

Legal Requirements for Bargaining

SkillBrief

Both the union and management are required to follow certain legal requirements in connection with contract negotiations.

Most private employers that are not government or public agencies are covered by the National Labor Relations Act (NLRA), which is enforced by the National Labor Relations Board (NLRB). (Some businesses in the railroad and airline industries are covered under the Railway Labor Act, and some very small enterprises may not be covered at all.)

Public employers may be covered by state or local laws.

Since public employee bargaining laws vary from place to place, this manual discusses only the NLRA. However, the principles discussed here are useful guidelines on how to prepare yourself and your legal team to meet legal requirements. You also should obtain from the state and local labor relations agencies all laws and regulations on bargaining that apply to your members as public employees.

Depending on the situation, failure to meet notice requirements — even by a few hours — may result in union members losing the chance to reopen their contract, to file charges against the employer for bad faith bargaining, or to conduct a legally protected strike.

Therefore, the local union should have a foolproof system for keeping track of notice deadlines for all contracts it handles.

Status quo

Even if a contract has expired, subject to the notice requirements discussed above, management must maintain the ‘status quo’ — the existing wages, hours, and working conditions — unless legal ‘impasse’ has been reached in negotiations. An impasse means that negotiations have reached a deadlock in which neither side is willing to change its position.

The employer can unilaterally impose on employees its last offer at the negotiating table on the issues for which impasse has been reached.

At any time after a contract expires, subject to the notice requirements discussed above, the union can strike or the employer can lock out employees in order to pressure them to accept management’s proposals.

Bargaining in good faith

Under Section 8(a)(5) of the NLRA, the employer must negotiate with the union in good faith. That does not mean that the employer must agree to union proposals. But it does prohibit certain management tactics which are considered by the NLRB to be proof that the employer does not intend to negotiate a contract with the union.

Violation of the duty to bargain in good faith is an unfair labor practice (ULP). Typical examples include the following:

Refusing to supply information requested by the union in order to perform its duties as bargaining representative.

Refusing to meet at reasonable times with union negotiators, or attempting to dictate who those union negotiators may be or how large a team the union can use.

Refusing to abide by ground rules for negotiations agreed to by both sides.

Attempting to bargain directly with the membership instead of with the union's official negotiators.

Attempting to discourage membership support for the union negotiators by using threats, promises, punishment, or discrimination.

Withdrawing approval of particular parts of the contract on which the two sides had already reached tentative agreement.

Refusing to negotiate over a mandatory subject of bargaining or refusing to settle without agreement from the union on a non-mandatory subject.

Unilaterally changing wages, hours, or working conditions before reaching impasse in bargaining or without talking to the union first (unless you have waived this right in the contract).

Engaging in 'surface bargaining' — going through the motions of negotiating but taking positions that clearly could never be the basis of give-and-take bargaining.

Section 8(d)(3) of the NLRA requires the union to negotiate in good faith as well. Providing time for employees to participate in negotiations

Management is legally required to meet with employees' elected representatives. So if the union negotiating team includes employees as well as staff, management must be willing either to meet during hours when employees would not be on duty or to provide a reasonable number of employees the opportunity to participate in negotiations. But the law and NLRB rulings do not define how many employees must be given time off, how much time they can demand, or who will pay for their time.

Therefore, paid leave for employees to take part in negotiations, including union meetings and caucuses, is one of the first subjects for bargaining between the union and management.

Winning on this issue often requires the same tactics as on any other negotiating point. You may have to ask for more than you expect to get. You may have to build up your rights over a series of negotiating rounds. And you may have to demonstrate membership support through worksite tactics.