



BARGAINING BASICS

National Labor Relations Board

The National Labor Relations Board

The National Labor Relations Board (NLRB) is an independent federal agency, created by Congress in 1935 to administer the National Labor Relations Act (NLRA).

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The NLRB has two primary functions:

1. To investigate and prosecute unfair labor practices (ulps).
2. To process representation cases and conduct secret ballot elections.

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Unfair Labor Practices – 8(a)(5), 8(b)(3), and 8(d)

Section 8 of the National Labor Relations Act sets forth certain enumerated unfair labor practices.

Sections 8(a)(5), 8(b)(3) and 8(d) establish the legal obligations of Employers and Unions to bargain with each other in good faith.



Collective Bargaining Process

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Collective Bargaining Process

Section 8(d) of the Act establishes a mutual obligation to bargain:

the mutual obligation...to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...and the execution of a written contract incorporating any agreement reached..., but such obligation does not compel either party to agree to a proposal or require the making of a concession....

This “mutual obligation” to bargain is enforced against employers and unions through Sections 8(a)(5) and 8(b)(3), respectively.



8(d) Notice Requirements

The party seeking to modify or terminate a contract must:

- (a) Serve written notice on the other party to the contract sixty days prior to the expiration of the contract (Section 8(d)(1))
- (b) Offer to meet and confer with the other party (8(d)(2))
- (c) Notify FMCS and appropriate state agency within thirty days after 8(d)(1) notice (8(d)(3))
- (d) Continue to adhere to the contract without resort to strike or lockout for sixty days after the 8(d)(3) notice or until the expiration of the contract whichever is later (8(d)(4))

* Different timelines apply in healthcare industry



8(d) Notice Requirements – Failure to Meet

- (a) Cannot resort to strike or lockout;
- (b) Cannot alter terms of the agreement;
- (c) Strikers lose protected status and can be fired.



Subjects of Bargaining

- (a) Mandatory – Wages, Benefits and other terms of Employment;
- (b) Permissive – Definition of the bargaining unit, insisting on a different bargaining representative, health insurance for retirees;
- (c) Illegal – Hiring hall based on membership; contract clauses using race or other invidious considerations to differentiate.



Good Faith Bargaining

The duty to bargain in good faith is the obligation of the parties to participate actively in a sincere effort to reach a common ground. In determining whether a party has violated its duty to bargain in good faith, the Board examines all of the party's conduct, both at and away from the bargaining table.



Good Faith Bargaining

Was a party engaging in hard but lawful bargaining or were they attempting to frustrate any agreement?

The Board will look at several factors:

- (a) delaying tactics;
- (b) unreasonable bargaining demands;
- (c) unilateral changes;
- (d) efforts to bypass the union (direct dealing);
- (e) failure to designate an agent with bargaining authority;
- (f) refusing to bargain with a designated agent;
- (g) withdrawal of already agreed-upon provisions;
- (h) arbitrary scheduling of meetings;
- (i) Refusing to provide information.



Refusing to Bargain with a Representative

Neither party may refuse to bargain with representatives chosen by the other party, absent unusual circumstances, since each side is entitled to choose its own representatives.

The right to choose a representative is not absolute. A party may be privileged to refuse to bargain with a chosen representative if it is clear that their presence would create ill will and make good faith bargaining impossible.



Meeting Quickly and at Reasonable Times

The obligation to bargain includes a duty to make prompt arrangements for meeting and conferring.

Considerations of personal convenience, including geographic or professional conflicts, are not more important than the demand that the bargaining process take place quickly and regularly.



Duty to Furnish Information

Under the Act, an employer is obligated to furnish the union with requested information that is potentially relevant and that would be useful to the union in discharging its statutory responsibilities.

These responsibilities include:

- (a) monitoring compliance and policing the collective-bargaining agreement;
- (b) enforcing provisions of a collective-bargaining agreement;
- (c) processing grievances.



Relevance of Requested Information

The duty to provide information extends to both Employers and Unions.

Information pertaining to the bargaining unit is presumptively relevant and no showing of relevance is required.

When the requested information pertains to matters outside the bargaining unit or to non-unit employees, the requester has to show relevance and the need for such information.

Steward Training



Defenses to Providing Requested Information

There may be defenses to immediately providing otherwise relevant information:

- (a) Legitimately confidential or proprietary;
- (b) Unduly burdensome;
- (c) Waiver;
- (d) Bad Faith;
- (e) Financial Information
- (f) ~~Witness Statements~~



Direct Dealing

Section 8(a)(5) does not permit an employer to negotiate directly with individual employees when they have a bargaining representative.

But under Section 8(c), an employer is, under certain circumstances, entitled to communicate with its employees during collective-bargaining negotiations.



Unilateral Changes

Unilateral Change – The obligation is to give notice of proposed change and then to bargain in good faith to impasse over the subject before instituting the proposed change.

When the union is newly elected, the employer must keep past work practices in effect unless it bargains over changes with the new union.

When the parties are engaged in negotiations for a new successor agreement, the employer must refrain from unilateral action unless and until overall impasse has been reached in bargaining for the agreement as a whole.



What is Impasse?

The Parties obligation to bargain in good faith does not compel either party to agree to a proposal or require the making of a concession. Rather, whether in overall contract bargaining or bargaining over changes to past practices, all that is required is that the parties bargain to impasse.

Impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. Both parties must believe that they are at the end of their rope.”

The Board has recognized two limited exceptions to its insistence on overall impasse: delay or avoidance by the union in fulfilling its obligation to bargain and economic exigency that compels prompt action.



Unilateral Changes Must Be Material

- (a) Unilateral change in dress code policy by prohibiting use of acrylic or artificial nails?
- (b) Taking away Christmas dinners and hams?
- (c) Requiring use of generic drugs before brand name drugs?
- (d) Granting stock to unit employees?



Unilateral Changes After Expiration of Contract

Unilateral changes in wages, hours and other terms and conditions of employment after expiration of a collective bargaining agreement are unlawful because these conditions generally survive expiration of the agreement.

But a small number of contractual provisions, including ~~dues-check off clauses~~, union-security clauses, no-strike clauses (with limited exceptions) and arbitration clauses establishing terms and conditions of employment, do not survive contract expiration.



Defenses to the Bad Faith Bargaining Charge

- (a) Waiver
- (b) Contract Interpretation
- (c) Section 10(b)



Mid-Term Modification

Mid-Term Modification – To modify a term of a current collective-bargaining agreement the party must obtain the consent of the other party before implementing the change. The Employer may not implement its desired change to the contract, even if they bargain to impasse.



Withdrawal of Recognition

Unfair labor practice unless the Employer demonstrates actual loss of majority support when the Employer withdrew recognition.

Even with evidence of actual loss of support, an employer cannot withdraw recognition during the term of a collective-bargaining agreement.



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Thank
You

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