



COVID-19:

Construction Industry Update on the
COVID-19 Public Health Crisis From a
Labor Perspective

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Presented by



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What is the impact of a government declared quarantine or state of emergency on union contract provisions that would otherwise prohibit or limit the employer's ability to comply?

A government declared quarantine or state of emergency would excuse compliance with union contract obligations. This view is consistent with §264 Restatement (Second) Contracts, “Prevention by Governmental Regulation or Order” (1981)(“If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made”).



What is the impact of a government declared quarantine or state of emergency on NLRA bargaining obligations that would otherwise exist?

The employer has no duty to bargain over the decision to implement non-discretionary changes in terms and conditions of employment mandated by law, though effects bargaining may still be required.



Do the above rules apply to actions the employer may take in order to comply with safety and other regulations?

Yes. Whether or to what degree the employer is excused from union contract and/or NLRA bargaining obligations will turn on whether the actions it takes are legally mandated or involve the exercise of some discretion.



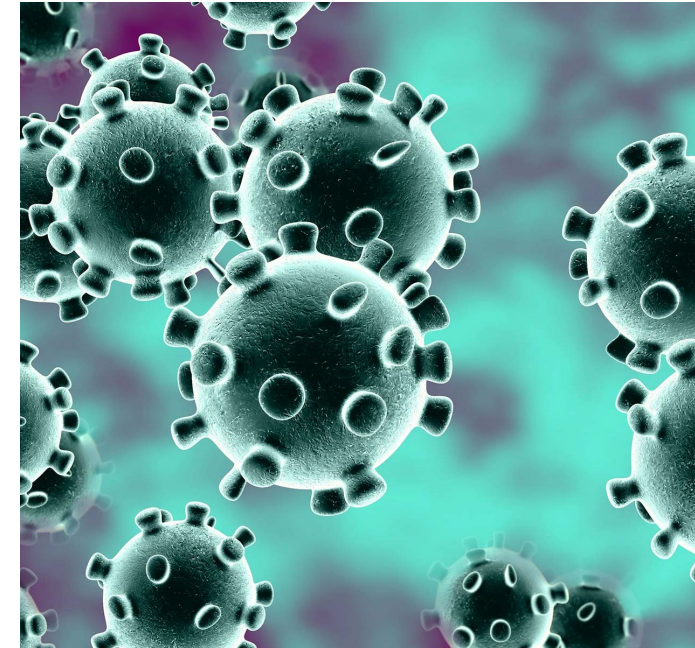
Do the above rules apply to discretionary “best practice” actions the employer may choose to implement?

No. The employer would have legal risk if and to the extent such actions violate union contract and/or NLRA bargaining obligations.



Are there any state laws (e.g., those relating to states of emergency) that may be read to excuse performance of union contract obligations?

Governor Walz has issued an emergency declaration on combatting COVID 19. To the extent that work conflicts with the declaration's prohibitions, yes, it may excuse performance.



What are the normal remedies for violating NLRA bargaining obligations?

- Unfair labor practice charges usually take 30-60 days for a regional NLRB office to investigate and, if a complaint is issued, a year or more to litigate with appeals. The normal remedies for such violations are:
 - A cease and desist order requiring a return to the pre-violation *status quo*;
 - An order that employees be made whole for economic losses (or a *Transmarine* remedy if the alleged violation only involves effects bargaining); and/or
 - A Notice of Rights posting
- It is unlikely in the current environment that the NLRB would seek or obtain interim 10(j) injunctive relief restoring the *status quo* while litigation is pending.

What are the normal remedies for CBA violations?

If a union claims its rights under the CBA were violated, the grievance procedure could take a month or more, and arbitration, if requested, would take over a year to complete with appeals. The normal remedy for a CBA violation is an award requiring a return to the pre-violation *status quo* and that employees be made whole for economic losses. It is also possible a union will file a reverse *Boys Markets* action in federal court seeking a temporary injunction restoring the *status quo* pending arbitration (the union would have to prove the employer's action threatens irreparable harm to the economic security of employees).

Practicing Good Labor Relations During a Public Health Emergency

We also encourage our unionized clients to consider leveraging the common interest unions and employers generally have in employee safety as a risk mitigation strategy. This might include:

- Immediately notifying unions that the employer is developing a COVID-19 response plan. State: (1) safety is a shared priority; (2) the employer is monitoring the situation to understand best practices and intends to comply with any legal mandates; and (3) the employer appreciates the unions' cooperation.
- For non-discretionary responses or discretionary responses covered by your rights under a CBA, notify unions what you intend to do, when, and why, and request that questions be directed to a single point of contact. Give reasonable pre-implementation notice if possible and bargain over the effects upon request without delaying implementation.
- For discretionary decisions where union consent is needed or bargaining obligations are believed to apply, seek to fulfill these obligations if at all practical but not at the expense of more material business risk.

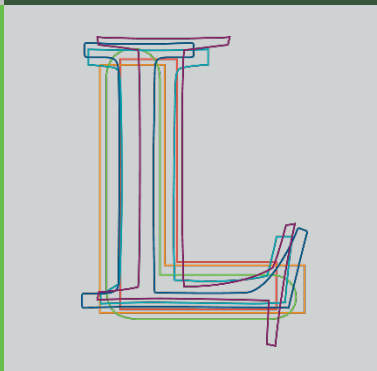
Other Laws to Keep in Mind

Keep up with latest developments on paid leave, both at the federal level and at the state level. Changes are being made on almost a daily basis.

Be mindful of WARN Act requirements for layoffs, as well as state WARN Act requirements.

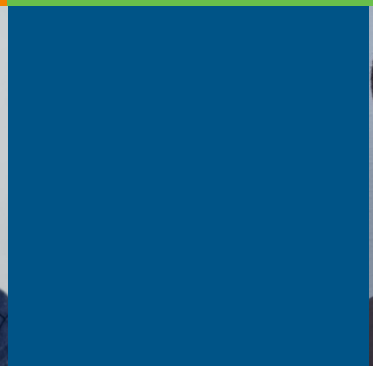
Coronavirus (COVID-19) Resources for Employers

Please visit [littler.com/coronavirus](https://www.littler.com/coronavirus)
for Littler's resources for Employers.



Questions?

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.





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