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THE COVID-19 PANDEMIC AND COLLECTIVE BARGAINING ISSUES

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As counties deal with employment issues during the COVID-19 pandemic, there are a multitude of factors and laws that must be considered. The FFCRA includes new types of leave, civil service law addresses numerous issues such as sick leave and layoffs and Federal laws such as the Fair Labor Standards Act and Family Medical Leave Act apply to everyday situations that are more complicated during the current pandemic. Perhaps the most complex area for some counties to deal with relates to collective bargaining. Many employers have found current collective bargaining agreements to be too limiting and unrealistic in addressing COVID-19 related issues such as scheduling, leave benefits and layoffs. This memo provides suggestions on dealing with legal issues and includes best practices for addressing collective bargaining matters.

Collective Bargaining and the COVID-19 Pandemic

Ohio collective bargaining law has a broad definition of topics that are mandatory subjects of bargaining. Under O.R.C. section 4117.08(A), all matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative. Even subjects falling within management rights are subject to bargaining if they affect wages, hours or terms and conditions of employment. This definition means most matters between public employers and bargaining unit employees can fall within the obligation to bargain.

The broad duty to bargain often is at odds with a county's legitimate need to address and modify important issues. A county's need for flexibility and decision-

making authority is no more important than during a crisis such as the current pandemic and its inevitable economic consequences. Over the years, the State Employment Relations Board (SERB) has issued decisions that recognize a public employer's need to make changes, even at times in contravention of a current collective bargaining agreement.

In one case, SERB addressed the City of Toledo's unexpected dire financial circumstances as it sought to increase employee health insurance premium contribution and eliminate pension pick-up during the term of the collective bargaining agreement. The Toledo Police Command Officers Association ("TPCOA") alleged that the City committed an unfair labor practice by unilaterally increasing the health-care premiums for members of the TPCOA and rescinding Employer's 10% payment into the TPCOA's pension fund. The City claimed the existence of exigent circumstances. SERB noted that "exigent circumstances" are a "situation that demands unusual or immediate action and that may allow people to circumvent usual procedures." SERB found the employer's predicament facing a 24% funding deficit and requiring a budget that must be balanced, submitted to the legislative body, along with potential spending reductions spread across six different bargaining units as well as exempt employees fits the description of exigent circumstances. SERB concluded the Employer did not violate its duty to bargain by unilaterally increasing the health-care premiums for members of the TPCOA and rescinding Employer's 10% payment into the TPCOA's pension fund after meeting with the TPCOA in an attempt to bargain these changes. *In re City of Toledo*, SERB 2011-001.

In an earlier case, SERB held an employer cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute. *SERB v. Toledo City Sch. Dist. Bd. of Edn.*, Case No. 2000-ULP-05-0274

These cases provide counties with guidance about changes that may be necessary due to the COVID-19 pandemic and the economic downturn. First, counties should attempt to avoid making unilateral changes without at least some good faith effort to bargain with the union. Even cases where SERB has allowed employers to make unilateral changes, the employer has offered to bargain with the union before the changes were made. If circumstances are so exigent that changes must occur before bargaining, counties should offer to bargain concerning the changes as soon as feasible.

Second, it is likely SERB will find the current circumstances to be exigent and not contemplated by the parties when they negotiated the most recent collective bargaining agreement. Public employers should be careful on how many changes need to be made and how drastic the changes are. Do not get greedy. Counties will have to justify these changes even under exigent circumstances.

Third, provide the union with information supporting the reasons for the proposed changes. This information should include documentation concerning revenues and expenditures, the need to continue providing services and changes made to minimize the spread of COVID-19.

Fourth, do not limit the focus on a particular union or unions. In the City of Toledo case, one of the reasons for the employer's success was it implemented the same changes across the board and shared that information with the union.

Finally, please note SERB considers these cases based on the specific facts. Counties should not assume any or all changes they want to make will be upheld by SERB or an arbitrator. Careful planning is required and counties should consult with their legal counsel and human resource specialists as they proceed through these bargaining issues.

Management Rights

Despite the broad scope of bargaining rights given to unions under Chapter 4117 of the Ohio Revised Code, management rights certainly are not meaningless. Ohio Revised Code section 4117.08(C) provides:

Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

- (1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
- (2) Direct, supervise, evaluate, or hire employees;
- (3) Maintain and improve the efficiency and effectiveness of governmental operations;
- (4) Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
- (5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
- (6) Determine the adequacy of the work force;
- (7) Determine the overall mission of the employer as a unit of government;
- (8) Effectively manage the work force;
- (9) Take actions to carry out the mission of the public employer as a governmental unit.

In addition, many collective bargaining agreements expand on these management rights.

Employers do not have unfettered authority to exercise management rights but these rights provide some guidance for counties as they are dealing with COVID-19 related issues. Whenever possible, employers should cite to its management rights as

authority for making changes. It still remains important to confer with union representative before changes are made when feasible.

Layoffs and Cost Savings

Clearly, many public employers are or will be considering layoffs and other cost savings measures affecting personnel. As counties and appointing authorities assess their situations, it makes sense to meet with bargaining representatives to explain the issues. Do not assume unions and their members simply will understand or accept possible reductions in force.

Most collective bargaining agreements include a layoff article. Most agreements do not provide for furloughs or reduced work schedules. As counties plan for reduced revenues and expenditures, collective bargaining agreement can provide more opportunities to accomplish this goal. Appointing authorities should meet with bargaining representatives to explore cost savings measures in addition to layoffs. Alternatives could include temporary furloughs, modified work schedules, changes to overtime compensation and premium pay and other changes.

As public employers are contemplating layoffs, other collective bargaining issues need to be considered. Some of these issues include:

- Whether non-bargaining unit employees can bump a less senior employee in a bargaining unit.
- Whether bargaining unit employees can displace non-bargaining unit employees.
- Whether a public employer can use contract or part-time employees while full-time employees are laid off.
- Payout of leave upon layoff.
- Procedural requirements for implementing layoffs.

Processing Grievances During the Pandemic

The emergency clause of a collective bargaining agreement may allow an employer to suspend or extend the timeline or process for processing grievances, for example due to social distancing or other requirements by authorities. Before doing so, a county should consider whether it is possible to have a meaningful grievance meeting through alternative communications before suspending the grievance process altogether. For instance, a county may wish to seek the union's agreement to an alternative meeting process, such as through a web conference or conference call. Parties can also share documents through email in advance of the meeting.

Some collective bargaining agreements provide that a grievance is automatically granted if the employer does not answer in the timeframe provided in the agreement. Employers should not assume these provisions are unenforceable during the pandemic. Again, communication with the union is important.

Timing of Negotiations

Another potential issue caused by COVID-19 is uncertainty over the timing of negotiations for a successor collective bargaining agreement between the parties. Many counties are either currently engaged in the bargaining process or will soon be negotiating successor agreements. As state and federal officials continue to extend the dates for the stay at home order and recommendations for social distancing requirements to combat the spread of coronavirus, how, when, and in what capacity these negotiations will take place creates confusion for employers and unions alike.

It is recommended that the parties work together to schedule negotiation sessions which are agreeable to both parties. The parties are also free to agree to an extension of the bargaining deadlines should they not be able to agree on a resolution. A county should carefully draft or closely analyze a proposed extension agreement so as not to unknowingly waive certain rights under the collective bargaining agreement. For example, counties should take caution not to waive any management rights or agree to automatic retroactive wage increases. As the pandemic continues to extend into the late spring and early summer, parties may want to consider alternative options to traditional in-person meetings, including telephone or video negotiation sessions.

In addition, public employers currently engaged in the negotiation process should consider notifying the union that they are withdrawing certain economic proposals. Normally, an employer cannot simply engage in regressive bargaining but the economic downturn likely justifies such changes to bargaining positions. Technically, if an employer made a wage proposal that is still on the table, a union can accept it at any time until it is withdrawn or modified. A proposal offered earlier in negotiations may no longer be viable which is why employers should consider withdrawing such a proposal.

Negotiating over Economic Articles

Collective bargaining agreements create significant financial obligations for counties. Because the parties can, and often do, negotiate collective bargaining agreements for three-year terms, counties should carefully evaluate their options when making proposals on economic items. SERB reports that the average county wage settlements negotiated in 2019 were 2.53% for 2019; 2.44% for 2020; and 2.30% for 2021 contract years. The average wage increases for 2020 and 2021 agreements likely will be substantially lower for negotiations occurring from April 2020 and forward.

During and shortly after the Great Recession, wage increases went down. The national unemployment rate rose from about five percent in December 2007 to ten percent in 2009. Home prices fell approximately 30 percent, on average. Average wage settlements in Ohio county collective bargaining agreements dropped from 3.16% in 2008 to 1.74% for 2009; 0.94% for 2010; 0.72% for 2011; 1.35% for 2012, 1.81% for 2013 and 1.98% for 2014. It was not until 2015 that the average increased exceeded 2%. Currently, the State is already preparing to operate on a leaner budget due to

economic ramifications of the pandemic. In a recent press conference, Governor DeWine announced that he asked State agency directors to prepare for cuts of up to 20%.

Of course, wages are not the only topic in a collective bargaining agreement that has financial implications for a county. Other topics that may arise during bargaining in light of the pandemic include health insurance, overtime pay, hazard pay and others. It is important for counties to develop collective bargaining strategies based on the new realities.

Conclusion

Counties need to give consideration to potential changes concerning wages, hours and terms and conditions of employment for employees in a bargaining unit. Employers need to work on short term and long term plans to address their needs in collective bargaining agreements in light of the COVID-19 pandemic and economic downturn. Employers need to be mindful of their bargaining obligations and take them seriously. There are no shortcuts. Communication with bargaining unit members and their leadership will be crucial. Ultimately, each appointing authority will need to determine how far changes need to go and how much risk they are willing to take should a union not agree to those changes.