

by Quinton M. Herbert

Public sector collective bargaining

COVID-19's disruptive impact



Downtown Baltimore

Boxer Mike Tyson is famously quoted as saying “Everybody has a plan until they get punched in the mouth.” COVID-19 has certainly punched us all in the mouth. At the height of the COVID-19 response last spring, U.S. employers shed nearly 30 million positions from payrolls. “Depending on how you count it, you’re talking about something like a quarter of all U.S. jobs being disrupted by the pandemic,” according to Erica Groshen, a former Bureau of Labor Statistics commissioner appointed by President Obama.¹

To say that employers have faced unprecedented challenges is nothing short of an understatement. In particular, the COVID-19 epidemic has changed the public sector’s work and workplaces almost overnight. Employers, particularly municipal employers, had to figure out rather quickly how to transform an environment, where the word “telework” was classified as a foreign language, into an environment where remote work and use of secure, cloud-based technologies became the new normal. Employees whose work was mostly done at desktop computers were given the option of keeping their desktops or exchanging them for laptops, all while minimizing service disruption to millions of citizens.



Quinton M. Herbert, JD, serves as the Director of Human Resources and Chief Human Capital Officer for the City of Baltimore.

In addition to the change of the workspace, state and local governments have been forced to furlough or lay off millions of employees while still maintaining a high level of service to constituents. Congress has provided aid through the Families First Coronavirus Response Relief Act and American Rescue Plan Act to states and municipalities, but the aid is little more than a band-

aid as tax revenues continue to plummet and estimated shortfalls are targeted at \$1.3 trillion over the next three years.

Public sector employees are at the forefront of the pandemic's response. Whether it be public safety, sanitation services, local health department employees, or traditional support agencies such as revenue collection or IT, workforces in the public sector are being challenged to work in new ways and in new situations. The conditions of work created by COVID-19 have created additional tensions in the labor-management relationship as labor seeks to reimagine compensation, benefits, and other terms and conditions of employment while government employers are realizing record deficits in their budgets.

Notwithstanding that tension, the effects of COVID-19 are still being felt throughout the economy, collective bargaining agreements will expire, new units will gain bargaining rights, and the National Labor Relations Act will continue to require management and labor to come to the table and bargain in good faith. COVID-19's financial turbulence and its impact on the landscape of the municipal workforce will undoubtedly heighten pressures and cause significant disruption in upcoming labor negotiations. This article seeks to identify and contextualize two major anticipated hot-button issues that will likely arise during labor negotiations because of the parties' collective experiences with COVID-19: compensation and management rights. This article also seeks to provide some general guidance on negotiating in this postpandemic environment when both parties will likely bargain from what Deepak Malhotra called "the impossible," a bargaining position without money or muscle.²

Compensation

The economic uncertainties resulting from the pandemic will indubitably generate waves that will reverberate across all labor discussions. Employers have been forced to close or substantially decrease operations in practically every industry, and income has plummeted. Meanwhile, expenses related to meeting the needs created by the health emergency have soared in industries that have not been closed. This trend has been magnified in governmental workspaces. State and municipal governments have been hit twice, with the unanticipated fiscal investment needed to provide critical services to constituents while simultaneously facing a sharp drop in revenue. Many workers, on the other hand, have lost pay during this period, through furloughs or layoffs, and their finances may be stressed. It is against this backdrop that negotiations of economic proposals will be cast.

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For this year's bargaining cycle, salaries are anticipated to be the most controversial issue. Almost all employers — both private and public — can justifiably assert that the financial basis for previously negotiated wage rates has altered significantly. Further exacerbating the problem is the desire of both labor and management to pay some type of "hazard pay" or stipend to employees providing essential and forward-facing services.

To navigate successfully through the bargaining issues related to compensation, parties should evaluate whether across-the-board wage increases are feasible this year. Parties should give serious consideration to linking pay raises to performance goals. For example,

employees may get raises if the performance target is linked to revenue at a certain level.

Success for a wage structure as previously articulated will require transparency about the employer's financial condition, particularly when there is a claim of inability to pay a wage increase. Because of the heightened sensitivities around compensation, both parties must also take care to pay attention to the optics of their respective proposals. It's not just the substance of the offers that matters, but also how those offers look to negotiating parties and other stakeholders.³

Management rights

Many employers, particularly public sector employers, exercised the flexibility afforded by broad management-rights clauses and zipper clauses,⁴ in responding to the COVID-19 pandemic. Labor bargaining agents will likely seek to walk back some of the management rights in favor of more specific definitions around when particular management rights are applicable.

Unions will look for contractual guarantees to limit what they consider as overly broad management-rights clauses. To achieve this end, unions may seek to include "statement of emergency" language, which would limit management's ability



Credit: Bruce Emmerling



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to make unilateral changes in the event that a defined governmental entity declares an emergency. On the other hand, employers will likely come to the table hoping to broaden management-rights wording, such as the ability to cancel scheduled salary increases in the middle of the year or reemploy employees to various parts of the business in response to changing demands resulting from an emergency. To preserve or broaden expansive management rights, employers should consider alternative terms or conditions of employment on which they are willing to compromise.

A separate issue related to management rights that is likely to surface during this year's bargaining cycle is *force majeure* clauses. *Black's Law Dictionary* defines *force majeure* as "an event or effect that can be neither anticipated nor controlled." The frequency of force majeure clauses in collective bargaining agreements (CBAs) varies by industry. For example, in the health care industry, force majeure clauses became more common in CBAs in the aftermath of Hurricane Katrina. Other industries may follow suit in the wake of the COVID-19 pandemic.

Employers should carefully consider whether to use bargaining capital in obtaining force majeure language in a CBA. In the absence of a force majeure clause, the common law doctrines of impossibility, impracticability, and frustration of purpose may very well serve to excuse nonperformance. Moreover, employers should consider clarifying any confusing force majeure clauses and making sure that pandemics, epidemics, and other outbreaks are expressly designated as force majeure occurrences. If courts determine that such disasters have now become predictable, general force majeure provisions that do not specifically include pandemics in their definitions may not give protection during a future pandemic.

Another way labor and management can mitigate the impact of future pandemics or epidemics without bargaining over force majeure language is to utilize labor-management committees to address joint health and safety concerns. The parties may agree to develop information-sharing protocols to ensure that employees' health- and safety-related feedback and management's responses are received in a timely fashion.

During these unprecedented times, it is important for public sector employers to remember that unilateral changes made to address the needs of the pandemic are temporary. It is equally important for public sector bargaining agents for labor to remember that in a crisis, decision making becomes more centralized because rapid responses can save lives. That said, as governmental services are restored as virus prevalence wanes yet remains in the forefront of news, employee concerns about it are likely to grow. The relationships between management and labor will continue.

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The views of the author and publication do not reflect those of and may not be imputed to the author's employer. ■

Notes

1. Eric Morath, "How Many U.S. Workers Have Lost Jobs during Coronavirus Pandemic?" *Wall Street Journal*, June 3, 2020.
2. Deepak Malhotra, *Negotiating the Impossible: How to Break Deadlocks and Resolve Ugly Conflicts* (Oakland, Calif.: Berrett-Koehler, 2016).
3. *Ibid.*, p. 19.
4. "A zipper clause is a term in an employment agreement that 'purports to close out bargaining during the contract term and to make the written contract the exclusive statement of the parties' rights and obligations.'" R. Gorman, *Basic Text of Labor Law* 455, 471 (1976).



“REACHING OUR FULL POTENTIAL”

The importance of people and ideas to advance diversity and inclusion in the economics profession

In April 2021, the 12 Federal Reserve Banks turned the lens of their “Racism and the Economy” series on the economics profession, examining how racism affects the people and practice of economics and addressing the work that needs to be done to achieve greater diversity, expand avenues of inquiry, and better inform public policy. Now, a follow-up report synthesizing and expanding on the event’s expert panel conversations is available.

Conversations during the event made it clear that economists increasingly recognize a broad set of factors that contribute to a lack of diversity in who works in the discipline. Panelists agreed that these dimensions reinforce each other and that changes are needed to keep economics relevant and “reaching our full potential,” as San Francisco Fed President Mary Daly said during the event.

“This event built on a lot of hard work by other groups in the economics profession,” said Abigail Wozniak, director of the Opportunity & Inclusive Growth Institute at the Federal Reserve Bank of Minneapolis, an author of the report, and a member of the Labor and Employment Relations Association. “But what I think this report brings is an emphasis on the importance of culture and behavior in the profession. We heard from a range of panelists about how racism affects everything from who studies economics to which research ideas receive support. By translating these conversations into action items, we hope this provides those in the profession with a new set of recommendations to work from.”

These recommendations begin with steps to change the practice of economics. These include evolving the discipline’s culture to welcome people and ideas that may not fit a preconceived mold; examining assumptions when including race or ethnicity variables in statistical analysis; and diversifying editors, reviewers, and authors at journals. Panelists also pointed to the need to expand recruitment and retention by engaging with young people from underrepresented groups and showing them how economics is useful for the problems they wish to address. And to track progress, organizations should collect data and evaluate whether policies have a disproportionately negative impact on underrepresented groups.

Evidence presented at the conference suggests that an important first step is measuring diversity among economists, particularly those employed in the private sector. Fortunately, engagement patterns during and after the event show that interest in these questions extends to all sectors that engage with economic analysis, including private, public, and nonprofit organizations. Indeed, more than 1,000 registrants pledged to carry the conversation into their own organization. That so many people watched the event and chose to discuss its themes indicates a growing willingness to take action on expanding inclusion in economics.

To read the full report, visit minneapolisfed.org/article/2021/reaching-our-full-potential.