The Legal Framework for Bargaining

*[Notes to accompany Labor Bookstore's **Labor Law 101 for Private Sector Union Negotiators** webinar, presented on November 30, 2023 by Michael Mauer, Esq.]*

The National Labor Relations Act (NLRA) is the federal statute that governs labor relations nationwide in the private sector. (A separate statute, the Railway Labor Act, has coverage limited to certain employers / workers in the transportation sector.) What follows are some of the most important legal concepts for private sector negotiators to be familiar with.

Bargaining "in Good Faith": Legal Obligations and Pitfalls

The 1935 Wagner Act (the first legislation passed to create the National Labor Relations Act) imposed the legal obligation on employers to bargain in good faith at the request of the union. The NLRA's definition of the obligation to bargain in good faith is set forth in Section 8(d):

"to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party."

The statute is explicit that this obligation "does not compel either party to agree to a proposal or require the making of a concession." What the law mandates is that the parties engage in the process of attempting to reach agreement; it does not impose any requirement that a meeting of the minds actually occurs. It's solely the process, not the end result, that is examined. (But note that if the parties do reach agreement, upon request of either party that agreement must be reduced to writing and signed.)

The 1947 Taft-Hartley amendments to the National Labor Relations Act extended the good faith bargaining obligation to unions, and added some specifics. So since then breaches of the law's requirements by either side at the bargaining table constitute unfair labor practices (ULPs), processed by the NLRB.

The requirements of the obligation to bargain in good faith are spelled out in some specifics in Section 8(d) of the NLRA and in case law. There are what are known as *per se* violations of the obligation, such as:

- refusing to execute a written document once an agreement reached;
- unilateral changes in terms and conditions of employment; and
- direct dealing with unit employees (that is, bypassing the union as the exclusive representative of all employees in the bargaining unit.)

With *per se* violations, the very fact that an act has occurred is sufficient to establish a ULP; there's no need to prove motivation, or any other aspect of the context in which the act occurred.
But in large part, the obligation to engage in good faith bargaining is a more general one, subject to a largely subjective standard: the parties are subject to a general obligation "to meet at reasonable times and confer in good faith with respect to wages, hours, and other conditions of employment."

Whether a party has met its obligation is determined by examining the “totality of conduct”; whether it can be said that it approached negotiations with a “sincere resolve” to reach agreement. (In another context, U.S. Supreme Court Justice Potter Stewart famously said that he couldn’t give a precise definition of obscenity, but that “I know it when I see it.”) Bad faith can be proven by showing, for example, that a party’s conduct adds up to “surface bargaining”, that it showed no willingness to make any significant concessions, or that it engaged in delaying tactics.

Information Requests

One critical element of success in bargaining as well as in other activities of a union is obtaining information. Making such requests pursuant to a statute or collective bargaining agreement can help unions carry out their duties: to address salaries, benefits and other conditions of employment; investigate and process grievances and prepare cases for arbitration; formulate and carry out a bargaining agenda; and so on. In addition, information requests can serve valuable tactical functions, putting the employer on notice that its feet will be held to the fire on certain issues, and that those issues won't go away until adequately addressed.

Statutory Authority to Make Information Requests

The statutory obligation to furnish information grows out of the duty to bargain in good faith. One element of that duty is that a unionized employer must "provide, on request, information that is relevant and necessary to the union's performance of its duties as collective bargaining representative." (*NLRB v. Acme Industrial Co.*, 385 U.S. 432, 1967) The precise parameters of this legal obligation are not spelled out in the NLRA, but have been fleshed out in case law pretty thoroughly over the decades.

A second statutory source of the obligation to furnish information lies in public records laws. For example, the Freedom of Information Act applies to records kept by federal agencies. Equivalent public records laws at the state and local level can also be a valuable independent mechanism to obtain records.

And additional statutory routes to obtaining information lie in reporting requirements overseen by regulatory agencies. So, for example, the federal Occupational Safety and Health Administration (OSHA), along with corresponding state-level health and safety agencies, has mandatory reporting requirements for covered employers. Along with that is also a public right to review such filings, which can be used by unions.

Contractual Authority to Make Information Requests

Most existing collective bargaining agreements have language specifying precisely what types of information an employer is obligated to furnish, and the format and timing for doing so. And as a general rule, a union's statutory and contractual rights to information are complementary. Unions are cautioned to make it clear that any rights to information contained in a collective bargaining
agreement do not waive statutory rights to information.

Scope of Information Requests

A statutory obligation to produce information arises when the data sought is necessary and relevant for the collective bargaining representative to carry out its duties. Virtually any aspect of contract administration (information needed to evaluate compliance with the terms of a collective bargaining agreement, or to process a grievance) or any matter related to bargaining is properly the subject of an information request.

So by way of illustration, information requests under a contract or bargaining statute might include records of how certain situations were dealt with in the past ("past practice"), or financial information pertaining to employee pay or benefits, such as the costs of providing health care coverage or pensions.

As a general rule, the labor board upholds the type of liberal standard for relevance that is applicable to pretrial discovery proceedings in court cases, rather than the narrower standards that apply during trials. This means, for example, that an information request could flow from hearsay (second hand) knowledge the union has. Information relating to terms and conditions of employment of bargaining unit members (that is, negotiable matters) is presumed to be relevant, meaning that the burden rests on the employer to demonstrate a lack of relevance.

There are limits, however, to a union's broad right to obtain information. Numerous legal decisions have said that a requestor must have more than "a mere suspicion" about something as a basis for a request, and that requests cannot be vague or speculative, amounting to "fishing expeditions." And requests must be made in good faith.

But be aware that some slightly different rules apply in the case of financial data. Generally, such data must be furnished only if the union makes a showing that it is especially relevant to matters under discussion at the bargaining table. A union will not prevail in a dispute over the obligation to provide financial information simply by stating that it would be "helpful" to review such data. But if an employer asserts an inability to pay for wages or benefits sought by the union then there is a presumption of relevance of that information.

Note that under public sector open records laws, generally "any person" (meaning an individual union staff member or member / leader)can make a request of an agency, and almost all public records are subject to disclosure. Under these laws, the purpose for the request is not taken into account when establishing the right to the information requested.

Types of Information Covered

A request pursuant to the terms of a contract or bargaining statute can encompass "data" in whatever form it may exist. So valid requests can include both printed documents and electronic records. It also may be possible for requests to be for factual information. (That is, one may be able to ask for information in the form of answers to questions, rather than simply requesting documents.) That said, employers are not required to create new records to respond to a request, even if doing so would involve only compiling information from existing records. So union requestors must be prepared to receive an "information dump," designed by the employer to require considerable effort to separate wheat from chaff.

In formulating a request under a public records act, it's useful to check the definition of "public

record" that generally will be contained in the statute, and likely will be quite broad. One typical example of the definition of "record": "any document, device, or item, regardless of physical form or characteristic." Under such a broad definition, videotapes, audiotapes, work-related e-mails on company servers, computer disks, microfilms, etc. would be encompassed.

Timeframes for Processing

The timing of responses to information requests and the completeness of responses are frequent areas of dispute. As a general—though admittedly not very helpful—rule, under bargaining statutes and many public records laws, information must be furnished within a reasonable amount of time. What constitutes “reasonable,” though, will vary under the circumstances. The NLRB articulates a “totality of the circumstances” rule, meaning that it looks at factors such as the following:

- the complexity of the information sought;
- the difficulty the employer would have in compiling the information;
- the communication to the union as to anticipated time frames and reasons for any delay;
- whether the time period for response created an adverse impact on the union; and ● the amount of time elapsed.

So in one case a delay of two weeks was found to be an unfair labor practice where only a one-page document was requested. But a delay of over 10 months was ruled not to violate the NLRA in a case where the union didn't prove that the employer could have responded faster, and where the union was not prejudiced by the amount of time that elapsed.

An employer and a requesting union may be required to bargain over costs the union must share in. As an alternative to bearing the financial burden of copying costs, the union should consider requesting to examine records, rather than being furnished copies, or making arrangements to copy the documents at its own cost (using a portable copier or simply taking photographs, for example.) Note that cost sharing for the searching of records is not, as a general rule, required.

Here are some suggestions as to framing of initial information requests to head off problems that employers may try to create:

- Neither bargaining statutes nor public records laws generally require that information requests must be submitted in writing. Nothing is to be gained, however, in inviting disputes over what was requested and when. So good practice dictates that oral requests either should not be made, or should be followed by a written confirmation of what is being sought.
- To avoid having problems with information that quickly becomes incomplete or obsolete, it's advisable to make a request continuing in nature ("Please provide any new information that comes to light after your initial response to this request.")
- To head off an argument that since an employer already has responded to an information request it has no obligation to furnish additional documents pursuant to a subsequent request, it's best to make clear that your request isn't considered exhaustive ("The union reserves the right to ask for additional information pertaining to this concern.")

- To prevent an employer from failing to produce anything until it has time to compile

everything, the initial request should specify that requests are severable ("Please provide information that is available as soon as it is practicable to do so; the union will accept a partial response to this request without prejudice to its position that it is entitled to all documents and information requested.")

- Sometimes an employer will take the position that it has no obligation to provide any documents at all since some of the requested information is exempt from disclosure on privacy grounds. To head this off, the information request can state at the outset that the union consents to redaction (blacking out) when warranted to protect confidentiality, but that the remainder of the requested information—rather than complete withholding—is still requested.

Employer Defenses

Over the years, the NLRB and federal courts have recognized a number of legitimate defenses that an employer can raise to justify a complete or partial refusal to furnish requested information.

One category is the reasonableness of the request itself. As with the "totality of the circumstances" rule on time frames for responding, what constitutes an "unduly burdensome" request is not precisely defined. But it is recognized that if, under the circumstances, a request fits within that definition, an employer can decline to comply. Even when this is the case, however, the union can request bargaining over what to produce and in what form. In some instances, it may be simpler for the union to withdraw part of its request, and then to argue that the remainder is not unduly burdensome.

Another category is confidentiality. But general assertions of confidentiality, even if legitimate, must be weighed against the union's need for the information. And, similar to the scenarios when a claim of burdensomeness is raised, an employer is obligated to bargain on alternative forms of disclosure (for example, redacting names or other identifying information, releasing information as to employees on whose behalf the union furnishes privacy waivers, etc.)

Nondisclosure cannot be justified by citing the availability through alternative means of the information sought. An employer cannot, for example, insist that the union obtain information directly from employees or from a governmental agency, or that the union ask an arbitrator to require the employer to produce information. Similarly, the fact that an employer does not have particular information in its possession does not necessarily get it out from under an obligation to furnish that information. If the employer can, for example, obtain the information from third parties with whom the employer has a business relationship, it generally has a legal obligation to do so.

As previously discussed, information requests must arise from a union's representation responsibilities. Sometimes an employer will argue that information sought does not relate to a matter at issue in bargaining. Or an employer may assert that there is no obligation to produce information on the grounds that it will not raise a certain defense or not make certain factual contentions in a grievance case. Such arguments should not carry the day, however; so long as the union's request meets the test of being "necessary and relevant" for the union to carry out its duties, the employer's legal obligation remains.

Note that as a practical matter, that even if an employer has valid grounds for refusing to furnish

requested information in whole or in part, the requester must nevertheless be given an explanation of the basis for the denial. Simply refusing to respond to an information request will not pass legal muster.

Finally, it is well established that an employer is not obligated to provide requested information in the form most convenient to the union.

Enforcement

Requests made pursuant to an applicable collective bargaining law are enforceable through unfair labor practice proceedings before the NLRB. Refusals to furnish information requests that are grounded in specific collective bargaining agreement language may be challenged through the contract's grievance / arbitration procedure. Similarly, information needed for an upcoming arbitration may be requested by means of a subpoena issued by the arbitrator (or by the American Arbitration Association or other organization under whose auspices the arbitrator was selected.)

Requests for information that are made under a state open records law are enforceable through whatever means are provided in that state law. There may or may not be a required administrative appeal before seeking recourse in state courts. Unlike unfair labor practice cases, where the relief granted will consist of an order for the requested records to be produced, in proceedings under state public records laws, there may be direct financial penalties for noncompliance, as well as the awarding of attorney's fees and court costs.

Tactical Considerations

A multitude of tactical calculations can come into play in deciding how to pursue requests for information.

Quite often, there are multiple tools available to obtain information that the union needs to carry out its organizing or representation functions. In deciding which path to take, the initial question to be asked, of course, is whether one source of authority for your request more specifically grants you the entitlement to secure the information you seek. But in addition, other considerations may come into play in choosing among multiple options to compel disclosure: might one type of request yield results more quickly than another, or at a lower cost? Will one type generate more publicity that might have a useful collateral impact on your campaign? Will one type tip your hand (if that's what you would find helpful in a given instance) or enable you to preserve anonymity (if that's tactically preferable)?

Requests should be framed carefully and artfully. A combination of specificity and generality in formulating the request is most likely to force production of all you seek. So if you know precisely what records the employer has that would be of use to you ("all records of discipline for inappropriate communications to customers") by all means your request should be formulated to reference precisely that. But adding a phrase such as "and of any other infraction similar in nature" will cover other documents that might also have bearing on the matter you're investigating.

Perhaps a bit counterintuitively, keep in mind that requests can be made not for information that the employer has, but simply to establish what information the employer does not have. Suppose that 6 the union is trying to build a case using a disparate treatment argument. A request can be made for

records of any action taken by the employer with respect to any other similarly situated employees for the purpose of proving that, in fact, no other worker was subjected to the same treatment as the one the union is representing.

In addition to seeking documents for the purpose of using the information in them, another tactical use of information requests is simply to obtain leverage. It may be that the employer wants to avoid the public embarrassment of certain information coming to light, such as records of crimes committed on its property. This can make a particular request a means of pressuring the employer to resolve the issue at hand. Or if a request would be particularly burdensome—taking up a lot of time to search for records, for example—that can be used as a bargaining chip (putting the union in a position to say, "If you drop your plan to do X, we'll then have no need to pursue our information request.")

If the union wants to head off the employer's unilateral imposition of terms and conditions once an impasse in negotiations is reached, information requests can be a valuable impasse avoidance technique. This is because if there's a pending information request, then as a matter of law no impasse can exist. (And keep in mind that there are no time frames for when in the course of negotiations information requests have to be submitted.)

A caution is in order, though, about the tactical use of information requests, since some of these tactics run on a two way street. Keep in mind that employers generally can make requests for information to the union. So in aggressively pursuing information requests, the union must be aware of the risk that the other side will respond by attempting to impose equivalent production burdens on the union.

Subjects of Bargaining

The NLRA places restrictions on which subjects unions and employers must or may bargain over. There are three broad categories:

Mandatory Subjects of Bargaining

"Wages, hours, and other terms and conditions of employment" (such as salaries, benefits, discrimination, and enforcement of the contract through grievance and arbitration) are "mandatory subjects of bargaining." This means that they must be negotiated at the request of either party. Failure to bargain upon request over a mandatory subject constitutes an unfair labor practice, which the NLRB will prosecute.

Permissive / Nonmandatory Subjects of Bargaining

"Permissive" or "nonmandatory" subjects may be negotiated only by mutual agreement. Such topics include agreeing to change the composition of a bargaining unit, ground rules for negotiation, or ratification procedures for a contract. Neither side can declare an "impasse" (that is, hold up finalization of a contract) if the parties have bargained over such subjects, but have not yet reached agreement.

Prohibited Subjects

Matters that would violate any federal or state laws may not lawfully be incorporated into a collective bargaining agreement.This provision seldom comes into play, but could be triggered by a proposal that arguably violates discrimination or health and safety laws, for example.

Impasse Resolution

Independent of any contractual notice requirements, under the NLRA a party wishing to negotiate a successor agreement must notify the other party and offer to meet and confer for the purpose of negotiating a successor agreement at least 60 days before the expiration of a collective bargaining agreement. Within the following 30 days, notice of the ongoing negotiations must be filed with the Federal Mediation and Conciliation Service (a federal government agency) and with any state mediation agency. (Typically, both sets of notices are accomplished simultaneously using FMCS Form F-7, Notice to Mediation Agencies.) Note that the FMCS accepts only Form F-7s that are filed online.)

Mediation

After the filing of the Form F-7, the FMCS formally assigns a mediator available to assist the parties. The mediation process is one of attempted voluntary reconciliation. It may be initiated at the parties' mutual voluntary request at any time. Often, this is done before any formal declaration of "impasse" (a deadlock in negotiations) is made.

While participation in mediation is entirely voluntary, a party's refusal to participate can have important political ramifications.

Economic Weapons

If the parties, despite their best "good faith" efforts, fail to reach agreement on mandatory subjects of bargaining, the obligation to continue to bargain is suspended so long as that genuine deadlock in negotiations continues to exist. If such an impasse is reached and no contract is in effect (that is to say, if the parties have not extended the terms of the expired contract) the employer can lawfully implement part or all of its "last, best, offer" at the table.

And once a contract has expired and any contractual no-strike / no lockout provisions are no longer in effect, both parties are free to exert additional "economic pressure." That is to say, the union may call a strike and the employer may lock out the employees.

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