

TO: NEPBA EXECUTIVE COMMITTEE AND LOCALS
FR: NOLAN | PERRONI, PC
RE: ADVICE MEMO:
CONTRACT AND COLLECTIVE BARGAINING RIGHTS DURING STATE OF EMERGENCY

March 19, 2020

Many local union leaders have contacted us regarding issues surrounding the COVID-19 situation. Not unexpectedly, union locals have stepped-up, and have expressed an overwhelming desire to work with their local governments in order to combat the ongoing threat to the public health. In doing so, we have been asked about the effect of the declared State of Emergency on union contracts and the traditional bargaining required when employers change the terms and conditions of employment. In addition to issues of paid leave, unions may face scheduling changes, additional or modified job duties, staffing changes, and, obviously, increased health and safety concerns for members. Here are some things to consider:

Collective Bargaining Agreements

Union contracts are still good during this time of emergency. In fact, many of the provisions negotiated over time anticipate emergency and crisis situations. Generally, a declaration of law from the state or local government does not relieve the governments from complying with its contractual obligations. For example, in its recent notice to employers nationwide regarding the COVID-19 outbreak, the US Dept. of Labor has advised that in a unionized environment, questions regarding the FLSA (controlling wages and overtime) and FMLA (family medical leave) are controlled by the collective bargaining agreement.

Many contracts have provisions specifically dealing with declarations of emergency or may incorporate existing policies and procedures that address such situations. So, as always, the CBA should be reviewed for guidance.

Bargaining Changes in Working Conditions

Although public safety managers have authority to make decisions in times of emergency (deployment of resources, levels of services decisions, mandatory overtime, etc.) rules regarding bargaining obligations are not suspended. To the extent such decisions are exempt from the collective bargaining laws, the obligation to bargain over the impacts of those decisions remains. By way of comparison, in a relatively recent situation, Massachusetts characterized the opioid crisis as an epidemic, declared a public health emergency, and former Gov. Patrick then implemented the carrying of NARCAN by police officers. While this decision, implemented by municipalities, was exempt from bargaining, the Massachusetts Dept. of Labor ruled that the Cities and Towns were required to bargain with unions over the impacts of implementing these new job duties before implementing them. In that case, the primary

concern was the health and safety of the police officers asked to perform this new duty. Remember, that proposals or orders that impact health and safety – as almost all changes in work conditions will during these extraordinary times – are subject to impact bargaining before implementation.

Changing Landscapes

Because the collective bargaining law has been in place for many years, and most circumstances have been litigated at one time or another, legal outcomes are generally predictable based on past precedent. In the current environment, it is clear that both labor and management are in somewhat uncharted waters, and it will take a joint effort to navigate safely through this storm. In fact, this week, State and Local leaders held a conference call discussing many of these same concerns, and it is clear that there are a lot of unknowns.

Emergency Bargaining Committees

With the above principles in mind, we are recommending that union locals request to be part of the decision-making process, as opposed to having to react to notices of unilateral changes. Unions can and should propose that municipalities create emergency bargaining committees, so that proposed changes can be flushed out, members' concerns can be addressed ahead time, and changes can be agreed upon in advance where possible. A joint process such as this can help to avoid adding labor strife to an already difficult situation and eliminate some of the unpredictability and uncertainty that exists.