The Region submitted this case for advice on whether Asian Americans Advancing Justice – LA (“AAAJ” or “the Employer”) violated Section 8(a)(1) and (5) by laying off unit employees without affording the Union notice and an opportunity to bargain, by refusing to bargain over the effects of those layoffs, by refusing to provide requested information, and by engaging in direct dealing with unit employees. We conclude that the Employer unlawfully laid off some but not all unit employees without providing notice and an opportunity to bargain those decisions and, in each case, unlawfully failed to engage in pre-implementation effects bargaining (except regarding severance). We further conclude that the Employer failed and refused to provide, or delayed in providing, some but not all the requested information. Finally, we conclude that the Employer did not engage in direct dealing.

FACTS

The Employer is a nonprofit corporation with offices in Los Angeles and Orange County. The Employer and the Charging Party Union have been engaged in initial contract bargaining since the Employer voluntarily recognized the Union in May 2018 as exclusive collective-bargaining representative for the following unit of employees: All full-time and regular part-time attorneys, legal assistants, administrative assistants, program coordinators, receptionists and other clerical employees employed at the Los Angeles and Orange County offices excluding guards, managerial employees, supervisors, and confidential employees as defined by the National Labor Relations Act. To date, there has been no final agreement on terms of the contract.
In late July or early August 2019, the Union learned from its unit members that the Employer’s board had recently passed a motion approving potential layoffs and restructuring. On about August 8, 2019, the Union sent an e-mail to the Employer’s representatives, requesting information about the board meeting at which the motion passed. The email read:

We understand that, on July 25, 2019, the Board of Directors considered and passed a motion that would result in layoffs and restructuring, should the organization fail to meet certain fundraising goals by a designated date. We understand that the layoffs and restructuring would effectively dissolve the Impact Litigation Unit and significantly reduce the size of Direct Services. ... Further information about these developments is necessary and relevant for the Union to carry out its bargaining and representation responsibilities. To that end, please provide the Union with the following information and documents:

1. Any and all materials prepared by Interim Management and/or any Advancing Justice-LA staff in preparation for the Board of Directors meeting held on or around July 25, 2019;

2. Any and all materials presented and/or shared at the Board of Directors meeting held on or around July 25, 2019;

3. Any and all notes, including but not limited to official minutes, related to the Board of Directors meeting held on or around July 25, 2019;

4. Any and all materials that resulted from the Board of Directors meeting held on or around July 25, 2019; and

5. Any and all transition memoranda or similar documents prepared by [three] former Vice Presidents . . . prior to their departure from Advancing Justice-LA staff.

The Employer responded to the email stating that it would address the information request at the parties’ next scheduled meeting on August 16. At a staff meeting on August 14, the Employer advised employees that it had tentatively approved a staff reduction of 10 to 12 percent.

On August 16, the Employer and Union met. The Union explained the requested information on August 8 was necessary to understand who was being targeted for the

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1 All dates are in 2019 unless otherwise indicated.
potential layoffs, when the layoffs would occur, and the reasons for those layoffs. The Employer refused to provide the information on grounds of confidentiality. When the Union suggested that the Employer could redact confidential information, the Employer still refused. The Employer instead presented an Interim Agreement on Layoffs. The proposed agreement provided a 10-day notice of layoff to affected employees, payment of wages and unused vacation and compensation time on the final day of employment, and a severance payment based on years of employment and conditioned on a release of claims. The agreement provided no information about the timing of layoffs or who would be targeted for layoffs. The Union declined to enter the agreement and asked instead that the Employer institute a moratorium on layoffs. The Employer stated that it continued to experience financial difficulties and would not agree to a moratorium. When asked, the Union indicated to the Employer that it would not oppose the Employer offering a severance agreement to unit employees consistent with what appeared in the proposed agreement.

On August 21, the Union sent a second request for information, seeking certain financial records. The request sought:

6. Updated information contained in the Financial Sustainability Assessment dated May 23, 2019 including a breakdown of increased revenue and/or savings which resulted in the reduction of the projected deficit to approximately $600,000 as stated by management in the August 12, 2014 [sic] staff meeting;

7. A list of all staff, bargaining unit and non-bargaining unit, that are no longer employed by the organization since January 1, 2019. Please state if these positions have been replaced and by whom. Please provide a breakdown of the cost savings generated by the positions which have not been backfilled with detailed listing of how much savings per position in salary amounts and other costs such as benefits;

8. Detailed budget information for each department and/or unit including a breakdown of expenses and revenue generated or received by each department and/or unit;

9. The power point slides shown to staff at the August 14, 2019 staff meeting;

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2 The Union numbered both its August 8 and August 21 requests for information 1 through 5. For the sake of clarity and to avoid confusion, we have employed continuous numbering consistent with the Region’s analytical approach.
10. Any and all additional information to allow the Union to objectively assess the current financial condition of AAAJ.

On about August 23, the Employer provided a partial response to the Union’s August 21 request. The Employer provided a document called “summary of the savings due to the freeze,” apparently in response to request 7. This document included the titles of the jobs and the departments where the freeze had occurred and a summary of the overall savings generated by the freeze, but it did not provide a detailed breakdown by position as requested. The Employer also provided the power point slides requested in request 9.

At a meeting on or about October 10 (after layoffs were announced), the Employer asserted that it had provided the requested financial information, including its audited financial statements. It additionally provided the Union with a five-page document entitled “Financial Dashboard,” which partially responded to request 6. The document appears to reflect updated charts and data from an earlier-provided May 23, 2019 Financial Sustainability Assessment. The Union told the Employer that the “Financial Dashboard” document was not a sufficient response to its August 21 information request. The Union told the Employer that it would follow up regarding what financial information remained outstanding.3

Between the end of August and beginning of October, the Employer did not provide additional information or engage in bargaining with the Union. After hearing rumors that layoffs would occur on October 7, the Union sent an email to management on October 4, demanding bargaining over the layoffs and their effects on unit employees. In a response dated October 7, the Employer committed to giving the Union notice of the layoffs and indicated that it would do so “later today after we have had a chance to notify as many affected employees as possible individually in-person today.”

Eighteen bargaining unit employees were given notice of layoff on October 7, including three Asian Language Legal Intake (ALLIP) community legal advocates,4 a

3 It is unclear from the investigative record whether any follow-up ever occurred.

4 The Employer eliminated Vietnamese and Khmer language services in its intake program based on low call volumes; it also reduced its Tagalog-speaking staff from two to one.
staff attorney from its Impact Litigation Department,\(^5\) a staff attorney from its Advanced Planning and Elder Law Program,\(^6\) two ESL/Civics instructors,\(^7\) a communications manager,\(^8\) a Health Access Project (HAP) senior policy manager,\(^9\) an UPLIFT coordinator,\(^10\) a policy manager for the Immigrant Rights Project,\(^11\) a senior paralegal performing family-based petition work in its Immigration Unit,\(^12\) an administrative assistant,\(^13\) and five employees working in various roles for the

\(^5\) The Employer restructured its impact litigation work, dissolving its standalone Impact Litigation Department and creating three discrete legal units focusing on voting rights, workers’ rights, and immigration.

\(^6\) The Employer discontinued this program entirely.

\(^7\) Because government contracts that had funded the ESL/Civics Program had expired and had never fully covered the costs of the program, the Employer eliminated this program in its entirety.

\(^8\) To reduce expenses, the Employer eliminated the standalone communications team and transferred its functions to the development team in support of its fundraising efforts. This resulted in the layoff of a communications manager. At the October 7 meeting, the Employer told the communications manager that \(\square\) was being laid off because another employee in the Communications Department, who was retained, had more tenure and was less expensive.

\(^9\) Due to budgetary challenges, the Employer reduced its HAP staff by one but continues to operate this project.

\(^10\) Though unclear from the record, UPLIFT appears to be a separate organization from the Employer that enjoyed its operational support. The Employer discontinued that support and consequently laid off the UPLIFT coordinator.

\(^11\) The Employer eliminated the Immigrant Rights Project, a subdivision of its policy department, and integrated its immigrant rights policy work into its Immigration Unit and its broader policy work.

\(^12\) The Employer reduced staff performing family-based petition work in its Immigration Unit by one but continues to offer this service.

\(^13\) The Employer determined that its full-time receptionist could cover the front desk and as a result, decided to eliminate the position of a part-time receptionist/administrative assistant.
Employer’s Youth & Parent Leadership Development Project (YPLD). The Employer did not notify the Union until after it had met individually with most employees. Between October 10 and November 7, the Employer and Union exchanged proposals and met several times to discuss the effects of these layoffs. Ultimately, the Employer implemented its last, best, and final offer on layoffs, which included, \textit{inter alia}, severance based on years of tenure, recall rights, release of claims in exchange for enhanced severance and COBRA premium payments, and letters of recommendation. Eleven of the 18 affected bargaining unit employees remained on the organization’s payroll until October 18, three remained on its payroll until October 22, and five remained on its payroll through December 31. At least three employees worked their last day on October 8 but were paid through the following week.

\textbf{ACTION}

We conclude that the Employer had no duty to bargain over its decision to eliminate positions from YPLD, the ESL/Civics Program, the Advanced Planning and Elder Law Program, and the UPLIFT program, but that it unlawfully failed to provide notice and an opportunity to bargain over the effects of its decision (except regarding severance). We also conclude that the Employer unlawfully failed to bargain over both the decision and the effects of its decision (other than severance) to eliminate positions in the Impact Litigation Department, Immigrant Rights Project (policy work), the Immigration Unit (family-based petition work), HAP, the Communications Department, Reception, and ALLIP. We further conclude that the Employer violated the Act by refusing to provide information requested on August 8 that was relevant to the potential layoffs and could not insulate itself from its statutory obligations by asserting a blanket claim of confidentiality or privilege. We also conclude that it violated the Act by unlawfully refusing to provide or delaying in providing some of the information sought on August 21. Finally, we conclude that the Employer did not engage in direct dealing by informing unit employees of its predetermined course of action with respect to layoffs.

\textbf{I. The Employer Had a Duty to Bargain Over Decisions to Lay Off Unit Employees Where It Continued to Perform the Same or Similar Work.}

We conclude that the Employer’s decisions to eliminate certain positions were mandatory subjects of bargaining under \textit{Dubuque Packing}. In so concluding, we find

\begin{footnotesize}
\footnote{14 The Employer discontinued the YPLD Project entirely.}
\footnote{15 \textit{Dubuque Packing Co.}, 303 NLRB 386 (1991), \textit{enforced sub nom. United Food \& Commercial Workers Local 150-A v. NLRB}, 1 F.3d 24 (D.C. Cir. 1993), \textit{dismissing cert.}, 511 U.S. 1138 (1994).}
\end{footnotesize}
that, under current Board law, certain of those decisions may also be properly analyzed under *Holmes & Narver*. However, for the reasons set forth below, we conclude that *Holmes & Narver* should be overruled. We further conclude that the Employer violated Section 8(a)(5) by failing to provide the Union with an opportunity to bargain over those decisions.

In *Fibreboard*, the Supreme Court held that an employer’s subcontracting of bargaining unit work, such that it merely replaced existing employees with those of an independent contractor, was a mandatory subject of bargaining because the change did not alter the basic nature of the business. However, as the Supreme Court later illustrated in *First National Maintenance Corp. v. NLRB*, an employer need not bargain over every decision that affects a bargaining unit. In that case, the Court found that an employer’s decision to shut down a segment of its business was not a mandatory subject of bargaining because it was a decision “akin to the decision whether to be in business at all.” The Court in *First National Maintenance* considered management decisions as falling into one of three categories: Category I, consisting of those decisions having an indirect and attenuated impact on the employment relationship and for which there is no decisional bargaining obligation; Category II, decisions that are exclusively aspects of the employment relationship, and for which there is typically a decisional bargaining obligation; and Category III, consisting of those decisions which, while having a direct impact on employment, i.e., the elimination of jobs, are those whose focus is only economic profitability.

In *Dubuque Packing*, to determine whether an employer’s decision to relocate bargaining unit work from one plant to another was more like *Fibreboard* subcontracting or a *First National Maintenance* partial closure, the Board devised a new test. Under that test, the General Counsel carries the initial burden of establishing that the decision to relocate work was “unaccompanied by a basic change

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18 379 U.S. at 213-14.


20 *Id.* at 677.

21 *Id.*

22 *Dubuque Packing Co.*, 303 NLRB at 391.
in the nature of the employer’s operation.”23 If that burden is met, the decision constitutes a mandatory subject of bargaining unless the employer can rebut the General Counsel’s prima facie case or, as an affirmative defense, establish that neither direct nor indirect “labor costs” were a factor in the decision, or—even if labor costs were a factor—that the union could not have offered labor cost concessions that could have changed the employer’s decision to relocate.24 The Dubuque Packing Board emphasized that the crucial inquiry in these cases is whether requiring bargaining over the decision would advance the neutral purposes of the Act.25 Although Dubuque Packing itself involved a work relocation decision, the Board has applied its principles to all First National Maintenance “Category III” decisions (i.e., ones that have a direct impact on employment but have as their focus the economic profitability of the employing enterprise) that fall within the spectrum between Fibreboard subcontracting and First National Maintenance partial closures.26

In several cases since Dubuque Packing, however, the Board has found employers’ decisions to consolidate operations and lay off employees to be bargainable but strayed from applying the Dubuque Packing analysis.27 In Holmes & Narver,28 for example, the employer reduced its motor-pool operation from three divisions to two. The Board found that the employer’s resultant decision to lay off employees while continuing to do “the same work with essentially the same technology, but . . . with fewer employees by virtue of giving some of the [remaining] employees more work

23 Id.

24 Id. An employer may rebut the prima facie case by “establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer’s decision involves a change in the scope and duration of the enterprise.” Id.

25 Id. at 390.

26 See Int'l Shipping Agency, 369 NLRB No. 79, slip op. at 20-21 (May 20, 2020), and cases cited therein.


28 309 NLRB at 146-47.
assignments,”29 did not involve a change in the scope and direction of the enterprise and was a mandatory subject of bargaining. The Board majority characterized the decision as a Category II decision under First National Maintenance, and in responding to Member Raudabaugh’s concurring opinion, noted that even if the employer’s decision was a Category III decision, application of a Dubuque Packing analysis was unnecessary because, like the subcontracting involved in Fibreboard, the employer’s decision involved no capital investment but did involve labor cost considerations on a core subject of bargaining and thus was clearly amenable to bargaining.30 However, as noted, infra, the deviation away from the Dubuque Packing standard in certain cases has created unnecessary confusion. It is notable that the Board in Holmes & Narver would have come to the same conclusion had it simply applied the Dubuque Packing test.

Here, we first conclude that the Employer was not required to bargain over the decision to lay off employees from departments the Employer eliminated entirely, namely: the YPLD Project, the ESL/Civics Program, and the Advanced Planning and Elder Law Program, because those decisions are effectively partial closures and fall under First National Maintenance. There is no evidence indicating that the Employer continues to perform the functions of these discontinued programs through other departments or projects. We similarly conclude that the Employer did not owe a duty to bargain over the decision to lay off the UPLIFT coordinator, because the evidence indicates that the UPLIFT program was an independent organization whose relationship the Employer chose to discontinue, and such discontinuation constitutes a core entrepreneurial decision, again, falling under First National Maintenance.31

With regard to the layoffs in the remaining seven departments, we conclude that the Employer was obligated to bargain over those decisions by application of the Dubuque Packing analysis. Initially, we conclude that the Employer’s decisions to lay off employees in these departments were “unaccompanied by a basic change in the nature of the [E]mployer’s operation.”32 In this regard, its decision to eliminate its standalone Impact Litigation Department and lay off its employees did not result in the wholesale elimination of the Employer’s impact litigation functions. Rather, the Employer continues to perform this same type of work under a different

29 Id. at 147.

30 Id.

31 If the evidence establishes that UPLIFT is not an independent organization, that fact may warrant a contrary conclusion.

32 Dubuque Packing Co., 303 NLRB at 391.
organizational structure. Its decision to narrow the focus of its impact litigation to three specific areas does not constitute a basic change in the scope or direction of its operation. Instead, the record demonstrates that the Employer simply decided to perform its litigation work with fewer employees.

Similarly, the decision to lay off the Immigration Rights Project’s policy manager was not a basic change in the scope or direction of the Employer’s operation because the Employer continues to perform immigration policy work and merely transferred the work to another department. Further, we conclude that the layoff decisions affecting unit employees who worked in the Immigration Unit (family-based petition work), HAP, the Communications Department, and Reception were also unaccompanied by a basic change in the nature of the Employer’s operation, because these layoffs were mere reductions in staff.

We further conclude that the Employer’s decision to lay off three ALLIP community legal advocates was unaccompanied by a basic change in the scope or nature of the program. It did not terminate the program, but rather restructured it to reduce labor costs.

Having concluded that the Employer’s decision to lay off employees from the Impact Litigation Department, the Immigration Rights Project, the Family-Based Petition Work in the Immigration Unit, HAP, the Communications Department, Reception, and ALLIP were all unaccompanied by a basic change in the nature of the operation, we next conclude that the Employer cannot otherwise establish a defense under the Dubuque Packing analysis. As to the first potential affirmative defense, the Employer cannot show that labor costs were not a factor in the decision to reduce staff, as the Employer expressly implemented the layoffs to address a budget shortfall. As to the second potential defense, the Employer has not established that the Union could not have offered concessions that would have been enough to change its decision. Consequently, the decisions to lay off employees from these seven

33 This conclusion is bolstered by evidence that the Employer suggested that the unit employee prepare a transition memo, implying that the work he had performed prior to his layoff would continue.

34 While Vietnamese and Khmer language services were eliminated and Tagalog services reduced, ALLIP remained in existence and continued in its purpose to provide multilingual legal aid to callers. The evidence suggests that community legal advocates provide services both in foreign languages and in English, and thus supports application of the Dubuque Packing analysis, rather than First National Maintenance, because the unit employees in the eliminated positions arguably could have continued to perform similar work.
departments were mandatory subjects over which the Employer was required to bargain.

Although these layoff decisions would also be mandatory subjects of bargaining if we applied a *Holmes & Narver* analysis, the Region should urge the Board to overrule *Holmes & Narver* and its progeny. As the instant case demonstrates, the confusion and uncertainty generated by the application or misapplication of varied analyses based on whether an employer’s decisions involve reorganization, restructuring, or some other type of action engenders uncertainty in the law and hinders productive collective bargaining. We find that the *Dubuque Packing* analysis furnishes a more complete analytical approach by shifting the burden to the employer to show labor costs were not a factor where the decision was unaccompanied by a basic change in the employer’s operation. By focusing on the question of whether labor costs factor in an employment decision, the *Dubuque Packing* approach adequately and appropriately addresses the wide range of “Category III” decisions that fall within the spectrum between *Fibreboard* subcontracting and *First National Maintenance* partial closures. The consistent application of the *Dubuque Packing* analysis to all such decisions will aid parties by providing greater clarity in determining their bargaining obligations and will thereby foster improved collective-bargaining relationships. Accordingly, *Holmes & Narver* and its progeny should be overruled to the extent they are inconsistent with these principles of clarity and consistency.

With respect to those layoff decisions over which the Employer owed an obligation to bargain, we conclude that the Employer failed to provide the Union with notice or an opportunity to bargain. To the contrary, the Employer waited to notify the Union until after it had finalized its decision to conduct layoffs and communicated that decision to most of the affected employees. When the Employer did finally announce the layoffs to the Union, the decision was presented as a *fait accompli*.36

**II. The Employer Had a Duty to Bargain Over the Effects of Its Layoffs.**

For similar reasons, and apart from whether the Employer had a duty to bargain over the decision to lay off unit employees in each of the 11 departments, it violated Section 8(a)(5) by not providing pre-implementation notice of the decision to satisfy its

35 The Employer essentially decided to reduce its staff and shift their work to its other employees. These layoffs involved no capital investment but did involve labor cost considerations on a core subject of bargaining and thus were clearly amenable to bargaining.

36 *See, e.g.*, Chrissy Sportswear, 304 NLRB 988, 989 n.6 (1991) (citing Willamette Tug & Barge Co., 300 NLRB 282, 283 (1990)).
effects-bargaining obligation. While the Union and Employer did engage in effects bargaining after employees were notified, such post-implementation bargaining does not remedy the unfair labor practices here, where the Employer refused to provide the Union relevant information necessary to the discharge of its duties as exclusive bargaining representative and waited until after it notified most employees of the layoffs to notify the Union. Under the totality of the circumstances, the Employer’s conduct did not afford the Union an opportunity to bargain the effects of its decision “in a meaningful manner and at a meaningful time.”

However, we conclude that the Employer did not violate its effects bargaining obligation regarding severance. The Union agreed to the Employer’s severance offer presented during the August 16 meeting. Although the Employer’s August 16 proposal for an interim agreement on layoffs was presented before it had finalized its decision to restructure operations and lay off employees, the Union clearly agreed to the Employer’s offer of severance by indicating it would not object to the Employer offering it to separating employees. Such agreement, however, does not otherwise limit the Employer’s obligation to bargain over other effects of the layoffs. Thus, the Union’s refusal to engage in discussions about non-severance aspects of the Employer’s proposed interim agreement on layoffs did not constitute a waiver of its right to effects bargaining. The waiver of a right to bargain must be “clear and unmistakable.” Here, the Union explicitly opposed layoffs and requested that the Employer place a moratorium on layoffs. As noted above, the Union had sought but not yet obtained information concerning possible layoffs. This lack of information rendered the Union incapable of engaging in any meaningful bargaining over the effects of such layoffs in August.

37 First Nat’l Maint., 452 U.S. at 681-82. On this point, we conclude that a limited backpay remedy is appropriate notwithstanding that some limited post-implementation effects bargaining occurred. The purpose of a limited backpay remedy is two-fold: it is “designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties’ bargaining position is not entirely devoid of economic consequences for the Respondent.” Transmarine Navigation Corp., 170 NLRB 389, 390 (1968).

38 Cf. Porta-King Bldg. Systems, 310 NLRB 539, 539 (1993) (union did not waive right to bargain over employer’s decision to lay off employees during initial contract bargaining where it sought information about layoffs and did not expressly propose to give employer managerial right to conduct such layoffs), enforced, 14 F.3d 1258 (8th Cir. 1994).

39 Norco Products, 288 NLRB 1416, 1422 n.9 (1988), enforced mem., 944 F.2d 909 (9th Cir. 1991).
III. The Employer Failed to Timely Provide Relevant Information Sought by the Union.

With respect to the August 8 request for information, we conclude that the Employer unlawfully failed to provide information in response to requests 1 through 4, which broadly sought documents related to the Employer board’s July 2019 meeting at which layoffs were authorized. Although this information is not presumptively relevant, because it does not plainly concern terms and conditions of unit employees’ employment, the Union explained the relevance of these documents to the Employer in its written request: it advised the Employer that it had received reports of layoffs and restructuring, identified departments that it believed would be affected by the layoffs, and generally explained to the Employer that it was seeking the information “to carry out its bargaining and representation responsibilities.” We note that while such blanket requests for any and all materials related to private meetings are not relevant merely because an aspect of unit employees’ terms and conditions of employment were discussed at said meeting, in this case, the Union made clear both in its written request and at the August 16 meeting that it specifically sought information related to the layoff measure that the Employer’s board had approved. Under the liberal standard applied to determine whether a party is obligated to provide information, such information is clearly relevant because it could have confirmed the identity of the impacted unit employees and departments, the reasons necessitating the layoffs, and the anticipated timing of the layoffs.40

We reject the Employer’s defense that it lawfully refused to provide the information based on claims of confidentiality, attorney work product, or attorney-client privilege, because it did not articulate a basis for claiming that the information was confidential and cannot shield the information from disclosure by a blanket claim of confidentiality.41 Even where the employer can prove a legitimate confidentiality concern, it has a duty to seek an accommodation through the bargaining process.42 The Employer flatly refused to engage in accommodation bargaining.

40 Cf. Schuylkill Contracting Co., 271 NLRB 71, 72 (1984) (finding employer unlawfully failed to provide information relevant to layoffs, including layoff dates, number and names of affected employees, names of individuals who approved layoffs, reasons for layoffs, and how long in advance layoffs had been planned), enforced mem., 770 F.2d 1075 (3d Cir. 1985).


42 Lenox Hill Hospital, 327 NLRB 1065, 1068 (1999).
Moreover, the Employer has not demonstrated that the information sought is protected under the work product doctrine, which covers material “prepared in anticipation of litigation or for trial by or for another party or its representative.”\textsuperscript{43} The party asserting the work product doctrine bears the burden of showing that a document “can fairly be said to have been prepared or obtained because of the prospect of litigation . . . . and would not have been created in substantially similar form but for the prospect of that litigation.”\textsuperscript{44} Here, there is no indication that the requested documents were prepared because of the prospect of litigation. Therefore, the work product doctrine does not relieve the Employer from its obligation to produce otherwise relevant information.

Additionally, the attorney-client privilege applies only to “communication between attorney and client related to the giving of legal advice that is privileged—not simply documents that pass between them”\textsuperscript{45} and does not exempt the underlying facts from disclosure.\textsuperscript{46} Here, there is no indication the documents were communications with an attorney regarding legal advice, so the attorney-client privilege is inapplicable.

With respect to request 5, we conclude that the Union has not established the relevancy of the information. Transition memoranda or similar documents prepared by non-unit employees are not presumptively relevant because they do not concern unit members’ terms and conditions of employment.\textsuperscript{47} The Union has not otherwise demonstrated their relevance.


\textsuperscript{44} Central Telephone Co. of Texas, 343 NLRB 987, 988 (2004) (internal quotation marks and citations omitted).


\textsuperscript{47} See Caldwell Mfg. Co., 346 NLRB 1159, 1159-60 (2006) (relevance of data or information related to non-unit employees must be shown).}
With respect to the August 21 request for information, we conclude that the Employer unlawfully delayed providing a response to request 6 and failed to provide information in response to requests 7 and 8. Financial information is relevant when a union requires it to assess an employer’s assertion that the employer’s “poor financial condition” justifies concessions by the union. Given that the Employer had communicated to the Union on August 16 that it continued to experience financial difficulties and could not agree to a moratorium on layoffs, the financial information sought in requests 6, 7, and 8 is relevant. While the Employer provided a response to request 6, it delayed in doing so until October 10, seven weeks after the request was made and three days after the Employer implemented its layoffs without first giving the Union notice or opportunity to bargain. The information that the Employer provided in response to request 7 was incomplete, as it did not identify the staff or break down the cost savings by position. Instead, the Employer provided a summary sheet that only listed the positions and the overall cost savings. The Employer’s response was thus patently inadequate and required no additional clarification from the Union.

With respect to request 9, in which the Union sought copies of power point slides shown at a staff meeting, we conclude that there is no violation because the information was provided. We further conclude that the Union’s request 10 was vague.

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48 Request 6 sought updates to the Employer’s Financial Sustainability Assessment based on statements made during the August 12 staff meeting, at which it told employees that its project deficit had been reduced. While the Union claims that the Employer failed to provide some information in response to request 6, it did not explain what was missing from the Employer’s response.

49 Request 7 sought cost-savings information for unit and non-unit vacancies that had not been filled. Request 8 sought detailed budget information by department. The Employer argues that the information was not available because it had not finalized its 2019 budget. However, there is no indication that the Employer advised the Union that the information was not available.


51 McLaren Macomb, 369 NLRB No. 73, slip op. at 1 n.1, 7 (May 11, 2020) (considering totality of circumstances, employer unreasonably delayed furnishing information, where union’s request was not complex and was readily available).
and that the Employer consequently was not obligated to furnish the information. Request 10 sought “[a]ny and all additional information to allow the Union to objectively assess the current financial condition of AAAJ.” Generally, an employer is not required to guess as to what a union would need to make an assessment. Given the very specific nature of the preceding requests for financial information, we do not find that the Employer was obligated to seek clarification or to furnish additional financial information without a more detailed request. Moreover, at the October 10 meeting concerning layoffs, the Employer asserted that it had provided the requested financial information, and the Union did not identify specific information that the Employer was lacking in its response. The Employer is not required to read the Union’s mind.\footnote{52}

**IV. The Employer Did Not Engage in Direct Dealing.**

We conclude that the Employer did not engage in direct dealing by meeting individually with employees on October 7 to notify them of their layoffs. These meetings were for the purpose of communicating a predetermined course of action to affected employees.

Direct dealing “involves dealing with employees (bypassing the [u]nion) about a mandatory subject of bargaining.”\footnote{53} The Board will therefore find a direct dealing violation when (1) the employer communicated directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union’s role in bargaining; and (3) such communication was made to the exclusion of the union.\footnote{54}

\footnote{52} Parties have an obligation to engage with each other over whether and how requested information is relevant, and a requesting party cannot simply argue that relevance should have been “apparent” under *Disneyland Park*, 350 NLRB 1256, 1258 (2007), without further explanation, once relevance has been contested. *See First Transit, Inc.*, Case 09-CA-219680, Significant Advice Memorandum dated Oct. 19, 2018, at 5-7; *United States Postal Service*, Case 10-CA-220727, Advice Memorandum dated Nov. 14, 2018. However, we conclude that this case does not present an appropriate vehicle to urge the Board to overrule the “apparent relevance” prong of *Disneyland Park*, because the Union explained its relevance when it submitted its request and did not argue that its relevance should have been apparent to the Employer.

\footnote{53} *Champion International Corp.*, 339 NLRB 672, 673 (2003).

\footnote{54} *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).
Although the Employer communicated directly with employees when it informed them of their layoffs, there was no discussion or negotiation. Announcement to affected employees of an employer’s predetermined course of action, even if that action constitutes a unilateral change, does not constitute direct dealing. The Employer did not invite any feedback from employees or solicit them to negotiate. It announced a predetermined decision.

**CONCLUSION**

Based on the foregoing, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully laid off unit employees from the departments identified above, without providing notice and an opportunity to bargain those decisions; unlawfully failed to engage in pre-implementation effects bargaining over all layoffs (except regarding severance); and failed and refused to provide, or delayed in providing, the requested information to the extent described above. The Region should also urge the Board to overrule **Holmes & Narver**, for the reasons described above. Finally, the Region should dismiss the remaining allegations, absent withdrawal, including the allegation that the Employer engaged in direct dealing.

/s/
R.A.B.

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55 **Capitol Ford**, 343 NLRB 1058, 1067 (2004) (citing **Johnson’s Industrial Caterers**, 197 NLRB 352, 356 (1972), enforced mem. per curiam, 478 F.2d 1208 (6th Cir. 1973)).