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**UNITED STATES**

**Collective agreements**

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Most of the following answers are based on the application of collective bargaining in private sector interstate commerce regulated by the NLRA. State and governmental unit variations are noted (or remembered) where appropriate.

**1. Definitions**

1.1 What is the definition of the collective agreement in your country?

A collective agreement in the US is the enforceable contract negotiated between the employer or the designated component thereof and the union certified as the collective bargaining representative for all non-supervisory employees therein. Since we have majoritarianism, the designated union voted in by the majority of voting employees represents all employees in the unit.

1.2 Is there a distinction made between different types of collective agreements according to their source, content or scope (occupational or territorial)?

All collective agreements are enforceable agreements, but the unit they cover may vary. The private sector norm is a “production and maintenance unit”; in the public sector it is more likely to be by occupation such as police, firemen, clerical workers, teachers, etc. The agreement may be by locality, by state or enterprise-wide. Supervisory personnel (those with the authority to hire or fire or effectively recommend such action) are usually excluded, as are confidential personnel. Federal law applies to those enterprises in interstate commerce, but comparable provisions are in place on the state level for companies engaged solely in local commerce. State and municipal employees have comparable rights with some restrictions. Federal employees have more limited rights since many of the conditions for federal employment (such as compensation, health care, pensions, etc.) are matters of legislation, not collective bargaining.

**2. Please summarize the history of collective agreements in your country.**

In 1935 the National Labor Relations Act created the right of unionization for private sector employees and the obligation on the employer to negotiate in good faith to reach a collective bargaining agreement with the union designated by the majority of employees as their representative. It set forth certain prohibited practices including interfering with the employees in the exercise of their rights, refusal to bargain in good faith, creation of employer dominated unions, etc. In 1947 these unfair labor practices

were extended to unions. Collective bargaining is conducted over wages hours and working conditions which are included in a written, signed, enforceable agreement. Virtually all agreements contain a grievance and arbitration procedure culminating in final and binding arbitration of all issues of contract interpretation or application. In 1960 the United States Supreme Court in the “Steelworkers Trilogy” of cases held that such arbitration decisions are to be respected and endorsed as the result of the contractual agreement between the parties.

### 3. Collective agreement as a source of law

#### 3.1 What are the constitutional or/and legal grounds of collective agreements?

There are no constitutional grounds for CBA. The legal grounds are the statutory grant of the right to negotiate such agreements, the right of union and management to be sued for violation of the agreement, and in the Trilogy, the court’s endorsement of the enforceability of such agreements.

#### 3.2 Does a collective agreement have a contractual or statutory status (or both)?

Contractual status, although in some jurisdictions, local legislators may adopt legislation reflecting and implementing negotiated settlements.

#### 3.3 The relationship between collective agreements and other sources of law

How do collective agreements receive legal status from the Constitution and the constitutional principles in force in your country?

Collective agreements receive judicial endorsement because of their statutory authorization, without reference to constitutional principles.

##### 3.3.1. Relationships between collective agreements and general principles

###### A) Hierarchy of standards

###### 1) Principle of hierarchy

- a) Are collective agreements and covenants subject to superior standards?

Collective agreements do not infringe on individual statutory rights. The US Supreme Court has held that the courts may overturn an arbitrator’s decision interpreting and applying a CBA if there is evidence of collusion, corruption, lack of jurisdiction or a violation of public policy.

- b) Does a hierarchy of levels exist between collective agreements?

No, they are treated as contracts.

###### 2) Derogations

- a) Are collective agreements subject to the “principle of favour” (exemption “in melius” from the laws or higher-ranked agreements)?

CBAs cannot violate statutes or limit employees’ statutory rights.

- b) Can they be less favourable than the latter or is it acceptable that lesser ranked agreements contradict unfavourably (“in pejus”) to higher ranked agreements?

Principle of equality: non-discrimination and “equal pay for equal work”

- 2) May collective agreements set conditions of unequal treatment and are these upheld as legal?

No. Individual rights prevail (Alexander v. Gardner Denver held that an arbitration decision might be taken as evidence but the discrimination law controlled prevailed?).

- 2) Are collective agreements subject to the principle of equality?

C) Law and order

- 3) Is there a definition of “social” law and order (which is different from “economic” or “management” law and order)?

No.

- 4) Is there a distinction between absolute and relative law and order?

No.

D) Is there a duty of good faith in collective bargaining?

Yes, it is prescribed in federal and many state laws creating collective bargaining rights.

### 3.3.2. Collective agreements and other sources of law

A) Collective agreements and law

Are collective agreements allowed to abridge rights that employees have been given by law?

No (although individual employment agreements have been held to surrender the right to litigation if that is part of the agreement, and the US Supreme Court in the Gilmer case held that such agreements, if knowing and voluntary, are enforceable).

- 1) May the law itself annex a collective agreement?

I do not know of this happening. State and local governments may legislate terms and conditions which have been negotiated in collective bargaining, but I know of no annexation.

- 2) May a law delegate some of its powers to a collective agreement?

No, statutes and courts retain their respective powers and collective agreements are subject thereto.

B) Collective agreements and regulations

- 1) Should collective agreements be extended by a regulation to govern the whole profession, even businesses that are not members of the signatory unions?

That cannot happen in the US. CBAs are established by specific designated units where the unionized employees work. Those

outside those work unions are not protected by any such conditions, although non-unionized employers might extend such terms and conditions of work.

- 2) Are some collective agreements subject to approval by ministerial order?

Only for government employees where the “ministry” involved is a party and signatory to the agreement, as an equal to the union.

C) Collective agreements and customs

- 1) Does a collective agreement challenge custom when its object is the same?

Collective agreements can specify changes in custom. But if silent on a custom, then that custom may continue if open, notorious, of long-standing and not restricted by negotiated agreement language.

- 2) Does the voluntary enforcement by the employer of a collective agreement that normally does not apply to him/her constitute a custom?

It might, but in the absence of any collective bargaining obligations, there is no legal restriction on changing that custom, unless doing so violates some statute.

- 3) Have you something else to say about this point?

When discussing employers not covered by collective agreements, it is important to note that in the United States only 12% of employees are covered by CBAs, 43% in the public sector and somewhat less than 8% in the private sector. There are some 100,000,000-110,000,000 workers without such protection.

D) Collective agreements and the labour contract

- 1) Is the contract of employment allowed to contain clauses less favourable to the employee than the relevant collective agreement?

Not if the employee is covered by a collective agreement, although in individual employment contracts, usually imposed on new hires as a condition of employment in the absence of a collective agreement obligation, there may be a requirement of appeal to the employer’s machinery and a surrender of a right to litigate alleged statutory violations.

- 2) Is the collective agreement incorporated into the contract of employment or does it remain independent from it?

The collective agreement prevails in the event of conflict if the individual provisions are less beneficial to the employee.

3) May a new collective agreement modify the contract of employment?

Yes.

#### **4. Elaboration of collective agreements**

##### 4.1. Collective bargaining

4.1.1 How many levels of bargaining exist in your country?

Federal, state, municipal, private sector (enterprise wide, plant wide), particular crafts within a government or enterprise. But all are independent and equal. There is no hierarchy of agreements although the CBA of the larger unit might permit conforming local sub-agreements.

4.1.2 How are they related?

Each unit of bargaining is based on the certified unit, and the single designated union for those employees. If there is a larger unit, say in GM, the single union and the management would be the same, but they could negotiate specific provisions for individual plants.

4.1.3 Is collective bargaining freely decided or mandatory?

Once a union is voted on and designated by a majority of employees in an enterprise, the employer is obligated to bargain with it. The agreement then negotiated is voluntarily agreed to. If there is no agreement the option will be a strike or lockout until there is agreement or a commitment to voluntary interest arbitration. In rare cases affecting the national health and safety the President of the US can impose an 80-day cooling off period while he appoints an Emergency Board to investigate and if unresolved make recommendations. Congress on a few occasions has incorporated those recommendations into statute.

4.1.4 What subjects may collective bargaining include?

Wages, hours and working conditions.

##### 4.2. Conclusion of collective agreements

###### 4.2.1. Signatories

a) Who can be parties to the collective agreement?

Only unions (or their representatives)?

(2) Also the employees, or work-council, or workforce delegates?

(3) Other responses?

Collective agreements are voluntary contracts and must be signed by both disputants.

b) Must the parties meet a condition of representativity?

Representativity among the employees is determined by an election between or among competing unions with a majority selecting one union which then becomes the certified bargaining union for those employees in the unit of the enterprise involved, and the employer is

then obligated to bargain with that union. It may not bargain with any other union.

- c) May the agreement be signed by only one union, though in the minority, or is it necessary that a majority of unions do not oppose the text of the agreement?

Majoritarianism means one union per bargaining unit of the enterprise.

- d) Does a right of opposition exist?

No rights for the union that did not secure the majority vote. It is barred from seeking a new union selection election for one year.

#### 4.2.2 Formal requirements

- a) Must collective agreements be made in writing?

Presumably. I know of none which were not in writing. (As Sam Goldwyn, the movie entrepreneur, noted, “An oral agreement is not worth the paper it is written on”.

- b) Must notice be given?

Notice of the NLRBs’ determination of the appropriate bargaining unit and notice of the NLRBs’ designation of the designated employee representative, as well as certification of the union as the representative of the majority of employees are prerequisites to bargaining. There is no notification requirement thereafter to the government agency.

- c) Must collective agreements be registered?

There may be administrative requirements for such registration, but not for the implementation or enforcement of the agreements.

## 5. The enforcement of collective agreements

### 5.1. Scope of collective agreements

#### 5.1.1. Geographic area

- a) National, regional, local?

Depending on the size of the bargaining unit.

- b) International?

US employers with employees working national, including the US Department of State foreign service.

#### 5.1.2 Professional sphere

What jobs, professions or branches are concerned?

Any non-supervisory positions, white collar workers, clerical workers, etc. Government agencies have bargaining units of lawyers (including employees of the NLRB itself).

### 5.2 Determining which collective agreement is enforceable

#### 5.2.1 Is the main activity of the business a criterion?

No.

5.2.2 What about the mandatory application of “extended” collective agreements?

5.2.3 Is it possible for an employer to voluntarily apply a collective agreement that does not apply to his/her business? Then, how to prove this voluntary enforcement?

Yes, but in the absence of a certified union there would be no right of employee enforcement of such conditions.

5.2.4 Which collective agreement is to be enforced in case of coincidence of several agreements? According to what criteria?

There would be only one agreement per designated bargaining unit and union.

5.3 Binding force of collective agreements

5.3.1 Are collective agreements enforceable upon signing?

Yes, unless there is agreement on a different effective date.

5.3.2 Do collective agreements apply automatically?

Yes, on signature.

5.3.3 Are collective agreements binding (imperative)?

Yes. They may be challenged through their internal grievance machinery culminating in binding arbitration.

## 6. Content of collective agreements

6.1 Is the content mandatory, or can the parties choose it freely (or both)?

Binding on both parties unless they have negotiated a waiver or side agreement to the contrary. Failure to apply the terms of the agreement might be held in arbitration to constitute a waiver of the provisions involved.

6.2 Different subjects dealt with

6.2.1 Freedom of collective industrial organization?

6.2.2 Form and content of the contract of employment

- Requirements concerning the use of fixed-term contracts?

Contracts are of fixed term, usually one to four years.

- Form of the contract: in writing; compulsory mentions?

Invariably in writing. Requires statement of mutual recognition, and since the agreements are voluntary, whatever the parties agree upon for terms and conditions.

- Various clauses

- Covenant not to compete?

Not applicable in collective agreement.

- Compensation (financial) for covenant not to compete?

- Probationary period?

Provided as a prerequisite for eligibility to grieve contract protections. During the probationary period (the duration of which is negotiated) the employee has no contractual rights and may be terminated without right of appeal). In government employment a probationary period may be statutory, as for the customary three years for school teachers.

#### 6.2.3 Minimum wages?

Statutory minima prevail but contractual negotiated rates exceed statutory minima.

#### 6.2.4 Classification and career of staff members?

Job criteria may be negotiated into agreements, as well as provisions for bidding on job openings for transfer or promotion, usually based on skill, ability and seniority.

#### 6.2.5 Hours of work

- On-call time and hours of “equivalence”? Hours of work, shift access, on-call and call-in pay are all negotiated.
- Vacation? All negotiated, with duration and access to particular times based on seniority.
- Overtime and fixed wages? Overtime at time and one half after 40 hours per week established by federal statute. Parties may negotiate daily overtime, as well as amounts beyond time and a half, such as double time on Saturday or Sunday, or triple time on weekend holidays, etc.
- Compensatory rest? Contractual protections of time off may be afforded, but usually without compensation Some occupations such as airline personnel are regulated by statute though contractual salaries apply.
- Part-time work? Usually in contract if used; with contractual benefit entitlement based on number of hours worked, including health care, vacation entitlement, opportunity to secure full time work, etc.
- Minimum rest time and maximum work time? Contractual. Frequent restriction on working more than two full shifts, assuring 8 hours of rest per 24 hours.

#### 6.2.6 Rights of an employee who is on sick leave?

- Suspension of performance of the contract of employment?

Contract establishes right to sick leave for those ill, with the employer right to verify by examination, or to discipline for falsification. If work-related absence under workers’ compensation laws, statutory protections apply.



- Guaranteed resources?
- Job security? Rare guarantee of employment, but protections as to order of reduction in personnel based on skill, seniority, ability, with bumping and transfer rights. Some contracts set triggers for reduction: lack of work, new job requirements, new equipment, changes in production, etc.

#### 6.2.7 Discipline

Included in all agreements: Employers' right to discipline for just cause with the right to protest such actions through the grievance and arbitration procedure, with the arbitrator having final authority to determine the propriety of the discipline and penalty and right to impose a remedy including reinstatement with or without back pay.

#### 6.2.8 Vocational training?

May be provided for.

#### 6.2.9 Follow-up of the agreement?

Agreement expires on agreed to date, rare to have automatic renewal.

### **7. Interpretation of and litigations relating to collective agreements**

#### 7.1 Which bodies are responsible for interpreting the collective agreements?

##### 7.1.1 Joint boards?

Airline and railway industry have joint boards, but if disagree designate a neutral chair who arbitrates the decision.

##### 7.1.2 Other bodies or organizations?

Usually single arbitrator agreed to in contract or one of an agreed to panel, and if no agreement resort to American Arbitration Association or Federal Mediation and Conciliation Service for the designation of an arbitrator pursuant to their rules.

##### 7.1.3 What is the scope of their interpretation?

###### a) Is it binding for the judge?

Arbitrators' decisions are final and binding and deferred by judges unless the arbitrator has exceeded jurisdiction, issues an award against public policy, or is overturned for corruption (never heard of one). Main reason for overturn is if judge finds decision against public policy (such as returning to work a user of illegal drugs).

###### b) Can it be retroactive?

Decisions are retroactive to date of the employer's discipline with reinstatement and remedy for earnings lost if the employee wins, or greater penalty if the arbitrator so rules.

##### 7.1.4 Is the judge entitled to interpret him/herself collective agreements?

Arbitrators are expected to interpret and apply the terms of the agreement. If appealed to a court, there is usually deferral to the arbitrator's decision pursuant to the Steelworkers Trilogy theory.

7.2 Remedies against breach of collective agreements

7.2.1 Are penalties provided?

Left to the discretion of the arbitrator on a “make whole” standard. In some cases there is contractual penalty such as recall to work when off shift is subject to a negotiated minimal 4 hours pay.

7.2.2 Which body or authority ascertains violations?

Arbitrator.

7.2.3 What are the civil remedies?

a) Individual claims?

No civil remedy except enforcement of the contract per the arbitrator’s decision.

b) Collective lawsuits?

Same.

7.3 Proceedings related to collective agreements

7.3.1 Is there a distinction made between individual and collective litigations in this matter?

No, although employer would usually apply an individual decision to all other employees similarly situated.

7.3.2 Which court(s) or body(ies) have jurisdiction over legal matters relating to collective agreements?

Federal or state, depending on whether federal or state labor relations law is being applied.

7.3.3 How is the judge informed of the existence and content of a collective agreement? What is the role of the judge and the parties in litigation relating to collective agreements?

Once advised of his or her selection as an arbitrator for a particular dispute, an adversarial hearing is usually held attended by disputants, and perhaps their attorneys, at which witnesses testify on direct and cross-examination and exhibits are offered. Post hearing briefs may be filed after which the arbitrator will issue a written decision.

**8. Altering and challenging of collective agreements**

8.1 Cases and procedures

8.1.1 Do procedures exist for the review and termination of collective agreements?

No, only interpretation and application, although on appeal to a court there may be a finding that an agreement is contrary to law. That decision is not within the province of the arbitrator for final determination.

8.1.2 What happens to collective agreements in the case of a transfer of undertaking or change of employer?

The subsequent employer is bound by a collective agreement that has not expired.

8.1.3 What happens before and during the time of expiration of the agreement?

If the contract has expired, the terms are voided unless the parties agree to continue the agreement in place until a successor agreement has been agreed upon.

8.1.4 What is the procedure for substituting a collective agreement with another one?

That is a function of negotiation between the parties. Successor follows, though parties may agree to substitute earlier.

8.2 Can employees retain vested or established rights (“droits acquis”) in case of termination of collective agreements?

Only if they filed a grievance while the agreement was in effect.

## **9. Conclusions**

9.1 Is there a policy promoting collective bargaining and contractual collective law?

Yes, as noted above

9.2 Are there problems concerning the relationship between contract of employment and collective agreements?

The above answers refer to collective agreements when a union is party thereto. Without a union, individual contracts are primarily a function of management imposition, and thus less likely to be negotiated.

9.3 Does the connection between law and collective agreements operate in favour of employees (principle of favour, ratchet effect), or does it allow less favourable conditions?

Collective bargaining favours the unionized employee. Non-unionized employee rights are limited to statutory protections which are more restricted than in other industrialized countries, particularly without having the benefit of labour courts in the US.

9.4 Are there any additional conclusions or problems you want to mention?