

As we reopen parts of our economy, one can't help but wonder what this two-month gap of such a standstill and devastating time for so many will look like fiscally as we move forward-as a county, state and nation. Right now- it's too hard to predict as final budgets are not yet finalized. Our local leaders aren't really sure, and our Fresno County CAO continues to say the sky is falling and the financial future is bleak. Although this isn't the first time he has made such a prediction. One positive note- the stock market is back on the rise. Trading is happening, people are reinvesting and moving their current portfolio around. As far as financially- there seems to have been a spark, rather than a fear driven panic for Americans to resume planning for their future. The one common theme in all of this – hard working Americans really want to get back to work and somewhat of a normal life.

This agency and the people who work here- are truly front lines workers. We battled a positive case of Covid19 in our dispatch center. We recovered and pressed forward. We scrambled for PPE, as many people- both private and government agencies ran short and were not prepared for a pandemic. This agency showed that even through all of that, we come to work and serve the public. Many of you never stopped- arresting criminals, handling your cases, processing your crime scenes and evidence, dispatching calls and interacting with the public. Our profession has not stopped – a 24/7 operation cannot be put on hold. This fact has been reiterated once again through this pandemic.

In the coming months, you will start to see many people try to justify their existence as essential workers. "Essential workers," is a term – commonly used by those trying to justify their existence in the workforce.

Every day- for as long as you have served in law enforcement- you have been a front line, boots on the ground, essential worker(s). It means being exposed each shift without PPE and performing a job because that's what you signed up to do. There is a difference.

Those who work in the supply chain, are absolutely important to the economy. However, they don't serve actual people, mostly face to face- each time they report to work. It's a very long logistical chain that is used. The "fair," way is to call it essential. You will never hear me say things like our county family, and we are all in this together. While we share the same employer and work together for the common good of our community- there is a stark difference in what we do as deputies, dispatchers, etc.

When this crisis called for everyone to shelter at home and-if possible, work from home- we still served in the streets, responded to emergencies- around the clock. Our jobs, by nature- are inherently dangerous. The coronavirus crisis added an additional airborne threat in dealing with the public.

As I stated earlier, the government was caught with little to no inventory on proper PPE for its essential workers. The reason why is laid out in this article. In short, government policy makers who denied the extra dollars over the years- to go towards other priorities, is where the chain links broke. This insightful article I read recently in The Wall Street Journal explains the issue more clearly. It's titled, "*Miscalculation at Every Level Left U.S. Unequipped to Fight Coronavirus,*" *A shortfall in masks lays bare the blunders by hospitals, manufacturers and the federal government.*

The article is one of the best written and most honest I have read during this entire pandemic. The article described a hospital official trying to put on a mask and the elastic straps break. This was due to the breakdown of the mask straps- since it was from the 2009 H1N1 outbreak, also referred to as the swine flu. Although the outbreak was not declared a pandemic- government officials did not learn a valuable lesson from the crisis. Instead- as we started to bottom out of the

recession, the approach was looking towards building up, and socking more profits away. Specifically, in the hospital industry – a bid to increase profit, resulted in slashing inventory of all supplies. Rather than bulk up after the swine flu, hospitals turned to inventory-tracking software to monitor stocks of protective gear and other supplies, replenishing only as needed.

Manufactures of these PPE supplies were also impacted during this time. Bulking up production, meant only to be left holding millions of extra items. None of the supplies were of interest to the American people. So, to create a profit they were sold overseas at a fraction of the cost.

The US government focused more on preparing for terrorism than for a pandemic. Despite the severe 2009 H1N1 Swine Flu, the government lacked a permanent budget to buy protective medical gear for its Strategic National Stockpile of supplies for health emergencies.

Hindsight is always twenty-twenty. Those who prepare are always ready. Those who are ready have prepared. Many of us in this profession have always been ready because we prepare. We don't let complacency dictate our lives. We live each day as a privileged day to be on this earth.

Public Employers Have Additional Labor Relations Powers in an Emergency—Expect To See Positive and Negative Uses of Them

By Gregg Adam

We live in extraordinary times. None more so than our first responders, who bravely battle on the front lines of this global pandemic. Dramatic changes are likely to pervade all of our lives even when, to whatever degree, state and local emergency orders are lifted.

One change likely to impact everything from bargaining rights to pensions will be public entities exercising emergency powers in their employment relationship with employees. Public entities' emergency powers are reflected in collective bargaining laws, which permit them to act first and bargain later during an emergency. They are also recognized in constitutional law, which suggests there are limited circumstances that permit public entities to violate contractual obligations in an emergency. Fortunately, both sets of laws significantly restrict public agencies' ability to act unilaterally to affect long-term change. But that will not stop some from aggressively pursuing unilateral action as this public emergency deepens and lengthens.

Collective Bargaining During Emergencies

Most California-based peace officers' collective bargaining rights arise under the Meyers-Milias-Brown Act, which can be found in Government Code section 3500 and subsequent provisions. Section 3504.5 provides that generally public agencies must provide advance notice to employee organizations of changes to matters within the scope of representation—typically changes to wages, hours or other working conditions. Subsection 3504.5(b), however, provides: "In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation." In other words, in an emergency, a local public employer may act first and bargain later. This right is restricted. The agency must establish that the need for unilateral action is tied directly to the emergency at hand and cannot await normal bargaining processes. And even if it satisfies this standard, and acts unilaterally, the agency must then bargain "at the

earliest practicable time.” Not some far off time in the future, but as soon as it is capable of bargaining. Typically, that should be a matter of days, not weeks.

Five weeks into California’s statewide Shelter in Place Order (at the time of writing), the reaction of public entities to this crisis and their use of section 3504.5(b) rights has been interesting. Many are acting unilaterally to help and support employees. For example, agencies have awarded first responders and other employees performing disaster relief work additional paid leave, or have suspended vacation accrual caps to prevent employees from losing vacation accruals. Some are engaging with employee unions—remotely, of course, by telephone or video-conference, our new way of bargaining—on safety issues, like quarantining or notice if positive COVID-19 cases occur, or benefits issues, like worker’s compensation presumptions or paid leave for employees sent home or ordered quarantined. Notably, however, employers’ actions carry an air of noblesse oblige about them since few have reduced these additional benefits to written agreements, even though they are negotiable items.

One suspects that public entities worry that entering into written agreements on such matters now will undermine their right to act unilaterally in the future. Presumably, such reservations are motivated by genuine fear that public employers may, if the economic consequences of the emergency become as severe as many are projecting, have to consider layoffs, furloughs and takeaways. The latest unemployment figures show more than 22 million Americans unemployed. Public employers seem to prefer to leave their option to take unilateral action as open as possible.

Unilateral Impairment of Contract Rights

Aside from collective bargaining, perhaps the bigger threat is presented by those who will encourage public entities to overreach and try to impair existing contractual obligations. That could mean attempts to change benefits under an existing MOU; more likely, it will produce another round of pension attacks.

Attacks on public employee pensions come, predictably, with every economic downturn. In 2018, your author argued *Cal Fire Local 2881 v. Public Employees Retirement System* (known as the “air time” case), which involved Jerry Brown’s Public Employee Pension Reform Act. Those “reforms” were premised on the “fiscal emergency” created by the 2008 Great Recession. Governor Brown argued that the legislature could act unilaterally to reduce certain existing pension benefits (in addition to creating new lower tiers of benefits) because of how severely the economic downturn, and the concurrent increase in pension contributions, impacted public finances. But because a booming economy had returned by the time the case was argued, those arguments seemed dated. The Supreme Court ultimately avoided the question of the State’s exercise of its emergency powers by ruling that the right to purchase pension credits at issue in the case was not a pension benefit and therefore was not protected by vested pension protections.

The economic impacts of the COVID-19 emergency appear more severe than even the 2008 Great Recession. Much will depend on how quickly the economy bounces back and whether the pandemic causes wholesale societal changes, as some predict. So expect anti-pension advocates to dust off what is called the “necessity” defense to justify impairing public employee pension rights. Fortunately, constitutional law sets a high bar on these efforts. All previous attempts to impair public employee pensions as a necessity in an emergency have failed.

The primary sources of the necessity defense are two United States Supreme Court cases some 40 years apart: the depression-era decision in *Home Building & Loan Assn. v. Blaisdell* in

1934 and *U.S. Trust Co. of New York v. New York* in 1977. Those cases recognized that in an emergency the federal Contract Clause was not an absolute bar to subsequent modification of a public entity's own financial obligations.

This body of law was applied in California in 1979 in *Sonoma County Org. of Public Employees v. County of Sonoma*. There, after Proposition 13 was passed and dramatically reduced property tax revenues for public entities, the Legislature passed a law which nullified any local agency agreement to pay employees cost-of-living adjustments greater than those received by state employees. Drawing from both *Blaisdell* and *U.S. Trust Co.*, the California Supreme Court crafted a four-part test which provides that a legislative enactment that impairs a private contract right is permissible only if it: (1) protects basic interests of society; (2) is justified by an emergency; (3) is appropriate for the emergency; and (4) is temporary and defers, but does not destroy, the vested contract rights. The California Supreme Court ruled that the legislation before it caused substantial impairment because a contractual salary increase would be "irretrievably lost." Despite legislative analysis of a projected \$7 billion loss in local property tax revenues at that time (about \$25 billion in today's money), the Court rejected the government's claims of a fiscal emergency and that the legislation was necessary to "maintain essential services." Impairment of contract is permitted due to fiscal exigencies only when "legislation was temporary and limited to the exigency which provoked the legislative response."

Thus, while a public entity may in a *bona fide* emergency have a right to impair contract rights, courts use strict scrutiny to guard against it—the highest constitutional bar to clear. As Justice Harry Blackmun warned in *U.S. Trust Co.*, even during an emergency, "[a] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives."

Thus, while Governors and others have frequently attempted to use "emergency" justifications to impair pension rights in the past. None have succeeded. Stay tuned for the next round of battles.

Finally – with all the civil unrest happening around the United States, we must rely on one another more than ever. This applies not only in this department- but in our profession. Law Enforcement is under attack. I am proud to say- this agency is full of good human beings who do not take their job lightly. Many of you are very skilled at de-escalating tense situations. Throughout my career, people who have demonstrated use of force (outside of our lawful scope) have been terminated. I am reminded recently of the message during the Easter Weekend from Sheriff Mims regarding the closure of Fresno County Parks due to Covid19. The message was simple, but clear- and I will paraphrase – nobody allowed in county parks. Also- removing people should *not* result in any use of force whatsoever. This is how we operate at this department. I commend all of you for the job you do and acting lawfully and within policy, especially when dealing with situations that can result in use of force or possibly death to the people we serve.

Stay safe and please keep watch over your partner.

Eric

