

Morgan Lewis

# NLRA IN THE TIME OF COVID-19

**THE RISE OF EMPLOYEE ACTIVISM AND  
PUBLIC SHAMING OF EMPLOYERS AND  
HOW UNIONS ARE TAKING ADVANTAGE**

Nicole Buffalano and Douglas Hart  
April 14, 2020

# What's So Different About the NLRA During COVID?

- Nothing and Everything.
- Today we will address the opportunities for employers and unions during the COVID pandemic in the following areas:
  - Protected Concerted Activity
  - Collective Bargaining
  - Union Organizing

**PROTECTED CONCERTED ACTIVITY**



# What We Are Seeing on Social Media

## Area health care workers join national demand for protection against COVID-19

April 9, 2020 Mark Guydish Local News

Area health care workers join national demand for protection

By Mark Guydish mguydish@timesleader.com



Workers at Guardian Healthcare in Nanticoke pose with homemade masks and signs seeking

## Health care workers plead for more supplies on social media to combat coronavirus



Coronavirus outbreak

## Medical staff beg for masks on social media amid coronavirus crisis

The hashtag #GetMePPE is being used by doctors and nurses seeking personal protective equipment

- Coronavirus - latest updates
- See all our coronavirus coverage



Hospital workers by a tent to test for the coronavirus disease at the Brooklyn hospital center in Brooklyn, New York. Photograph: Andrew Kelly/Reuters

Doctors, nurses and other frontline health workers in the coronavirus crisis are faced with a critical lack of personal protective equipment and have taken to begging for equipment online, using the Twitter hashtag #GetMePPE.

## Detroit hospital nurses refuse to work without more help, ordered to leave



By Paul P. Murphy, Ryan Young and Jake Carpenter, CNN

Updated 9:33 AM ET, Wed April 8, 2020

# What We Are Seeing in Healthcare

- Refusals to treat COVID positive patients
- Work Stoppages

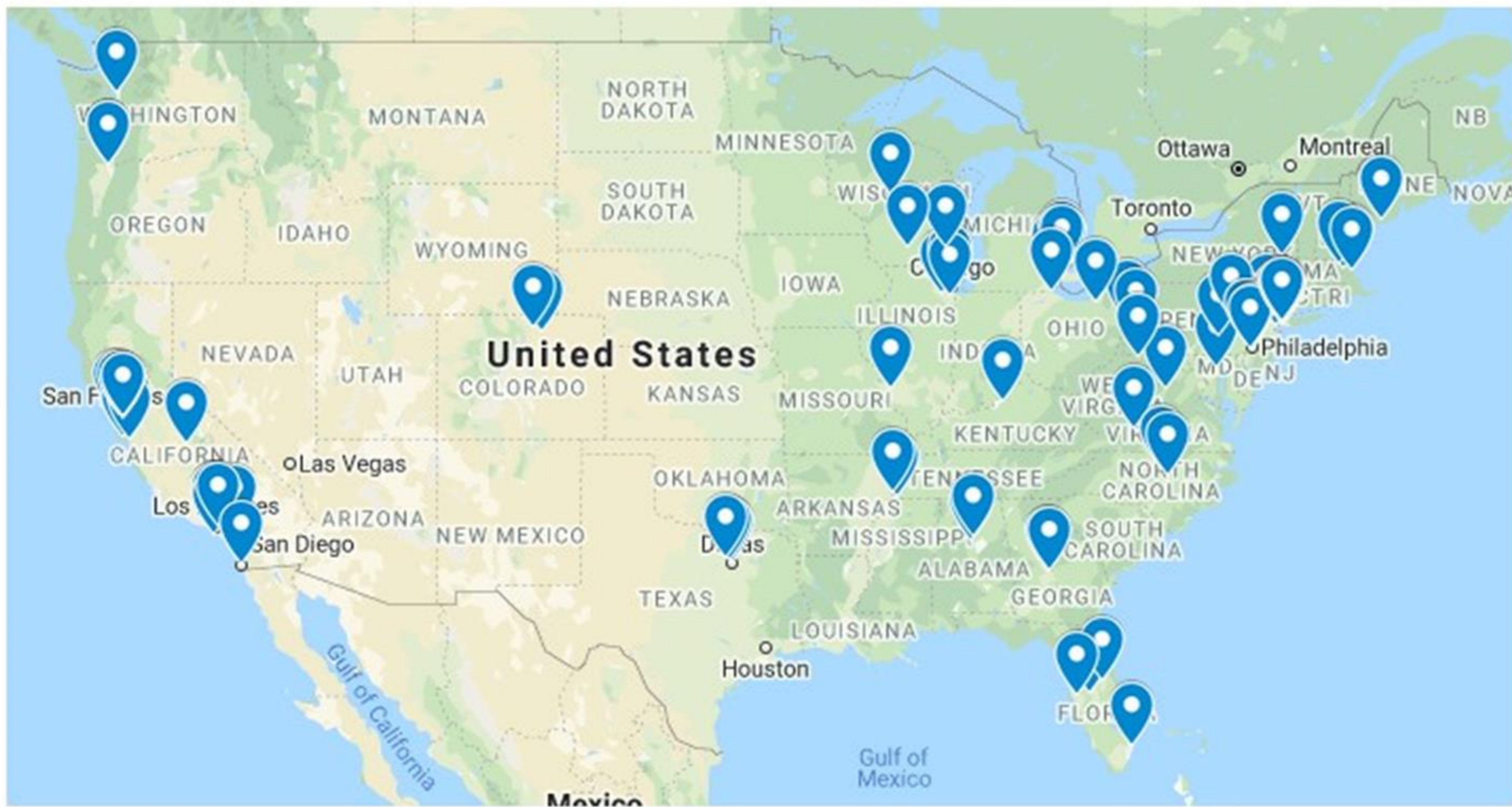
## CORONAVIRUS CALIFORNIA

Coronavirus: 84 residents evacuated from Southern California nursing home after employees do not show up for work

## Watsonville Nurses Call For Higher Protective Equipment Standards

Nurses are calling for stronger personal protective equipment standards and to protest staff cancellations.

# What We Are Seeing Across Industries – A Strike Map



## The Core of the NLRA: Section 7

- Section 7 of the NLRA gives employees the right to discuss their pay and working conditions and prohibits employers from disciplining or terminating employees for exercising such rights.
- This provision applies to non-unionized employees as well.
- The conduct is protected even if the discussion is confrontational, annoying or relatively disrespectful.

# Refusals to Work – Employees Not Covered by a CBA

- Types: Strikes, walkouts, sickouts, partial or intermittent work stoppages (i.e. “I refuse to accept an assignment to work with a COVID-positive patient”).
- Are work stoppages protected? Yes. EXCEPT:
  - If employees fail to take reasonable precautions to protect the facility or patients from foreseeable imminent danger.
  - If it is a partial or intermittent work stoppage unrelated to safety.  
Intermittent work stoppages may be protected under NLRA Section 502 or OSHA Section 11(c).





## Refusal to Work – Employees Covered by a CBA

- Most CBAs contain a “no strike” clause – whereby the union agrees not to strike during the life of the contract.
- Rarely cited LMRA Section 502 permits workers otherwise subject to a “no strike” clause to refuse to work because of an “abnormally dangerous condition.”
- What is required?
  - “[A]scertainable, *objective evidence* supporting its conclusion that an abnormally dangerous condition for work exists.”
  - “[S]ome identifiable, *presently existing* threat to the employees' safety.”
    - *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 387 (1974).

# When Are Conditions “Abnormally Dangerous” Under Section 502 of the LMRA?

- When a “reasonable person would agree there is a real danger of death or serious injury.”
- Consider whether your healthcare institution is/has:
  - Complying with the CDC guidelines.
  - Actively educated workers on the prevention of COVID-19 and the use of PPE.
  - The proper and essential PPE available for all workers, consistent with the CDC guidelines.
  - Complying with state orders related to prioritizing resources, including PPE.

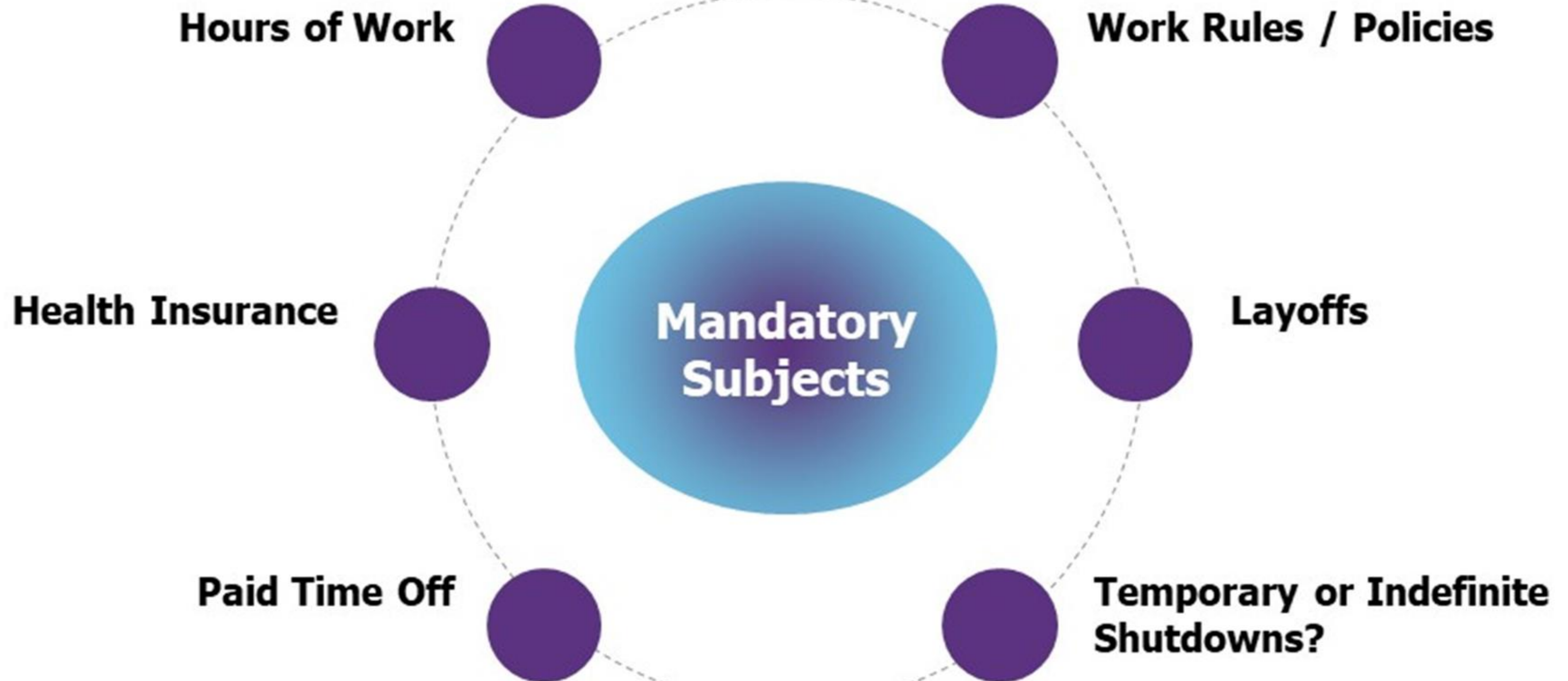
# Lawful Responses to PCA

- **Be Proactive:**
  - Management training and preparation are key: Have a plan in place.
  - Prepare talking points for the areas where you are vulnerable.
  - Communicate, communicate, communicate.
- **For complaints:**
  - Reiterate that the company takes employee safety seriously and is actively monitoring the situation.
  - Review the company's safety procedures and protocols with employee(s).
  - Listen to suggestions from employee(s).
  - Remind employees of the company's complaint procedures should any additional concerns arise.
- **For refusals to work (options):**
  - Have a staffing plan (management, strike breakers, replacement workers).
  - Lawfully communicate with employees.
  - Polling employees.
- **REMEMBER** – taking disciplinary action based on protected complaints and/or refusals to work could result in liability under the NLRA and OSHA.

# COLLECTIVE BARGAINING



# Mandatory Subjects of Bargaining



# Common COVID-19-Related Union Demands the in Healthcare Industry

- Demands regarding PPE
- Enhanced workplace sanitation
- Staffing adjustments (up and down)
- Schedule and shift changes
- Enhanced sick leave/other PTO
- Other health and safety changes
- Hazard pay and increased overtime
- Changes to patient/floor assignments
- Improvements to medical benefits
- Demands for remote work arrangements for non-front line staff

# Duty to Bargain

- The obligation to maintain the status quo and/or bargain over changes/union demands depends on contract status.
- Potential exception:
  - RBE Electronics – “exigent circumstances” exception to make specific changes, with or without bargaining over that change.
- Even if the employer does not have to bargain over the decision, it may still need to bargain over the effects.



# Local Government Orders – Impact on Bargaining

- Complying with state or federal orders may excuse an employer's obligation to bargain – at least over the decision.
  - If an order gives the employer discretion, it should give the union notice and bargain over the decision, if requested.
  - If an order gives the employer no discretion, it may respond without bargaining first.
    - Employers may need to bargain over the effects (e.g., furloughs, continued health insurance coverage, severance)
- State orders often leave employers little-to-no time to comply.
  - On March 23, MD governor held press conference at 11:00 am to announce order closing all “non-essential” businesses – which took effect at 5:00 pm the same day.
- Even if an employer does not need to bargain over the decision to comply with a state order, it may still be required to bargain over the effects.



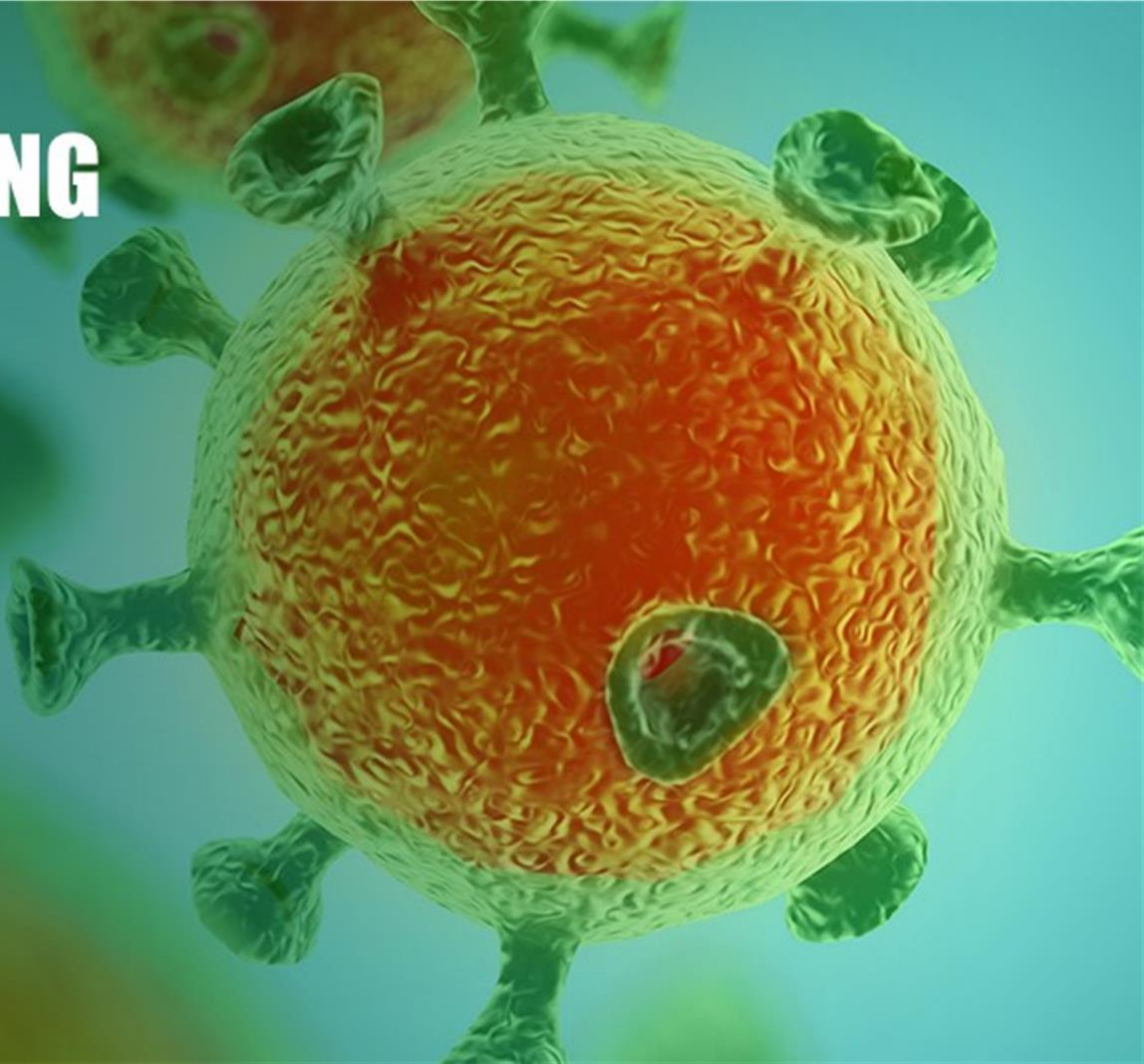
# Duty to Provide Information

- An employer is obligated upon request to furnish the union with information that is necessary and relevant to the union in discharging its statutory responsibilities.
- The Board applies a liberal, discovery-type standard.
- COVID-19-related information requests are typically cumbersome but targeted:

## What Can You Do? What Do You Have To Do?

- Provide union with advance notice of operational changes, layoffs, temporary shutdowns, or policy changes in response to COVID-19
- Respond to union requests for information as promptly as possible
- Engage in effects bargaining, if union requests, and possibly decision bargaining
  - Circumstances may require bargaining in a compressed time period
- No duty of either party to agree to modify terms of existing CBA
  - But there may be a mutual interest in bargaining temporary, mid-term modifications
- Absent a specific agreement to modify the CBA, rely on existing terms of CBA and past practice to take unilateral action

# UNION ORGANIZING



# Unions Are Using the Pandemic to Re-Position Themselves



Video TV News Tech Music Food Health Money Drugs + More

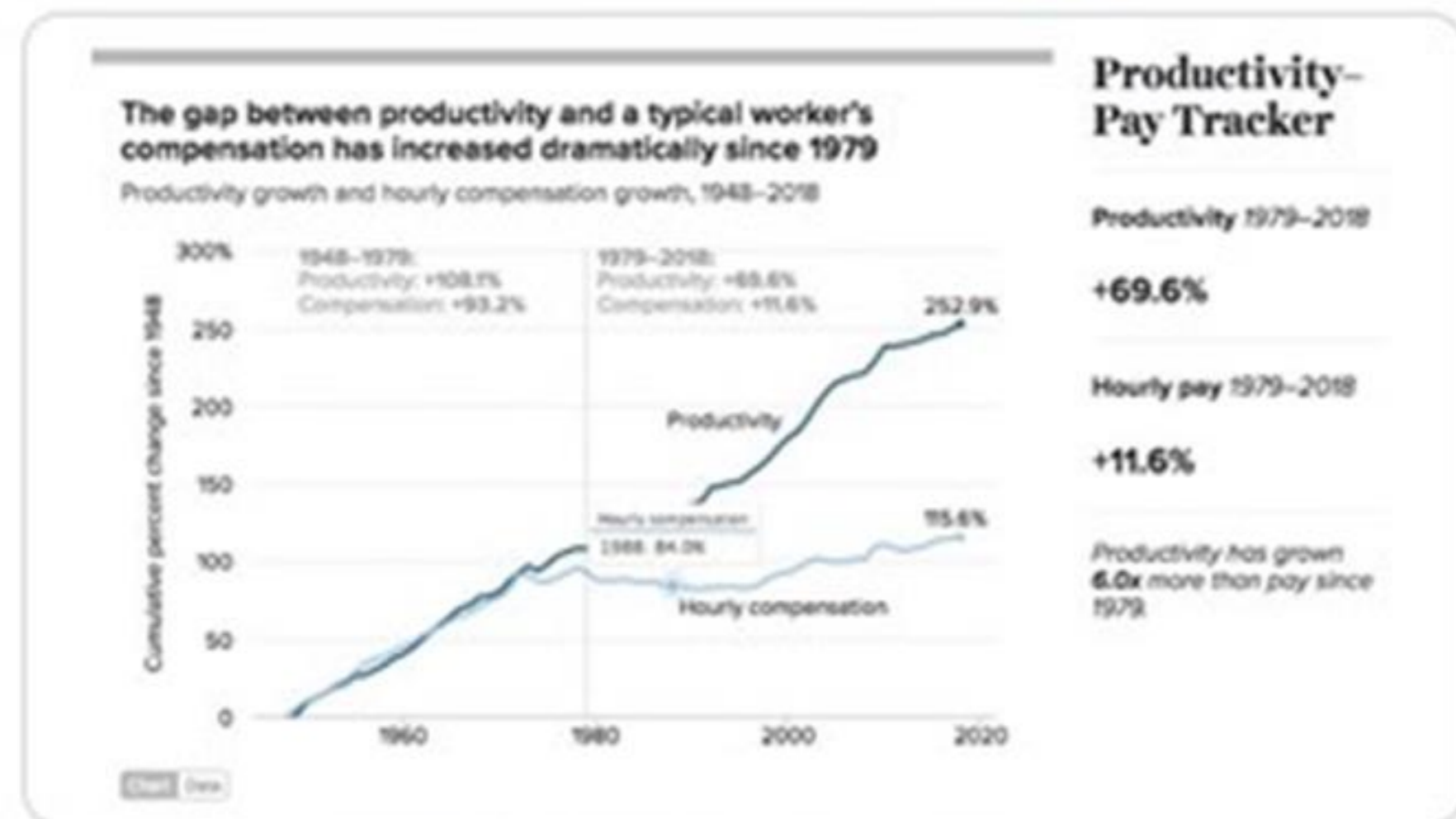
## Workers See Coronavirus Mismanagement Unions Are Helping Them Speak Out

AFA-CWA Retweeted



Sara Nelson @FlyingWithSara · Mar 30

#[covid19](#) shines a bright light on the crime that workers have been forced to work more to make more since 1980 & even more in last 20 yrs. American workers count on overtime or 2nd/3rd job to survive. This [#wagecrisis](#) is colliding w/ this health crisis. Increase worker wages! #Tu



Economic Policy Institute and 4 others

14

319

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Economic  
Policy  
Institute

About Areas of Research Publications Experts

Working Economics Blog

Posted March 31, 2020 at 5:24 pm by [Lora Engdahl](#)

**Unions are giving workers a seat at the table when it comes to the coronavirus response**

# And Continue Their Organizing Efforts

## Amid coronavirus uncertainties, hospitality workers look to labor unions

Posted By [Ken Storey](#) on Tue, Mar 24, 2020 at 12:25 pm

 **Liste**  
05:47

 **UNITEHERE Central FL** @UNITEHERE\_CFL · Mar 24  
We are going to keep fighting and winning for all hospitality workers in Central Florida! #1u #unitehere

 **Orlando Weekly** @OrlandoWeekly · Mar 24  
Amid coronavirus uncertainties, hospitality workers look to labor unions  
[orlandoweekly.com/Blogs/archives...](http://orlandoweekly.com/Blogs/archives...)

  7  12 



Photo by Chad Sparkes/Flickr

In the hours and days after Orlando theme parks announced they would be closing for at least two weeks, many workers were confusing information about what they needed to the closures. With continued ambiguity and confusion, industry workers are talking more about unions.

## The Coronavirus Is Jump-Starting Union Organizing at Delta

Organizers started a union drive for flight attendants at Delta last November. Uncertainty about the pandemic is stoking a desire among workers for labor protections.

BY MIKE ELK MARCH 13, 2020

Morgan Lewis



**RWDSU** @RWDSU · Apr 3

"Workers hoping to form a union recently circulated a petition calling for Trader Joe's to offer 'hazard pay,' or an hourly rate of time & a half. And over the last few weeks, the Retail, Wholesale and Department Store Union has held talks with employees."



Labor Fight Collides With the Pandemic at Trader Joe's

The chain has aggressively opposed unionization efforts among its employees, who have been critical of its response to the coronavirus.

[nytimes.com](http://nytimes.com)

# Including in the Healthcare Industry

## HCA, nurses scrap over union organizing during coronavirus outbreak

POSTED — MARCH 24, 2020, BY NEIL COTIAUX



### Nurses' union battle continues on at Mission Health as coronavirus cases climb

Brian Gordon, Asheville Citizen Times | Published 3:38 p.m. ET April 6, 2020 | Updated 9:27 a.m. ET April 7, 2020

The recently completed Mission Health North Tower houses the Asheville hospital's new emergency room. Nurses at Mission Health are seeking to form a union. Mission owner HCA and union organizers both cite the coronavirus pandemic in their efforts to slow or speed that process. Colby Rabon / Carolina Public Press



National  
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PRESS RELEASE

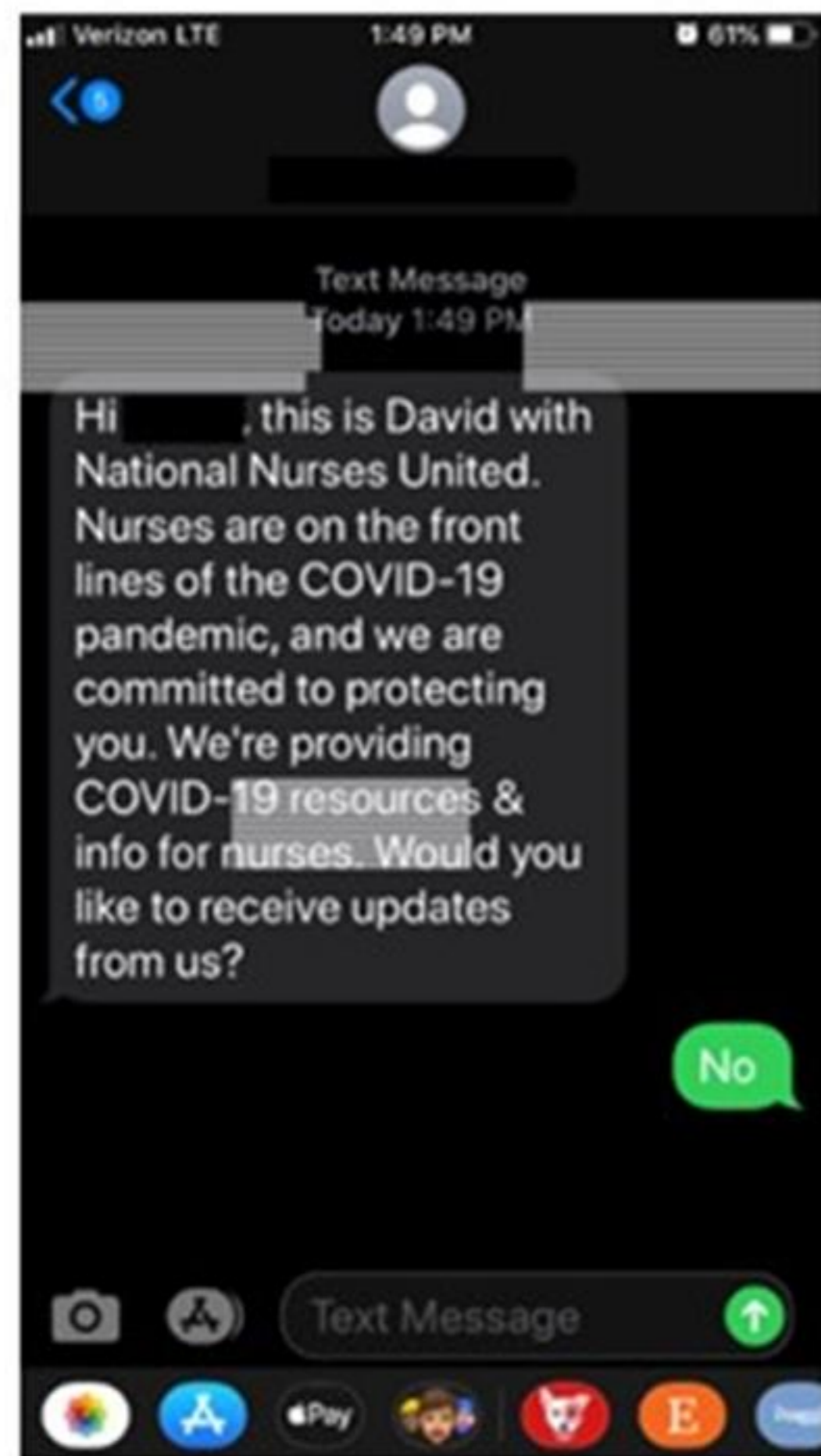
### Mission Hospital RNs to Protest Lack of COVID-19 Preparedness

National Nurses United | April 09, 2020



Registered nurses at HCA's Mission Hospital in Asheville, NC will hold a public protest tonight, April 9, at 6 p.m. over what they say remains the hospital's ongoing lagging response to preparedness for the coronavirus pandemic at a time cases are skyrocketing in the state.

# Healthcare Industry Organizing (cont.)



- Do not overlook Union organizing as the cause of your employees' social media posts or threats or actual work stoppages.
- The NLRB is processing Union petitions and, in fact, is ordering mail ballot elections in most cases.
- The implementation of the NLRB's new election rules has been postponed until July 31, 2020.

**Morgan Lewis**

# **CORONAVIRUS COVID-19**



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COVID-19 ALERTS >](#)**



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