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Littler on Collective Bargaining

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COVERAGE

Scope of Discussion. This publication provides an overview of the collective bargaining process, including an employer's basic bargaining duties and typical collective bargaining provisions. It also looks at the complications that may arise when the parties cannot reach agreement and includes information on various party tactics, such as work stoppages, strikes, and lockouts. Practical tips for employers, including basic collective bargaining strategies and steps to minimize the effect of "refusal-to-bargain" charges, are included.

Although the major recent developments in federal employment and labor law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. The focus of this publication is federal law. Although some state law distinctions may be included, the coverage is not comprehensive.

To adhere to publication deadlines, developments and decisions subsequent to **June 1, 2023** are generally not covered.

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§ 1 COLLECTIVE BARGAINING: LEGAL FRAMEWORK

§ 1.1 INTRODUCTION

The cornerstone of labor-management relations is the collective bargaining agreement. The statutory framework under which companies and unions negotiate contracts is unique in U.S. law. Few hard-and-fast rules exist, rather, the relatively flexible "good faith" standard governs the parties' actions.

The legal foundation of the collective bargaining system is the National Labor Relations Act (NLRA). This statute provides the framework for most private-sector bargaining that falls under federal jurisdiction. The NLRA guarantees workers the right to organize unions and bargain collectively. The NLRA also empowers the National Labor Relations Board (NLRB or "Board") to conduct union certification elections and investigate and prosecute violations of employee rights, including claims of bad faith bargaining.

As a result of the complexity of this area of law, the collective bargaining process can be challenging to inexperienced negotiators or those unwilling to work at creative solutions to bargaining difficulties. There is no substitute for practical experience at the bargaining table. The information below provides an overview of the collective bargaining process as well as cautions and strategies for employers.

§ 1.2 BASIC BARGAINING DUTIES

§ 1.2(a) *Duty to Bargain in Good Faith*

The NLRA requires both employers and unions to bargain in good faith over certain terms and conditions of employment. The key NLRA provisions that affect the bargaining relationship include:

- **Section 8(a)(5):** compels an employer to bargain in good faith.
- **Section 8(b)(3):** sets forth the union's reciprocal duty to bargain in good faith.
- **Section 8(d):** defines good faith in the collective bargaining context.

The concept of good faith negotiations is central to collective bargaining. The "good faith" bargaining standard continually evolves and is fact-specific, but it principally requires bargaining parties to "meet and confer" and negotiate with an aim towards reaching an agreement. "Bad faith" bargaining can subject either party to NLRB sanctions. Bad faith is inferred from the totality of circumstances surrounding parties' conduct at and away from the bargaining table.[1] Thus, several acts that in isolation would not support a claim of bad faith bargaining might, in combination, amount to bad faith.[2]

The NLRA does not compel either party to agree to a proposal, make concessions, or agree to any substantive bargaining provision demanded by the other party.[3] Nevertheless, the Board regularly views a

[1] *Eastern Maine Med. Ctr. v. NLRB*, 658 F.2d 1 (1st Cir. 1981); *Optica Lee Borinquen, Inc.*, 307 N.L.R.B. 705 (1992).

[2] *See, e.g., Cable Vision, Inc.*, 249 N.L.R.B. 412 (1980), *enforced*, 660 F.2d 1 (1st Cir. 1981).

[3] *See, e.g., Unique Thrift Store*, 363 N.L.R.B. No. 122, at *31 (Feb. 17, 2016) (Board affirmed dismissal of case alleging bad faith bargaining where employer refused to agree to union security and checkoff clauses); *H.K. Porter Co.*, 153 N.L.R.B. 1370, 1372 (1965) ("Nevertheless, the statutory right to refuse to agree or to make a concession, may not be used 'as a cloak … to conceal a purposeful strategy to make bargaining futile or fail.'").

party's willingness to make concessions as evidence of good faith bargaining. Conversely, courts and the Board often treat a party's absolute refusal to grant concessions as a sign of bad faith.[4] However, the NLRA does not require either party to agree to any particular substantive bargaining provision demanded by the other party.[5]

§ 1.2(b) *Good Faith v. Bad Faith Bargaining*

The NLRB generally reviews all of the facts and circumstances to determine whether a party has bargained in good or bad faith. Some actions constitute automatic violations of a party's duty to bargain in good faith, for example:

- bargaining directly with employees (going behind the union's back);
- refusing to sign a written agreement reached between the parties through collective bargaining;[6]
- refusing to meet at reasonable times or refusing to schedule sufficient bargaining sessions;[7]
- refusing to bargain during nonwork hours while requiring employees to use paid leave to attend negotiation sessions during work time;[8]
- surface bargaining (*i.e.*, bargaining without intent to reach agreement);[9]
- bargaining on proposals that give the employer exclusive control over terms and conditions of employment or would leave employees with fewer rights than they had without a collective bargaining agreement;[10]
- collusive bargaining (bargaining in secret);

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[4] *See, e.g.*, *General Elec. Co.*, 150 N.L.R.B. 192 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969).

[5] *See, e.g.*, *Phelps Dodge Specialty Copper Prods. Co.*, 337 N.L.R.B. 455 (2002) (Board dismissed complaint alleging bad faith bargaining where employer refused to agree to continue union security and checkoff clauses but made numerous concessions during negotiations and fully explained its position on these issues).

[6] *West Co.*, 333 N.L.R.B. 1314 (2001) (employer violated NLRA section 8(a)(5) when it refused to sign a contract that incorporated the terms of its final offer even though it was accepted five months after the offer was submitted). *But see Shaw's Supermarkets, Inc.*, 337 N.L.R.B. 499 (2002) (employer properly refused to sign contract that did not accurately reflect its agreements at the bargaining table).

[7] *Calex Corp. v. NLRB*, 144 F.3d 904 (6th Cir. 1998) (employer bargained in bad faith when the parties only engaged in 19 bargaining sessions over 15 months, and the employer canceled seven bargaining sessions); *Fruehauf Trailer Servs.*, 335 N.L.R.B. 393 (2001) (employer violated its bargaining obligation when it met with union only once in a seven-month period even though the employer had 22 other sets of simultaneous negotiations).

[8] *Ceridian Corp.*, 343 N.L.R.B. 571 (2004), *enforced*, 435 F.3d 352 (D.C. Cir. 2006).

[9] *See Unbelievable, Inc.*, 318 N.L.R.B. 857 (1995), *enforced*, 66 F.3d 335 (9th Cir. 1995) (employer liable for union's litigation and negotiation expenses because employer's unusually aggravated misconduct infected the core of the bargaining process).

[10] *Public Serv. Co. v. NLRB*, 318 F.3d 1173 (10th Cir. 2003); *see also Altura Comm. Solutions, L.L.C.*, 369 N.L.R.B. No. 85 (May 21, 2020).

- conditioning bargaining over mandatory subjects on the union's concessions to employer demands;[11] and

- implementing a final offer when the parties were not at a valid impasse.[12]

A party's desire to employ economic pressure does not by itself constitute bad faith bargaining.[13] The U.S. Supreme Court noted:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties is part and parcel of the system. […] [T]he truth of the matter is […] the two factors—necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.[14]

Coordinated bargaining, whereby employers in a specific industry pool their resources while reserving the right to make separate proposals, is lawful. However, when negotiating together, such employers must avoid establishing nonnegotiable bargaining positions. In *Don Lee Distributors v. NLRB*, a group of companies established a secret mutual aid agreement that laid down a number of specific, nonnegotiable contract terms.[15] The agreement required any individual employer that deviated from the agreed-upon terms or negotiated directly with the union to pay $400,000 to the other employers. The Sixth Circuit Court of Appeals found the arrangement was illegal and entered into in bad faith because it prevented the union from negotiating individual contract terms with each employer.

Sometimes, bad faith is found in seemingly innocent acts. In one case, the Board ruled that a Mississippi company bargained in bad faith when it unilaterally implemented a no-smoking policy.[16] In *Vanguard Fire & Supply, Inc. v. NLRB*, the court held that an employer bargained in bad faith when it insisted that the union provide a detailed agenda two weeks before each bargaining session.[17] The court found the company "was not using the agenda merely to put pressure on the Union" but was creating an illegal precondition to bargaining.[18]

In a more recent case, *District Hospital Partners, L.P.*, the Board made clear that the following guidelines may assist an employer to not cross the line into bad faith bargaining:

- remain open to negotiating its initial proposals;

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[11] *Carey Salt Co., subsidiary of Compass Minerals Int'l, Inc.*, 358 N.L.R.B. No. 124 (Sept. 12, 2012), *aff'd in part by Carey Salt Co. v. NLRB*, 736 F.3d 405, 426 (5th Cir. 2013) (ALJ's reasoning was supported by substantial evidence; the employer violated its duty to bargain in good faith when it required the union to agree to its final proposal before having further meetings).

[12] *Carey Salt Co.*, 358 N.L.R.B. No. 124.

[13] *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

[14] 361 U.S. at 488–89.

[15] 145 F.3d 834 (6th Cir. 1998).

[16] *See, e.g., Hi-Tech Cable Corp.*, 318 N.L.R.B. 280 (1995), *enforcement denied, in part, enforcement granted, in part*, 128 F.3d 271 (5th Cir. 1997); *NLRB v. Roll & Hold Warehouse & Distrib. Corp.*, 162 F.3d 513 (7th Cir. 1998) (employer bargained in bad faith when it created a formal attendance policy that replaced a long-standing informal, unwritten policy).

[17] 468 F.3d 952 (6th Cir. 2006).

[18] 468 F.3d at 961–62.

- consider the union's counterproposals;
- remain ready, willing, and able to discuss the rationale for its positions; and
- be willing to offer concessions.[19]

Virtual bargaining became increasingly common during the COVID-19 pandemic. Board authority generally supports that a party acts in bad faith by refusing to bargain face-to-face but case law is still developing.[20]

Employers should be aware of enhanced remedies in cases of egregious or repeated bad-faith bargaining. In *Noah's Ark Processors L.L.C.*, the NLRB held that remedies imposed on an employer by an administrative law judge (ALJ) did not go far enough.[21] The parties in that case had been engaged in bargaining for five years over a successor contract. During that time, the union filed multiple unfair labor practice charges against the employer, alleging that the union and the employer could not come to an agreement because of the employer's various bad-faith bargaining tactics.[22] The Board sought a variety of remedies against the employer, including an injunction, sanctions, and contempt findings in federal court. The ALJ held that the employer bargained in bad faith, and ordered the employer to resume bargaining with the union, hold meetings with certain specifications, and compensate the union for bargaining expenses.[23] On appeal, the NLRB upheld the ALJ's remedies, and applying the standard in *Hickmott Foods* (additional remedies are justified when an employer "is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights"), and piled on more remedial requirements.[24] These included, among others, adding an explanation of rights to remedial orders, notice reading, authorizing NLRB representatives to conduct site visits, and compensating employee-bargainers for any wages lost during bargaining.[25]

Additionally, when it came to compensating the employee negotiators, the Board applied its December 2022 decision in *Thryv, Inc.*[26] In *Thryv*, the Board held that employers found to have committed unfair labor

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[19] 370 N.L.R.B. No. 118 (Apr. 30, 2021); *see also* Maura A. Mastrony, *Aggressive vs. Bad Faith Bargaining: Where is the Line?*, LITTLER, May 31, 2021, *available at* https://www.littler.com/publication-press/publication/aggressive-vs-bad-faith-bargaining-where-line.

[20] *See Altura Comm. Solutions, L.L.C.*, 369 N.L.R.B. No. 85, n.47 (May 21, 2020), *aff'd*, 848 F. App'x 344 (9th Cir. 2021) (noting that Board precedent requires face-to-face negotiations if demanded); *Dish Network*, 366 N.L.R.B. No. 119, at 2 (June 28, 2018), *rev'd in part and granting appeal*, 953 F.3d 370 (5th Cir. 2020) ("Rather than explore this real possibility of fruitful discussion, however, the Respondent rejected the Union's repeated requests for a face-to-face bargaining session… Our precedent is clear that only in-person, face-to-face meetings satisfy the Act's obligation to meet and confer.") (citations omitted).

[21] 372 N.L.R.B. No. 80 (Apr. 20, 2023).

[22] 372 N.L.R.B. No. 80 at *1. The NLRB had previously provided remedies for the union in other unfair labor violations. *See Noah's Ark Processors, L.L.C. d/b/a WR Reserve*, 370 N.L.R.B. No. 74 (Jan. 27, 2021), *enf'd*. 31 F.4th 1097 (8th Cir. 2022).

[23] 372 N.L.R.B. No. 80.

[24] 372 N.L.R.B. No. 80.

[25] 372 N.L.R.B. No. 80.

[26] 372 N.L.R.B. No. 22 (Dec. 13, 2022).

practices are liable to employees for not only reinstatement, backpay, and lost benefits, but also for "all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice."[27]

Although the factual findings in the *Noah's Ark* case documented a far-ranging variety of significant unfair labor practices, the case serves as a reminder to employers how far the present Board may stretch its remedial powers.

§ 1.2(c) *Duty to Provide Relevant Information*

As part of the duty to bargain in good faith, unions and employers have an obligation to provide each other *relevant information* for the purposes of contract negotiations and contract enforcement.[28] A party's duty to provide information usually varies depending on the circumstances. Information relating to wages, hours, and terms and conditions of employment for unit employees is presumptively relevant.[29] However, when an information request does not pertain to the union's role as a bargaining representative, the union must demonstrate "a reasonable belief, supported by objective evidence, that the requested information is relevant."[30] In analyzing whether an information request is relevant, the Board uses "a broad, discovery type standard."[31] The duty to provide information extends throughout the life of the agreement insofar as the information is necessary to enable the union to administer and police the agreement's terms and provisions and to make informed decisions about processing grievances.[32]

In addition to being relevant, information requests must be made in good faith.[33] A union's request for information is presumptively made in good faith, and the employer has the burden of proving bad faith.[34]

When a union demands relevant information, the employer must make reasonably diligent efforts to promptly provide the information in a form that is useful to the union (however, not necessarily in the same form that the union requested).[35] The employer does not have to disclose information if the union's need

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[27] 372 N.L.R.B. No. 22 at *1; James A. Paretti, Jr. & Dru Selden, *National Labor Relations Board Expands Make-Whole Remedy*, LITTLER, Dec. 15, 2022, *available at* https://www.littler.com/publication-press/publication/national-labor-relations-board-expands-make-whole-remedy.

[28] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

[29] *Gruma Corp.*, 345 N.L.R.B. 788 (2005); *see also St. George Warehouse, Inc*., 341 N.L.R.B. 904 (2004), *enforced*, 420 F.3d 294 (3d Cir. 2005) (employer that unilaterally transferred bargaining unit work to a temporary agency had to provide the union with information about its contracts with the temporary agencies and provide the names of its temporary employees).

[30] *Disneyland Park*, 350 N.L.R.B. 1256 (2007) (noting that information requests about an employer's subcontracting agreements is not presumptively relevant).

[31] *See* 350 N.L.R.B. 1256.

[32] *Norris v. NLRB*, 417 F.3d 1161 (10th Cir. 2005) (company violated its duty to bargain in good faith when it refused to release employee medical information to a union that was investigating the company's absence policy). *But see Northern Ind. Public Serv. Co.*, 347 N.L.R.B. 210 (2006) (company's interest in confidentiality precluded disclosure of investigatory interview notes where union was provided with names of interviewed employees and all other requested information regarding company's grievance handling).

[33] *Gruma Corp.*, 345 N.L.R.B. 788 (2005).

[34] 345 N.L.R.B. 788 (internal citation omitted) (holding that the sheer volume of the union's information request, alone, was not sufficient to overcome the good faith presumption).

[35] *Compare Cincinnati Steel Castings Co.*, 86 N.L.R.B. 592, 593 (1949) (oral information sufficient), *with B.F. Goodrich Co.*, 89 N.L.R.B. 1151 (1950) (wage data identified by employee department number rather than by name insufficient); *see also General Elec. Co.*, 290 N.L.R.B. 1138 (1988); *IronTiger Logistics, Inc.*, 359 N.L.R.B. No. 13 (Oct. 23, 2012) (employer illegally failed to respond to the union's information request in a timely manner even though the information was ultimately found to be irrelevant), *aff'd in part by*, 2015 NLRB LEXIS 206 (Mar. 25, 2015); *U.S. Info. Servs., Inc.*, 341 N.L.R.B. 988 (2004) (employer illegally failed to give the union information

for information is rendered moot by subsequent events. However, the employer may not refuse to provide information simply because the union's request is ambiguous or overbroad.[36] Rather, the employer must request clarification and offer to cooperate with the union to reach a mutually acceptable accommodation with regards to the request.[37] For various reasons, unions commonly request information about non-unit employees. In some cases, an employer can avoid disclosing such information or force the union to narrow its request based on the non-unit employees' right to privacy. Information that infringes on an individual's privacy must be balanced against the union's need for the information.[38]

Employers may also withhold information on the basis that the union waived its right to information or because the information is confidential.[39] In one case, the NLRB held that a union had to demonstrate the relevance of information concerning the employer's pre-hire drug and alcohol testing of job applicants.[40] The Board has also held that employee Social Security numbers are not presumptively relevant information.[41]

When an employer claims the union has requested confidential information, the Board balances the union's need for the information against the employer's legitimate confidential interests.[42] For example, in *Ralphs Grocery Co.*, the Board found the employer was required to give local unions information about the company's rehiring of workers under false names and Social Security numbers during a lockout.[43] However, the unions' interest in an audit of the company's hiring activity that had been prepared by the company's attorneys did not outweigh the company's "strong confidentiality interest" in that privileged document. It is the employer's obligation to raise the privacy issue in order to trigger this balancing test.

As a general rule, unions can legitimately seek information relating to employee grievances, wages and benefits, job classifications of unit employees, and seniority lists. Employers can expect to obtain information relating to a union's contracts with other employers, its hiring hall practices, and its health and welfare plans.

In addition, the Board consistently holds that an employer must provide financial information to the union about its operations if the basis for suppressing wages and/or benefits is financial hardship, or where the employer has made other assertions at the bargaining table that the union seeks to verify.[44] Relevant financial information could include facts about nonunionized divisions, other plants, or foreign operations.[45]

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about employee bonuses because the employer had not shown that the information did not exist or was not reasonably ascertainable).

[36] *Gruma Corp.*, 345 N.L.R.B. 788 (2005).

[37] 345 N.L.R.B. 788; *see also Providence Hosp. v. NLRB*, 93 F.3d 1012 (1st Cir. 1996) (a proposed merger between two hospitals was sufficiently probable to obligate both hospitals to respond to a union information request); *North Star Steel Co.*, 347 N.L.R.B. 1364 (2006) (employer had to provide relevant information that concerned its plans to transfer bargaining unit members to a separate facility or transfer unit work outside the unit).

[38] *See NLRB v. U.S. Postal Serv.*, 660 F.3d 65, 69 (1st Cir. 2011).

[39] *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

[40] *Finch, Pruyn & Co.*, 349 N.L.R.B. 270 (2007).

[41] *Gruma Corp.*, 345 N.L.R.B. 788 (2005).

[42] 345 N.L.R.B. 788 (internal citation omitted).

[43] 352 N.L.R.B. 158 (2008), *aff'd*, 2010 NLRB LEXIS 396 (2010).

[44] *Fairhaven Props., Inc.*, 314 N.L.R.B. 763, 769 (1994); *Harvstone Mfg. Corp.*, 272 N.L.R.B. 939 (1984), *enforced in part*, 785 F.2d 570 (7th Cir. 1986); *see also KLB Indus.*, 357 N.L.R.B. 127 (2011), *aff'd*, 700 F.3d 551 (D.C. Cir. 2012).

[45] *Caldwell Mfg. Co.*, 346 N.L.R.B. 1159 (2006) (company that claimed it needed to become more competitive had an obligation to comply with union's request to inspect certain financial records).

In contrast, an employer may not have to disclose financial information if it merely claims an unwillingness to raise wages, alleges that the union's financial proposals are unreasonable, or asserts that the company "is fighting to stay alive" rather than being "unable to pay."[46]

As a result of the COVID-19 pandemic, unions increasingly requested information on employers' compliance with government mandates, COVID-19 policies and procedures, and employee health information. Additionally, unions requested information regarding employers' utilization of government funding and tax incentives. It is recommended that an employer consult with skilled labor counsel for continued questions regarding COVID-19-related requests for information.

§ 1.2(d) *Bargaining to Impasse*

Although NLRA section 8(d) requires parties to "meet […] and confer in good faith with respect to […] terms and conditions of employment," the duty to bargain does not require a party to "engage in fruitless marathon discussions at the expense of frank statement and support of [its] position."[47] The law recognizes a bargaining impasse when irreconcilable differences remain in the parties' positions after exhaustive good faith negotiations.[48] *Impasse* means the employer and the union have made their final bargaining proposals and are unwilling to make further concessions to reach an agreement. Impasse is synonymous with deadlock; it occurs when the parties have discussed the matter and, despite their best efforts to reach agreement, neither party is willing to move from its position. An impasse usually occurs when both sides have made multiple offers and efforts to resolve differences are futile.

When parties reach impasse, the employer may implement its final offer. This means the employer can unilaterally change employees' wages, hours, and working conditions without the union's consent.[49]

§ 1.2(d)(i) *Determining Whether Impasse Has Been Reached & Risks of Unilateral Changes to Working Conditions if it Has Not*

Before an employer implements any unilateral change in working conditions, it must be certain that impasse has been reached. There are significant pitfalls if it is later determined that the parties had not reached impasse. In *NLRB v. Katz*, the employer altered its sick leave policy and granted merit and automatic wage increases while contract negotiations were in progress.[50] The U.S. Supreme Court enforced the Board's determination that the employer committed an unfair labor practice because it implemented changes before impasse. Unions routinely file unfair labor practices charges with the Board under the *Katz* doctrine when employers implement their final proposals.

Consequently, employers inclined to negotiate to impasse and unilaterally implement working conditions are faced with two issues: (1) how to properly identify the point at which impasse is reached; and (2) how to effectively defend its action if the union subsequently files an unfair labor practice charge. Further, a unilateral change may move the baseline for negotiations and alter the parties' expectations about what they

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[46] *AMF Trucking & Warehousing, Inc.*, 342 N.L.R.B. 1125 (2004); *see also Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955 (D.C. Cir. 2003); *Wayron, L.L.C.*, 364 N.L.R.B. No. 60 (Aug. 2, 2016) (employer's statements about its financial circumstances conveyed inability to pay rather than unwillingness).

[47] *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

[48] *Fetzer Television, Inc. v. NLRB*, 317 F.2d 420 (6th Cir. 1963); *see also Stroehmann Bros. Co.*, 268 N.L.R.B. 1360, 1361 (1984) (impasse exists "where the parties, after good faith bargaining, have exhausted the prospects of concluding an agreement").

[49] *Washoe Med. Ctr., Inc.*, 348 N.L.R.B. 361 (2006) (employer lawfully implemented its final offer because the parties were at impasse).

[50] 369 U.S. 736 (1962).

can achieve, making it harder for the parties to come to an agreement. Therefore, an employer's determination of whether impasse has been reached is a critical decision.

Factors the Board may consider when determining whether parties are at impasse include:

- the parties' bargaining history, including whether the parties are bargaining for an initial contract;
- the complexity and importance of the issues being negotiated and the parties' bargaining processes;
- the parties' good faith during negotiations;
- the length of the negotiations, including the amount of time and number of bargaining sessions since bargaining commenced;
- the amount of progress made in negotiations and how close the parties are to reaching an agreement; and
- the parties' contemporaneous understanding of the status of negotiations.[51]

Before an employer can declare impasse, it must bargain for a "reasonable period of time."[52] For example, an employer did not bargain for a reasonable period of time when it "abruptly" made its final offer after only eight days of bargaining. The parties had not reached impasse because they made concessions prior to the employer's final offer, after which the union requested more bargaining. The parties' actions did not convey a mutual understanding that negotiations were permanently stalled to the point of impasse.[53] Therefore, more bargaining was required.

Similarly, in *Stein Industries, Inc.*, the Board found that an employer improperly declared impasse after only four bargaining sessions.[54] In reaching its decision, the majority noted that there had been sufficient movement at the last bargaining session before impasse was declared, suggesting that a "ray of hope" had opened that agreement could be reached. The union's course of conduct also demonstrated a willingness to continue to negotiate.

A line of cases under *CalMat Co.*[55] further refines the analysis for a "single-issue" impasse. Generally, a party asserting a single-issue impasse has the burden to prove that: (1) a good-faith impasse existed as to a particular issue; (2) the issue was critical by being of overriding importance in the bargaining; and (3) the impasse on the single issue led to a breakdown in overall negotiations. In *Southcoast Hospitals Group, Inc.*, the Board held that the employer's failure to prove the third element resulted in a violation of NLRA

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[51] *Cf. Lee Lumber & Bldg. Material Corp.*, 334 N.L.R.B. 399 (2001), *with Taft Broad. Co., WDAF AM-FM TV*, 163 N.L.R.B. 475, 478 (1967).

[52] *But see TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001) (despite a relatively short set of meetings, parties had reached impasse because there was no evidence supporting the union's belief that further negotiations would be fruitful and the employer had engaged in good faith bargaining, made substantial concessions, and reached a point where it was unwilling to make further compromises).

[53] *Cotter & Co.*, 331 N.L.R.B. 787 (2000), *rev'd in part, remanded in part sub nom. TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001).

[54] 365 N.L.R.B. No. 31 (Feb. 10, 2017).

[55] 331 N.L.R.B. 1084, 1097 (2000).

sections 8(a)(5) and (1) when it implemented its final offer without having reached a valid impasse.[56] In the decision, former Chairman Miscimarra noted that an unfair labor practice does not arise merely from a false declaration of impasse (*i.e.*, declaring impasse when a legally valid bargaining impasse has not been reached), but rather the employer's implementation of its final offer in the absence of a valid impasse.

As a remedy for illegally refusing to bargain to impasse, employers may be required to bargain in good faith for at least six months, and under certain conditions, up to 12 months.[57] These time frames are an effort on the Board's part to specifically define a "reasonable period of time" for cases that involve an employer's refusal to bargain.

If an employer unilaterally implements a change in work conditions that results in the reduction of employee economic benefits and is then found to have engaged in an unfair labor practice, the Board usually orders that any lost benefits be retroactively awarded from the date of implementation. Liability may also mount because the Board decides impasse issues at a notoriously slow pace.

§ 1.2(d)(ii) *Presence of Unremedied Unfair Labor Practices*

Impasse cannot be reached in the presence of unremedied unfair labor practices.[58] However, only "serious" unremedied unfair labor practices that actually affect negotiations will prevent impasse from lawfully being reached.[59]

Examples of unremedied unfair labor practices that can prevent a party from declaring lawful impasse include:

- threats to transfer bargaining unit work to a nonunion plant if bargaining employees do not end a strike;[60] and
- refusal to furnish information about a subject central to bargaining.[61]

§ 1.2(d)(iii) *Breaking Impasse*

Impasse does not permanently relieve either party of the duty to bargain: "[I]mpasse is only a temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force."[62]

Various factors that can break impasse include: strike; concessions; the passage of time; improvement in an employer's general industry or in its own financial position; a change in bargaining representative;[63] or a substantial change in either party's bargaining position.

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[56] 365 N.L.R.B. No. 100 (June 28, 2017).

[57] *Lee Lumber & Bldg. Material Corp.*, 334 N.L.R.B. 399 (2001).

[58] *White Oak Coal Co.*, 295 N.L.R.B. 567, 568 (1989).

[59] *Alwin Mfg. Co.*, 326 N.L.R.B. 646, 688 (1998), *enforced*, 192 F.3d 133 (D.C. Cir. 1999); *Noel Foods Div. of the Noel Corp.*, 315 N.L.R.B. 905, 911 (1994), *enforced in part*, 82 F.3d 1113 (D.C. Cir. 1996).

[60] *Titan Tire Corp.*, 333 N.L.R.B. 1156 (2001).

[61] *United States Testing Co.*, 324 N.L.R.B. 854 (1997), *enforced*, 160 F.3d 14 (D.C. Cir. 1998).

[62] *Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (citing *Charles D. Bonanno Linen Serv., Inc.*, 243 N.L.R.B. 1093, 1093–94 (1979), *enforced*, 782 F.2d 7 (1st Cir. 1986)).

[63] *Raven Servs. Corp. v. NLRB*, 315 F.3d 499 (5th Cir. 2002).

Employers must exercise great care when they implement a final offer and later return to a normal bargaining relationship. Even though impasse creates great economic opportunities for employers, there is always the danger of adversely affecting the bargaining relationship and the risk of potential financial exposure that will result from improper implementation. For further information on avoiding "refusal to bargain" charges, see **§ 3.2**.

§ 1.3 BARGAINING SUBJECTS

The Board recognizes three types of bargaining subjects: illegal, permissive, and mandatory. Bargaining subjects are usually reviewed on a case-by-case basis. Some topics, however, repeatedly fall into the same category. These topics are addressed below.

§ 1.3(a) *Illegal, Permissive & Mandatory Bargaining Subjects*

Illegal bargaining subjects cannot be bargained over or included in a collective bargaining agreement. The parties automatically commit an unfair labor practice if they bargain over an illegal subject. Illegal topics include: closed-shop provisions; hiring-hall provisions that give preference to union members; "hot cargo" clauses that violate NLRA section 8(e); contract provisions inconsistent with a union's duty of fair representation; and contract clauses that discriminate among employees on an invidious basis, such as race, religion, sex, or national origin. In one case, an agreement between a union and an investment firm that required companies controlled by the firm to sign neutrality/card-check agreements survived attack under section 8(e).[64] The Board held that the agreement was not an illegal subject of bargaining because the agreement, on its face, did not require the employer to "cease doing business" with anyone. Former General Counsel Peter Robb issued a Guidance Memorandum advocating for a stricter standard for assessing the legality of neutrality agreements,[65] but his successor, Acting General Counsel Peter Sung Ohr rescinded it in March 2021 and withdrew a complaint alleging that an employer provided impermissible support to a union by entering into such an agreement.[66]

Permissive bargaining subjects are issues that the parties can agree to bargain over but cannot insist upon as a condition of agreement.[67] Examples of permissive bargaining subjects include: provisions that cover supervisors or agricultural labor; the employer's right to deal directly with employees to establish above-scale wages;[68] performance bonds; legal liability clauses; the scope of the bargaining unit;[69] individual employment contracts; and internal union affairs.

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[64] *Heartland Indus. Partners, L.L.C.*, 348 N.L.R.B. 1081 (2006).

[65] Peter B. Robb, Office of the General Counsel, *Memorandum GC 20-13: Guidance Memorandum on Employer Assistance in Union Organizing* (Sept. 4, 2020), *available at* https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

[66] Peter Sung Ohr, Office of the General Counsel, *Memorandum GC 21-02: Rescission of Certain General Counsel Memoranda* (Feb. 1, 2021), *available at* https://www.nlrb.gov/guidance/memos-research/general-counsel-memos; *see also* Alan I. Model et al., *Peter Sung Ohr has Cemented the Biden NLRB's Direction Despite Challenges to his Interim Appointment and Prosecutorial Authority*, LITTLER, Mar. 17, 2021, *available at* https://www.littler.com/publication-press/publication/peter-sung-ohr-has-cemented-biden-nlrbs-direction-despite-challenges.

[67] *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

[68] *Midwest TV, Inc.*, 343 N.L.R.B. 748 (2004).

[69] *See, e.g.*, *Dixie Elec. Membership Corp. v. NLRB*, 2016 U.S. App. LEXIS 3406, at *6 (5th Cir. Feb. 25, 2016) (rationale underlying the principle that the scope of a unit covered in a contract is a permissive subject of bargaining is that the parties cannot bargain meaningfully about mandatory subjects, such as terms and conditions of employment, "unless they know the unit of bargaining.") (citations omitted).

Mandatory bargaining subjects must be addressed by the parties during negotiations. If a party fails to bargain over a mandatory subject, that party commits an unfair labor practice. In general, *mandatory subjects* are those enumerated in NLRA section 9(a) as "rates of pay, wages, hours of employment, or other conditions of employment" and in section 8(d) as "wages, hours, and other terms and conditions of employment." *Conditions of employment* include: job duties;[70] work schedules;[71] break schedules;[72] employee drug and alcohol testing; plant rules, including dress codes,[73] parking regulations, lunch breaks, absenteeism, and job safety standards; retirement and pension provisions; seniority systems; grievance procedures; vacations and holidays; performance of bargaining-unit work by persons not in the unit;[74] and other changes in business operations that have some impact (no matter how slight) on unit employees.[75] Courts generally defer to the Board's determination of whether a given topic is a mandatory subject of bargaining.[76] For more information on illegal, permissive, and mandatory bargaining subjects, see **§ 3.1**.

A party can insist on bargaining to impasse over mandatory subjects. An employer's unilateral change to a mandatory subject during the course of collective bargaining, and prior to impasse, is a *per se* unfair labor practice.[77] Likewise, it is an unfair labor practice to unilaterally change a mandatory subject after contract expiration without bargaining to impasse.[78] However, if an employer provides notice to a union that it wishes to adjust a mandatory subject of bargaining, and the union fails to request bargaining, the employer's bargaining obligation may be excused.[79] A unilateral change can be unlawful even if the employer erroneously believes the union bargained in bad faith or believes bargaining had reached impasse.[80] For more information about bargaining to impasse, see **§ 1.2(d)**.

Early in the COVID-19 pandemic, the issue arose whether employers had a duty to bargain over implementation of COVID-19 government mandates, such as compliance with the leave requirements of the Families First Coronavirus Response Act. Generally, employers do not have a duty to bargain over a nondiscretionary change in terms and conditions of employment mandated by federal, state, or local law.[81]

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[70] *Bohemian Club*, 351 N.L.R.B. 1065 (2007) (employer breached duty to bargain by unilaterally assigning cooks cleaning tasks that were previously performed by stewards).

[71] *Willamette Indus., Inc. & Weyerhaeuser Co.*, 341 N.L.R.B. 560 (2004).

[72] *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226 (6th Cir. 2003).

[73] *Crittenton Hosp.*, 342 N.L.R.B. 686 (2004).

[74] *NLRB v. Brede, Inc.*, 315 F.3d 906 (8th Cir. 2003).

[75] *See, e.g., Verizon N.Y. Inc.*, 339 N.L.R.B. 30 (2003), *aff'd*, 360 F.3d 206 (D.C. Cir. 2004) (company's unilateral termination of its workplace program, which paid employees for participating in blood drives, was an unfair labor practice because it involved a term and condition of employment); *Georgia Power Co.*, 342 N.L.R.B. 192 (2004) (employer may not unilaterally form an employee ethics committee); *Barnard College*, 340 N.L.R.B. 934 (2003) (employer may not unilaterally change the parties' agreed upon grievance procedure).

[76] *NLRB v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13 (1st Cir. 1999) (affording considerable weight to the Board's holding that an imposition of a fee for lost timecards is a mandatory subject).

[77] *St. Barnabas Med. Ctr.*, 341 N.L.R.B. 1325 (2004) (employer violated the NLRA when it unilaterally increased wages in the middle of its contract with the union because it did not first bargain over the proposed changes).

[78] *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991); *Cibao Meat Prods. Inc. v. NLRB*, 547 F.3d 336 (2d Cir. 2008) (meat processing company violated the NLRA when it unilaterally stopped making fringe benefit contributions after contract expiration; company failed to show that circumstances constituted an emergency that justified its unilateral change).

[79] *Ciba-Geigy Pharms. Div.*, 264 N.L.R.B 1013 (1982).

[80] *Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983).

[81] *See Long Island Day Care Servs.*, 303 N.L.R.B. 112, 117 (1991); *Lifeway Foods, Inc.*, 364 N.L.R.B. No. 145 (Nov. 9, 2016).

On the other hand, an employer is required to offer to negotiate over discretionary aspects of the law.[82] Indeed, the NLRB Office of the General Counsel, Division of Operations Management issued Operations Management Memorandum 22-03, which confirmed this bargaining framework with respect to the U.S. Department of Labor's Emergency Temporary Standard to Protect Workers from Coronavirus (*i.e.*, the vaccinate or test mandate),[83] although the Occupational Safety and Health Administration (OSHA) later withdrew the standard.[84] The line between discretionary and nondiscretionary aspects of a law or government order is often unclear, as the COVID-19 pandemic demonstrated.

§ 1.3(b) *Employee Benefits Plans*

Retirement and pension plans are mandatory bargaining subjects. An employer must exercise great care in implementing changes to employee benefit plans when the employer has not bargained over changes to such plans.[85] Benefit plans can only be amended after giving the union notice and an opportunity to bargain over the proposed changes. For example, the NLRB found that two aircraft manufacturers violated the NLRA by unilaterally substituting a managed health care plan for a comprehensive employee medical plan that included options for participation in a copayment system or health maintenance organization.[86] The Board determined the employers were obligated to bargain with the union over the change because the new plan amounted to a new delivery system for health insurance, whereas the collective bargaining agreement only permitted amendment or modification to an existing plan.

An employer that unilaterally implemented pension plan changes to conform to requirements imposed by the Internal Revenue Service violated the NLRA because the employer did not provide the union notice and an opportunity to bargain over alternative plans.[87] The same outcome resulted where an employer failed to notify the union and provide it with an opportunity to bargain over changes to the provision of health insurance to recently-hired employees that were mandated by the Affordable Care Act.[88]

If there is a "sound arguable basis" for an employer's belief that the collective bargaining agreement allows a midterm contract modification, however, an employer may be allowed to make a unilateral change to an employee benefit plan. In *American Electric Power*, the Board held that a company's elimination of retiree

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[82] *Pacific Maritime Ass'n*, 367 N.L.R.B. No. 121, at n.28 (May 2, 2019) ("…"when an employer has discretion over how to implement certain changes in employee wages, hours, or other terms and conditions of employment mandated or imposed on it by statute or regulation, it has a duty to notify and bargain with the employees' representatives over how such changes should be implemented before making any such changes"); *see also Wexford Health Sources, Inc.*, 2014 NLRB LEXIS 684, at **48-49 (Sept. 5, 2014).

[83] NLRB, Operations-Management Memos, *OM 22-03: Responding to Inquiries Regarding Bargaining Obligations Under the Department of Labor's Emergency Temporary Standard to Protect Workers from Coronavirus* (Nov. 10, 2021), *available at* https://www.nlrb.gov/guidance/memos-research/operations-management-memos.

[84] U.S. Dep't of Labor, Occupational Safety and Health Admin., *Statement on the Status of the OSHA COVID-19 Vaccination and Testing ETS* (Jan. 25, 2022), *available at* https://www.osha.gov/coronavirus/ets2.

[85] *Palm Court Nursing Home N.H., L.L.C.*, 341 N.L.R.B. 813 (2004) (employer violated the NLRA when it made unilateral changes to its 401(k) plan, employee contributions to medical services, holidays, overtime and its policy on the amount of advance notice an employee must provide to an employer prior to an absence).

[86] *Loral Defense Sys. v. UAW Local 856*, 320 N.L.R.B. 755 (1996), *enforced*, 200 F.3d 436 (6th Cir. 1999). *But see Bath Iron Works Corp.*, 345 N.L.R.B. 499 (2005) (company's merger of pension plan with larger plan of its corporate parent, without first receiving union consent, was reasonable under provisions of the collective bargaining agreement), *affirmed*, 474 F.3d 14 (1st Cir. 2007).

[87] *Trojan Yacht*, 319 N.L.R.B. 741 (1995).

[88] *Western Cab Co.*, 365 N.L.R.B. No. 78, at **5-6 (May 16, 2017) ("It is well established that when an employer is compelled to make changes in terms and condition of employment in order to comply with the mandates of another statute, it must provide the collective-bargaining representative of its employees with notice and an opportunity to bargain over the discretionary aspects of such changes.").

medical benefits for future hires was based on a reasonable interpretation of the collective bargaining agreement and, therefore, the company had a "sound arguable basis" for making the change under section 8(d) of the NLRA.[89] In overturning the administrative law judge's decision, the Board explained that where the dispute is solely one of contract interpretation and there is no evidence of anti-union animus, bad faith, or intent to undermine the union, it will not seek to determine which of two equally plausible contract interpretations is correct.

§ 1.3(c) *Employee Stock Purchase Plans*

Employee stock purchase plans are *not* a mandatory subject of bargaining because they do not constitute "wages" or a condition of employment.[90] Therefore, an employer may lawfully withhold information from a union concerning which employees are participating or have been solicited to participate in a stock purchase plan. Similarly, at least one circuit court has upheld the NLRB in finding that an employer may give represented employees a one-time gift of stock shares without having to bargain over the decision to so.[91]

§ 1.3(d) *Drug & Alcohol Testing*

Drug and alcohol testing of *current* employees is a mandatory subject of bargaining.[92] An employer does not violate the NLRA, however, by unilaterally instituting drug or alcohol testing programs as part of a screening process for job applicants. Preemployment testing is not a mandatory bargaining subject because job applicants are not employees within the meaning of the NLRA, and such testing does not "vitally affect" the terms and conditions of employment for bargaining unit employees.[93]

§ 1.3(e) *Hidden Cameras in the Workplace*

The use of hidden cameras in the workplace is a mandatory subject of bargaining. In *Colgate-Palmolive Co.*, the employer installed hidden cameras in the men's bathroom because it believed theft was occurring at the plant.[94] Employees also observed hidden cameras in the exercise room. The union filed a grievance and demanded the company bargain over the issue. The company refused to bargain, and the union filed an unfair labor practice charge. The Board compared the use of hidden cameras to physical exams, drug or alcohol testing, and polygraph tests, all of which are mandatory bargaining subjects.[95] The Board concluded that the use of investigatory tools, like hidden cameras, to confirm employee misconduct is not among the class of managerial decisions that lie at the core of the employer's entrepreneurial control. Therefore, the company had a duty to bargain over the use of hidden cameras for surveillance. The Board has further held that a company must provide information about its use of hidden surveillance cameras when requested by the union.[96]

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[89] 362 N.L.R.B. No. 92 (2015).

[90] *Pieper Elec., Inc.*, 339 N.L.R.B. 1232 (2003).

[91] *Unite Here v. NLRB*, 546 F.3d 239 (2d Cir. 2008).

[92] *Delta Tube & Fabricating Corp.*, 323 N.L.R.B. 856 (1997). *But cf. Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992) (employer entitled to unilaterally implement a policy under which an employee could be required to undergo alcohol or drug testing, or both, if the employer had an "articulable belief" that an employee might be under the influence of an intoxicating substance on company property during working hours).

[93] *Star Tribune, Div. of Cowles Media Co.*, 295 N.L.R.B. 543 (1989).

[94] 323 N.L.R.B. 515 (1997).

[95] Federal appellate courts have also adopted the NLRB holding that the use of hidden cameras is a mandatory subject of bargaining. *See, e.g.*, *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F. 3d 36 (D.C. Cir. 2005).

[96] *Anheuser-Busch, Inc.*, 342 N.L.R.B. 560 (2004) aff'd in relevant part, 414 F.3d 36 (D.C. Cir. 2005); *National Steel Corp. v. NLRB*, 324 F.3d 928 (7th Cir. 2003).

Notably, in General Counsel Memorandum 23-02, NLRB General Counsel Jennifer Abruzzo pledged to uphold the above precedent and to urge the Board to increase the burden on employers seeking to utilize employee monitoring technologies in the workplace, if such devices would tend to interfere with or prevent a reasonable employee from engaging in protected activity.[97]

§ 1.3(f) *Implementation of Email Policies*

Several NLRB decisions and directives suggest that workplace email policies are a mandatory bargaining subject. However, in 2014, the Board held that employee use of email for statutorily protected communications on nonworking time (*e.g.*, union-related communications) must presumptively be permitted by employers that have chosen to give employees access to their email systems.[98] While this case was on appeal to the Ninth Circuit Court of Appeals, the NLRB reversed the decision in 2019. In *Caesars Entertainment*, the Board restored an employer's rights to prohibit the use of its email for nonbusiness purposes, with the caveat that employees may use the employer's information technology (IT) systems for section 7 activities when they are "the only reasonable means for employees to communicate with one another."[99]

In August 2021, NLRB General Counsel Jennifer Abruzzo issued Memorandum 21-04, instructing the NLRB regional directors on her litigation priorities. In the memo, Abruzzo directed the regions to submit to the Division of Advice cases dealing with the use of internal electronic communication systems. These platforms include, but are not limited to, Discord, Slack, and Groupme. Employers should anticipate that the General Counsel will push to expand an employee's right to use company communication systems for union organizing and other section 7 activities.[100]

Accordingly, it is advisable to consult counsel before bargaining over or implementing any policy prohibiting nonwork-related communications on company IT systems.

§ 1.3(g) *Entrepreneurial Decisions & Operating Changes*

An employer may be excused from the duty to bargain over the *decision* to sell or merge its operations, but it will be obligated to bargain over the *effects* that decision has on its bargaining unit employees.[101] An employer's duty to bargain over entrepreneurial decisions, more broadly, has led to contentious debate over the distinction between mandatory and permissive bargaining subjects.

When a collective bargaining agreement is silent as to the employer's right to unilaterally make an operating change, the decision will be a mandatory bargaining subject if the change will significantly impact employees. However, the decision will not be a mandatory bargaining subject if the employer can prove that the decision: (1) will change the business's scope and direction; (2) is entrepreneurial in nature; and

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[97] Jennifer A. Abruzzo, Office of the General Counsel, *Memorandum GC 23-02: Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights* (Oct. 31, 2022), *available at* https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

[98] *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126 (Dec. 11, 2014).

[99] *Caesars Entm't*, 368 N.L.R.B. No. 143 (Dec. 16, 2019).

[100] Jennifer A. Abruzzo, Office of the General Counsel, *Memorandum GC 21-04: Mandatory Submissions to Advice* (Aug. 12, 2021), *available at* https://apps.nlrb.gov/link/document.aspx/09031d4583506e0c; *see also* Jeffrey E. Dilger, *The NLRB's New General Counsel Issues First Guidance Memorandum Foreshadowing Reversal of Key Board Decisions*, LITTLER, Aug. 19, 2021, *available at* https://www.littler.com/publication-press/publication/nlrbs-new-general-counsel-issues-first-guidance-memorandum.

[101] *UFCW, AFL-CIO, Local 540 v. NLRB*, 519 F.3d 490 (D.C. Cir. 2008) (affirming Board's findings that the company had no duty to bargain over its decision to convert to a case-ready meat operation, but it had a duty to bargain over the effects of its decision).

(3) is not based on labor costs.[102] In one case, an administrative law judge found the employer had no obligation to bargain about its decision to cease manufacturing one of its products and purchase the same product from a supplier in China.[103]

In some instances, an employer may rely on a management rights clause, discussed in more detail in **§ 1.4(a)**, to unilaterally implement organizational changes. For example, the Board found an employer acted lawfully when it unilaterally laid off bargaining unit employees based on the contract's management rights clause and the parties' past practice.[104] Similarly, a federal court refused to enforce an NLRB order that an employer obtain union consent before realigning its operations from three to six units when the parties' contract stated that employees would be grouped into three units.[105] The court held that the contract's management rights clause authorized the employer to determine the organization of its divisions, and that the union, in negotiating the clause, implicitly agreed to changes created by restructuring.

The NLRB's standard remedy for an employer's unlawful failure to bargain over the effects of a major business decision is to order back pay for the affected employees beginning five days after the Board's decision and continuing until: (1) the parties reach agreement; (2) the parties reach a *bona fide* impasse; (3) the union fails to request bargaining within five days of the Board's order or the union fails to commence negotiations; or (4) the union fails to bargain in good faith.[106]

For a more detailed analysis of the duty to bargain after corporate reorganizations, see **LITTLER ON CORPORATE RESTRUCTURING**.

Below is a basic summary of an employer's obligation to bargain over some common entrepreneurial decisions.

§ 1.3(g)(i) *Plant Relocation*

In response to regional competitive forces and shifting markets, many employers find it necessary to relocate operations. Frequently, the decision to relocate company operations affects the status of a preexisting bargaining unit.

The Board's test to determine whether an employer's decision to relocate bargaining unit work is a mandatory bargaining subject turns on whether there is a basic change in the nature of the employer's operation. If there is not a fundamental operational change, the relocation decision is presumptively a mandatory bargaining subject.[107]

The employer may rebut this presumption by showing that the work performed at the new location varies significantly from the work performed at the former location, that the work performed at the former location is to be discontinued entirely, or that the employer's decision involves a change in the scope and direction of its enterprise. The employer may also defend its action by showing that labor costs were not a factor in the relocation decision, or, even if labor costs were a factor in the decision, the union could not have offered labor-cost concessions that would have changed the employer's decision to relocate. If labor costs were irrelevant to the decision to relocate, the Board will not require bargaining. If the employer is able to show that although costs were relevant to the decision to relocate, the work would not have remained at the former

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[102] *See, e.g.*, *Newspaper Printing Corp. v. NLRB*, 625 F.2d 956 (10th Cir. 1980).

[103] *E.I. DuPont de Nemours & Co., Inc.*, 2004 NLRB LEXIS 281 (May 28, 2004).

[104] *California Pac. Med. Ctr.*, 337 N.L.R.B. 910 (2002).

[105] *Conoco Inc. v. NLRB*, 91 F.3d 1523 (D.C. Cir. 1996).

[106] *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968).

[107] *Dubuque Packing Co.*, 303 N.L.R.B. 386 (1991), *enforced*, 1 F.3d 24 (D.C. Cir. 1993).

location because of non-labor-related costs, the employer must also be able to show that these costs exceeded any labor-cost concessions that the union could offer.[108]

If the employer is supposed to, but fails to, bargain over a relocation decision, the Board will order bargaining and possibly award back pay to employees who were terminated as a result of the relocation.

§ 1.3(g)(ii) *Subcontracting or Partial Plant Closing*

Employers may have a duty to bargain over a decision to subcontract or otherwise remove work from unit employees, such as through a partial plant closing. Aside from this duty, employers normally have an independent duty to bargain over the *effects* such decisions might have on unit employees.

The Board has taken contradictory positions on the duty to bargain over subcontracting or a partial plant closing. After the U.S. Supreme Court held that subcontracting is a mandatory bargaining subject because it concerns the economics of replacing bargaining unit employees with non-unit employees to do the same work,[109] the Board reversed its previous position and held that an employer violates NLRA section 8(a)(5) if it fails to bargain over a decision to subcontract—even if the decision is based solely on economic considerations.[110] In *Westinghouse Electric Corp.*, the Board clarified the issue and adjusted its position slightly by outlining a series of factors to consider in determining whether a subcontracting decision is a mandatory subject of bargaining.[111] *Westinghouse* held that bargaining over subcontracting is *not* required if the following factors exist:

1. the decision to subcontract is motivated solely by economic considerations;
2. the employer's custom is to subcontract;
3. the proposed subcontracting does not vary substantially from the employer's past subcontracting practices;
4. the subcontracting causes no significant detriment to unit employees; and
5. the union has the opportunity to discuss the employer's subcontracting policies at general contract negotiations.

Furthermore, an employer has no duty to negotiate over subcontracting when the work being subcontracted is outside the scope of the unit employees' job specifications.[112] Nevertheless, an employer generally has a duty to negotiate over the decision to subcontract if the decision will result in a change to unit employees' working conditions.[113]

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[108] *See Mercy Health Partners*, 358 N.L.R.B. No. 69 (June 26, 2012) (labor costs were not a factor in the employer's decision to unilaterally relocate pre-registration work to a hospital where pre-registration employees were unrepresented); *Vico Prods. Co. v. NLRB*, 333 F.3d 198 (D.C. Cir. 2003) (employer failed to show that relocation decision was not based on labor costs).

[109] *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961), *supplemented*, 138 N.L.R.B. 550 (1962), *enforced sub nom., East Bay Union of Machinists v. NLRB*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

[110] *Town & County Mfg. Co.*, 136 N.L.R.B. 1022 (1962), *enforced*, 316 F.2d 846 (5th Cir. 1963).

[111] 150 N.L.R.B. 1574 (1965).

[112] *Central Soya Co., Inc.*, 151 N.L.R.B. 1691 (1965).

[113] *Weston & Brooker Co.*, 154 N.L.R.B. 747 (1965), *enforced*, 373 F.2d 741 (4th Cir. 1967).

Following *Westinghouse*, courts generally hold that a decision to either subcontract or partially close operations is a mandatory subject of bargaining if the decision is motivated in part by labor costs or some other factor that could be addressed and possibly overcome through collective bargaining.[114] To avoid litigation or an unfair labor practice charge, an employer's best practice may be to assume that virtually all subcontracting or partial closure decisions require bargaining with a recognized union. Furthermore, employers should keep in mind that, at the very least, they will likely have to bargain over the *effects* of such a decision.

§ 1.3(g)(iii) *Sale or Transfer of Stock*

When there is a sale or transfer of stock and no other change in corporate structure, the employing entity must recognize and bargain with an incumbent union and adopt and apply the substantive provisions of the preexisting collective bargaining agreement. In other words, a change in stock ownership will not void the company's union contract. For example, an entity that purchased 100% of a company's stock was considered a *continuing employer* because there was no hiatus in operation or termination of employees, even though the new employer bought new equipment and introduced new product lines.[115] In contrast, an entity that purchases a corporation's *assets* generally does not inherit the preexisting union contract. However, the asset purchaser may be viewed as a successor employer, discussed briefly in **§ 2.4**. For more information about successor status, see **LITTLER ON CORPORATE RESTRUCTURING**.

§ 1.4 COMMON COLLECTIVE BARGAINING PROVISIONS

§ 1.4(a) *Management Rights Clauses*

A *management rights clause* serves two significant functions:

1. management may act unilaterally with respect to the terms and conditions of employment encompassed by the clause without committing an unfair labor practice; and

2. the clause may be relied upon in arbitration to resolve an ambiguity in the contract or to argue that, in the absence of clear language to the contrary, the management rights article permits the company's disputed action(s).

In general, an employer may not unilaterally change employees' terms and conditions of employment during the life of a contract, even if the contract does not mention such terms or conditions or does not expressly restrict the employer from making such changes.[116] A management rights clause that expressly authorizes the employer to change terms and conditions of employment, however, allows the employer to act unilaterally without bargaining over its actions.[117]

While union rights are often scattered throughout a contract according to subject matter, management rights are generally stated in a single contract section. Various statements of managerial prerogatives may also be

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[114] *See, e.g.*, *Mid-State Ready Mix*, 307 N.L.R.B. 809 (1992), *aff'd*, 316 N.L.R.B. 500 (1995) (employer's unilateral decision to replace two union truck drivers with nonunion drivers and independent contractors was a mandatory subject of bargaining). *But see Finch, Pruyn & Co.*, 349 N.L.R.B. 270 (2007) (union waived its right to bargain over employer's continued subcontracting of pulp mill operations after strike ended because the union failed to request bargaining after the employer explicitly told the union it intended to continue subcontracting bargaining unit work).

[115] *EPE, Inc. v. NLRB*, 845 F.2d 483 (4th Cir. 1988) (noting that a "general rule of corporate law is that a corporation's obligations continue in force despite a change in share ownership").

[116] *NLRB v. Katz*, 369 U.S. 736 (1962).

[117] *Smurfit-Stone Container Corp.*, 344 N.L.R.B. 658 (2005) (management rights clause permitted employer to unilaterally change employee attendance policy).

interspersed throughout the agreement, however. For example, if the employer wishes to retain the discretion to pay individual employees a higher wage than that specified in the agreement, the agreement should provide such a right in the wage article, rather than in the general management rights article. Some of the most common reservations in a management rights clause include: direction of the workforce; management of the company business; the right to frame company rules; control of production methods; determining employees' duties; creating new job classifications; subcontracting, closing, or relocating a plant; and instituting technological changes.

Most contracts place some restrictions on management rights. Typical restrictions include prohibiting management from taking actions in violation of contract terms and specifying that management actions are subject to the applicable grievance and/or arbitration procedure.

An employer's right to act unilaterally under a management rights clause is based on the theory that the union waives its statutory right to require bargaining over certain subjects by agreeing to the management rights clause. The NLRB, however, rarely finds that a union has waived its right to bargain. Historically, the Board has held that union waivers must be "clear and unmistakable."[118] In 2004, the Board reaffirmed its adherence to the clear and unmistakable standard and explicitly rejected the contract coverage standard.[119] The Board criticized the contract coverage approach as failing to recognize the union's statutory right to demand bargaining, whereas in its view, the clear and unmistakable standard "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action …"[120] The Board further commented that a change in the clear and unmistakable standard would "create a significant and unbargained-for shift of rights to employers and away from employees and unions."[121]

In 2016, the Board majority, applying the "clear and unmistakable waiver" standard, issued several decisions further undermining the enforceability of management rights clauses and similar provisions both during and after expiration of a collective bargaining agreement. For example, in *Graymont PA, Inc.*, the majority found that an employer unlawfully changed its work rules, absenteeism policy, and progressive discipline schedule during the term of an agreement.[122] The employer relied on a management rights clause stating that it retained the sole and exclusive right to: (1) evaluate performance; (2) discipline and discharge for just cause; (3) adopt and enforce rules, regulations, policies, and procedures; and (4) establish standards of performance for employees. The majority found that because the clause did not specifically refer to work rules, absenteeism, or progressive discipline, it could not be construed as a clear and unmistakable waiver of the union's right to bargain over those subjects.

Many employers argued that the Board devalued the language of collective bargaining agreements by mechanically applying the clear and unmistakable test in *Graymont PA, Inc*.

In 2019, the Board dispatched the "clear and unmistakable waiver" standard and adopted the "contract coverage" standard in *MV Transportation, Inc.*, previously advocated by the D.C. Circuit Court of

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[118] *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008) (deferring to Board's conclusion that employer unlawfully ended union dues check-off after contract expiration because union did not clearly and unmistakably waive its protection against unilateral changes following contract expiration).

[119] *Provena Hosps.*, 350 N.L.R.B. 808 (2007).

[120] 350 N.L.R.B. at 811.

[121] 350 N.L.R.B. at 813.

[122] 364 N.L.R.B. No. 37 (June 29, 2016), *enforcement denied*, *Graymont (PA) Inc. v. NLRB*, 2017 U.S. App. LEXIS 3922 (D.C. Cir. Mar. 3, 2017).

Appeals.[123] This theory is premised on NLRA section 8(d), which provides that the duty to bargain "shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."[124] The D.C. Circuit Court of Appeals has explained that "a waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a matter, but where the matter is covered by the collective bargaining agreement, the union has exercised its bargaining right and the question of waiver is irrelevant."[125] Courts that apply this doctrine reason that once the parties have exercised their right to bargain about a particular subject by negotiating a management rights provision into the contract, the parties' rights are fixed and further mandatory bargaining is foreclosed as to that subject.[126] Agreeing with the D.C. Circuit, the Board in *MV Transportation, Inc.* stated that the "clear and unmistakable" standard:

1. "results in the Board impermissibly sitting in judgment upon contract terms;"
2. "undermines contractual stability;"
3. "alters the parties' deal reached in collective bargaining;"
4. "results in conflicting contract interpretations between the Board and the courts;"
5. "undermines grievance arbitration;" and
6. "has become indefensible and unenforceable."[127]

Under the contract coverage standard, the Board will review alleged unlawful unilateral changes by first reviewing the plain language of the collective bargaining agreement, applying the ordinary principles of contract interpretation, and if it is determined that the disputed act falls within the scope of the contract language, then the employer's change will not violate the NLRA. By way of example, the Board noted that if an agreement granted an employer the right to implement new rules and policies and to revise existing ones, the employer would be within its rights to unilaterally implement new attendance or safety rules or to revise existing disciplinary policies.[128] If, however, the review of the plain language of the collective bargaining agreement demonstrates that the disputed act does not come within the scope of a contract provision that grants the employer to act unilaterally, the analysis shifts to "one of waiver."[129] While *MV Transportation* is more favorable to employers and their ability to implement change to meet business

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123 368 N.L.R.B. No. 66 (Sept. 10, 2019). In *MV Transportation*, the Board noted that the *Graymont PA, Inc.* decision attested to the D.C. Circuit's observation that under the clear and unmistakable waiver standard, "the union would almost invariably prevail in duty to bargain cases, because it almost always could find some ambiguity in the relevant contractual language." 368 N.L.R.B. at *25.

124 29 U.S.C. § 158(d).

125 368 N.L.R.B. at *7; *see also Mississippi Power Co. v. NLRB*, 284 F.3d 605 (5th Cir. 2002) (employer lawfully unilaterally changed employee medical insurance benefits because the union's agreement to a side letter effectively waived its right to object to the employer's unilateral change); *Department of Navy, Marine Corps Logistics Base v. Federal Labor Relations Auth.*, 962 F.2d 48, 57 (D.C. Cir. 1992).

126 *See, e.g., Local Union No. 47, International Bhd. of Elec. Workers v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991).

127 368 N.L.R.B. at **16-31.

128 368 N.L.R.B. No. 66, at *5 (Sept. 10, 2019).

129 368 N.L.R.B. at *6; *see also* Alan I. Model & Kurt Rose, *NLRB Issues Reprieve for Unionized Employers Seeking to Make Unilateral Changes*, LITTLER, Sept. 18, 2019, *available at* https://www.littler.com/publication-press/publication/nlrb-issues-reprieve-unionized-employers-seeking-make-unilateral.

demands, it may not be the Board's position permanently. The current NLRB General Counsel's Office under Jennifer Abruzzo has advocated for a return to the "clear and unmistakable waiver" standard.

The Obama-era Board had also held that the expiration of an agreement renders a management rights clause ineffective, which overruled previous precedent relying on the past practice established by such a clause. In *E.I. DuPont de Nemours*, the majority found that an employer unlawfully made changes to the employees' benefit plans after expiration of the collective bargaining agreement.[130] The employer relied on a reservation of rights clause that reserved the right to change or discontinue the plans in its discretion. The majority treated that provision as a management rights clause, but found that such a clause expires upon contract expiration and does not establish a status quo that permits unilateral changes, absent evidence that the parties intended the clause to outlive the contract.[131] However, *E.I. DuPont de Nemours* was overruled by *Raytheon Network Centric Systems* in 2017.[132] The majority reversed the ALJ's findings that the employer violated the NLRA by announcing and unilaterally implementing changes to employees' healthcare benefits.[133] The Board held that actions do not constitute a change if "they are similar in kind and degree with an established past practice consisting of comparable unilateral action."[134] This principle applies regardless if the collective bargaining agreement was in effect when the practice was created, and if no collective bargaining agreement existed when the disputed actions were taken.[135] Additionally, the Board ruled that such actions consistent with an established practice do not constitute a "change" requiring collective bargaining just because there is some degree of discretion.[136]

§ 1.4(b) *Union Security Clauses*

Unions often strongly bargain for a *union security clause*, which requires bargaining unit employees to pay union dues and initiation fees as a condition of employment. Historically, the language of these clauses implied that employees had to become full union members and pay all membership dues, regardless of an employee's objections to the union's spending on certain activities.

Bargaining unit employees in private-sector employment may now choose not to join the union, however, and cannot be obligated to pay more than the percentage of dues that relates to the union's "representational activities." In *Communications Workers of America v. Beck*, the U.S. Supreme Court held that unions may not expend a nonmember employee's dues on nonrepresentational activities over the employee's objections.[137] The Court also held that a union must notify employees of: (1) their right to refuse full-fledged union membership; and (2) their obligation to pay only core, financial dues—referred to as *Beck* rights. Under these rights, an employee may only be made responsible for paying the union an amount equal to

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[130] 364 N.L.R.B. No. 113 (Aug. 26, 2016).

[131] *See also American National Red Cross*, 364 NLRB No. 98 (Aug. 26, 2016) (provisions allowing for changes to the Red Cross's national benefit plans did not survive the expiration of local agreements and did not establish past practice permitting benefit changes by local chapters).

[132] 365 N.L.R.B. No. 161 (Dec. 15, 2017).

[133] 365 N.L.R.B. at 1.

[134] 365 N.L.R.B. at 17.

[135] 365 N.L.R.B. at 1.

[136] 365 N.L.R.B. at 1.

[137] 487 U.S. 735 (1988). Different rules may exist for public-sector employees, both because the NLRA does not cover state or local public employees and because of the impact of the First Amendment. However, the U.S. Supreme Court's decision in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which held that public employees who do not belong to a union can be required to pay a "fair share" or "agency" fee, was overruled by the U.S. Supreme Court in 2018. Specifically, the Court found that public-sector agency-shop arrangements violate the First Amendment. *See Janus v. American Fed'n of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448 (2018).

the dues and fees used for the union's "core" representational functions (*i.e.*, collective bargaining, contract administration, and grievance adjustment). Employees who choose not to join the union are considered "financial core" members and cannot be subject to union fines or discipline for violating union rules.

When an employee objects to a union's expenditures on representational activities under *Beck*, the union must provide an independent audit of its finances in a way that is "verifiable" using accounting principles.[138] Previously, objectors had to accept a union's assertion that a certain percentage of its dues went towards representational activities.[139] The Board and courts have struggled over how to define *representational activities*. In *United Food & Commercial Workers Union, Local 1036 v. NLRB*, the Ninth Circuit Court of Appeals affirmed a Board ruling that *Beck* objectors can be charged for union expenses incurred when organizing other employers in the same competitive market because such costs are "germane" to the union's representational functions.[140]

The U.S. Supreme Court narrowed the scope of *Beck* rights in *Marquez v. Screen Actors Guild*.[141] In that case, the Court held that a union does not breach its duty of fair representation when negotiating a union security clause that tracks the language of NLRA section 8(a)(3), which permits unions to require "membership in good standing" as a condition of employment. The Court stated that, absent a showing that the union misled individuals about their *Beck* rights, the fact that the contract clause did not contain the employee's explicit right to object did not mean that the union violated its duty of fair representation. Notwithstanding, a union must still advise employees of their *Beck* rights in another fashion.

In 2009, the U.S. Supreme Court held in *Locke v. Karass* that a local union may charge nonmember employees an appropriate share of the union's contribution to its national affiliate's litigation expenses provided: (1) the subject matter of the litigation bears an appropriate relation to collective bargaining (*that is*, is of a kind that would be chargeable if the litigation were local, *e.g.*, litigation appropriately related to collective bargaining rather than political activities); and (2) the litigation is reciprocal (*i.e.*, the local union's payment to the national affiliate is for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization.")[142] Here, although a portion of the fee paid by the local union to its national union affiliate was used to pay for litigation expenses incurred in large part on behalf of *other* local units, it was still found to ultimately benefit the local union at issue because the other locals contributed similarly to the national's resources, and that local could reasonably expect these resources would be available for costs it incurred regarding similar litigation, if and when it were to take place.

In *United Nurses & Allied Professionals (Kent Hospital)*, the Board held that private-sector unions cannot charge lobbying and other nonrepresentational costs to nonmembers.[143] The First Circuit Court of Appeals upheld the NLRB's decision,[144] which is in line with U.S. Supreme Court precedent commanding that unions separate collective bargaining and lobbying costs. Under the Trump Administration, General

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[138] *American Fed'n of Television & Recording Artists, Portland Local (KGW Radio)*, 327 N.L.R.B. 802 (1999); *see also United Food & Commercial Workers Union, Local 4*, 365 NLRB No. 32 (Feb. 13, 2017) (auditor need not be "independent" in a strict formal sense).

[139] *See also NLRB v. Studio Transp. Drivers Local 399*, 525 F.3d 898 (9th Cir. 2008) (enforcing Board's order against union that had forced *Beck* objector to pay agency fees that included offsets for liquidated damages incurred from nonrepresentational expenses).

[140] 284 F.3d 1099 (9th Cir. 2002), *amended by*, 307 F.3d 760 (9th Cir. 2002).

[141] 525 U.S. 33 (1998).

[142] 555 U.S. 207, 210, 218-19 (2009) (quoting *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524 (1991)).

[143] 367 N.L.R.B. No. 94 (Mar. 1, 2019).

[144] *United Nurses & Allied Prof'ls v. NLRB*, 975 F.3d 34 (1st Cir. 2020).

Counsel Peter Robb issued Guidance Memorandum 19-06, which instructed that unions should bear the burden of demonstrating the legitimacy of their expenses in any unfair labor practice charge alleging impermissible application of lobbying or other non-representational costs to non-member agency fee payers.[145] However, in March 2021, Acting General Counsel Peter Sung Ohr rescinded Guidance Memorandum 19-06, suggesting that the NLRB may seek to strengthen union finances.[146]

§ 1.4(b)(i) *"Right-to-Work" & Other State Laws Related to Union Security Clauses*

Union security clauses are subject to state law. Pursuant to NLRA section 14(b), a significant number of states have enacted "right-to-work" laws that prohibit union security provisions. In states with right-to-work laws, employees have a legal right to reject union membership without losing their jobs.

Furthermore, state law cannot permit unions to withhold more dues than allowed under *Beck*. In *Local Union No. 435, International Brotherhood of Teamsters*, the Board held that state law cannot sanction a more expansive union security arrangement than is permitted under federal law.[147] In that case, the union argued that Colorado law permitted it to charge an objector for nonrepresentational activities. The Board disagreed, holding that federal law preempts state law on this subject. Thus, an objecting employee can only be charged for representational activities consistent with *Beck*.

Various versions of the PRO Act—which stands for "Protecting the Right to Organize"—have been introduced in Congress for the last couple of years. In March 2021, the U.S. House of Representatives passed the PRO Act,[148] but it never made it onto the floor of the Senate. If signed into law, the legislation would effectively overturn state right-to-work laws by amending the NLRA to permit "fair share agreements." As of June 1, 2023, the reintroduced PRO Act has not made it past either house.

§ 1.4(b)(ii) *Beck Notice & Federal Contractors*

Former President Obama revoked Executive Order No. 13201, signed by President George W. Bush in 2001, which required federal government contractors to post a notice ("*Beck* Notice") in the workplace informing them of their rights insofar as union dues were concerned. President Obama's Executive Order No. 13496 requires that contractors instead inform employees about their rights under the NLRA. For more information on the requirements for federal contractors under Executive Order No. 13496, see **LITTLER ON GOVERNMENT CONTRACTORS & EEO OBLIGATIONS**.

§ 1.4(c) *Most-Favored-Nation Clauses*

Employers sometimes bargain for provisions that reference provisions in other contracts negotiated by the union with other companies. Such provisions, called *most-favored-nation clauses*, are meant to prevent industry competitors from gaining an advantage by negotiating more favorable contract terms. Typically, such clauses specify that more favorable terms must automatically be incorporated into the agreement, or

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[145] Peter B. Robb, Office of the General Counsel, *Memorandum GC 19-06:* Beck *Case Handling and Chargeability Issues in Light of* United Nurses & Allied Professionals (Kent Hospital) (Apr. 29, 2019), *available at* https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

[146] Peter Sung Ohr, Office of the General Counsel, *Memorandum GC 21-02: Rescission of Certain General Counsel Memoranda* (Feb. 1, 2021), *available at* https://www.nlrb.gov/guidance/memos-research/general-counsel-memos; *see also* Alan I. Model et al., *Peter Sung Ohr has Cemented the Biden NLRB's Direction Despite Challenges to his Interim Appointment and Prosecutorial Authority*, LITTLER, Mar. 17, 2021, *available at* https://www.littler.com/publication-press/publication/peter-sung-ohr-has-cemented-biden-nlrbs-direction-despite-challenges.

[147] 327 N.L.R.B. 458 (1999).

[148] Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

that the employer is entitled to utilize them. Some agreements require the union to inform the employer about concessions it makes to other employers. An example of a most-favored-nation clause is:

> Nothing contained herein shall require the Employer to pay any employee a higher rate of pay, a higher Health and Welfare or Pension contribution, or a higher holiday or vacation benefit than that required by any other collective bargaining contract entered into by the Union with any other Contractor competitive with this Employer for the same classification of employment for the same period of time. To the extent that any such other collective bargaining contract provides lower wages, pension or welfare contributions, holiday or vacation benefits, than those provided hereunder, the provisions thereof shall be called to the attention of the Union and this Agreement will be amended immediately to so provide.

These clauses often include language that requires more favorable terms to be made immediately available to signatory employers or a provision that deems the contract modified and amended if the union does not correct any inequity within a certain number of days after notification.

§ 1.4(d) *Wage Adjustments or Merit Pay & Incentive Clauses*

Employers generally resist lock-step wage increases that can discourage employees from increasing the output and quality of their work. As an alternative, employers may seek to incorporate merit pay or pay-for-performance systems into collective bargaining agreements. Formal bonus plans and merit-pay increases are widely utilized by nonunion employers, but the extent to which merit pay may be implemented by an employer under the terms of a collective bargaining agreement is often disputed. Not surprisingly, unions have generally fought employer merit-pay proposals. Union negotiators generally fear that pay-for-performance systems undermine the union and may have a tendency to adversely affect workers who are more senior.

The NLRB has consistently sided with organized labor on the issue of merit pay. In *Colorado-Ute Electric Association*, the Board held that the employer violated NLRA sections 8(a)(1) and 8(a)(5) by unilaterally granting merit-pay increases to employees without first bargaining over the timing and amounts of those increases.[149] Because merit pay is a mandatory bargaining subject, the employer's proposal was deficient because it set no criteria for the amounts or timing of the merit-pay increases.[150] Similarly, in 2017, the Board held that the employer violated the NLRA by granting raises to unit employees mid-contract without the union's consent.[151] The three-member Board rejected the employer's argument that referral and sign-on bonuses are not wages; as such, these bonuses were a mandatory subject of bargaining.

In *Daily News of Los Angeles v. NLRB*, the D.C. Circuit Court of Appeals held that an employer may not unilaterally discontinue a merit-pay program because it is a mandatory subject of bargaining, but it may exercise complete discretion over the amount of the increase, provided the employer's determination is based on fixed criteria.[152] The court noted that the NLRB's proscription of unilateral changes to mandatory bargaining subjects demands that the company apply the same criteria and use the same formula for awarding increases during the bargaining period as it had previously. The court held that the company was

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[149] 295 N.L.R.B. 607 (1989), *rev'd on appeal*, 939 F.2d 1392 (10th Cir. 1991) (Board erred by regulating substantive terms of wage proposal instead of applying good-faith bargaining requirements).

[150] *See also McClatchy Newspapers, Inc.*, 299 N.L.R.B. 1045 (1990), *enforcement denied and remanded*, 964 F.2d 1153 (D.C. Cir. 1992), *supplemented*, 321 N.L.R.B. 1386 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997) (employer violated NLRA sections 8(a)(1) and 8(a)(5) by unilaterally granting merit-pay wage increases to employees without first bargaining with the union over the timing and amounts of those increases).

[151] *Lenawee Stamping Corp. d/b/a Kirchhoff Van-Rob*, 365 N.L.R.B. No. 97 (June 14, 2017).

[152] 73 F.3d 406 (D.C. Cir. 1996).

free to evaluate each employee's record and to deny across-the-board increases if no employee was deserving. However, the employer could not make a unilateral across-the-board policy determination based on nonmerit criteria. The Board's remedial order included back pay based on prior merit increases and merit increases given to nonunion employees. The Court of Appeals rejected the employer's argument that back pay under a merit plan is too speculative to calculate.

Because the Board and some courts disagree over merit-pay bargaining, employers are faced with two choices: (1) use a lock-step wage increase schedule; or (2) carefully construct a merit-pay system that includes the following elements:

- minimum pay levels for all classifications;
- a bargained-for employer right to grant merit-pay increases;
- a bargained-for timing schedule for granting merit-pay increases;
- bargained-for criteria to be utilized in determining the amounts of merit-pay increases generally; and
- union representation in an appeal procedure for employees who may be dissatisfied with the results of the merit-pay determination.

A proposal with the above-enumerated elements, although potentially cumbersome, may satisfy an employer's duty to bargain under current Board precedent.

§ 1.4(e) *Lump-Sum Payments*

Many employers prefer to give lump-sum payments as an alternative to wage adjustments. Under a lump-sum proposal, employees receive a one-time specified amount of money and their wages remain fixed (or, in some cases, are reduced). A lump-sum structure benefits employers by ensuring that future costs do not increase. The lump-sum expenditure is only incurred once, and it is generally not considered wages for the purpose of computing overtime or benefits like pensions and vacations. Lump-sum payments may also be used as an incentive to end negotiations, in which case the payment becomes analogous to a signing bonus.

Employers that bargain for lump-sum payments must be careful. The U.S. Department of Labor (DOL) has taken the position that certain types of lump-sum payments should be included in the rate of pay upon which overtime is calculated. In contrast, in *Minizza v. Stone Container Corp. Corrugated Container Division East Plant*, the Third Circuit Court of Appeals ruled that lump-sum payments are not compensation for hours worked.[153] Therefore, they should not be considered when calculating the regular hourly rate for overtime purposes, at least under federal law. The court noted that the Fair Labor Standards Act's application to lump-sum provisions of a collective bargaining agreement is fact specific, and depends on the contract language. For this reason, an employer that wishes to implement a lump-sum-payment program should consult counsel regarding potential overtime obligations.

§ 1.4(f) *Cost of Living Adjustments*

Cost of living adjustment clauses (COLA) in union contracts historically tie employee wages to some economic index of price levels. COLAs have nearly disappeared from union contracts and are unlikely to surface in a low-inflation environment. Note that in one case, the Board held that a federally funded nonprofit agency did not commit an unfair labor practice when it granted a 2.2% COLA increase to non-

[153] 842 F.2d 1456 (3d Cir. 1988).

unit employees while withholding the increase from bargaining unit employees during contract negotiations.[154]

§ 1.4(g) *Health Care Cost Containment Provisions*

Most employers now depend on employees to shoulder part of the cost of health care premiums. Employers that want to defray the cost should negotiate for cost-containment provisions. Given the high cost of pharmaceuticals, one of the most effective cost-containment provisions is the requirement that employees purchase generic drugs. Nearly three-quarters of all labor contracts contain such a requirement. Employers can also implement wellness programs to control the cost of health care. Many employers also propose pretax health savings accounts, eligibility restrictions, or financial charges for employees' spousal coverage and lowered benefit levels for new employees.

§ 1.4(h) *Job Security Provisions*

Most bargaining agreements contain at least one provision designed to provide job security for bargaining unit members, increase employees' skills and value, or address other issues connected with employee job security. Unions push hard for contracts with provisions that extend recall rights, restrict subcontracting clauses, limit the employer's ability to hire temporary employees, and require the employer to provide notice to employees in the event of a shut down.

§ 1.4(i) *No-Strike & No-Lockout Pledges*

Most collective bargaining agreements contain some form of no-strike or no-lockout pledge. *Conditional no-strike pledges*, which are common in nonmanufacturing industries, allow for strikes during the term of a collective bargaining agreement, but only if one or more preconditions are met. The most common preconditions are:

- exhaustion of the grievance procedure;
- violation of an arbitration award;
- the company's refusal to arbitrate a dispute;
- noncompliance with a portion of the collective bargaining agreement; or
- a deadlocked contract reopener.

As with no-strike pledges, *no-lockout pledges* are equally common and frequently conditional. Examples of events that can trigger a lockout include:

- exhaustion of the grievance procedure;
- violation of an arbitration award by the union;
- the union's refusal to arbitrate a dispute; or
- noncompliance with a portion of the collective bargaining agreement.

[154] *Neighborhood House Ass'n*, 347 N.L.R.B. 553 (2006) (union rejected employer's proposed COLA increase, which conditioned implementation on union waiving its right to bargain further about COLA amount).

Employers can negotiate absolute prohibitions on strikes. In so doing, employers must pay attention to the precise contract language because a broad prohibition on strikes may not prevent sympathy strike activities. In *Children's Hospital Medical Center of Northern California v. California Nurses Association*, the Ninth Circuit Court of Appeals held that the union did not clearly and unmistakably waive its NLRA section 7 right to engage in sympathy strikes when it waived its general right to strike in a no-strike clause.[155] Therefore, an employer that wants to protect itself against all strike activity should include the phrase "sympathy strike" in its no-strike clause.

Nearly 50% of bargaining agreements contain a provision that limits a union's liability for violation of a no-strike pledge. Typically, these liability limitations impose some affirmative obligation on the union, such as requiring the union to attempt to persuade employees to return to work or requiring the union to publicly disavow the strike. Often, these provisions impose liability on the union if any union officer encourages or initiates a work stoppage. Many no-strike provisions provide for penalties to be assessed against employees who strike in violation of a no-strike clause. Many penalty provisions, however, give employees the right to a limited form of appeal if penalties are incurred.

§ 1.4(j) *Agreements to Arbitrate*

Many employers negotiate for an all-inclusive mandatory arbitration clause. These provisions simplify the grievance process and reduce the expense of resolving employee disputes. In *14 Penn Plaza L.L.C. v. Pyett*, the U.S. Supreme Court addressed whether an employer may enforce an arbitration clause contained in a collective bargaining agreement that "clearly and unmistakably" waives the union member's right to a judicial forum in statutory discrimination cases.[156] The Court held that an employer may enforce such clauses, emphasizing that earlier decisions deriding arbitration as unfair and ineffective have since been repudiated. The Court further found that arbitration is an acceptable forum for addressing employment discrimination grievances. Organized labor was quick to ask Congress to overrule the ruling in *14 Penn Plaza*. However, the decision remains in effect and Congress has not overwritten it.

Notably, an employer commits an unfair labor practice when it maintains a mandatory arbitration policy that is so broad that employees could reasonably believe they are precluded from filing charges with the Board,[157] including a policy that permits the employee to file charges with the Board but precludes the employee from recovering monetary relief.[158]

§ 2 ISSUES ARISING IN THE ABSENCE OF AN AGREEMENT

There are several complications that can arise when an employer and union have not reached an agreement or their collective bargaining agreement has expired.

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[155] 283 F.3d 1188 (9th Cir. 2002).

[156] 556 U.S. 247 (2009).

[157] *U-Haul Co. of Cal.*, 347 N.L.R.B. 375 (2006) (mandatory arbitration language included Title VII and other statutory claims and "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations");

[158] *20/20 Commc'ns, Inc.*, 369 N.L.R.B. No. 119 (July 15, 2020), citing *Kelly Servs., Inc.*, 368 NLRB No. 130 (Dec. 12, 2019).

§ 2.1 REFUSAL-TO-BARGAIN CHARGES

When the bargaining process breaks down, unions have a number of tactics at their disposal. Some unions file *refusal-to-bargain charges* in virtually every set of negotiations. Typically, these charges allege that employers are engaging in one or more of the following:

1. bargaining without a sincere desire to reach a contract;
2. refusing to supply necessary information to the union;
3. refusing to meet at reasonable times and locations;
4. making unilateral changes in wages, hours, and working conditions without negotiating with the union; or
5. negotiating to a point and then making unilateral changes prior to impasse.[159]

There are several potential explanations for the high number of refusal-to-bargain charges. Foremost among these may be the apparent willingness of many unions to enlist the Board's assistance in an attempt to resist concessionary bargaining by employers. If a union can stall negotiations by bargaining at a snail's pace and inundating an employer with disingenuous information requests, the employer may lose its patience and declare impasse. Unions are increasingly challenging impasse by means of unfair labor practice charges, making insistence upon concessionary bargaining far riskier and more expensive for employers.

§ 2.1(a) *Requirement to Supply Necessary Information Supporting Employer Representations at the Bargaining Table*

It is well established that an employer must submit to a financial audit by a union during collective bargaining negotiations if it claims an "inability to pay" with respect to union proposals or where the employer has made other assertions at the bargaining table that the union seeks to verify.[160] In *Wayron, L.L.C.*, the Board majority concluded that an employer is not required to recite any "magic words" about inability to pay.[161] Instead, the majority found that the employer made it clear by various statements during negotiations that its financial circumstances conveyed an inability to pay. Thus, employers should consider carefully their responses to union proposals during negotiations, as this decision may increase union attempts to gain access to potentially sensitive financial information.

§ 2.2 BARGAINING PAST CONTRACT EXPIRATION

Many times, employers and unions commonly bargain past the collective bargaining agreement's expiration date, as some unions are reluctant to use strikes as a contract-expiration weapon against employers. The general legal rule is that the duty to bargain extends beyond contract expiration. Management cannot make unilateral changes without bargaining to impasse. As a matter of law, however, some portions of the collective bargaining agreement change when a bargaining agreement expires.

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[159] *See ServiceNet, Inc.*, 340 N.L.R.B. 1245 (2003) (employer unlawfully declared impasse on permissive bargaining subjects although it had negotiated with the union on two occasions prior to declaring impasse).

[160] *Fairhaven Props., Inc.*, 314 N.L.R.B. 763, 769 (1994); *Harvstone Mfg. Corp.*, 272 N.L.R.B. 939 (1984), *enforced in part*, 785 F.2d 570 (7th Cir. 1986); *KLB Indus.*, 357 N.L.R.B. 127 (2011), *aff'd*, 700 F.3d 551 (D.C. Cir. 2012).

[161] 364 N.L.R.B. No. 60 (Aug. 2, 2016).

§ 2.2(a) *Suspension of Union Security Clause*

Union security clauses are suspended when a bargaining agreement expires. Thus, newly-hired employees cannot be required to join the union or financially support the union as a condition of continued employment. A union's attempt to enforce a union security provision after contract expiration generally constitutes an unfair labor practice.

§ 2.2(b) *Cessation of Dues Checkoff*

The Board and courts have been inconsistent in deciding whether an employer has the right to suspend union dues checkoffs after a contract expires. A *dues checkoff* is the automatic deduction of union dues from employees' paychecks. Board decisions generally had affirmed an employer's right to stop deducting union dues once a contract expired.[162] However, in 2015, the Board held that an employer's obligation to check off union dues continues after expiration of a collective bargaining agreement that contains such a provision.[163] In 2019, the Board overruled that holding and held that there was no obligation under the NLRA to continue dues checkoff after the contract expired.[164] On October 3, 2022, the Board overruled the latter decision, returning to the 2015 standard, and held that after the expiration of a collective bargaining agreement an employer is still obliged to check off union dues.[165]

§ 2.2(c) *Arbitration Requirements*

To some extent, an employer's obligation to arbitrate grievances changes when the contract expires. This area of the law was refined by the U.S. Supreme Court in *Litton Financial Printing Division v. NLRB.*[166] In *Litton*, the company repudiated its obligation to arbitrate grievances after the contract expired. The union claimed the company made a unilateral change in the grievance procedure (a mandatory subject of bargaining) without bargaining to impasse. In an earlier case, *Nolde Brothers, Inc. v. Bakery & Confectionery Workers Union*,[167] the Supreme Court had held that arbitration of post expiration grievances over rights that arose and vested under an expired collective bargaining agreement was required. In *Litton*, the Court reaffirmed *Nolde*, but held that the dispute at issue in *Litton* (a layoff dispute) turned on the workers' qualifications at the time of layoff and, therefore, the facts did not involve a right that vested or accrued before the contract expired. Consequently, the employer did not have a duty to arbitrate.[168]

§ 2.2(d) *Employer's Change in Bargaining Position*

In *Cook Brothers Enterprises, Inc.*, the Board concluded that an employer is entitled to change its bargaining position as a result of improved economic conditions and its ability to survive a strike.[169] The Board held that such a change is not bad faith bargaining. Thus, *Cook Brothers* condones a company's

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[162] *See Western Paper Prods.*, 321 N.L.R.B. 828, 831 n.8 (1996), *enforced in part and remanded sub nom. Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998), *limited by DuPont Dow Elastomers L.L.C. v. NLRB*, 296 F.3d 495 (6th Cir. 2002).

[163] *See Lincoln Lutheran of Racine*, 362 N.L.R.B. No. 188 (Aug. 27, 2015).

[164] *See Valley Hosp. Med. Ctr., Inc.*, 368 N.L.R.B. No. 139 (Dec. 16, 2019).

[165] *See Valley Hosp. Med. Ctr., Inc.*, 371 N.L.R.B. No. 160 (Oct. 3, 2022).

[166] 501 U.S. 190 (1991).

[167] 430 U.S. 243 (1977), *reh'g denied*, 430 U.S. 988 (1977).

[168] *See also Local 15, International Bhd. of Elec. Workers, Local 15 v. Midwest Generation EME, L.L.C.*, 284 F. Supp. 2d 1005 (N.D. Ill. 2003) (where there is no current union contract, and no implied in fact contract, there is no duty for the employer to arbitrate the termination of five striking employees).

[169] 288 N.L.R.B. 387 (1988).

decision to bargain from a position of strength in recognition of its improved bargaining power after weathering a strike.

§ 2.2(e) *Withdrawing Outstanding Proposals*

An employer may be required to execute a collective bargaining agreement if the union accepts an offer it had previously rejected. This may be true even though the employer has not renewed its offer.[170] For this reason, an employer should consider withdrawing proposals that the union rejected in order to retain the right to reassess, and perhaps change, its bargaining position. Note, however, that withdrawing a bargaining proposal without good reason can constitute bad faith regressive bargaining. Furthermore, employees' refusal to ratify an employer proposal is not, by itself, good reason to withdraw a proposal.[171] The employer should have an independent justification for the withdrawal.

§ 2.3 USE OF ECONOMIC WEAPONS

§ 2.3(a) *Work Stoppages & Strikes*

While major strikes rarely occur, 2022 experienced the second-most major strikes since 2007.[172] Work stoppages and strikes remain an important and sometimes effective union tool. The table below illustrates the impact of work stoppages over the past 15 years.

Table 1. Work Stoppages Involving 1,000 or More Workers[173]

Year	No. of Work Stoppages Beginning	No. of Workers Involved	No. of Idle Days
2022	23	120,600	2,312,700
2021	16	80,700	1,551,900
2020	8	27,000	965,700
2019	25	425,500	3,244,300
2018	20	485,200	2,815,400
2017	**7**	25,000	440,000
2016	15	99,000	1,543,000
2015	12	47,000	740,000
2014	11	34,000	200,000
2013	15	55,000	290,000
2012	19	148,000	1,131,000
2011	19	113,000	1,020,000
2010	11	45,000	302,000
2009	5	13,000	124,000
2008	15	72,000	1,954,000
2007	21	189,000	1,265,000

[170] *Curtin Matheson Scientific*, 287 N.L.R.B. 350 (1987), *enforcement denied*, 859 F.2d 362 (5th Cir. 1988), *rev'd*, 494 U.S. 775 (1990).

[171] *Dayton Electroplate*, 308 N.L.R.B. 1056, 1063 (1992), *enforcement denied*, 16 F.3d 1220 (6th Cir. 1994).

[172] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Work Stoppages: Annual Work Stoppages Involving 1,000 or More Workers, 1947-Present* (Feb. 22, 2023), *available at* https://www.bls.gov/web/wkstp/annual-listing.htm.

[173] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Work Stoppages: Annual Work Stoppages Involving 1,000 or More Workers, 1947-Present* (Feb. 22, 2023), *available at* https://www.bls.gov/web/wkstp/annual-listing.htm.

Although the frequency of work stoppages and strikes had been on the decline, the number of work stoppages went up to 20 in 2018 and 25 in 2019 (compared to 7 in 2017, 12 in 2015, and 11 in 2014), and resulted in the largest number of days idle in the past decade (2010-2020).[174] 2020, however, saw the reverse of this increase—with only eight strikes and the third lowest number of workers (27,000 workers) idled annually since 1947, just behind 2017 and then 2009.[175] The small number of strikes in 2020 was likely a result of significant workforce disruptions caused by the COVID-19 pandemic. Not surprising, perhaps, in 2020, the education and health services industry super-sector accounted for over 75% of idled workers—again this trend may have been influenced by COVID-19 since both of these industries bore the brunt of work changes.[176]

In 2021, when the United States was slowly resuming normal operations, 80,700 workers were involved in major work stoppages. The service sector was hit the hardest, with 76% of all idled workers (or 61,000 workers) coming from service-providing industries. Within this sector, major work stoppages affected education and health services (52,600 workers idled), health care and social assistance (45,400 workers), and educational services (7,200 workers).[177] In 2022, this trend continued, with 98% of idled workers coming from the service-providing industries.[178]

Strikes in certain industries are inherently disruptive to the public and, therefore, bring more pressure to bear on employers to settle the dispute. For example, West Virginia schoolteachers went on strike in late February 2018 seeking a 5% pay raise; as a result of the strike, schools closed across the state for nine consecutive school days.[179] Mass transportation strikes are another example. In 2016, Southeastern Pennsylvania Transportation Authority (SEPTA) employees went on a nearly weeklong strike in Philadelphia, paralyzing a public transportation system that provides almost 1 million rides each weekday.[180] Among other things, the deal provided for wage increases and pension improvements.

Other notable strikes earlier in the decade include the continued expansion of the "Fight for $15" movement that began in late 2012 with a series of strikes at fast-food restaurants and a national retailer. Involving nonunionized workers, the movement pushes for wage increases to $15 per hour and the right to unionize without fear of retaliation. By 2015, the campaign expanded to over 15 airports—including Boston, Los Angeles, Miami, the New York area's three major airports, Philadelphia, and Washington, D.C. where airport workers pushed for a $15 minimum hourly wage, as well as health care, sick leave, retirement benefits, and job protections.[181] Walkouts, service disruptions, and strikes were all a part of the movement's arsenal. And the movement met with success in 2016 when both New York and California enacted phased-

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[174] U.S. Dep't of Labor, Bureau of Labor Statistics, News Release, *Major Work Stoppages in 2019* (Feb. 11, 2020).

[175] U.S. Dep't of Labor, Bureau of Labor Statistics, News Release, *Major Work Stoppages in 2020* (Feb. 19, 2021).

[176] U.S. Dep't of Labor, Bureau of Labor Statistics, News Release, *Major Work Stoppages in 2020* (Feb. 19, 2021).

[177] U.S. Dep't of Labor, Bureau of Labor Statistics, News Release, *Major Work Stoppages in 2021* (Feb. 23, 2022).

[178] U.S. Dep't of Labor, Bureau of Labor Statistics, News Release, *Major Work Stoppages in 2022* (Feb. 22, 2023), *available at* https://www.bls.gov/news.release/wkstp.nr0.htm.

[179] Eric Levenson & Sarah Jorgensen, *West Virginia Lawmakers Reach Deal to Give Striking Teachers Pay Raise*, CNN, Mar. 6, 2018, *available at* https://www.cnn.com/2018/03/06/us/west-virginia-teachers-strike/index.html.

[180] Camila Domonoske, *Philadelphia Transit Strike Ends, Just in Time for Election Day*, NPR, Nov. 7, 2016, *available at* https://www.npr.org/sections/thetwo-way/2016/11/07/500992200/philadelphia-transit-strike-ends-just-in-time-for-election-day.

[181] Luz Lazo, *Washington-area Airport Workers Join Fight for $15-an-hour Minimum Wage*, WASH. POST, Oct. 25, 2015, *available at* https://www.washingtonpost.com/local/trafficandcommuting/washington-area-airport-workers-join-fight-for-15-an-hour-minimum-wage/2015/10/25/3454ef98-774f-11e5-bc80-9091021aeb69_story.html.

in statewide minimum wage increases to $15 per hour. The District of Columbia and several localities followed suit in 2016, 2017, and beyond.

Not every strike is lawful. As one illustration, in *Smithfield Packing Co. v. NLRB*, the Fourth Circuit Court of Appeals held that employees were not entitled to walk off the job in protest of their employer's change in *management* personnel.[182] The court rejected the NLRB's determination that section 7 rights can be exercised over employment decisions that affect nonunion supervisory employees. Instead, the court held that section 7 protests must pertain to working conditions that affect employees covered by NLRA section 7.

In 2020, the COVID-19 pandemic caused a rise in actual or threatened walk-outs, "sick-outs," and other relatively informal work stoppage activity in both unionized and non-unionized workplaces. Such work stoppages and strikes continued in 2021 and 2022, accompanying the increase in union organizing efforts.

In March 2021, then Acting General Counsel Peter Sung Ohr issued a Guidance Memorandum advocating for "vigorous enforcement" of employees' rights to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection.[183] Ohr took the position that section 7 protection applies to not only union activity and labor organizing, but also to various forms of "employees' political and social justice advocacy when the subject matter has a direct nexus to employees' 'interests as employees.'"[184] The guidance lists examples including, among others, a hotel employee's interview with a journalist about how earning the minimum wage affected her and employees like her, and a "solo" strike by a pizza-shop employee to attend a demonstration for an increase in the minimum wage. General Counsel Jennifer Abruzzo takes a similarly expansive view of protected concerted activity.[185] Employers, therefore, should expect broad interpretation of employees' section 7 rights and enforcement in the coming years.

Employers received more welcome news, however, in an 8-1 decision issued by the U.S. Supreme Court on June 1, 2023. In *Glacier Northwest, Inc. v. International Brotherhood of Teamsters*, striking employees walked off the job and abandoned trucks filled with concrete, which could have caused the concrete to harden—rendering it unusable and the trucks it is stored in inoperable.[186] The Supreme Court ruled in the employer's favor that the NLRA does not preempt state law tort claims for property damage resulting from a strike when the strikers fail to take "reasonable precautions" against foreseeable and imminent harm.[187] As such, employers may bring an action in state court to recover for damage to its property, as opposed to bringing the issue before the Board. This decision will likely make it easier for employers to pursue damage claims against unions in state court. Conversely, it may make unions more wary of calling strikes that have

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[182] 510 F.3d 507 (4th Cir. 2007).

[183] Peter Sung Ohr, Office of the General Counsel, *Memorandum GC 21-03: Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines* (Mar. 31, 2021), *available at* https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

[184] Peter Sung Ohr, Office of the General Counsel, *Memorandum GC 21-03: Effectuation of the National Labor Relations Act Through Vigorous Enforcement of the Mutual Aid or Protection and Inherently Concerted Doctrines*, at 2 (Mar. 31, 2021).

[185] Jennifer A. Abruzzo, Office of the General Counsel, *Memorandum GC 21-04: Mandatory Submissions to Advice* (Aug. 12, 2021), *available at* https://apps.nlrb.gov/link/document.aspx/09031d4583506e0c.

[186] 143 S. Ct. 1404 (2023).

[187] 2023 U.S. LEXIS 2299, at **14-16.

the potential to damage employer property as the risk of litigation outside the Board's processes might act as a deterrent.[188]

§ 2.3(b) *Lockouts*

Lockouts are the flip side of strikes. Just as a union can withhold its members' services to exert economic pressure on an employer, an employer can lock out employees for the purpose of putting economic pressure on a union in support of its legitimate bargaining position. However, lockouts are unlawful if they are motivated by anti-union animus.[189] A lockout can be an extremely powerful tool for management.

In *Harter Equipment Inc.*, the NLRB held that an employer did not violate the NLRA when it hired temporary replacements during a lawful lockout, given the absence of specific proof that its actions were motivated by anti-union animus.[190] *Harter* gives an employer the right to decide whether and when to cause a work stoppage after a labor agreement expires. The employer's power to lock out employees has posed problems for unions contemplating "solidarity campaigns" (*i.e.*, campaigns in support of fellow union members) or other in-plant industrial actions.[191] An employer that reaches impasse with a union intent on causing in-plant turmoil can consider locking out employees as a preemptive measure to avoid the union's tactics.[192] For example, an employer need not wait until its employees decide to strike during the employer's busiest part of the year. Instead, the employer can lock out employees before the busy season arrives and hire temporary replacement workers so as not to disrupt operations.

In one of the longest-running lockouts, American Crystal Sugar, the largest U.S. sugar beet producer, locked 1,300 workers out after they voted to reject what the company called a final contract offer. The lockout began in August 2011; in July 2012, the AFL-CIO began a nationwide effort to end the lockout, but when its efforts were unsuccessful, it endorsed a nationwide consumer boycott of the company's products.[193] In April 2013, the union voted to accept the company's long-standing contract offer, which provided for a 4% wage increase in the first year, a 3% increase in the second year, and 2% increase the last two years.[194] In a more recent high-profile case, Major League Baseball (MLB) locked out MLB players from December 2, 2021 until an agreement was reached on March 10, 2022.[195]

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[188] Samuel Wiles & Kathryn E. Siegel, *Supreme Court Holds Employers Can Sue for Strike Damages*, LITTLER, June 7, 2023, *available at* https://www.littler.com/publication-press/publication/supreme-court-holds-employers-can-sue-strike-damages.

[189] *Dresser-Rand Co.*, 358 N.L.R.B. No. 97 (Aug. 6, 2012) (finding the lockout following the end of a strike unlawful because the lockout was discriminatorily motivated; the majority considered the employer's use of unfair labor practices after the lockout evidence of a discriminatory motive), *vacated*, 576 F. App'x 332 (5th Cir. 2014).

[190] *Harter Equip., Inc.*, 280 N.L.R.B. 597, 600 (1986); *see also International Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997) (employer did not commit an unfair labor practice by implementing a permanent subcontract for maintenance work during a lawful lockout and failing to produce a cost study on the proposed subcontract). *But see Local 15, IBEW v. NLRB*, 429 F.3d 651 (7th Cir. 2005) (employer may not lockout strikers who make an unconditional offer to return to work while not locking out those who either did not participate in the strike or crossed the picket line during the strike).

[191] *See Central Ill. Pub. Serv. Co.*, 326 N.L.R.B. 928 (1998).

[192] *See also Eads Transfer, Inc. v. NLRB*, 989 F.2d 373, 376 (9th Cir. 1993).

[193] *AFL-CIO Calls for Boycott of Crystal Sugar over 14-Month Lockout of BCTGM Workers*, 26 Lab. Rep. Wkly. (BNA), at 1853 (Oct. 10, 2012).

[194] Mark Wolski, *BCTGM Members OK American Crystal Offer, Ratification Soon Will End 20-Month Lockout*, 72 Daily Lab. Rep. (BNA), at A-9 (Apr. 15, 2013).

[195] *MLB lockout: MLB, MLBPA agree on new CBA*, ESPN, Mar. 10, 2022, *available at* https://www.espn.com/mlb/story/_/id/32882139/mlb-lockout-mlb-mlbpa-agree-new-cba.

§ 2.3(c) *In-Plant Actions*

Many unions implement in-plant or on-the-job actions to pressure employers into new contracts. These in-plant actions, known as *contract campaigns*, have been trumpeted by high-level union leaders. A common element of most in-plant campaigns is a *work to rule* policy, which slows production while technically keeping employees "on the job." According to the AFL-CIO, working to the rules can throw any work site into a "frenzy" because workers refuse to do work outside of their job descriptions and decline to use productivity and timesaving skills they have developed through years of job experience.

Other common strategies of in-plant campaigns include: employee rallies on company property; wearing matching T-shirts, buttons, and arm bands to demonstrate solidarity; coordinated "sick-outs;" media campaigns; stockholder resolutions; and consumer boycotts. These strategies likely will continue to be employed by unions because of their ability to place stress on a company.

Generally, employers may not bar employees from wearing buttons, T-shirts, and other clothing that contain slogans protesting terms and conditions of their employment.[196] However, there may be circumstances under which an employer can place restrictions on this right. In *Southern New England Telephone Company v. NLRB*, the D.C. Circuit Court of Appeals held that the telephone company had a right to forbid employees, when interacting with the public, from wearing T-shirts that the company reasonably believed could harm its relationship with customers or its public image.[197] During contract negotiations, the union urged employees to wear T-shirts that said "INMATE" on the front and "Prisoner of [company]" on the back. The company permitted employees to wear the shirts in offices and other non-public workspaces, but instructed employees not to wear them when interacting with customers or working in public. The union filed an unfair labor practice charge after the company issued one-day suspensions to 183 employees who refused to comply. In overturning the Board's ruling, the D.C. Circuit noted that it is well established that when an employer can show "special circumstances," its right to limit or prohibit the display of union insignia can outweigh an employee's right to display it. The court recognized that while the employer bears the burden of establishing special circumstances, it can meet that burden "by demonstrating a reasonable belief that the message may damage customer relations—even in the absence of evidence of actual harm."[198]

In a 2019 case, a three-member Board held that a rule permitting "small, non-distracting logos or graphics…no longer than the size of your [employee] name badge" was lawful as applied specifically in sales areas because of the store's interest in maintaining customers' sales experience.[199] In August 2022, the latter decision was overruled and the Board reaffirmed that if an employer interferes with an employee's right to display union insignia, the employer must prove that there were special circumstances to justify such a decision.[200]

§ 2.3(d) *Sick-Outs*

In some industries where union members cannot strike, "sick-outs" have been used with increasing success to disrupt employer operations. A *sick-out* occurs when all or a substantial percentage of the employer's unionized employees call in sick and refuse to report to work. A sick-out may be protected concerted

196 *NLRB v. Mead Corp.*, 73 F.3d 74 (6th Cir. 1996).

197 793 F.3d 93 (D.C. Cir. 2015).

198 793 F.3d at 96.

199 *Wal-Mart Stores*, 368 N.L.R.B. No. 146 (Dec. 16, 2019).

200 *Tesla, Inc.*, 371 N.L.R.B. No. 131 (Aug. 29, 2022).

activity where the employer knew or had reason to know that the employees were not really sick, but were engaged in a work stoppage to protest their working conditions.[201]

These tactics are particularly effective in the transportation industry. For example, as a result of a three-day sickout by operators in 2014, the San Francisco Municipal Transportation Agency operated its buses, trolley coaches, cable cars, and other lines at 54%, 61%, and 80% of total service.[202] Although the Transport Workers Union Local 250-A denied any involvement in the sickout, San Francisco's City Attorney filed unfair labor practice charges against the union to pressure the union to end the sickout. The widespread repercussions of such tactics were also felt in Cobb County, Georgia in December 2017, when 50 unionized bus drivers called out sick on the same day in the midst of a labor dispute with the bus company.[203]

Sickouts have also been used in the educational setting. A teacher sickout to protest unsafe working conditions closed over 80 schools in the Detroit Public School system in 2016.[204] A court ultimately ruled against the school system in its lawsuit against two teachers involved in the sickout.[205]

The publicity garnered by sick-outs may prompt other rank-and-file employees to consider this tactic, especially when they do not have the right to strike. However, union leaders often try to disclaim involvement in sick-outs for fear of being fined by the NLRB. Some no-strike clauses cover sick-outs, which means employees who participate in such an action may be violating the collective bargaining agreement. In the absence of a contractual prohibition, employers may be entitled to enforce their reasonable attendance, absenteeism, and reporting policies.

§ 2.3(e) *Replacing Economic Strikers*

An employer may permanently replace striking employees.[206] NLRA section 13 prohibits interpreting the statute, except as specifically provided, so as "to interfere with or impede or diminish in any way the right to strike."[207] However, section 13 does not cause an employer to forfeit "the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the place of strikers, upon the election of the latter to resume their employment, in order to create places for them."[208]

Over the last few decades, the power of the permanent replacement weapon has been weakened somewhat by the Board and courts. For example, the Sixth Circuit Court of Appeals agreed with the Board that an employer was prevented from hiring permanent replacements because an employee work stoppage was in

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[201] *Tri-State Wholesale Bldg. Supplies, Inc.*, 362 N.L.R.B. No. 85, at *18 (Apr. 30, 2015) (citing *Safety Kleen Oil Services, Inc.*, 308 N.L.R.B. 208, 209 (1992)).

[202] *Muni's Sickout Ends and Even the Cable Cars are Returning*, KQED NEWS, June 5, 2014, *available at* https://www.kqed.org/news/137717/san-francisco-muni-operators-may-stage-monday-sick-out.

[203] Meris Lutz, *Cobb Bus Drivers Stage Apparent Sick Out Over Payroll Issues*, ATLANTA JOURNAL-CONSTITUTION, Dec. 19, 2017, *available at* https://www.myajc.com/news/local-govt--politics/cobb-bus-drivers-stage-apparent-sickout-over-payroll-issues/hXhKR7W1Cw1uGxu3mLWwCI/.

[204] Emma Brown, *Rats, Roaches, Mold—Poor Conditions Lead to Teacher Sickout, Closure of Most Detroit Schools*, WASH. POST., Jan. 20, 2016, *available at* https://www.washingtonpost.com/news/education/wp/2016/01/20/rats-roaches-mold-poor-conditions-leads-to-teacher-sickout-closure-of-most-detroit-schools.

[205] Ann Zaniewski, *Judge Rules Against DPS in Teacher Sick-Out Case*, DETROIT FREE PRESS, Aug. 18, 2016, *available at* https://www.freep.com/story/news/education/2016/08/18/sickout-lawsuit-ruling/88970526/.

[206] *NLRB v. Mackay Radio & Tel. Co*, 304 U.S. 333 (1938).

[207] 29 U.S.C. § 163; *Mackay Radio & Tel. Co.*, 304 U.S. at 345.

[208] *Mackay Radio & Tel. Co.*, 304 U.S. at 345.

protest of dangerous workplace conditions.[209] In *TNS, Inc.*, the Board used a four-part test to determine that a work stoppage involving cumulative, slow-acting dangers to employee health and safety was protected under NLRA section 502. The test required the union to demonstrate, by a preponderance of the evidence, that: (1) the employees believed in good faith that their working conditions were abnormally dangerous; (2) the employees' belief was a contributing cause of the work stoppage; (3) the employees' belief was supported by ascertainable, objective evidence; and (4) the perceived danger posed an immediate threat of harm to employee health or safety. The *TNS* decision gives unions leeway to claim health and safety concerns as justifications for strikes and helps to ensure employees are not permanently replaced because of health and safety issues.

There are other significant limitations on an employer's right to permanently replace strikers. In *Laidlaw Corp.*, the NLRB held:

> [E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements remain employees and are entitled to full reinstatement upon the departure of replacements unless [the strikers] have in the meantime acquired regular and substantially equivalent employment elsewhere, or the employer can sustain [its] burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.[210]

Designating replacement workers as "permanent" can have negative effects. For example, a union faced with having its membership "permanently" replaced may retaliate with a tougher bargaining position on the theory that it cannot afford to make concessions except in exchange for the reinstatement of its strikers. Also, individual employees may retaliate by engaging in picket line violence or other misconduct.

Employers should not make unsubstantiated threats regarding the replacement of strikers. In *American Linen Supply Co.*, the Board held that the company violated NLRA sections 8(a)(3) and 8(a)(1) when it terminated economic strikers and informed them they had been permanently replaced, when in fact, no permanent replacements had been hired.[211] The employer distributed a memorandum informing employees that they had 10 minutes to return to work or "be permanently replaced." The Board found the memorandum constituted an unlawful threat of discharge, and the terminations were unlawful because the company never corrected its false claim.

One-day strikes present difficulties for employers that wish to utilize replacement workers. Temporary replacements in the hospital context are often hired pursuant to five-day contracts, while other strikers may be replaced by in-house managers, supervisors, or non-unit employees. The Board sees a legal distinction between the two approaches. It has held that economic strikers replaced by temporary contract workers may have their reinstatement delayed for the full five-day period, while strikers replaced by in-house personnel may not have their return delayed by four days after a one-day strike.[212] Thus, when deciding whether and

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[209] *TNS, Inc.*, 329 N.L.R.B. 602 (1999), *vacated*, 296 F.3d 384 (6th Cir. 2002). Although the Sixth Circuit upheld this principle, it vacated the Board's finding of objective evidence of abnormal danger and vacated the Board's order due to inexcusable delay in prosecuting the case.

[210] 171 N.L.R.B. 1366, 1369–70 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

[211] 297 N.L.R.B. 137 (1989), *enforced*, 945 F.2d 1428 (8th Cir. 1991).

[212] *Compare Encino-Tarzana Reg. Med. Ctr.*, 332 N.L.R.B. 914 (2000) (employer faced with a 1-day strike lawfully hired temporary replacements for a contractual 4-day minimum, and during the 3 days after the strike, the employer was not obligated to displace crossovers with more senior returning strikers under the employer's "call off" procedure), *with Sutter Roseville Med. Ctr.*, 348 N.L.R.B. 637 (2006) (hospital failed to establish substantial and legitimate business justification for delayed reinstatement).

who to use as replacement workers, employers should consider how soon they want their striking employees to return to work.

The 2021 PRO Act, which passed the U.S. House of Representatives in March 2021, proposed to prohibit the replacement of strikers, a significant change.[213] However, the 2021 version never made it to the floor of the Senate and the reintroduced bill faces steep opposition in the current legislative climate. The current NLRB General Counsel has advocated for the NLRB to revisit cases involving an allegation that an employer's permanent replacement of economic strikes had an unlawful motive.[214]

§ 2.3(e)(i) *Unemployment Compensation Implications*

In many states, employees who voluntarily leave work because of a trade dispute are not eligible for unemployment benefits while the dispute continues and the employees have the option of returning to work. Designating replacements as permanent, however, may enable strikers to obtain unemployment compensation if jobs are not available for strikers. A permanently replaced employee generally becomes eligible for unemployment compensation benefits when the employee's unemployment is no longer voluntary. But where jobs *are* available, the benefit disqualification applies. Thus, leaving some positions open when strikers are replaced may preserve the disqualification for all strikers.[215]

§ 2.3(e)(ii) *Rights of Replacement Workers*

The rights of individuals hired as strike replacements were significantly broadened by the U.S. Supreme Court in *Belknap, Inc. v. Hale*.[216] Employee who are told they are a "permanent" replacement can bring a state court breach of contract action on that promise because the state has "a substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm."[217] Thus, an employer that informs replacements they are "permanent," but then discharges them to allow strikers to return to work, may face a state court wrongful termination action by the replacements. In other circumstances, the NLRB may order an employer to reinstate striking workers if the strike is converted into an unfair labor practice strike. In either case, there is a serious risk that the permanent replacements will sue for wrongful discharge if they are terminated to make room for returning strikers. Employers should carefully word employment offers to replacement workers to minimize the potential for these problems.

An employer may lawfully refuse to displace workers who cross the picket line when strikers with more seniority want their jobs back at the end of the strike. In reaching this decision, the Supreme Court stated, "we see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful."[218]

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[213] Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (2021).

[214] Jennifer A. Abruzzo, Office of the General Counsel, *Memorandum GC 23-04: Status Update on Advice Submissions Pursuant to GC Memo 21-04, available at*https://www.nlrb.gov/guidance/memos-research/general-counsel-memos.

[215] *See, e.g., Bridgestone/Firestone, Inc. v. Employment Appeal Bd.*, 570 N.W.2d 85 (Iowa 1997) (employees who were permanently replaced were eligible for unemployment); *Bridgestone/Firestone, Inc. v. Aldridge*, 688 N.E.2d 90 (Ill. 1997) (strikers could qualify for unemployment compensation if they could show that they sought interim employment in good faith, rather than making a sham effort to obtain unemployment benefits).

[216] 463 U.S. 491 (1983); *see also United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. NLRB*, 544 F.3d 841 (7th Cir. 2008) (denying union's petition for review; holding that NLRB reasonably concluded that employer did not violate NLRA by refusing to reinstate economic strikers because it had offered permanent employment to replacement workers).

[217] *Belknap*, 463 U.S. at 511.

[218] *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 438 (1989).

Permanent replacements on temporary layoff may be recalled to work before economic strikers who retain recall rights. A union that challenges the recall of replacement workers must prove that the laid-off employees had no reasonable expectation of recall and that the layoff was permanent. Conversely, should permanent replacements be given notice as to the projected length of a temporary layoff, they retain preferential rights to return before economic strikers.[219]

An employer can prospectively use the permanent replacement weapon against employees who are considering a strike. In *Pirelli Cable Corp. v. NLRB*, the employer sent a letter to employees during negotiations informing them that their jobs could be taken by replacement workers if they struck over economic issues.[220] The employees struck after rejecting the employer's proposed contract. The company hired replacement workers and did not rehire the strikers after the union made an unconditional offer to have its members return to work. The court explained that the letter did not convert the strike into an unfair labor practice strike because the letter merely explained the rights the employer had when employees struck.[221]

§ 2.3(e)(iii) *Crossing the Picket Line*

Prior to the 1980s, unions had a time-honored rule that they could discipline members for crossing a lawful picket line. Then, in *Patterson Makers League v. NLRB*, the U.S. Supreme Court ruled that a union member's right to resign from the union is protected by the NLRA.[222] When a union member lawfully resigns, the union loses control over the former member, and the *ex-member* may cross a picket line and return to work without being fined or otherwise disciplined by the union. Thus, it is extremely difficult for a union to maintain a long strike if the union begins to experience significant member resignations. Accordingly, management should be aware that it has the right to truthfully advise employees of their resignation rights in response to legitimate inquiries. However, no management representative should encourage resignation or actively assist employees in writing union resignation letters.

§ 2.3(e)(iv) *Rights of Strikers*

Another frequent issue for striking employees is whether a union will waive or modify the rights of un-reinstated strikers. In *United Aircraft Corp.*, the Board held that unions can agree to limit the rights of un-reinstated strikers.[223] In that case, the strike settlement agreement provided for reinstatement of strikers as work became available, but that all such reinstatement rights terminated approximately four-and-a-half months after the strike was settled. The Board reasoned that:

> So long, therefore, as the period fixed by agreement for the reinstatement of economic strikers is not unreasonably short, is not intended to be discriminatory, or misused by either party with the object of accomplishing a discriminatory objective, was not insisted upon by the employer in order to undermine the status of the bargaining representative, and was the result of good faith collective bargaining, the Board ought to accept the agreement of the parties as effectuating the policies of the Act which, as we have previously stated,

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[219] *Aqua-Chem, Inc., Cleaver Brooks Div.*, 288 N.L.R.B. 1108 (1988), *enforced*, 910 F.2d 1487 (7th Cir. 1990).

[220] 141 F.3d 503 (4th Cir. 1998).

[221] *See also Jones Plastic & Eng'g Co.*, 351 N.L.R.B. 61 (2007) (employer did not violate NLRA section 8(a)(3) by refusing to reinstate striking employees because it represented to "at-will" replacement workers that they were hired as permanent replacements).

[222] *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985).

[223] 192 N.L.R.B. 382 (1971), *enforced in part sub nom., Lodges 743 & 1746, Int'l Ass'n of Machinists & Aerospace Workers v. United Aircraft Corp.*, 534 F.2d 422 (2d Cir. 1975).

> includes as a principal objective encouragement of the practice and procedure of collective bargaining as a means of settling labor disputes.[224]

An employer has no duty to bargain over wages for workers who replace economic or unfair labor practice strikers.[225] These wages may be higher or lower than striking employees' wages or wages proposed during negotiations, provided there is no evidence the employer set the wages in bad faith.

Providing "perks" to employees who remain working during a strike or, conversely, withholding benefits from striking workers may raise an unfair labor practice charge. For example, the Eighth Circuit Court of Appeals ruled that an employer's withholding of accrued vacation benefits from striking workers who were permanently replaced was an unfair labor practice.[226] After the contract that contained the vacation benefits provision expired, union workers went on strike and were permanently replaced. The company refused to pay vacation benefits to employees who did not meet the newly-imposed eligibility criteria for hours worked. The company argued it had legitimate business reasons for denying the vacation benefits, and that it was entitled to unilaterally assert new terms regarding accrued vacation benefits once negotiations reached impasse. The NLRB rejected that argument and held that already-accrued vacation benefits were a mandatory subject of bargaining for which the company could not unilaterally implement terms. The Eighth Circuit further held that such benefits are debts that arise out of the contract, which are due and owing upon its expiration.

There may also be risk to an employer that cancels medical benefits for strikers. In *Hawaiian Telcom, Inc.*, the Board found that an employer violated sections 8(a)(1), (3), and (5) of the NLRA when it cancelled medical and dental benefits during a two-day strike that occurred after a collective bargaining agreement had expired.[227] Coverage under the plans was restored retroactively after the employees returned to work. The majority held that eligibility for the benefits had previously accrued under the collective bargaining agreement and was not dependent upon the continued performance of work. This decision effectively reversed two earlier Board decisions holding that an employer could lawfully deny continuous service credit and medical insurance benefits during a period when employees were on strike.[228]

§ 2.3(f) *Corporate Campaigns*

The term *corporate campaign* has no fixed meaning. The term originally referred to a union's attempt to make workers' voices heard through connections among corporate boards of directors, the governing bodies of publicly traded companies, and the financial networks that support business entities. Now, the phrase describes a catch-all of union tactics that fall outside the traditional organizing and collective bargaining context. Such tactics include litigation, public pressure by use of various media outlets, political figures, shareholder activity, and pressure on influential outside parties such as the employer's clients or potential clients. In 2020, this led to the phenomenon of minority labor unions, which are organizations made up of individuals who seek to advocate for their rights and other social justice issues, and the growing trend of company unions in 2022. Employers must consider this collective activism because even though minority unions do not have the ability to compel an employer to negotiate a collective bargaining agreement,

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[224] 192 N.L.R.B. at 388; *see also Road Sprinkler Fitters Local Union 669 v. Herman*, 234 F.3d 1316 (D.C. Cir. 2000) (following holding in *Detroit Newspaper Agency*); *Detroit Newspaper Agency*, 327 N.L.R.B. 871 (1999) (employer did not violate the Act by unilaterally setting the terms and conditions of employment for striker replacements); *Gem City Ready Mix Co.*, 270 N.L.R.B. 1260 (1984) (union may waive full prestrike seniority on behalf of returning strikers in return for an opportunity to end the strike and return to work).

[225] *Service Elec. Co*., 281 N.L.R.B. 633 (1986); *Detroit Newspaper Agency*, 327 N.L.R.B. 871 (1999).

[226] *NLRB v. Swift Adhesives*, 110 F.3d 632 (8th Cir. 1997).

[227] 365 N.L.R.B. No. 36 (Feb. 23, 2017).

[228] *Simplex Wire & Cable Co.*, 245 N.L.R.B. 543 (1979); *General Elec. Co.*, 80 N.L.R.B. 510 (1948).

activists may put pressure on employers through work stoppages and other harmful public relation campaigns.[229]

In one of the more visible corporate campaigns of recent years, large national retailers have been subject to a creative mix of themes: opposition to "big box" stores for alleged environmental reasons; claims of discrimination against women; attacks on allegedly inadequate health insurance coverage; nationwide, multi-store, one-day strikes; planned protests in front of stores featuring politicians; coordinated activities encouraging customers to come into a store but not purchase any product; organized confrontations with management in which groups of employees simultaneously confront a manager to present the manager with various grievances; and instigation of a government investigation into alleged improprieties.

§ 2.3(f)(i) *Sponsoring Lawsuits Against Employers*

Many unions fund employee lawsuits against employers. For example, in 2015, the Teamsters continued to support port truck drivers in petitioning federal state and local agencies and bringing private wage and hour lawsuits to challenge their alleged misclassification as independent contractors.[230] These tactics may pass muster if challenged before the NLRB. In *52nd Street Hotel Association*, the Board concluded that the union did not engage in objectionable pre-election conduct by funding a FLSA lawsuit brought by bargaining unit employees against the company eight days before a representation election.[231]

However, the lawsuit tactic backfired against a union in *Freund Baking Co. v. NLRB.*[232] The union's attorney filed a class action lawsuit against the company alleging nonpayment of overtime one week before a union election. The day before the election, union representatives distributed a flyer to employees advising them that the lawsuit had been filed and that the union was sponsoring the lawsuit. The union subsequently won the election, and the employer challenged the results. The D.C. Circuit Court of Appeals held that the union's sponsorship of the lawsuit violated the rule that prohibits unions from providing gratuities to employees during the "critical period" in an election campaign.

Employers embroiled in union-fueled lawsuits may be entitled to relief under statutes like the NLRA and the Racketeer Influenced and Corrupt Organizations Act (RICO), common law defamation and slander theories, and criminal charges for threats, violence, and other conduct. For example, in *Bayou Steel Corp. v. Steelworkers*, a federal court rejected a union's motion to dismiss an employer's complaint that included causes of action against the union for conspiracy to unlawfully seize control of the company through extortion and fraud, civil conspiracy to cause assault and battery, malicious interference with business, civil conspiracy for assisting or encouraging wrongful acts, and interference with business.[233] The court ruled that the employer's complaint, which detailed the "corporate campaign of harassment and violence" engaged in by the union as an attempt to "take over or destroy" the company, alleged sufficient facts to support its RICO claims.

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[229] Stefan Marculewicz, Alan I. Model, & Tanja L. Thompson, *Minority Unions – A Major Concern for Employers in 2021 and Beyond?*, LITTLER, Jan. 11, 2021, *available at* https://www.littler.com/publication-press/publication/minority-unions-major-concern-employers-2021-and-beyond.

[230] Teamsters, *Port Truck Drivers at 3 Major Drayage Firms Return to Work*, May 1, 2015, *available at* https://teamster.org/news/2015/05/teamsters-port-truck-drivers-3-major-drayage-firms-return-work.

[231] 321 N.L.R.B. 624 (1996). *But cf. Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995) (court refused to enforce bargaining order after the union filed a Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit against the employer as class representative of employees during the critical pre-election period).

[232] 165 F.3d 928 (D.C. Cir. 1999).

[233] 151 L.R.R.M. (BNA) 2252 (D. Del. 1996).

§ 2.3(f)(ii) *Using the Media*

While many unions make effective use of media outlets, there are risks involved with such tactics. For example, in a highly publicized dispute between the UFCW and the Food Lion supermarket chain, the UFCW and the Food and Allied Services Trade Union (FAST) engaged in an extensive corporate campaign against Food Lion. As part of the ongoing campaign, the union leaked information to the ABC News show "Prime Time Live," which alleged that the stores sold rotten food, provided ABC a roster of disgruntled former employees to interview, and arranged for an undercover reporter to get a job at Food Lion. The story was denounced as a union propaganda piece, and a federal jury ordered ABC to pay Food Lion $5.5 million in punitive damages for the news program's fraudulent news gathering methods. Unions are increasingly turning to social media as the outlets of choice.

§ 2.4 LABOR'S RESPONSE TO CORPORATE REORGANIZATIONS

Unions have adopted and refined several aggressive strategies in response to corporate mergers and reorganizations, which often result in layoffs and changes of employee status. These techniques may involve state and federal courts, labor arbitrators, sympathetic clergy, social activists, and various governmental entities in an effort to forestall corporate reorganization or, at a minimum, make reorganization prohibitively expensive. Unions have expanded their arsenal in recent years, enabling them to more effectively attack both predecessor and successor entities involved in a reorganization. Unions are increasingly attempting to bind successor employers to predecessor employers' contracts and/or hold predecessor employers liable for damages.

Another approach unions use to protect themselves from downsizing, mergers, and other forms of corporate reorganization is to negotiate contracts that require companies to invest capital for the purpose of enhancing the long-term stability of their facilities. This strategy is most common in auto, steel, and other industries where job viability is contingent upon management's willingness to reinvest capital in its operations.

Attacks on the buyer are usually limited to the filing of unfair labor practice charges alleging either alter-ego status or a violation of the *Burns* "perfectly clear" doctrine.[234] General Counsel Jennifer Abruzzo has lauded the utilization of 10(j) injunctions against alleged successors.[235] Occasionally, the buyer is named as a defendant along with the seller under the theory that the two entities are in fact the same. If the union prevails, both entities will be in breach of the collective bargaining agreement if the buyer fails to apply the seller's contract to the new entity's employees.

In contrast, attacks against the seller continue to expand and are becoming more imaginative. The seller faces potential liability on various fronts, including in federal and state court, arbitration and before the NLRB. The following examples are illustrative.

§ 2.4(a) *Status Quo Injunctions*

Unions often attempt to use contract clauses (express and implied) to obtain an injunction prohibiting the seller's transfer of assets to the buyer pending arbitration over whether the buyer must comply with the seller's collective bargaining agreement. To obtain injunctive relief, the union must show that the underlying dispute is arbitrable (*i.e.*, covered by the collective bargaining agreement) and that the sale would render a future arbitration award meaningless. As with any request for injunctive relief, the union

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[234] For more information about alter-ego and successor status, see **LITTLER ON CORPORATE RESTRUCTURING**.

[235] Jennifer A. Abruzzo, Office of the General Counsel, *Memorandum GC 21-05: Utilization of Section 10(j) Proceedings* (Aug. 19, 2021), *available at* https://www.nlrb.gov/guidance/memos-research/general-counsel-memos. *available at* ;.

must show a likelihood of success on the merits, irreparable injury absent injunctive relief, and a balancing of the equities that weighs in favor of injunctive relief.

§ 2.4(b) *Grievances Against the Seller*

Unions may lodge grievances against a seller on the basis that express or implied contractual provisions restrict the seller's right to dispose of its assets. Some contracts contain clauses that require advance notice to the union of contemplated sales or transfers or require a seller to obtain the buyer's commitment to adopt the bargaining agreement as a condition of sale or transfer.

Absent an explicit "condition of sale" clause, unions generally rely on a bargaining agreement's successors-and-assigns clause. These clauses usually state that an agreement will bind an entity's successors or any other company to which a seller's assets are transferred, leased, or assigned. Arbitrators rarely construe a general successors-and-assigns clause as creating liability for a buyer or seller for a buyer's failure to abide by the collective bargaining agreement. Nevertheless, one line of arbitration decisions holds the seller liable in successorship situations.[236]

Unions also may file grievances over severance pay when the seller's employees are terminated and immediately rehired by the buyer.[237] Because of this union strategy, employers should attempt to negotiate contract language that provides for severance pay only in the event that employees lose work because of the corporate transition. Severance issues may also be addressed in transaction documents. For a more detailed analysis of severance issues relating to the transaction, see **LITTLER ON CORPORATE RESTRUCTURING**.

Unions sometimes advance grievances on the theory that a collective bargaining agreement impliedly limits the company's right to reorganize or that past union concessions imply a promise by management to maintain the operation's existence. These theories are not widely accepted, but they can pose a potential threat to sellers. For these reasons, companies should try to negotiate explicit contract language that protects against liability in the event of sale, transfer, lease, or other reorganization.

§ 3 PRACTICAL GUIDELINES FOR EMPLOYERS

§ 3.1 COLLECTIVE BARGAINING GENERAL CONSIDERATIONS

The general considerations discussed below are not intended to set standards of care, nor are they intended to be a comprehensive or mandatory listing of the specific steps to be taken in handling a particular matter. Rather, they provide a broad outline of certain considerations an employer may want to keep in mind as it engages in collective bargaining.

- **Relationship with Union.** Develop an honest, respectful, and professional relationship with union leadership. This will enhance the employer's credibility during negotiations and increase the likelihood of a mutually acceptable negotiated resolution of the contract.

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[236] *Marley-Wylain Co.*, 88 LA 978 (Jacobowski 1987) (seller liable under a general successors-and-assigns clause for the buyer's failure to assume the collective bargaining agreement); *Kohn, Inc.*, 93 LA 1124 (Dworkin 1989) (seller liable for failure to require the buyer to assume the collective bargaining agreement because sale transferred practically all of the seller's operating assets to the buyer and amounted to the transfer of intact operations); *Boardman Co.*, 91 LA 489 (Harr 1988) (same).

[237] *Ala Moana Volkswagen*, 91 LA 1331 (Tsukiyama, 1988); *Atlantic Richfield Co.*, 91 LA 835 (Nelson, 1988).

- **Union Information Requests.** Use best efforts to try to respond promptly to all valid information requests by the union. Remember that unions may use information requests to set employers up for unfair labor practice charges. If the request does not pertain directly to the wages, hours, or working conditions of bargaining unit employees, ask the union to justify the request. If the union's requests are legitimate, but onerous, or seek confidential information, consider negotiating a cost sharing agreement and/or a confidentiality agreement.

- **Good Faith Bargaining.** The employer is obligated to bargain over mandatory subjects of bargaining, including wages, hours, and other terms and conditions of employment, in good faith with the union. *Good faith* generally means the employer intends to reach an agreement, is willing to compromise, and will meet with representatives of the union's choosing at reasonable times and places. Employers are not obligated to agree to any particular proposal or to make any particular concession; however, the Board looks to a general willingness to make concessions as evidence of good faith. This requirement suggests that the company go to the bargaining table with some proposals that it can trade away.

- **Illegal Subjects of Bargaining.** The parties are prohibited from demanding any of the following illegal subjects of bargaining:

  - contract provisions whereby the employer agrees not to do business with another employer or agrees to refrain from dealing in the products of another employer ("hot cargo clauses");

  - hiring-hall provisions that give preference to union members;

  - contract provisions inconsistent with a union's duty of fair representation; and

  - contract clauses that discriminate among employees on an individual basis, such as race, religion, sex, national origin, age, or disability. For example, many old collective bargaining agreements still contain dangerous provisions regarding fitness of employees, which may violate the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), and/or state age discrimination, disability discrimination, and workers' compensation laws.

- **Permissive Subjects of Bargaining.** The parties may bargain over permissive subjects, which are collective bargaining subjects about which the parties can agree to bargain but upon which they cannot insist as a condition of agreement. Either party may refuse to bargain over permissive subjects of bargaining. Examples of permissive subjects of bargaining include:

  - scope of the bargaining unit;

  - parties to the collective bargaining agreement (such as including the international union as well as the local union, where only the local is certified);

  - administrative expense funds;

  - use of union labels;

  - settlement of unfair labor practice charges or other litigation, including grievances arising under the expired collective bargaining agreement;

- inclusion of supervisors in the bargaining unit or including provisions that apply to supervisors (other than when they may be performing bargaining unit work);
- interest arbitration;
- using a mediator in bargaining; and
- internal union affairs, such as ratification procedures.

- **Mandatory Subjects of Bargaining.** Employers must negotiate over all mandatory subjects of bargaining proposed by the union, even if they seem trivial. Some mandatory subjects that are sometimes overlooked by employers:
  - drug and alcohol testing;
  - work rules, including those concerning dress codes, parking regulations, lunch breaks, absenteeism, limits on smoking, and job safety standards;
  - performance of bargaining-unit work by persons not in the unit;
  - selection of benefit plan administrators;
  - Christmas bonus/Thanksgiving turkeys;
  - employee parking; and
  - availability of vending machines on work premises.

  Note that in 2020, the NLRB held that before a first contract is negotiated, an employer does not have a duty to bargain with the union about the discretionary elements of an existing discipline policy before imposing serious discipline on individual employees.[238] The decision overruled 2016 precedent that imposed such a duty, and returned to the longstanding rule that employers may take disciplinary action as long as it is consistent with the employer's policy and practice. However, the Board may change its position again.

- **Bad Faith Bargaining.** The conclusion that bad faith bargaining has occurred is typically determined by the totality of the surrounding circumstances, both at and away from the bargaining table. The employer should not engage in the following conduct that violates the duty to bargain in good faith:
  - bargaining directly with employees;
  - refusing to meet at reasonable times;
  - surface bargaining (merely going through the motions of bargaining with no intent to reach agreement);

[238] *800 River Rd. Operating Co., L.L.C. d/b/a Care One at New Milford*, 369 N.L.R.B. No. 109 (June 23, 2020).

- demanding provisions that confer upon the employer exclusive control over an excessive number or very significant terms and conditions of employment; and

- refusing to sign a written agreement reached between the parties through collective bargaining.

- **Proposals.** If an employer wants to modify or add to the contract or change past practices, it must propose a contract change. If the collective bargaining agreement already covers a subject matter or is silent on the subject, the employer must negotiate with the union regarding its proposal to change the status quo. The employer cannot make changes to the collective bargaining agreement or past practices without first bargaining with the union and: (1) obtaining the union's consent for the change; or (2) bargaining to impasse about the change.

- **Impasse.** If the employer and union have made their final bargaining proposals and are unwilling to make further concessions to reach an agreement, then impasse has been reached. Employers must bargain for a reasonable period of time before an impasse can be officially declared. The employer must not bargain to the point of impasse over any non-mandatory or illegal subjects of bargaining. If impasse is reached in bargaining and the proper contract termination notices have been sent to the union and to the state and federal mediation services, the employer may implement the terms of its final offer. But if the impasse is tainted by an unfair labor practice that causes or prolongs the impasse, any unilateral changes may be unlawful and could be the basis for an unfair labor practice strike. Note that, except in limited circumstances, impasse must be reached on all negotiating issues before the employer's final offer may be implemented. Furthermore, the employer's entire final offer (minus no strike clause, union security, dues checkoff, and arbitration provisions), and not only selected proposals, must be implemented.

- **Prepare Notes Detailing Bargaining Sessions.** A note-taker should prepare a set of typed notes ideally during each bargaining session and circulate them to the employer's bargaining team members for review before the start of the next session. Bargaining notes are crucial because they set forth the bargaining history, which can be used in grievances and arbitrations, during subsequent negotiations, and to defend against unfair labor practice charges.

- **Organization.** The note-taker should maintain well-organized files to document the bargaining history, including a clean copy and marked-up copies of all union and company proposals, all tentative agreements, all information requests and responses, all documents exchanged in bargaining, including those passed across the negotiating table (showing the date and time when exchanged), and typed notes of each bargaining session. Ideally, the files should include a short bargaining history summary containing, for each bargaining session, the meeting number, the date, summary of what happened at that session, notation of all proposals tendered by either side, notation of any information requested or provided, and notation of any tentative agreements reached during that session.

§ 3.2 STEPS TO MINIMIZE EFFECT OF "REFUSAL TO BARGAIN" CHARGE

Rather than passively waiting for a refusal-to-bargain charge to be filed, employers should try to plan and conduct negotiations in a manner calculated to minimize the probability of such a charge or, at a minimum, in a manner that may help to defend against such a charge. The following techniques and strategies provide guidance for negotiating in this proactive manner.

- **Prepare to Document Union Stalling Techniques.** Prior to and during the negotiating process, the employer should suggest dates and convenient negotiating times to the union in writing. Follow-up correspondence should be sent if the union does not respond in a timely fashion. If the employer is prepared to implement upon impasse, numerous meetings should be scheduled in advance. Although there is no minimum number of meetings that must be held to reach impasse, the Board rarely finds a supportable impasse after just a few meetings. It is more likely to find impasse after a half dozen or more lengthy meetings at which the major outstanding issues are discussed. In addition, an employer should never declare impasse before it has explained all of its bargaining proposals to the union.[239]

- **Make Proposals in Writing.** To the extent it is feasible to do so, written proposals will minimize the union's ability to stall negotiations by claiming confusion over the details of the company's proposals. Written proposals are also helpful in preventing the union from mischaracterizing the employer's positions throughout negotiations. This minimizes the probability that the union will allege regressive bargaining by the company.

- **Include Agreed-On Provisions in Updated & Revised Offers.** Note any tentative agreements reached between the parties on specific proposals. This will keep the negotiations moving and remind the parties of previous agreements while simultaneously maintaining focus on unresolved issues.[240]

- **Focus on Major Issues.** While it is standard practice to initially negotiate contract language items and save economic issues for later in the bargaining process, there is no legal requirement that negotiations be conducted in this fashion. Focusing negotiations on major outstanding issues will keep the negotiations from getting bogged down in minutia, a common union-delaying tactic. While older contracts may require substantial revision to remove obsolete contract provisions, proposing many language changes (*i.e.*, rewriting the contract) without any real need to do so is a poor bargaining strategy as it can unnecessarily prolong negotiations.

- **Keep Accurate, Contemporaneous Bargaining Notes.** Negotiation notes should be thought of as an employer's Exhibit A in any refusal-to-bargain case. While it is generally more important to capture the principles discussed at the bargaining table, as opposed to recording a verbatim transcript, it is especially useful to record (word-for-word) any impasse statements made by union negotiators. It goes without saying that pronouncements such as "we'll never agree to wage cuts" should be recorded.

- **Recap the Negotiating Progress from Time to Time.** It is often useful to write letters to the union setting forth the employer's understanding of the status of negotiations and the issues separating the parties. This can be combined with a confirmation of future meeting dates or documentation of the union's cancellation of meetings.

- **Do Not Hesitate to Use Mediation.** Although some negotiators feel that the use of a mediator may prolong contract negotiations, mediation can be helpful. Obviously, if a mediator

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[239] *EAD Motors E. Air Devices, Inc.*, 346 N.L.R.B. 1060 (2006).

[240] In *Thill, Inc.*, 298 N.L.R.B. 669 (1990), *enforcement granted in part*, 980 F.2d 1137 (7th Cir. 1992), an employer bargained in bad faith by failing to include agreed-upon provisions in its revised offers because the employer's omissions made it difficult for the parties to determine where negotiations stood and necessitated time-consuming discussions of matters already settled.

expresses the opinion that the parties are at impasse, or if the mediator informs the parties that further meetings would not be useful, this is powerful evidence of impasse.[241]

- **Insist on Proposals from the Union.** Unions may try to delay negotiations by receiving employer proposals and insisting upon long periods of time to study them. Many union negotiators believe that by delaying counterproposals, it will give them the upper hand and put them in a more advantageous bargaining position. In such situations, the employer must communicate to the union that it expects a proposal from the union either before negotiations are concluded for the day or at the next scheduled meeting. A union's consistent failure to provide proposals will cut against any bad faith bargaining charge it might lodge against the employer.

- **Fully Explore the Union's Position.** At times, the union will disguise its true position with regard to outstanding issues. For instance, the union may claim that the size of an economic concession is keeping the parties apart when, in fact, the union is resisting any concession as a matter of principle. If the union's position is unyielding, the parties are likely at impasse.

- **Provide Relevant Information When Justified.** Employer negotiators should not hesitate to insist that the union justify its request for information during negotiations. Relevant information must be provided, but, many times, when the justification is revealed, the union either does not legitimately need the information or is already in possession of it.

While the above list is not exhaustive, these techniques should be considered to advance negotiations in situations where a union appears to be avoiding impasse.

§ 3.3 SAMPLE COLLECTIVE BARGAINING PROVISIONS

§ 3.3(a) *Sample Management Rights Clauses*

The following are two sample "Management Rights Provisions" that may be included in a bargaining proposal.[242] Note that since the COVID-19 pandemic, employers have given greater consideration to management rights concerning health and safety measures.

Sample 1

1.1 Except as otherwise provided in this Agreement, the Employer has the sole and exclusive right to exercise all the authority, rights, and functions of management. The Employer expressly retains the complete and exclusive authority, right, and power to manage its operations and to direct its employees except as the terms of this Agreement limit said authority, rights, and power.

1.2 The Employer shall have the right to close, partially close, or transfer facilities, on-site locations, or specific kinds of services as it deems necessary in its sole discretion. Nothing contained herein shall prevent the Union from bargaining the effects of any such decision.

1.3 The Employer shall have the sole authority to select and direct all managers and supervisors.

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[241] Employers may not insist on mediation because mediation is a permissive subject of bargaining. *Success Vill. Apartments, Inc.*, 347 N.L.R.B. 1065 (2006).

[242] These are sample provisions and do not constitute and are not a substitution for consultation with legal counsel. The law governing collective bargaining is ever-evolving and must be reviewed before proposing collective bargaining language. These sample provisions should not be proposed except on advice of counsel.

Managers and supervisors may perform bargaining unit work as the needs of the business require

1.4 The Employer shall have the right to pay an employee above-scale or to reduce an employee's pay rate to scale at the Employer's discretion. The Employer shall have the right to establish a bonus program or to discontinue a bonus program at the Employer's discretion.

1.5 This Management Rights Article shall survive the expiration of this Agreement and shall remain in full force and effect during any period of time in which the Parties are continuing to negotiate for a renewal agreement.

Sample 2

2.1 Except as expressly limited by the specific terms of this Agreement, nothing in this Agreement shall be construed to limit or impair the right of the Employer to manage its business generally. The parties' signatory hereby understands and agrees that the Employer reserves to itself for its exclusive discretion and judgment the following prerogatives and responsibilities that are listed by way of example, but are not necessarily limited to such matters as the location of its facilities; determination of the equipment, methods, or processes to be employed; size and/or composition of the workforce; and the products or services to be offered and/or performed. The Employer further reserves the sole right to transfer, layoff, assign work, promote, discipline, or discharge employees for just cause. The Employer shall be the exclusive judge of the qualifications, proficiency, and abilities of employees, and shall determine those hours it shall be open for business and establish such rules or regulations it deems necessary for the conduct of its operations and affairs. The Employer may further take whatever are steps necessary to ensure the health and safety of employees, particularly during an emergency situation.

2.2 The Employer shall have the sole authority to select and direct all managers and supervisors. Managers and supervisors may perform bargaining unit work as required by the needs of the business.

2.3 The Employer shall have the sole authority to pay its employees above scale, below scale, or reduce their wages to scale at its own discretion.

2.4 The Employer hereby retains the exclusive right to determine that work that shall be done in or out of its facilities and/or those persons or firms with whom it elects to do business. The rights herein reserved to the Employer, and those not otherwise expressly limited by the provisions of this Agreement, shall remain for the sole and final judgment of Employer. The exercise of the rights hereby reserved to Employer and those not expressly limited by the expressed terms of this Agreement shall not be subject to collective bargaining or the disputed settlement procedures set forth herein during the life of this Agreement.

2.5 It is agreed that the Employer shall have the right to subcontract wherein the Employer's judgment it is economically advantageous to do so, where it is in the interest of time to do so, or where the Employer's facilities are inadequate. Whenever the Employer does in fact subcontract work normally done in its facility, the Employer will notify the Union within a reasonable period of time but not to exceed two weeks after the commencement of such work, provided such work is expected or planned to continue beyond such two-week period. Upon request by the Union, the parties will meet to discuss possible mutually acceptable alternatives.

2.6 The Employer shall have the right to close, partially close, or transfer facilities and departments as it deems necessary in its sole discretion. Nothing contained herein shall prevent the Union from

bargaining over the effects of any such decision.

2.7 Work Rules: The Employer shall have the right to implement work rules, so long as they are not inconsistent with this Agreement, and so long as copies are provided to the Union.

2.8 This Management Rights Article shall survive the expiration of this Agreement and shall remain in full force and effect during any period of time in which the Parties are continuing to negotiate for a renewal agreement.

§ 3.3(b) *Sample No-Strike Provisions*

The following are two sample "No-Strike Provisions" that may be included in a bargaining proposal.

Sample 1

1.1 During the period of this Agreement, the Union agrees that it will not authorize, cause, induce, support, or condone any strike, picketing, sympathy strike, work stoppage, slowdown of work, or walkout by any employee covered by this Agreement.

Employees who engage in any such act shall be deemed to have violated this section. It is further agreed that the honoring of a picket line shall constitute a violation of this section.

1.2 The Employer agrees that, during the term of this Agreement, it shall not lock out any of the employees covered by this Agreement.

1.3 It is agreed that the Employer may discharge without notice any employee who engages in action that violates this section and that such discharge shall be deemed to be for cause.

Sample 2

2.1 During the period of this Agreement, the Union agrees that it will not authorize, cause, induce, support, or condone any strike, picketing, sympathy strike, work stoppage, slowdown of work, or walkout at the Employer's place of business by any employees covered by this Agreement. Employees who engage in any such acts shall be deemed to have violated this section. It is further agreed that the honoring of a picket line shall constitute a violation of the section.

2.2 The Employer agrees that, during the term of this Agreement, it shall not lock out any of the employees covered by this Agreement.

2.3 It is agreed that the Employer may discharge without notice any employee who engages in action that violates this section, and that such discharge shall be deemed to be for cause.

2.4 In the event that the Employer claims that this section has been violated, the parties agree to submit the dispute to final and binding arbitration before one of the following arbitrators (to be heard by the first of the arbitrators who is available): **[Arbitrator 1]**; **[Arbitrator 2]**; **[Arbitrator 3]**; or **[Arbitrator 4]**. The arbitration shall take place within twenty-four hours of the submission by the Employer of a written request. The dispute may be submitted in person or over the telephone. The arbitrator must render the decision within four hours of submission. The arbitrator's decision shall be final and binding on the parties.

§ 3.3(c) *Sample Discipline Provisions*

The following are two sample "Discipline Provisions" that may be included in a bargaining proposal.

Sample 1

1.1 The Employer reserves the right to suspend, discharge, or otherwise discipline any employee for violation of established rules and regulations governing employee conduct.

Sample 2

2.1 All discipline must be for just cause.

2.2 Disciplinary letters, verbal warnings, or any other action by the Employer against any employee prior to the effective date of this Agreement shall be weighed according to the severity of the disciplinary action and underlying cause for discipline.

2.3 The following is an illustrative, but not exhaustive, list of circumstances that shall constitute just cause: insubordination; theft; falsification of Employer records; excessive absenteeism; excessive tardiness; destruction of Employer property; dishonesty; gross negligence; fighting or inciting to fight during working time; possession or use of alcohol or controlled substances during working time or on Employer property (including vehicles); sale or solicitation to sell alcohol or controlled substances during working time or on Employer property (including vehicles); unlawful harassment; or unauthorized use of Employer property. **[Additional specific offenses can and should be added, based on the nature of the business.]**

2.4 The Employer will notify the Union of any discharge in writing within two business days, specifying the reason for the discharge. Timely verified notification to the Union via facsimile will be deemed proper notification.

