FUNDAMENTALS OF
COLLECTIVE BARGAINING

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The following summary provides an overview of the basic legal principles and practical tips involved in collective bargaining. The major related issues addressed are:

- The duty to bargain in good faith, and what that duty requires
- An employer’s right to communicate with represented employees during and about negotiations
- What constitutes an “impasse” in bargaining, and what the consequences are of an impasse
- The effect of expiration of a collective bargaining agreement
- Strikes, the rights of strikers, and an employer’s right to replace striking workers

I. THE DUTY TO BARGAIN

The National Labor Relations Act, as amended (the “Act” or the “NLRA”), establishes as a matter of federal law the right of employees to be represented by labor organizations of their choosing. Employees also have the right to decline such representation. Under Section 9(a) of the Act:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment....

29 U.S.C. §169(a) (provisos deleted).

Section 8(d) of the Act defines the obligations of collective bargaining parties:

...to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees [1] to meet at reasonable times and [2] confer in good faith [3] with respect to wages, hours, and other terms and conditions of employment, or the negotiations of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to proposal or require the making of a concession....

A. Summary of the Duty to Bargain

The bargaining duty may be broken down into three parts.

1. The Duty to Meet, Confer and Negotiate

The Act expressly requires the bargaining parties “to meet at reasonable times and confer in good faith with respect to...the negotiation of an agreement....” One federal appellate court has stated that:
…the Act, it is true, does not require that the parties agree; but it does require that they negotiate in good faith with the view of reaching an agreement if possible; and mere discussion with the representatives of employees, with a fixed resolve on the part of the employer not to enter into any agreement with them, even as to matters which there is no disagreement, does not satisfy its provisions.

In short, the parties must negotiate in an honest attempt to reach an agreement.

2. The Requirement to Bargain in Good Faith

The concept of “good faith” is elusive and difficult to define with precision. An early National Labor Relations Board (“NLRB”) case stated that if the obligation of the Act is to produce more than a series of empty discussions, bargaining must mean more than mere negotiation. It must mean negotiation with a bona fide intent to reach an agreement if agreement is possible. More recently, the Board summarized the duty as follows:

Each party to the collective bargaining process must make a serious attempt to resolve differences and reach a common ground. While one party may not approach the bargaining table with a closed mind, neither is he bound to yield any position fairly maintained.

The parties must “genuinely desire...to reach an agreement.” Good faith bargaining was defined by one federal appellate court as:

[A] ‘desire to reach ultimate agreement, to enter into a collective bargaining contract’; ‘a willingness to negotiate toward the possibility of effecting compromises’; a ‘willingness among the parties to discuss freely and fully their respective claims and demands and, when these are opposed, to justify them on reason’; and ‘the serious intent to adjust differences and to reach an acceptable common ground.’ Good faith is ‘inconsistent with a predetermined resolve not to budge from an initial position....’

While no party is required to make concessions, the Act does require the parties to make a reasonable effort to resolve their differences. The parties “must refrain not only from behavior ‘which reflects a state of mind against reaching agreements,’ but from behavior ‘which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion.’”

3. Bargaining Subjects Generally

The third aspect of the bargaining duty concerns the subjects over which the parties negotiate. Three categories have evolved as the NLRB has interpreted the Act’s language requiring parties to “confer in good faith with respect to wages, hours or other terms and conditions of employment.”

The Board, with court approval, has declared issues related to wages, hours or other employment conditions to be mandatory subjects over which the parties must bargain. Subjects not directly related to wages, hours or other working conditions may be permissive subjects over which the parties may consent to bargain, but over which the law does not compel bargaining. Examples of permissive subjects include contract terms regarding supervisors or internal union
matters. Finally, the Act forbids bargaining over subjects deemed illegal, e.g., closed-shop provisions, hiring-hall provisions giving preference to union members or “hot cargo” clauses.

B. Ascertaining the Parties’ Good Faith

1. *Per Se* Violations

The Board and the courts evaluate all of the surrounding circumstances of a party’s conduct where an unlawful refusal to bargain has been alleged. However, certain actions have been found *per se* refusals to bargain without evaluation of subjective good or bad faith. As the following examples show, a *per se* unlawful refusal to bargain more often involves a simple failure to negotiate in which bad faith is deemed inherent. Moreover, a particular *per se* violation will cast doubt on a party’s general good faith if additional unlawful conduct has been alleged.

a. **Unilateral Changes.** An employer’s modification of a matter that is a mandatory bargaining subject without first bargaining with the union generally is a *per se* violation of the Act. For example, an employer may not unilaterally change wage rates it pays to represented employees.

b. **Direct Dealing.** Because the union is the exclusive representative of bargaining unit employees under the Act, an employer may not bypass the bargaining representative and negotiate directly with the employees.

c. **Failure to Execute a Written Contract.** Section 8(d) of the Act expressly requires “the execution of a written contract incorporating any agreement reached....” The failure to sign such an agreement will be regarded as an unlawful refusal to bargain.

d. **Failure to Meet at Reasonable Times.** Again, the Act explicitly requires the parties to meet at reasonable times, although it does not define “reasonable.” The requirement generally includes a minimal number of meetings. An employer may not unduly delay meetings. Failure to meet is a violation of the Act, and may also indicate general bad-faith bargaining.

e. **Failure to Confer.** A refusal to bargain about a mandatory subject violates the Act’s express requirements that the parties “confer in good faith.”

f. **Insisting on Permissive Subjects.** Supreme Court decisions indicate that regardless of a party’s good faith in bargaining, that party commits an unfair labor practice by insisting, to the point of impasse, on incorporating permissive subjects into the collective bargaining agreement. For example, *per se* violations of the bargaining duty will be found where a party insists on including interest arbitration or neutrality clauses in the contract.
C. Bargaining in Good Faith

The good faith bargaining duty requires the parties “to participate actively in the negotiations so as to indicate a present intention to find a basis for agreement.” This obligation suggests “an open mind and a sincere desire to reach an agreement” and “a sincere effort...to reach a common ground.”

The NLRB and the courts look to all of the circumstances surrounding the negotiations, including conduct both at and away from the bargaining table. The Board has described its evaluation process:

Even though some specific acts viewed in isolation may not support a bad-faith bargaining charge, a party’s overall course of conduct in negotiations could show an unfair labor practice.

In short, the Board and courts examine the “totality of conduct” of the bargaining parties.

1. Totality of Conduct and “Boulwarism”

Proposing at the outset of negotiations a “bottom-line” contract offer with little or no willingness to discuss or modify the proposal, no matter how reasonable and well-justified that proposal is under an employer’s economic circumstances, may be an unlawful refusal to bargain in good faith under the Act. Such an approach has been called “Boulwarism” in honor of Lemuel R. Boulware, the General Electric vice president who developed the concept after GE experienced a bitter and disastrous strike in 1946. The bargaining procedure avoided the give-and-take inherent in good faith negotiations contemplated by the Act.

Boulware sought to persuade GE’s employees that the company was responsive to their needs, and that the union was not needed to force the company to grant what it would provide voluntarily. This persuasion was to be accomplished through a massive communications program to employees, a continuing research program so GE could discover what was “best” for its employees, and the formulation of a “firm and fair” offer to the union based on the facts GE had gathered.

GE developed a single bargaining proposal that, on the basis of the company’s own research, anticipated the union’s bargaining demands. For six weeks, the company held meetings with employees and mounted a massive publicity campaign before presenting the union with the company’s offer. GE characterized its offer to the union on August 30, 1960 as “fair and firm,” an offer giving the union no reason to strike. GE also said the offer would be open and subject to change only if new information showed that the original offer was not “right.” By September 9, the company had made only four changes to the original offer. The parties eventually signed a contract on November 10.

On the union’s subsequent charge against GE, the NLRB determined that GE had failed to bargain in good faith. More significantly, the Board found an unlawful refusal to bargain based on GE’s overall attitude or approach to bargaining, as evidenced by the totality of its conduct. The Board held that:

…an employer may not so combine ‘take-it-or-leave-it’ bargaining methods with a widely publicized stance of unbending firmness that he is himself unable to alter a position once taken…. Such conduct, we find, constitutes a refusal to bargain in
fact.... It also constitutes...an absence of subjective good faith, for it implies that the Company can deliberately bargain and communicate as though the Union did not exist, in clear derogation of the Union's status as exclusive representative of its members under [the Act].

2. **Factors Indicating Bad Faith**

In evaluating the totality of the bargaining parties' conduct, the Board may look to various factors.

a. **“Surface Bargaining.”** Even where an employer is willing to meet at length and confer with the union, the NLRB will find an unlawful refusal to bargain if it determines that the employer is merely “going through the motions” of bargaining. Surface bargaining has been found where an employer rejected a union’s proposal, tendered its own and did not attempt to reconcile the differences.

Evidence of surface bargaining includes refusal to discuss or consider the other party’s proposals, unwillingness to make counterproposals, the use of delaying tactics, such as frequent postponements of bargaining sessions and the withdrawal of previously-granted concessions or agreed-upon proposals.

Merely tendering a “predictably unacceptable” counterproposal is inadequate, on its own, to justify a finding of bad faith, so long as the proposal does not foreclose further discussion.

b. **Concessions: Proposals and Demands.** Section 8(d) of the Act specifically states that a bargaining party is not obligated to make concessions or agree to a proposal. Nevertheless, under the Board’s evaluation of the totality of conduct, a willingness to compromise is an important factor. The willingness to compromise does not necessarily require an employer to grant a particular demand or to counterpropose on a particular issue to avoid a finding of bad-faith bargaining.

c. **Dilatory Tactics.** An employer’s failure to respond to a union’s request to commence negotiations, persistent refusal to agree to meet at suggested times, canceling scheduled bargaining sessions without proposing alternate dates and other forms of delay may evidence a lack of good faith.

d. **Inadequate Negotiators.** Sending a bargaining representative who has no authority to enter into a contract or advance binding contract proposals demonstrates a lack of good faith. Where an employer has not expressly reserved the right to ratify or reject a tentative contract settlement made by its representative who has apparent authority, the employer unlawfully declines to execute the agreement.

e. **Conditions on Bargaining.** An employer may violate the duty to bargain if it conditions bargaining on the union’s acceptance of particular proposals or abandonment of a right (e.g., withdrawal of pending unfair labor
practice charges, ending a strike, refusing to meet with certain union negotiators, refusing to negotiate economic proposals without agreement on non-economic issues, etc.).

f. **Unilateral Changes.** As noted above, an employer’s unilateral change in an employment term that is a mandatory bargaining subject usually is a *per se* violation of the Act. The Board also will consider unilateral changes in its examination of the totality of the conduct.

An employer may make unilateral changes without bargaining with the union if the employer has reserved this right in the collective bargaining agreement. For example, the Board and courts have held that altering a medical plan without negotiating with the union is not an unfair labor practice if the employer has reserved the right to do so in the collective bargaining agreement.

g. **Direct Dealing.** As is the case with unilateral changes, bypassing the union and bargaining directly with represented employees may be a *per se* violation on its own, as well as evidence of bad faith in the Board’s totality-of-conduct examination.

While direct dealing is unlawful, an employer may communicate with employees about its proposals submitted to the union and state its position on those proposals. This aspect of the law is more fully discussed below.

h. **Other Unfair Labor Practices.** An employer’s commission of other unfair labor practices away from the bargaining table is also considered an indication of the employer’s lack of good faith in bargaining.

### D. Mandatory, Permissive and Illegal Subjects for Bargaining

By imposing an obligation to bargain collectively, Congress did not require that an employer bargain over all aspects of this business, but only over “wages, hours, and other terms and conditions of bargaining” (NLRA, Section 8(d)). In interpreting these broad guidelines, the NLRB has classified potential subject matter of collective bargaining into three basic categories:

1. **Mandatory**

   Rates of pay, wages, hours of employment and other terms and conditions of employment are mandatory subjects of bargaining. Neither party may refuse to bargain over these issues, nor may the employer unilaterally change terms and conditions which are mandatory subjects of bargaining.

2. **Permissive**

   Subjects falling outside of wages, hours and working conditions, such as provisions covering supervisors, internal union affairs, transcribing negotiation sessions, employer neutrality and the union label are permissive subjects of bargaining.
Parties are free to negotiate over permissive subjects and include them in agreements, but neither party is required to negotiate over them.

3. Illegal

Contract proposals unlawful under the NLRA, such as provisions for a closed shop or “hot cargo” agreement, may not be insisted upon by either party. See Appendix A for a further list of subjects of bargaining.

E. Bargaining over Permissive Subjects of Bargaining

A party that refuses to bargain over a mandatory subject of bargaining commits an unfair labor practice, while a party who proposes to bargain over a permissive subject of bargaining and bargains to impasse on that issue also commits an unfair labor practice. Commission of an unfair labor practice is most significant in contexts of determining whether a subsequent strike is an economic strike or an unfair labor practice strike.

II. COMMUNICATIONS WITH EMPLOYEES DURING BARGAINING

An important aspect of GE’s Boulwarism bargaining strategy included a “massive communications” program directed at the employees. While GE’s communications program contributed to a finding that, under the totality of GE’s conduct, its bargaining had lacked good faith, the court of appeals specifically noted that, “[w]e do not today hold that an employer may not communicate with his employees during negotiations.”

Section 8(c) of the Act affirms an employer’s right to communicate with its employees. That section states:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

A. General Rules

As a matter of settled law, the Act does not, on a per se basis, preclude an employer from communicating in non-coercive terms with the employees during collective bargaining. The fact that an employer chooses to inform the employees of the status of negotiations, of proposals previously made to the union, or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith. It is plain that a non-coercive communication campaign may be utilized as an effective instrument as long as it is not used for bypassing the union and engaging in direct dealing with the employees.

While employers may present their own view of negotiations to their employees, presentations which are “coercive or invite direct bargaining between the employer and the employees” will violate the Act. Employers may communicate with employees regarding the status of negotiations, but the communications must be structured in a non-coercive, non-negotiative manner.
B. The Elements of Lawful Communications

Before an employer may disclose to employees generally its bargaining proposals, those proposals must first have been presented to the union. This avoids a claim of bypassing the bargaining agent and losing the privilege of Section 8(c) of the Act. The communication to employees also must be presented in a manner which does not undermine the representative authority of the union. In situations where these two criteria have been met, the employer’s conduct has been upheld.

C. Media

Since an employer has the right to communicate with its employees about negotiations in a non-coercive manner that does not seek to undermine the union, a variety of communications devices may be used.

1. Letters Mailed Directly to Employees

The Board has upheld an employer’s communication campaign that included sending letters to employees concerning the status of contract negotiations. The employer also read summaries of the negotiation sessions to the employees at group meetings.

2. Large and Small Group Meetings

The Board has held that an employer acted lawfully during negotiations by conducting employee meetings to explain contract proposals that had been rejected by the union membership. The Board rejected the union’s claim that the employer was attempting to bargain directly with the employees and undermine the union’s support. The Board based its conclusion, inter alia, on the fact that the employer did not commit other unfair labor practices.

In another case, the Board permitted the employer’s general manager to discuss the contract negotiations personally with three employees. The Board based its conclusion on the following factors:

   a. The employer had a long and continuing history of negotiations with the union.
   b. The manager previously had discussed the proposals with the union.
   c. The record did not show that the statements were threats made to the employees to discourage their union support or that the statements were not made in good faith based on economic considerations.
   d. The statements did not constitute an “ultimatum.”


The Board has held that an employer may lawfully post on an employee bulletin board an announcement concerning ongoing negotiations. The Board in that case stated that the evidence failed to support the union’s claim that the posted letter was unlawfully motivated.
D. Employer Communications to Employees May Be Unlawful if They Are Part of an Unlawful Campaign to Undermine Union Support

During negotiations, an employer’s conduct at and away from the bargaining table must show subjective good faith. An employer’s communications to employees about negotiations will be considered a factor in this evaluation. Statements to employees should be carefully structured to deliver information candidly and describe the employer’s position without undermining the union’s representative status.

III. BARGAINING IMPASSE

The duty to bargain does not require an employer “to engage in fruitless marathon discussions at the expense of frank statement and support of his position.” Where there are irreconcilable differences in the parties’ positions after exhaustive good faith negotiations, the law recognizes the existence of an impasse. When a bona fide impasse occurs, the duty to bargain is suspended, and the employer is free to make unilateral changes in working conditions (i.e., wages, hours, etc.) consistent with its last offer to the union during negotiations.

A. Impasse Defined

A bona fide impasse has been defined as “a state of facts in which the parties, despite the best of faith, are simply deadlocked” and as a “temporary deadlock or hiatus in negotiations.” The determination of a bona fide impasse, like that of good faith bargaining, depends on the mental state of the parties and is highly subjective. Whether impasse exists is a question of fact, based on the totality of the circumstances.

Whether a bargaining impasse exists also is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exists.

B. Effect of Impasse on a Single Issue

The Board has consistently ruled that impasse on a single issue does not suspend the obligation to bargain on other unsettled issues. The Board has, however, upheld overall impasse when the issue over which impasse has been reached makes further bargaining over all issues impossible.

C. Effect of Impasse on Bargaining Obligation

When an impasse occurs, the duty to bargain does not end, but is suspended. Upon impasse, an employer may unilaterally implement some or all of its contract proposals; it need not implement all of them.

Generally, an employer may only implement those proposals concerning mandatory subjects of bargaining on which impasse has been reached. An employer may not act unilaterally if the changes implemented differ from its pre-impasse proposals. For example, an employer violates the Act when it implements wage increases which exceed those previously offered at the bargaining table. Terms changed unilaterally must not be “substantially different or greater than any [offers] which the employer...proposed during the negotiations.” Likewise, an overall
bargaining impasse does not justify a unilateral change concerning a subject over which there has been no bargaining.

Further, if an employer has bargained in bad faith or has committed unfair labor practices, thus preventing the parties from reaching an agreement, the resulting impasse is not a valid one, and any unilateral changes the employer makes will be deemed illegal.

Any event or occurrence that renews the possibility of fruitful discussion breaks the impasse, and unilateral changes made following a break in the impasse will be unlawful. For example, a strike after impasse changes the bargaining atmosphere, and negotiations must resume upon request. Changes in the employer’s business or in the industry generally, or a substantial change in one party’s bargaining position may also break the impasse. Finally, impasse alone does not indicate that the union has lost the majority support of employees so as to justify withdrawing recognition from the union.

IV. THE EFFECT OF CONTRACT EXPIRATION

A. The General Rule

The fact that a collective bargaining agreement expires does not mean that its terms are no longer effective. Rather, the duty to bargain under the Act requires that the employer continue generally to apply the contract’s terms until the parties either: (a) conclude a new agreement, or (b) reach an impasse in bargaining and the employer becomes privileged to make unilateral changes consistent with its proposals to the union. The U.S. Court of Appeals for the Ninth Circuit has explained this principle:

[T]he collective bargaining agreement survives its expiration date for purposes of marking the status quo as to wages and working conditions. The employer is required to maintain that status quo following the expiration of the collective bargaining agreement until the parties negotiate a new agreement or bargain in good faith to impasse.

B. The Union Security Exception

Notwithstanding the above general rule, union security provisions have been found not to survive the agreement’s expiration.

C. Grievances and Arbitration

The expiration of a contract also may affect an employer’s obligation to arbitrate grievances. As a general principal, disputes arising under the terms of an expired contract must be arbitrated even after the contract’s expiration. This principal will not apply if the contract specifically provides that the parties did not intend that post-contractual right.

Generally, the right to arbitration exists where a grievance either involves rights which to some degree have vested or accrued during the life of the contract and merely ripened after termination or relates to events that occurred at least in part while the agreement was still in effect.

An employer must entertain employee grievances filed during a hiatus period between contracts pursuant to the grievance procedure set forth in the expired agreement. An employer’s duty to
arbitrate grievances arising in the post-contract hiatus is not always clear.

D. No-Strike/No-Lockout Clause

Unlike most other terms of an expired collective bargaining agreement, the no-strike promise does not survive contract expiration. Once the contract has expired, the union becomes free to engage in a strike to enforce its demands at the bargaining table. Similarly, the employer may, in appropriate circumstances, lock out employees once the agreement containing a no-lockout clause has expired.

E. Other Waivers of Statutory Rights

Waivers of statutory rights often do not survive contract expiration. An employer relying on a management-rights clause to make unilateral post-expiration changes must proceed cautiously.

V. STRIKES

Upon expiration of a collective bargaining agreement, the union may decide to bring economic pressure to bear on the employer in an effort to force acceptance of its contract demands. The union’s ultimate economic weapon is a strike, where the employees withhold their labor from the employer. Such strikes are termed “economic strikes” under the Act because they seek to apply economic pressure to enforce bargaining demands. Employees and unions also may engage in an “unfair labor practice strike” in protest of unlawful employer conduct. The rights of strikers and employers vary, depending on the type of strike.

Note that under the Act, an employer may not discharge strikers except in certain limited circumstances of striker misconduct. Section 2(3) of the Act provides that strikers remain the employees of the struck employer. However, a struck employer may hire replacement workers to perform the jobs of striking employees. As a practical matter, the technical legal distinction between being fired and being replaced may be lost on a striking employee. An economic striker who has been permanently replaced may well feel the same as if he or she had been fired — nevertheless, the distinction is important because an employee who is fired for exercising his or her right to strike under the Act will be entitled to reinstatement and back pay.

A. Economic Strikes

An employer has the right to hire permanent replacements to continue its business operations during an economic strike. The employer need not discharge replacement workers to create vacancies for economic strikers who wish to return to work, and it may lawfully refuse to reinstate economic strikers whose positions are occupied by permanent replacements when the strikers make an unconditional offer to return.

While an employer has the right to hire permanent replacements to continue its operations during an economic strike, it may be asked to discharge these same permanent replacements as part of a strike settlement agreement. In the event that the employer agrees, federal law does not preclude discharged strike replacements from filing state lawsuits seeking damages for misrepresentation in inducing them to accept “permanent” employment and for breach of contract in their discharge from such employment as part of a strike settlement agreement.

A struck employer also may hire temporary replacement workers who will be discharged in the event of a settlement in which strikers return to work.
1. Reinstatement Rights of Economic Strikers

As a general rule, an employer must reinstate economic strikers upon their unconditional application for reinstatement, if a vacancy exists. Further, an economic striker’s right to reinstatement extends beyond his former position. If a striker’s former position is eliminated or filled, he or she may be entitled to reinstatement to another position. However, there are some limited exceptions to this general rule.

In the absence of any agreement to the contrary, the employer owes only a limited duty to an economic striker whose job, on the date of his request for reinstatement, has been filled by a permanent replacement. The employer only need offer reinstatement to a replaced employee when a position for which the employee is eligible becomes available. The replaced employee is placed on a preferential hiring list while he or she waits for an available position.

The limited exceptions to the employer’s obligation to reinstate economic strikers are:

a. An employer is not required to offer reinstatement to economic strikers guilty of serious misconduct during a strike.

b. If a substantially comparable position becomes available, is offered to the economic striker on the preferential hiring list, and is declined, the employer’s obligation to reinstate is extinguished.

The Board has also held that the new position need not provide exactly the same pay in order to be substantially equivalent, nor must it be the same function.

c. When the employee abandons his interest in reinstatement through obtaining substantially equivalent employment elsewhere, reinstatement is not required.

d. If, for legitimate and substantial reasons, the employer is justified in withdrawing a reinstatement offer, there is no obligation to reinstate.

The reinstatement rights of economic strikers do not lapse with the passage of time, but continue indefinitely or until such time as an employer can establish a substantial business justification for terminating the rights.

2. Employment Terms for Strike Replacements

If an economic strike occurs after the expiration of the contract, an employer is not under any obligation to hire replacement workers at the wage rates in the contract.

Even in the absence of an impasse, an employer lawfully may change contract rates for replacement employees after the termination of the contract, provided the employer does not offer replacement employees a better economic package than was offered to striking employees.
B. Unfair Labor Practice Strikes

An unfair labor practice strike is one caused or prolonged by the employer’s unfair labor practices. Unfair labor practice strikers have significantly greater rights than economic strikers. Unfair labor practice strikers are entitled to reinstatement to their jobs when they make an unconditional offer to return to work, even if reinstatement requires discharging replacement workers to make room for the returning strikers. Unfair labor practice strikers who are not reinstated upon an unconditional application will be eligible for back pay, typically beginning five days after their offer to return to work.

Employers must be aware of the distinction between economic strikes and unfair labor practice strikes, and of the different rights available to economic and unfair labor practice strikers, because what begins as an economic strike may be converted to an unfair labor practice strike by the employer’s unlawful conduct.

Conversion of an economic strike to an unfair labor practice strike can occur when, during the economic strike, the employer commits an unfair labor practice, the effect of which is to prolong the strike. The conversion is not automatic. The Board maintains a general rule that a conversion will be found only when there is proof of a causal relationship between the unfair labor practices and the prolongation of the strike.

However, a strike will be characterized as an unfair labor practice strike if it is caused “in whole or in part” by one or more unfair labor practices. Even if the primary cause of the strike was economic in nature, the strike may nonetheless be an unfair labor practice strike if an unfair labor practice was one of the other underlying reasons for the strike.

A decisive factor in determining causal connection between the unfair labor practice and strike extension is the basis upon which the strike actually is prolonged. Even where an unfair labor practice is charged by the union during a strike, the continuation of the strike still may be due to the initial economic dispute. The causal connection between the unfair labor practice and strike prolongation must be established to convert the economic strike to an unfair labor practice strike.
PREPARING FOR NEGOTIATION

COMPILING INFORMATION

To bargain effectively, a negotiator must have an arsenal of information and knowledge to back them up. Intelligent and thorough preparation for bargaining requires an understanding of the opposition, the existing labor agreement (if there is one) and other labor agreements in the same industry and area.

Knowledge of the union involved, as well as the individuals on the union’s negotiating team, is imperative to negotiating the union contract. The employer must know the opposition, its strengths and weaknesses, its reputation and history, and its dealings and relationships with other employers. By examining these factors, the employer can assess the union’s bargaining strength and also foresee its behavior at the bargaining table. The following list sets out relevant information that should be acquired:

- Name and address of union(s) involved – international, local and district affiliates
- Names and titles of officers
- Constitutions and bylaws (with particular emphasis on the duties and financial obligations imposed on the membership)
- Financial status of the union
- Salaries and expense accounts of officers and staff
- Record of strikes and boycotts
- Record of contract observance or violation
- Accumulation of strike funds
- Record of unfair labor practices
- Record of other civil or criminal violations by the union and staff
- Other contracts entered into by the union
- Details of union benefit plans, if any

Information about the structure and finances of a union may be obtained from the U.S. Department of Labor, with which unions are required to file various reports. Form LM-1 is the initial report filed by a union. It discloses the names and titles of the union officers, fees, dues and assessments charged to the membership. Certain parts of the union constitution and bylaws are summarized, as well as such matters as qualifications for membership, levying of assessments, meetings, and audits, selection of stewards and officers, and strike authorization procedures. Form LM-2, the “Labor Organization Annual Report,” is a financial report that itemizes salaries of union officers and employees, expense allowances, receipts from dues, fines and assessments, and disbursements for such items as strike benefits. In addition, forms D-1 and D-2, required of welfare and pension plan benefit administrators, are available for study. These are excellent sources with which to compare the employer’s own plans.

Employer associations also may be able to provide additional resource material, and labor unions publish their own periodicals which are available at major libraries and online. Finally, much can be ascertained from labor law services published by Labor Relations, Inc.
Also essential in preparing for negotiations is an analysis of the provisions of the agreements that have been reached by employers and unions in the same community or industry. The industry or area patterns that are revealed have a significant impact on the negotiations, and they are strong indicators of the relative bargaining positions of both the union and management.

Industry and area patterns may be influential, but they are not controlling. Neither side is bound by recent settlements made by other employers and unions. Different competitive conditions, varying work conditions and a change in economic conditions since the other agreements were reached all can justify a different outcome.

Information about comparable contract settlements may be obtained from the Bureau of Labor Statistics of the U.S. Department of Labor, state labor departments, private labor law services, employer associations and/or union research departments.

Also important in evaluating a union’s bargaining strength is: (1) determining the extent of unionization in the client’s industry; and (2) assessing the union climate in the particular geographic location. For instance, certain employers may be confronted with complete unionization, as in the steel and automobile industries, and in radio, television and the performing arts industries. In such a situation, the union’s ultimate weapon during negotiations – the strike – is much more credible. In the event of a walk-out, the employer would have much greater difficulty operating in a highly-unionized industry and community, since replacement workers would be less likely to apply for strikers’ jobs, fewer strikers would cross the picket line to return to work, and truckers would be reluctant to make pickups and deliveries. In sum, the extent to which the employer can control personnel, wages and benefits is limited generally by the particular industry and location.

Finally, an analysis of the strengths and weaknesses of an existing labor agreement is an important part of the preparation for negotiations. One aspect of this is to study the grievances and arbitration cases that arose during the previous contract term. In this way, you can identify where contract changes are needed and which problems should be solved.

**ASSESSING THE BARGAINING POWER OF EACH PARTY**

The outcome of negotiations largely depends on two factors: (1) the relationship between the parties; and (2) the economic leverage each party possesses. If the company and union have always maintained a positive relationship, the parties may be able to find a mutually-acceptable compromise on even the most difficult problems. Normally, however, negotiations become a test of strength on at least some issues. In these situations, if all else fails, the union must be prepared to unleash its main weapon – the economic strike. Management also must be prepared for the worst, since its bargaining power arises from the employer’s ability (and willingness) to withstand a strike.

Prior to negotiations, both the employer and union must evaluate realistically its adversary’s and its own bargaining leverage. It would be a disservice to the employer to end the inquiry when you are told that, if pushed to the wall, the company would withstand a strike to achieve its bargaining objectives. Such conclusive statements can be misleading. It is incumbent upon the members of the negotiating team to determine whether, in fact, sustaining a strike would help. To assess the employer’s bargaining power, one must determine whether the employer has sufficient financial resources to endure a strike. This analysis should include the following:
• Can the employer (through inventory in stock, other company facilities, subcontracting, use of managers, or hiring of replacements) continue to supply or service its customers during a strike?
• What is the financial status of the company? Will it be forced to lay off workers or close down as a result of a strike?
• Has the company ever withstood a strike in the past?
• Can any competitors make inroads into the company’s market share during a strike?
• Will the company’s stance be affected by the adverse publicity caused by a strike?

While the effectiveness of the union’s strike would largely be answered by the above questions, to assess a union’s bargaining power one also must know:

• How many union members work in the facility? Can they afford to be out of work, virtually without compensation, for any period of time?
• Is the union strike fund substantial? When does this union (according to its constitution) start providing strike benefits, e.g., after the third week of the strike?
• Is alternative work available for the strikers?
• Can the employer find non-union replacements?
• Does the state where the facility is located provide unemployment compensation for strikers?
• What were the results of past strikes or picketing at this company? Are there any other unions inside the company that would honor a union picket line?

Once these questions are answered, each side can conduct internal discussions about the appropriate bargaining posture in view of its actual bargaining power.

**PRACTICAL PREPARATION TIPS TO MAXIMIZE SUCCESS AT THE TABLE**

Often, insufficient time is spent in advance of bargaining to prepare for and lay the foundation for the upcoming negotiations. This often leads to unsatisfactory results in which the union ends up controlling the agenda, management is reactive at the table, the union ends up having more leverage than it otherwise would, and the eventual agreement fails to meet management’s needs. A number of things can and should be done well in advance of coming to the table for bargaining.

1. **Align Management.** All key management constituencies (operations, finance, human resources, legal) should participate in the planning process and be aligned with common goals for the corporate good. The failure to do so not only leads to unsatisfying results, but can be professional suicide for those who go off on their own!

2. **Anticipate Issues.** Try to determine what the union likely will bring to the table before you ever get there. Review grievances and other complaints. Consult with other area employers with which the union has recently bargained. Keep in touch with any internal “political” issues and constituencies which might affect the approach the union’s team will take at the table. Unions frequently look to determine whether or not an employer is a leader or follower in the industry or geographic area. Most unions believe in “pattern bargaining” whenever possible. Pattern bargaining attempts to eliminate labor costs as a competitive factor. By having all competitors in a particular market possess the same labor costs, labor costs (at least in theory) become less significant and employers will be more likely to agree to a pattern
increase. Thus, often the priority of a bargaining topic to the union will be dictated by which employer is the leader, as unions typically expect follower employers to adopt terms similar to those agreed to by the leader.

3. **Set Goals.** Establish meaningful goals to achieve from bargaining. Those include economic, non-economic, and “relationship” goals.

   a. Economic goals include all direct and indirect labor costs – not just the “big ticket” items of wages, health insurance premiums, and pension benefits. Also include concerns such as: (1) overtime premiums; (2) vacations, holidays, sick leave, and other paid time off; (3) special programs like tuition reimbursement, employee discounts, and EAP; and (4) hours of work.

   b. Non-economic goals primarily go to management rights and flexibility – although it bears noting that they typically all have a significant economic component. They include: (1) use of contractors and contingent workforce; (2) work jurisdiction and performing bargaining unit work by supervisors and other non-bargaining unit employees; (3) changes in duties and responsibilities; (4) the introduction of new technology; (5) layoff and recall rights and procedures; (6) an “employer-friendly” grievance and arbitration procedure; and (7) a litany of favorable “technical” language.

   **Identify problems that have occurred during the term of the expiring contract; i.e., are there significant grievance issues that need to be solved, unfavorable arbitration awards that need to be cleansed and/or any “past practices” that need to be eliminated?

   c. Don’t forget your “relationship” goals with the union. You need to determine what you want your relationship to be (e.g., cooperative, competitive or adversarial) and how you can best get there. Your relationship goals should be driven not so much by a philosophical predisposition, but by the realities of the situation (e.g., whether the union is entrenched, who holds the structural power in the relationship, whether there are viable alternatives to the current union leadership, etc.) and the long-term corporate interest. Always review the bargaining history and the history of the relationship with the union. The union’s approach likely will be affected by an employer’s history of hard bargaining (or worse), and whether the relationship is improving or deteriorating.

4. **Select the Team.** Thoughtful decisions should be made as to who is a part of the bargaining team – and who is not. A chief negotiator (whether inside or outside) should have collective bargaining skills and experience necessary to deliver the sought-after goals. When selecting team members, consider not merely internal company politics but the relationships (positive and negative) and resources they provide. A good team has all major constituencies represented without any significant distractions. And the earlier the team is selected, the better.

5. **Make Strike/Lockout Preparations.** It is never too early to begin strike preparations. Indeed, your ability to successfully plan for the worst-case scenario may govern how you approach the negotiations and your bottom line. Strike preparation considers, most
generally, labor supply needs, logistics, and security and legal concerns, but can vary substantially from industry to industry and employer to employer.

6. **Research the Facts.** Being well-informed helps you be well-armed. On issues of wages and health insurance, you should gain a good understanding of wages among comparable employers in the labor market, internal wage equity issues, cost-of-living changes, and health insurance trends and options. You also should seek out information concerning the union’s finances, strike fund balance, and internal and external politics.

7. **Build Relationships.** You should set the tone for your desired relationship with the union well in advance of bargaining. If you have set an adversarial tone in your day-to-day dealings, you likely won’t be able to take a cooperative approach at the table.

8. **Define Needs.** Review your goals and separate them from your needs. At what point does a possible deal become unacceptable? Somewhere between your goals and your needs is the zone of possible settlement. Defining your needs and goals is important not only to ensure you have an understanding of where you might start with your initial proposals and where you can settle, but also to manage the company’s own internal expectations.

9. **Develop a Strategy for “At the Table.”** Give some advance thought to your bargaining strategy – how do you plan to get to where you want to go? What you end up doing often depends heavily on the other side and your own style and preferences, and it may need to be revised as you go. Approaches include “win-win” or cooperative bargaining, “win-lose” or competitive or adversarial bargaining, or any number of more exotic approaches, such as “good cop/bad cop” routines or “end around” strategies. But at least have a plan.

10. **Develop a Strategy for “Away from the Table.”** You should have some form of communications strategy for dealing with employees in the unit, employees outside of the unit, management, and the public. Different organizations have different needs, but you should not let the union control the message or let rumors and misinformation fill a communication vacuum. A good communications strategy can facilitate settlement and aid strike preparation. Be careful not to blindside the union, however – or worse, inadvertently engage in unlawful direct dealing.

**FIVE THINGS TO AVOID AT THE BARGAINING TABLE**

1. **Behaving Badly at the Bargaining Table.** While unions expect to bargain as equals with management, union members respect the position of management and expect management to exhibit preparedness, maturity, and decorum when bargaining. Bad behavior at the bargaining table (e.g., arrogance, over-familiarity, emotional outbursts, swearing) is seen as hypocritical and insulting. While the issues in bargaining may be very difficult to resolve, someone has to be the adult. Bad behavior devalues the natural respect bargaining unit employees typically have for management.

Union leadership also recognizes that most companies would rather not have unions. They don’t need to be reminded. Comments about non-union operations or even about how other unions operate will not be helpful to getting an agreement. Worse, inflammatory anti-union comments interject unnecessary personal, political, or philosophical views into the negotiation and typically will be nothing but harmful in getting an agreement. No one wants to be bad-mouthed. Respectful, business-like communication is far more likely to be successful in reaching an agreement.
2. **Lacking Clear Direction.** Bargaining is a series of events starting with identification of objectives, communication of goals and, finally, bargaining to those goals. If the union doesn’t know where you need to go, either from candid discussions away from the table or from clear indications at the table, it is difficult for the union’s negotiator to lead his or her team to an agreement that they will accept. The parties may wind up with very different positions due to a lack of understanding of management’s objectives and goals. During negotiations, the company should identify clearly its important issues and signal those issues (its own and the union’s) for which there is flexibility.

3. **Making Radical Changes in Position.** Don’t talk for half the bargaining session about how important getting rid of the defined benefit pension plan is and then, out of the blue, drop your proposal. It’s confusing and reflects poorly on the credibility of the company’s positions at the table. It makes the union negotiator’s task in persuading the bargaining unit of any need for change more difficult, if not impossible.

4. **Assuming the Union Negotiator Knows Something.** Most union negotiators know their core industries very well — but there is no guarantee or even any likelihood that they will know your individual business conditions and needs as well as you do. Don’t let the union negotiator jump to (or hold onto) incorrect assumptions. The longer the union continues to work from an inaccurate view of the facts, the more difficult it will be to move them off of proposals and positions they have taken based on those views. Be clear. Be factual. Be honest.

5. **Blaming (and Yelling at) the Union Negotiator Because of Problems Outside of his Control.** Union governance is all about politics — and the typical union negotiator has to deal with political issues coming from both above and below. Understand and be respectful of that issue. An experienced union negotiator will not expect you to concede any issues due to his political problems, but will expect you at least to understand that he or she has to come up with solutions. It is purely political in nature — not substantive or business-driven. And, while new proposals and creative ideas at the table might be helpful to attaining an agreement, management should avoid any inclination to interject into the union’s internal political issues.
APPENDIX A – MANDATORY SUBJECTS OF BARGAINING

Wage Compensation for Services
- Wages
- Salaries
- Incentive pay or bonus
- Shift premiums
- Overtime premiums
- Premium pay for work on Sundays and holidays
- Merit pay increases
- Equity pay adjustments
- Cost-of-living adjustments (COLA’s)
- Premium payments for undesirable schedules or work
- Red-circle pay
- Longevity pay or premiums
- Pay for training

Wage Compensation for Non-Worked Time
- Holidays
- Vacations
- Jury duty pay
- Funeral or bereavement pay
- Call-in or call-back pay
- Reporting pay or daily/weekly minimum pay
- Standby pay
- Travel pay
- Pay for time spent on union business
- Pay for time spent on safety matters
- Severance pay
- Pay for lost wages due to contract violation

Non-Wage Benefits
- Holiday bonuses or “gifts”
- Pension benefits for current employees when they retire
- Profit-sharing plans
- Stock purchase or bonus plans
- Employer-provided or employer-reimbursed housing, meals, and services
- Medical, life, sickness and accident, dental and vision plans
- Legal services plans
- Discounts on company products
- Leaves of absence (paid or unpaid)
- Clothing and tool allowances or benefits
- Company-provided or employer-reimbursed transportation
- Tuition reimbursement programs
- Working conditions on the job
- Hours of work and work schedules
- Rest and lunch periods
- Plant rules of conduct
- Grievance procedures and arbitration
• Promotions, transfers, layoffs, recalls, etc.
• Workloads
• Discharge and discipline
• Safety and safety rules
• Probationary and trial periods
• Testing of employees, including use of lie detectors
• Job-required clothing or equipment
• Job duties
• Job qualifications and certification requirements
• Workplace facilities and conveniences
• Seniority accumulation (loss and application)
• Work assignments

Management Rights and Union-Management Issues
• Subcontracting
• Management-rights clause
• Effects on employees of plant closure, relocation, sale, etc.
• Union shop or other union security agreement (unless state law prohibits)
• Dues checkoff clauses
• Bargaining unit work
• No-strike clause
• Union hiring halls
• Nondiscrimination clauses
• Waiver or “zipper” clauses
• “Most favored nation” clause
• Arrangements for labor contract negotiations

Permissive Subjects of Bargaining
• Definition of bargaining unit
• Conditions affecting supervisors
• Formal parties to the collective bargaining agreement
• Performance bonds
• Legal liability or indemnification clauses
• Identity of either party’s bargaining representatives
• Internal union affairs including contract ratification procedures
• Union label
• Industry promotion funds
• Settlement of unfair labor practice charges
• Multi-employer or multi-level negotiations
• Pension benefits for persons presently retired
• Interest arbitration
• Recording or transcribing of negotiations

Illegal Subjects for Bargaining
• Closed shop (illegal)
• Hot cargo clauses (illegal)
• Clauses which are racially or sexually discriminatory (illegal)
• Union shop clauses (in states with right-to-work law)
• Strike insurance or mutual aid plans (MAPs)
APPENDIX B – GLOSSARY OF LABOR RELATIONS TERMS

ADMINISTRATIVE LAW JUDGE - An administrative officer of the National Labor Relations Board who presides at NLRB trials to determine if unfair labor practices have been committed. Decisions of administrative law judges can be appealed to the five-member Board in Washington, D.C.

AGENCY SHOP - A company which has a contract with a union which does not require union membership, but does require all employees to pay a sum of money equal to union dues for the privilege of working at the company.

AGENT - A person who is authorized by law to act for another person. For example, a supervisor is an “agent” of an employer.

APPROPRIATE UNIT - A group of employees sharing common interests who are eligible to vote together to decide if they want a union to represent them.

ARBITRATION - A method of deciding a dispute in which the parties to the dispute have agreed that an outside person or persons shall hear and decide the dispute.

ASSESSMENTS - A sum of money required by unions of their members for special purposes, such as strike contributions and special legal costs. Assessments are in addition to normal dues and initiation fees.

AUTHORIZATION CARD - A card signed by an employee designating a union as his or her representative for purposes of bargaining collectively with an employer. An authorization card may be used to support a petition for an election with the NLRB, a card check, a demand for recognition, or, where unfair labor practices have occurred, an order by the NLRB requiring an employer to recognize and bargain with a union.

BARGAINING IN GOOD FAITH - Generally means both sides must meet at reasonable times with a good faith intention of reaching a mutually acceptable agreement. Neither side, however, is required to adopt a contract proposal or make a concession so long as its bargaining obligation is carried out in good faith.

BARGAINING ORDER - An order by the NLRB that the company must recognize and bargain with a union whether or not the union won a secret ballot election.

BUSINESS AGENT OR REPRESENTATIVE - An official agent of the union who conducts its business of organizing, negotiating or administering union matters.

CARD CHECK - A process of comparing signatures on union authorization cards against an employer’s payroll records to determine whether a valid majority of employees have signed authorization cards.
**CHARGE** - An allegation against an employer or a union alleging that the National Labor Relations Act has been violated. Charges are filed with the appropriate NLRB regional office.

**CHECK-OFF CLAUSE** - A contract which requires an employer to deduct union dues from the pay checks of employees for direct payment to the union.

**COLLECTIVE BARGAINING CONTRACT** - A formal agreement regarding wages, hours, and conditions of employment entered into between an employer and a union.

**COMPLAINT** - If, after investigating a charge, the NLRB regional office finds merit and no settlement is reached, the Regional Director serves a complaint in the name of the Board stating the unfair labor practice(s) and containing a notice of a hearing to be held before an Administrative Law Judge. The complaint does not constitute a finding of wrongdoing, but instead raises issues to be decided by the judge.

**CONCERTED ACTIVITIES** - Activities undertaken by two or more employees acting together or one employee acting on behalf of or as the representative of his co-workers. Where such concerted activities are undertaken by employees to improve their wages, hours, or working conditions, they are generally “protected” by law unless carried out by indefensible means such as violent or unlawful conduct.

**DECERTIFICATION ELECTION** - An election held by the NLRB to determine whether employees represented by a union no longer wish to be represented by a union.

**DEMAND FOR RECOGNITION** - A demand by a union that an employer recognize it as the representative of the company’s employees, based upon signed authorization cards from a majority of the employees.

**DISTRIBUTION** - The distribution of advertising, handbills, literature, or other written or printed material (except union authorization cards). Employee distribution may be prohibited on “work time” and in “work areas.” See also “Solicitation.”

**ECONOMIC STRIKE** - Generally encompasses any strike by employees for improved wages, benefits, hours or terms or conditions of employment. Most accurately, it is any strike other than a strike caused or prolonged by the unfair labor practices of an employer. Economic strikes usually involve strikes over the terms of a new collective bargaining agreement or the protection of working conditions.

**FEATHERBEDDING** - A practice of forcing an employer to hire a fixed number of employees in specific job classifications, even though there may not be sufficient work available.

**FINES** - Financial penalties by a union against members who violate its constitution, bylaws, or other rules. For example, fines can be imposed for crossing union picket lines, missing union meetings, “demeaning” union members, etc.
**FREE SPEECH** - The right of employers to express their views, arguments and opinions with respect to unionization, which is specifically protected under Section 8(c) of the National Labor Relations Act.

**FRINGE BENEFITS** - The terms used to describe employee compensation other than wages.

**GRIEVANCE** - A complaint by an employee or union that a provision of a collective bargaining agreement has been violated by an employer.

**INITIATION FEES** - A one-time payment required of an applicant for union membership to join a union.

**INJUNCTION** - An order by a court forbidding a person or party from engaging in prohibited activity, such as an unlawful strike.

**INTERNATIONAL UNION** - The term commonly applied to a parent union.

**INTERROGATION** - The questioning of an employee about his/her membership in, feelings about or activity on behalf of a union or the membership, feelings or activities of other employees.

**LOCAL UNION** - A union holding a charter from a national or international labor organization. Most local unions have deemed geographical boundaries.

**LOCKOUT** - The closing down of part or all of a company by an employer in order to bring pressure upon employees to abandon their demands or to accept an employer’s proposals.

**MAJORITY STATUS** - The terms used to describe the status of a union which has obtained signed authorization cards from a majority of employees in an appropriate bargaining unit.

**MANAGEMENT’S RIGHTS CLAUSE** - A clause in a collective bargaining agreement which expressly preserves certain rights of management to run its business without union involvement or interference.

**NATIONAL LABOR RELATIONS BOARD** - The federal agency charged with regulating the relations between management, employees, and unions.

**OBJECTIONABLE CONDUCT** - Conduct which prevents the holding of a fair, secret ballot election and which usually requires a new election to be held.

**OPEN SHOP** - A unionized company which does not require employees to become a member of the union as a condition of continued employment.

**ORGANIZING DRIVE** - A campaign by a union to collect employee signatures on authorization cards.

**PERMANENT REPLACEMENT** - An employee hired by an employer to replace permanently an employee who is engaging in an economic strike.

**PETITION** - An official document requesting the NLRB to conduct a representation election.
REPRESENTATION CASE - The term used by the NLRB to describe an election proceeding before the Board.

REPRESENTATION ELECTION - A secret ballot election held by the NLRB to determine whether employees desire to have a union represent them.

RIGHT-TO-WORK LAWS - The terms used to describe laws in several states which forbid unions and employers from entering into a collective bargaining agreement which require employees to become a member of a union as a condition of employment.

SECTION 10(j) - Section 10(j) of the National Labor Relations Act (NLRA) empowers the NLRB to petition a federal district court for an injunction to prevent temporarily unfair labor practices by employers or unions and to restore the status quo, pending the full review of the case by the Board.

SECTIONS 10(1) AND 10(e) - Section 10(1) of the NLRA requires the Board to seek a temporary federal court injunction against certain forms of union misconduct, principally involving “secondary boycotts” and “recognitional picketing.” Finally, under Section 10(e), the Board may ask a federal court of appeals to enjoin conduct that the Board has found to be unlawful.

SHOP STEWARD - An employee designated by a union to represent its interests at a company.

SHOWING OF INTEREST - Evidence presented to the NLRB that at least 30% of the employees in an alleged appropriate bargaining unit desire that an election be held. Usually the showing of interest presented to the NLRB is in the form of union authorization cards.

SLOWDOWN - The concerted act of employees slowing their work pace in order to bring pressure upon the employer to accept their demands. Slowdowns are unlawful.

SOLICITATION - Activities by a union or other group enlisting employee support. Solicitation describes all oral communication and the distribution of union authorization cards. Employee solicitation may be prohibited on “work time,” i.e., when the employee is supposed to be actually working. See also “Distribution.”

STRIKE - The concerted refusal of employees to work in order to bring pressure on a company to meet their demands.

STRIKE BENEFITS - Nominal payments sometimes made by a union to striking employees to help them pay their bills in the absence of a paycheck.

STRIKE REPLACEMENTS - A term used to describe employees hired (permanently or temporarily) to perform the jobs of employees out on strike.

SUPERVISOR - The term used to describe an individual with authority to hire, fire, evaluate, and direct the work of employees or to make effective recommendations regarding these matters. Supervisors under the National Labor Relations Act are members of management’s team, and management is responsible for their actions.
SURVEILLANCE - Spying on employee’s activities on behalf of a union.

SYMPATHY STRIKE - A strike in which the striking employees seek to assist other employees who have a labor dispute with their employer. Employees who respect a picket line established by another union are referred to as sympathy strikers.

TEMPORARY REPLACEMENT - An employee hired by an employer to replace a striking or locked out employee only for the duration of the strike or lockout.

UNAUTHORIZED STRIKE - A strike by employees without the consent of their union – also called a “wildcat” or “unsanctioned” strike.

UNFAIR EMPLOYMENT PRACTICE - The term commonly used to describe discrimination in employment based on race, color, religion, age, sex, national origin, marital status or physical or mental handicap.

UNFAIR LABOR PRACTICE - The term used to describe labor practices forbidden by the National Labor Relations Act.

UNFAIR LABOR PRACTICE STRIKE - A strike caused or prolonged by an employer’s unfair labor practices.

UNION CONSTITUTION - A book or document published by a union which contains the procedures and rules of the union which bind union members.

UNION DUES - Monthly payments required from a union member to a union.

UNION SHOP - A company where employees represented by a union must join the union on or after the 30th day of their employment. If employees fail to join the union after the 30th day or thereafter fail to pay union dues and fees, the union may lawfully require the employer to discharge them.
Fundamentals of Collective Bargaining

Presented By:
Jacqueline M. Damm (Portland (OR))
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Collective Bargaining = Good Faith

Duty to Bargain

- Basic legal framework
  - Meet at reasonable times and places
  - Negotiate in good faith with sincere intention of reaching agreement
  - Provide relevant information requested by union
Duty to Bargain

• Basic Legal Framework
  – Don’t have to agree to anything specific
    • But failing to make concessions may be evidence of bad faith
  – Bargain in good faith to agreement or impasse
  – Maintain status quo during bargaining
    • Even after contract expiration

Status Quo

• After contract expires:
  – Continue terms of contract until agreement or impasse
  – Except, these expire with agreement:
    • No strike/lockout
    • Arbitration (still have to process grievances)
    • Other statutory waivers (e.g., management rights)

Scenario – Health Plan Changes

• Employer and union in bargaining for successor CBA; prior CBA expired
• Union-represented employees are under Company health plan; CBA says same as everyone else
• Employer made annual minor adjustments to health plan for the past 12 years
• Union objects to upcoming annual changes in health plan
Scenario – Health Plan Changes

Can the Employer move forward with the health plan changes?
1. Yes, consistent with its past practice
2. No, the contractual waiver of bargaining expired with the CBA
3. Yes, it can bargain to single issue impasse over the changes
4. No, impasse is all or nothing

ANSWER?
Raytheon Network Centric Systems, 365 NLRB No. 161 (2017)

“Mandatory” vs. “Permissive”

Mandatory subjects of bargaining
- Related to wages, hours, or working conditions, e.g.:
  - Management rights
  - Drug testing
  - Union security
  - Contracting out
  - Seniority
  - Grievance/arbitration
  - Work rules
  - Vacation/time off
  - Benefits
  - Contract duration
“Mandatory” vs. “Permissive”

- Permissive subjects
  - Unrelated to wages, hours, or working conditions
  - Parties may lawfully bargain, if BOTH agree
  - May not insist on permissive subjects

Examples of Permissive Subjects

- Scope of bargaining unit
- Neutrality
- Members of bargaining teams
- Internal union affairs
- Supervisors
- “After retirement” benefits
- Job applicants

Where to begin?

- Identify bargaining team
- Location of bargaining
- Note-taker(s)
- Format of proposals
- Section 8(d) notices
- Contingency planning
Where to begin?

• Identify management priorities
• Anticipate union demands
• Analyze leverage continuum
• Will Company go to impasse to achieve its goals?
• Communication strategy

Identify Management Priorities

• Compensation philosophy
• Health and welfare and retirement plans
  – Current cost/anticipated cost
  – Flexibility; Company-wide plans
• Employee concerns

Identify Management Priorities

• Anticipate upcoming business changes
• Identify past and anticipated legal changes
• Operating efficiency
• Management rights and flexibility
• Need to address recent grievances?
• Review and update no strike clause
Anticipate Union Proposals

- Grievances during term of contract?
- Other settlements in industry?
- Cost of living?
- Increasing cost of benefits?
- Company non-union operations?
- Prior bargaining agenda?

Bargaining Leverage

- Employer enters process with greater leverage
  - Right to implement, lockout, permanently replace strikers
- Union seeks to diminish employer leverage
  - Disrupt operations
  - Picketing
  - Strikes
  - Publicity
  - ULP charges
Leverage Continuum

| No disruption or discord | Ok with some internal discord within bargaining unit | Ok with internal discord but no external discord | Will respond to appeals to constituents, media, other employees | Picketing, handbilling, media coverage | All of above, including strike |

Scenario – Demonstration

- Union leads march of 30 bargaining unit employees to administration offices
- Carrying signs and milk cartons, and chanting “1% is for milk, not wages”
- Burst into CEO’s meeting, uninvited, to present petition
- Presented petition and left without further disruption

Scenario – Demonstration

- Is the employees’ action protected?
  1. Yes
  2. Yes, as long as the employees were off-the-clock
  3. No, because they interrupted a meeting of the CEO
  4. No, because they marched on the employer’s private property
**Scenario 2 – Demonstration**

**ANSWER?**

- KHRG Employer, LLC d/b/a Hotel Burnham and Atwood Café, 366 NLRB No. 22 (2018)

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**Impasse – What Is It?**

- Inability to reach agreement despite good faith bargaining
- No realistic possibility that continuing bargaining would be fruitful

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**Impasse – Why Does It Matter?**

- Upon overall impasse
  - Employer has right to unilaterally implement all or part of final offer
  - Union agreement is not required
Impasse

• Decide at outset if impasse is likely
  – Are you proposing concessions you’re willing to implement unilaterally?
  – If you’re not looking for concessions, don’t need impasse
• Impacts bargaining from the beginning
  • Likely ULP upon unilateral implementation
  • Handling information requests
  • Contingency planning

Diminishing Employer Bargaining Leverage

• “Bait” employer into committing ULPs
• Create potential financial liability
• Galvanize employee support
• Undermine company negotiating team

The Union’s Playbook

“Establishing an employer’s unfair labor practice is a critical strategic weapon in any contract campaign.”

David Rosenfeld, Offensive Bargaining, Institute for the Study of Labor Organizations
Diminishing Employer Bargaining Leverage

- Unfair labor practice charges against employer impact right to:
  1. Declare impasse and implement
  2. Hire permanent replacements for strikers
  3. Lock out in support of bargaining position

Create significant risk unless managed correctly

Union Information Requests

- Unions use information requests to create ULPs, disrupt impasse, harass employers
- Employers still have to respond
- Failure to provide relevant information, upon request, may equal bad faith

Union Information Requests

- Broad, discovery-type standard of relevance
- Virtually all information about individual bargaining unit members is presumptively relevant
- Bargaining unit wages, hours, benefits, working conditions
Union Information Requests

- Information about non-bargaining unit employees or management is not typically relevant
- Special situations:
  - Employer financial information
  - Company-wide benefit plans

Scenario – Employer Financial Data

- During bargaining, Company said:
  - “We need cost reductions” and “a new line of credit”
  - “Having a hard time,” “going to be in financial trouble”
  - “Unable to remain competitive in global marketplace”
  - Owner met directly with employees to explain
- Union said “show me the money”
- Company refused

Scenario – Employer Financial Data

- Did the Company violate the NLRA?
  1. No, because financial information is confidential
  2. Yes, because the owner met with employees directly
  3. No, because the Company did not “plead poverty”
  4. Yes, because the Company’s statements made its financial condition relevant
Scenario – Employer Financial Data

ANSWER?

Wayron, LLC, 364 NLRB No. 60 (2016)

Enhancing Leverage

• Be prepared for all union tactics
• Don’t overreact
• Communicate, communicate, communicate
• The passage of time
• “What if” proposals
• A word about retro pay

Communication Strategy

• Bargaining unit employees
• Non-bargaining unit employees
• Management team
• C-Suite
• Board
• Others?
Communication Strategy

- Beware of “direct dealing”
  - Lawful to communicate to bargaining unit employees about proposals *already made in bargaining*
  - Unlawful to communicate before a proposal is made to a union
  - Can’t ask what employees think about a proposal

Contingency Planning

- Leverage continuum
- Security
- Replacements
  - Temporary or permanent

Contingency Planning

- Other Company operations
- Related companies – secondary activity?
- Communications plan
  - Internal constituents
  - Customers
  - Media
Scenario – Strike

Union and Company are engaged in difficult negotiations.

The contract has expired – discussions are ongoing, and some progress is being made.

The day after a particularly difficult day of bargaining, management shows up at work to find employees on strike.

Scenario – Strike

Employer operates facility with management and non-bargaining unit employees.

Union offers to return to work after 4 days.

Employer refuses unless employees sign “no-strike” pledge.

Scenario – Strike

Did the Union violate the NLRA?

1. Yes, because they went on strike before impasse was reached.
2. No, because the contract was expired.
Did the Employer violate the NLRA?
1. Yes, because it performed bargaining unit work
2. Yes, because it wouldn’t let the employees return to work
3. Yes, because it conditioned return-to-work on no-strike pledge
4. No, it engaged in a lawful defensive lockout

During the strike, the union picketed another Company facility
The union-represented employees at the other facility refused to cross the picket line

Did the Union break the law by picketing the other Company facility?
1. Yes, because the other facility wasn’t involved
2. Yes, because there is a no-strike clause at the other facility
3. No, because the union can picket the employer’s other facilities
Scenario – Strike

Did the employees at the other facility break the law by refusing to cross the picket line?
1. No, because it is protected activity
2. Yes, because they weren’t involved in the labor dispute
3. Yes, because their contract contains a general no-strike clause
4. Yes, because their contract prohibits sympathy strikes

Scenario – Strike

ANSWER?

*Sysco Minnesota v. Teamsters Local 120, US District Court, Case No. 17-5162 (D. MN 2018)*

Fundamentals of Collective Bargaining

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Jackie Damm is the Office Managing Shareholder in the Portland, Oregon office of Ogletree Deakins, and is also a member of the firm's Traditional Labor Steering Committee. Jackie focuses her practice on all aspects of traditional labor law, including representing both public and private sector employers in collective bargaining negotiations, National Labor Relations Board proceedings, Employment Relations Board proceedings, union organizing campaigns and labor arbitrations. Jackie also has developed a significant practice in preventive labor and employment law, which includes advising clients on labor contract administration, grievances, union avoidance, leave law issues, employment discrimination, and personnel policies and procedures.

Jackie has experience handling traditional labor matters across many different industries including healthcare, utilities, manufacturing, retail, construction, warehousing, public safety, food processing, trucking and maritime.

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Thornell Williams began his legal career with Ogletree in 2005. His practice currently involves providing strategic advice and representation to management clients in traditional labor matters such as labor-management relations, collective bargaining, grievance administration and arbitration, and other matters before the National Labor Relations Board. Thornell also provides counsel, advice, and representation to management in numerous areas of employment law, including employment policy development and administration, employee relations, employment discrimination and retaliation training, workplace investigations, wage garnishment, and occupational safety and health matters.