Is That Robot in the Bargaining Unit?

By Richard F. Vitarelli

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Drones fly over the jobsite, snapping photos of progress and scanning the area for possible safety concerns. A 3D-printer churns out customized parts and scaled models. A remote-controlled robot lays bricks meticulously, with near-perfect precision and five times faster than a human.

According to a recent survey by SoftwareConnect, 18% of construction firms are already using drones (with another 8% planning to implement drones by 2020). Further, 16% are already using autonomous equipment, and 4% are using 3D printing. More than 30% are planning to increase their investments in technology in the next 12 months.

Despite the utility and advantages, technological advances complicate employers' and labor unions' collective bargaining relationship. For example, to what extent must employers bargain with unions over the introduction of technology on the jobsite, especially where new technology performs bargaining unit work or monitors bargaining unit workers' performance?

While employers do have the right to make fundamental entrepreneurial changes to their business *(see Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 [1964]), that generally relates to decisions that represent a "basic change" to the business. However, where an established business with a unionized workforce seeks only to change *how* its work is performed or by *whom* (such as through the use of new technologies), the employer may have an obligation under the National Labor Relations Act to bargain with the union.

Employers should be careful before implementing new technology on the jobsite for another reason: even absent a duty to bargain, a union may use disruptive tactics to try to discourage negative impacts on a bargaining unit, such as extensive information requests, engaging in informational picketing, handbilling or bannering, and intensified organizing activities.

For example, this past summer, Las Vegas hospitality workers reportedly threatened to strike unless they received assurances that their jobs were safe from automation, and package delivery service workers specifically negotiated protections against the use of drones and self-driving vehicles into their collective bargaining agreement.

In the meantime, other questions loom on the horizon: What happens if a robot "discriminates"? Does a robot have "whistleblower" protections? Can a robot file a grievance or participate in arbitration?

American jurisprudence has not yet provided answers to these questions (last year, the European Union reportedly rejected a proposal that would have classified certain robots as "electronic persons").

Consequently, construction contractors with unionized workforces should work closely with their experienced labor attorney to assess whether and to what extent bargaining is required over a decision to implement new technology, or the effects of the decision, and to develop an effective labor-relations strategy.

Please contact your Jackson Lewis attorney with any questions on this topic.

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