

COVID-19 Related Unilateral Changes to Mandatory Subjects of Bargaining

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Most, if not all, public safety employers in Washington have adopted new rules, schedules, or working conditions in response to the outbreak of COVID-19 in the state. Some of these changes may be welcomed, while others may leave labor organizations wondering what they can do to prevent the unwanted change or mitigate the negative impact of it. The purpose of this memo is to address the general rules governing when an employer may unilaterally implement changes to mandatory subjects of bargaining, as well as a general history of decisionmakers' rulings in situations where an employer has argued that an emergency caused them to implement a change.

I. PERC History of the Business Necessity or Emergency Defenses

a. The General Duty to Bargain

Washington law requires public employers to engage in collective bargaining with the exclusive bargaining representative of their employees concerning mandatory subjects of bargaining, including wages, hours, and working conditions of employment.¹ Absent a clear and unmistakable waiver of a union's right to bargain, an employer is prohibited from making unilateral changes to mandatory subjects of bargaining without engaging in the collective bargaining process in good faith.²

To establish a valid unilateral change case, a union must prove four elements of the claim: (1) existence of a relevant status quo or past practice, (2) the status quo's status as a mandatory subject of bargaining, (3) notice and an opportunity to bargain the proposed change was not given, or notice was given but an opportunity to bargain was not afforded, and (4) an actual change to the status quo or past practice occurred."³ The Commission determines whether an alleged unilateral change actually constitutes a part of the status quo. To be part of the status quo, a rule or policy must be a precedent which the employer has used during the relevant past, not merely a written policy that is pulled off the shelf just in time to fend off an unfair labor practice charge.⁴

¹ RCW 41.56.030(4); 41.56.100.

² *State – Social and Health Services*, Decision 9551-A (PSRA, 2008).

³ *Port of Anacortes*, Decision 12225 (PORT, 2014).

⁴ *Pierce County Fire District 3*, Decision 4146 (PECB, 1992).

In order to determine whether a party bargained in good faith, the totality of conduct is examined. If the conduct reflects a rejection of the principle of collective bargaining, the party will be considered to have acted in bad faith.⁵ Even when employers do not have a duty to bargain a particular decision, they may still be required to bargain the effects of a decision that impacts the wages, hours, or working conditions of represented employees.⁶ In instances where an employer contemplates a change and takes action toward the goal of implementing that change without allowing the union an opportunity for bargaining which could influence the employer's planned course of action, an unfair labor practice may be found.⁷ An employer who presents a union with a change of a mandatory subject as a *fait accompli*, has committed an unfair labor practice.⁸

PERC has recognized certain exceptions to the bargaining obligation.⁹ A unilateral change of a mandatory subject of bargaining can be lawfully implemented where (1) a party waives its bargaining rights by inaction, after adequate notice of the proposed change has been provided;¹⁰ or (2) *the employer establishes a "business necessity" to impose the change.*¹¹

The business necessity defense may be applicable where a party to a collective bargaining relationship is faced with a *compelling* legal or practical need to make a change affecting a mandatory subject of bargaining.¹² It may then be relieved of its bargaining obligation *to the extent necessary to deal with the emergency.*¹³

If an employer raises a "necessity defense" to an otherwise unlawful unilateral change, they must show that: (1) a legal necessity existed; (2) they provided adequate notice of the proposed change; and (3) that bargaining over the effects of the change did, in fact, occur or the complainant waived bargaining over the effects of the change.¹⁴ This defense may relieve the employer of its bargaining duty even if the decision to implement a unilateral change was presented as a *fait accompli*.¹⁵ We next turn to the principles that apply in the fact of a claimed "emergency" defense to the duty to bargain and discuss how PERC has evaluated emergency defense claims.

b. PERC Application of "Emergency" Exception Principles

⁵ *City of Snohomish*, Decision 1661-A (PECB, 1984).

⁶ *Seattle School District*, Decision 5755-A (PECB, 1998).

⁷ *See SKAGIT County*, Decision 6348-A (PECB, 1998).

⁸ *City of Seattle*, Decision 3654 (PECB, 1990).

⁹ *See Cowlitz County*, Decision 7007-A (PECB, 2000).

¹⁰ *North Franklin School District*, Decision 3980-A (PECB, 1993).

¹¹ *City of Chehalis*, Decision 2803 (PECB, 1987).

¹² *See Cowlitz County*, Decision 7007-A (PECB, 2000).

¹³ *Id.*

¹⁴ *Port of Anacortes*, Decision 12225 (PORT, 2014).

¹⁵ *Id.*

PERC has repeatedly noted that while an emergency may justify a unilateral change in a mandatory subject of bargaining, the defense only *modifies* the employer's normal bargaining obligations; *it is not a wholesale exemption*.¹⁶ But PERC case law does provide *some* ability for employers to act unilaterally when presented with an emergency.¹⁷ There are, on occasion, situations "where a unilateral change of a limited nature is necessitated by an emergency of some kind."¹⁸ PERC has repeatedly found that the defense of necessity, under either a business or legal basis, is *an affirmative defense that the employer bears the burden of establishing*.¹⁹

The "business necessity" defense arises where a party to a collective bargaining relationship is faced with a compelling legal or practical need to make a change affecting a mandatory subject of bargaining. The employer then may be relieved of its bargaining obligation, *to the extent necessary to deal with the emergency*. Even then, a business necessity that justifies a particular decision or action will not relieve that party of its obligation to bargain *the effects* of the decision on the affected employees.²⁰ Therefore, a union facing a questionable emergency claim should make a demand to bargain, *and even if the emergency defense appears solid, the union should always demand to bargain at least the effects (or impacts) of the implemented changes*.

Evaluation of the merits of an employer's business necessity defense must be made in the context of all of the relevant facts and circumstances of the action.²¹ A review of case law by PERC (and other labor agencies) suggests five principles or tests likely to be applied to evaluating a claimed emergency defense:

1. The employer had the burden to establish the defense;
2. The employer must give the union notice of the emergency situation as soon as possible;

¹⁶ See *Cowlitz County*, Decision 6832-A (PECB, 2000); *King County*, 10576-A (PECB, 2009); See also *Business Necessity as a Defense to an Employer's Breach of its Bargaining Duty*, 28 Willamette L. Rev. 259 (1992).

¹⁷ See *Green River Community College*, Decision 4008-A (CCOL 1993) (There are, on occasion, situations where a unilateral change of a limited nature is necessitated by an emergency of some kind, but only when the situation creating the emergency was outside of the employer's control.).

¹⁸ *Id.*

¹⁹ See *Cowlitz County*, Decision 7007-A (PECB, 2000).

²⁰ *City of Chehalis*, *supra*.

²¹ *City of Sumner*, Decision 1839 (PECB, 1984).

3. The employer must engage in every reasonable opportunity to negotiate the matter as the circumstances of the emergency allow;
4. Whatever change the emergency requires must be only made on a temporary basis;
5. The defense is not available where employers have had prior opportunities to bargain the subject matter but have failed to complete such negotiations.

The defense of necessity, under either a business or legal basis, is an affirmative defense *that the employer bears the burden of establishing*.²² The employer must prove, at the least, that: “(1) a business necessity existed; (2) it provided adequate notice to the union of the proposed change; and (3) the parties bargained over the effects of the change or the union waived bargaining.”²³

The Commission has long held that the affirmative defense of business necessity should be *narrowly construed*.²⁴ “Evaluation of the merits of the business necessity defense must be made in the context of all of the relevant facts and circumstances of the personnel action.”²⁵ However, a business necessity may serve as a defense only when the modification of a benefit is “outside the employer’s control.”²⁶ The successful assertion of this defense relieves an employer of its normal bargaining obligation, but only “to the extent necessary to deal with the emergency.”²⁷

A common issue that arises is the severity of an emergency necessary to give rise to the possible defense of business necessity. There does not seem to be any bright-line answer to this question, and it is apparent that the individual facts of each case are critical to the determination.

In *Port of Walla Walla*, the union alleged that the employer refused to bargain regarding the decision to layoff an employee or the impacts of the lay off decision.²⁸ In that case, the employer argued that the layoff procedure that it used was tentatively agreed to during ongoing collective bargaining negotiations. The Commission ruled that for interest arbitration eligible groups, changes to the contract can only be forced upon a

²² See *Cowlitz County*, Decision 6832A (PECB, 2000); *Lake Washington Technical College*, Decision 4721-A (PECB, 1995).

²³ Decision at 18, *citing Skagit County*, Decision 8886-A (PECB, 2007)

²⁴ See Decision at 23.

²⁵ *Western Washington University*, Decision 8256 (PSRA, 2003).

²⁶ *Cowlitz County*, *supra*.

²⁷ *Spokane County*, Decision 2167 (PECB, 1985).

²⁸ *Port of Walla Walla*, Decision 9061-A (PORT, 2006).

bargaining unit by an interest arbitration panel, or under true emergency circumstances.²⁹ The employer argued that a budget shortfall was such an emergency, however the union showed that the employer faced greater budget shortages in previous years, and in those years did not layoff any employee.³⁰ The Commission ruled that a valid emergency did *not* exist. This holding suggests that one tool that a labor organization has to rebut an employer claim of emergent circumstances is to provide examples of employer behavior in similar past situations, if any exist.

In *City of Tacoma*, the employer's theory that a valid emergency giving rise to the business necessity defense was rejected when the City required an employee to take a drug test to see whether an officer was fit for duty.³¹ In that case, the union argued that drug testing is a mandatory subject of bargaining, and that the employer committed a ULP by unilaterally adopting a policy which the parties had been negotiating for over six years. The employer did not dispute that drug testing is a mandatory subject of bargaining, but it contended that it was addressing an emergency within the structure of its preexisting disciplinary procedure. The employer's Police Chief had received reports from an informant that an officer was using marijuana and cocaine among other substances. After receiving the report, the department surveilled the officer, and found that they had been present in locations with known drug use. The employer felt that this situation constituted an emergency due to the threat of public harm, and ordered a drug test. The union objected to this order, asserting that "reasonable suspicion" should not be the standard for determining whether a drug test is necessary. The initial hearing examiner ruled that, "[a]lthough the employer made a unilateral change, the drug test of [the officer] was a circumstance where the duty to bargain gives way to the legitimate need for an employer to take reasonable action in response to an emergency,"³² however that rationale was vacated by the Commission despite its confirmation that the ULP was invalid.

In *Evergreen School District*, an employer temporarily transferred the bargaining unit work of distributing textbooks to students from a union clerk to a newly created supervisory position.³³ This one-time "skim" occurred when a shipment of books arrived while the clerk was not present. The Examiner found that, under the specific circumstances of that case, delaying the distribution of the books would have impacted

²⁹ *Id.*

³⁰ *Id.*

³¹ *City of Tacoma*, Decision 4539 (PECB, 1994).

³² *Id.*

³³ *Evergreen School District*, Decision 3954 (PECB, 1991).

the students' ability to learn, constituting an emergency. As a result, the temporary transfer of work was deemed to fall under the "business necessity" defense.³⁴

In *Cowlitz County*, a group of corrections employees decided to leave their Teamsters union to form a guild and could no longer be part of the Teamster's medical plan.³⁵ The County offered the group insurance plans that were available to other employees in the County. The parties began bargaining a new contract in September of 1998. During a November bargaining session, the employer informed the Guild of rate increases for the following year, and the Guild filed a ULP over the unilateral change. In that case, the Commission ruled that the potential for employees' insurance to lapse served as a valid circumstance for the business necessity defense to apply.³⁶

Similarly, in *Port of Anacortes*, the Examiner held that the employer met its burden to support a showing of business necessity for similar changes to those in *Cowlitz County* when the testimony of both union and employer supported the thought that the existing health benefits plan could not continue to the following year because of the enactment of the Affordable Care Act.³⁷

Conversely, an unfair labor practice *was* found in *Spokane County*,³⁸ even where PERC acknowledged the inherent possibility that an employer could show a compelling business necessity for changing a medical plan. In *Spokane County*, PERC rejected business necessity as a defense to the employer's unilateral implementation of new medical coverage when it was the employer that initiated the new coverage, not the insurance company.³⁹

This approach continued with a contrary result in *Shelton Police*, where no violation was found to have occurred when medical deductibles were adjusted by third party trustees not under employer control.⁴⁰

Another issue that has arisen in emergency situations is the scope of the duty to bargain. In *Workforce Central*, the employer opted to lay off employees by seniority date, rather than adhering to a specific formula that was laid out in the CBA.⁴¹ The employer argued that its budget crisis constituted an emergency, and that it should be relieved of any bargaining obligations as a result. The Commission in that case understood that negotiations during ongoing emergencies may be abbreviated, however it ruled the duty

³⁴ *Id.*

³⁵ *Cowlitz County*, Decision 7007-A (PECB, 2000).

³⁶ *See Id.*

³⁷ *Port of Anacortes*, Decision 12225 (PORT, 2014).

³⁸ *Spokane County*, Decision 2167 (PECB, 1985).

³⁹ *Spokane County*, Decision 2167-A (PECB, 1985).

⁴⁰ *City of Shelton*, Decision 7602 (PECB, 2002).

⁴¹ *Workforce Central*, Decision 7007-A (PECB, 2000).

to bargain does not cease entirely.⁴² It held: “The duty to bargain does not impose a duty to agree, and there are times when a party may lawfully conclude that further collective bargaining negotiations will not produce an agreement. However, in order for a lawful impasse to be declared, a party must first enter negotiations in good faith, and continue to bargain in good faith until impasse.”⁴³ In *Workforce Central*, that negotiation did not occur.

And in *City of Sumner*,⁴⁴ the hearing examiner declined to find an emergency permitting the City to change paydays despite the fact that the paydays did not conform to general accounting principles. In addition to not finding a valid emergency, the Examiner concluded that the City failed to take *all* opportunities presented to it to engage in collective bargaining.

There does not seem to be a singular event from a public health *and* economic standpoint that comes close to the impact that the COVID-19 pandemic is having and will continue to have on public safety bargaining units in Washington. Even considering that, the duty to bargain *in some capacity* will not cease entirely, regardless of the seemingly realistic employer need to implement changes in response to this emergency. And, as noted, even if an emergency relieves the employer from the duty to bargain the decision in a given circumstance, that does not relieve the employer from the duty to bargain any and all identified impacts. Therefore, *a union is advised to always submit a demand to bargain, both the decision and the impacts of the decision.*

II. The Business Necessity or Emergency Defenses under the NLRB and other agencies

a. The Economic Exigency Exception to the Duty to Bargain

Unless permitted by management rights clauses or other provisions of a CBA, the layoffs of private sector unionized employees are mandatory subjects of bargaining. However, in a March 27, 2020 memo, NLRB General Counsel Peter Robb advised that, “we are in an unprecedented situation,” and provided a summary of cases that the agency has deemed useful in making decisions impacted by the COVID-19 pandemic.⁴⁵

In one case where the parties did not have a pre-existing CBA, the Board found that the employer did not violate Section 8(a)(5) by laying off several employees without

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *City of Sumner*, Decision 1839 (PECB, 1984).

⁴⁵ *Memorandum GC 20-01*, Case Summaries Pertaining to the Duty to Bargain in Emergency Situations

affording the union notice or an opportunity to bargain.⁴⁶ However, in that same case, the employer *did* violate Section 8(a)(5) when it subsequently used non bargaining unit employees, including a supervisor, to perform bargaining unit work in the aftermath of a hurricane.⁴⁷ According to the Board, the impending hurricane and the associated mandatory citywide evacuation were exigent circumstances that permitted the employer to lay off bargaining unit employees *without* bargaining with the union, but failing to bargain the effects of the layoff after the hurricane constituted a violation.⁴⁸ The Board found a violation of Section 8(a)(5) in another case involving a hurricane when, during a two-day power outage, the employer unilaterally and unlawfully implemented a new policy concerning employee compensation during the hurricane.⁴⁹

In another case taking place shortly after September 11, 2011, the ALJ determined that layoffs in anticipation of dropping business volume were appropriate because the economic fallout resulted in “extraordinary unforeseen events having a major economic effect that required the employer to take immediate action.”⁵⁰

In *Virginia Mason Hospital*, the Board determined that the employer violated Section 8(a)(5) by unilaterally implementing a flu-prevention policy without affording the Union notice and an opportunity to bargain.⁵¹ The employer was an acute care hospital in Seattle, with approximately 5,000 employees, approximately 600 of whom were registered nurses represented by the union. The employer unilaterally implemented a policy, during the term of the parties’ collective bargaining agreement, requiring all nurses who had not received a flu immunization shot to either take antiviral medication or wear a protective mask.

b. Lessons from other agencies as to the Duty to Bargain in the face of an “Emergency.”

A leading law review article on this defense based on Oregon and NLRB law describes the obligation under this defense as follows: “Even if the employer establishes a business necessity that warrants a unilateral change, the employer remains obligated to engage...in as much good faith bargaining as circumstances allow. The business necessity defense modifies, but does not relieve, the employer’s obligation to bargain.”⁵² In order to fulfill its bargaining obligations, the employer has to be “prepared to

⁴⁶ *Port Printing & Specialties*, 351 NLRB 1269 (2007)

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Dynatron/Bondo Corp.*, 324 NLRB 572, 578-579 (1997).

⁵⁰ *K-Mart Corp.*, 341 NLRB 702, 720 (2004).

⁵¹ *Virginia Mason Hospital*, 357 NLRB 564 (2011).

⁵² Business Necessity as a Defense to An Employer’s Breach of its Bargaining Duty, 28 Willamette L. Rev. 259 (1992).

commence bargaining as soon as it becomes aware of exigent circumstances requiring a change in the status quo.”⁵³

Other jurisdictions have recognized a defense tantamount to the emergency doctrine, normally referred to as the “business necessity” defense. A thorough discussion of this defense under Oregon and National Labor Relations Board law is set forth in Chicoine, *Business Necessity as a Defense to an Employer’s Breach of Its Bargaining Duty Under the PECBA*.⁵⁴ Chicoine describes the employer’s obligation under the defense:

Even if the employer establishes a business necessity that warrants a unilateral change, the employer remains obligated to ‘engage . . . in as much good faith bargaining as circumstances allow.’ The business necessity defense modifies, but does not relieve, the employer’s obligation to bargain.

To comply fully with the bargaining obligation, the employer should be prepared to commence bargaining as soon as it becomes aware of exigent circumstances requiring a change in the status quo. Even if it takes some time for the employer to formulate its proposed change, the employer should consider notifying the union about the subject matter that the employer wishes to address.⁵⁵

As an example of the employer’s obligation Chicoine cites is an Oregon case involving drug testing in which the Employment Relations Board held that the employer’s failure to complete negotiations on a long-contemplated drug policy disallowed it the right to raise the necessity defense.⁵⁶

NLRB law. The Supreme Court in *Katz* recognized the possibility that there might be “special circumstances” which should be accepted as excusing or justifying unusual or emergency unilateral action regarding mandatory issues.⁵⁷ Under the National Labor Relations Act only actions of a temporary nature have been allowed under the business necessity defense. Compare *NLRB v. Powell Electric Mfg. Co.*,⁵⁸ (allowing temporary rule

⁵³ *Id.*

⁵⁴ 28 Willamette L. Rev. 259, (1992)

⁵⁵ *Id.*, at 277.

⁵⁶ *Id.*, at 278 (citing *Federation of Oregon Parole and Probation Officers v. State of Oregon, Dept. of Corrections*, 12 PECBR 816, 824, n. 6 (1991).

⁵⁷ *Katz*, 369 U.S. at 748, 82 S.Ct. at 1114. For example, exceptions have been allowed in cases of impasse (*NLRB v. Tex-Tan*, 318 F.2d 472, 53 LRRM 2298 (5th Cir. 1963), necessity where a core purpose of the enterprise is jeopardized (*Peerless Publications*, 283 NLRB 334, 124 LRRM 1331 (1987) supplementing 231 NLRB 244, 95 LRRM 1611 (1977), and waiver (*United States Lingerie Corp.*, 170 NLRB 750, 67 LRRM 1482 (1968)).

⁵⁸ 906 F.2d 1007 (5th Cir. 1990).

changes so as to allow the company to continue operation during the strike); *American Cyanamid Co.*⁵⁹ (finding an unfair labor practice where employer used the occasion of a strike to permanently contract out work). The NLRB has not allowed employers to use the economic necessity defense to repudiate collective bargaining agreements.⁶⁰

In commenting on this defense, the National Labor Relations Board has said “to establish a business necessity defense...the employer must show that it was essential to make the change quickly, without regard to whether there was agreement or a bargaining impasse.”⁶¹ However, even if this defense were to justify a particular change, it “will not relieve the party of its obligation to bargain the effects of the decision on the affected employees.”⁶² Exceptions have been allowed in cases of impasse,⁶³ necessity where a core purpose of the enterprise is involved,⁶⁴ and waiver.⁶⁵

⁵⁹ 592 F.2d 356 (7th Cir. 1979).

⁶⁰ See, e.g., *Willis Electric*, 116 LRRM 1045, 1046 (1984).

⁶¹ [*E.I. DuPont De Nemours & Co.*, 303 N.L.R.B. 631 \(1991\)](#).

⁶² [*Cowlitz County*, supra.](#)

⁶³ *NLRB v. Tex-Tan*, 318 F.2d 472, 53 LRRM 2298 (5th Cir. 1963)

⁶⁴ *Peerless Publications*, 283 NLRB 334, 124 LRRM 1331 (1987) *supplementing* 231 NLRB 244, 95 LRRM 1611 (1977)

⁶⁵ *United States Lingerie Corp.*, 170 NLRB 750, 67 LRRM 1482 (1968)