Outsourcing and the Duty to Bargain

Outsourcing - also referred to as subcontracting - is an important theme in this year’s presidential campaign. It has gained this level of attention due to the growth outsourcing has experienced in the last few years. Of particular interest is the practice of outsourcing work to other countries.

Many blame outsourcing as the reason for a net loss of jobs to the American workforce. One of the presidential candidates promises to use the federal tax system to discourage outsourcing of work to other countries. Several states predict legislation to use the fiscal system to penalize companies that outsource work outside of the respective state.

However, not everyone opposes outsourcing of work to other countries. While some economists blame it as a cause for the slow economic recovery, others extol its virtues in support of economic growth. Irrespective of the differences of opinion, it seems clear that outsourcing will continue to grow, driven by unavoidable economic forces. As it expands, it is also foreseeable that legal restrictions will be imposed, designed to slow down the trend. In addition to the restrictions that future fiscal policies may impose on outsourcing, employers whose employees are represented by labor unions already face very significant limitations to their ability to outsource work performed by said employees.

An employer wishing to outsource work that has been performed by employees represented by a union may be prohibited or restricted from doing so by the language in the union agreement. Absent contractual language restricting or accepting the employer’s right to outsource, the employer generally has a duty to negotiate (bargain) with the union regarding both the decision to outsource, and the effects of the decision on the employees represented by the union. A rare exception to the obligation to bargain regarding the decision to outsource may be made when the employer can show that the purpose of outsourcing turns “not on labor costs but on a significant change in the nature and direction” of the company’s business.

Once a union represents a group of employees, the employer of those employees is required to “bargain collectively with the representative of its employees with respect to the terms and conditions of employment.” Clearly, outsourcing the employees’ work is a change in terms and conditions of employment over which the employer is obligated to bargain. Typically outsourcing does not involve a change in the scope and direction of the enterprise and, thus, is not a core entrepreneurial decision beyond the scope of the bargaining obligation imposed by the National Labor Relations Act.

In addition to the obligation to bargain with the union that represents its employees over the decision to outsource work which has been performed by those employees, the employer also has the duty to bargain with the union regarding the effects of its outsourcing decision on the affected employees. Thus, even if the employer and the union reach an agreement (or a good-faith impasse) over the decision to outsource, the employer is also required to bargain regarding the effects of the decision on the employees. Effects bargaining must take
An element of meaningful effects bargaining is timely notice to the union of the decision. Effects bargaining must occur sufficiently before actual implementation of the decision, so that the union is not presented with a *fait accompli*.

Clearly, effects bargaining is almost always commingled with decision bargaining, for the position which the union may adopt regarding the decision to outsource is normally based on the employer’s generosity regarding “effects,” such as severance packages, transfers to other locations, retraining, etc.

In sum, while the trend to outsource work in order to achieve greater efficiencies in production is likely to continue, employers whose employees are represented by labor unions must be prepared to bargain with their unions, both over the decision to outsource, and the effects of outsourcing on the represented employees.