children whose schools close due to COVID-19, are set to expire at the end of this year. However, New Jersey leave entitlements relating to emergencies such as the COVID-19 pandemic do not expire. Specifically, recent amendments to the New Jersey Family Leave Act and Family Leave Insurance and Temporary Disability Insurance law provide paid leave to employees for a variety of COVID-19-related reasons, including to care for themselves or a family member when directed or advised to quarantine by a healthcare provider or public health official. The New Jersey Family Leave Act also provides leave for employees to care for their children in the event of COVID-19-related school closures; however, such leave is unpaid unless employees can secure unemployment benefits.

The parties should also consider whether and how operations would continue in the event of another spike in COVID-19 cases. This includes whether and how operations would run if multiple employees are required to self-isolate or quarantine or if a new stay-at-home Executive Order is issued. In light of this, employers are urged to consider negotiating telework arrangements for bargaining unit employees who are able to work remotely.

Employers do not have a duty to bargain regarding their compliance with any law or Executive Order. Employers, however, must bargain with their employees' union(s) regarding the effects any mandate may have on employees and any discretion they might want to exercise in excess of what is mandated.

Economics

Economics is always a major topic during the negotiation of collective bargaining agreements, and will likely be even more of an issue now given the pandemic's effect on most businesses. Depending on the industry, some businesses have lost significant revenue since the pandemic started, while other businesses have been booming. Although collective bargaining agreements typically contain incremental wage increases during each year of their term, employers may not be willing or able to agree to guaranteed wage increases, let alone greater hazard pay, due to their financial situation. Unless they claim an inability to pay, employers generally are not required by the NLRA to disclose their financial records in response to a union's information request. Some employers may already know they are unable to pay for what their employees' union(s) will likely demand during negotiations, and may even question the long-term viability of their businesses. Others are uncertain of what ongoing effect the pandemic may have, whether their Paycheck Protection Program loans will be forgiven and whether additional governmental aid may become available to them. Employers in the latter category should carefully draft their response to union information requests as linked to the unknowns presented by the current state of the pandemic rather than to their potential inability to pay.

When considering what, if any, wage increases to offer employees, it is prudent for employers to survey the relevant labor market to ensure their wages are sufficiently competitive to retain the trained workforce needed during the term of the successor agreement, or determine that other factors will encourage employees to stay. In an effort to promote the long-term viability of their businesses, employers may consider proposing a link of any wage increases, in whole or in part, to employees meeting specific production or service metrics. Employers also may consider proposing lump-sum wage increases, instead of increases to base pay which compound over the term of the agreement, or delays in the traditional timed increases until some of the uncertainties presented by the pandemic subside. Unions, on the other hand, may be willing to trade wage increases for increased time off, especially for COVID-19-related reasons, or to retain jobs.

Flexibility in Operations

Difficult times call for greater flexibility. As such, employers and unions should consider the elimination of “zipper clauses” that preclude their ability to engage in midterm bargaining. Further, employers should ensure that their collective bargaining agreement’s management rights clause provides sufficient flexibility to continue operations as necessary due to the pandemic. Items to consider raising at the bargaining table include the employer’s ability to contract out work when necessary to meet production deadlines and to allow employees to take time off for reasons related to COVID-19.

Furloughs and Layoffs

Employers may want to propose agreement revisions to address their need to reduce their workforce through furloughs or layoffs. One issue to consider is how the employer would select employees for furlough or layoff, such as in order of reverse seniority, according to performance over a set period or via some other criteria. Employers should anticipate union counterproposals specific to layoffs, including severance pay, the order in which employees would be recalled to work, and the length of time recall rights remain in place. The longer employees’ recall rights last, the greater the restrictions on employers’ future hiring decisions. In negotiating any increased severance benefits for employees, employers should seek the required execution of a release, in both a form and substance acceptable to them.

Contract Term Considerations

If parties find themselves not obtaining the items they want or need during negotiations, they may seek a shorter-term agreement and/or the ability to reopen the agreement midterm, when triggered by certain events or during a certain timeframe. The risk of a reopener provision is that, unless narrowly written, it reopens the entire agreement to negotiation. For this reason, and to ensure that its inclusion does not cause more harm than good, a reopener provision should explicitly set forth which provisions can be reopened during the term of the agreement, including whether the no-strike and no-lockout provisions would continue to apply.

Logistics of Negotiations

Lastly, traditional face-to-face negotiations may not be desirable, or even possible, during a continuing pandemic. Because the format of negotiations must be mutually agreed upon, the parties should discuss logistics in advance of negotiations, including whether negotiations would be conducted via conference call or web-based video application. If negotiations are conducted in person, the parties should ensure that any negotiation location can safely accommodate social distancing of the parties' negotiating committees. During the negotiations, the parties should also discuss the possibility of virtual grievance meetings and/or arbitrations, and how such proceedings would work.

Although the above outlines several items to consider in preparing for negotiations, employers and unions should consider the specific needs of their business and their workforce. Given the difficulties presented by the pandemic, entering negotiations with an understanding of desired goals and an open mind will be beneficial for all involved.



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This article was first published in New Jersey Law Journal on November 4, 2020.

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