



SHEET METAL & AIR CONDITIONING
CONTRACTORS' NATIONAL ASSOCIATION

Legal Framework for Collective Bargaining

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DUTY TO BARGAIN

Under the National Labor Relations Act, the Union and the Employer have a ***mutual obligation to bargain in good faith*** in an attempt to reach agreement on a new collective bargaining agreement.



DUTY TO BARGAIN

PER SE REFUSALS TO BARGAIN

1. Failure / refusal to “meet at reasonable times.”
2. Refusal to provide info or data to the union that it has requested and is entitled to receive.
3. Refusing to negotiate over a *mandatory* subject of bargaining.
4. Insisting upon a *permissive* subject of bargaining.
5. Direct dealing a/k/a bypassing the union.
6. Unilateral changes.
7. Refusal to sign an agreement that was reached.

OVERALL BAD FAITH BARGAINING a/k/a SURFACE BARGAINING

The overall pattern of conduct establishes that the party is trying to frustrate negotiations and not reach an agreement.



DUTY TO BARGAIN

PER SE REFUSALS TO BARGAIN

1. Failure / refusal to “meet at reasonable times.”

- The parties have a mutual obligation to “meet at reasonable times” for collective bargaining negotiations.
- Problem = Simply refusing to meet, or failing to schedule any meetings, or being “unavailable” only on dates that are far apart.
- It is fine to suggest that some proposal exchanges or discussion occur by e-mail or over the phone (and this could in fact be productive), but it’s unlawful to insist that the parties negotiate the contract through these means.
- Problem = Refusing to meet unless the other party agrees to unilaterally-dictated conditions.



DUTY TO BARGAIN

PER SE REFUSALS TO BARGAIN

2. Refusal to provide info or data to the union that it has requested and is entitled to receive.
 - The employer is obligated to provide the union with requested information that is relevant or reasonably necessary for the union to perform its duty as the representative of the employees.
 - In the context of *contract negotiations*:
 - ✓ Info to prepare for negotiations and to formulate proposals and counter-proposals while bargaining.
 - ✓ Info may become relevant by virtue of positions taken and/or statements made across the bargaining table.

Continued →



DUTY TO BARGAIN

PER SE REFUSALS TO BARGAIN

2. Refusal to provide info or data to the union that it has requested and is entitled to receive, *continued*.
 - What requested information is “relevant”?
 - a. Is the information relevant under the liberal, discovery-type standard used by the Board?
 - Requested information regarding employees represented by the union is presumptively relevant.
 - b. Pleading poverty / inability to pay.
 - c. Employer put it at issue by making claims at the bargaining table.



DUTY TO BARGAIN

PER SE REFUSALS TO BARGAIN

3. Refusing to negotiate over a *mandatory* subject of bargaining.
 - It is a failure to bargain in good faith to refuse to negotiate over “wages, hours, and other terms and conditions of employment.” [NLRA 8(d)]

“wages, hours, and other terms and conditions of employment” = mandatory subjects of bargaining

Continued →



Examples of MANDATORY subjects of bargaining

Wages	Scheduled work days and hours
H&W & pension	Overtime and premium pay
Holidays	Contract duration
Training	Grievance procedure
Safety measures	Subcontracting bargaining unit work
Work rules	Drug testing of current employees
No-strike clause	Health testing mandatory vaccines



Examples of PERMISSIVE subjects of bargaining

Matters of internal union affairs, including how the union conducts a contract ratification vote

Industry fund contributions

Union withdrawal of pending ULP charges that it filed

Union label clause

Interest arbitration, such as Article X, Section 8

Political Action Committee or Political Action League payroll deductions



DUTY TO BARGAIN

PER SE REFUSALS TO BARGAIN

4. Insisting upon a permissive subject of bargaining.

A party cannot...

- Condition additional negotiations on inclusion of a permissive subject of bargaining.
- Insist upon a permissive subject of bargaining to the point of impasse
- Require that, in order to reach a collective bargaining agreement, the contract must include something on a permissive subject of bargaining.
- **Employer** cannot impose **lockout** over permissive subject of bargaining, and **Union** cannot **strike** over permissive subject of bargaining.



	MANDATORY	PERMISSIVE
Have to bargain in response to proposal	Yes	No
Must bargain to impasse prior to implementation?	Yes	No*
Insist upon inclusion (despite other party's unwillingness to discuss further)?	Yes	No
Can union strike or ER lock-out in effort to achieve?	Yes	No
Duty to provide information?	Yes	No
OK to reach agreement and include in CBA	Yes	Yes**



DUTY TO BARGAIN *PER SE* REFUSALS TO BARGAIN

5. Direct dealing a/k/a bypassing the union.

- It is a failure to bargain in good faith for an employer to engage in *direct dealing* with employees (a/k/a *bypassing the union*).
- The principle is that, once the union has been lawfully certified or recognized as the representative of the employees, the employer must bargain ***with the union*** concerning mandatory subjects of bargaining, and ***cannot bargain with employees*** regarding such matters.



Examples of improper direct dealing:

- ✓ “At the last negotiations session, the contractors proposed increases of **x** in the first year, **y** in the second year, and **z** in the third year. We are meeting again next week. You wouldn’t vote to strike with this on the table, would you?”
- ✓ “What two issues are most important to you and the rest of the crew in these negotiations.”
- ✓ “I know that you’re well-respected among the crew and have been talking to your co-workers. What’s it going to take to avoid a strike?”
- ✓ “I believe that the management team is trying to get the Union down to **x**, **y**, and **z**. I think that would be a favorable contract settlement for the Union and the sheet metal workers covered by the contract. What do you think?”



Direct dealing general safe harbor:

It is not *per se* bad faith bargaining (as direct dealing) to...

Merely tell employees what has already occurred at the bargaining table (*i.e.*, proposals already made and positions already taken by one party or the other or both).

However, communicating this to the employees may be contrary to a ***ground rule*** established by the parties at the outset of negotiations, and violating this ground rule may be ***used as evidence*** in support of an allegation of ***overall*** bad faith bargaining.



UNION USE OF SOCIAL MEDIA

1. Unions and active union members within the bargaining unit are increasingly using social media.
 - ✓ Keeping the membership informed on developments.
 - ✓ Rallying the troops.
 - ✓ Bashing management.
 - ✓ Scheduling and organizing meetings with employees (*e.g.*, input on negotiations, ratification vote).
 - ✓ Coordinating protest activities and strikes.



UNION USE OF SOCIAL MEDIA

2. If the page, blog, etc., is publicly accessible to anyone who visits it, then it is permissible for you to ***review the contents***.

If it is not publicly accessible then...

- ✓ Do not create a fake identity to obtain access.
- ✓ Do not steal the login credentials or password to gain access.



UNION USE OF SOCIAL MEDIA

3. ***Responding to the contents*** might be a bad idea.
 - ✓ This may be contrary to a ground rule established by the parties.
 - ✓ It is unlawful to make threats to employees.
 - ✓ There is a potential issue with direct dealing. (*See above.*)
 - ✓ You may set them off despite having the best of intentions.



MANAGEMENT COMMUNICATIONS

Management may have a legitimate interest in communicating with the union members regarding the status of negotiations.

- ✓ If the parties can hammer out an agreement, it is often preferred to stand on the sidelines.
- ✓ But it may be advisable to communicate...
 - If the union is delivering messages to the members during the course of negotiations, and the communications are inaccurate, one-sided, and/or hostile to management.
 - If there's a perceived risk of contract rejection (despite the parties' agreement).
 - If the membership is voting on a management proposal (in the absence of a Tentative Agreement).



MANAGEMENT COMMUNICATIONS

Considerations:

- Existing, controlling ground rule?
- Avoid direct dealing.
- What to say and how to say it.
 - What has already been proposed | What is the proposal.
 - What is the union stuck on.
 - We've made movement and have been reasonable.
 - It's a favorable proposal (or TA) and why.
 - Don't receive pay or unemployment while out on strike.

It is lawful to communicate all of this.



DUTY TO BARGAIN

PER SE REFUSALS TO BARGAIN

6. Unilateral changes.

- **General rule** = Employer violates the law by – during collective bargaining negotiations – making a *unilateral change* in an existing term and condition of employment (*i.e.*, a mandatory subject of bargaining).
 - There are exceptions to this rule.
- However, upon reaching an *impasse* in overall negotiations, the employer is privileged to make unilateral changes in terms and conditions of employment.
 - This assumes that there is no collective bargaining agreement in effect.



DUTY TO BARGAIN

PER SE REFUSALS TO BARGAIN

- 7. Refusal to sign an agreement that was reached.**
 - If the parties reached a binding, legally enforceable agreement for a new collective, bargaining agreement, it is unlawful for a party to refuse to sign a written agreement accurately reflecting the terms.



DUTY TO BARGAIN

OVERALL BAD FAITH BARGAINING a/k/a SURFACE BARGAINING

- To bargain in *good faith* means that the parties are negotiating with the aim of reaching agreement on the terms for a collective bargaining agreement.
- There is a ***mutual obligation*** to engage in good faith negotiations with the aim of reaching a contract – as opposed to engaging in a course of conduct that's aimed at frustrating the process and not reaching an agreement.
- ***Surface bargaining*** = Where the totality of the parties' conduct demonstrates that the party's real purpose is to frustrate the bargaining process and *not* reach a mutual agreement. (This is an unlawful failure to bargain in good faith.)



DUTY TO BARGAIN

OVERALL BAD FAITH BARGAINING a/k/a SURFACE BARGAINING

Surface bargaining–

1. The Board reviews the ***totality of the party's conduct*** throughout the course of negotiations to determine whether the party is engaged in surface bargaining.
2. The test for bad faith bargaining (when reviewing the totality of the circumstances) hinges upon whether it was the party's ***intent to frustrate negotiations and not reach an agreement.***



DUTY TO BARGAIN

OVERALL BAD FAITH BARGAINING a/k/a SURFACE BARGAINING

Surface bargaining–

Typical factors reviewed:

- a. Cancelling bargaining sessions.
- b. Calling early termination to bargaining sessions.
- c. Refusal or delay in scheduling meetings.
- d. Unilateral changes in mandatory subjects of bargaining.
- e. Efforts to engage in direct dealing (bypassing the union).
- f. Failure to designate an agent with sufficient authority.
- g. Failure to furnish relevant, requested information.

Continued →



DUTY TO BARGAIN

OVERALL BAD FAITH BARGAINING a/k/a SURFACE BARGAINING

Surface bargaining

Typical factors reviewed, *continued*:

- h. Injecting new proposals at advanced stage of bargaining
- i. Not explaining or discussing position.
- j. Lack of counter-proposals.
- k. Withdrawal of tentative agreements / TAs.
- l. Moving target / regressive bargaining.
- m. Take it or leave it / failure to offer any compromises.
- n. Violating ground rules mutually established by the parties.



DUTY TO BARGAIN

OVERALL BAD FAITH BARGAINING a/k/a SURFACE BARGAINING

Surface bargaining

Typical factors reviewed, *continued*:

Note—It is typical for the parties agree to negotiate over language items before turning to economics. That said, it would be bad faith bargaining for one party to refuse to bargain over economics until the parties have completed bargaining over the language issues.



Surface bargaining–

1. The Board reviews the ***totality of the party's conduct*** throughout the course of negotiations to determine whether the party is engaged in surface bargaining.
2. The test for bad faith bargaining (when reviewing the totality of the circumstances) hinges upon whether it was the party's ***intent to frustrate negotiations and not reach an agreement.*** Typical factors reviewed are ***a through m above.***
3. It is not improper for a party to engage in ***hard bargaining.*** If the evidence demonstrates that the party was engaged in ***hard bargaining aimed at achieving a settlement on favorable terms,*** this is not surface bargaining.



QUESTIONS?

Thank you.

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