THE LEGAL FRAMEWORK FOR COLLECTIVE BARGAINING

COLLECTIVE BARGAINING ORIENTATION
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INDEX

I. THE BARGAINING OBLIGATION: PRE-HIRE AGREEMENTS UNDER SECTION 8(f).

Much of this outline discusses the duty to bargain in a traditional collective bargaining relationship. In such a relationship, the parties have a continuing obligation to bargain, because the union has, in an NLRB supervised election, by contract language, or some other voluntary recognition arrangement, established that it has the support of a majority of the employer's employees.

However, a significant number of SMACNA contractors do not have such a relationship. An employer in the construction industry is granted the unique right to enter into a contract with a union, even though the union has not established that it has the support of a majority of employees. Such an agreement is called an 8(f) "pre-hire" agreement, and some of the traditional rules concerning the duty to bargain are basically inapplicable in such a relationship. Thus, many of the rules concerning the bargaining process that are discussed in this outline will not apply to a contractor having only a pre-hire agreement.

A. The Attributes of an 8(f) Relationship.

In John Deklewa & Sons, 282 NLRB 1385, 124 LRRM 1185 (1987), the Board held that when parties enter into Section 8(f) pre-hire agreements, they will be required by Section 8(a)(5) and Section 8(b)(3) of the NLRA, to comply with that agreement during its term unless the employees vote, in a Board-conducted election, to decertify their bargaining representative. Therefore, the parties are obligated to comply with the agreement until it expires. After expiration, however, the employer has no Section 8(a)(5) obligations, and can lawfully refuse to negotiate a successor agreement. Ironworkers Local 3 v. NLRB, 843 F.2d 770, 128 LRRM 2020 (3rd Cir. 1988) (sustaining Board's decision in Deklewa).

Only the Fourth Circuit Court of Appeals has held that the Deklewa decision is inconsistent with previous court authority, and is, therefore, not the law. All other circuit courts addressing the issue, however, have upheld the Deklewa decision as a permissible interpretation of the Act, although they split on the issue of whether the NLRB could apply it retroactively.

B. Potential Reversal of Deklewa?

From time to time, building trades unions have expressed the view that Deklewa is an incorrect application of Section 8(f), and have called for its reversal.

If the NLRB decided to revert to the law as it existed prior to Deklewa, much of this section of the outline would become academic. Nearly all collective bargaining agreements in the construction industry would become governed by Section 9(a), through application of the Board's "merger" and "conversion" doctrines. If the Board was to reverse Deklewa, it would likely apply its new doctrine to all pending unfair labor practice cases, as well as any future proceeding. The practical effect of such an approach is that bargaining conduct that is perfectly legal at the present time could become unlawful, through the retroactive application of any new doctrine that the Board may adopt. This potential should be carefully considered anytime that the legality of any bargaining strategy is dependent upon the continued utility of Deklewa.

C. Scope of the Duty to Bargain under Section 8(f).

There is Board authority for the proposition that during the term of the Section 8(f) contract, the contractors' duty to bargain is limited to (1) simply observing the terms of the contract, and (2) furnishing any relevant information demanded by the union, establishing that the employer is abiding by the contract.

Once the contract has expired, the contractor is generally not obligated to observe the normal obligation to bargain in good faith, even if it voluntarily attempts to negotiate a new 8(f) agreement. Therefore, upon expiration, the contractor may, for example, insist on non-mandatory topics of bargaining as a precondition to entering into a new agreement. Such conduct would normally be an unfair labor practice in a Section 9 bargaining relationship, as will be discussed later.

Even though the Deklewa case allows the employer to cease dealing with the union at contract expiration, if that agreement contains Article X, Section 8, that obligation will remain enforceable. The employer party to such an agreement may be directed to enter into a new agreement by an order of the NJAB. Those Circuit Courts that have addressed the issue have uniformly held that the obligations imposed by Article X, Section 8 are enforceable at expiration of an 8(f) agreement. Local 162 v. Jason Manufacturing, 900 F.2d. 1392, 134 LRRM 2097 (9th Cir, 1990); Beach Air Conditioning v. Local 102, 55 F.3d 474, 149 LRRM 2391 (9th Cir., 1995); Sheet Metal Workers Int'l. Ass'n. Local 110 Pension Trust Fund v. Dane Sheet Metal, Inc., 932 F.2d 578, 137 LRRM 2312 (6th Cir., 1991); Sheet Metal Workers Local Union No. 20 v. Baylor Heating and Air Conditioning, Inc., 877 F.2d 547, 131 LRRM 2838 (7th Cir., 1989). A common theme in such cases is that, while an employer may not have a statutory duty to bargain under 8(f), it may be held to a contractual obligation to bargain that is the product of collective bargaining.

Although an employer need not agree to a new pre-hire agreement upon contract expiration, if it verbally agrees to such a new agreement, it will have a legal duty to sign such an agreement upon request of the union. Ryan Heating Co., 297 NLRB 619, 133 LRRM 1145 (1990).

However, the employer does not incur an obligation to negotiate a new agreement merely by attempting to negotiate a successor 8(f) agreement. By engaging in unsuccessful negotiations for a new contract, the contractor does not waive its right to walk away at expiration, or, when negotiations break down after expiration. Again, this principle will not apply if the agreement has Article X, Section 8.

Also note that many contracts in the sheet metal industry are not Section 8(f) pre-hire agreements. They have been converted to traditional collective bargaining agreements by the union having demonstrated its majority status, either by language incorporated into the agreement stating that the contractors have recognized the union based on proof that it has the support of a majority of employees, or, through an NLRB election. The NLRB has viewed such contract language as being enforceable, standing alone, in cases where:

(i) the union has unequivocally requested recognition as majority representative; and

(ii) the employer has unequivocally granted the union recognition as majority representative; and

(iii) the employer's grant of recognition was based upon the union's having shown, or having offered to show, the employer proof that it has the support of a majority of employees.

Historically, there has been substantial disagreement between the NLRB and the courts as what is sufficient in terms of voluntary recognition language to convert an 8(f) agreement to a Section 9 (a) agreement. This has led to fair degree of uncertainty for contractors.

For example, some circuits have flatly rejected the proposition that language providing that the union merely offered to provide proof of majority status is sufficient, reasoning that honoring such recognition could do serious harm to the employees' right to select the union of their choice. Circuits have also rejected other aspects of the NLRB's application of its rules concerning voluntary recognition. For example, the NLRB has held that a clause granting recognition in the future, if the union demonstrates majority status, is enforceable. One circuit has rejected this principle on the basis that the demand for recognition must be contemporaneous with the showing of majority status. This disharmony between the courts and the NLRB means that the effect of contract language will often depend upon what jurisdiction the contractor is located in, or which Circuit Court is ultimately called upon to resolve the issue.

In an attempt at diminishing the uncertainty created by these conflicts, in Staunton Fuel and Material, Inc., 168 LRRM 1121 (2001), the NLRB offered guidance to clarify to employers and unions as to how they may lawfully accomplish valid majority recognition through contract language. The Board stated:

(i) The language need not specifically refer to the establishment of a Section 9(a) relationship, although that would be a clear indication of the parties' intent. Any prior inconsistent cases on that point were overruled.

(ii) In many cases, the union's request for recognition may be implied from the employer's granting of recognition.

(iii) The grant of recognition must be reflected in unconditional language. Language stating that the employer will grant recognition, based upon future proof of majority status, will not be effective until that proof is supplied.

(iv) Standing alone, language stating that the union represents a majority of employees, or that a majority of employees are members, will not suffice, because each statement could be true in either a Section 8(f) or Section 9(a) relationship. What will suffice is language stating that the union has the support of, or the authorization of, a majority.

The issue of whether contract language alone may establish 9(a) status is also complicated by NLRB decisions that have established seemingly contradictory principles regarding recognition agreements. For example, in 1991, the Board decided Comtel Systems Technology, Inc., 305 NLRB No. 30, 138 LRRM 1299 (1991). In that case, the Board held that

a construction industry employer that has designated a multi-employer bargaining association as its representative will be bound by a voluntary recognition agreement negotiated by the Association. However, it will not elevate the bargaining relationship of any contractor to one under Section 9(a), unless there is an actual showing that a majority of that contractor's employees had manifested support for the union. To what degree this requirement was later modified by Staunton Fuel, if at all, is unclear.

In 2020, the NLRB used its rulemaking authority to adopt a rule governing conversion from 8(f) status to 9(a) status. The effect of this rule was to – for a time – overrule Staunton Fuel. This rule went into effect on June 1, 2020, and provided as follows:

> § 103.22 Proof of majority-based bargaining relationship between employer and labor organization in the construction industry.
>
> (a) A voluntary recognition or collective-bargaining agreement between an employer primarily engaged in the building and construction industry and a labor organization will not bar any election petition filed pursuant to section 9(c) or 9(e) of the Act absent positive evidence that the union unequivocally demanded recognition as the section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit. Collective-bargaining agreement language, standing alone, will not be sufficient to provide the showing of majority support. ***

This rule was adopted a Board majority appointed by President Trump.

On November 3, 2022, the Board – a majority of which was appointed by President Biden – issued a Noticed of Proposed Rulemaking. In this Notice, the Board basically announced the intent to rescind Section 103.22, and revert to the prior caselaw, including Staunton Fuel. The Board did go ahead and rescind the rule on July 26, 2024. The effect is that the rule of Staunton Fuel is back in place.

D. Section 8(f) or 9(a) – What Are the Benefits of Each, from the Contractor's Perspective?

In 2011, the Standard Form of Union Agreement was modified to incorporate 9(a) recognition language, obligating the contractor to grant 9(a) recognition if the union provides proof of majority support. While this language was incorporated in the context of other changes that were decidedly beneficial from the contractor's standpoint, questions do remain about the relative advantages and disadvantages of such language. The language of the Standard Form is attached as Exhibit A.

Some contractors have strongly resisted the incorporation of Section 9(a) recognition language, believing that by agreeing to it, they are giving up an important right. However, the issue is not a simple one. Furthermore, the analysis is changing, due to the efforts of some

unions – particularly the Carpenters – to aggressively assert jurisdiction over work historically performed by other crafts.

1. Potential Advantages of an 8(f) Relationship.

At the expiration of the collective bargaining agreement, the contractor can theoretically walk away from the relationship. While that may not be the contractor's ultimate objective, that ability may give the contractor greater leverage during contract negotiations.

Even if the contractor desires to continue the bargaining relationship following expiration, the existence of an 8(f) relationship gives the contractor more latitude during negotiations.

For example, the association may lawfully insist that there be an increase in industry fund contributions as a pre-condition to any collective bargaining agreement. In a Section 9(a) relationship, the identical conduct could potentially be an unfair labor practice. That is because in a Section 9(a) relationship, neither party can insist, to the point of impasse, on the inclusion of a non-mandatory item of negotiations, such as an industry fund contribution.

COUNTERPOINT:

Most SMACNA contractors aren't in any realistic position to simply walk away at contract expiration. The absence of a labor agreement may, as a practical matter, prevent the contractor from obtaining work, and effectively staffing projects, for the kind of work that is the core of the contractor's expertise. Furthermore, a contractor exercising that right will immediately be confronted with withdrawal liability, if it has been contributing to an underfunded multiemployer pension plan.

If the contractor refuses to agree to the incorporation of recognition language, the union is nonetheless free to obtain 9(a) recognition through an alternative method – by the filing of an election petition with the National Labor Relations Board. Filing such a petition does not require the consent of the contractors, and in most cases, it is a foregone conclusion that the union will win the election.

2. Potential Advantages of a Section 9(a) Relationship.

The existence of a Section 9(a) relationship makes it more difficult for members of the multiemployer group to leave the group, and bargain individually – or even worse, to attempt to go non-union. Obviously, such stability is beneficial to the multiemployer group.

A Section 8(f) agreement will not bar a petition for a union election filed by a rival labor organization, even during the term of the 8(f) agreement.

That literally means that a contractor could negotiate an 8(f) collective bargaining agreement with SMART, only to have the Carpenters Union, for example, file a petition to represent employees covered by the labor agreement. If the Carpenters won the election, several very unfortunate results would occur:

(i) The contractor's collective bargaining agreement would no longer be in effect. However, it would have a legally enforceable obligation to negotiate an entirely new contract with the Carpenters Union. If those negotiations were unsuccessful, the Carpenters Union could strike. That would be the case, even if the contractor had successfully bid a project on the basis of the labor costs in its recently negotiated contract with SMART.

(ii) If the contractor had been contributing to an underfunded multiemployer pension plan, it would be subject to withdrawal liability once it no longer had an obligation to contribute to that plan. Although in some cases, the Carpenters have offered to reimburse the contractor for such liability, in reality, such "reimbursement" has typically consisted of the *ad hoc* granting of wage relief on future construction projects. Therefore, such assistance may be of limited utility, as the obligation to pay withdrawal liability is fixed, while the ability to recoup such amounts on future projects may be speculative, particularly in a "down" construction market.

(iii) The contractor's access to sheet metal workers through SMART, as well as any training offered by a Sheet Metal Joint Apprenticeship and Training Committee, would come to an end.

For these reasons, contractors in other facets of the construction industry – particularly those that are facing aggressive encroachment upon their jurisdiction by the Carpenters Union – have incorporated Section 9(a) recognition language as a defensive measure.

II. THE DUTY TO BARGAIN IN GOOD FAITH IN A SECTION 9(a) COLLECTIVE BARGAINING RELATIONSHIP.

A. Introduction.

The obligation to bargain in good faith is far more complex in the context of a 9(a) relationship.

Section 8(d) of the National Labor Relations Act describes the duty of the employer and the union to bargain in "good faith" as follows:

> For the purposes of this section, 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 . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Section 8(a)(5) states that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees."

Section 8(b)(3) states that it is an unfair labor practice for a labor organization to "refuse to bargain collectively with an employer."

Accordingly, the duty to bargain has been defined as a bilateral procedure where the employer and the union jointly attempt to set wages and working conditions for employees. This duty can best be described as the obligation to negotiate, with an object of trying to reach an agreement.

B. Per Se Violations.

Normally, the NLRB will examine the overall conduct of the parties to determine whether they have bargained "in good faith." However, certain conduct has been viewed as a "per se" violation of the duty to bargain, without regard to any considerations of good or bad faith. This type of conduct normally involves an absence of bargaining, and the violation results from the complete failure to negotiate, rather than the absence of good faith. This issue can be confusing, as the Board has not been consistent in classifying conduct as a per se refusal to bargain, or merely evidence of bad faith bargaining. Thus, some of this same conduct will be discussed in the next section as well, which deals with conduct that is merely evidence of bad faith bargaining.

1. Unilateral Changes.

A unilateral change is when one party changes an existing condition without bargaining with the other party. Unilateral changes by an employer, concerning matters which are a mandatory subject of bargaining, are normally regarded as a per se refusal to bargain. NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962) (where the employer made a unilateral change in its sick leave policy and wages). However, as will be discussed later, in some cases, unilateral changes have not been viewed as a per se violation, but only evidence of bad faith bargaining.

The concept of unilateral changes is not readily applicable to unions, because of their relative inability to affect such a change. For example, the union can't unilaterally increase wages, as they are paid by the employer. However, a union's imposition of production quotas on members, enforced by union fines, has been held to be an illegal unilateral change. Similarly, an attempt to modify or terminate the labor agreement by means of a strike, without serving the requisite statutory notice upon federal and state mediation agencies, as required by Section 8(d), has been held to be an attempt to secure unilateral change in the bargaining relationship, and therefore, a violation of the union's bargaining obligation. See Mine Workers (McCoy Coal Co.), 165 NLRB 592, 65 LRRM 1450 (1967).

Note that a unilateral change is generally unlawful, even if the other party has not been bargaining in good faith.

2. Bargaining Directly With Employees.

The collective bargaining obligation requires "recognition that the statutory representative is the one with whom (the employer) must deal in conducting bargaining negotiations, and it can no longer bargain directly or indirectly with the employees." General Elec. Co., 150 NLRB 192, 57 LRRM 1491 (1964), enf'd. 418 F.2d 736, 72 LRRM 2530 (2nd Cir. 1969). Circumventing the union has been treated as a per se refusal to bargain in most cases, but again, only as evidence of bad faith in others.

However, an employer does not violate the Act merely by communicating with employees during bargaining. The employer is free to communicate the substance of a proposal that has been previously submitted to the union. See Oneita Knitting Mills, Inc., 205 NLRB 500, 83 LRRM 1670 (1973). What is prohibited is bargaining directly with the employees, and circumventing the union.

3. Execution of a Written Contract.

Section 8(d) specifically requires execution of a written contract incorporating any agreement reached. The failure to sign a written agreement upon request of the other party is always a per se refusal to bargain. NLRB v. Midvalley Steel Fabricators, Inc., 243 NLRB 516, 101 LRRM 1503 (1979), enf'd. 621 F.2d 49, 104 LRRM 2063 (2nd Cir. 1980). However, that does not mean that the employer is obligated to sign an agreement that does not accurately reflect what was agreed upon.

There is very early NLRB authority for the proposition that even in cases where the Employer has given its bargaining rights to a multiemployer group, the Employer must also execute the contract, even though it has been signed by the Association on behalf of the Employer.

4. Meeting at Reasonable Times.

Section 8(d) also requires the parties to "meet at reasonable times." Generally, long delays between meetings, employer insistence upon bargaining by mail, etc. may be viewed as a complete rejection of bargaining, and therefore, a per se refusal to bargain. NLRB v. United States Cold Storage Corp, 302 F.2d 924, 32 LRRM 2024 (5th Cir. 1953).

5. Insisting on Non-Mandatory Subjects of Bargaining.

Regardless of a party's overall good faith, it commits a per se unfair labor practice by insisting to impasse upon the incorporation of non-mandatory subjects of bargaining in the collective bargaining agreement, *i.e.*, subject matter outside the scope of "wages, hours and other terms and conditions of employment." NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958). In that case, the employer insisted upon a "recognition" clause, and a "ballot" clause affecting the union's contract ratification procedures, as prerequisites to reaching an agreement. Other examples of non-mandatory subjects are industry funds, and interest arbitration provisions, such as Article X, Section 8.

In some cases, a party's unlawful insistence on a non-mandatory issue to the point of impasse may suspend the other party's duty to bargain.

C. The Requirement of Overall "Good Faith."

1. Elements of Good or Bad Faith.

As indicated, not all misconduct constitutes a per se refusal to bargain. In many cases, the Board will look at a party's overall conduct in negotiations to determine if it is bargaining in good faith.

a. Surface Bargaining

The National Labor Relations Board will find a failure to bargain in good faith if the employer is merely "going through the motions" of bargaining.

"Surface bargaining" is found where the employer engages in a course of conduct which, in its totality, evidences a desire to frustrate the bargaining process, or to avoid reaching mutual agreement. Thus, an employer who offers a proposal that is predictably unacceptable and one sided, coupled with an inflexible attitude on major issues, and offers no proposals embodying reasonable alternatives, has been found to have violated the good faith obligation. NLRB v. Wright Motors, Inc., 603 F.2d 604, 102 LRRM 2021 (7th Cir. 1979).

Other examples of conduct consistent with "surface bargaining" include failure to designate an agent with sufficient authority to reach agreement, withdrawal of provisions already

agreed upon, delaying tactics, and injecting significant new proposals at an advanced stage of negotiations. However, the mere tendering by an employer of a counter-proposal which is "predictably unacceptable" is not, standing alone, sufficient to justify a finding of lack of good faith, provided the proposal does not foreclose future discussion. The employer's conduct may support a charge of surface bargaining when it refuses to change any portion of its proposal, and when it rejects all compromises offered by the union. Neon Sign Corp., 229 NLRB 861, 95 LRRM 1161 (1977).

The NLRB pays particular attention to circumstances where acceptance of the employer's proposal would leave the union with less rights than it would have merely by having been certified as bargaining representative. An example would be where the company simultaneously demands a broad no-strike provision, waiver of the union's right to bargain during the term of the contract, and no neutral arbitration of disputes over issues such as alleged violations of the contract.

b. Concessions

Even though Section 8(d) does not require the making of a concession, the courts' and the Board's definitions of "good faith" suggest that willingness to compromise is an important ingredient. See NLRB v. Reed and Prince Mfg. Co., 96 NLRB 850, 28 LRRM 1608 (1951), enf'd. 205 F.2d 131, 32 LRRM 2225 (1st Cir. 1953). Thus, while a party is not obligated to make concessions on any particular issue, it generally cannot refuse to make any concessions whatsoever during the course of bargaining.

Note that the Board will analyze the conduct of both parties. For example, the employer's failure to make concessions has been found appropriate in cases where the union has adopted an equally inflexible approach.

c. Proposals and Demands

The making of proposals is considered as a factor in determining overall good faith, as a sign that the party is actually participating in the process of bargaining. The withdrawal of a solitary proposal, which itself embodies only existing conditions, and the rejection of proposals that have previously been tentatively accepted, have been considered elements of bad faith. NLRB v. Industrial Wire Prod. Corp., 455 F.2d 673, 79 LRRM 2593 (9th Cir. 1972), enf'g. 177 NLRB 328, 74 LRRM 1128 (1969).

The timing of demands or proposals may also be a factor in determining good faith. The injection of numerous new proposals for the first time after several months of bargaining, or the submission of new issues after the parties have reached agreement in order to frustrate or stall contract execution, has been found to be an indication of bad faith. Shovel Supply Co., Inc., 162 NLRB 460, 64 LRRM 1080 (1966).

Proposals for contracts of excessively long or short duration may be evidence of bad faith, when judged in the light of pending circumstances. Homes Tuttle Broadway Ford, Inc., 186 NLRB 73, 75 LRRM 1298 (1970), enf'd. 465 F.2d 717, 81 LRRM 2036 (9th Cir. 1972).

d. Dilatory Tactics (The Antithesis of the Obligation to Confer at Reasonable Times and Intervals)

Refusal to meet at all with the union obviously does not satisfy the duty imposed on the employer. Willful avoidance of meetings, or delaying and evasive tactics have been considered evidence of bad faith by the National Labor Relations Board. Exchange Parts Co., 139 NLRB 710, 51 LRRM 1366 (1962), enf'd. 339 F.2d 829, 58 LRRM 2097 (5th Cir. 1965).

Delay in supplying requested information that is necessary for negotiations, or for administration of the contract, may also prompt the Board to conclude that the employer is engaged in dilatory tactics. Failure to supply wage information promptly, or delay in furnishing the union with a current list of employees, wage rates, and job classifications, or a pension plan, has been considered evidence of bad faith. Crane Co., 244 NLRB 103, 102 LRRM 1351 (1979).

e. Imposing Conditions

Attempts to place certain conditions upon either the bargaining process, or the execution of a contract, will be scrutinized by the National Labor Relations Board. For example, demanding a union waiver of grievances pending under the old contract, conditioning further bargaining upon waiver of strikers' reinstatement rights, declining to discuss economics until all other issues are resolved, refusing to negotiate unless the union ceases its strike, and requiring acceptance by the union of an "open shop" before the company will engage in economic discussions, have all been found unlawful. Fitzgerald Mills, *supra*.

f. Unilateral Changes in Conditions

Unilateral action by an employer, affecting its employees' compensation during bargaining, is a strong indication that it is not bargaining in good faith, and may also be a per se refusal to bargain. Fitzgerald Mills Corp., *supra*.

Even unilateral wage increases are normally violative of Section 8(a)(5), as are increases in wage related fringe benefits, such as holiday pay, expense allowances, and incentive programs. Aztec Ceramics Co., 138 NLRB 1178, 51 LRRM 1226 (1962).

However, there are some situations in which an employer may lawfully make unilateral changes.

(i) After a bona fide impasse has been reached in negotiations for the contract as a whole provided that the change was reasonably comprehended within the employer's proposals.

(ii) Continuation of traditional payments or implementation of increases already promised. The implementation of such changes is not viewed as altering those wage plans already in existence.

g. Bypassing the Representative

The employer must conduct bargaining negotiations with the union, and cannot bargain directly with the employees. Attempting to bypass the representative may be considered evidence of bad faith. General Electric Co., 150 NLRB 192, 57 LRRM 1491 (1964), enf'd. 418 F.2d 736 (2nd Cir. 1969).

Once again, this does not mean that an employer is prohibited from communicating with its employees during negotiations.

However, flagrant attempts to deal directly with the employees, so as to undermine the bargaining agent, such as offering the employees a wage raise if they will disavow the union, or coupled with making speeches or statements to the employees demonstrating anti-union animus, will be found unlawful.

h. Commission of Independent Unfair Labor Practices

For example, unlawful threats to close the plant; promotion of withdrawal from the union; illegal reductions in working hours; and discriminatory layoffs. Imperial Mach. Corp., 121 NLRB 621, 42 LRRM 1406 (1958). The Board's theory is that the commission of such unfair labor practices reflects overall bad faith.

D. Bargaining Impasse.

The duty to bargain does not require a party to "engage in fruitless marathon discussions at the expense of frank statement in support of his position." NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 30 LRRM 2147 (1952).

Where there are irreconcilable differences in the parties' positions after exhaustive good faith negotiations, the law recognizes the existence of an impasse. The Board will find that an impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. Television Artists AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968); Erie Brush & Mfg. Corp. v. NLRB, 700 F.3d 17, 20-21 (D.C. Cir. 2012).

The Board has identified a number of "relevant factors" to review when determining if parties are at an impasse. These factors include:

1. Whether there has been a strike or the union has consulted the employees about one. However, a strike does not necessarily create an impasse and may even break a preexisting one.

2. Fluidity of position.

3. Continuation of bargaining.

4. Statements or understandings of the parties concerning impasse.

5. Union animus evidenced by prior or concurrent events.

6. The nature and importance of issues and the extent of difference or opposition.

7. Bargaining history.

8. Demonstrated willingness to consider the issue further.

9. Duration of hiatus between bargaining meetings.

10. Number and duration of bargaining sessions.

11. Other actions inconsistent with impasse.

Carey Salt Co. v. NLRB, 736 F.3d 405, 412 (5th Cir. 2013); Huck Mfg. Co. v. NLRB, 693 F.2d 1176 (5th Cir. 1982) (no impasse; the parties continued to meet and negotiate); Powell Elec. Mfg. Co., 287 NLRB 969 (1987) (solicitation of mediator's assistance in arranging further negotiations indicates parties had not yet exhausted bargaining over core economic issues).

Upon reaching impasse, the obligation to bargain "becomes dormant until changed circumstances indicate than an agreement may be possible." See Rood Trucking Co., Inc., 6-CA-34491 (Advice Memorandum, May 31, 2005)(citing Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973)). In determining whether "changed circumstances" exist, the Board must review the facts to determine whether conditions have "changed materially from those existent at the time of impasse." Id.

When an impasse exists, the employer is free to make unilateral changes in wages, hours, or working conditions that are consistent with, or "reasonably comprehended" within the proposal submitted to the union. Church Square Supermarket, 356 NLRB No. 170, slip op. at 5 (2011); Grondorf, Field, Black & Co. v. NLRB, 107 F.3d 882, 886 (D.C. Cir. 1997). Thus, an employer violates the NLRA when it gives wage increases to its employees which exceed those previously offered at the bargaining table, even if it is found that there was a continuing impasse in negotiations at the time the wages were granted. Moreover, an overall bargaining impasse will not justify a unilateral change concerning a subject over which there has been no bargaining. Nortech Waste, 336 NLRB 912, 917 (2001); NLRB v. Intra-Coastal Terminal, Inc., 286 F.2d 954, 47 LRRM 2629 (5th Cir. 1961).

Impasse on a single issue will not ordinarily permit unilateral action. Where, however, that impasse has caused a "breakdown in the overall negotiations, unilateral action may be permissible." CalMat Co., 331 NLRB 1084 (2000).

Note that there is authority for the proposition that if the parties are at impasse, the employer cannot implement just those portions of its offer that are disadvantageous to employees, particularly where those issues were part of a package proposal.

Also, note that the employer may not implement non-mandatory items of negotiations at impasse. Insisting on non-mandatory items to the point of impasse is an unfair labor practice

which eliminates the ability of the employer to implement its offer, even as to mandatory topics of negotiations.

E. Notice Requirements under the Act.

1. Contractual Reopeners and Renewal Provisions.

Section 8(d)(1) of the National Labor Relations Act requires that the party desiring termination or modification of the collective bargaining agreement must serve upon the other party written notice of termination or modification 60 days prior to the contractual expiration date.

Many agreements provide that in the event that neither party gives the 60 day notice, the collective bargaining agreement will automatically renew itself for another year.

Note that the notice provisions of Section 8(d), including the related obligation to provide notices of a dispute to mediation agencies, may be applicable to contract reopener provisions, depending on how the reopener is phrased.

2. Effect of Untimely Notice.

The effect of one party's failure to give timely notice, however, depends upon on the exact language involved, and the reasons for any delay in providing notice.

For example, in Koenig Brothers, Inc., 108 NLRB No. 67, 34 LRRM 1017 (1954), the contract provided that it would renew itself unless "either party notified the other in writing of a desire to change, modify or terminate this agreement at least 60 days prior to an annual termination date." The employer mailed a notice of re-opener one day before the 60th day, which was not received by the union until three days later. Consequently, the Board held that the contract had renewed itself. It held that under such renewal language, the timeliness of the notice depends not on the date of mailing, but rather, the date of receipt.

3. "Mitigating Circumstances".

However, note that under some circumstances, such as unforeseeable delay by the Post Office, a party's failure to give timely notice may be excused, and the other party may be obligated to bargain for a new agreement. One example is United Electronics Institute of Iowa, 222 NLRB 814, 91 LRRM 1271 (1976), where the union's failure to give timely notice was excused, because the notice would have been received by the employer in a timely fashion but for the Postal Department's failure to deliver the notice, on the mistaken belief that the employer's business offices were closed on Saturday.

4. Notice to Federal and State Mediation Agencies.

Section 8(d)(3) of the National Labor Relations Act requires the party desiring to terminate or modify the agreement to notify the Federal Mediation and Conciliation Service, and any state mediation agency, within 30 days after the notice of re-opener, in the event that no new

agreement has been reached. See NLRB v. Whitesell, Corp., 638 F.3d 883, 894 (8th Cir. 2011) (affirming NLRB Order requiring employer that failed to give timely notice under Section 8(d)(3) to reimburse union for uncollected dues from the date it failed to give timely notice).

Section 8(d)(4) provides that the parties are precluded from striking or locking out employees for the duration of the notice period. That means that a party cannot strike or lock out, until a full 30 days' notice has been given.

Note: It is an open question whether the requirements of Section 8(d)(3) are applicable to an 8(f) bargaining relationship, although the language of that Section provides a strong argument that it is not. Legal counsel is unaware of any cases that have addressed this issue.

III. SUBJECTS OF BARGAINING.

A. Introduction.

Sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act, in conjunction with Section 8(d), essentially mandate employers and unions to bargain in good faith about "wages, hours, and other terms and conditions of employment." NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958).

The NLRB and the Courts have divided bargaining subjects into three categories: mandatory, permissive, and illegal. Parties to a Section 9(a) bargaining relationship have a statutory obligation to bargain with regard to mandatory bargaining subjects. Conversely, parties may refuse to bargain over permissive subjects, and must refrain from bargaining over illegal subjects. Similarly, it is an unfair labor practice for an employer in a Section 9(a) relationship to make changes in mandatory subjects of bargaining without first providing the employees' representative an opportunity to bargain about any proposed changes, NLRB v. Katz, 369 U.S. 736 (1962). However, it can make unilateral changes regarding permissive items. (Although it does not have the right, from a contractual standpoint, to unilaterally depart from a term of an existing contract.)

Generally, the test for determining whether a bargaining subject is mandatory, or permissive, is whether the subject "vitally affects" the relations between the employer and its employees. As previously noted, the distinction between mandatory and permissive items is far more significant in the context of a Section 9(a) bargaining relationship.

B. Mandatory Subjects of Bargaining.

1. Rates of Pay and Wages.

Broad Inclusion as "wages." This category is very broad and includes hourly wage rates, piece rates, incentive plans, overtime pay, shift differentials, paid holidays, paid vacations, and severance pay.

Bonuses: A bonus is a mandatory subject of bargaining if it is "compensation" for services rendered, rather than merely a "gift." Factors to consider include whether the bonus is

consistently or regularly awarded, whether the amount of the bonus is uniform, and whether the amount of the bonus is dependent on the financial condition of the employer. If it is paid on an irregular basis in varying amounts, and is based upon the financial condition of the employer, it is more likely to be viewed as a gift.

Pensions: Pensions and similar welfare plans fall within the scope of "wages" and "other conditions of employment," and therefore, are considered mandatory subjects of bargaining. Note, however, that the issue of pension benefits for those who have already retired is not a mandatory topic of bargaining, because such individuals are no longer "employees," and the law only obligates employers to bargain over issues concerning employees.

Health and Welfare Plans: Insurance plans are considered mandatory subjects of bargaining, but some questions remain as to an employer's duty to bargain solely about changes in insurance carriers. Where an employer unilaterally changed its health and life insurance carrier, in conjunction with other unilateral changes, a violation was found. However, the Board expressly declined to rule whether the change in the identity of the carrier in and of itself constitutes a unilateral change. Some courts have held that the identity of the insurance carrier, standing alone, is not a mandatory topic of negotiations, where the selection of a new carrier had no impact on benefits or claims processing.

Also note that like the situation with pension benefits, retiree health insurance benefits for those who have already retired are not a mandatory topic of negotiations.

Meals, Discounts and Services: If an employer provides meals or other services at discounts or for free, they are likely to be mandatory subjects of bargaining.

Profit Sharing Plans: Profit sharing plans and some forms of stock purchase plans have been found to be just another form of wages, and thus, mandatory topics of bargaining. Note, however, that an ESOP has been held to be a permissive item, as its operation established how employees would ultimately become owners of the company.

Hours: Particular hours of the day, and particular days of the week during which employees may be required to work, are subjects about which employers and unions must bargain.

2. Other Terms and Conditions of Employment.

General topics that fall within the phrase "other terms and conditions of employment," and which are considered mandatory subjects of bargaining, include layoffs and recalls, grounds for discharge, workload, vacations and holidays, sick leave, work rules, grievance and arbitration procedures, union use of company bulletin boards, change in payment from a weekly salary to an hourly rate, definition of bargaining unit work, performance of bargaining work by supervisors, physical examinations of employees, and the duration of the collective bargaining agreement.

Seniority: This is a mandatory subject, along with related issues such as probationary periods, standards for promotions, and transfers.

Plant Rules: If plant rules affect, in substance, the terms and conditions of employment, they may be mandatory subjects of bargaining. For example, tardiness rules, as well as lunch and break polices may constitute mandatory topics of bargaining. Rules that expressly provide for discipline in the event of a violation will always be viewed as a mandatory subject of bargaining.

Work Assignment: If proposed changes would impact bargaining unit work significantly, it is likely that any changes are mandatory subjects of bargaining.

Health Testing: An employer's requirement of physical examinations of employees is a mandatory subject of bargaining.

Smoking: Smoking restrictions have also been deemed mandatory subjects of bargaining, falling within "conditions of employment."

Drug Testing: The Board has held that an employer's unilateral implementation of a drug/alcohol testing policy for current employees is a mandatory subject of bargaining. However, pre-employment drug and alcohol testing of applicants for employment is not a mandatory subject of bargaining, because applicants are not "employees" within the meaning of the Act. However, it should be noted that some exceptions to this rule arguably may exist for the construction industry, because of its reliance on hiring halls and referral systems.

Union Security: Provisions requiring membership in the union constitute mandatory topics of negotiations, in non-"right-to-work" states.

No-strike and no-lockout clauses constitute mandatory subjects of bargaining.

No-discrimination clauses have been found to fall within the phrase "terms and conditions of employment", and are, therefore, mandatory.

C. Permissive Subjects of Bargaining.

Permissive subjects are matters that the parties are free to bargain over, but have no obligation to do so. Permissive subjects of bargaining include the following:

(i) Definition of the bargaining unit

(ii) Most likely, union recognition clauses converting 8(f) to Section 9(a) relationships

(iii) The inclusion of supervisors in the bargaining unit

(iv) Internal union affairs

(v) Legal liability clauses (an example would be a provision fixing liability for violation of a no-strike clause)

(vi) Industry promotion funds

(vii) Interest arbitration, such as Article X, Section 8

(viii) Unfair labor practice charge settlements

(ix) Deductions for Political Action Leagues

(x) Union label clauses

(xi) Clauses prohibiting the arbitration of a dispute, in the event that the union has filed charges over the same issue with any state or federal agency

D. Illegal Subjects of Bargaining.

Illegal bargaining subjects include provisions for a closed shop, a provision for a hiring hall giving preference to union members, and "hot cargo" clauses in violation of Section 8(e), such as subcontracting restrictions concerning non job-site work that require the subcontractor to be signatory to a labor agreement.

IV. BARGAINING IN THE ERA OF SOCIAL MEDIA.

A. Unions Increasingly Using Social Media.

Recently, unions have utilized social media to solicit opinions from bargaining unit members regarding proposals, to discuss the employer's bargaining proposals, and to coordinate collective action (e.g., strikes, picketing, etc.). Unions are looking to better communicate with members and to add a level of "transparency to the negotiations.

Initially, unions utilized public websites on Facebook or Twitter to engage in these activities. More recently, this activity has moved to password-protected sites or closed groups.

B. Do Not Bypass the Bargaining Representative.

The NLRA requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment violates Section 8(a)(5) and (1).

Direct dealing need not take the form of actual bargaining. As the Board made clear in Modern Merchandising, 284 NLRB 1377, 1379 (1987), the question is whether an employer's conduct is likely to erode "the Union's position as exclusive representative."

For example, in Detroit Edison Co., the Board concluded that the employer engaged in unlawful direct dealing because it presented the employees with the substance of a proposal before it presented the proposal to the union, and over union objections. Detroit Edison Co., 310 NLRB 564, 564-65 (1993).

However, communications to employees that inform them of the employer's bargaining position constitute no violation of the NLRA. Indeed, Section 8(c) of the Act protects an

employer's right to communicate truthful information to bargaining unit employees. An employer may lawfully inform employees of matters which may involve bargaining issues, as long as it does not intrude on the bargaining process.

For example, in United Technologies, 274 NLRB 609 (1985), enfd. sub nom. NLRB v. Pratt & Whitney Air Craft Division, 789 F.2d 121 (2d Cir. 1986), the Board found no violation when an employer passed out leaflets to employees explaining the final contract offers it had made to the union earlier that same day.

C. Do Not Engage in Unlawful Surveillance.

While publicly-available websites are generally fair game for bargaining-related information, you should not attempt to "hack" into a private Facebook group or website or otherwise solicit or encourage employees to report on these activities.

For example, in National Captioning Institute, Inc., 368 NLRB No. 105 (2019), the Board held that an employer violated Section 8(a)(1) of the Act when it repeatedly solicited and received reports about the membership and messages posted on a private (invite-only) Facebook page.

EXHIBIT A

Article V, Section 2

The Union may request recognition as the exclusive collective bargaining agent for all employees employed by the Employer in the classifications and geographic jurisdiction covered by this Agreement, whether or not they are members of the Union. In determining whether the union has the support of a majority of the Employer's employees, such showing may be based upon either a majority of those employed at the time such recognition is requested, or, a majority of those eligible to vote under the National Labor Relations Board's Steiney-Daniel formula. No later than 10 days following the Union's request, the Employer shall review employees' authorization cards submitted by the Union in support of its claim to represent and have the support of a majority of such employees. If a majority of the employees has designated the Union as their exclusive collective bargaining representative, the Employer will recognize the Union as such majority representative of all employees in the classifications and geographic jurisdiction covered by this Agreement. The Employer shall not file or cause the filing of a petition for election or unfair labor practice charge with the National Labor Relations Board in connection with any demands for recognition provided for here. Article X of this Agreement shall be the sole and exclusive means of resolving any dispute concerning this provision.