

**HOW TO USE THE LAW TO
ORGANIZE, MOBILIZE,
REPRESENT WORKERS, AND
BARGAIN BETTER:**

**THE ABCS OF LABOR AND
EMPLOYMENT LAW**

UNITED FOOD AND
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HOW TO USE THE LAW TO ORGANIZE, MOBILIZE, REPRESENT WORKERS, AND BARGAIN BETTER: THE ABCS OF LABOR AND EMPLOYMENT LAW

This handbook provides ways that organizers, representatives and bargainers can grow the power of workers and unions by using the law and legal tactics. By using these laws to strengthen collective action, we can persuade and pressure companies and bosses to respect their workers and to treat them fairly. This is not a technical primer for identifying legal violations so lawyers can then file lawsuits.

The objectives of campaigns and bargaining should always control legal strategies. Rather than asking if an action enables a legal tactic, we should ask if a legal tactic advances the goals of the campaign – like more worker power, a unionized workforce or a better contract. Unions should be wary of allowing lawsuits or charges to take priority over these goals. If lawsuits or charges advance campaign goals, unions should file them. If they do not, unions should avoid diverting their limited time and resources from other strategies or activities to pursue legal actions that do not help organize or better represent workers.

Of course, the best worker protection is a strong union who actively mobilizes workers, aggressively represents them, and bargains and enforces good contracts. We know that laws and government agencies by themselves fail to protect workers. Laws are often too weak to assist workers. For the few meaningful laws, courts and government agencies often lack the resources or inclination to fully enforce them. Worse yet, legal actions often proceed far too slowly to make any difference.

In this challenging environment, unions and their lawyers must confront conventional legal wisdom, try new legal tactics, and overcome legal obstacles by finding other ways to achieve their goals. When lawyers say no to a legal strategy, we must challenge them to confirm that the laws are in fact not helpful.

We, like companies, must challenge our attorneys to assess the risks and benefits of any legal strategy. For example, does the downside of a legal strategy risk a large part of a union's treasury or just a notice posting? Does the success of a legal strategy result in a complete victory or merely a small step towards our goals?

Finally, the International intends this publication to be as helpful as possible and seeks to improve both the publication's substance and style. Please forward to the International Legal Department any corrections or suggestions.

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USING THE LAW TO ORGANIZE AND CONDUCT EFFECTIVE CAMPAIGNS: THE NATIONAL LABOR RELATIONS ACT

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What Is the National Labor Relations Act (NLRA)?

The **NLRA** is the federal law that implements the Constitutional rights of private-sector workers to associate together and with unions to organize, to bargain collectively, and to engage in actions. The NLRA makes it unlawful for companies to interfere in any way with these rights.

Who Does the NLRA Cover?

Companies

The NLRA covers most private-sector (non-governmental or non-public) companies, including all UFCW private-sector employers, except certain agricultural companies, and railroads and airlines covered by the Railway Labor Act.

Workers

The NLRA protects all of these companies' workers except:

- supervisors, managers, and
- independent contractors.

Factors Showing Supervisor Status

A person is a supervisor under the NLRA Act if the person takes any one of the following actions using “**independent judgment**” or “**effectively recommends**” any of these actions:

- hiring workers,
- “responsibly” directing workers,
- assigning workers,
- transferring workers,
- rewarding workers,
- promoting workers,
- disciplining workers,

- suspending workers,
- discharging workers,
- laying off or recalling workers,
- resolving workers' grievances or other workplace issues, or
- effectively recommending any of these actions.

(Note: The definition of "supervisor" under other labor and employment laws may be different.)

What does exercising "independent judgment" mean? Persons take actions using independent judgment when they make decisions **on their own** based on their own knowledge, experience or consideration. Persons don't exercise independent judgment when they just **automatically or routinely** ask other workers to do their jobs as required by well-known company policies, rules or guidelines.

Example: A front end manager who sends a cashier home for being late one time too many according to the company's time and attendance policy is not exercising independent judgment. But, a front end manager does exercise independent judgment when the manager sends a cashier home because the cashier is not **in the manager's opinion or judgment** doing the cashier's job correctly and the manager did **not check with** any **higher-level manager**.

Example: A front end manager exercises independent judgment if the manager – without checking with a higher-level manager -- selects which cashiers are assigned to which cash registers, determines the hours cash registers are running, and ensures that the store has enough cashiers.

If the person's title includes the word "manager" or "supervisor," is the person a supervisor? Not necessarily. Although the National Labor Relations Board considers titles, in the end the determination of whether someone is a supervisor is based on the **authority** the person **actually exercises** or **actually possesses**.

What if the person's job description says the person has supervisory authority but the person has never exercised the authority? What controls supervisory status is the authority the person actually exercises or actually possesses, not what company policies say. So, a person is probably **not** a

supervisor if the person **never exercises supervisory authority**, despite what company policies say.

Example: If the department manager's job description says the manager has the authority to transfer workers to other departments but the manager **hasn't transferred** anyone in recent years, the manager probably does not possess the supervisory authority to transfer workers.

Example: The department manager possesses the authority to transfer if the manager **has transferred** workers and **no higher-level manager approved** the transfers, **even if** the manager's **job description doesn't list transfer** among the manager's authority.

What does "responsibly direct" workers mean? To responsibly direct means that the person is responsible for using independent judgment to tell other workers what to do (and the workers must do what the person says) and that **higher-level managers hold the person responsible for ensuring that other workers do their jobs**. If the person only tells other workers to **do their jobs the way company policy or practice requires**, the person is a lead worker and does **not** responsibly direct.

Example: When the produce department is in disarray, a higher-level manager tells the produce manager to get the department straightened up, instead of talking directly to other department workers. If the higher-level manager holds the produce manager responsible if the other workers fail to straighten out the department, the department manager responsibly directs workers.

Example: If company policy requires produce department workers to first stock and rotate vegetable bins before spraying water on them and a worker is doing the opposite, the department manager does not responsibly direct if the manager simply tells the worker to do the job the way the policy says.

What does "effectively recommend" mean? To effectively recommend means that higher-level management acts **on the person's word alone without independently checking into the matter or making their own decisions based on their own knowledge, experience or consideration**.

Example: A department manager has the authority to effectively recommend, if whenever the manager suggests that the plant manager write up a worker, the store manager does so on the

department manager's recommendation alone without investigating the matter.

Secondary factors: In addition to the above primary supervisory authority factors, the NLRB also considers certain secondary factors. **These factors alone would not make someone a supervisor** but if combined with the occasional exercise of minor primary supervisory authority can make someone a supervisor. A checklist of primary and secondary factors is set forth below.

Primary Factors:

- Does the person hire job applicants?
 - ◆ Has the company hired applicants based solely on the person's recommendation?
 - ◆ Does the person have the authority to effectively deny job applicants positions by for example not recommending applicants for further interviews?
- Does the person have the authority to tell other workers what to do and do they have to do what the person tells them?
- Does the person have the authority to require workers to work in other departments or areas, or perform tasks outside their job description or what they normally do?
- Does the person have the authority to transfer workers to other departments or other areas?
- Does the person have the authority to promote workers or has the company promoted workers based solely on the person's recommendation?
- Does the person have the authority to discipline, suspend or discharge workers or has the company disciplined, suspended or discharged workers based solely on the person's recommendation?
- Can the person resolve worker complaints or workplace disputes?
- Does the person prepare evaluations that are taken into account in determining the amount of merit raises and do higher-level managers rarely change the evaluations the person prepares?
 - ◆ Does the person present or discuss evaluations with workers?

- ◆ Does the person sign evaluations in a capacity other than witness to the evaluation meeting?

Secondary Factors:

- Does the company consider the person to be a “supervisor”?
- Does the person undergo the same training or attend the same meetings as higher-level managers?
- Are there more than just a few workers “below” the person?
- Does the company pay the person substantially more than other workers the person works with?
- Does the person work hours or a more regular schedule than other workers the person works with?
- Does the person schedule workers?
- Does the person have the authority to let workers arrive late, leave early or approve vacation/day off requests?
- Can the person make or approve time card adjustments?
- Does the person prepare substantive or sensitive paperwork regarding either workers or the company’s business?

Supervisors may be included in bargaining units, if unions and companies agree. However, the NLRA does not protect unrepresented supervisors who try to organize unions or engage in other protected activity.

Managers

Managers are persons who formulate and implement managerial policies.

Independent Contractors

Independent contractors are persons who are typically paid a set price for work rather than wages and who **independently** decide **how** to perform the work. Whether a person is an independent contractor depends on several factors, but if the company **controls how** the person **does the work**, the person probably is a worker and not an independent contractor.

What Is the National Labor Relations Board (NLRB)?

The **NLRB** is the federal agency that administers and enforces the NLRA and conducts union representation elections. Its headquarters is located in Washington, D.C. The NLRB has numerous regional offices throughout the country, each headed by a **Regional Director**. Some larger regions have sub-offices.

The NLRB is comprised of two parts: the **General Counsel** and the **Board**.

The General Counsel: The **General Counsel** investigates charges alleging **unfair labor practices (ULPs)** or violations of the NLRA, and decides whether there is enough evidence to prosecute companies. The General Counsel performs these functions through the Regional offices.

The President appoints the General Counsel for 4-year terms and the Senate confirms the appointment.

The Board: The **Board** performs the judicial functions of interpreting the NLRA and deciding whether companies have committed ULPs. The Board is also responsible for supervising and holding elections, a task it delegates to Regional offices.

The Board is comprised of five **members** who are appointed by the President and confirmed by the Senate. Board members serve 5-year terms. The President designates one member to serve as Chairperson.

Administrative Law Judges (ALJs) hold hearings and take evidence for the Board in ULP cases. ALJs work in the Board's Division of Judges. ALJs recommend decisions to the Board based on findings of fact based on the evidence offered during hearings. ALJs are insulated from the political process. Civil service rules govern their appointment and tenure.

What Is an Unfair Labor Practice (ULP)?

Violations of the NLRA's provisions protecting worker rights to organize and collectively bargain are unfair labor practices or **ULPs**. Companies commit the overwhelming majority of ULPs to thwart organizing campaigns or to undermine effective collective bargaining.

Companies commit ULPs whenever they interfere in any way with worker rights to organize or bargain collectively. Specifically, companies commit ULPs when they:

- Threaten, coerce or intimidate workers because of their support or activities for the union, a worker association or campaign. **Important:** Unions must show that what the company said was coercive or intimidating in the context of the communication and the power imbalance between workers and their companies.
- Coerce means to restrain, dominate or force. Intimidate means to frighten.
- Ask or interrogate workers about the union, worker association or campaign, or what concerns led to the workers' interest in the union, worker association or campaign.
- Promise or grant benefits if workers abandon their support for the union, worker association or campaign.
- Watch or surveil workers on or near company property in an intimidating manner. **Important:** Unions must show that supervisors did something different than what they normally do.

Example: Supervisors who talk on cellphones or walkie-talkies, photograph, videotape, record or write on clip boards, photograph while watching workers engage in protected activity.

Example: Supervisors who come to work on their day off to watch handbilling or picketing.

- Surveil workers away from company property. **Important:** When workers are away from company property, Unions need only show that supervisors followed and watched them at union meetings, hotels, hangouts or other location.
- Adversely change any working condition, or discipline or discharge workers because they supported or participated in the union, worker association or campaign.

Unions must show that:

- Workers engaged in organizing or campaign activity, were otherwise active with the union or worker association, or posted on social media comments critical of the company's working conditions.

Example: Workers talking to organizers or campaign supporters, participating in actions, attending meetings, accompanying organizers on homecalls.

- **And**, some supervisor knew about or was in a position to see the worker's protected activity.

Example: Worker spoke to organizer, handbilled co-workers or customers, or participated in an action while supervisor stood outside of workplace watching.

- **And**, company took adverse action against worker.

Example: Company changed senior clerk's duties from grocery stocking to bagger, but clerk continued to work same number of hours and same schedule at same wage rate. If workers perceive the bagger position to be less in stature than grocery clerk, this is an adverse change in the worker's employment conditions.

Other company ULPs:

- Creating company unions by sponsoring, supporting, controlling or assisting financially or otherwise worker groups.
- Discriminating against, disciplining or discharging workers for cooperating with or participating in NLRB investigations or cases.
- Failing to bargain in good faith, including
 - ◆ Unilaterally changing working conditions without first giving unions advance notice and meaningful opportunities to bargain.
 - ◆ By-passing workers' exclusive bargaining representatives and bargaining or dealing directly with workers.
 - ◆ Asking or polling workers for their input on bargaining proposals.

Unions commit ULPs when they:

- Threaten, restrain or coerce workers in forming, joining or assisting unions, or to otherwise act together to advance their interests as workers, or to refrain from exercising any of these rights. Violations include breaches of the union's duty of fair representation.
- Fail to bargain in good faith.

- Coercively strike or picket, or threaten to coercively strike or picket neutral companies (companies not directly involved in the labor dispute with the union) in a manner that constitutes a secondary boycott prohibited by Section 8(b)(4) of the NLRA. This is a very complex area of law.
- Picket (or threaten to picket) a company where an object thereof is to coerce the company's workers to organize or the company to recognize the union in a manner prohibited by Section 8(b)(7) of the NLRA.

Exception: Unions may engage in this picketing (often called informational picketing or NLRA Section 8(b)(7)(C) proviso picketing) where the purpose is to truthfully inform consumers or the general public that the company does not employ members of or have a contract with the union, and the picketing does not have the effect of causing work stoppages or interrupt deliveries.

How Do Unions Start ULP Cases?

The first step is to file a ULP **charge** with the appropriate NLRB Regional office. Unions may obtain **charge forms** from any NLRB Regional office or from the NLRB's website (www.nlr.gov). The website also contains addresses of Regional offices. Each Regional office has an information officer who will assist representatives fill out charge forms.

Anybody, including representatives and workers, may file ULP charges. The person who files the charge is called the **charging party**. The entity the charge is filed against (usually the company) is called the **respondent** or **charged party**.

Six-Month Statute of Limitations

The union must file charges no later than 6 months after the company committed the ULP. Otherwise, the NLRA's statute of limitations bars the charge and the NLRB will not issue a complaint against or prosecute the company based on the charge.

Withdrawn charges: The union may refile a charge it has withdrawn as long as the union refiles the charge within 6 months of when the company committed the ULP.

Practical Campaign Considerations

The union should be careful not to file ULP charges just because the union identifies some company action or statement that violated the NLRA. Rather, the union should file ULP charges **only if** the charges **advance** the union's **campaign** or another objective. The union should consider whether:

- The charges will get the company to back off?
- The charges will advance the campaign's objectives?
- The charges will divert too much time, staff resources and energy away from organizing or the campaign?
- The charges will increase worker or community support for the union or participation in organizing or the campaign?

Inoculation

Most organizers believe it is more effective to inoculate workers against the company's campaign and unlawful conduct, than it is to file ULP charges and rely on the NLRB to protect workers. Inoculation attempts to diminish the intimidating effect of company conduct first by educating workers on what to expect. Company misconduct that does not surprise workers has less impact on them.

Example: Organizers should inform workers that supervisors will likely question workers about the union or campaign, threaten adverse consequences if workers organize, watch workers more closely, and may correct problems that prompted workers' interest in organizing.

Inoculation also involves preparing workers by suggesting how workers can respond to company conduct in a way to diffuse or deflect supervisors' questions or comments. This makes it harder for the company to identify, target and pressure supporters early in the campaign before there are a significant number of workers active in the campaign. The company can continue to operate if it terminates a few supporters, but won't if it terminates dozens of workers.

Before unions are prepared to demonstrate to companies substantial worker solidarity, unions should prepare workers:

- to avoid attracting attention at the workplace by, for example, distributing literature to co-workers away from the workplace,

- to change the subject when talking about the campaign and a supervisor or a co-worker who will report the conversation to the company walks by, and
- to evade answering supervisor questions about the union or campaign if possible.

Important: Even after a large number of workers support the campaign, it is important that supporters not give the company any excuse to terminate them. This means that supporters should be extra careful to comply with all orders and directives, and to follow all company rules, policies and procedures as closely as possible.

Finally, inoculation involves creating solidarity among workers so they support each other through tough and intimidating times.

How Are ULP Charges Investigated?

The NLRB Regional Director assigns a **Board agent** to investigate the factual statements or allegations of the charge. The Board agent relies primarily on representatives to furnish information and evidence, and to schedule for the Board agent to interview witnesses and take their affidavits. Affidavits are sworn statements.

Affidavits: The Board and the union will keep worker affidavits confidential. The company will not see the affidavit until after the worker testifies at a ULP hearing when the Board attorney provides the company a copy of the affidavit.

Dealing with NLRB Personnel

Every representative should be familiar with the NLRB Regional offices that cover their union's jurisdiction, and get to know Board agents and NLRB attorneys who work in those offices.

Organizers should not **assume** that Board agents or other Regional office personnel are biased either for or against workers or the company. Instead, organizers should get to know the reputation of the agents and attorneys assigned to their cases and take that into account when trying to persuade them to take issue complaints or refrain from settling cases out from under the union.

Differences of opinion occur and the union's position will not always prevail. Nevertheless, representatives should not directly question the

professionalism or integrity of Board agents or NLRB attorneys because the union may need their help in the future.

Representatives begin their relationship with the NLRB with a blank slate. The best way to develop credibility and a productive working relationship with the Regional office is to:

- file only charges the union can prove, or let the Board agent know that the union realizes the charge is weak but had to file for other reasons,
- not exaggerate the union's evidence,
- promptly provide evidence,
- promptly and completely respond to all Board agent questions and requests for information or documents (even if it seems like the agent asked for the same information before),
- promptly withdraw charges that have no merit or that the union can't prove, **unless** there is a good campaign reason not to,
- recognize that Board agents are overworked and have hundreds of cases besides the union's, and
- be firm, but professional, in advocating the union's position, listen carefully to the Board agent's responses and only then respond.

Settlements of ULP Cases

If the Regional office's investigation reveals that evidence supports the charge, the Board agent will try to settle the case.

Most settlements are informal because they consist only of the company's agreement to pay backpay and post a notice. Regional Directors approve informal settlements, unless a hearing before an administrative law judge has begun. If a hearing has begun, the Administrative Law Judge (ALJ) — not the Regional Director — must approve the settlement.

The NLRB will attempt to convince the union to settle. The NLRB, however, may settle the case without the union's consent (a unilateral settlement). The union may appeal a Regional Director's unilateral settlement to the General Counsel's Office of Appeals. Appeals of settlements approved by ALJs must be filed with the Board. Appeals of settlements are rarely successful.

All informal settlements require **notice postings** which require companies to post basically worthless printed notices of the terms of the settlement on workplace bulletin boards.

Non-admissions clauses, which state that the company does not admit having committed any ULP, are routinely included in settlements.

Unions and companies may privately settle cases without NLRB involvement or approval. The NLRB almost always honors these **non-Board settlements**.

A formal settlement consists of a signed stipulation that the Board issues as a formal Board order that is typically enforced by a court. The NLRB can ask a court to rule the company in contempt if the company violates a formal settlement. Formal settlements are extremely rare.

Complaints

If, after investigation, the Regional Director finds that there is enough evidence to show that there is reasonable cause to believe that the company committed a ULP and there is no settlement, the Regional Director will issue a document describing or alleging the ULPs and the facts that show the company committed those ULPs. This document is called a **complaint**.

Regional Directors should also issue complaints if the determination of whether the company committed a ULP turns on the credibility of witnesses.

Example: A worker says the supervisor threatened the worker and the supervisor denies making the threat. The Regional Director should **refrain from** determining whether the worker or supervisor is more credible. The Regional Director should instead leave that determination to the Administrative Law Judge (ALJ), who will make it after observing the demeanor of the worker and supervisor when counsel test their credibility through questioning on cross examination during the hearing and after considering whose version makes more sense.

After the Regional Director issues the complaint, an ALJ will hold an evidentiary hearing.

Dismissals of Charges

If the Regional Director decides that the charge lacks merit, the Board agent will inform the representative that the Region is prepared to dismiss the charge and recommend that the representative withdraw the charge.

Unless there is a valid reason not to, such as a significant adverse effect on workers, the campaign or the community's support for the campaign, the representative should withdraw the charge.

If the representative does not withdraw the charge, the Region will dismiss the charge. The Board agent will send a letter explaining the dismissal to the representative and the company.

At the representative's request, the Regional Director will send a long-form dismissal, which contains more explanation of the reasons for dismissing the charge.

Appeals from dismissals must be filed with the General Counsel's Office of Appeals within 14 days of the dismissal. Appeals from Regional Directors' decisions to dismiss charges are rarely successful.

Hearings on Complaints, ALJ Decisions and Appeals to the Board

After the Regional Director issues a complaint, a hearing will be held before an administrative law judge (ALJ).

At the hearing, the NLRB General Counsel is represented by an attorney assigned from the NLRB's Regional office, referred to as Counsel for the General Counsel. The Board attorney puts on the case showing that the company committed a ULP. The union and company have the right to have their own attorneys or other representatives participate in the hearing. The Board, the union and the company may subpoena witnesses and documents from the other parties.

Following opening statements, the Board attorney will call and question witnesses and offer documents into the evidentiary record. After workers testify or answer the Board attorney's questions, the Board attorney will provide a copy of the worker's affidavit to the company. This is the first time the company sees the affidavit. Attorneys for the union and the company have the right to also question the Board's witnesses.

After the Board's case, the union may call additional witnesses or offer other documents into evidence. The company puts on its case after the union's case.

Following hearings, the parties usually file documents arguing what facts the ALJ should find and what legal conclusions the ALJ should make based on those facts. These written arguments are called briefs.

The ALJ will issue a decision that determines which witnesses the ALJ found credible, what factual findings the ALJ made based on the evidence, and recommending to the Board certain legal conclusions that the company either committed or did not commit the ULPs alleged in the complaint.

The losing party may appeal to — or file exceptions from the ALJ's decision with — the Board. The parties file several briefs when cases are appealed to the Board.

The Board will decide the appeal and either adopt the ALJ's decision, entirely or in part, or reverse part or all of the ALJ's decision.

The party who loses before the Board may appeal the Board's decision to a U.S. court of appeals. In rare cases, the U.S. Supreme Court will hear an appeal from the appeals court's decision.

What Remedies Are Available to Correct ULPs?

The Board has the power to order the company to stop committing ULPs and to make workers whole.

If the company committed ULPs, such as threats, interrogation or surveillance, the Board will order the company to stop or cease and desist from those violations and to post a notice in the workplace informing workers that it has violated the law and will not commit those violations again.

If companies unlawfully terminate or suspend workers, the Board will order the company to reinstate the workers and pay them backpay for lost wages and benefits, with interest. Backpay means all wages and benefits the worker would have earned but for the ULP, **minus** the wages the worker earned elsewhere and any unemployment compensation the worker collected since the company committed the ULP.

Other remedies may be available depending upon the nature and severity of the violations, and whether the company committed ULPs in the recent past. Fines and other criminal penalties are not available.

Injunctions

Normally, workers receive no relief from ULP charges until after all NLRB and appeals court proceedings have been completed, which usually takes years. Often, by that time the injury to the campaign is beyond repair.

For this reason, in certain cases involving serious violations that will, if not immediately stopped, irreparably damage the campaign or collective bargaining relationship, the NLRB may go to court to obtain a court order or injunction requiring the company to stop the violation.

This type of court order is called a **10(j) injunction**, after the section of the NLRA that authorizes the Board to seek it.

Whenever a 10(j) injunction might be appropriate, the representative should request that the NLRB “seek a Section 10(j) injunction” on the charge form or cover letter.

ORGANIZING AND MOBILIZING WORKERS AT THE WORKPLACE: THE RIGHT TO DISTRIBUTE, TALK, SOLICIT AND WEAR STICKERS OR BUTTONS

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Workers have broad rights to solicit, distribute papers, talk to each other and the general public, and to wear stickers or buttons at work. Workers can exercise these rights to organize and to pressure their company for the purposes of their own bargaining, the bargaining of other workers who work for the same company or to support legislation or political candidates who would improve their workplace.

When and Where Do Workers Have the Right to Distribute?

Workers generally have the right to distribute anytime, anywhere at work. Workers almost always have the right during their nonwork time and in nonwork areas to distribute literature about the union, campaign or political issues that affect the workplace. Company rules prohibiting workers from distributing literature in nonwork areas during nonwork times are unlawful. As a result, workers always have the right to distribute literature during nonwork time in nonwork areas.

Having said that, the law allows companies to restrict distribution during work time and in work areas if (1) they establish the restriction **before** workers begin union or campaign activity, and (2) they consistently enforce the restriction in a way that does not discriminate against union or campaign activity. Important to the ability of companies to restrict distribution are the meanings of work time, nonwork time, work areas and nonwork areas.

When Is Work Time and Nonwork Time?

Work time is **only** the time when workers actually perform their assigned job duties. Nonwork time is any time other than work time. Work time does **not** include time when workers punch in or out, take or make personal phone calls, or otherwise stop performing their work duties, even if they are still on the clock.

Example: Workers are not on work time when they are on the way to the breakroom, smoking area, restroom, water fountains, or entering or leaving the facility. In one case, a worker was not working during the time the worker went to get coffee, from the time the worker left the worker's work area, walked to the coffee machine, waited for the cup to fill and until the worker returned to the work area and began to work again.

For this reason, nonwork time is much broader than just meal and other breaks.

Which Part of the Workplace Are Work Areas and Nonwork Areas?

Work areas are **only** those areas where workers regularly perform a significant amount of work that directly relates to the main function of the facility. It is **not** all areas of the facility except breakrooms. Like the term nonwork time, nonwork area means all areas other than work areas.

An area does not become a work area merely because some work functions occur there. For example, a store parking lot is not a work area merely because workers retrieve carts or assist customers loading purchases into cars there.

“Mixed use areas” are nonwork areas. Mixed use areas are areas where workers work but also where they spend nonwork time. For example, a hallway is a nonwork mixed use area where both socializing and work incidental to the company’s main operation occur. Even areas that are otherwise work areas can be converted to nonwork areas if companies allow workers to be there when they are not working. For example, an area used for production during most of the day but as a meal area during the lunch break is not a work area when used as an area where workers can eat lunch.

What Rights Do Workers Have to Talk to Each Other While Working in Work Areas?

The law guarantees workers the right to communicate with one another at the workplace about their union or campaign, or political issues that affect the workplace. A company cannot restrict workers from talking about these and related subjects work while working even though the company claims that the conversation interferes with productivity, if the company allows workers to talk about other topics during work time.

Subjects Workers Have the Right to Talk About

Workers have the right to talk about all workplace issues such as bargaining, working conditions, organizing, campaigns, union meetings and political issues that affect the workplace.

Example: Workers have the right to talk about proposed “right to work” bills or political candidates who support or oppose right to work bills.

What About Workers' Rights to Talk to Outsiders?

If a company permits workers to talk with customers about other subjects like the weather and sports, workers have the right to talk to customers about the union and workplace issues. Similarly, workers also have the right to talk to each other about protected subjects in the presence of customers.

UFCW employers have conceded that workers have the right to talk about bargaining and workplace disputes to customers while working on the salesfloor. For example, in response to a UFCW letter notifying Safeway chain Vons that workers would be talking with customers about bargaining messages on stickers they would be wearing while working on the salesfloor, the Labor Relations Director recognized that both Safeway's practice and the law allow for certain dialogue between workers and customers.

The right to talk to outsiders includes the right to talk about workplace issues with other outsiders, such as the company's business partners, investors, vendors, suppliers and advertisers.

What About Worker Rights to Solicit?

In general, workers have the right to solicit any time anywhere on the company's premises. The law however allows companies to limit solicitation during work time, if (1) they establish the limitation **before** workers begin union or campaign activity, and (2) they consistently enforce the limitation in a way that does not discriminate against union or campaign activity. Stores may restrict work time solicitation on "salesfloors" when the store is open.

Companies may not ban solicitation during nonwork time.

What Does Solicitation Mean?

Solicitation means only requesting a worker to sign an "authorization card" at the time of the request. An authorization card is a paper workers sign to organize a union through a worker free choice process or card check, or National Labor Relations Board election. The law defines solicitation in this way because worker productivity can be interrupted when one worker asks another to sign an authorization card, the second worker agrees, stops work, completes the card, signs the card, and then returns the card to the first worker who stood by while the first filled out and signed the card.

Talking Is Not the Same as “Soliciting”

Because solicitation only means someone asking a worker to sign an authorization card **at that** time, solicitation does **not** include informing coworkers of a campaign meeting, asking a union-related question or talking about whether the union is good or bad. Solicitation does **not** include workers:

- stating favorable opinions about the union or “soliciting” other workers to support the union or vote for representation
- asking coworkers to participate in the campaign or meet organizers
- asking coworkers to sign authorization cards at a later time like breaks, after work or at someone’s house.

Example: In a Wal-Mart case, despite the store’s concern for customer service, a worker did not solicit when during work time the worker asked a coworker if the coworker had an authorization card and invited co-workers to a union meeting.

Because talking about the union is not solicitation, companies may not restrict workers from talking about the union or campaign under no-solicitation rules.

What Are Workers Rights to Wear Stickers or Buttons?

Most workers have broad rights to wear union stickers and buttons while working at the workplace. This includes stickers or buttons supporting workers’ own campaigns, bargaining or disputes, those of other workers who work for the same company, and workplace legislation or candidates who take positions on workplace issues.

Important: The rights of certain workers in processing plants who work directly with food may be limited by the U.S. Department of Agriculture to wearing certain non-paper stickers. To make sure unions know the boundaries of those limitations, unions should ask representatives of the Department of Agriculture for copies of all restrictions on plant workers wearing buttons or stickers.

The Right to Wear Stickers or Buttons During Nonwork Time in Nonwork Areas

Companies other than processing plants may not have rules that restrict workers from wearing stickers or buttons during nonwork time in nonwork areas.

The Right to Wear Stickers or Buttons During Work Time in Work Areas or on the Salesfloor

Workers who do not work in processing plants have broad rights to wear stickers or buttons while working in work areas or on salesfloors. These rights are protected by the main federal labor law, called the National Labor Relations Act, and contracts under, for example, no-discrimination or union activity provisions or past practices. Absent “special circumstances,” discussed below, companies may not restrict these rights.

The right to wear stickers or buttons can be based on the past practice of workers wearing stickers or buttons displaying other messages: Past practices may protect rights to wear stickers or buttons with union or campaign messages. For example, if a company disregards dress codes and permits workers to wear stickers or buttons with other messages, this past practice effectively modifies the dress code to allow workers to wear union, campaign and political stickers or buttons.

Example: In one case, the company requested workers to remove buttons based on a policy. Despite the policy, workers regularly wore other types of buttons, including religious and sports team buttons, and supervisors knew they did. Because of this past practice, the company could not restrict workers from wearing union buttons.

Other examples:

- “Support Our Troops” buttons
- Holiday buttons
- Buttons that display pictures of grandchildren or United States flags

Past practices may also establish the right to wear stickers or buttons of a certain size. When companies allow large buttons, they create a past practice giving workers the right to wear similarly sized union, campaign or political stickers or buttons.

The Law Presumes Restriction on Stickers or Buttons to Be Unlawful

Workers have a near-absolute right to wear union and campaign buttons. Consequently, companies almost always violate the National Labor Relations Act and commit an unfair labor practice when they restrict stickers or buttons.

In Limited Circumstances, Companies May Restrict Stickers or Buttons

To overcome the presumption that rules restricting stickers or buttons are unlawful, companies must prove real harm to their business, or “special circumstances,” **and** that the harm outweighs worker rights. Only 4 types of business harm justify restrictions on stickers or buttons. Those are real threats:

- to discipline,
- to safety,
- of damage to property or product, or
- to public image.

What Are “Threats to Discipline”?

While in limited circumstances threats to discipline may justify restrictions on stickers or buttons, companies must prove that workers wearing them pose actual threats to discipline. Companies may not just say that stickers or buttons might lead to disorder or disruption, or attempt to rely on an unsubstantiated fear of conflict between workers. For example, a company’s fear concerning a “Scab” button did not, without more, justify restrictions.

Rather, when companies attempt to restrict stickers or buttons because they will cause conflict, the company must prove that there is a **likelihood** – not just a **possibility** – that they will cause conflict. For example, a company could not restrict a button with an inflammatory message because there was no evidence that the button would cause any workplace disruption. And, companies may not restrict stickers or buttons merely because workers wear them at a time when the workplace is already in a state of disharmony or conflict.

What Are “Threats to Productivity”?

Although threats to productivity can justify restricting stickers or buttons, they rarely do. This is because wearing stickers or buttons do not affect productivity. Workers can wear stickers or buttons while performing jobs like stocking shelves or working on plant lines.

What Are “Threats to Safety”?

In rare cases companies may restrict stickers or buttons when they prove that stickers or buttons threaten safety. To prove a safety threat, companies must show that the stickers or buttons cover safety information. For example,

workers retain the right to wear stickers on hardhats next to safety stickers so long as the safety information and bright colors of hardhats are still visible. Ultimately, companies may only restrict stickers based on a safety threat if they can prove that:

- workplace visibility is a problem,
- the company uses hardhats or stickers to increase the wearer's visibility or communicate information, and
- stickers interfere with visibility of hardhats or safety stickers.

What Are “Threats of Damage to Property or Product”?

Company claims that stickers or buttons pose a threat of damage to the company's property or product are usually rejected. For example, companies may not rely on the pretext of preventing objects from falling into or damaging machines or products to restrict worker rights to wear stickers or buttons. And there is no threat of property damage if companies permit workers to carry loose items in their shirt pockets, or workers do not wear stickers or buttons near machines.

Important: These rules may not apply to processing plants because of U.S. Department of Agriculture requirements.

In one case, the company did not prove a threat of property damage based on the possibility of falling buttons because the company permitted all workers, supervisors and guests to wear plastic name tags attached to their jackets with safety clips, workers carried pencils, both loose and clipped, steel rulers without clips, cigarettes, and other things in their shirt pockets.

Even if companies prove that stickers or buttons threaten property or product damage, however, they may not restrict them during times when they pose no threat, such as when workers are no longer on the workfloor or when lines are not running.

What Are “Threats to Public Image”?

In rare cases, companies may restrict stickers or buttons to protect their public image. Companies may not, however, prohibit stickers or buttons merely because they have dress codes or uniform policies. Companies may restrict stickers or buttons only if they prove that public image is very important to their business, and that stickers or buttons unreasonably interfere with that image.

Rules based on public image must be narrow. For example, they may not apply to a group larger than is necessary. In one case, a company unlawfully restricted **all** workers from wearing buttons based on a public image claim because the restriction applied to workers who did not come in contact with the public. Similarly, companies may not prohibit union buttons when they allow their own promotional buttons.

In Grocery Stores, Public Image Never Justifies Restricting Stickers or Buttons

Grocery stores may not restrict stickers or buttons based on public image because public image in grocery stores is not that important.

In one case, a company was found to have unlawfully modified its dress code to prohibit on-duty workers from wearing buttons because the operation of a grocery store is not so sensitive that buttons detract from worker appearance, even in public areas. The argument that its uniform dress code attracted customers and increased profits was rejected. This is because the grocery store business does not traditionally require the same rigor of appearance as other industries. The aprons and smocks of cashiers, clerks and meatcutters worn over white shirts and dark slacks and shoes are simply not the equivalent of traditional uniforms of workers in, for example, world class restaurants.

To base restrictions on stickers or buttons on threats to public image, companies must prove at least four things:

- Public image is particularly important to the company's business.
- Worker appearance contributes to the company's public image which the company has controls through appearance rules as part of its business plan.
- Stickers or buttons unreasonably interfere with a public image.
- The company restricts stickers or buttons only during times when workers have direct contact with the general public or are on the salesfloor while the store is open.

The Right to Wear Stickers or Buttons Prevails Even When Workers Are Frequently in Contact with Customers

Although public image may sometimes justify restricting stickers or buttons, customer contact, alone, never does. So, speculation that the company might lose customers does not justify a restriction because this right does not turn on the pleasure or displeasure of customers.

Size and Color

Companies may not restrict reasonably sized and unobtrusive buttons because they do not unreasonably interfere with public image. Even where a company has an image worthy of protection, it may not restrict neat, small and unobtrusive stickers or buttons because their effect on uniforms and public image is minimal. For example, in one case, the company could not restrict buttons showing the union's initials, even though a hotel guest remarked about them, because the buttons were smaller than a dime, neat, inconspicuous and unprovocative, and did not detract from the dignity of the company or reduce business.

May Companies Restrict Worker Rights to Distribute, Talk to Customers or Wear Stickers or Buttons Based on Contract No-Strike Clauses?

No, unless the no-strike clause explicitly prohibits workers from specifically distributing literature, talking to customers or wearing stickers or buttons displaying messages about collective bargaining or other labor disputes.

Because the National Labor Relations Act protects these rights, the only way unions may waive them is "clearly and unmistakably." This means that unions may only waive these rights in contract clauses that explicitly refer to these specific rights, or during bargaining, if the union explicitly agreed to specifically waive.

Example: A no-strike clause that waives the right to strike or boycott during the term of the contract, does **not** waive worker rights to talk to customers about contract disputes or to handbill during nonwork time.

No-strike clauses rarely waive these specific rights. And equally rare is the union official who expressly agrees during bargaining that workers will not talk to customers, handbill, or wear stickers or buttons anytime or for any reason while the new contract is in effect.

Companies May Not Discriminatorily Implement or Enforce Rules Restricting Protected Activity or Establish Rules Requiring Prior Company Approval Before Workers Engage in Protected Activity

Companies may not restrict worker rights to distribute, talk, solicit or wear stickers or buttons if the company:

- establishes the rule after workers begin to engage in protected activity
- enforces a pre-existing restriction more strictly in response to protected activity by for example beginning to enforce an existing apparel policy prohibiting buttons only after workers begin to wear campaign stickers
- did not consistently enforce the rules before workers began to engage in protected activity
- discriminatorily enforces the restrictions by previously allowing other workers to engage in similar activity with different messages, like, for example, talking about the weather or their families, soliciting for Avon or their children's sports teams, or wearing U.S. flag or holiday buttons.

Restrictions that require prior approval are unlawful: Rules may not require workers to obtain the company's prior approval before engaging in protected activity.

The NLRA Protects Worker Comments on Social Media

Workers have the right to post online comments that relate to working conditions. Thus, companies may not discipline workers for posting online comments that criticize, disparage, or otherwise remark on, for example, supervisors, co-workers, or company policies. Similarly, companies cannot discipline workers for using their company logos when making such online comments. Company policies that restrict this right to post online violate the NLRA by being overbroad.

Companies Must Bargain Over Workrules Such as No-Distribution/No-Solicitation Policies, Dress Codes, and Social Media Policies

Companies May Not Unilaterally Establish or Change Rules to Restrict Workers from Engaging in Protected Activity Without First Bargaining with the Union

Because work rules are mandatory subjects of bargaining, companies must provide unions with advance notice of and the opportunity to bargain over new rules — or changes in existing rules — that would restrict workers from exercising their rights to distribute literature, talk, solicit or wear stickers or buttons.

What Rights Do Off-Duty and Off-Site Workers Have to Engage in Protected Activity at the Workplace?

Off-duty and off-site workers basically have the same rights as on-duty workers and workers who work at the facility, **unless** the company has a pre-existing, consistently and non-discriminatorily enforced policy prohibiting:

- off-duty workers from visiting the interior of their own workplace, or
- workers from visiting the interior of company facilities other than those they work at, and
- the company clearly disseminated the policy to all workers, and
- the company consistently enforces the policy against all off-duty and off-site workers who attempt to visit a company facility for any reason other than going to work.

Even with such a policy, companies may **not** exclude off-duty or off-site workers from the **exterior, non-work areas of the company's facilities unless business reasons justify** the exclusion, even if the company has a preexisting, consistently and non-discriminatorily maintained and enforced policy excluding off-duty and off-site workers.

What Rights Do “Salts” Have?

Because they are considered workers, salts have the same distribution, talking, solicitation, stickers and buttons, and access rights as other workers.

Who Is a Salt?

A salt is a worker who has obtained a job at a company to assist organize the company's workers or for other campaign purposes. The term refers to the campaign interspersing workers among the company's workforce like a shaker sprinkles salt on food.

UNION ACCESS TO COMPANY PROPERTY AND INFORMATION

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Union Access to the Workplace and Company Property for Organizing and Campaign Purposes

In general, union representatives have the right to engage in **protected activity** including organizing on company property, **unless** the company has a **pre-existing, consistently** and **non-discriminatorily** enforced no-solicitation/no-distribution policy excluding non-workers from the areas where representatives desire to conduct their activities.

Protected activity includes representatives introducing themselves to workers, asking workers to join worker associations or to participate in actions, inviting workers to campaign meetings, soliciting, distributing literature and talking to workers while they work except to the extent it unduly interferes with workers performing their jobs. Area standards and informational handbilling and picketing are also protected.

In order to lawfully exclude representatives, companies must have had their no-solicitation/no-distribution **policy in place before** representatives engaged in protected activity. It's unlawful for companies to institute new policies or to begin to enforce dormant policies in **response to** protected activity.

The company must have **consistently enforced** the policy in a **non-discriminatory** manner **before** the representatives' activity. If the company previously allowed other non-workers, such as charitable, civic, commercial or political groups, to conduct activities on the company's property, the company's exclusion of representatives from the same property is discriminatory and an unfair labor practice. (Some appeals courts disagree that evidence that the company permitted charitable groups to conduct activities on their property proves that the company discriminatorily excluded union representatives.)

Example: A plant unlawfully excludes union representatives from breakrooms if it permits workers' family and friends to wait in the breakrooms for workers to get off work or vendors to sell there.

If instead of the company a shopping center landlord orders union representatives off of the center's parking lots and sidewalks or "common areas," the union should investigate whether the landlord has allowed any other groups to conduct activities on any other part of the common areas. This is because to determine whether the **landlord** discriminatorily excluded the representatives, the Board will consider any activity the landlord has allowed any other group to conduct on any part of **its property** which consists of the entire shopping center. The union does not have to show that the landlord allowed other groups to

conduct activities on the sidewalk and parking lot in front of the target company where the representatives were conducting their activities.

Important: Never assume the company maintains a no-solicitation/no-distribution policy, or that the company has consistently enforced its policy in a non-discriminatory manner. Representatives should instead investigate these matters.

Representatives also have the right to go into snackbars and cafeterias opened to the general public, as long as they act as other patrons do, by for example, not “table hopping” from one table to another and not nursing one cup of coffee for hours on end.

What If the Company’s Policy Prohibits Solicitation?

If the company’s policy prohibits non-worker solicitation, representatives should consider simply introducing themselves and talking to workers – instead of asking workers to sign authorization cards.

Solicitation means asking a worker to sign an authorization card at the same time the representative asks the worker. Solicitation is **not** representatives introducing themselves to workers, talking to them about the union or campaign, inviting workers to meetings, or encouraging workers to support the union or participate in the campaign. Indeed, solicitation is not even asking workers to sign authorization cards at a **later time**, during breaks or after work.

Practical point: Representatives should consider whether asking workers to sign authorization cards, distributing literature or even talking to workers at the workplace while wearing union insignia advances the campaign.

It may be better for representatives to just introduce themselves and talk with workers while wearing street clothes. This approach might delay the time the company realizes that campaign activity is occurring, might make it harder for the company to identify and target campaign supporters, and may make workers who work for anti-union companies less apprehensive and less reluctant to talk to representatives.

Can Companies Exclude Representatives from All Private Property?

No. Companies may only exclude representatives from **their own property**. Put another way, companies may not exclude representatives from **property they do not own or lease**, even if they have consistently enforced pre-existing, non-discriminatory no-solicitation/no-distribution policies against all other outside groups on that property.

Example: Companies may not exclude representatives from shopping center common areas — sidewalks, parking lots and driveways — because companies do **not** hold the property rights to those areas necessary to **close off** those **areas** to anyone, including other **shopping center stores** or **those stores' customers** or **workers**. Instead, companies only have the right under their leases to use shopping center common areas.

What About Public Property?

Companies may not exclude representatives from **public property**, including public property that is immediately next to company property.

Important: Representatives should never assume that the company owns the property they seek to conduct activities on. Representatives should research the property first. If representatives are unable to research land records themselves, the union can hire title insurance companies to conduct title searches of properties and to write reports describing the company's rights to the property. The cost of title searches and reports is typically only a few hundred dollars.

What Is and Is not Trespass?

Representatives do **not** commit trespass if they enter a company's property with the intent to engage in protected activity, unless the company has posted the property with a no trespass sign and has consistently enforced the no-trespass restriction against all outsiders, including customers. Importantly, no solicitation and no distribution signs are **not** the equivalent of no trespass signs.

Rather, trespass occurs only when the company's agent who possesses the authority to speak for the company has ordered representatives to leave the property and the representatives refuse to leave:

- after verifying that the person is a company agent with authority to order outsiders to leave the property, and
- after representatives have had the chance to try to convince the agent to allow them to remain on the property.

If representatives are unsuccessful in persuading the company's authorized agent to change the agent's mind, representatives should leave the property. Generally, representatives should not take arrests.

Practical Point

Representatives should use access and trespass law to persuade police, local government attorneys, shopping center landlords and possibly even the company to grant access to property. Representatives should **not** automatically file ULP charges if the company commits an access violation because the NLRB process will likely take years before the Board or a court orders the company to grant access.

The best way to assert the right to remain on company property is to conduct the activities in the right manner. All activities should be: peaceful; orderly; polite, professional and positive; refrain from blocking anyone's access to any entrance, driveway, parking lot lane or store aisle; and leave the area where the activity occurred in the same condition it was before the activity by for example picking up any litter.

In short, the best way to conduct activities is to impact workers, customers and the general public through the persuasiveness of the activity's message, not the way it was conducted.

Union Access to the Workplace to Bargain Contracts, Service Members and Enforce Contracts

Generally, representatives have access to workplaces primarily when contracts contain visitation clauses granting access or past practices establish access rights.

However, unions have the right to enter workplaces in several other situations even when contracts do not contain visitation clauses and past practices do not establish access rights:

- When unions are unable to investigate or evaluate grievances or other workplace matters without visiting workplaces.

Example: Companies must grant access if to assess a grievance or dispute, the union needs to see a work area or examine a machine.

- To prepare to bargain first contracts or subsequent contracts.
- To observe work, workplace layout and equipment.
- To prepare for arbitration
- To conduct occupational safety and health inspections.

Obtaining Company Information and Documents

Company information and documents can often be useful to the union during organizing or other campaigns.

Who Can the Union Get Information and Documents From?

Unions may get information from any individual, including individuals who work for the company that the information concerns. The more important questions are the type of information the union is getting rather than who is giving it to the union, and how the union received that information.

What Information Can the Union Get?

There are several kinds of information that the union can generally always get:

- Information about a company's past or present unlawful actions.
- Any information in the public domain, or available or released to the public, whether companies willingly placed the information in the public domain or other parties made the information available to the public against the company's wishes.
- Knowledge that workers or executives acquire or develop on the job, especially if the information generally known in the industry.

Example: The way a plant slaughters and processes chickens and the machinery used in that process is not protected because workers acquire this information while working in plants.

- Information discoverable through basic investigation or research like interviewing workers or visiting worksites.

Unions can also generally obtain and use any other information, including documents, as long as the information is not a **trade secret** or **confidential** information that the company restricts access to and limits disclosure of.

What Is a Trade Secret?

A trade secret is information that derives independent economic value by giving the company a competitive advantage and is not accessible by others like a scientific formula, a manufacturing process or an industrial pattern.

Examples

A company's unique computer or accounting system that other companies do not have or use.

The formula for Coca-Cola.

What Is Confidential Information?

Before legally protecting the information as confidential, most courts require companies to meet most or all of the following conditions:

- The nature of the information must be sensitive or actually confidential:
- Does no one outside of the company know the information?
- Has the company invested a large amount of effort or money to develop the information?
- Would it be difficult for others to develop or duplicate the information?
- Is the information valuable to the company and its competitors?
- Does the company limit access to the information to only a few of its own workers, executives and other persons working with the company?

Examples

Information about a product that only approved personnel had access to that required a special password on a special computer.

Marketing information that companies distribute to a small number of high level executives during a meeting and then collect the information after the meeting.

- Has the company taken measures to guard the secrecy of the information?

Note: Companies that print “confidential” on a few truly sensitive policies may protect those policies as confidential, whereas printing confidential on the bottom of **all company policies**, including policies that are obviously not sensitive, will not.

Similarly, while companies can legally protect particular information that is explicitly identified as confidential in confidentiality agreements, general confidentiality provisions at the end of agreements and general company policies requiring confidentiality generally will not.

Example: Information was protected as confidential where the company took express measures to hide the information, locked it up and only disclosed the location of the information to a limited group of people who the company ordered not to disclose the information and to keep it confidential.

Information that meets all or almost all of these conditions is information the company likely can protect as confidential. For this reason, the union should be careful not to ask, negotiate with or pay money to anyone to get this information.

On the other hand, information that meets none or almost none of these conditions should not be confidential, and the union may obtain and use this information without liability.

Examples

A court did not protect as confidential a “confidential” chicken feed formula because the company reprinted the formula for workers at a training where the company did not tell attendees that the formula was “confidential.”

Information about a special machine was not protected as confidential because the company mailed a pamphlet about the machine to all of its shareholders even though the pamphlet was labeled “confidential.”

Unions should consult with attorneys when in doubt whether the information is a trade secret or confidential.

What About Confidential Information?

Unions should be careful about acquiring or asking someone to acquire confidential information that the union has reason to believe may have been acquired in an unlawful manner. Acquiring trade secrets or confidential information or soliciting workers or executives to provide the union with such information may violate state or federal law.

If, however, the union, through no act of its own, passively receives unsolicited confidential information from a third party, such information becomes public and therefore is available for the union's use, unless the union has reason to know that the third party acquired the confidential information through improper means, such as theft, deception, or bribery.

Even if the third party acquired the confidential information by improper means, the First Amendment may still permit a union that passively received the information to disclose it, so long as the information regards a matter of public concern. (Again, when in doubt about this, unions should consult with attorneys.)

The union must be careful however and ensure that it retains documentation to demonstrate that any such information was truly unsolicited and received without any action on the union's part.

When the union has a bargaining relationship with the company, the company cannot deny the union access to "confidential" information or documents, unless the union refuses to place reasonable conditions on its access to and use of the information or documents.

VOLUNTARY RECOGNITION OF UNIONS AS WORKERS' COLLECTIVE BARGAINING REPRESENTATIVES

Companies may voluntarily recognize unions as the collective bargaining representatives of their workers without NLRB elections upon a showing that a majority of the bargaining unit workers have chosen the union as their representative. Once the company recognizes the union, the company is legally obligated to bargain with the union.

Companies voluntarily recognize unions either because they realize the benefits of a union-represented workforce or as a result of a campaign that uses First Amendment rights to convince companies to allow the workers to freely choose whether they want workplace representation.

The First Amendment to the U.S. Constitution gives unions and workers free speech rights to publicize the company's record as an employer and corporate citizen, to boycott the company, to petition governments by filing charges or court cases against companies, by encouraging local governments to pass resolutions condemning companies, and by requesting government officials to comment on companies, and to associate with community and other allied groups.

The determination of whether a majority of workers support the union is usually made by an independent neutral party who compares signed authorization cards against a list of unit workers under a worker free choice and majority verification agreement. These agreements are referred to as a process agreement or a card check agreement. To ensure that workers will be able to exercise their choice free from coercion and intimidation, such agreements should:

- Require companies to provide complete, accurate lists of workers' names, addresses, and cell and home telephone numbers (along with updated lists as the union requests).
- Require the company to remain neutral. The provision should prohibit the company's managers and supervisors from saying anything against the union, organizing or collective bargaining, or that the company opposes union representation. The provision should also prohibit the

company from directly or indirectly supporting anybody who opposes representation.

- Grant the union access to the workplace to talk and distribute literature to workers, as long as representatives do not unduly interfere with workers' work.
- Provide that a previously selected neutral party will determine whether a majority of workers chose union representation.
- Require the company to recognize the union, if a majority of workers choose union representation.
- Require the parties to bargain a contract, and if they fail to reach agreement, submit all open terms to binding interest arbitration. Interest arbitration is an arbitration where the neutral resolves the parties' disputes over contract provisions and sets the terms of those provisions.
- Require the parties to submit any disputes related to or arising under the process agreement to a previously selected neutral to resolve in expedited final and binding arbitration.
- Waive the parties' NLRA rights to: file any election petition, challenge the appropriateness of the unit, or file any ULP charges related to the agreement, the agreement's process or the union's recognition demand, with the NLRB; or to directly or indirectly assist or support anyone who files a petition or charge with the NLRB.

THE NATIONAL LABOR RELATIONS ACT: REPRESENTATION ELECTIONS

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The Process

The first step in the National Labor Relations Board's (NLRB) election process is the union filing a **petition for election** (or RC petition), which must be supported by a **showing of interest** of at least 30 percent of the workers in an **appropriate bargaining unit**.

The showing of interest is usually made by signed **authorization cards** but may also be shown in other ways, such as a petition signed by workers.

If the union and company agree on the scope of a bargaining unit and there are no other disputed election issues, the parties sign an election agreement and schedule an election.

Absent agreement, the Regional Director will schedule a **hearing** to resolve any election issues such which workers are included and excluded from the bargaining unit. Many NLRB regional offices will schedule hearings to begin 10 days after the union files the petition. The hearing is conducted by a hearing officer who is usually a Board agent from the NLRB's regional office. At the hearing, both the union and company present evidence supporting their positions.

After the hearing, the Regional Director issues a **Decision and Direction of Election** describing the bargaining unit, resolving any other issues and scheduling the election. Many regions will issue Decisions and Directions of Election within days of when the parties file their post-hearing briefs.

Either party may appeal the Regional Director's decision by filing a request for review of the decision with the NLRB. Requests for review are due 14 days after the Regional Director issues the decision. The NLRB grants requests for review only in cases raising important issues.

Ordinarily, the Region will hold the election even if the NLRB has not decided the request for review, and will impound the ballots pending the NLRB's ruling. In rare cases, the NLRB will stay (hold up) the election, pending its ruling on the request for review.

Elections are usually held at the company's workplace. Mail ballots may be used in certain circumstances, such as a widely dispersed workforce or a workforce that rarely reports to the company's facility. All voting is by secret ballot.

NLRB rules strictly limit company and union campaign activity near polling areas. The polling area is the area in the immediate vicinity of the check-in table and voting booths.

The union and company usually have one or more workers serve as **election observers** in the polling area. Supervisors may not serve as election observers.

Observers may challenge eligibility of workers to cast ballots based on whether their name is on the *Excelsior* list, they still work for the company, they are supervisors or they should be in the bargaining unit. The *Excelsior* list is the list of workers eligible to vote. If the number of challenged ballots could change the outcome of the election, the NLRB will determine whether the workers who cast them were eligible to vote. If the numbers of challenges is not election determinative, the NLRB will not decide their eligibility.

Authorization Cards

Authorization cards authorize the union to represent the signer for collective bargaining purposes. Unions can petition for an election, if at least 30% of the workers sign cards.

Example of authorization card language: “I want this union to be my voice on the job and to represent me to get respect in the workplace, good wages, decent benefits and better working conditions.”

Workers should date cards they sign. Whoever witnesses workers sign cards or whoever receives signed cards from workers should initial the cards and date cards if workers fail to do so.

Unions and the NLRB keep cards confidential. Cards may, however, be entered into evidence during NLRB hearings to prove the union’s majority status. To make this showing, however, unions may not use cards if representatives **tell workers to ignore the text of the card and that the “only purpose of the card is to get an election.”**

Unions should not ask persons who may be supervisors with authority to assign work to or write up other workers to solicit authorization cards from those workers. The NLRB will not count cards solicited by supervisors under circumstances that reasonably tend to coerce or interfere with worker free choice. **Example:** The NLRB has ruled that it is inherently coercive for first line

supervisors to solicit cards from workers they have the authority to issue written warnings to, or who they direct or assign work to in a non-routine manner.

Such supervisory conduct could also be the basis for overturning election results if the supervisors encouraged workers to vote for the union.

Signed cards from a majority (50% plus 1) of unit workers will support the company's **voluntary recognition** of the union under a free choice agreement. This is generally known as a card check.

Excelsior List

Within 7 days after the Regional Director directs an election or the union and company enter into an election agreement, the company must furnish the Regional Office with a list containing all of the full names and addresses of all workers in the bargaining unit. The Regional Office then makes the list available to the union. This list is called the "Excelsior list," after the case that first required it.

A company's failure to produce a substantially complete list of names and accurate addresses can be the basis for setting aside election results, especially where the number omissions or bad addresses are determinative of the election outcome by equaling or exceeding the difference in the vote. **Example:** The NLRB has set aside elections where the Excelsior list omitted the names of 10% of unit workers and where 18% of the addresses were inaccurate.

Eligibility to Vote

Generally, workers eligible to vote are all those employed during the payroll period immediately preceding the direction of election or approval of the parties' election agreement, who still work for the company on the date of the election.

Workers who the company discharged in violation of the NLRA are eligible to vote. If a ULP charge concerning their discharge is pending, the workers may vote subject to a challenge to their ballots. Laid-off workers may vote if they have a reasonable expectation of employment in the foreseeable future. Workers hired on a temporary basis may vote if the duration of their employment is uncertain or is for a long period of time, such as longer than a year. Probationary workers may vote if they have a reasonable expectation of continued employment.

Appropriate Bargaining Units

The NLRB will schedule an election for workers in an appropriate bargaining unit. Importantly, there may be **more than one** appropriate bargaining unit in a workplace.

Often, the determination of the appropriate unit determines the outcome of the election. For this reason, the union representative's choice of which unit to petition for is often more of a strategic — rather than legal — judgment. The union generally tries to tailor the unit to maximize the number of union supporters. The company tries to do the opposite. Accordingly, before the union files the petition, representatives should devote a lot of thought into the scope of the unit, as well as to arguments and evidence to support the bargaining unit they choose.

Examples

While a unit of all non-supervisory, non-security guard workers of a grocery store is a presumptively appropriate unit (known as a wall-to-wall unit), smaller units consisting of just meat department, bakery department or grocery workers may also be appropriate.

In a processing plant, all production workers may be in one unit and all maintenance workers may be in another unit, or they may all be combined into one unit.

Unions do not have to prove the appropriateness of presumptively appropriate units. Instead, companies must prove that presumptively appropriate units are inappropriate.

The NLRB cannot combine security guards with other workers into one unit. Nor can the NLRB certify a unit of guards if the union, or any union affiliated with the union, represents non-guard workers. For this reason, all UFCW-represented units exclude guards.

In making unit determinations, the NLRB uses a **community of interests** test. The test is whether the unit workers share a community of interest with each other separate from the company's other workers. This test considers:

- similarities in workers' duties, work performed, skills and working conditions;
- similarities in wages and benefits;

- location of work areas or facilities;
- common supervision;
- common or similar policies, practices and work rules;
- common or similar training;
- frequency of contact, interchange and transfers among workers, groups of workers, departments or work sites;
- the company's organizational structure;
- bargaining history and extent of union organization;
- worker preferences;
- anything else representatives can think of like these factors that shows that workers in the proposed unit have similar working conditions and excluded workers don't.

Unions attempting to exclude workers from a unit must find out how many of these working conditions of the excluded workers are different from those of the unit workers. Unions attempting to include workers in a unit must find out all similarities of working conditions among these workers.

In short, representatives should find out what those workers they want to vote have in common, and how the other workers are different.

Unions should investigate and compile these working conditions and line up witnesses who can testify about them **before** filing petitions and NLRB Regions **schedule hearings**.

What Happens When a Company Objects to an Appropriate Bargaining Unit?

When a company contends that the smallest appropriate unit contains workers who are not in the petitioned-for unit, the Board first assesses whether the petitioned-for unit is an appropriate bargaining unit. The workers in the petitioned-for unit must be readily identifiable as a group, and share a community of interest. If so, the burden is on the employer to demonstrate that the additional workers it seeks to include share an **overwhelming community of interest** with the petitioned-for workers because the traditional community-of-interest factors **overlap almost completely**.

Important: Representatives should try to anticipate the company's position and conduct their investigation accordingly. Representatives should also coordinate with attorneys before filing petitions so attorneys can help compile the information and select and prepare witnesses, and to confirm that attorneys will be available on the dates the Region schedules the hearing for. This way the union will be prepared to present the best case possible on the earliest possible hearing dates, and will not have to postpone the hearing — and the election — because it is unprepared or its attorney is unavailable.

Other issues: The NLRB considers **single-location units** presumptively appropriate. Companies may attempt to convince the Region that the smallest appropriate unit is a multi-location unit (all stores or facilities in a particular geographic area), but the burden of proof is high and companies generally lose.

Workers provided by a “temp agency” may, under certain circumstances, be included in the same bargaining unit as permanent workers.

Generally, temp agency workers may be included in a unit when they share a community of interests with the permanent workers. **Example:** Temp agency workers who work side-by-side with permanent workers, perform the same work as permanent workers, and are subject to the same supervision and discipline as permanent workers.

However, temp agencies may object to being part of the election among the permanent workers. In this case, the union should file a separate election petition for the temp agency workers.

NLRB Election Bars

There are several bars that preclude the holding of elections.

Election Bar

The NLRA prohibits the NLRB from **holding** an **election** within 12 months of an earlier election in the same unit.

Certification Bar

The certification bar precludes any election within one year of the NLRB's certification of a union as the collective bargaining representative of workers. The NLRB will extend the certification bar if companies fail to bargain in good faith during the year.

Contract Bar

The contract bar prohibits the holding of elections based on petitions filed by companies during the entire term of the contract.

The contract bar also precludes elections based on petitions filed by **workers** and **other unions** for **up to three years** of the **contract term** no matter how long the entire contract term is.

Window period: The NLRB imposes a 30-day window period for filing petitions for units covered by an existing contract. To be timely, petitions must be filed no **earlier** than 90 days before the **contract expires** and no **later** than 60 days before it expires.

For **healthcare employers**, petitions must be filed no earlier than 120 days before contracts expire and no later than 90 days before expiration.

Exception: If the contract term exceeds 3 years, the window period is measured back from the last day of the end of the 3rd year of the contract instead of the date the contract expires. Petitions may also be filed any time **after** the **last day** of the **contract's 3rd year**.

Recognition Bar

The recognition bar prohibits the NLRB from holding elections for a reasonable period — up to 1 year — from the date companies voluntarily recognize unions.

Election Objections

The NLRB may overturn election results because the company or the union violated election rules, or committed election objections or ULPs that affected the outcome of the election.

Following the election, the losing party may file **objections** describing the alleged misconduct. Objections must be filed with the Region by the close of business on the 7th day after the tally of ballots. Evidence in support of objections must be submitted to the Region within 7 days of the date objections were filed.

Examples of objectionable conduct include:

- most types of ULPs (threats, interrogation, surveillance, promises or grants of benefits, discrimination, discipline or discharge),

- the company holding mandatory **captive audience** meetings with groups of workers within 24 hours of election (the 24 hour rule),
- holding raffles or similar activities during the 24-hour period if participation in the activity is linked to voting,
- campaigning near the polling area,
- a company's failure to provide the Excelsior List (or a reasonably complete or accurate list) or timely post the NLRB's election notice, and
- using a supervisor as an election observer.

Certain actions of the Board agent conducting the election may also constitute election objections.

Because workers are not party to the election, to prove that worker misconduct constitutes an election objection, the company must show that the misconduct created a general atmosphere of fear and reprisal that rendered a fair election impossible. This is very difficult to show.

If the Regional office's investigation of the objections reveals that there is evidence to support the objections, the Regional Director should set the objections for hearing, along with any determinative challenged ballots. If there are no related ULPs, the hearing is held before a hearing officer, who is usually a Board agent or attorney. If there are related ULPs, the Regional Director will consolidate the objections and challenges with the ULPs and schedule a hearing before an ALJ.

Although the procedure differs somewhat depending on whether there was an election agreement or a directed election and whether the hearing is held before a hearing officer or an ALJ, either party may appeal the hearing officer's or ALJ's decision to the NLRB. If the NLRB finds merit to objections, it should overturn the election results and order a rerun election.

Practical Point

Unfortunately, this appeals process is time-consuming, usually taking more than a year. Because a new election can be held one year after an earlier election, a union that believes it can win a second election should consider refraining from filing objections and instead file another petition for a new election to be held after the one-year election bar period has ended, rather than wait for a final NLRB ruling on its objections and challenges. To get a new election, the union must submit a new 30 percent showing of interest. No new showing of interest is required if a rerun election is ordered.

Unit Decertifications

Workers may decertify a union as the workers' bargaining representative if a majority of the workers who vote in the election vote to decertify the union. To get a decertification election, at least 30 percent of the bargaining unit members must sign a decertification petition. Decertification drives are usually initiated by the company and are seldom successful in well-served units.

STATE & LOCAL PUBLIC EMPLOYEE COLLECTIVE BARGAINING LAWS (PERB & PERC)

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What Are They?

Because the **National Labor Relations Act (NLRA) does not cover state and local government workers**, state and local law provides what rights these workers have to organize unions and to bargain collectively.

Most states have laws that protect the right to organize and bargain collectively for at least certain public-sector workers. Some of these laws have fewer protections than the NLRA, particularly pertaining to the right to strike. Others have more protections than the NLRA, for example requiring public employers to resolve bargaining disputes through interest arbitration.

Interest arbitration is an arbitration where the arbitrator resolves the parties' disputes over contract provisions and sets the terms of those provisions after hearings. At the hearings, the union and public employer present evidence and make arguments about why the arbitrator should set the provision in accordance with their contract proposals. The union and public employer base their arguments on evidence showing the employers' financial ability or inability to afford the proposals, the importance of the proposals to workers, and what similar public-sector employers do with their workers on the bargaining subjects.

Space prohibits any comprehensive review of all of these laws. This section attempts to only summarize some common characteristics of these laws. Representatives should contact state or local public-sector labor relations agencies or the state AFL-CIO to obtain information about the relevant collective bargaining law.

Who Are Public Workers?

All workers who work directly for the state government (departments or agencies), or local governments (cities and counties), or special districts are public workers.

In addition, many workers who do not directly work for state or local governments may also be public workers if their employer is owned, managed or controlled by a board of trustees or other entity comprised of persons who are appointed by state or local officials. This may be true even though the employer is not a governmental entity.

What Is PERB or PERC?

Many state and municipal collective bargaining laws establish **Public Workers Relations Boards (PERB) or Public Employee Relations Commissions (PERC)** to administer and enforce those laws.

Organizers should become familiar with their state or local PERB or PERC and their procedures. They should visit the office, introduce themselves to the staff, and obtain copies of their rules and regulations.

What Do State and Local Public-Sector Collective Bargaining Laws Provide?

Most public-sector collective bargaining laws borrow aspects of the NLRA, with the most significant difference being the number of protections the laws provide workers.

Some laws allow more categories of public workers to organize. Some permit certain categories of public-sector workers to strike while others prohibit strikes.

Some laws that prohibit strikes contain procedures for resolving contract disputes, usually through mediation or interest arbitration. These laws are even better than the NLRA because workers are assured that at the conclusion of the process they will have a contract, whereas the NLRA does not guarantee that the workers will ever get a contract.

Other Sources of Rights for Public-Sector Workers to Organize

Even though a state or local government does not have a collective bargaining law, or has a law but the law does not cover the workers the union seeks to represent, there may be other sources for the right to organize.

For example, the charter of a public institution or an institution that employs public workers may contain a provision requiring the institution to recognize and collectively bargain with unions authorized to represent the institution's workers. Or the state constitution may contain a provision recognizing the right of public workers to union representation. Or a governor may sign an executive order providing that certain categories of workers can

choose a representative and negotiate for some limited rights such as the right to “meet and confer” or enter into a “partnership agreement” with the state.

Politics and Community Allies Are Important

Although community coalition building is important in any campaign, it is particularly important in organizing public workers. This is because the persons who typically control the employer’s reaction to the campaign are government officials who are particularly sensitive to the desires of the community. And, community involvement may influence these officials to choose the high road in response to campaigns or collective bargaining proposals.

COLLECTIVE BARGAINING: USING THE LAW TO BARGAIN BETTER CONTRACTS AND EFFECTIVELY REPRESENT WORKERS

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The National Labor Relations Act (NLRA)

The NLRA is the principal law governing collective bargaining, strikes and other economic actions unions can take in support of bargaining against private sector companies, and to a lesser extent, the interpretation and enforcement of contracts.

The National Labor Relations Board (NLRB)

As the federal agency that enforces the NLRA, the NLRB determines what is good faith versus bad faith bargaining, mandatory versus permissive subjects of bargaining, when companies may lawfully versus unlawfully unilaterally change working conditions, and what documents and information companies must provide to unions.

While it is frequently ineffective in assisting with organizing, filing ULP charges with the NLRB can help create bargaining leverage, avoid bargaining impasse and convert economic strikes into unfair labor practice strikes. Specifically, the NLRB can rule that companies bargained in bad faith, refused to provide the union with relevant documents or information, or committed other ULPs.

The Courts

More often than the NLRB, courts sometimes become involved with interpreting and enforcing contracts when companies appeal or refuse to abide by arbitration awards. In deciding these cases, courts enforce arbitral awards if they “draw their essence” from contract language or are reasonably plausible interpretations of contracts. Courts generally refuse to second guess arbitrators and instead require companies to abide by their agreement to arbitrate workplace disputes.

Arbitration

Almost every contract assigns to arbitrators the final say on interpreting contracts and on whether companies violated them. Although arbitration clauses almost always provide that their awards are “final and binding,” companies are increasingly appealing awards they disagree with to the courts.

Good Faith Bargaining

The NLRA requires companies and unions to bargain in good faith over mandatory subjects of bargaining.

Definition

Good faith bargaining obligates companies to talk to unions with **open minds** and a **genuine intent** to reach agreement on employment matters that unions raise. This obligation **prohibits** companies from **changing any working condition without** first giving the union **advance notice** and a **meaningful opportunity to bargain before** implementing the change.

Specifically, the NLRA imposes the obligation to:

- “Meet at reasonable times and confer in good faith.” This requires companies to meet with unions at reasonable intervals and frequency, and cannot unreasonably drag out bargaining when unions are available to meet earlier.
- Confer “with respect to wages, hours, and other terms and conditions of employment.” A company’s obligation to bargain encompasses generally **every matter** that **affects workers** as workers, **even if** the matter is **outside** of the **contract**. Mandatory subjects of bargaining are discussed below.
- Negotiate “an agreement, or any question arising thereunder.” The obligation to bargain continues **after** the contract is signed and includes bargaining over the meaning of contract terms and the processing of grievances, **even if** companies believe they are **not required to arbitrate** because, for example, grievances were not timely filed or appealed.
- Sign “a written contract incorporating any agreement reached.” Companies must put agreements into written contracts that they must sign.

While it requires companies to “adjust” differences with unions to reach common ground, the obligation to bargain does not compel either party to agree to a proposal or make a concession. In other words, the obligation allows companies to engage in hard bargaining as long as they genuinely attempt to reach agreement with the union.

Duration of the Obligation

The obligation to bargain begins on the date companies recognize unions or workers **win NLRB representation elections (even if the NLRB has not yet certified the union as their representative)** and continues **after** contracts expire.

After Elections

Importantly, after workers win elections, companies must bargain over every working condition unions demand to bargain over. This includes terms companies have not changed. And, companies may not unilaterally **change** employment terms without first bargaining with unions.

Union representatives thus have the right to represent and advocate for bargaining unit members on workplace issues even **before** the NLRB **certifies** unions, **before** parties sign contracts, and even if companies have **not changed** any working condition.

- After winning elections, unions have the right to demand to bargain over unchanged policies, practices or rules such as those matters workers considered to be major issues during the campaign. Unions have the right to request documents and information relevant to these bargaining demands.
- When beginning to bargain contracts, unions should be careful to state their desire to bargain an overall contract in addition to separate unchanged policies, practices or rules. This should preclude companies from declaring impasse based solely on the failure to reach agreement on individual policies, practices or rules. If bargaining reaches an impasse, companies can unilaterally implement their final offer.
- Representatives have the right to discuss with managers workers' questions, concerns or complaints about employment matters, such as schedules, hours or discipline. **Representatives can in effect grieve issues before the parties establish grievance procedures. In addition, representatives should request documents and information relevant to worker questions, concerns or complaints.**
- Representatives should let workers know that the union is trying to go to bat for them even before the NLRB certifies the union. Unions can appoint or elect shop stewards to assist with these efforts.

- This way, unions can maintain contact with organized units **before** they begin to service them under contracts and process grievances under the contracts' grievance procedures.

Unions should file unfair labor practice charges if companies refuse to discuss matters or disputes, or provide documents or information. (Of course, if the NLRB does not certify the union, the NLRB will ultimately dismiss the charges.)

After Certification or Recognition

To give unions the chance to organize new bargaining units and reach agreement on contracts, the NLRB requires companies to bargain for one year from the date of certification or longer if they fail to promptly begin good faith bargaining following certification.

Similarly, the NLRB requires companies who voluntarily **recognize** unions to bargain for a **reasonable period** of time of up to 12 months.

After Parties Sign Contracts

The **obligation** to bargain **continues** even **after** parties **sign contracts**. Companies must consider and bargain over **every employment matter** unions raise that contracts do not expressly resolve or specifically address.

Companies generally must bargain over:

- any employment matter **outside** of the **contract**,
- any working condition the company attempts to change (including company **rules, policies, procedures and practices**), and
- any **new** working condition companies attempt to implement.

Before changing any existing working condition or implementing any new condition, companies must first notify unions and give them meaningful opportunities to bargain.

After contracts expire: Even after contracts expire or unions strike, companies are prohibited from changing working conditions before they bargained to impasse over those changes.

Waiver of the Obligation

If unions or their agents know companies changed working conditions or implemented new conditions, unions must demand that companies rescind and

bargain over the changes because the NLRB will rule that unions waived the company's obligation to bargain over changes or new conditions that they knew about but failed to timely demand bargaining over.

Example: A representative is aware that the company unilaterally changed its time and attendance policy. Several weeks after operating under the new policy, the company terminates a member for excessive absences under one of the policy's new provisions. The company refuses the union's demand to bargain over its earlier changes to the policy.

The NLRB may rule that the union waived the right to bargain over the policy because the union's agent actually knew about the change several weeks earlier but the union nevertheless failed to demand bargaining at that time. The NLRB would be even more likely to dismiss the bad faith bargaining unfair labor practice charge if the union waited longer than the 6-month statute of limitations to demand bargaining.

Zipper Clauses

Definition

In zipper clauses unions generally waive companies' obligation to bargain over working conditions that are outside of the contract. There are different kinds of zipper clauses.

Zipper clauses can apply to matters discussed during bargaining but not agreed to, matters never mentioned during bargaining, or both. The worst zipper clause allows companies to eliminate all past practices that are not contained in contracts, including arbitrators' contract interpretations.

While there are occasions when they act to the union's advantage, zipper clauses sometimes preclude unions from challenging companies who implement new working conditions or change existing conditions. Consequently, unions should generally attempt to keep zipper clauses out of contracts or, if necessary, agree only to the narrowest clause.

Interpretation

Because they purport to waive unions' NLRA rights to require companies to bargain, the NLRB requires zipper clauses to "**clearly and unmistakably**" **wave** companies' obligations to bargain over the **particular employment**

terms. As a waiver of NLRA rights, the NLRB construes zipper clauses narrowly.

Unions should similarly construe zipper clauses narrowly. Unions should generally take the position that they waived the right to bargain over few, if any, working conditions outside of contracts and instead insist that companies bargain over all working conditions.

Enforcement

When companies refuse to back down, unions can have arbitrators decide whether they waived the right to bargain over particular working conditions because zipper clauses are contract terms. Unions also have the option of filing ULP charges.

In deciding which option to take, unions should consider whether arbitrators are more likely to require the company to bargain than the NLRB and whether unions can obtain quicker final decisions through arbitration.

Unions' Use of Zipper Clauses

Depending on their wording, unions can sometimes use zipper clauses to their advantage.

Example: If it provides that both parties waive the right to bargain over working conditions discussed during bargaining, zipper clauses may prohibit companies from making any changes the company proposed during bargaining but that the union did not agree to.

Bargaining Impasse

Definition

Parties reach bargaining impasse when they are deadlocked on at least one mandatory subject of bargaining so that they cannot reach agreement on an entire contract and it is futile to continue talking. Parties may also reach impasse on individual issues they bargain apart from contracts or while contracts are in effect.

Impact

Once parties reach impasse, companies have fulfilled their obligation to bargain and may unilaterally implement their final positions on contract terms or other employment matters, as long as the parties have reached impasse over every change they implement.

After reaching impasse on entire contracts, companies may lawfully pick and choose which terms of their final proposals they implement, as long as they previously proposed and bargained to impasse over each of the terms they implement and none of the terms were combined, tied or linked with other terms the company failed to implement.

Examples: If during bargaining, the company linked a 10% wage cut to a new profit sharing plan, stating that the company would partially compensate workers for the wage cut through profit sharing, the company may **not** unilaterally implement only the wage cut — without the profit sharing plan — after reaching impasse.

In contrast, if the company never linked the proposed wage cut with the profit sharing plan, but instead offered them as separate proposals included in its final offer, the company could lawfully implement the wage cut without also implementing the profit sharing plan.

If unions approach bargaining as negotiating over a contract as a whole rather than piecemeal, the parties will not reach impasse unless and until they reach impasse on every contract proposal and term. Unions should therefore state at the outset of bargaining and repeatedly thereafter the union's intent to bargain one overall contract. Unions should also consistently expressly condition their agreement to company proposals on the parties reaching agreement on the overall contract.

Exceptions to companies' authority to unilaterally implement changes after reaching impasse:

- Companies may only unilaterally implement proposals on mandatory subjects of bargaining after reaching impasse. While unions may agree to bargain over permissive subjects, companies may not implement their proposals on permissive subject after reaching impasse. Permissive subjects are discussed below.
- Companies may not unilaterally implement proposals that circumvent their collective bargaining obligations or unions' status as bargaining representative, even after reaching impasse. **Example:** Companies may not implement proposals that grant them the authority to unilaterally re-set wage rates, unilaterally set merit raises or unilaterally change contract terms or policies at their sole discretion.

Practical Tips

To **avoid impasse**, unions should:

- Not only express a **willingness to compromise** and be **flexible**, but also demonstrate that willingness through actions. Unions should agree to acceptable proposals, for example. If necessary, unions can point the NLRB to those compromises when arguing that the parties have not yet reached impasse. (Having said that, the NLRB is unlikely to consider agreements **to insignificant proposals** to indicate a genuine willingness to compromise sufficient to show that the parties have not yet reached impasse.)
- Try to leave room for movement or compromise on some proposal. **Example:** Unions should hold in reserve changes in position on more than one contract term that they can propose if the parties seem to be reaching impasse. (Again, the NLRB may not consider insignificant movement to demonstrate room for real movement.)
- Make and keep in reserve **document** and **information requests**. Unions should especially consider making additional requests when companies make new or modified proposals or change their arguments or positions on existing proposals. The parties are not at impasse if unions indicate they may agree or be willing to compromise after considering additional documents or information.
- Offer to bring in mediators and then use them to demonstrate flexibility and a willingness to compromise.
- Where possible, file unfair labor practice charges alleging that companies bargained in bad faith. Bad faith bargaining charges or, better yet, bad faith bargaining complaints the NLRB General Counsel issues preclude companies from declaring impasse.

Bad Faith Bargaining

Definition

Companies bargain in bad faith when they **fail** to:

- talk with unions,
- consider or specifically address proposals or arguments unions make,
or

- approach discussions or bargaining with an **open mind** and a **genuine intent** to reach agreement.

Proving Bad Faith Bargaining

Unions may prove bad faith bargaining based on companies' conduct or statements at or **away from** the bargaining table. This includes actions or statements indicating that the company is anti-union or intends to avoid reaching agreement. While it will consider **all** of the company's **conduct**, the NLRB will usually require unions to show that companies bargained or acted in bad faith on more than one term, proposal or matter.

To make the best case, unions should compile a record of the company's historical — as well as contemporaneous — conduct and statements at and away from the bargaining table.

Categories of Bad Faith Bargaining

Surface Bargaining

Definition: The most common form of bad faith bargaining, surface bargaining consists of companies merely going through the motion, revealing an absence of a sincere intent to reach common ground or agreement with unions.

Examples

- Agreeing to minor issues or proposals but no major or significant ones,
- Rejecting union proposals without explanation or counterproposals,
- Refusing to agree to basic or common contract provisions such as seniority, just cause, or grievance and arbitration procedures,
- Making predictably unacceptable proposals,
- Proposing wage levels or benefits lower than those in effect before elections or recognition,
- Proposing that contracts bestow on companies unlimited authority to set wage or benefit levels, determine merit raises or change contract terms.

Unilateral Changes

Companies bargain in bad faith when they unilaterally change mandatory subjects of bargaining without first giving unions advance notice and meaningful

opportunities to bargain. Companies' obligation to refrain from unilaterally changing employment terms **begins** on the **dates** workers win their **elections** or companies **recognize** unions, and continues **during contract terms** and **after contracts expire**.

Direct Dealing

Companies bargain in bad faith when they bypass workers' exclusive bargaining representatives and bargain or deal directly with workers. While companies may accurately inform workers of the parties' bargaining proposals and positions, companies may not talk to workers about proposals or bargaining positions.

Polling Workers

When they ask workers what they think of bargaining proposals or issues, companies unlawfully poll workers, another form of unlawful direct dealing.

Example: Asking workers which proposals they prefer or would accept, or ask their opinions on proposals or bargaining positions.

Unlawfully Withdrawing Recognition

Companies bargain in bad faith when they withdraw recognition of the union as the workers' bargaining representative unless the company possesses evidence **clearly** showing that a **majority of workers** did not support the union **at the time** they withdrew recognition. Because unions are presumed to enjoy majority support among workers, **unions do not have to prove** that a majority continues to support the union.

Companies may not withdraw recognition if the company's information is unclear or shows that an equal number of workers support and oppose the union. Similarly, companies may not withdraw recognition if a number of workers large enough to swing the majority back to the union change their minds or are indecisive.

Example: Companies may not withdraw recognition if workers who signed petitions stating they "no longer want the union to represent them" change their minds and subsequently also sign another petition stating that they support the union. Companies may not count workers who signed the union's petition after signing the company's because those workers may have changed their minds and gone back to supporting the union by the time the company withdrew recognition. (Workers can indicate that they changed their minds in other ways such as joining the union **after** signing the company's petition.)

So, if enough workers sign the union's petition before the company withdraws recognition so that the number of workers who **signed only the company's petition** fails to constitute a majority, the company may not lawfully withdraw recognition.

Importantly, to lawfully withdraw recognition, companies must show that a majority of workers **clearly** no longer support the union. For this reason, petitions that state they are "showings of an interest for decertification" are not evidence of the union's loss of majority status because support for an election does not clearly show that the workers no longer support the union. Similarly, a petition whose purpose workers are told is to get a decertification **election** also is not evidence of a clear loss of the union's majority for the same reason.

Finally, the company's evidence must show that a majority of workers no longer support the union **at the time** the company withdrew recognition. Companies therefore may not rely on information they discover **after** withdrawing recognition, including the ULP hearing testimony of workers who say they did not support the union.

NLRB Remedies for Bad Faith Bargaining

Unfortunately, because the NLRA does not require companies to reach agreement, remedies for bad faith bargaining consist merely of orders requiring companies to bargain in good faith. Having said that, the purpose of filing bad faith bargaining charges is to attempt to create or increase bargaining leverage, to avoid impasse and to attempt to convert economic strikes into ULP strikes. The purpose is not to cause the NLRB to order companies to agree to union proposals.

If companies' bad faith bargaining caused any workers to lose hours, pay or their jobs, or to suffer reduced benefits, remedies can include backpay. For example, the NLRB may order backpay for members working in departments companies unlawfully contracted out without bargaining.

Subjects of Bargaining

There are 3 categories of bargaining subjects: mandatory, permissive and illegal. The importance of the designation is that companies are only **required** to bargain — and may only bargain to **impasse** — over **mandatory subjects**. In contrast, while the parties **may** bargain over **permissive** subjects, companies may not declare impasse over — or unilaterally implement proposals on — permissive subjects.

Mandatory Subjects of Bargaining

As a practical matter, mandatory subjects are generally those matters that in some way affect the work life of bargaining unit members. This includes not only wages and benefits, but all policies, practices, procedures, work rules and anything related to workplace environment including how managers supervise workers.

The technical legal definition of mandatory subjects is any matter that directly affects unit workers' wages, hours or other terms and conditions of employment. Mandatory subjects also cover matters that are **outside** of the **bargaining unit** if those matters "vitally affect" workers' employment, such as decisions to contract out work based on labor costs.

This outline strongly encourages representatives to think of mandatory subjects in the broadest sense. Put more directly, unions should demand to discuss, bargain over and have input into every matter that affects workers' employment.

The following is a list of mandatory subjects. It is however only a **general guide**. Representatives should err on the side of asserting that any matter that affects workers is a mandatory subject, even if it does not appear on this list.

- ABC Political Action Committee checkoff
- arbitration procedures
- bonus programs
- use of bulletin boards
- worker free choice or card check agreements for stores or facilities similar to those already under contract that the company acquires or opens in the future
- days off including vacation, holidays, personal and sick days, and jury duty
- discipline
- discharge
- drug and alcohol programs
- worker discounts

- dues checkoff
- evaluations
- family and medical leave
- fringe benefits, including healthcare, pension, 401(k) and other savings programs, life insurance
- grievance procedures
- hours
- most layoffs & recalls
- raises including merit raises
- worker physicals
- promotions
- changes from salary to hourly wage rates
- schedules
- seniority
- sick leave
- Social Security number no-match letter policies
- surveillance cameras
- time clocks
- transfers
- Thanksgiving or Christmas turkeys
- union security
- vending machine prices and contents
- wage rates
- work assignments

- work loads
- work preservation
- all work rules, including rules regarding absenteeism and tardiness, lunch breaks, dress codes, fighting or workplace violence, parking or safety
- worker performance certificates/awards

Company Decisions to Close, Consolidate or Relocate Operations

If directly or indirectly based in significant part on **labor costs**, fundamental business or entrepreneurial **decisions** that impact workers' jobs by either moving or eliminating them are **mandatory subjects** companies must bargain over. These include **decisions** to:

- partially close or consolidate facilities
- phase out business lines or operations
- transfer or relocate operations or work

Such **decisions** are **not mandatory subjects** if instead of labor costs, they are based primarily on:

- basic changes in the scope or direction of company's' business
- changes in composition or loss of customers
- technological changes

Proving That Labor Costs Partially Motivated Company Decisions

Unions can prove that labor costs directly or indirectly motivated company entrepreneurial decisions in several ways:

- Private or public company statements or comments mentioning or complaining about collective bargaining agreements or labor costs.
- Documents, such as internal memos, reports or studies, showing that company officials, managers, consultants, accountants or other representatives considered labor costs to be at least one significant reason for decisions. Unions have the right to request these documents and information.

- Financial documents showing relatively high labor costs for the facilities, operations, business lines or work the company closed, consolidated or transferred.

Significance: When company **decisions** are mandatory subjects, companies must bargain over the decision whether or not to make the change. And, if unions agree to the changes, companies must bargain **how** to implement them.

Effects Bargaining

Even if they do not have to bargain over **decisions** that are unrelated to labor costs, companies must nevertheless bargain over the **effects** on workers of **all** of their **decisions**. Effects bargaining typically involves matters such as:

- severance pay
- continuation of company payments of healthcare premiums
- retraining
- counseling
- preferential hiring or transfer rights

Permissive Subjects of Bargaining

Permissive subjects are those that do not directly relate to wages, hours or working conditions, but that the parties **may voluntarily** nevertheless **discuss**. Parties may neither condition their agreement to contract on permissive subjects, nor may they bargain to impasse over them. Unions may not file ULP charges over companies' refusal to bargain over permissive subjects or their bad faith bargaining over permissive subjects. However, unions may file ULP charges over companies' insistence on bargaining to impasse over permissive subjects.

Once they agree to include permissive subjects in contracts, however, companies are bound, and may not get around their agreement by arguing that the matters are permissive subjects.

Example: The most common permissive subjects are terms in **contracts** that are still **in effect**. While either party may request to revisit or bargain over a provision in a current contract, the other may lawfully refuse to discuss it.

Bargaining unit descriptions are also permissive subjects. To promote stability of bargaining by ensuring that the parties confidently know which workers they are bargaining over, bargaining unit definitions and descriptions **may only be changed by agreement of both parties.**

Example: While companies are not required to discuss placing supervisors in bargaining units, once companies agree to do so, unions may lawfully refuse to thereafter even discuss company proposals to remove them.

Other examples of permissive subjects:

- unions' Beck fee calculations
- unions' internal contract ratification procedures
- other internal union affairs
- interest arbitration (that is, arbitrations to set contract terms rather than decide whether companies violated contracts)
- loyalty oaths that workers will use best efforts to promote companies' business
- settlements of ULP cases
- taping or transcribing bargaining sessions or grievance meetings
- union labels on company products

Illegal Subjects of Bargaining

Illegal subjects are those the parties may not lawfully agree to because to do so would violate a law.

Examples: Parties may not agree to discriminate against workers because of their race, national origin, sex, sexual orientation, religion, disability, age or union membership.

Union Security and Dues Checkoff

Union security is the term used to describe the means by which workers preclude their companies from undermining their unions by ensuring that their

unions have the resources necessary to represent them through the collection of membership dues and fees.

The NLRA allows unions and companies to bargain clauses in collective bargaining agreements that require workers to become union members or pay dues and fees equal to membership dues as a condition of employment. These clauses are called union security clauses. Contracts may not, however, compel workers to become union members. Workers must be provided with the option of not joining the union and instead just paying the equivalent of membership dues.

Unions and companies may also bargain dues checkoff clauses that require companies to deduct or checkoff dues and fees from the wages of those workers who sign dues checkoff authorization or assignment forms and to forward the checked off amounts to the union. Dues checkoff authorizations are typically irrevocable for up to one year.

The NLRA allows states to enact so-called **right-to-work** laws that prohibit union security clauses but not dues checkoff clauses. In right-to-work states, worker payments to the union are voluntary. Again, checkoff authorizations are typically irrevocable for up to one year.

Automatic Revocation of Checkoffs Because a Worker Resigned Membership

Checkoff forms should state that the worker is directing the company to deduct amounts to help offset the **cost of representation**, **not** because the worker is a member. Checkoff forms that only refer to membership are automatically revoked if the worker exercises the right to resign membership. In contrast, checkoff forms that refer to the cost of representation and bargaining remain in effect even if the worker resigns membership.

“Beck” Objectors

In non-right-to-work states, non-members may object to paying fees for purposes other than collective bargaining, contract administration, representation and grievance processing, and organizing in a competitive market. These non-members are known as Beck objectors based on the Supreme Court case giving them the right to pay less than full membership dues. If they comply with the union’s Beck objection procedures, the non-member will be required to only pay an amount based on the union’s chargeable expenditures relating to collective bargaining, contract administration, representation, grievance processing, union administration and organizing in a competitive market.

Non-members enjoy all the benefits of the collective bargaining agreement and union representation, but have no right to serve as shop stewards, attend union meetings, vote in union elections, hold union office or vote on contracts.

Contract Violations

Arbitrate or File ULP Charges?

Sometimes unions will have the option of vindicating contract violations through either ULP charges or grievance arbitration proceedings. For several reasons, unions should lean in favor of arbitration rather than NLRB charges.

- **More neutral decision maker.** Many of the NLRB's administrative law judges have become more conservative, pro-company and anti-worker. Even though not all arbitrators are pro-worker, there is frequently a better chance of getting an open-minded or fair decision maker through arbitration than at the NLRB.
- **Deferral.** When ULP charges could be resolved through arbitration, the NLRB will almost always defer them to arbitration, rather than issue complaints and prosecute companies in ULP proceedings. Afterwards, the NLRB will adopt arbitrators' decisions unless they clearly undermine NLRA rights. Even if the NLRB rejects the arbitrator's decision, the NLRB case would be **postponed** until **after** arbitration.
- **Delay.** Arbitrations usually result in quicker final decisions than ULP proceedings.
- **Remedies.** While remedies arbitrators can award are theoretically the same as the NLRB, there is a greater chance of persuading arbitrators than ALJs and the NLRB that doing justice requires extraordinary remedies. And, it is less likely that arbitrators' novel remedies will be overturned on appeal.

Grievances and Arbitration

Grievances assert that companies violated contract provisions. Unions can prove contract violations in an arbitration by showing that companies either violated specific contract terms or **departed** from **policies** or established **past practices**, even if the policies or practices are not incorporated into contracts.

Proving Past Practices

To prove past practices, unions must show not only the existence of fairly consistent practices, but also that companies' managers or supervisors knew about the practices and implicitly agreed to them by failing to stop them. Arbitrators are unlikely to find past practices where facts show that companies prohibited the practices as often as they allowed them, or that no manager or supervisor knew about them.

Management Rights Clauses

Unions can use contracts' management rights clauses to grieve not only company actions, but the **manner** in which companies **establish or apply new or existing rules, policies or procedures** by arguing that companies' exercise of their management rights authority was unreasonable, unfair or unjust.

While management rights clauses typically seem to broadly authorize companies to do anything the contract does not restrict, many arbitrators nevertheless interpret management rights clauses as requiring companies to exercise their authority reasonably and fairly.

Burdens of Proof

Companies bear the burden of proving just cause for **discipline and discharges**. **Unions bear the burden of proving other**, non-disciplinary **contract violations**.

For discipline and discharge grievances, this means workers win if there is no evidence, the evidence is inconclusive or the union's evidence is equivalent to the company's.

As a **practical matter**, in discipline and discharge grievances, unions can make their case merely by challenging or poking holes in the companies' cases. Having said that, it's usually best for unions to prove they are right rather than just show why companies are wrong.

Document and Information Requests

Obtaining documents and information in the company's possession helps prove grievances, helps disprove company defenses, and, if grievances are meritless, helps explain to grievants why unions cannot proceed with their grievances. Because documents are more difficult to circumvent or alter, unions should demand copies of documents rather than rely on company characterizations of facts or information.

Companies' Obligation to Provide Documents and Information Relevant to Bargaining and Other Labor Disputes

This company obligation extends to documents and information relevant to bargaining proposals, issues or arguments, and to any workplace dispute or matter, even if it is not the subject of a grievance.

Which Documents and Information?

Companies must produce all documents and information relevant to grievances, possible grievances, arbitrations, all workplace disputes or matters, unions' investigation of workplace issues whether or not the results might show contract violations, and contract and other bargaining.

Relevancy: Documents and information are relevant when unions can explain how they might tend to show that the union's position is meritorious or the company's position is meritless. Unions must explain some connection between the documents or information and what they are trying to prove, disprove, investigate or persuade the company to agree to.

Confidentiality

The NLRB rarely finds that companies can withhold a document or information because it is confidential, proprietary or privileged. When the NLRB does, it imposes on companies the burden to seek an **accommodation** that will meet the needs of both parties and to nevertheless **produce** the documents or information or a mutually agreeable equivalent.

Company Refusal to Produce Documents

The obligation to produce relevant documents and information is one that the NLRB enforces relatively vigilantly. If unions file ULP charges over company refusals to produce documents or information, the NLRB will usually issue complaints and prosecute companies.

Instead of filing ULP charges to obtain documents or information, unions may choose to instead argue during the grievance process that an arbitrator will draw an adverse inference against the company because it refused to produce requested documents. This means that instead of forcing companies to produce documents, arbitrators **infer** or rule that, if provided, the documents would say what the union claims they would say in a way adverse to the company's case. Arbitrator threats to draw adverse inferences usually compel companies to reconsider and provide documents and information.

Union Representative Access to the Workplace to Bargain Contracts, Service Members and Enforce Contracts

Generally, representatives have access to workplaces primarily when contracts contain visitation clauses granting access or past practices establish access rights. However, unions have the right to enter workplaces in several other situations even when contracts do not contain visitation clauses and past practices do not establish access rights:

- when unions are unable to investigate or evaluate grievances or other workplace matters without visiting workplaces

Example: Companies must grant access if the union needs to see a work area or examine equipment or a machine to assess a grievance or other dispute

- to prepare to bargain first contracts or subsequent contracts
- to observe work, workplace layout and equipment
- to prepare for arbitration
- to conduct occupational safety and health inspections.

Who Decides Whether Unions Violate Contracts?

When companies claim that unions violated contracts, unions should consider whether their interests would be better served by having judges decide rather than arbitrators.

Some contracts do not permit companies to file grievances. If the union has such a contract and if the union feels it would get fairer consideration from a judge, the union should refuse to consent to arbitration and insist that the company go to court. Unions may also want to move disputes to court if they believe companies would be reluctant to spend more money on attorney's fees to litigate their grievances in court.

Alternatively, if the company filed in court, the union should consider filing a motion requesting that the court transfer the case to arbitration if the union feels it would be better off in arbitration. In making this determination, unions should compare local judges to the arbitrators who usually appear on arbitrator lists in their areas.

Contract Language

Unions should fight to keep unfavorable language out of contracts. At the very least, unions should try hard to ensure that contract language — including compromise language — is drafted as plainly as possible and reflects what the parties in fact agreed to and no more.

More focus on non-economic language could help organize members. After focusing on wage rates and benefits during ratification meetings, many members become more concerned with contracts' non-economic provisions when other issues, such as schedules, hours, time off, family and medical leave, etc., arise during contract terms. This is especially true given the economics of some contracts.

When contracts' financial benefits are not significantly increasing, one way to gain membership and maintain the support and involvement of members is to aggressively enforce the contracts' non-economic provisions. This task is more difficult, however, when unions agree to unfavorable language or language that takes away with one hand what it seems to give with the other.

For example, all too often unions tell grievants that they must withdraw grievances because of bad contract language. It doesn't help organize members when representatives answer grievants' question, "who agreed to the bad language?" by explaining that the union did.

This situation can be all the worse if representatives initially encouraged members in their grievances because the company gave the union the impression during bargaining that the pertinent provision was more favorable to workers than the provision's literal language, and the union didn't realize this until it checked with its attorneys about arbitrating the grievance. In the end, if the literal language is clear, arbitrators and the NLRB will apply the language, not what unions testify companies said the provision meant.

While economics usually drive bargaining and it is important to get first contracts as soon as possible, there are several things unions can attempt to do to help minimize unfavorable language from creeping into and then remaining in contracts.

- When proposing language, unions should carefully revise and improve even favorable language in existing contracts and start to bargain from the best form of that language. Taking proposals from **existing contracts means that bargaining** on many issues **begins** with already **compromised language**.

- Unions may consider proposing provisions from a collection of recommended language the International has been compiling.
- When companies propose language or when unions consider whether to attempt to alter existing language, unions should ask many questions about the language's meaning, its impact and how it would apply in various situations. This is especially important with proposals management attorneys draft because they often obscure the proposal's real meaning in a jumble of legalese.

Sometimes, companies or their lawyers will be reluctant to openly characterize language as pro-company as it really is and will instead describe the language as being more reasonable.

In which case, unions may agree to the proposal but only if the language is expressly rewritten in plain English to reflect only the reasonable parts of the company's explanation the union agrees to.

- While each union has to consider whether to pay lawyers to sit in on bargaining sessions, unions should consider asking lawyers to review contract language before bargaining begins and identify language pitfalls, propose questions, prepare revisions or compromise language, and suggest arguments unions should make in support of improvements. This is all the more important with first contracts since it is so difficult to change language after unions agreed to it.

What Is Important to Keep in Mind When Writing Contract Language?

Unions should try to write contract language in plain English that clearly says what it means. Stick with familiar and simple language and stay away from unfamiliar or technical language, like legalese.

While the language must express what the union is agreeing to, it does not have to be long. Examples frequently clarify the parties' intent and help make clear what they don't intend.

If unions start with existing language, carefully scrutinize the existing language to be certain what it means and doesn't mean. If the writer is not completely sure what certain sections or sentences mean, the writer should revise the language so that it becomes completely clear to the writer and to others who service the unit.

Proposing Changes to Existing Contract Language Does not Necessarily Concede the Company's Interpretation of the Language.

If unions are reluctant to propose changes to existing language because they are concerned that an arbitrator might find that the union's proposal concedes the company's interpretation, unions should — when they make the proposal — explain that their proposal merely clarifies the language and does not change its meaning. Unions can explain that this is necessary in light of the parties' recent misunderstandings over this or other contract language or the company's recent attempt to misconstrue language, including other provisions.

At least one court has ruled that a union did not implicitly concede the company's interpretation when the union twice proposed changing the language because when it made the proposals, the union explained that the proposals merely clarified what the clause already meant and emphasized that the proposals were not attempts to change the meaning of the language.

If there's a realistic chance of improving existing language, unions should consider doing so. And if they do, unions should be sure to explain across the table before both bargaining committees that the union's proposal does not change the meaning of the existing language but merely makes it clearer.

Contract Expiration

Apart from certain exceptions, all contract terms survive contract expiration.

Provisions That Do not Survive Contract Expiration:

- no strike/no lockout
- arbitration clause, **except** the obligation to arbitrate
- grievances that arose under or occurred during the contract term
- contract rights the parties intended to arbitrate even after the contract expired.

Examples: Rights to hours, schedules, vacations, etc., based on seniority or the right to continue to collect sick or disability leave that commenced while the contract was in effect.

What Actions Can Unions and Workers Take to Support Their Own Bargaining or Other Unions' Bargaining While Their Contracts Are Still in Effect?

In general, unions and their members have the right to engage a wide-range of economic actions against companies, except to the extent restricted by no-strike clauses. In addition to those actions discussed here, workers can also exercise their free speech rights to talk to each other and customers, handbill and wear stickers and buttons that are discussed in the chapter titled **Organizing and Mobilizing Workers at the Workplace**.

Protected Activities

The NLRA broadly protects worker rights to apply peaceful economic pressure on their company to improve their working conditions or the working conditions of other workers who work for the same company. Except as restricted by no-strike clauses, workers have the right to:

- Withhold their labor by striking, engaging in sympathy strikes or honoring picket lines. Sympathy strikes are strikes in support of workers in other bargaining units.
- Picket, handbill, attend demonstrations and participate in other actions during breaks and outside of work hours. Picketing typically involves workers carrying picket signs or wearing “sandwich” boards parading, patrolling or walking back-and-forth or in an oval at entrances to company facilities or stores that request workers not to work and customers not to shop.
- Circulate and sign petitions or ask customers to do so.

Clearly and Unmistakably Waiving Worker Rights to Engage in Economic Activities

The NLRB's Waiver Rule and No-Strike Clauses

Unions may **waive** the right of workers to engage in economic activities **only clearly and unmistakably**. As a result, arbitrators and the courts almost always rule that the **only non-work stoppage** actions **no-strike clauses** prohibit are those the clauses **explicitly** and **specifically restrict**.

In other words, except for withholding of labor for their own benefit, unions and workers retain the right to engage in a specific activity unless a no-strike

clause explicitly prohibits that specific activity or the union explicitly waived the specific right during bargaining. (Or, of course, there is a contrary arbitration decision or side letter.)

Example: In one decision, an arbitrator ruled that a no-strike clause that expressly prohibited the union from “interfering with” the company’s business did not prohibit the union from mailing the company’s customers letters protesting a policy and emphasizing the policy’s potential negative effects on the customers.

The arbitrator wrote that **disseminating anti-company publicity is not a work stoppage or strike**, and that the phrase “**interference with the company’s business**” was **ambiguous** and **therefore did not explicitly prohibit the specific** action of **communicating with customers**.

Arbitrators and courts narrowly interpret no-strike clauses when actions do not involve work stoppages because they appear to be reluctant to rule that workers violate no-strike clauses when they solely engage in free speech activity — handbilling, boycotting, talking and picketing — and do not withhold their labor.

Definition of Strike

When interpreting no-strike clauses, it is important to know what actions the term strike encompasses and which it does not. Strike means the concerted withholding of labor, including coordinated or widespread work stoppages, slow downs, sick outs and refusals to accept work (such as turning down overtime, work assignments or job referrals). (Workplace sabotage is likely a strike because sabotage that stops or slows down the company’s operations likely also causes workers to stop work or slow down.) **In contrast, although actions such as picketing, handbilling and boycotts usually accompany strikes, they are not strikes because they do not necessarily involve the withholding of labor.**

Important: Unions should remember what no-strike clauses are. They are contract provisions that permit companies to narrowly restrict certain specifically identified actions.

No-strike clauses are not the sources of nor do they give workers or unions those rights. So, instead of checking no-strike clauses to identify what rights unions and members have, unions should read no-strike clauses to determine which specific rights have been expressly waived. If the clause does not explicitly restrict the specific action, unions and workers retain the right to engage in it.

The Waiver Rule: Waiving Rights During Bargaining

When no-strike clauses do not explicitly waive worker rights to engage in specific actions, companies may try to prove that the union explicitly waived the right to engage in those actions during bargaining.

To do so, companies must prove that the union and the company had an express, clear **mutual** intent to waive those rights. The company does **not** prove **mutual** intent to waive the right to engage in specific actions if the parties “agreed to disagree” over the scope of a no-strike clause during bargaining.

Example: In one case, the NLRB and the court relied heavily on the **union** witness’s testimony that although during negotiations the company consistently took the position that the no-strike clause prohibited sympathy strikes, the union insisted that it did **not**. The union’s witness admitted that the parties included the same no-strike clause in several subsequent contracts without either party agreeing to the other party’s position. In short, the union’s witness testified that the company never agreed to the union’s position, and the union never agreed to the company’s.

Based on this testimony, the NLRB and the court ruled that the company failed to prove that the no-strike clause **mutually** waived the right to engage in sympathy strikes because the parties agreed to disagree whether the union waived that specific right.

Unions Do not Waive Rights to Engage in Actions Just Because They Previously Refrained from Engaging in Those Actions

Unions do not waive any right when they decide against engaging in actions. This is true even if the union decided against engaging in an action in response to a company request or demand.

In one case, a company argued that the union waived the right to engage in an action because the union agreed to the company’s demands that the union refrain from taking the action on several prior occasions. Rejecting the company’s argument, the NLRB and the courts observed that the union had the right to make a policy decision that it would not engage in that action during those prior occasions without clearly and unmistakably waiving its right to engage in the same action in the future.

The Waiver Rule: Unions May Waive Rights by Implicitly Agreeing to Company Policies That Restrict Actions Workers May Take

Arbitrators may find that the union implicitly waived rights to engage in certain actions if they failed to demand to bargain over company policies or rules that prohibit or restrict workers from engaging in specific actions, **and** the union's agents knew about the policies or rules. Even in these cases, however, the company would have to have established the policy prior to the time workers engaged in protected activity and have **consistently** enforced the policy in a **non-discriminatorily** manner.

Example: If the company allowed workers working on the sales floor to talk to customers about family, weather, sports and politics, then they must allow workers to talk to customers about bargaining or labor disputes.

An Approach to Interpreting No-Strike Clauses

When reviewing no-strike clauses, unions should first scrutinize the clause to determine which specific actions they explicitly prohibit. The union and its members should be able to engage in the proposed action, unless:

- the clause explicitly prohibits the particular action. Does the contract explicitly prohibit the specific action of:
 - ◆ honoring picket lines?
 - ◆ picketing?
 - ◆ handbilling the store or facility?
 - ◆ distributing literature away from the workplace, for example, nearby neighborhoods?
 - ◆ talking to customers?
 - ◆ attending rallies?
 - ◆ publicity?
- An arbitrator's decision ruled that the particular action violates the clause.
- The union in either a side agreement or during bargaining expressly addressed and explicitly waived the right to engage in the specific action.

Second, if the clause explicitly prohibits the specific action the union believes it needs to engage in, unions should brainstorm alternative actions that could be as effective but would not violate the no-strike clause.

Example: If it prohibits “boycotts,” the clause might not prohibit the union from publicizing negative messages about the company that stops short of also requesting the public to boycott the company.

Third, unions should consider whether actions that may violate the clause would cause damages. Not all economic actions — even if found to violate no-strike clauses — cause damages or substantial damages. If the proposed action might violate the no-strike clause but would not cause significant damages, the union may determine that engaging in the action would effectively apply significant pressure on the company without exposing the union to significant monetary liability.

Example: Picketing corporate headquarters or shareholders’ meetings, or wearing stickers or buttons at the workplace would not necessarily cause damages if the message does not request a boycott of the company.

Finally, if the union believes that an arbitrator may find that the no-strike clause prohibits all of the actions the union is considering, the union should structure actions to minimize possible damages.

Example: If the clause explicitly prohibits all consumer handbilling for any purpose, the union could distribute handbills that ask customers to merely communicate to managers that the company should bargain fairly and reasonably, and request that customers commit to boycott the company only after the contract (and its no-strike clause) expire.

Arbitrating Company Claims That Unions Violated No-Strike Clauses

If the company files a court case claiming that the union violated the no-strike clause and owes damages, unions should examine the contract’s grievance and arbitration provisions to see whether the company must arbitrate all contract violations. If so and if the union believes an arbitrator would be less likely to award damages or large amounts of damages to companies, the union should file a motion asking the court to transfer the case to arbitration. Arbitrators who are more familiar with labor disputes may be less inclined to award large damages than judges who preside over jury awards in civil cases, such as personal injury actions.

The International legal department's research indicates that courts and arbitrators rarely award damages against unions for violating no-strike clauses.

What Other Actions Can Unions and Workers Take to Support After Their Contracts and No-Strike Clauses Expire?

In addition to the activities unions can engage in while contracts are still in effect, unions and their members may strike after the contract no-strike clause expires.

Strikes

The Right to Strike

The NLRA theoretically protects workers' right to strike. The NLRA, however, does not protect partial strikes or slowdowns.

Companies technically may not "terminate" or discipline workers for striking.

Permanent Replacements of Strikers

While they may not "terminate" strikers, companies may **permanently replace economic strikers**. This means that following **economic strikes**, companies may **refuse** to: (1) terminate any replacement workers they hired permanently during the strike, or (2) reinstate any strikers unless and until openings occur.

Economic Strikes

Economic strikes are those strikes undertaken to increase bargaining leverage to force companies to agree to better contracts, including better economic terms such as wages and benefits.

Companies may refuse to reinstate strikers, however, **only when** they **permanently replace** them. Unions should **not assume** that **all workers hired during strikes** were **permanently** employed. **Companies must prove** that they and the new workers intended to establish a permanent and not temporary employment relationship.

Example: Companies must show that their advertisements for replacements and orientation packets made it clear that they hired the workers for an indefinite, long-term duration, like the company

normally hires permanent workers. Companies fail to meet this burden of proof if these or other documents imply that they hired the workers only for the duration of the strike.

If companies fail to meet this burden, the replacements were not permanent and companies may not refuse to reinstate economic strikers at the end of the strike.

While they may **permanently replace economic strikers**, companies may **not** permanently replace **unfair labor practice strikers**. Following **ULP strikes**, companies **must** lay off replacements and **reinstate ULP strikers**.

Consequently, the union's ability to effectively characterize or convert economic strikes into ULP strikes **preserves strikers' rights to their jobs**.

ULP Strikes

ULP strikes are those strikes workers engage in part to protest ULPs companies have committed. To prove a ULP strike, unions must show that the ULPs in part either motivated workers to strike at the beginning of the strike or motivated them to continue the strike at some point during the strike.

Setting up ULP Strikes

The key to a ULP strike is identifying ULPs the company committed and evidence showing that those ULPs in part motivated the strike or the continuation of the strike. Such evidence may include papers, slides and powerpoints shown or distributed to members during meetings; handbills and picket signs; and press releases or statements to the press.

ULPs That Commonly Occur During Bargaining

- bad faith bargaining, including surface bargaining and unilateral changes,
- unlawful statements,
- contracting out bargaining unit work,
- company prematurely declaring impasse or declaring impasse over permissive rather than mandatory subjects,
- withdrawal of recognition,
- undermining union's' bargaining unit support, and

- terminating, disciplining or retaliating against strong union supporters or picketers.

Notices to Open Contracts and Strike

When unions intend to bargain new contracts, the NLRA requires them to provide certain notices to the other party and other entities such as the Federal Mediation and Conciliation Service.

Non-Healthcare

To open contracts, unions should:

- Check whether the contracts require notices in addition to those the NLRA requires.

and provide written notice to:

- Companies, at least 60 days before contracts expire. NLRA Section 8(d)(1).
- The Federal Mediation and Conciliation Service (FMCS) **and** state mediation services at least 60 days before contracts expire. NLRA Section 8(d)(4). Unions can obtain forms from the FMCS's Washington, D.C., or regional offices or from the FMCS's website: www.fmcs.gov.

The NLRA prohibits unions from striking before the end of the 60-day FMCS notice period or the expiration of the contract, whichever is later.

Healthcare

To open contracts, unions should:

- Check whether the contracts require notices in addition to those the NLRA requires.

and provide written notice to:

- Companies, at least 90 days before contracts expire. NLRA Section (d)(4)(A).
- The FMCS **and** state mediation services, at least 90 days before contracts expire. NLRA Section 8(d)(4)(A).

To strike or picket, unions should:

- Check whether the contracts require notices in addition to those the NLRA requires.

and provide written notice to:

- Companies 10 days before striking or picketing.

NOTE: Written notices must state the precise date and time unions will strike or picket. If it changes or postpones date or time, the union must provide another 10 day notice. NLRA Section 8(g).

Strike Votes

The UFCW International Constitution requires that 2/3's of all members voting must authorize strikes before unions strike.

Picketing the Primary Company's Other Facilities

After contracts expire, unions may extend **picket lines** to the company's other facilities, affiliated corporations or operations **AS LONG AS there is common control over the primary and target company's labor relations**. The company that the union has the direct or primary dispute with is the primary company.

Unions, however, **may engage** in **other** First Amendment actions against unrelated or unaffiliated target companies such as **handbilling, publicizing negative messages and boycotting, EVEN IF** there is **no common control over labor relations**.

Researching and Collecting Evidence That Primary and Target Companies Share Common Control Over Labor Relations

Before striking, unions should collect evidence that the labor relations of the companies the union may target for picketing are commonly controlled by or with the primary company.

Unions should check:

- Have company labor relations representatives made statements indicating common control?
- Who has the final say on bargaining, major bargaining issues or final contracts? Does the same office, department, or officials control bargaining for both the primary and target companies?

Example: Does the corporate home office ultimately decide final contracts for both the primary company and the target company?

- Who has final say on major workplace issues, disputes, grievances, arbitrations and settlements thereof?

Example: Does the parent company's human resources department also control the target company's labor relations?

- Who controls policies, procedures and rules? Compare the text of policies, handbooks, orientation packages, benefit booklets, etc., for nearly identical language or common sources.
- Who issues payroll checks? Does the same bank or payroll service issue the primary and target companies' checks?
- Compare other employment matters, such as uniforms, nametags, counseling services, etc.
- Compare non-employment operations, such as merchandise (company brands), remodeling/decor, contractors, cleaning and maintenance services, etc.

Unions may be able to compensate for weak evidence of common labor relations with evidence of significant corporate relationship or common operations.

To show significant corporate relationship or common operations, unions should before striking research the primary and target companies' corporate names, corporate structure, and the names and corporate structure of their divisions, affiliates, subsidiaries and operations.

- Are the names of the primary and target companies the same? How is the primary company named in the contract?
- Does the named entity actually operate the company or is it just the name of a paper entity that performs limited functions, such as owning real estate? For example, "Kroger Co." versus "Kroger Limited Partnership." If the contract name is just a paper entity, is the name of the actual primary company the same as the target's?
- Are primary and target companies related parent, sister or affiliated corporations?

- Do primary and target companies share common owners, directors, officers, executives or managers?
- Who owns, holds or manages primary and target companies' real estate?
- Do primary and target companies share common tradenames or trademarks?
- Is there common financing or common financing sources?
- Are there common or shared accounting systems or accounting firms?
- Is there common operational management?
- Do the primary and target companies share central or regional offices?
- Are any of the primary and target companies' records centrally maintained through, for example, interconnected computers?
- Do the companies share computer programs?
- Is there interchange of equipment or merchandise?
- Are there common warehouses or vendors?
- Are the operations or businesses similar?

Picketing Secondary Companies

Although unions **may handbill secondary companies**, they may **not picket secondary companies** whose **labor relations are not commonly controlled by or with the primary company** for unlawful objectives. If they engage in unlawful picketing of secondary companies, unions can be liable for damages those companies incur, measured by the drop-off in customer traffic or business, and their picketing can be enjoined.

Unions may **not picket** to:

- "threaten, coerce, or restrain"
- entities that are **not** the primary company or whose labor relations are not commonly controlled with those of the primary company.

Unlawful Objectives

- causing secondary companies' workers to cease working
- causing vendors to cease deliveries to secondary companies

Exception to Prohibition Against Picketing Secondary Company

Unions **may picket** retail secondary companies **as long as** the union **directs** the picketing exclusively at the primary company's **products** and **not** the secondary company. Both the picket signs and the picketers should clearly say that:

- the union's dispute is with the primary company only,
- the union is requesting the general public to refrain from buying the primary company's products only, and
- the union does not have any dispute with the secondary company and is not asking customers to boycott the secondary company.

Handbilling Alternative to Secondary Picketing

While unions may not picket secondary companies, unions **may** nevertheless truthfully **handbill** the secondary companies' customers requesting that they boycott the secondary company until it stops selling the primary company's products.

This is because handbilling is fully protected by the First Amendment and the NLRA as an exercise of Constitutional free speech rights, and therefore can't be made unlawful by the NLRA.

Contract Ratification

The UFCW International Constitution requires unions to submit new or amended contracts for ratification by majority vote of those members voting. Union members must also ratify mid-contract term **reductions** in or adverse changes to wages, benefits or other contract rights.

Accretions

Accretions occur when a company adds a department or facility to an existing bargaining unit. In true accretions, unions do not have to show that a majority of workers in the added department or facility support the union.

Accretions are legally appropriate only in situations where the accreted workers would not constitute a separate appropriate bargaining unit by themselves. True accretions are relatively rare.

After-Acquired or Additional Stores or Facilities Clauses

More common are contract after-acquired or additional stores or facilities clauses that:

- obligate the company to recognize the union as the bargaining representative for workers in new or additional stores or facilities that the company acquires after the parties sign the contract upon a showing of majority support for the union,
- include those workers in the agreement's existing bargaining unit, and
- apply the agreement to those workers.

Successorship

The NLRA requires certain successors to companies to recognize and bargain with unions. In addition, contracts sometimes require successors to hire workers, recognize unions and assume contracts.

NLRA Requirements

The NLRA requires successor companies to recognize and bargain with unions when they:

- acquire and continue to operate most of the company's business,
- employ a substantial complement (at least 40%) of the predecessor's workers,
- continue to operate in a manner that by-and-large keeps the bargaining unit appropriate.

The NLRA generally permits successor companies to change the initial employment terms and does not require successors to assume contracts.

Contract Requirements

Most contracts attempt to bind successors. Courts and arbitrators, however, rarely require successors to assume contracts. Courts almost always, however, compel predecessor companies to arbitrate successorship.

Unions can use arbitrations to intrude into corporate acquisitions and create some bargaining leverage by requesting documents and information on the transaction, its structure, terms, financing and other details from the predecessor and by subpoenaing the same information and documents from the prospective successor company. Companies are very reluctant to share such information and documents. Successorship provisions that impose large financial penalties — or liquidated damages — on predecessor companies if they fail to obtain the agreement of the successor company to hire workers, recognize the union and assume contracts create the most leverage.

Unions can use leverage to bargain better severance packages for laid off workers, or, sometimes, the successor's agreement to hire workers and recognize the union.

WEINGARTEN RIGHTS

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What Are Weingarten Rights?

The National Labor Relations Act (NLRA) gives union workers the right to representation — either shop stewards or union representatives — during any discussion with any supervisor that the **worker** reasonably believes may involve questioning that might lead to the discipline or termination of the worker. This includes all such discussions from formal closed-door meetings to simple work floor conversations if the discussions could result in discipline.

These rights are called Weingarten rights after the Supreme Court decision that first established them.

When Do Workers Have Weingarten Rights to Have a Shop Steward or Union Representative Present When Speaking to a Manager?

Anytime **workers think** the manager may question them about something that **the workers** feel they might be disciplined for.

Example: An assistant manager asks to talk about an accident the worker was involved in the week before. The worker thinks the manager is trying to find out who was responsible. The worker has Weingarten rights.

Example: An assistant manager asks to talk to a worker but doesn't say about what. The worker's department manager warned the worker that the manager told the store manager about a customer who complained about the worker. The worker has Weingarten rights.

Example: An assistant manager wants to talk to a worker. The worker has heard that the manager is talking to workers who were in an argument that got too loud. The worker has Weingarten rights.

What Kind of Communications Does Weingarten Apply to?

All kinds: in person, over the telephone, even e-mail.

Example: A manager telephones a worker from outside of the store and the worker thinks the manager may want to talk about something that happened at work that the worker could be

disciplined for. The worker has Weingarten rights. The worker should tell the manager that the worker would rather talk in the presence of a shop steward or union representative.

Example: A manager asks a worker to write a report about missing merchandise. The worker has Weingarten rights.

Example: A manager approaches a worker while the worker is working on the sales floor and starts to ask the worker questions about the worker's tardies. The worker has Weingarten rights.

Example: A manager approaches a worker in the breakroom or in front of the store while the worker is on break and starts to ask questions about the shelves in the worker's department that the manager has warned the worker about before. The worker has Weingarten rights.

Does the Communication Have to Occur at Work?

No.

Example: A manager telephones a worker at home about the worker's absences. The worker has Weingarten rights. The worker can tell the manager that the worker would rather speak at work in the presence of a shop steward or union representative.

Example: A manager attends the same Church as a worker and after a service, starts to talk to the worker about shortages in the worker's cash register. The worker has Weingarten rights.

Example: A manager approaches a worker in the parking lot as the worker leaves work or at a nearby McDonald's and starts to ask about the worker's bad "attitude." The worker has Weingarten rights.

When Should Workers Invoke Weingarten Rights?

As soon as the worker realizes that the manager may be asking about something the worker could be disciplined for.

Example: A manager tells a worker that the manager wants to talk tomorrow about a spill the manager says the worker should have

cleaned up. The worker can tell the manager at that time or just as the meeting starts that the worker is invoking your Weingarten rights and that the worker wants a shop steward or union representative to attend.

Example: The worker tries to invoke Weingarten rights and the manager "guarantees" that the worker will not be asked any questions. Then, half-way through the meeting, the manager begins to ask about what happened.

At the point during the meeting that the manager begins to ask questions, the worker should invoke Weingarten rights and refuse to answer any questions until a shop steward or union representative is present.

How Do Workers Invoke Weingarten Rights?

Workers must invoke Weingarten rights by telling supervisors they want a witness. Workers are **not required** to invoke their Weingarten rights if the contract prohibits the company from talking to workers without a witness.

Best practice: The best practice is for unions to bargain automatic Weingarten rights in contracts so members don't risk waiving them by forgetting to invoke their rights in the face of possible discipline.

The next best practice is for unions to distribute Weingarten cards that workers can keep in their wallets to pull out and read to supervisors. Unions should periodically emphasize to members that they should be sure to remember to refer to the cards whenever supervisors talk to them about discipline.

What Is the Representative or Shop Steward's Role?

The role of the Weingarten witness is first to hear everything everyone says and take notes. Second, the witness can make sure that all of the manager's questions are clear and that the worker has a chance to answer all questions in the worker's own words. The witness can ask the manager to rephrase confusing questions or questions the worker doesn't understand. Third, the witness ensures that managers treat workers fairly, give workers the chance to present their side, and to make sure that the manager does not abuse or harass the worker.

Example: A manager tries to put words in the worker's mouth by asking, "so you admit eating the potato chips before paying for them." The Weingarten witness can jump into the discussion and insist that the manager instead ask whether the worker first paid for the chips before eating them.

Example: A decent manager is truly trying to find out the facts but asks a convoluted question. The Weingarten witness can ask the manager to rephrase the question so it is clear.

Example: A manager asks, "so you admit being at work when the money was missing, that the money came out of your cash register, that the missing money was your responsibility, and that you're the associate who should be disciplined for it? Yes or no?" The Weingarten witness can insist that the manager break up these four questions so the worker can answer "yes" to the first two but "no" to the last two.

Example: A manager tries to mislead or trick the worker into admitting something untrue. The Weingarten witness can point out what the manager is doing and insist that the manager question the worker fairly.

Example: A manager gets angry, starts shouting and doesn't let the worker say anything. The Weingarten witness can insist that the manager let the worker answer in the worker's own words.

The Weingarten witness' role of protecting members and ensuring that members do not to facts that are not true is especially important when the company's security, loss prevention or risk management personnel conduct the questioning.

What Other Rights Does Weingarten Give Workers?

Workers or their witness insist that the manager state what the interview is about and what kind of discipline might result. If the worker or witness feels the need for a break or the worker wants to talk things over with the witness, they can take a private break. During that break, one of the things the representative or steward should do is prepare the worker as a witness. Weingarten witnesses should advise members:

- To listen carefully to the question and make sure the member heard and understood it. If not, the Weingarten witness or member should request the supervisor to repeat or rephrase the question.
- To tell the truth.
- To answer in as few words as possible. Members should not volunteer anything. Members get into more trouble by saying too much than saying too little.
- To answer only what the member knows first-hand based on what the member saw, heard, felt, etc.
- To admit if the member doesn't know or can't recall.
- Not to guess, speculate or assume.
- To answer in the member's own words. The member should not let the questioner put words in the member's mouth.
- If the member can't answer the question with a simple yes or no, the member should answer in the member's own way.
- To request a break, if the member needs one.

The Weingarten witness should also tell the member not to sign any document until a representative or steward reads it first.

Lastly, the worker has the right to present the worker's side and make the worker's defense.

What Are the Company's Obligations?

If the contract provides for automatic Weingarten rights, supervisors **cannot** meet with members **unless** and **until** a shop steward or union representative is present.

Otherwise, the company has three choices:

- grant the member's invocation of Weingarten rights, state what the discussion is about, and allow the member and witness time to consult privately,

- deny the member's demand for a witness and immediately end the discussion, or
- give the member the **choice** of continuing the discussion without a witness or ending the discussion.

If the company refuses to allow the witness and nevertheless questions the member, the member has the right to refuse to answer without discipline. If the company continues to question the member, the company violates the NLRA and the union can file a unfair labor practice charge.

DUTY OF FAIR REPRESENTATION

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Unions have a duty to represent bargaining unit members fairly, non-discriminatorily and in good faith.

What Does This Mean Legally?

Courts have found it easier to define what fairly representing members does **not** mean.

Unions violate their duty of fair representation or DFR if they discriminate against members based on their race, sex, sexual orientation, religion, national origin, and other bases protected by federal or state law. Unions also violate their duty of fair representation when they treat members, or members' grievances, problems or issues irrationally or arbitrarily.

Unions do not act irrationally or arbitrarily if they make decisions on members' grievances or problems based on legitimate reasons and for the most part consistently with the way they have handled other similar grievances or problems.

What Does This Mean as a Practical Matter?

The National Labor Relations Board and the courts **rarely** find that unions violate their duty of fair representation under the legal definition of what it means to act irrationally, arbitrarily or in bad faith.

While unions are rarely found to have breached their duty of fair representation, many unions nevertheless spend too much in attorneys' fees defending charges and lawsuits that could have been dismissed early in the legal process because the union didn't aggressively process the member's grievance or actively address the member's concern.

If the union's file shows that it represented the member well, the NLRB or the member's lawyer can often be talked out of litigating the claim. In which case, the union avoids paying much at all in attorneys' fees.

The Scope of Unions' Duty of Fair Representation

DFR applies to all employment matters for which unions are members' **exclusive** bargaining representative, including grievance processing and contract bargaining.

DFR does **not apply** to employment matters unions do **not** represent members for or that **members may pursue on their own**.

Examples:

- unemployment compensation claims
- workers compensation claims
- statutory wage and hour claims
- statutory race/sex/age/disability discrimination claims

Enlarging Unions' Scope of DFR

Unions risk expanding the scope of their duty of fair representation if they represent members on claims members can independently pursue or if they contractually assume joint responsibility for company obligations.

Examples: Unions may inadvertently expand the scope of their DFR if they:

- Regularly represent members in workers unemployment cases.
- Incorporate into contracts language that appears to imply that unions assume along with companies the obligations to ensure safe workplaces, or workplaces free from sexual harassment or sex, race or religious discrimination, such as:
 - The company and the union agree to maintain a safe and healthy workplace.
 - The company and the union will make every effort to guarantee a workplace free of sexual harassment.

Having said that, unions do not risk expanding the scope of their duty of fair representation if they file **grievances under the contract** for example protesting the company's discriminatory treatment of members, **instead of** representing members before the Equal Employment Opportunity Commission or state human rights agencies on charges the members filed under federal or state anti-discrimination law. Along the same lines, unions do not risk assuming the obligation of guaranteeing safe or harassment-free workplaces by grieving unsafe working conditions or the company's failure to fulfill its contractual obligations to protect members from harassment.

USING ELECTION LAW TO STRENGTHEN POLITICAL POWER

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This chapter discusses legal issues that most frequently arise when the UFCW is active in federal elections. In addition to discussing union campaign communications, the chapter addresses issues related to bargaining political action committee or “PAC” check-off language for contracts, the language of the check-off forms, and requirements related to unions soliciting members for PAC contributions.

Because the UFCW’s federal PAC is administered entirely at the International, this chapter does not cover issues related to establishing or administering PACs, or the reports federal PACs must periodically file. The PAC makes contributions to state and local candidates on behalf of Locals. The International files all of the PAC’s state reports for these contributions as well.

This chapter does not cover state election law. State election law varies sometimes widely from one state to another. For example, some states permit unions to contribute to candidate campaigns directly from their treasuries and others require unions to make campaign contributions from their PACs. A union who plans to participate in state elections should consult an attorney familiar with their state’s election law.

How Can Unions Finance Election-Related Communications and Activities with Members?

Unions may use treasury money to disseminate any communication concerning any federal election, to union members or others in the union’s “restricted class.” A union’s restricted class includes the union’s members, union executive staff, and the immediate family living in the households of members or executive staff. These communications may be made by phones or mailed or hand-carried printed materials (including magazines, newsletters, literature and emails).

For legal purposes, the content of these membership communications can be divided into two categories: “express advocacy” and everything else. “Express advocacy” is a communication that explicitly calls for the election or defeat of a candidate or a particular party’s candidates for federal office. Other communications, even if they discuss candidates and issues, fall in the second category.

Unions may coordinate with federal candidates and political parties any of their election-related communications in either category that are directed at members. Unions can, for example, discuss with campaigns what messages the

union should disseminate to members, and which members the union should target and where.

The union must file a report with the Federal Election Commission (FEC) if the combined cost for outside vendors to draft, produce, design, publish or circulate (including postage) member publications that are **mainly** devoted to express advocacy exceeds \$2,000 for any primary or general election cycle (meaning that these costs related to all federal races in either cycle are added together). Importantly, the \$2,000 threshold does **not** include the costs of a particular publication unless **most** of its content consists of express-advocacy material (including all of any particular piece that discusses a candidate and at some point expressly advocates that candidate's election. Not counted toward the \$2,000 is union overhead such as time union staff spend writing or producing publications.

Unions must use federal PAC money to pay for (i) copying or distributing, even to members, materials produced by federal candidate campaigns and political parties. The FEC treats these costs as an "in-kind" contribution to the campaign. So, these costs must be counted toward a PAC's contribution limits to a candidate or party. (This rule does **not** apply if instead of copying or distributing entire campaign materials, unions produce their own materials that in part quote campaign materials in support of the union's own overall message.)

Union Representatives Engaging in Express Advocacy While Servicing Members

Representatives may encourage members to vote for candidates the union supports when they visit workplaces and engage in other union business. This doesn't have to be reported.

Candidate Appearances at Union Events

Unions may allow federal candidates they support to address members at meetings, conventions or other functions, and exclude candidates the union opposes. Unions may use treasury money to pay for the costs of these events. (The candidate's campaign also may pay its own costs.) At these events candidates and union officials may suggest that members contribute directly to the candidate's campaign. However, only the campaign — and not union officials or staff — may collect contributions there. Unions may open these events to news media, but not the general public in person. If the audience present includes much beyond the restricted class, then the event could be treated as an in-kind contribution to the candidates.

Expenses of Incumbent Candidate's Appearance in an Official Capacity at Union Events

Subject to U.S. House and Senate ethics rules, unions may use treasury money to pay the expenses of elected federal officeholders who are candidates for federal office to appear at Union events as long the official appears and speaks only in an official capacity and does not campaign. Otherwise, the rules described just above apply to paying the costs when an incumbent appears in a candidate capacity.

How Must Unions Pay for Federal Campaign Communications and Activities Directed at the General Public?

Express Advocacy and Other Partisan Messages

Unions may also use treasury money to pay for express-advocacy and other partisan communications (such as other criticism or praise of particular candidates) to the general public about federal candidates, such as:

- shirts, hats, buttons, bumper stickers, yard signs and other materials that inevitably are displayed to the general public, and
- literature distributed to the general public, and
- newspaper advertisements and radio and television commercials.

Although unions can use treasury money to pay for political communications directed at the general public, to avoid possible tax consequences most unions should use separate political-only accounts to pay for these communications. While these accounts may be funded with union-treasury funds, they should be separate from the union's regular treasury account and they should have their own Internal Revenue Service Employer Identification Number (EIN), not the union's EIN. The union does not have to make any IRS filings for the political account unless it is funded with at least \$25,000 during a tax year. If a union treasury-funds this account, it should do so only in accordance with simple IRS procedures, including avoiding interest earnings on the funds before they are deposited in the political account. Unions should consult with their accountant about setting up a political account and with an attorney about spending it on public political communications.

Public communications (except buttons, bumper stickers, hats and other small items) that contain express advocacy must include a self-identification “disclaimer” that states in a “clear and conspicuous manner”:

- who (the union or its PAC) paid for the communication, and
- the speaker’s full name, and its street address, telephone number or website address, and
- that the message was “not authorized by any candidate or candidate’s committee.”

Example: Paid for by the United Food and Commercial Workers International Union Active Ballot Club, ufcw.org. Not authorized by any candidate or candidate’s campaign.

This disclaimer on a printed item must be legible, appear in a box or within a border, and appear in at least 12-point font. A bigger font size is required for signs larger than 2’ by 3’.

Disclaimers on radio and television are somewhat more involved. A radio ad must say, at the end:

“Paid for by [name of union or PAC], [street address or phone number or website address], which is responsible for the content of this advertising. Not authorized by any candidate or candidate’s committee.”

A television ad must display that message visually for at least 4 seconds and for at least 4% of the picture height. And, the TV ad must also include a spoken message: “[Name of union or PAC] is responsible for the content of this advertising.”

Also, a union or a PAC that spends for an express-advocacy message to the public must file a special report with the FEC, depending on the cost. If a union pays, then a quarterly report is due that specifies all such spending in a particular federal race that exceeds \$250. A union or a PAC also must file a report within two days of spending \$10,000 on express advocacy in a particular race; and, in the last 20 days before a primary or general election, that threshold is \$1,000 and the report is due the next day.

Issue Advocacy

Unions may also use treasury money to pay for issue advocacy directed at the general public. “Issue advocacy” is everything except express advocacy.

The difference is that a union does not have to self-identify on issue advocacy, although a union ordinarily will do so anyway. And, if it does so, the self-identification can simply be the union's name.

The one exception is for what the FEC calls an "*electioneering communication*," which is a radio or television advertisement that refers to a candidate without express advocacy either 30 days before a primary or 60 days before a general election. That broadcast requires the full "disclaimer" in the same format as an express-advocacy message, described above.

Endorsements

Unions may use treasury money to pay for press conferences or press releases to publicly announce their federal candidate endorsements, but they cannot coordinate this with a candidate's campaign. If the costs are minimal, then the union does not have to report that spending.

Voter Registration and GOTV

Unions may use treasury money to engage in **non-partisan** voter registration and get out-the-vote drives directed at the general public. If the drive is partisan, then follow the rules described above for express advocacy and other partisan messages.

No coordination by the union with candidates and political parties of the union's public electoral communications: Although a union or its PAC may pay for all of the express advocacy and other partisan communications described above, for the most part they must do so **independently** of a benefited federal candidate or a political party. That's because any **coordination** of those communications would convert the spending into an in-kind contribution to the candidate or party, but the union cannot contribute any amount and the PAC is strictly limited as to how much it can contribute.

A public communication cannot be coordinated if it includes **any** of the following content:

- express advocacy in any medium at any time, or
- other language that can only be interpreted as advocating the election or defeat of a particular candidate, in any medium at any time, or
- any reference to a Senate or House candidate, in any medium, within 90 days of a primary or a general election, or

- any reference to a presidential candidate in a particular state from the state from 120 days before its presidential primary or caucus until the November general election, or
- any reference to a political party (depending on the election cycle and whether the coordination is with a candidate or a party, this could apply for as long as from 120 days before a state's presidential primary or caucus until the November general election),

The act of coordination includes any of the following if it influences any aspect of a public communication described above:

- a campaign's request or suggestion, or
- a campaign's agreement to the union's suggestion, or
- any involvement by the campaign in discussions or development of the communication, or
- the campaign's provision of non-public information about its plans, activities, strategy or needs.

What About Union Websites?

The same rules that apply to express advocacy communications that the union directs at members versus the general public also apply to websites, including options for payment and including a disclaimer for express advocacy. There is one difference: a union **can** coordinate with a federal candidate or a political party its public website content about an election. However, coordination about the website could taint other union or PAC public communications that would otherwise be treated as independent of the candidate or party.

Union Officer Campaign Appearances

Union officers may appear at federal candidate public events as long as:

- they do so on their own time, or
- they make up the time during the following weeks and document it, or
- their appearances do not exceed one hour per week or 4 hours per month of working time.

The appearance must be "unofficial" – the officer cannot say that he or she is there on behalf of the union (unless the campaign pays all associated

expenses for the appearance, including the officer's time). Except for expenses directly attributable to traveling to or appearing at the event, a union may pay the expenses of officers who appear at campaign events if the officer spends the rest of the day on union business.

How Must Unions Make Contributions to Federal Candidates?

Unions must contribute to federal candidates through their federal PAC because election law prohibits Unions from contributing to federal candidates with treasury money.

Aggregating Contributions of Affiliated Union Pacs for the \$5,000 per Election Limitation

Importantly, the FEC combines or aggregates contributions made by federal PACs of the same or affiliated unions for purposes of determining whether the PAC contribution limit of \$5,000 per candidate per election has been exceeded. So, for example, the UFCW and RWDSU federal PACs may only contribute a **combined** total of \$5,000 to the same presidential, senatorial or congressional candidate for a particular primary or general election.

“In-Kind Contributions”: Can Union Facilities or Equipment Be Provided to a Candidate or a Political Party for Their Use?

A Union may allow a candidate or party to use its facilities or equipment, including phones, only if the candidate or party pays the union the fair market value for that use. This includes the installation of phones for a phone bank to be used by the candidate or party. Without such payment to the union, the union would make an “in-kind” contribution to the candidate or party, and the union cannot make **any** contribution to them with union resources of any kind. The payment to the union must occur within 30 days of use, except that use of union staff time or the union's provision of catering or other food and beverage services for an event must be paid in advance.

The alternative is for a union's federal PAC to pay the union for that candidate or party use and treat that as an in-kind contribution by the PAC, subject to the federal contribution limit.

Unions that customarily make their meeting rooms available to clubs, community organizations or other groups for free or otherwise less than fair market value may make their facilities available to federal candidates on the

same terms – but if it does, then the union cannot refuse any other candidate from access on the same terms, subject to room availability.

Written Agreement Preferred

Whenever candidates, parties or other groups are required to pay the union for using union resources, the union should sign a written agreement with that campaign or group in advance.

Union Staff Working Directly For Federal Campaigns

Union staff working for campaigns may constitute an in-kind contribution to the campaign depending on the circumstances.

Union Staff Working Directly for Federal Campaigns During Vacations, Holidays, Personal And Other Paid Time Off

Union staff have the right to work on campaigns during their own paid time off. When they do so, neither the union nor the staff make an in-kind contribution to the campaign.

When staff work for campaign on their own paid time off, unions must be careful to document that they did so on their own time, such as on weekends, vacation, personal days, and after they completed their union work for the day.

For the same reason loaning union facilities and equipment to federal campaigns constitutes an impermissible in-kind contribution with treasury money, loaning staff would constitute an in-kind contribution equal to the salary the union pays the staff while they work for the campaign.

On the other hand, unions may pay with treasury money the salary of staff assigned to member mobilization efforts.

Union Staff on Unpaid Leave

A union worker may take an unpaid leave of absence to work directly for a federal campaign, but the worker, the campaign or (as an in-kind contribution to the campaign, up to the federal contribution limit) the union's federal must reimburse the union for any union (as employer) costs, such a premiums, for continuing health and other benefits coverage for the worker during that leave. But the worker may continue to earn seniority and other service credits like anyone else taking unpaid leave for any other reason.

Union Employee Use of Union Facilities for Individual Volunteer Federal Election Activity

Union employees may use the union's facilities for "occasional, isolated or incidental" individual volunteer federal election activity that is directed at the general public. In order not to cross the line and become an unlawful union in-kind contribution, this volunteer activity must not:

- prevent the employee from completing her work for the Union, or
- interfere with the Union carrying out its normal activities, or
- exceed one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours.

If this volunteer activity **actually** increases the union's operating costs, the employee must reimburse the union for that increase; for example, by paying to use the union's photocopier to reproduce campaign materials

Who Can the Union Solicit to Contribute the Union's PAC, and How?

Unions may solicit PAC contributions from its "restricted class." Again, this includes members, union executive staff and the immediate family living in their households. Unions do not, however, violate federal election law if they "accidentally or inadvertently" solicit relatively few people outside of the restricted class. And, unions may accept **unsolicited** contributions from anybody. However, regardless of membership status, only U.S. citizens and lawful permanent U.S. residents ("green card"-holders) can contribute to a union's PAC.

How Must Unions Solicit Their Members?

PAC contributions must be voluntary and paid separately from dues. It is not "voluntary" within the meaning of federal election law for a member to designate part of his or her dues to the union as a federal PAC contribution, even if that's the member's actual preference. And, the union cannot make contributing a condition of membership (or employment), and cannot use any other coercive measures to prompt a contribution.

When soliciting PAC contributions, a union must inform members of the PAC's political purpose and state that the member can refuse to contribute without any reprisal. If the solicitation recommends a specific amount, then it must state that the guideline is merely a suggestion, the member is free to

contribute more or less, and the union will not favor or disadvantage anyone due to the amount of their contribution or their decision not to contribute. And, the union must accept a different amount if that's what the member designates. Finally, the union must state its basic recordkeeping and reporting obligations about the member's contributions, and inform the member that contributions aren't tax-deductible.

In order to make sure all this is accomplished, and protect union representatives and stewards from error, the payroll deduction (check-off) form itself should include all of the required solicitation language. That way, representatives and stewards won't have to remember to repeat all of these statements to every member every time they ask them to contribute, and there will be a record that the solicitation was made lawfully.

What Should the Union's PAC Check-Off Form Say?

In compliance with these requirements, the International PAC check-off form reads:

AUTHORIZATION FOR UFCW POLITICAL CHECKOFF

I authorize my employer to deduct **[LOCAL MUST FILL IN AMOUNT AND SELECT PERIOD]** per [paycheck **[OR]** week **[OR]** month] from my paycheck as a contribution to the United Food and Commercial Workers International Union Active Ballot Club. I understand that any guideline contribution amount is merely a suggestion and that I am free to contribute more or less, and the Union will not favor or disadvantage me by reason of the amount I contribute or my decision not to contribute. I also understand that I have the right to contribute or not to contribute without reprisal. I understand that my contributions will be used for political purposes, including the support of candidates for federal, state and local office, and speaking out on public issues.

Contributions to the UFCW Active Ballot Club are not deductible for federal income tax purposes.

Amount other than suggested guideline: _____

Date: _____

Signature

Print Name: _____

[Last 4 numbers of Social Security No: _____]

Federal Law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year.

Does the Law Require Companies to Permit Members to Make PAC Contributions Through the Company's Payroll Deduction System?

Ordinarily, the union must bargain with the company for PAC payroll check-off, just as the union must bargain for dues check-off.

But there is one situation where the union can secure PAC check-off as a matter of right without bargaining. (There is no comparable opportunity for dues check-off.) Upon the union's written request, a company must allow (without the union having to bargain for it) the union's members to use the company's payroll deduction system to contribute to the union's PAC if executives of the company, or executives of any division, branch, subsidiary or any other affiliate of the company anywhere use payroll deduction to contribute to the company's PAC or any trade association PAC.

Example: If executives of Kroger subsidiaries QFC or Fred Meyer in the Northwest contribute to the trade association Retail Industry Leaders Association (RILA) PAC, the Kroger Marketing Area (KMA) in Virginia must allow union members in Virginia to use payroll deduction to make PAC contributions.

To find out whether a company has a federal PAC, the union can ask the company or check whether any PAC under the name of the company has filed FEC reports at the FEC's website: www.fec.gov/finance/disclosure/candcmte_info.shtml. (Corporations and unions must include their name in the name of their PACs. So, the PAC name could include the name of a different corporate affiliate than the one where the union has a bargaining unit.)

The following is a sample letter demanding to use a company's payroll deduction system for PAC contributions:

The Union hereby requests that the Company permit the Union's members to contribute to the UFCW Active Ballot Club federal political action committee (PAC) through the Company's payroll deduction system.

It is our understanding that the Company makes its payroll deduction system available to its management to

contribute to the Company's PAC. In these circumstances, the Federal Election Campaign Act, at 2 U.S.C. § 441b(b)(5-6), and Federal Election Commission regulations, at 11 C.F.R. § 114.5(k) and (l), require the Company to also permit the Union's members to use the same payroll deduction system to contribute to UFCW's federal PAC.

The Union will provide the Company individually signed PAC assignment or check-off forms from employees who desire to make their PAC contributions through the Company's payroll deduction system. The Union expects that the Company will abide by the FEC regulations and begin checking off and remitting these payroll deductions commencing the payroll period immediately following the period during which the Union provides the assignment forms. The Union will reimburse the Company for any actual costs incurred in administering these payroll deductions.

Even if the union secures PAC check-off in this manner, the Union should incorporate PAC check-off into the contract so the union can grieve and arbitrate – rather than litigate – if the company later reneges, or if the company later discontinues check-offs for its executives and takes the position that union members no longer have the right to PAC check-off.

Cost of Using the Company's Payroll Deduction System

Whether the union bargains for PAC check-off or achieves it because the company itself uses it, the law requires the union or the PAC, and not the company, to pay any associated administrative costs. But the company may only charge the union for the "actual expenses" the company additionally incurs for the members' use of the payroll deduction system. That said the union does **not** have to reimburse the company if the union and the company agree that those expenses were accounted for in negotiating the overall wages and fringe benefits under the contract. Below is sample side agreement that says so.

The Union and Company agree that, in negotiating the economic provisions of the contract, including wages and fringe benefits, they accounted for the Company's actual costs of administering a payroll deduction system for the UFCW Active Ballot Club, so the Company will not separately bill the Union for these costs.

Below is language from a legal opinion the International has used to persuade a company that the union did not have to pay specially for the cost of administering the PAC check-off.

The following is a legal opinion about whether the Union may lawfully refrain from reimbursing an employer for the actual expenses of using the employer's payroll deduction plan to deduct the contributions of UFCW members to the UFCW Active Ballot Club political action committee if the parties agree that these costs were factored into the economic provisions of the contract, including wages and fringe benefits. It is my legal opinion that if the parties agree that they did so, then the law does not require the Union to reimburse employers for these expenses.

As you know, Sec. 114.5(k)(1) of the Federal Election Commission regulations requires Unions to reimburse an employer only for the actual expenses incurred in making the employer's payroll deduction plan available to the Union. The FEC provides an exception to this requirement when the parties agree that such expenses were factored into the overall economic provisions of their collective bargaining agreement. See FEC Advisory Opinion 1981-39. The FEC concluded in this Advisory Opinion that when they so agree the regulation does not require the union to reimburse these expenses separately. *Id.*

Consequently, it is my legal opinion that if [the Company] and the UFCW memorialize their agreement during recent contract negotiations to include the actual expenses of [the Company]'s use of its payroll deduction plan to deduct PAC contributions in the overall economic package, then FEC regulations, including Sec. 114.5(k)(1), will not require the Union to reimburse [the Company] for these expenses.

What Are Local Unions' Legal Obligations as the PAC's "Collecting Agents"?

A company may send payroll-deducted PAC contributions directly to UFCW ABC, along with an itemization of which members contributed how much, and their individual rates of PAC payroll deduction. This is the best method

because it is the most direct and local unions do not have to become involved in PAC administration.

Often, however, a company will send everything that's deducted to the local union, both union dues and PAC contributions. A local union that receives payroll-deducted member PAC contributions from a company becomes a "collecting agent" for the PAC. That entails certain obligations for the local, although the PAC is ultimately responsible for meeting all legal requirements concerning the collection and transmittal of these contributions to the PAC.

Depositing PAC Contributions into Separate Accounts

Locals should deposit all PAC contribution checks or checks combining members' dues and PAC contributions that companies make payable to the union into a non-interest-bearing account separate from the union's treasury account. This is because no money earned as an investment of the union, including bank account interest, can be transferred to the PAC. After depositing the check into this separate account, the union then can transfer the amount of the PAC contributions to the PAC within 30 days of receipt, and transfer the balance into the union's treasury account. (If the local were to receive more than \$50 in PAC contributions deducted by a particular member, the local would have to send that to the PAC within 10 days.)

Maintaining Contribution Records

Locals are required to retain for three years all records of PAC contribution deposits and transmittals of them to the PAC. If the local uses a general-fund account to deposit and transmit PAC contributions, then it also must keep a separate internal account of those transactions within the general fund. Federal election law does not require locals to report their collecting agent activities.

Can Unions Pay the Expenses of Delegates to Federal Nominating Conventions?

Federal election law considers nominating conventions to be part of the primary election process so that only PAC money can be used to pay for the expenses of convention delegates. But, unlike with federal candidates, there is no limit on how much a PAC can contribute to a particular delegate either monetarily or in-kind. That includes both the costs associated with a delegate candidate becoming a delegate, and then that delegate's expenses incurred as a delegate both before and during a national party convention.

For the same reason that unions cannot pay the salaries of union staff who work directly for federal campaigns, unions cannot use treasury money to pay the

salaries of officials or staff to attend conventions as **delegates**. Rather, the time union officials or staff actually attend conventions as delegates must be either the individual's own time, such as vacation or other leave in accordance with the union's normal policies, or the PAC must reimburse the union for its costs for that time.

On the other hand, if the officials also engage in union business, such as attending meetings called by for example the International or a labor federation during the days the convention is held, then the union could pay part of the officials' salaries and allocate their expenses between the union and the PAC.

The expenses that could be divided include the cost of airfare. Airfare could be split 50-50 between the PAC and the union's treasury because the cost is not dependent on the amount of time the officer/delegate spends on union versus convention business. In contrast, if the union official engaged in union business only one day out of the 5-day convention, the PAC should pay closer to 4/5ths of hotel and meal costs that would be larger because of the number of days the official engaged in convention business. The union could pay the entire expenses for a day that the official engaged in only union business, so long as the the convention is not in session on that day. However, either the PAC or the official personally would have to pay expenses for the days the official did not engage in union business and instead only attended the convention as a delegate.

Member Rights to Distribute Political Literature, Wear Political Buttons or Stickers and to Talk to Co-workers and Customers About Political Issues While Working on the Sales or Workfloor

The rights of workers to distribute literature, wear stickers or buttons, and talk to co-workers or customers about political issues, legislation or political candidates that affect their working conditions are discussed in more detail in the chapter entitled "Organizing And Mobilizing Workers At The Workplace: The Rights To Distribute, Talk, Solicit And Wear Stickers Or Buttons."

In general, rights to engage in political communication directly related to working conditions are protected under, for example, no-discrimination or union-activity provisions of the contract or past practices, and the National Labor Relations Act.

For example, if the company allows workers to speak to each other about non-work topics, past practice prohibits the company from restricting workers

from talking about pending legislation on workplace issues or pro-worker political candidates.

Similarly, the National Labor Relations Board has ruled that workers engage in protected activity companies may not interfere when they wore buttons opposing pending right-to-work legislation while working in work areas.

WORKPLACE SAFETY AND HEALTH: OSHA

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What Is OSHA?

OSHA or the Occupational Safety and Health Act is the federal law that states that it is the company's responsibility to assure every worker safe and healthy working conditions. This is known as the general duty clause of OSHA.

OSHA established the Occupational Safety and Health Administration (OSHA), an agency within the U.S. Labor Department to:

- establish minimum safety and health standards that companies must meet, and
- conduct workplace inspections to enforce these standards.

Limitations of OSHA and the Importance of Union Action on Workplace Safety and Health Issues

OSHA provides workers with protections and legal rights that make it a useful tool for unions in many instances. However, OSHA is a very small agency and is limited by the number of inspectors. The agency's effectiveness has also been diminished over the years by political and budgetary constraints. With fewer than 2,200 federal and state OSHA inspectors, you would have to wait over 130 years for every U.S. workplace to be inspected. That is why it is important for union representatives, shop stewards, safety committee members and other members to be actively involved in safety and health issues. In addition to exercising OSHA rights, developing and enforcing strong safety and health contract language is important. However, even in the absence of contract language, unions still have the right to demand that companies address and correct workplace safety or health hazards.

Standards Versus the General Duty Clause

One of OSHA's regulatory functions is to set standards that require companies to adopt practices, methods or processes necessary to protect workers. Certain standards address specific safety and health hazards, such as machine guarding and chemical exposures. Other standards establish requirements across sectors of industry that address such issues as access to medical and exposure records, personal protective equipment, and hazard communications. A company's violation of any of these existing standards may result in an OSHA citation.

OSHA has not set forth a standard to address every hazard. For example, there are no standards that address exposure to ergonomic hazards or exposure to excessive heat or cold. Even where OSHA has not set forth a standard addressing a specific hazard, companies are responsible for complying with the OSHA's general duty clause. The general duty clause states that each company shall furnish a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to workers. OSHA may cite companies for general duty violations. However, successful prosecution of a general duty citation requires proof of all of the following:

- workers are exposed to a hazard,
- the hazard must be a recognized hazard, meaning that the company knew or should have known about the hazard, the hazard is obvious or it is a recognized hazard within the industry,
- the hazard is causing or likely to cause death or serious harm, and
- the hazard is correctable — meaning there is a feasible and known way to correct, eliminate or at least substantially reduce the hazard.

Union Action

Being able to cite a violation of either a specific OSHA standard or the general duty clause when the union identifies hazards or if workers get injured or become ill is a powerful strategy in getting the company to fix the problem. The union can initially demand that the company fix the problem, citing the OSHA standard and then if necessary state (threaten) that the union will have to file a complaint with OSHA or a grievance if the company doesn't correct the problem.

Note: Calling OSHA to determine if a standard has been violated may not always be the best course of action to take initially. Sometimes the threat of calling OSHA in and citing the standard or regulation being violated is a more powerful strategy. The reason for this is that OSHA may come in and not cite the company for violating a standard, at which point the union will have lost the leverage of the OSHA threat.

The Right to Know About Workplace Hazards

Several OSHA standards give workers, unions and other worker representatives access to company documents that contain important information

about workplace safety and health conditions. Workers and unions can use this information to identify and document hazardous conditions.

Access to Records on Exposure to Hazardous Agents

OSHA standards (Access to Employee Exposure and Medical Records) give **current workers, former workers and their union (or other worker representative)** the right to get the results of any hazardous exposure monitoring that has been conducted in the workplace.

What information do exposure records contain: Exposure records can reveal whether workers have been exposed to hazardous agents at levels that may affect their health, now or in the future. Monitoring or exposure records are the results of tests conducted to measure worker exposure to on-the-job hazards. Under OSHA's Access Standard, workers and the union are entitled to four types of exposure records:

- Past and present **tests for levels of hazardous exposures** (noise, chemicals, radiation, etc.) conducted in areas where workers now work or will be transferred to.
- **Safety Data Sheets** which give basic safety and ingredient information on specific workplace chemicals.
- Any other records that reveal the **identity of toxic substances** in the workplace.
- Copies of any reports, findings, analyses, conclusions or recommendations relating to worker exposure to toxic substances or harmful physical agents such as repetitive motion, **including ergonomic reports**, issued by any health and safety consultant or the company.

How to Obtain Workplace Monitoring or Exposure Records

Workers may obtain copies of exposure records **by making a request in writing** to the company. The OSHA standard states that companies must give workers access to these records within 15 working days after the request.

The union may similarly obtain copies of worker exposure records.

Companies' failure to honor these requests is a violation of the OSHA standard.

Access to Medical Records

This same OSHA Access Standard gives **workers and former workers** access to their medical records. **The union (or other designated worker representative)** can get records of aggregate information. Aggregate information records are collective medical test results (such as analyses using worker medical records) that do not identify individual workers. Under the OSHA standard, unions may only obtain individual medical records with the worker's written consent. (Note: Unions have independent rights to medical information under the National Labor Relations Act.)

What information do medical records contain: Individual records can tell workers what effect noise, chemicals or radiation may have on their health.

Aggregate records can help identify patterns of workplace injuries or illnesses. Unions may be able to use these records to show that a health problem is a **workplace** problem and not just limited to one worker.

How to obtain medical records: Any worker can request a copy of the worker's medical records. Companies must make the records available to the worker within 15 working days of the request.

Does HIPAA Affect This?

The Health Insurance Portability and Accountability Act or HIPAA does not cover information companies maintain in personnel or other human resource department files. Therefore, workers and unions have the right to access medical records maintained by companies, under OSHA rules. HIPAA is discussed elsewhere in this manual.

Exposure records and medical records can be very technical. For this reason, it may be helpful to get the assistance of a trusted physician or other qualified person to explain these records.

An example of how these records can help to identify workplace health hazards: Suppose the exposure records show that noise levels in a specific work area of the plant have been close to or above the OSHA standard for several months. The workers in this area of the plant then ask for the results of any hearing tests (medical records) the company has conducted during these months. If these tests show a pattern of hearing loss, there is a good chance

that a noise hazard exists in this area. The union or safety committee should then demand that the company abate any noise problem in this area of the plant.

Also under the Access Standard:

- Companies must keep **medical** records for each worker for the duration of employment plus 30 years. Companies must keep all **exposure** records for at least 30 years following the test or procedure which produces these records.
- At least once a year, the company must inform all workers of their rights to access their medical and exposure records. The company must also explain what tests, monitoring, etc., the exposure records refer to.
- Although this standard gives OSHA automatic access to medical records, worker privacy will be protected.

Workers' Right to Know About Hazardous Chemicals on the Job

OSHA's Hazard Communication Standard gives **workers and their unions** rights to get information on chemical hazards in the workplace. The standard requires companies to:

- identify hazardous chemicals **used in the workplace** (In healthcare facilities, hazardous substances include drugs other than pills administered to patients),
- provide workers access to information about these chemicals, and
- train workers in the effects and proper use of these chemicals.

What Information Is Available Through This Standard?

Chemical List

Companies must identify and compile all hazardous substances used in the workplace on a chemical list. If possible, the list should divide the chemicals by work area so that it is easy to determine **where** the chemical is used, as well as what chemicals to look for in each work area. The list must be made available to all workers on all shifts in their work areas.

Written Hazard Communication Program

Companies must have a written hazard communication program that explains how they will implement the Hazard Communication Standard. Companies must make the written program available to workers, the union or other representatives upon request.

Safety Data Sheets

Companies must keep Safety Data Sheets (SDSs) for each hazardous chemical in the workplace. SDSs contain a good deal of safety and health information about hazardous chemicals, including ingredient information, any adverse health effects and exposure control information including appropriate personal protective equipment. This is the primary means for workers to get information on the health effects of the chemicals with which they work. Companies must make these SDSs accessible to all workers during each workshift. SDSs must also be made available to unions and other worker representatives.

Labeling

All containers of hazardous chemicals must be labeled with (1) a product identifier that can be cross-referenced to the Safety Data Sheet, and (2) words, pictures, symbols or any combination thereof which provide appropriate hazard warning. Companies are not required to label portable containers into which hazardous chemicals are transferred from labeled containers as long as it is intended for the **immediate use of the worker who transferred the chemicals**.

Education and Training

Companies must train workers exposed to hazardous substances about the health effects of these chemicals and about protective measures to prevent adverse effects. Companies must train all new workers at the beginning of their employment, and must provide additional training whenever a new hazard is introduced into the work area.

The Trade Secrets Loophole

A chemical manufacturer may withhold the specific chemical identity of a substance if this information constitutes a trade secret. However, the company must still disclose other information concerning the properties and health effects on that substance.

How to Obtain Chemical Information Provided Under This Standard

- Any worker can request copies of the list of hazardous chemicals, the SDSs and the written Hazard Communication Program.
- Unions may also obtain copies of the list of hazardous chemicals, all the SDSs and the written Hazard Communication Program.

Information on Injuries and Illnesses: The OSHA 300 Log

OSHA regulations require most companies with more than 10 full-time workers to keep a yearly log of work-related injuries and illnesses for each establishment. (Regulations do not require companies in certain "low hazard" industries like retail furniture and clothing stores to maintain logs.) **This is the OSHA Log of Injuries and Illnesses, or the OSHA 300 Log.**

Companies must record all new cases of work-related fatalities, injuries, and illnesses if they involve:

- death,
- days away from work (lost work days),
- restricted work or transfers to other jobs,
- medical treatment beyond first aid,
- loss of consciousness, or
- a significant injury or illness diagnosed by a physician or other licensed healthcare professional.

Establishment: Companies must maintain the logs in each of their establishments, or locations where they conduct business, perform services or conduct industrial operations. For example, retail grocery companies operate their businesses in multiple store locations or establishments, and must maintain logs for each store.

Each listing on the OSHA 300 log must include information on:

- when and where the injury, illness or fatality occurred,
- the nature of the illness or injury,

- affected workers' names, and
- the number of workdays lost or restricted (if any). Restricted days are the number of days when a worker was unable to perform all or any part of the worker's normal job during all or any part of the normal workday or shift.

What Information Is Available?

The full OSHA 300 log contains information that can be used by unions and safety committees to determine where and what type of changes companies need to make. Unions can use the information to find out where most injuries or illnesses are occurring or what type of injuries occur most frequently. This information is also helpful in preparing for contract negotiations.

In addition, each recordable injury or illness must also be recorded on the Form 301 Injury and Illness Incident Report within seven calendar days after the company receives notice that the injury or illness occurred. This document is used to record information on how each injury or illness case occurred.

The law requires all companies to post Form 300-A, the Summary of Work-Related Injuries and Illnesses, annually from February 1 to April 30 in a location for all workers to see. However, this summary only lists the total number of injuries and illnesses which occurred during the past year — not the type of injuries or where they occurred.

How to Obtain OSHA 300 Logs

Unions, workers and former workers can access OSHA 300 logs for the past five years by requesting access in writing. *The company must provide the logs by the end of the next business day.* The names of workers must be left on the OSHA 300 log, except in certain privacy concern cases. These are cases where the injury or illness occurred to an intimate body part or the reproductive system, injury or illness resulting from sexual assault, mental illnesses, HIV infection, hepatitis or tuberculosis, and needlestick injuries.

Companies must provide upon request a copy of the log or a means to copy the log. Companies that fail to provide requested OSHA 300 logs violate OSHA.

Unions can double check company logs for accuracy and completeness. If unions suspect that companies are falsifying records, unions may file a grievance or OSHA complaint. OSHA considers accurate recordkeeping on these logs to be a top priority.

OSHA Enforcement

Federal OSHA operates several Regional Offices around the country. Within each region, area offices are organized geographically to carry out the inspection and enforcement duties of OSHA. Federal OSHA only covers private sector workers. OSHA encourages states to develop and operate their own job safety and health programs. In those states, the states carry out the enforcement activities instead of federal OSHA. Almost one-half of the states operate state safety and health plans which cover both the private sector and state and local government workers. To determine whether it's the state or federal OSHA that operates the safety and health program for a particular state, go to the OSHA website, www.osha.gov.

Filing an OSHA complaint is one method of compelling the company to correct a hazard. Unions should consider filing OSHA complaints if the hazard poses an immediate danger of injury or death. Complaints usually trigger workplace inspections. If OSHA finds violations of standards, then OSHA will issue citations. OSHA will also require companies to correct hazards and to possibly pay fines.

OSHA gives workers, unions and other representatives the right to file complaints. OSHA is required to keep a worker's name private from the company, and not reveal who filed the complaint, if the worker asks OSHA to do so when filing the complaint. However, to ensure that OSHA does actually carry out the inspection, the OSHA complaint must be in writing and must be signed either by the worker, the union or other representative.

Workers and unions have the right to:

- Be present during the opening conference of the inspection. The opening conference is when the OSHA inspector explains why the inspection is taking place and what the scope of the inspection will be.
- Accompany the inspector during the inspection.
- Talk privately with the inspector during the inspection.
- Be present with management during the closing conference or have a separate closing conference with the OSHA inspector.

The union should receive copies of OSHA citations. In the closing conference, the OSHA inspector should be reminded to give the union a copy of any citations. Companies are required to post citations at the work site for all workers to see.

An OSHA citation contains the following information:

- OSHA Standard that was violated
- Nature of the violation – hazards identified
- Date by which the employer must correct or abate the hazard(s)
- Proposed penalty, if one was issued.

Information on the hazards and violations OSHA found when it inspected particular worksites in the past are available on the OSHA website.

What Happens After an OSHA Inspection Takes Place?

If the company agrees with the citation, and does not contest, the company must correct or abate the hazard(s) by the time period specified by OSHA on the citation, and must pay the penalty if one was issued.

Companies may request an informal conference with OSHA within 15 days from the time the citations were received by the company for the purpose of discussing issues raised during the inspection or to come to an informal agreement regarding abatement of hazards or proposed penalties. Affected worker(s) or a representative shall be afforded an opportunity to participate in the information conference.

Companies have 15 days to contest any citation (by filing a Notice of Contest), which entitles them to hearings before administrative law judges. The affected workers or union may also file a Notice of Contest within the 15 days, but only as to the length of time the citation allows the company to abate the hazard. The 15 day contest period is not affected by a request for an informal conference. If the company requests an informal conference with OSHA, the company still only has 15 days to file a Notice of Contest.

Where the company files a Notice of Contest, affected workers and the union have the right to participate in the hearing by filing a Notice of Election of party status any time up to 10 days prior to the hearing. The Notice of Election must be filed with Occupational Safety and Health Review Commission in Washington, D.C. OSHA area offices can supply these forms.

Election of party status entitles the workers or the union to receive copies of all papers filed in the case and to participate in the hearing, including calling and cross-examining witnesses. Workers or the union can represent themselves and are not required to have an attorney.

OSHA citations are usually settled prior to hearing. The agency and the company can settle any citation without the workers' or union's consent. Workers or the union can appeal the settlement to the OSHA Commission, but their appeal is limited to one issue: the amount of time specified for abatement of the cited hazard.

Although workers have no right to participate in settlement negotiations, the UFCW has been successful on a number of occasions in securing a major role on a voluntary basis. The workers or the union should always attempt to participate as much as possible in the settlement process.

Workers' Protections from Company Retaliation and Discrimination Under OSHA

OSHA prohibits companies from retaliating or discriminating against workers for exercising their rights under OSHA, including:

- asking for OSHA 300 logs,
- filing OSHA complaints,
- participating in OSHA inspections,
- participating in safety and health committees,
- reporting or complaining about workplace hazards to companies, and
- reporting work-related injuries or illnesses.

Workers or their union or other authorized representative can file complaints protesting company retaliation or discrimination with any OSHA office. Complaints must be filed within 30 days of the retaliation or discrimination.

How Can Organizers Use OSHA?

Organizers can use safety committees to develop health and safety issues during organizing and other campaigns. Safety committees can conduct educational programs for other workers on their health and safety rights, research prior OSHA citations, inspect worksites, and bring issues to the company's attention or file OSHA complaints.

Apart from safety committees, organizers can facilitate workers collectively requesting their medical information or OSHA 300 logs. Workers can conduct surveys or do hazard maps of the workplace to determine workplace injuries and illnesses, and then compare the survey's results to the company's OSHA 300 logs for accuracy.

Finally, organizers can obtain safety and health information directly from companies if workers designate them or the union as their representative.

THE AMERICANS WITH DISABILITIES ACT

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What Is the ADA?

The Americans with Disabilities Act (ADA) is a comprehensive federal civil rights law that prohibits discrimination against individuals with disabilities in employment, public services, including transportation, public accommodations, and services operated by private entities.

The ADA's employment provisions, examined here, broadly prohibit companies from discriminating in all aspects of employment, including the application process, hiring, firing, assignments, transfers, promotions, compensation, and training.

What Companies Are Covered by the ADA?

The ADA covers all private employers that employ 15 or more workers. The ADA also covers state and local governments.

What Does the ADA Prohibit?

The ADA prohibits discrimination against a qualified individual on the basis of a disability in regard to applying for jobs, hiring, advancement, discharge, worker compensation, job training, and other terms, conditions, and privileges of employment.

Discrimination against a qualified individual on the basis of disability includes:

- Limiting, segregating, or classifying applicants or workers in a way that adversely affects their opportunities or status;
- Participating in a contractual or other arrangement which has the effect of subjecting to discrimination a disabled applicant or worker;
- Administering criteria that have the effect of disability discrimination or perpetuate discrimination of others subject to common control;
- Excluding or denying equal jobs or benefits to a qualified individual because of the individual's association with an individual with a disability;
- Failing to make a reasonable accommodation for the known physical or mental limitations of an otherwise qualified individual with a disability

unless the entity can demonstrate the accommodation will impose an undue hardship;

- Denying employment opportunities to an otherwise qualified applicant or worker because of the need to make a reasonable accommodation;
- Using employment selection criteria that screen out, or tend to screen out, individuals with disabilities unless such criteria is shown to be job-related and consistent with business necessity; and
- Failing to select and administer an employment test to ensure that the test accurately reflects what the test purports to measure rather than the impaired skills, except when such skills are what the test purports to measure.

What Is a Disability?

An individual is disabled if the person fits within one of the following “disability” definitions:

- a physical or mental impairment that substantially limits one or more major life activities;
- a record of such impairment; or
- being regarded as having such impairment.

These definitions are termed, respectively as: an “actual disability,” a “record of” disability, and a “regarded as” disability.

In determining whether an individual is disabled under the “actual disability” or “record of” disability definitions, the law requires a focus on how a major life activity is substantially limited and not what outcomes the individual can achieve. The “record of” disability definition is designed to ensure that individuals are not discriminated against due to a history of disability.

Impairments of short duration (lasting or expected to last fewer than 6 months) can constitute disabilities under both the “actual” and “record of” definitions. In addition, impairments which are episodic or in remission are disabilities if they would substantially limit a major life activity when active. For example, conditions such as epilepsy or post-traumatic stress disorder can constitute disabilities.

The “regarded as” disability definition was designed to prohibit discrimination based on unfounded concerns, mistaken beliefs, or prejudices about disabilities and can be used by individuals not challenging a company’s failure to make a reasonable accommodation. Therefore, a worker can prove disability under the “regarded as” definition by showing that the worker was treated adversely because of impairment without having to establish the employer’s belief as to the severity of the impairment.

What Is a “Major Life Activity”?

The term “major life activities” under the ADA is an expansive term that includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

The term “major life activities” also includes the operation of major bodily functions, including but not limited to those of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

The term “major” will not be interpreted strictly to create a demanding standard of disability.

Whether a function is a major life activity is not determined by reference to whether it is of central importance to daily life.

Example: Ability to perform manual tasks constituted a major life activity and restrictions on ability due to carpal tunnel provided evidence that retail credit card customer service and collections worker was disabled.

What Is “Substantially Limits”?

Determining whether an individual is substantially limited in the performance of a major life activity is made by comparing the individual’s performance to that of “most people in the general population.”

The term “substantially limits” is to be construed broadly in favor of expansive coverage.

The term “substantially limits” is not meant to be a demanding standard and need not prevent or severely restrict the individual from performing a major life activity.

A determination whether impairment substantially limits a major life activity will be made without reference to mitigating measures (except for ordinary eye glasses and contact lenses) which are or can be used.

An impairment that substantially limits one major life activity need not limit another major life activity.

An individual who shows that impairment substantially limits a major life activity does not have to also show that such limitation impacts the individual’s ability to perform activities that are of central importance to daily life.

It may be helpful in determining whether an individual is substantially limited in a major life activity to consider, as compared to most people in the general population, the condition, manner, and duration of time in which the individual performs the major life activity.

The employer should conduct an individualized assessment whether impairment substantially limits a major life activity when symptoms of impairment vary widely from person to person.

Example: A chronic ankle injury which restricted an individual’s ability to walk more than a half mile or stand in excess of an hour without a break was sufficient evidence of substantial limitation on the major life activities of walking and standing.

Example: An individual with vision in only one eye has shown a substantial limitation on a major life activity and is not required to show that the worker is unable to perform activities of central importance to daily life.

Who Is a Qualified Individual Under the ADA?

An individual is qualified for the job the worker holds or desires if the worker:

- Satisfies the job’s prerequisites such as education, skills, licenses, and experience requirements and
- Can perform the essential functions of the job, or

- Can show that a reasonable accommodation will enable the performance of the essential functions of the job

Qualification standards that screen out or tend to screen out individuals with disabilities must be job-related and consistent with business necessity or they are prohibited.

Example: A company that imposes a respirator certification requirement for a particular job will have 2 obligations regarding an applicant or worker whose disability (high blood pressure) renders him unable to pass the test. First, the employer will be required to show there is no alternative exam appropriate to test individuals with high blood pressure. Secondly, the employer will be required to show that the respirator certification is a requirement that is job-related and consistent with business necessity.

Example: A company that screens out an applicant or worker for a job based on the failure to achieve a 100% score on a functional capability test may be required to show that a 100% score is job-related and consistent business necessity if the test screens out a disabled applicant or worker who can perform the job.

Example: A requirement that all applicants for jobs in a plant be able to lift 50 pounds would be prohibited as it would tend to screen out individuals with disabilities unless the employer can show that the heavy lifting requirement was an essential function of all jobs.

What Are Essential Job Functions an Individual Must Be Able to Perform?

Essential job functions are those duties that are fundamental to the job.

Determining whether a function is essential is based on the specific facts from all relevant evidence. The initial inquiry must be whether the company actually requires performance of the function that it claims is essential; if the company in fact does not require performance of the function, then the function is not essential.

Factors to consider in determining whether a function is essential include:

- employer's judgment,
- written job description,

- amount of time spent performing the function,
- consequences of not performing the function,
- number of other workers available to perform the function,
- degree of expertise or skill required to perform the function,
- terms of a governing bargaining agreement,
- experiences of past workers in the job, and
- experiences of current workers in the job.

Example: A worker who was disabled with musculoskeletal disorders and unable to perform heavy lifting was able to provide evidence that lifting was not an essential function of her job. The worker used alternatives to lifting and bending to perform work and received help with lifting from available workers with the few tasks the worker was unable to perform.

Example: The job of an auto plant production technician required continuous inspecting all around, over, and underneath cars; hence climbing, squatting, and kneeling were essential functions of the job. A worker disabled by multiple sclerosis whose restrictions required no climbing, squatting, or kneeling and only intermittent standing and walking thus was unable to perform the job's essential functions.

What Constitutes a Direct Threat?

Qualification for a job includes a requirement that an individual with a disability not pose a direct threat.

“Direct threat” means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

The employer must make an individualized assessment based on reasonable medical judgment and best available objective evidence to determine an individual's present ability to safely perform essential functions of the job.

The employer must consider: (1) duration of risk; (2) nature and severity of potential harm; (3) likelihood that potential harm will occur; and (4) imminence of potential harm.

Example: An employer must perform an individualized assessment as to whether an individual poses a direct threat even as regards safety sensitive positions.

What Is the Food Handlers Amendment?

The ADA requires the Secretary of Health and Human Services (HHS) to publish annually a list of infectious and communicable diseases that can be transmitted by handling food. Twenty-one pathogens are on the list, including hepatitis A; however, the list does not include AIDS or the HIV virus.

A company is not obliged to hire an applicant who suffers from one of the listed diseases in a position as a food handler and is not required to retain a worker in a food handler position if the risk of transmitting the disease cannot be eliminated by a reasonable accommodation.

The employer is required to use the direct threat analysis in evaluating current workers.

The company must consider whether a worker who suffers from a listed disease can be accommodated by reassignment to a vacant position not requiring the handling of food.

What Is a “Record of” Impairment?

The “record of” impairment definition of disability provides protection for individuals not currently limited by an impairment but who have a history of an impairment that substantially limited one or more major life activities compared to most people in the general population or has been misclassified as having such an impairment.

Example: “Record of” disability definition prohibits discrimination against individuals with histories of cancer or heart disease even though they are not currently limited by such conditions.

Example: Individuals who were misclassified as having learning or intellectual disabilities are protected from discrimination on the basis of such erroneous classifications.

What Is “Regarded as” Impairment?

An individual is “regarded as” having an impairment if the individual is subjected to prohibited action because of an actual or perceived physical or mental impairment whether or not the impairment substantially limits, or is perceived to substantially limit a major life activity.

The “regarded as” disability definition helps prevent elimination of injured workers from the workforce based on fear and prejudice.

An individual who alleges “regarded as” discrimination is not required to show that employer believed the impairment substantially limited a major life activity.

To defeat a “regarded as” disability claim, the employer must show that the actual or perceived impairment is the type of impairment which is both transitory (lasts or is expected to last less than 6 months) and minor.

Example: If a company terminates a worker who contracted pneumonia, mistakenly believing the pneumonia to be symptomatic of HIV infection, the employer will have engaged in “regarded as” discrimination even though the worker recovers quickly and does not have HIV because HIV is not a minor condition.

Example: A worker states a claim for “regarded as” disability when employer forced worker to take leave and then discharged her because of diminished visual acuity in one eye that did not affect worker’s ability to perform her job.

What Conditions Are Excluded from the Definition of Disability?

An individual currently engaged in the use of unlawful drugs or the unlawful use of prescription drugs is not an individual with a disability.

Therefore a company does not violate the ADA for denying an individual employment or discharging a worker on the basis of such use.

Where an individual no longer uses illegal drugs or is participating in or has completed a rehabilitation program, the individual is not excluded from the definition of disability and qualified individual with a disability.

What Is a Reasonable Accommodation?

The requirement that an individual with a disability be able to perform the essential functions of the job the worker holds or desires can be accomplished through provision of a reasonable accommodation.

A reasonable accommodation is a modification or adjustment of the work environment or to the manner or circumstances under which the position held or desired is customarily performed to enable the individual to perform the essential functions of the position which does not cause an undue hardship on the employer.

The worker is required to request an accommodation. (Some courts require the worker to identify a specific accommodation that is reasonable on its face before the employer is obligated to take action.)

Once the employer receives a request, the employer is required to engage the worker (and the worker's union representative) in an interactive process to determine a reasonable accommodation.

The employer that resists the accommodation is required to show that it is unreasonable or would cause undue hardship on the business.

What constitutes a reasonable accommodation depends on the circumstances of the individual case.

The requirement to engage a worker in finding a reasonable accommodation is a continuing duty of the employer because of the changing nature of limitations resulting from disabling conditions.

To determine a reasonable accommodation, the employer should (1) analyze the job to determine the job's purpose and essential functions; (2) find out from the individual precise job-related limitations imposed by the disability and how the accommodation can overcome limitations; (3) consult with the individual to identify the accommodations and their effectiveness; (4) consider the individual's preference in selecting the most appropriate accommodation for both worker and employer.

A reasonable accommodation can include:

- making existing facilities readily accessible to and usable by workers with disabilities;

- job restructuring which is reallocating or redistributing nonessential or marginal job functions to other workers;
- modified work schedules such as part time work, waiver from shift rotation or overtime;
- extended leave beyond amount allocated in existing policy;
- reassignment to a vacant position where (1) the transfer is reasonable on its face and (2) the employer cannot show specific facts that demonstrate undue hardship (accommodation not reasonable on its face if another worker qualifies for position based on seniority);
- acquisition or modification of equipment or devices;
- appropriate adjustment or modifications of examinations, training materials, or policies; and
- provision of qualified readers or interpreters.

Example: Six months leave to diagnose and treat condition and allow driver sales representative to return to work, as his doctor requested, was a reasonable accommodation given evidence that employer could have continued to cover position with substitute sales representatives without undue hardship.

Example: Scooter, reaching device, or man lift may be reasonable accommodations to enable clerk restricted from working on her feet to perform her job's essential functions in retail store.

Example: Allowing cashier whose osteoarthritis in both knees made it difficult to walk or stand for long periods to sit throughout shift is not a reasonable accommodation where store needs its limited number of workers to perform tasks throughout store.

What Is an Undue Hardship with Respect to an Accommodation?

A requested accommodation will impose an undue hardship if it will result in significant difficulty or expense to the covered entity. A company must present evidence to demonstrate that accommodation will cause undue hardship.

The law requires the company to assess the cost of the accommodation and to compare such costs to the financial resources of the facilities that will

provide the accommodation and compare the cost of the accommodation to the financial resources of the covered entity.

The law also requires the company to assess the impact of the accommodation on the ability of the facility to conduct business and the impact on other workers to perform their duties. (Worker morale is not an element of undue hardship.)

A requested accommodation which disregards the seniority provisions of a collective bargaining agreement constitutes an undue hardship on the business and other workers.

Example: A request for a straight shift assignment to replace his rotating shift which aggravated the worker's type I diabetes posed an undue hardship on the company because rotating shifts allowed the workers to learn all geographic territories, work in different areas during emergencies, and spread undesirable night and weekend shifts among the workers.

How Does FMLA Relate to ADA's Reasonable Accommodation?

An employee's right under the Family and Medical Leave Act to leave in response to his/her own serious health condition is separate from his/her rights under the ADA which may require the employer to provide leave as a reasonable accommodation.

An employer is obligated to examine an employee's rights under each law independently and provide its employee the greater rights.

An eligible employee has 12 workweeks of FMLA leave in a 12-month period. If after the exhaustion of the 12 workweeks of leave, an employee is unable to return work, the employee may use other leave(s) for which s/he qualifies or be subject to termination.

While time on FMLA leave may be counted as ADA leave, an employee's exhaustion of FMLA leave cannot limit the amount of ADA leave an employer may be obligated to provide as a reasonable accommodation.

The ADA does not require an employer to provide a predetermined amount of leave. Rather, under the ADA, an employer may be obligated to provide leave as a reasonable accommodation to enable a disabled employee to return to work with the ability to perform the essential functions of his/her job. The

determination regarding whether the requested leave period is a reasonable accommodation includes a determination that the leave does not impose an undue hardship on the operation of the employer's business or other employees.

Leave provided as an ADA reasonable accommodation may be longer than the 12 workweeks provided under FMLA for a serious health condition. The ADA may require an employer to reasonably accommodate an employee with a period of leave that is longer than prescribed under its existing policy.

What Are Requirements Regarding Medical Inquiries?

The ADA prohibits medical examinations or inquiries into whether a worker is an individual with a disability or the nature or severity of the disability unless the inquiry is job related and consistent with business necessity.

A medical inquiry constitutes questions which are likely to elicit information regarding a disability of a worker.

A test to determine illegal drug use is not a medical inquiry and not prohibited by the ADA. However, if the test also discloses use of legally prescribed drugs, the employer must prove business necessity.

Business necessity requires the employer to show that the inquiry is vital to its business and is reasonably effective and no more intrusive than necessary in achieving the goal of the inquiry.

A prohibited medical inquiry constitutes discrimination without proof that the individual is disabled.

Example: A company requirement that workers identify all medicines they take constitutes an impermissible medical inquiry because it will likely disclose disabilities and is too overbroad to comply with business necessity.

What Are Acceptable Medical Inquiries?

A company is permitted to make inquiries into a job applicant's ability to perform job-related functions.

A company may require a medical examination *following* an offer of employment and prior to the start of the worker's duties *if*: (1) all entering workers for the position are subjected to the examination; (2) the examination is treated

as a confidential medical record as required by law; and (3) withdrawal of an employment offer is based only upon reasons which are job-related and consistent with business necessity.

What Are the ADA's Confidentiality Requirements?

The ADA requires companies to keep confidential all information regarding the medical condition or history of workers. The law specifically requires companies to collect and maintain medical information in separate files from other worker information.

Certain exceptions to the confidentiality requirement are made for management or safety personnel with a need to know about a worker's disability or medical restrictions. In addition, the EEOC recognizes that other federal laws may require disclosure of worker medical information.

Unions may have the right to obtain information about worker information when necessary for bargaining about proposed accommodations, but must comply with the same confidentiality requirements required of the employer.

What Is Protected Activity Under the ADA?

Protected activity under the ADA includes:

- Raising or filing a charge;
- Participating in an investigation, proceeding, or hearing;
- Opposing illegal activity, such as by:
 - ◆ Protesting an illegal employment practice, or
 - ◆ Refusing to participate in an illegal employment practice,
- Exercising, claiming, or asserting a protected right, including
 - ◆ Requesting reasonable accommodation;
 - ◆ Aiding or encouraging another individual in exercise of any right protected by ADA.

How Is the ADA Enforced and What Are Its Remedies?

The ADA adopts all the enforcement procedures and remedies provided for in Title VII of the Civil Rights Act of 1964.

To enforce the ADA, an individual must file a charge with the Equal Employment Opportunity Commission (EEOC) within usually 180 days following the alleged discriminatory action. If a state or municipality has a fair employment practices agency that has an agreement with EEOC, an individual will have 300 days following the alleged discriminatory action to file the charge with EEOC.

If the EEOC does not resolve the complaint within 180 days or issues a no cause finding, the charging party may request a “right to sue letter” and file a lawsuit in federal court.

ADA claimants have a right to trial by jury. Successful plaintiffs may obtain both compensatory and punitive damages in addition to remedies like back pay and reinstatement.

The ADA does not preempt any federal, state, or local law which may grant equivalent or greater protection to individuals with disabilities.

Union-represented workers whose collective bargaining agreements contain grievance-arbitration procedures may file a timely grievance alleging discrimination under the agreement’s anti-discrimination provision.

REHABILITATION ACT OF 1973, SECTION 503 (PROTECTION FOR WORKERS WITH DISABILITIES EMPLOYED BY FEDERAL CONTRACTORS)

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What Is Section 503 of the Rehabilitation Act?

Section 503 of the Rehabilitation Act is an anti-discrimination law that prohibits ***federal contractors*** from discriminating against qualified individuals with disabilities and requires federal contractors to take affirmative steps to hire, retain, and promote qualified individuals with disabilities. Taking affirmative steps includes the duty to refrain from discriminating in employment against qualified individuals on the basis of disability.

What Is a Covered Federal Contractor?

Covered federal contractors are those businesses that have contracts or subcontracts with the federal government, and the value of the contracts or subcontract exceeds \$10,000.

What Does Individual with a Disability Mean?

The Rehabilitation Act broadly uses the same definition of an individual with a disability as the Americans with Disabilities Act (ADA):

- has a physical or mental impairment that substantially limits one or more of the worker's major life activities,
- is regarded as having such an impairment.

What Type of Affirmative Action Must Federal Contractors Take?

Federal contractors are required to make reasonable accommodations to the known physical and mental limitations of workers and applicants unless they can show an undue hardship.

Federal contractors are required to establish meaningful contacts with social service agencies and other community organizations for individuals with disabilities to obtain advice, technical assistance, and job referrals.

Federal contractors are required to take all necessary actions to ensure that no one attempts to intimidate or discriminate against any individual for filing a complaint or participating in a proceeding under Section 503.

A federal contractor with 50 or more workers and contracts totaling \$50,000 or more must prepare, implement, and maintain a written affirmative action plan covering each of its facilities, setting forth its policies, practices, and procedures relevant to its compliance with this law.

The contractor must send a copy of the plan to the U.S. Department of Labor. These plans are available under the Freedom of Information Act from the U.S. Labor Department Office of Federal Contract Compliance Programs (OFCCP).

Enforcement

A worker who believes that the employer has discriminated in violation of the Rehabilitation Act can file a complaint with the OFCCP by calling 1-866-487-2365, visiting www.dol.gov/ofccp, or emailing OFCCP-Public@dol.gov.

A worker must file a complaint within 180 days of the act which is alleged to be discriminatory. A worker may also file class action complaints.

The OFCCP investigates to determine whether the employer violated the Rehabilitation Act. If the OFCCP finds reasonable cause of a violation, the agency will attempt to remedy the discriminatory conduct through settlement with the employer. If OFCCP is unable to remedy the violation, it may refer the complaint to the U.S. Department of Labor's Solicitor's Office.

The U.S. Department of Labor may initiate either administrative proceedings or, in the case of substantial violations, refer the case to the Justice Department for court proceedings.

The Rehabilitation Act does not authorize an individual to file a lawsuit against a federal contractor for violating the law; the U.S. Department of Labor has the sole enforcement authority under the law.

Remedies

Remedies for workers discriminated against in violation of the Rehabilitation Act include:

- back pay,
- front pay,

- reinstatement, and
- injunctions against the employer that violates the law.

The U.S. Department of Labor can impose sanctions on federal contractors who violate the law, including:

- cancellation of current contracts,
- withholding of payments under current contracts, and
- debarment of the contractor from future contracts.

WORKERS' COMPENSATION

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Introduction

State workers' compensation laws require companies to compensate workers (including payment of medical expenses) for most job related injuries or illnesses.

These laws result from a historic "compromise" whereby workers gave up the right to bring lawsuits against companies for injuries caused by the companies' negligence in return for companies compensating to some extent all job related injuries, regardless of whether the companies were negligent or the workers were at fault.

Companies are required to pay insurance premiums which finance the system.

What Do Workers' Compensation Laws Require?

The law requires that injured workers receive necessary medical care for work-related injuries or illnesses.

In addition, varying levels of tax-free cash benefits are paid to injured workers to offset income loss during periods of inability to earn income because of permanent or temporary incapacity or diminished capacity to work. The amount of benefits depends on the nature, severity and duration of the injury.

Special compensation is often awarded to injured workers for permanent impairments (i.e., if their injuries cause permanent loss, or loss of use, of a body part). This compensation is payable without regard to wage loss.

Permanently disabled workers receive vocational rehabilitation services.

If the work-related injury is fatal, surviving dependents receive tax-free benefits.

How Do Workers' Compensation Laws Work?

Each state system is different, but they share some basic similarities.

Most states require companies to file reports with the state workers' compensation agency when they learn of worker injuries from their own observation, worker reports or when claims are filed.

Workers have a right to see doctors, receive medical care and receive paid leave until a doctor releases them to return to work. Whether workers must see company doctors, doctors on panels provided by companies, or are free to choose a doctor on their own differs from state to state. If the worker's injury results in some permanent disability, the worker receives an award according to a schedule to compensate in some part for the loss.

Workers Often Fail to File Claims

One of the most important problems with workers' compensation systems is that many workers often fail to report accidents or file workers' compensation claims when they are injured.

This is almost always due to workers not knowing their rights or companies discouraging claims, or both. And, frequently, companies encourage workers to make claims under their health insurance, instead of under workers compensation. Unions should encourage workers to file workers' compensation claims for work-related injuries instead of filing health insurance claims.

Finally, even when the company knows about the injury and benefits are being paid, workers may lose future benefits if they fail to file claims within the statute of limitations.

What Is the Union's Role?

Representatives should educate workers on their workers' compensation rights and encourage workers to report all injuries and file workers' compensation claims. Unions should also advise workers to speak to their attorney or the union before agreeing to provide companies or workers compensation insurers with statements about the injury.

Representatives can discover whether workers are filing claims by obtaining the OSHA 300 logs and contacting the workers listed on the log to determine whether they filed workers' compensation claims. See Workplace Safety and Health section of this manual for a discussion of OSHA 300 logs.

Unions should cultivate good relations with competent workers' compensation lawyers and refer workers to these lawyers. Many workers' compensation lawyers will volunteer to attend union meetings to advise workers of their rights under workers compensation law.

Unions should consider distributing to workers cards that state the following:

Dos and Don'ts of Workers' Compensation

- Do notify your company or supervisor as soon after an accident as possible.
- Do file written notice of a work-related injury with your company as soon as possible.
- Do seek medical attention as soon as possible and give the doctor a detailed description of how the injury occurred.
- Do consult your attorney if you have any new injury or accident involving the injured body part or if your condition worsens.
- Do not sign any papers or forms unless you know what they mean.
- Do not give a recorded statement about the accident to your company's insurance company.
- Do not overlook any injury however slight it may appear.
- Do not expect your company to take care of you.

Companies May Not Interfere with the Claims Process

Companies may not discourage workers from seeing doctors or theoretically pressure doctors to return workers to work before their injuries are healed.

Companies who fail to report injuries to the state workers' compensation agency violate workers' compensation laws that, in some states, are grounds for criminal penalties.

In addition, most workers' compensation laws prohibit companies from retaliating or discriminating against workers for filing claims.

Enforcement

Representatives should encourage workers to consult workers' compensation lawyers because workers' compensation is a specialized practice,

and not all labor or employment lawyers handle workers' compensation cases. Their fee is limited by law and is subject to the scrutiny and approval of state workers' compensation agencies.

Retaining a lawyer is usually worth the additional cost in cases of serious injury because the fee is exceeded by the additional recovery a lawyer generally obtains.

Workers may sue non-company **third parties**, if their negligence caused or contributed to the workers injury.

Example: Cashiers may be able to sue the manufacturer of grocery store scanners if the scanners caused repetitive trauma injury because of their negligent design or the manufacturer's failure to warn workers of the dangers in operating the scanner.

FAMILY AND MEDICAL LEAVE ACT

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Overview of the Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) requires companies to provide unpaid, job-protected leave to workers, regardless of sex, to care for themselves and immediate family members when they encounter certain illnesses or conditions.

FMLA grants qualifying workers a statutory right to leave which they cannot be forced to give up. “Eligible workers” have the right to take leave for up to 12 workweeks in a 12-month period if they provide adequate notice to the employer and show they qualify for leave.

FMLA is designed to work along with employer workplace rules, including notice of absence policies. However, a company cannot impose more onerous obligations on the right to FMLA leave than are set out in the FMLA law and regulations.

Recent FMLA amendments grant workers military family leave. An eligible worker can take up to 26 workweeks of leave to care for a “covered veteran” with a serious health condition who is the worker’s next of kin. An eligible worker can take up to 12 workweeks of leave to take care of urgent, demanding circumstances which arise in connection with covered active duty status of a “covered military member” who is the worker’s spouse, parent, or child of any age.

What Workers Are Eligible for FMLA Leave?

An eligible worker under the FMLA is a worker who:

- has been employed by the employer for a minimum of one year before taking leave; the one-year period minimum can combine periods of employment going back 7 years;
- has worked 1,250 hours for the employer in 12-month period before the leave is scheduled to begin; and
- works for a company that employs 50 or more workers in same facility or within a 75-mile radius of worker’s job site.

What Conditions Qualify for FMLA Leave?

An eligible worker can use FMLA leave when the worker is unable to work because of the worker's own serious health condition.

An eligible worker can use FMLA leave when the worker is needed to care for a spouse, a child under age 18 years, or a parent with serious health condition.

The worker can also use leave to care for a child over age 18 years if the child is incapable of self-care because of a mental or physical disability as defined by the Americans with Disabilities Act.

A worker is the parent of a "child" if the worker has day-to-day responsibilities to care for and financially support the child even if there is no biological relationship between parent and child.

Caring for a family member with a serious health condition includes providing psychological comfort and reassurance for family member receiving inpatient or home care.

An eligible worker can use leave for birth of child or to prepare for and accept placement of new foster care or adopted child as well as for bonding with the new child.

An eligible worker who is the spouse, parent, son, daughter, or next of kin of a covered veteran can use 26 workweeks of leave to care for a covered veteran with a serious health condition. The term "next of kin" includes the nearest blood relative other than spouse, parent, daughter, or son. A covered veteran is a former member of the Armed Forces, including reserve components, who was discharged within 5 years before the eligible worker first takes FMLA leave.

An eligible worker can use leave to handle urgent and demanding circumstances for a military member who is a close family member, including a child of *any* age on covered active duty (foreign deployment), is called to covered active duty, or has been notified of an impending call or order to covered active duty. A covered military member is a member of the Armed Forces including reserve components.

What Is Employee's Leave Allotment?

Eligible workers have a 12 workweek leave allotment during a 12-month period for covered conditions, except that workers have 26 workweeks of leave when leave is needed to care for a “covered veteran” with a serious health condition. In any 12-month period during which a worker cares for a covered veteran, the total leave maximum is 26 workweeks.

Workers can use 12 workweeks of leave over a specified 12-month period.

When the husband and wife work for the same employer, they are limited to a combined total of 12 workweeks of leave for the birth, placement, or bonding with their child. Each may use the remainder of their allotment for other FMLA qualifying conditions.

Workers can use their leave in different amounts—weeks, days, hours, or even smaller amounts if the employer allows smaller leave times for non-FMLA leave. The amount of FMLA leave a worker will use each time will depend upon the reason for leave.

Workers can use a portion of their shift (intermittent leave) or work part-time (reduced schedule leave).

A company cannot require a worker to use more leave than is necessary for the worker's medical or family condition.

If a worker takes leave for an entire workweek, the entire week is counted as FMLA leave even if a holiday occurs in that week. By contrast, if a worker is using leave in increments of less than a week, a holiday during the week of FMLA use will not count against the worker's FMLA entitlement unless the worker was otherwise required to work during the holiday.

Example: A company cannot count its worker's period working a light duty assignment against the worker's 12 workweek allotment of FMLA leave when the worker agrees to work light duty rather than taking FMLA leave.

How Is the “12-Month Period” Determined?

There are various methods of calculating the “12-month period” over which the worker is authorized to use allotted leave.

The Union has the right to bargain with the employer over “12-month period” the employer will use to calculate represented workers’ FMLA leave use.

The 12-month period can be calculated using:

- a calendar year from January 1 through December 31;
- any fixed 12-month period such as the company’s fiscal year or the year which begins with a worker’s anniversary date;
- the 12-month period measured *forward* from the first date a worker uses the 12-week allotment; and
- the “rolling” 12-month period which looks backward from the date the worker requested leave would begin to see how much leave the worker is entitled to use.

Example: A worker, who works for a company that uses the rolling 12-month period for FMLA leave, requests 6 weeks of FMLA leave to begin on July 1 of the current year. The worker previously used 8 weeks of FMLA beginning October 1 of the previous year. The rolling 12-month method requires a look backward to July 2 of the previous year to determine how much leave the worker has used in the 12-month period between July 2 of the previous year and July 1 of the current year. The look back shows that the worker has used 8 weeks of leave and therefore has only 4 weeks leave available to use until October 1 of the current year.

A company has the obligation to inform its workers in writing of which method it will use to calculate the 12-month period for FMLA leave use. If a company fails to give proper notice of the 12-month period it requires, the worker has the right to use the most favorable 12-month period for calculating leave use.

What Notice Must a Worker Give a Company to Activate Right to FMLA Leave?

Workers who need leave must give sufficient notice to the employer of their need to take leave so that the employer is aware that the worker is requesting leave for an FMLA qualifying reason. The notice requirement is critical because leave taken by a worker who fails to provide adequate notice is not protected by the FMLA.

The notice of need for leave must inform the employer:

- identify condition requires use of FMLA leave;
- when leave will begin;
- when leave is expected to end;
- what essential job function worker cannot perform when asking leave for the worker's own illness or injury.

The FMLA notice may be oral or in writing.

A worker is not required to mention FMLA in the worker's request for leave; however, the worker must provide the employer sufficient information to indicate that the leave is for a purpose that qualifies under the FMLA.

Workers must provide notice to the employer before leave begins (except in unusual circumstances):

- if leave is foreseeable the worker must tell the employer 30 days before leave is to begin;
- if a worker does not know of the need for leave 30 days before leave is needed, the worker must tell the employer **as soon as** they know.

Example: A worker admitted to hospital for emergency colon surgery and received a cancer diagnosis the following day *provided* sufficient notice to the employer of that the worker was requesting leave for an FMLA qualifying reason when the worker contacted his employer within 3 or 4 days of emergency surgery to inform the employer of the required treatment and hospitalization and continued to communicate with employer about his treatment.

Example: A worker who suffered from chronic serious health condition diabetes which began the previous year *failed to provide* sufficient notice to employer that his 3 days of leave was FMLA qualifying because worker cited "illness" as reason for his request and clinic that completed certification form did not indicate chronic condition and the request for description of medical facts supporting certification was left blank. Termination did not violate FMLA.

Example: A worker whose previous back injuries had caused little or no time off from work and who notified employer that the worker hurt his back again, left work, and remained off work for 4 days *failed to provide* sufficient notice to the employer that his leave was for an FMLA qualifying reason because the worker provided no detail when

calling in sick each day that would differentiate his absences from ordinary sick days.

What Impact Do Company Attendance Policies Have on FMLA Leave Requests/Use?

Workers are obligated to follow company rules regarding notice of each day's part or full day's leave *unless* the notice requirements interfere with rights under the FMLA.

Example: A worker produced evidence that her termination for failure to comply with company policy of calling every day of absence interfered with worker's FMLA rights when worker personally and through the medical certification completed by her health care provider notified company that her FMLA leave would continue to a specific date.

Example: A worker's termination during leave for asserted FMLA qualifying reason did not constitute unlawful interference or retaliation in violation of FMLA when the worker failed to timely submit her FMLA certification form and failed to daily call in her absence in accordance with the company's absentee policy which provided for termination for 3 or more consecutive days absence without notice.

What Are Required Company Actions in Response to a Worker's FMLA Leave Request?

A company must respond to the worker within 5 business days after the worker provides notice of a need for leave for an FMLA qualifying condition.

Specifically, the company must:

- tell the worker whether the worker is "eligible employee" (provide a reason if the worker not eligible) and
- give the worker a written rights and responsibilities notice.

A company that has a significant number of non-English speaking workers is obligated to translate all required notices to those workers into a language which they understand.

What Must the Company Provide in the Written Rights and Responsibilities Notice?

The company must provide a written rights and responsibilities notice that:

- Informs the worker of the specific requirements the worker must satisfy to obtain FMLA leave and the consequences of not satisfying the requirements;
- Informs the worker that leave will be counted against the worker's FMLA leave allotment;
- Informs the worker which "12-month period" the company uses to calculate the amount of FMLA leave the worker can use;
- Informs the worker whether the worker is required to get a "certification of health care provider form completed and when the completed form must be returned.
- Informs the worker whether the worker has a right to substitute paid leave for unpaid leave and whether the company requires the worker to do so; and
- Informs the worker of any requirements the worker has to make premium payments to maintain health insurance coverage.

Once a worker returns the certification form to the company, the company has another 5 business days to:

- give written notice to the worker whether the worker's leave request is approved and, if not approved, the reason for disapproval;
- give written notice of how much leave worker can use, as determined by worker's health care provider and remaining leave allotment;
- tell worker whether return to work certificate (only for worker's own serious health condition) will be needed upon return;
- tell worker how often to submit recertification.

If a worker has a dispute with the company over leave, the worker should make a written complaint to the company because FMLA requires the company to document all FMLA-related disputes with workers.

Example: Employer violated FMLA by failure to give worker individualized notice that her leave would be counted against her FMLA allotment which prejudiced worker by causing her to exceed her FMLA leave allotment for surgery she could have postponed and resulting in her transfer to a less desirable job.

Law Requires that a Worker to Prove That Condition Qualifies for FMLA Leave

A worker is required to prove that the leave the worker requests is for a condition that qualifies for FMLA leave. When leave involves medical conditions, the company is required to maintain workers' medical privacy throughout the process, including not disclosing medical information to workers' direct supervisors.

A company can require its worker to have a Health Care Provider complete and return a medical certification form for leave needed for the worker's own or family member's serious health condition. The company must provide the worker a minimum of 15 calendar days to return the form. If the certification is incomplete or unclear, the company shall give its worker written notice of additional information needed and 7 calendar days to complete or clarify the form.

The certification must state: (1) when the serious health condition began; how long it's expected to last; (2) appropriate medical facts about the condition; and (3) a statement that worker is unable to perform at least one essential function of the job.

What Is a Serious Health Condition of a Worker or Family Member?

A serious health condition that entitles a worker to FMLA leave for the worker's condition or that of a family member is an illness, injury, impairment or physical or mental condition that causes the worker or family member incapacity (an inability to work, attend school, or perform other regular daily activities) and:

- Requires inpatient care which constitutes an overnight stay in a medical facility and subsequent treatment in connection with the inpatient care
- Requires continuing treatment which is either:

- ◆ A period of *more than 3 consecutive, full calendar days* (not required to be weekdays) during which a worker or family member is incapacitated (i.e., cannot perform an essential function of the job or the worker's family member cannot perform at least one activity of daily living) and *1 visit* to a health care provider, and the health care provider provides a regimen of continuing treatment such as prescriptive medicine;
- ◆ A period of *more than 3 consecutive, full calendar days* during which a worker or family member is incapacitated and *2 visits* to a health care provider during the period of incapacity;
- ◆ Any period of time during which a worker or family member is incapacitated due to a *chronic serious health condition*, which requires at least 2 treatments per year, continues over an extended period, and may cause episodic incapacity; or
- ◆ Any period of incapacity due to pregnancy and for prenatal care.

The first treatment by a health care provider must take place within 7 days after incapacity begins.

Example: A worker provided evidence sufficient for trial that she suffered serious health condition due to 2 medical conditions, genital herpes and urinary retention, which combined to incapacitate her for 2 work days and 2 weekend days, and required doctor's visit and prescriptive medicine.

Example: A worker who was absent from work for more than 3 consecutive days with migraine headaches and received a negative evaluation from one health care provider and during the same incapacity was treated by a second health care provider who confirmed her condition satisfied the 2-treatment prong of continuing treatment serious health condition so as to warrant trial on her FMLA interference and retaliation claim.

Does Employer Have the Right to Substitute Paid Leave for FMLA Leave?

The FMLA generally permits a company to require a worker's paid leave to run concurrently with the worker's unpaid FMLA leave. That means that a company can count its worker's accrued sick and vacation leave off against the worker's time on FMLA leave.

A worker in an unrepresented unit may voluntarily agree to substitute paid leave for periods of unpaid FMLA leave use.

A company of union-represented workers is obligated to bargain with the workers' union in order to be able to substitute accrued paid leave for unpaid FMLA leave.

If a worker is on a paid leave such as disability or workers compensation, the employer can count the time as FMLA leave, but cannot substitute any accrued vacation, sick, personal, or family for the period on FMLA leave.

Example: A company who counted a worker's sick and vacation leave days against her FMLA leave when she was receiving disability benefits pursuant to a union negotiated, short-term disability benefit program violated the FMLA.

How to Protect Workers' Rights to Return to Work Following FMLA Leave

A company can require a worker who returns to work following the worker's own serious health condition to provide a return to work certificate for the condition that was the reason for the FMLA leave.

The employer must require all similarly situated workers to provide return certificates.

A company who makes unreasonable requests or causes unreasonable delay in a worker's return to work may engage in unlawful retaliation.

Example: A company interfered with worker's FMLA right to return to work when it delayed its bus driver's return to scheduled shifts following a one-month absence to treat hepatitis and clearance by his doctor to return to work by requiring the worker to submit to numerous other tests unrelated to the reason for his FMLA leave before allowing him to work.

The union can monitor worker conditions upon return from leave to ensure that:

- the employer returns the worker to same or equivalent job with same or equivalent benefits;

- FMLA leave is not counted as an absence under any attendance policy, including a no-fault policy;
- the worker earned benefits during unpaid FMLA leave in same manner as on other unpaid leaves.

The requirement that a company pay a worker returning from FMLA leave equivalent pay and benefits includes payment of bonuses which are not based on hours worked or production. Production and hours of work bonuses and other benefits based on hours of work may be prorated.

Example: Employer violated the FMLA when it reduced its worker's stay bonus, a bonus to induce workers to continue employment with the company, following her use of 12 workweeks of FMLA leave to adopt a child.

How do FMLA Rights Differ From ADA Rights?

The FMLA grants prescribed amounts of leave to eligible employees to care for themselves (12 workweeks) and family members (12 workweeks; 26 workweeks to care for covered veterans) with serious health conditions and other conditions specified under the law.

The ADA examines the circumstances surrounding an employee's disability and the employer's business to determine whether and in what amount a leave of absence (or other modification of the job or work environment) constitutes a reasonable accommodation to enable the employee to perform the essential functions of the job in question. The ADA does not provide leave to care for a family member with a disability.

An employer must evaluate an employee's rights under each law separately and grant the greater rights.

A serious health condition under the FMLA is not the same as a disability under the ADA. A serious health condition addresses temporary incapacity which prevents an employee from performing at least one essential function of his/her job regardless whether the employee has an ADA disability. A disabled employee may use FMLA leave for periods of incapacity associated with his/her disability; but may require additional leave beyond the amount granted by the FMLA if additional leave would constitute a reasonable accommodation.

An employee has the right to use FMLA leave in small increments as medically necessary. Under the ADA, a disabled employee may be entitled to use increments of leave as a reasonable accommodation.

If an employee qualifies for FMLA leave, the employee has a right to take leave even though a reasonable accommodation would allow the employee to continue working.

An employee who uses FMLA has the right at the end of the leave to return to the same or equivalent job with equivalent benefits. If the employee cannot perform the job at the end of the leave period, the FMLA does not provide any additional rights. However, the employee may have rights under the ADA.

Under the ADA, the right to return to the same job following leave depends upon whether the employee can perform the essential functions of the job with or without reasonable accommodation. If the employee cannot perform the same job, the ADA may obligate the employer to place the employee in a vacant equivalent or lower paying job which the employee is able to perform with or without a reasonable accommodation.

Companies Must Live Up To FMLA and Collective Bargaining Rights

A company cannot impose rules which weaken workers' rights to FMLA leave. Unions should be alert so that:

- written employer policies do not conflict with FMLA rights;
- employer practices do not conflict with FMLA rights;
- an employer does not force worker to transfer to another job to prevent use of FMLA leave;
- an employer maintains job benefits on existing terms during FMLA leave; and
- an employer transfers a worker only when necessary to better fit with use of intermittent or reduced schedule leave and no conflict with contract.

A company may transfer a worker during the period the worker is scheduled to use intermittent or reduced schedule leave to a position that better accommodates periods of recurring leave than the worker's regular position if:

- the transfer does not violate the terms of the collective bargaining agreement;
- the transfer is not used to discourage use of FMLA leave;
- an employer pays a worker pay and benefits equivalent to worker's regular position; and
- an employer returns a worker to regular position following end of intermittent or reduced schedule leave.

A company cannot use the FMLA to weaken union representational rights and bargaining agreement provisions. The employer is required to observe any employment benefit program or plan that provides greater family and medical leave rights than those provided by the FMLA.

A bargaining representative has the right to negotiate over terms of employment and protect represented workers' FMLA rights by:

- Bargaining with employer over the 12-month period used to calculate use of FMLA leave allotment;
- Bargaining with employer that seeks to have workers count paid leaves against their FMLA leave allotment;
- Ensuring job transfers during intermittent or reduced schedule leave use does not conflict with bargaining agreement or discourage worker's use of FMLA leave;
- Representing workers in FMLA disputes with employer; and
- Using grievance/arbitration process to defend FMLA rights

FMLA Prohibits Denial of Rights and Retaliation for Asserting FMLA Rights

The FMLA prohibits retaliation which is discrimination against a worker for exercising the worker's FMLA rights.

The FMLA also prohibits interference which means denying or interfering with a worker's substantive rights under the FMLA.

The FMLA protects a worker who:

- requests FMLA leave
- takes FMLA leave
- seeks to return to work with equivalent pay and benefits
- asserts rights, or challenges employer practices, under FMLA
- opposes practices that violate FMLA

A worker cannot be forced to waive FMLA rights. Therefore, a worker cannot be forced to waive a right to future FMLA leave and cannot waive FMLA rights in disciplinary situations, including in last chance agreements.

Example: A worker raises sufficient evidence that her employer retaliated against her for use of FMLA leave to care for daughter when it fired her within 2 weeks of her return to work.

How Does a Worker Enforce FMLA Rights?

A worker can enforce FMLA rights through the U.S. Department of Labor which will investigate, try to settle if it finds reasonable cause, and may file a lawsuit against the employer.

A worker may directly sue the employer.

A union-represented worker can file a grievance to enforce FMLA rights.

Any court claim must be filed within 2 years following the alleged unlawful employer action. A worker has 3 years if the employer committed a willful violation of the law.

Remedies for violating the FMLA include:

- Reinstatement;
- Back pay and benefits; and
- Amount equal to back pay in liquidated damages

A worker can contact the U.S. Department of Labor to investigate the claim:

- Call the U.S. Department of Labor's Wage and Hour Division at 1-866-487-9243

- Access the U.S. Department of Labor's web page at www.wagehour.dol.gov

EMPLOYMENT DISCRIMINATION LAWS: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, OTHER FEDERAL ANTI- DISCRIMINATION LAWS AND STATE AND LOCAL FAIR EMPLOYMENT LAWS

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Title VII Overview

Title VII of the Civil Rights Act of 1964 is the principal federal law that prohibits employment discrimination based on an individual's ***race, color, national origin, sex, religion, or pregnancy*** and promotes equal employment opportunity. Title VII prohibits an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining from using race, national origin, sex, religion, or pregnancy as a factor in hiring, discharge, assignments, wages, benefits, discipline, promotions, or any other term, condition, or privilege of employment. Title VII also prohibits retaliation against an individual for asserting his/her rights, opposing discrimination, and participating in Title VII proceedings.

An employer can violate Title VII by engaging in intentional discrimination and disparate impact discrimination against individuals. Individuals alleging discrimination are required to prove that the adverse action of the employer was based on the protected characteristics of race, national origin, sex, religion, or pregnancy.

The Equal Employment Opportunity Commission (EEOC) has principal responsibility for enforcing Title VII. The law requires an aggrieved individual to file a charge with EEOC within 180 days after the alleged discriminatory act. Where EEOC has cooperation agreements with states and municipalities which have anti-discrimination laws, the local agencies will investigate the allegations and EEOC will review those investigations. Where EEOC has cooperation agreements with state or local anti-discrimination agencies, the period for filing a charge of discrimination is extended to 300 days following the alleged discrimination conduct.

Title VII provides several remedies to prevailing plaintiffs, including equitable remedies which place the victim of discrimination in the same place s/he would have been absent the discrimination as well as compensatory damages, punitive damages, and attorneys' fees.

What Entities Does Title VII Cover?

Title VII covers private employers who employ 15 or more employees for each working day in each of 20 or more weeks in the current or preceding calendar year. Title VII also covers public employers, including the federal government.

Title VII also covers employment agencies which are defined as any person who procures employees for an employer.

Title VII covers labor organizations with 15 or more members in their capacities as representatives of employees.

What Is Disparate Treatment Discrimination?

An individual can prove disparate treatment discrimination by showing that an employer treated similarly situated employees differently based on a protected characteristic such as the race, national origin, sex, or religion of the individual. Employees who have the same or similar education, knowledge, experience, seniority, or other requirements for the job are considered similarly situated.

A complainant makes an initial showing of disparate treatment discrimination by showing:

- s/he is a member of protected class;
- s/he met the qualifications for the position;
- the employer did not hire, promote, or provide another condition of employment; and
- the employer hired, promoted, or provided another condition of employment to an employee not within the protected class

Where these facts arise, there is an inference that an employer had a discriminatory motive in its treatment of the individual in the protected class. In response, the employer is required to produce evidence of a non-discriminatory reason for the challenged action. If an employer can make this showing, the individual challenging the employer's decision has to show that the non-discriminatory reason was not the true reason for the conduct or in other words was a "pretext" for discrimination.

What Is Disparate Impact Discrimination?

Disparate impact discrimination occurs when an employer's policies or practices have a significant disproportionate negative impact on members of a protected class without regard to whether the employer intended to treat protected class members less favorably. The policies are facially neutral in their treatment but in fact fall more harshly on one group than another. Such policies

can include any selection procedure which has a disparate impact on hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group.

When a challenged policy has a disparate impact, the employer is required to prove that the policy is job-related and consistent with business necessity and that the business objective cannot be accomplished by a mechanism with less disproportionate impact on protected class members.

Example: Lifting requirements may disparately impact women employees because many women cannot lift as much as men. If the lifting requirement is challenged as discriminatory based on sex, the employer will be required to show that the lifting requirement is job-related and consistent with business necessity.

Example: Language tests requiring a certain score may disparately impact employees who learned English as a second language. If the language requirement is challenged as discriminating against employees based on national origin, the employer will be required to show that such language proficiency is job-related and consistent with business necessity.

How Does Title VII Protect Pregnant Employees?

Title VII prohibits pregnancy discrimination through the 1978 amendment known as the Pregnancy Discrimination Act. Title VII prohibits an employer from treating pregnant employees less favorably than other employees.

There is no requirement under Title VII to treat pregnant employees more favorably than other employees; although preferential treatment is not forbidden. For example, under Title VII, an employer does not have to provide a pregnant employee with special leave provisions not provided other employees who request leave for other types of procedures or conditions not involving pregnancy.

It is important for aggrieved employees to look to state and local anti-discrimination laws which may provide greater protection.

What Is Illegal Workplace Harassment?

Workplace harassment is a form of intentional discrimination based on race, national origin, sex, or religion. Harassment may violate Title VII and an employer's workplace policies.

Harassment violates Title VII when:

- conduct is unwelcome and
- conduct is sufficiently severe or pervasive to alter conditions of employment and create an abusive work environment

It is necessary to examine the totality of circumstances to determine whether harassment rises to the level of a Title VII violation:

- frequency of the unwelcome conduct based on sex, race, or national origin (pervasiveness);
- whether the conduct is physically threatening or humiliating or a mere offensive remark; and
- whether the conduct unreasonably interferes with an employee's work performance.

Harassment can be so offensive that it unreasonably interferes with or alters an employee's work environment. Harassment can take the form of racial, ethnic, and sexual insults, name-calling and off-color jokes or displays of racially, ethnically, or sexually suggestive or derogatory material. This type of conduct is often referred to as "hostile environment" harassment. Such conduct violates Title VII even if the employee is able to satisfactorily perform his/her job.

Harassment, particularly sexual harassment, can also take the form of a tangible employment action by the employer because an employee refused to submit to a supervisor's sexual advances. An employer that takes negative action against an employee under these circumstances necessarily unreasonably interferes with the employee's job environment. This form of harassment is often described as "quid pro quo" harassment.

Employers are responsible for maintaining a workplace where employees are not harassed and establishing effective harassment policies to remedy harassment should it occur.

Is Sexual Harassment Different Than Other Forms of Harassment?

Sexual harassment is determined by the same criteria as other forms of unlawful harassment. Sexual harassment can include unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, including commenting on physical attributes, unwelcome touching, and granting job favors to those who participate in consensual sexual activity. Additionally, sexual harassment can include conduct that is not explicitly sexual if it is engaged in because of an individual's sex, such as sabotaging a female employee's work.

As with other forms of harassment, sexual harassment violates Title VII if it is sufficiently severe or pervasive so as to unreasonably interfere with an individual's work performance and create an intimidating, hostile, or offensive working environment.

Example: Sexual harassment of female police officers was held to include harassment which was not explicitly sexual such as disappearance of case files, work product, and destruction of their property; male police officers engaged in these activities (along with explicitly sexual activities) to force females out of the police department.

Example: Employer violated Title VII based on "hostile environment" analysis when a supervisor who subjected female employee to escalating conduct of repeated propositioning and physical touching over a 4-month period. The employer's firing the employee after she complained to superiors about the offensive conduct violated Title VII under a "quid pro quo" analysis.

Other *examples* of harassment include: (1) pressure to engage in sexual activity; (2) sexual assault, rape, or simulation of sexual acts; (3) making participation in sexual conduct a condition of getting or maintaining job benefits; (4) retaliation for complaining about harassment; and (5) retaliation for participating in harassment investigation.

What Is Union's Role in Fighting Workplace Discrimination?

Title VII covers unions in their representative capacity.

Discrimination, including harassment, impacts an employee's terms and conditions of employment. Therefore, a union is obligated to treat a complaint or grievance based on discrimination like it treats other claims and grievances. The union is obligated to investigate discrimination allegations to determine whether the claim or grievance has merit with the same seriousness it investigates claims or grievances involving other matters. If the investigation appears to substantiate that an employer has engaged in arguably discriminatory conduct, unions should attempt to remedy discrimination in the same way it attempts to remedy other complaints and violations of the collective bargaining agreement. Unions may seek remedies under the collective bargaining agreement or, if necessary, through EEOC administrative procedures and possibly court action.

Unions do not control the workplace and therefore a union will not be held liable for discrimination by an employer.

A union will violate Title VII if it discriminates in its role as the employee's agent. Specifically, a union risks liability if it handles complaints in a disparate manner based on a represented employee's race, color, national origin, sex, religion, or pregnancy. Additionally, a union risks liability if an employee who is also a union officer participates in the discrimination, such as engaging in sexual harassment, and the officer's actions negatively impact the union's ability to represent the complaining employee.

Example: Union held to discriminate against Black employees in violation of Title VII (and 42 U.S.C. § 1981) for failure to challenge discriminatory discharges of probationary employees and failure and refusal to assert racial discrimination as a ground for grievances no matter how strong even though it pursued many other legitimate grievances.

Example: A union was held liable under Title VII for intentionally avoiding asserting a sex discrimination grievance on behalf of a female member assigned to work near a male member who assaulted her in deference to the desires of its male members.

How Should a Union Respond When It Represents Both Harasser and Victim?

In situations in which the employee who alleges harassment and the employee accused of harassment are both represented by a union, the union can take the following steps:

- encourage member to inform employer of harassment because employer has responsibility to maintain non-discriminatory workplace
- be familiar with and refer employees to employer's anti-discrimination policy and procedures;
- inform alleged victim of right to file grievance;
- develop neutral procedures for handling claims when accuser and accused are both union members such as appointing an outside investigator or lawyer; and
- inform accused of right to file grievance over discipline while letting him/her know that employer has obligation to take measures reasonably calculated to end any harassment found to have occurred.

Title VII Protects Against Retaliation

Title VII prohibits an employer from discriminating against an employee because s/he has opposed any practice prohibited by Title VII or because s/he has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing in connection with the rights protected by Title VII.

The purpose of Title VII's anti-retaliation provision is to prevent an employer from interfering with an employee's efforts to secure or advance enforcement of Title VII's basic guarantees. Title VII's anti-retaliation provisions are broader than the law's substantive anti-discrimination provisions. An employee asserting retaliation is required to show that the employer's action could dissuade a reasonable employee from making or supporting a charge of discrimination.

Example: An employee who was discharged after providing evidence to her employer in response to questioning during the employer's investigation of allegations of workplace discrimination was protected because she opposed discrimination and her firing violated Title VII.

Example: An employee who alleges he is being discriminated against because of his race and a subsequent investigation fails to prove discriminatory conduct is protected from retaliation by an employer that resents his having made the allegation.

Example: A male employee who was fired by his employer 3 weeks after his fiancée filed a sex discrimination charge against the same employer was discharged in violation of Title VII in retaliation for his fiancée's charge, as he was within the zone of interest protected by Title VII.

How Employees Enforce Their Title VII Rights

How to Contact EEOC

EEOC charges can be filed at any of the numerous district and field offices in major cities and metropolitan areas around the country. Charges are typically filed in person and the agency will accept charges by letter if they satisfy charge filing requirements.

An individual can contact EEOC by:

- calling 1-800-669-4000 (1-800-669-6820 TTY) or
- emailing info@eeoc.gov

Requirement to File Charge

Title VII requires employees to exhaust administrative remedies before filing a claim in court. That means that a complainant must file an administrative charge with the EEOC or with a state or local agency which cooperates with EEOC.

A charge against an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining must be filed within 180 after the alleged discriminatory act occurred. Where a state or local agency has a cooperation agreement with EEOC, a charge may be filed within 300 days after the alleged discriminatory act occurred. State and local anti-discrimination agencies may allow longer charge filing periods than EEOC; however, their longer periods do not extend the filing period allowed by Title VII beyond 300 days.

Mediation

If the parties agree, EEOC will engage the parties in voluntary mediation in an attempt to resolve the complaint before formal investigation begins. If the charge is not resolved through mediation, it is returned to the investigative unit for regular processing.

Investigation and Determination

EEOC will investigate the allegations or the state or local agency will investigate the allegations and submit the investigatory file for review by EEOC.

If EEOC finds reasonable cause to believe that the complainant was discriminated against, the agency will issue a reasonable cause finding and attempt to remedy the discrimination through conciliation. If a settlement is reached it will be embodied in a conciliation agreement. If settlement is not reached, EEOC may litigate the complaint or issue the complainant a right-to-sue letter.

If EEOC does not find evidence of discrimination, the agency will issue a no reasonable cause finding and a right to sue letter.

Right to Sue Letter

A right to letter allows the complainant 90 days within which to file a claim in federal or state court making the same allegations of discrimination that were reviewed by the administrative agency.

Court Actions Under Title VII

Right to a Jury Trial

An employee suing under Title VII has a right to a jury trial if s/he is seeking compensatory or punitive damages.

Title VII Remedies

Title VII remedies include:

- Reinstatement or hire;
- Back pay and interest on back pay;
- Reasonable Attorney's fees and costs

Compensatory and Punitive Damages

Title VII was amended in 1991 to allow for compensatory and punitive damages for unlawful intentional discrimination but not for disparate impact discrimination.

Compensatory damages may be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

Punitive damages may be awarded if the complainant demonstrates that the employer or other respondent engaged in a discriminatory practice or practices with malice or reckless indifference to the federally protected rights of the aggrieved individual.

Even when compensatory and/or punitive damages are awarded, the amount each complaining party may recover is capped in accordance with the size of the employer (or other respondent). A complaining party can recover \$50,000 from an employer or other respondent with more than 14 and fewer than 101 employees; \$100,000 from an employer or other respondent with more than 100 and fewer than 201 employees; \$200,000 from an employer or other respondent with more 200 and fewer than 501 employees; and \$300,000 from an employer or other respondent with more 500 employees.

What Is the Federal Anti-Discrimination Law Title 42 U.S.C. Section 1981?

Title 42 U.S.C. §1981 is a federal law based on the 13th Amendment to the Constitution that prohibits employers from intentionally discriminating in employment based on race and national origin discrimination and from retaliating.

An aggrieved individual can proceed directly to federal or state court to enforce his/her rights because the law does not require the individual to exhaust administrative remedies by filing with a federal, state, or local agency.

An aggrieved individual can sue employers of any size, as there is no minimum employee complement.

An individual who believes s/he has been discriminated against has 4 years following the alleged discriminatory action to file a case against the employer.

Remedies under §1981 are more expansive than those under Title VII. Not only can a prevailing plaintiff obtain back pay and reinstatement or hire as under Title VII; the prevailing plaintiff also can recover compensatory and punitive damages with no monetary cap.

What Is the Federal Anti-Discrimination Law Title 42 U.S.C. Section 1983?

Title 42 U.S.C. §1983 is a federal law based on the 14th Amendment to the Constitution that protects individuals who can show that they were deprived of a right secured by the Constitution or laws of the United States and the deprivation was committed under color of state law. Individuals who pursue §1983 claims allege race, sex, and national origin discrimination claims against states and municipalities. Complainants are required to prove intentional discrimination.

Section 1983 provides a cause of action independent of and in addition to Title VII when an employer's conduct violates rights conferred by an independent source.

There is no administrative exhaustion requirement for §1983 claims and therefore an individual alleging discrimination under §1983 proceeds directly to court to vindicate his/her rights.

Individuals pursuing §1983 claims should be aware that the law adopts the most analogous state statute of limitations. This means that individuals must look to the law of the state where the alleged unlawful practice occurred in order to determine how much time they have to file a lawsuit against the employer. The period allowed may be limited or generous depending on the jurisdiction.

Section 1983 remedies include reinstatement and back pay. There is no monetary cap on a court's award of compensatory and punitive damages to a prevailing plaintiff in a §1983 case.

How Do State Anti-Discrimination Laws Differ from Title VII?

Many states, the District of Columbia, and certain counties and municipalities have fair employment laws that are substantially similar to Title VII. Most of these jurisdictions use the analysis developed under Title VII to analyze and determine whether discrimination has occurred.

However many state and local anti-discrimination laws provide greater protections in several areas.

- Certain states and municipalities have anti-discrimination laws with longer statute of limitations which means that an individual has more time after the alleged discriminatory action to file a discrimination charge than allowed under Title VII. For example, the District of

Columbia provides one year for an individual to file a charge of discrimination.

- Certain states and municipalities cover employers with fewer employees than the 15 employee threshold required under Title VII.
- The laws of some jurisdictions provide greater protection by prohibiting discrimination against additional protected classes or categories of individuals. For example, 21 states and the District of Columbia prohibit discrimination based on sexual orientation and 12 states and the District of Columbia prohibit discrimination based on gender identity. Several states prohibit discrimination based on marital status and personal appearance.
- The laws of some jurisdictions provide greater protection for pregnant employees than Title VII. For example, California requires reasonable accommodation to the medical needs of pregnant employees and requires employers to grant leave to pregnant employees.
- The laws of certain jurisdictions may provide more expansive remedies such as compensatory and punitive damages without the monetary caps imposed by Title VII.

Accordingly, it is important to check the anti-discrimination laws of the jurisdiction where the alleged discriminatory conduct occurred.

AGE DISCRIMINATION IN EMPLOYMENT ACT: ADEA

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What Is the ADEA?

The Age Discrimination in Employment Act is a federal law intended to protect workers over the age of 40 from age based job discrimination. Age discrimination occurs most frequently in hiring or forced retirement, corporate reorganizations and reductions in force.

The ADEA protects workers employed by companies with 20 or more workers. (Some state and local fair employment laws protect older workers employed by companies with fewer workers.)

How Do Workers Prove Age Discrimination Claims?

Age discrimination cases generally rely on a theory of disparate treatment. This means that the company treated a worker over 40 differently or disparately than a younger similarly situated worker because of age. For example, the worker proves disparate treatment when the worker is qualified for a promotion, but the company nevertheless promoted an equally qualified younger worker.

Courts often look to inconsistent or disingenuous company actions in finding that the company discriminated against workers on the basis of age. For example:

- when the company claims it used a fair evaluation process to lay off the poorest performers, but actually manipulated the process to lay off older workers.
- if the company eliminates positions held by older workers and then creates new positions with similar duties. This may be a subterfuge for getting rid of older workers.
- if a company uses medical or health conditions as an excuse to lay off workers or force them to retire, and this disproportionately affects older workers.
- when companies offer buy-outs or early retirement, representatives should look for evidence that they are really coercing older workers to leave or retire.

If companies provide a non-discriminatory reason for their actions, workers must show that the company's stated motive was false or that the company would not have taken the adverse action but for the workers' ages, and not another lawful factor. Representatives should look for code words or phrases

such as “she was not flexible in taking on new work,” “he can’t keep up with the times” or “she lacks energy or enthusiasm” as evidence of discrimination.

Anti-Retaliation Protection

It is unlawful for companies to retaliate against workers for filing or participating in age discrimination charges. (State and local fair employment laws typically contain strong anti-retaliation provisions.)

Is Age Discrimination Ever Legal?

Bona Fide Occupational Qualification: Age discrimination is never legal unless age is a bona fide occupational qualification reasonably necessary to the normal operations of the business or the worker’s position. Examples of bona fide occupational qualifications might be hiring a young person to model clothes for a teen clothing store, or setting mandatory retirement age for airline pilots for public safety reasons.

Seniority: A company may lawfully terminate an older worker if the decision is based on the contract’s seniority system, and not on the worker’s age. The law may also permit disparate treatment to observe the terms of a bona fide worker benefit plan that provides benefits based on longevity or seniority. Representatives should however consult attorneys in these situations because there are complex legal prohibitions against companies focusing on older workers when they reduce or eliminate benefits.

How Is the ADEA Enforced?

The Equal Employment Opportunity Commission (EEOC) is the federal government agency that enforces the ADEA. Workers initiate EEOC proceedings by filing charges within 180 days of when the company discriminated against the worker. Workers may also file age discrimination claims with state employment agencies. The statutes of limitation for filing charges with state and local fair employment agencies vary and are often longer than 180 days. The ADEA does not require workers to file charges with both the EEOC and state fair employment agencies. However, if workers want to sue their companies in court, they must first file charges with the EEOC or the relevant state agency. See www.eeoc.gov for EEOC locations, charge forms and filing information. See www.workplacefairness.org/complaintdisc for state-specific filing information.

Investigation and Determinations That Companies Likely Discriminated

The Equal Employment Opportunity Commission (EEOC) investigates charges. The EEOC often takes months to investigate and unions can do little to speed up the process. When it concludes its investigation, the EEOC will issue a finding on whether there is cause to believe the company discriminated. In some cases, the EEOC will simply state it cannot make a determination one way or another.

Mediation

Most EEOC offices have voluntary mediation programs.

Right to Sue

The EEOC will issue “right to sue” letters that state whether the agency found evidence of discrimination. Workers have 90 days from the receipt of that letter to file court actions or risk losing their right to sue.

Lawsuits

Workers may sue for age discrimination in court after the EEOC issues right-to-sue letters. The ADEA prohibits groups of workers from filing class actions to enforce the ADEA. Rather, workers must opt-in to group or collective actions the same way groups of workers collectively enforce the Fair Labor Standards Act. Workers are entitled to trials by jury in age discrimination cases. In very rare cases, the EEOC may sue the company itself.

Arbitration Clauses in Collective Bargaining Agreements

Clauses in collective bargaining agreements that require the parties to arbitrate age discrimination claims are binding.

What Remedies Can Be Awarded for Age Discrimination?

Courts may award workers in age discrimination cases backpay, front pay, benefits, reinstatement, jobs, promotions, transfers, or a court order or injunction prohibiting the company from engaging in age discrimination in the future.

If the jury or the court finds that the company willfully discriminated based on age, the worker may be awarded additional damages of up to two times the

worker's back and front pay. A violation is "willful" where the employer knowingly violated the ADEA or acted in "reckless disregard" of its provisions.

Settlement Agreements

To protect workers who are victims of age discrimination from being coerced into settling or waiving rights, the ADEA imposes strict requirements on settlements before any waiver or release of rights or claims is effective:

- Workers who sign waivers or releases of ADEA claims must do so knowingly and voluntarily – the waivers must be written in plain English.
- Releases and waivers must state explicitly that the worker is waiving age discrimination claims.
- The waivers cannot apply to ADEA claims that could arise out of future events.
- Workers must receive something of value in exchange for signing a waiver or release.
- Workers must be given at least 21 days to consider signing the agreement, and seven days after signing to revoke their signatures. (People who leave as part of an incentive program have 45 days to consider signing).
- Workers must be advised that they have the right to consult with attorneys and be given a reasonable time to do so.

THE EQUAL PAY ACT AND THE LILLY LEDBETTER FAIR PAY ACT

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What Is the Equal Pay Act?

The Equal Pay Act is an amendment to the Fair Labor Standards Act that prohibits companies from paying male and female workers different wages, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay **for equal work on jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions.**

Who Is Covered Under the Act?

Any worker of a company that has at least two workers and annual revenue of at least \$250,000 is covered under the Act.

What Constitutes Equal Work?

In applying the law, the courts have required that the job responsibilities and conditions be almost identical. Actual job duties and conditions rather than job titles, classifications or descriptions are controlling. Proof that the female worker is in a position higher or a supervisory position over the higher paid male is sufficient to prove an Equal Pay Act claim.

Exceptions

Even if the female worker proves lower pay for substantially equal work, the company can avoid liability by proving that the difference is due to:

- a seniority system,
- a merit system,
- a system that measures earnings by quantity or quality of production, or
- any factor other than sex.

However, companies cannot remedy any violation by cutting the pay of male workers.

How Is the Equal Pay Act Enforced?

Workers may file lawsuits to enforce the Equal Pay Act. Unlike other employment discrimination cases, the Equal Pay Act does not require workers to first file charges with the Equal Employment Opportunity Commission (EEOC) before filing private lawsuits, though the EEOC also enforces the Equal Pay Act.

To file a charge with the EEOC, workers need only contact the local EEOC office, listed in the blue government pages of the phone book under federal government. The EEOC's website (www.eeoc.org) explains how to file charges.

What Is the Statute of Limitations for Equal Pay Act Claims?

For non-willful violations, lawsuits must be filed within two years of the violation. For willful violations, the limitations period is three years.

Unlike Title VII complaints for other forms of discrimination, filing charges with the EEOC does not toll (stop) the statute of limitations from running. Therefore if a worker intends to file a lawsuit, it is important to keep track of the statute of limitations even if the worker has already filed a charge with the EEOC.

What Is the Lilly Ledbetter Fair Pay Act?

The Lilly Ledbetter Fair Pay Act amended discrimination laws (Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act and the Rehabilitation Act) to clarify that companies commit new discrimination violations each time they pay discriminatory wages, benefits, or other compensation, as well as when they adopt or apply a discriminatory pay practice.

How Does the Lilly Ledbetter Fair Pay Act Affect Wage Discrimination Claims?

The Lilly Ledbetter Fair Pay Act makes it possible for workers to sue their companies for discrimination each time they receive wages and benefits that discriminate based on race, color, religion, sex, national origin, age or disability. Before the Fair Pay Act, workers could only bring suit within 180 days of the first unfair payment. However, after the Fair Pay Act, workers can file claims based on each subsequent discriminatory payment. For workers who seek to bring a

discrimination suit, the statute of limitations now resets with each discriminatory paycheck or other payment.

How Does the Lilly Ledbetter Fair Pay Act Affect Equal Pay Remedies?

The Fair Pay Act allows workers to recover back pay for the two-year period prior to the date they filed claims, if the discriminatory practices occurred during that time. Thus, if a worker files a claim of wage discrimination in 2013, she may recover backpay for all of the discriminatory wages in the two years before she filed her claim, as well as any back pay or front pay owed during the investigation and litigation periods.

LAWS PROHIBITING FEDERAL CONTRACTORS FROM DISCRIMINATING (THE OFCCP)

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What Is the OFCCP?

The Office of Federal Contract Compliance Programs (OFCCP) is a part of the U.S. Labor Department that is charged with enforcing anti-discrimination laws against private companies that hold federal contracts worth more than \$10,000 annually. Generally speaking, all of the business's or organization's facilities will be subject to the same regulatory requirements, regardless of where the Federal contract is performed.

The OFCCP requires all companies with federal contracts worth at least \$50,000 and who employ at least 50 workers to develop written affirmative action programs that commit companies to specific affirmative action goals and procedures adopted to reach those goals.

Some of the types of discrimination that the OFCCP investigates involve hiring discrimination, compensation disparities, vigorous recruitment of veterans, and employment practices that discourage hiring and promoting disabled workers.

How Does OFCCP Enforce the Law?

OFCCP investigates discrimination complaints filed by workers, unions or others based on race, color, religion, sex, national origin, disability or protected veteran status. The OFCCP can then recommend enforcement actions to the U.S. Department of Labor solicitor. The U.S. Department of Labor can also recommend that either the Justice Department or Equal Employment Opportunity Commission (EEOC) file suit under Title VII. Generally, the OFCCP will refer individual complaints of discrimination directly to the EEOC.

What Relief Is Available for OFCCP Violations?

The U.S. Department of Labor solicitor may “debar” a contractor that violates the law — meaning that the company loses its federal contracts for a period of time — or the solicitor may suspend any contract or order backpay for lost wages to workers injured by violations.

Are There Advantages to OFCCP over EEOC?

It is not necessary to choose one or the other, because both agencies have authority over companies that violate anti-discrimination laws, and workers

claiming discrimination by a federal contractor can file complaints with either agency. However, the fear of losing a profitable federal contract may be a more powerful deterrent to workplace discrimination than fear of EEOC remedies. Also, OFCCP may bring actions in situations where the EEOC would not. For example, the OFCCP is more likely to investigate companies for equal pay violations.

ERISA: EMPLOYEE RETIREMENT INCOME SECURITY ACT (WORKER BENEFIT PLANS)

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What Is ERISA?

ERISA is a comprehensive federal law regulating worker benefit programs, including healthcare, pension, profit sharing and stock ownership plans.

ERISA **does not require** companies to establish plans. ERISA, however, controls plans that companies do establish. Companies receive favorable tax and other incentives to establish worker benefit plans.

What Types of Benefit Plans Does ERISA Cover?

ERISA applies to any plan or fund, no matter what it is called, that provides pensions or other income to workers after retirement or other separation of employment, or provides benefits in the event of sickness, hospitalization, surgery, accident, death, disability or unemployment. ERISA also covers plans that provide pre-paid legal services, apprenticeship and training, and severance benefits.

Exempt from ERISA's coverage are: government plans; and plans companies maintain solely to comply with workers' compensation, unemployment compensation or disability insurance laws.

What Does ERISA Require?

ERISA requires companies to manage benefit funds in the interest of the workers (participants) and their dependents (beneficiaries), and to pay benefits according to the funds' plan provisions.

ERISA imposes **fiduciary duties** on plan **fiduciaries**. Plan fiduciaries are all trustees and other persons who exercise discretionary authority or control over the management of a plan or its assets, or who provide investment advice for a fee. Trustees are the persons who have the ultimate authority to manage and direct the trust fund that pays plan benefits. Fiduciary duties are the responsibilities of fiduciaries to safeguard plans from mismanagement or misuse of assets, and to act solely for the benefit and in the best interests of the plan's participants and beneficiaries.

ERISA prohibits fiduciaries from self-dealing with plan assets. Fiduciaries may not, for example, acquire plan assets. ERISA also prohibits transactions between a plan and parties involved with the plan, such as the companies and unions (although there are exceptions for some transactions).

For example, a pension plan cannot loan money to companies, even if the companies repay the pension plan with interest.

How Can Workers Find out What Their Plans Provide?

The plan administrator must comply with workers' requests for information or documents and furnish them with copies of plan documents, **summary plan descriptions**, statements of accrued benefits, and procedures for making claims or appealing claim denials.

Plan administrators: The plan administrator may be, but is not always, the company if it is a company (single employer) plan. In multiemployer plans (plans with more than one employer who bargain the plan with unions) a joint board of trustees is usually the plan administrator.

Summary plan descriptions are booklets that describe the plan's benefits in plain English. Substantial penalties can be imposed on companies or plan administrators who fail to provide plan documents to workers who request them. The summary plan description must identify the plan administrator. It is important to address requests for documents to the plan administrator (a court can award penalties to the worker **ONLY** if the worker requested the documents from the plan administrator in writing).

What Documents Must the Plan Administrator File with Government Agencies?

The plan administrator must file an annual report on each benefit plan detailing the plan's financial status with the IRS and the DOL. These reports, called **Form 5500 reports**, are available on request from the DOL. The plan administrator also must provide the report to workers on written request. Failure or refusal to do so could subject the plan administrator to penalties. Form 5500 reports show the number of persons covered by the plan, the number of vested workers, the amount of money the plan has and, for pension plans, whether the plan is underfunded. It also shows benefits paid and lists all transactions between the plan and the company involving plan assets, such as pension fund investments in company stock.

What Workers Should Do If Plans Deny Their Claims

If the plan denies a worker's claim for benefits, workers may use plan procedures to contest the denials. **IMPORTANT!** If a worker disagrees with a benefit denial, the worker must follow the procedures in the summary plan description for how to file an appeal. Most plans contain time limits that workers must follow (similar to grievance procedures). Courts will dismiss cases if workers have not appealed before going to court.

If workers are dissatisfied with the result of those procedures, workers have a right to file their own actions to enforce ERISA in federal court. (Claims for benefits also can be filed in state court.)

Who Enforces ERISA?

Three federal agencies enforce ERISA:

- U.S. Labor Department (DOL)
- The Internal Revenue Service
- The Pension Benefit Guaranty Corporation (PBGC)

Unions do not have the right to bring suit in their own name to enforce ERISA, but they can help workers bring suit.

Although the U.S. Department of Labor has primary responsibility for enforcing ERISA, it lacks the resources to police the thousands of plans in effect. Unions or workers may file complaints with the U.S. Department of Labor by sending letters describing the violation or calling their local Department of Labor office. If the union decides to file a complaint with the U.S. Department of Labor instead of helping the member file a lawsuit in court, the union must aggressively and continuously demand that the U.S. Department of Labor pay attention to the matter. Neither the IRS nor the PBGC has responsibility over worker claims against funds.

Can Companies Discriminate Against Workers Because of ERISA Benefits?

No. Companies cannot discipline or otherwise discriminate against workers because of any benefits-related issues. For example, companies cannot

fire workers because the worker's spouse has a medical condition that requires expensive treatment or because the worker is close to earning a benefit.

Do Other Federal Employment Laws Apply to Plans?

Yes. For example, the FMLA applies so that the company has to continue the worker's health coverage during FMLA leave. A federal law also gives workers who are called up for military service special rights in their health and pension plans. That law is called the Uniformed Services Employment and Reemployment Rights Act (USERRA) and is discussed elsewhere in this manual.

Do State Laws Apply to Plans?

Usually not. Because ERISA is a federal law, in most cases it supersedes (preempts) state laws that relate to plans. For example, all states have laws that regulate health insurance sold in the state. Many require health insurance companies to provide certain benefits and cover certain medical conditions. These laws apply to insurance policies companies buy for their workers. Sometimes companies do not buy insurance and instead pay for medical claims out of the company's money (or a special fund the company sets up for that purpose). This is called being self-insured. If the company is self-insured and does not buy insurance policies, then state insurance laws do not apply. For example, state law that requires insurance companies to issue policies that cover fertility treatments would only apply to companies that buy insurance policies to cover their workers; the requirement would **not** apply to companies who self insure and pay for their workers' healthcare treatment with the company's own money. For help with insured plans, workers can contact the insurance commissioner of their state, in addition to the DOL.

Special Issues for Pension Plans

Are There Special Rules for Pension Plans?

Yes. There are two basic kinds of pension plans – defined benefit plans and defined contribution plans. Defined benefit plans pay workers a monthly pension payment (usually based on years of service and age) when the workers retire and the pension is usually paid for life. A defined contribution plan puts money in a worker's account and the amount the worker has for retirement depends on how much money is in the account when the worker retires. A

401(k) plan is a type of defined contribution plan. Both kinds of pension plans are governed by special rules.

What Is Vesting and When Is a Worker Vested?

Vested means that the worker has worked long enough to get a retirement benefit, even if the worker leaves the company before retirement. It usually takes five years to become vested, but some plans use a gradual formula where a worker is partially vested (entitled to part of the benefit, but not all of it) and the amount of vesting increases each year for several years.

Can Companies Make Workers Wait to Start Earning Pension Benefits?

Yes, but companies cannot make workers wait more than one year to join the pension plan and start earning benefits. For example, companies cannot make a rule (even if the union agrees to it in bargaining) that new hires have to wait two years before they are eligible to join the pension plan.

Can Companies Exclude Part-Time Workers from Pension Plans?

Companies can exclude workers who do not work more than 1,000 hours in a year, so this could exclude many part-time workers. However, if a part-time worker works at least 1,000 hours per year, then the company cannot keep the worker out of the pension plan.

Can Workers Lose Their Pensions If the Company Goes out of Business?

If companies go out of business and did not put enough money in the pension plan to pay benefits, the Pension Benefit Guaranty Corporation will take over the pension plan and pay the pension benefits. However, there are limits on how much the PBGC will pay so a worker could lose some benefits. As of 2013, the most the PBGC will pay for a benefit under a single company plan is \$4,789.77 per month for a regular lifetime pension at age 65 or \$4,310.79 per month for a lifetime pension at age 65 with a 50% survivor benefit (assumes the spouse is also 65). The limit is lower for a multiemployer plan, but it is very rare for these plans to fail. The PBGC only insures defined benefit plans. There is no similar protection for a 401(k) plan.

Special Issues for Health Plans

Can the Company Take Away Retiree Health Benefits?

In many cases, but not always. It depends on the bargaining agreement and on what the plan itself says about benefits. Unlike pension benefits, health benefits do not vest automatically so companies can reduce or eliminate health benefits, unless the plan specifically states that benefits are vested. A general promise of lifetime benefits usually is not considered enough for benefits to vest.

COBRA: CONTINUATION OF HEALTH INSURANCE COVERAGE AFTER SEPARATION OF EMPLOYMENT

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What Is COBRA?

The Consolidated Omnibus Budget Reconciliation Act (COBRA) is a federal law that requires a company's health plan to offer workers and their dependents the option of paying the premiums for continued coverage under the company's group health insurance plan when that coverage is interrupted.

What Is Considered an Interruption in Coverage?

Interruptions in coverage occur when workers quit, companies terminate workers or workers lose coverage because of a reduction in hours (such as moving from full to part-time). Interruptions in coverage are called **qualifying events**.

A qualifying event for the worker's spouse may occur due to divorce or the worker's death, in which case the spouse may be entitled to continue coverage under the worker's plan. A qualifying event for the worker's child is when the child reaches the maximum age for children under the plan.

Are There Exceptions to the Company's Obligation to Offer to Continue Coverage?

Yes. The primary exception is when companies terminate workers for **gross misconduct**. COBRA does not define gross misconduct. Gross misconduct, however, generally means serious intentional misconduct — not just work performance problems — that cannot be corrected through supervision, training or discipline, and that substantially and adversely impacts the company's operations or ability to maintain discipline and productivity.

Individual or Family Coverage?

COBRA requires plans to provide coverage comparable to what workers had during their employment. Thus, if workers had family coverage, their families would be entitled to family coverage under COBRA. Workers' dependents who were covered by the company's health insurance are covered dependents.

What Are the Obligations of Plans to Notify Workers or Their Dependents That They Have the Right to Continue Their Healthcare Coverage?

COBRA requires company plan administrators to notify workers and all covered dependents of their right to elect to continue healthcare coverage within a specific time period, usually 44 days after a qualifying event, such as separation of employment or reduction in hours.

Where workers and all of their dependents reside in the same household, the plan does not have to separately notify the dependents in addition to notifying the worker. Otherwise, the plan must provide separate notice to each covered dependent.

To make sure they receive COBRA notices, workers should ensure that their companies and their health plans have their current or forwarding address and addresses for all dependents who do not live with them at the time of their separation from employment.

How Much Time Do Workers or Their Dependents Have to Elect Coverage and Begin Paying Premiums?

Workers or their dependents have 60 days from the date of notice to elect coverage by sending a letter or a plan provided COBRA form to the plan.

Workers or their dependents have 45 days from the date of election to make the first health insurance premium payment. It is important to elect and pay for COBRA coverage on time, because if the worker's election or payment is late, the worker will lose COBRA coverage and may not be able to get it back. Once the worker elects COBRA coverage, many plans will not send the worker a monthly bill or a reminder that payment is due; the worker has to pay the premium every month on time without a reminder.

Is COBRA Coverage Cheaper Than Other Insurance?

Almost always. Companies must offer COBRA coverage at a premium that is no more than 2% higher than their cost of providing coverage to workers.

Where workers or covered dependents have pre-existing conditions that would be covered only under the company's plan, COBRA coverage will usually

be the cheapest option. Also, even if no one in the family has a pre-existing condition, the company's group rate is usually cheaper than buying individual insurance.

How Long Does COBRA Coverage Last?

Once elected, coverage continues for up to 18 months, 36 months if the spouse or child loses the coverage due to the worker's death, a divorce or the child reaching the age limit for children under the plan.

What If a Company Fails to Offer Continuing Coverage?

Workers may file lawsuits in federal court to enforce COBRA. The U.S. Labor Department also enforces COBRA based on complaints workers submit to any Department of Labor office. No particular form is needed to submit complaints to the DOL.

What Are Some Common COBRA Violations?

The most common violation is the company's failure to send workers or their beneficiaries notice of their COBRA rights.

The penalties for failing to send notices are: up to \$110 per day for each day the company fails to send the notice along with reimbursement of any medical expenses workers incur because the company's insurance did not cover them or their dependents. A worker has to go to court to get the penalty.

Another violation is companies mischaracterizing terminations as based on gross misconduct in an attempt to avoid providing COBRA benefits. Unless the company in fact terminated the worker for very serious misconduct, workers should challenge the company's mischaracterization as an attempt to evade COBRA.

HIPAA: HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT

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What Is the Health Insurance Portability and Accountability Act (HIPAA)?

HIPAA is the federal law that prohibits healthcare providers (hospitals, medical offices, clinics, doctors, nurses and pharmacists), healthcare plans and insurance companies from disclosing certain information concerning worker's health without the workers' written authorization.

HIPAA does **not** apply to companies acting as an employer. However, it applies to companies when they act in a capacity under a healthcare plan, such as when the company is the plan administrator. For example, if workers call in sick, companies may ask for proof of illness (if allowed to ask for a doctor's note under the collective bargaining agreement). But companies cannot ask insurance companies that cover workers if the worker visited a doctor or has a medical condition in order to verify sick leave.

What Information Does HIPAA Protect?

HIPAA prohibits healthcare providers and healthcare plans from disclosing information in any form about:

- an individual's physical or mental health,
- healthcare provided to an individual, or
- claims or payment of claims for healthcare costs.

What Does the Written Authorization Have to Say?

Usually on a form that either the healthcare plan or the healthcare provider supplies, the authorization must be signed and dated by the worker, and must:

- specifically describe the information to be disclosed,
- identify who the worker is authorizing the plan or provider to disclose the information to, for example, "UFCW Local 111."
- describe the purpose for disclosing the information (for example, "to assist me with my claim"),
- notify the worker of the rule that the plan may not condition benefit eligibility on whether workers sign authorizations,

- specify that the worker retains the right to revoke the authorization in writing, and
- notify the worker that once the information is released, it is no longer protected by privacy rules and may be re-disclosed.

Can Health Plans or Providers Disclose Information Without Authorization?

Sometimes. Health plans or providers (doctors, hospitals, etc.) can disclose the information necessary for the plan's operations and for the patient's treatment or payment of benefits. For example, a health plan and the patient's doctor can share information to facilitate payment of the claim, but only to the extent the information is actually needed to process the claim.

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Federal Fair Labor Standards Act (FLSA)

The Fair Labor Standards Act of 1938 (FLSA) ranks among the most important federal labor laws ever enacted. It is the federal law that established a national minimum wage and regular workweeks at 40-hours a week. It also regulates child labor, requires overtime premiums for overtime hours worked over 40 in a workweek, and established recordkeeping standards for companies and state and local governments. As hard as it is to imagine now, prior to the FLSA, child labor was common and few companies paid premiums for overtime work.

Do States Have Their Own Wage & Hour Laws?

Many states have laws similar to the FLSA. Many state laws cover employment matters the FLSA does not — such as required breaks or overtime premiums for hours worked over eight in one day — and provide higher minimum wage rates and greater protections for workers.

Unions and workers should check with state and local labor departments to see whether state or local law addresses wage and hour questions that the FLSA does not cover or does not cover adequately. A list of state minimum wage rates is available online at www.dol.gov/whd/minwage/america.htm. **Companies must pay the highest of the federal, state or municipal minimum wage rate.**

Who Does the FLSA Cover?

Coverage is very broad, with important exemptions. Generally covered are workers of companies who have sales of at least \$500,000 annually. State law may cover employees that the FLSA does not cover.

The FLSA Requires Companies to Pay Statutory Minimum Hourly Wage

- As of 2013, the federal minimum wage is \$7.25 per hour.
 - ◆ Youth minimum wage: Companies can pay workers under the age of 20 a federal minimum wage of \$4.25 per hour for the first 90 consecutive calendar days of employment, so long as they do not displace another worker earning the minimum wage.
- Companies must pay at least the minimum hourly wage for all hours worked through the first 40 hours in a workweek. Thus, any agreement to pay less than the minimum hourly wage is void.

- A workweek consists of a period of 168 hours during 7 consecutive 24 hour periods. It may begin on any day of the week and any hour of the day the company establishes as long as the designated workweek is consistent.
- Companies must pay workers at least the state or local minimum hourly wage when it is higher than the federal minimum hourly wage.
 - ◆ 18 states and District of Columbia have a higher minimum wage than federal minimum wage.
 - ◆ Certain municipalities (such as cities and counties) have higher minimum hourly wages than federal the minimum hourly wage.
 - ◆ Certain state laws impose supplemental wage requirements such as for split shifts, spread in hours over 10, or other requirements.
- Any wage payment by piece rate or project must average at least the minimum wage for every hour worked.
 - ◆ For example, a company wage payment of \$50 for a 5-hour project is a lawful wage because the average hourly wage, \$10 an hour, is higher than the federal minimum hourly wage of \$7.25.
 - ◆ In contrast, a company payment of \$30 for 5-hour project violates law because the average hourly wage of \$6 an hour is less than the federal minimum hourly wage.
- To determine whether a company is complying with minimum wage law, total the wages paid for the hours worked up through 40 and divide this amount by this number of hours worked up to 40 hours.
 - ◆ Federal law is generally satisfied when this wage rate averages the statutory minimum.
 - ◆ However, when an employer intended to pay a worker for only scheduled hours of work and workers are found to have worked for unscheduled periods (i.e., off-the-clock work), the employer may be liable for periods of off-the-clock work *even where no overtime hours are worked*.
- A company may be required to pay above statutory minimum. For example:

- ◆ A company may satisfy the statutory minimum, but still fail to pay special higher wages required on federally funded projects, or
- ◆ A company may satisfy statutory minimum, but still violate collective bargaining agreement requiring higher wages.
- A company violates federal law when it deducts the costs of work tools, uniforms, etc. from wages such that it reduces the hourly wage rate below the statutory minimum.
- State laws may prohibit certain wage deductions entirely.

The FLSA Requires the Company to Pay Workers for All Hours Worked

- A company must pay a worker for all hours worked in a workday.
 - ◆ A company's workday is the 24-hour period following the time that the company designates as the beginning of daily work.
 - ◆ A company cannot reduce the hours worked by rounding down hours.
 - ◆ A company cannot reduce pay for hours worked as penalty
 - ◆ A company cannot use one pay period to correct wage violation from another pay period.

A Company May Be Required to Pay Workers for More Hours Worked Than the Workers' Scheduled Shift or Time on the Production Line

- *Reporting to Work:* A company must pay a worker beginning when the company requires the worker to report to work, which may be earlier than when the worker is required to clock in.

Example: A cashier's scheduled shift begins at 8am, but the manager requires the cashier to report at work at 7:45am. The company must pay the worker starting at 7:45am.

- *Donning and Doffing:* Companies must pay workers for the time they put on or take off safety gear that the company or the nature of the job requires workers to wear, and clothing that the company requires workers to wear.

- *Traveling To and From Work:* Companies do not have to pay workers for ordinary commuting travel from home to work. However, companies must pay workers for travel time if the worker is required to perform a task for the company during nonregularly scheduled hours at a location different from the worker's regular workplace.

Example: A bakery worker normally has to commute half an hour to get to work and half an hour to return home after work. After the shift one day, the manager asks the worker to take a supply of flour to another store on the way home from work. The company must pay the worker for the time spent taking the flour to the other store.

Example: When a worker has to pick up and carry tools to a worksite, the travel from the designated pick up to worksite is part of workday

- *Meetings/Trainings:* A company must pay for the time a worker spends in company meetings and mandatory trainings because such time constitutes hours worked. Companies, though, do not have to pay workers for time spent training when the training is voluntary, outside working hours, and is not directly related to the worker's job.

Example: A company circulates a training DVD to all stores on good customer service. Supervisors require that all workers watch the 45-minute training DVD. The company must compensate the workers for that time.

- *Charitable Work:* A company must pay the worker for the workers' time performing civic or charitable activity at the company's request, direction or control.

Example: Supervisor requests that clerks work a fundraising table for Children's Miracle Network. The company must pay the clerks for time spent working at the fundraising table.

- *Off Premises Work:* A company must pay a worker for all hours worked in all locations, even if the work occurs off-premises.

Example: A company must pay a worker for the time spent taking merchandise to another store which is not the worker's primary workplace or for working on paperwork at home at night or on day off.

- *Medical Attention:* If a worker requires medical attention, the company must pay for that time if (1) the medical attention takes place during the

worker's normal work hours; (2) the medical attention is given on the company premises; or (3) the medical attention is required by the company on or off premises.

Example: A meatcutter receives on-site medical attention for a cut the worker received on the job. The company must pay the meatcutter for the time spent receiving medical attention.

Waiting Time Predominantly for a Benefit is Work Time

- Waiting time constitutes hours worked

- ◆ Waiting for repairs is work time

Example: A meatcutter waits for equipment to be fixed before resuming work. The store must compensate the meatcutter for that time.

- ◆ Waiting for equipment is work time
- ◆ Waiting for product is work time
- ◆ Waiting for the store to open is work time

Example: Meatcutters are scheduled to begin work at the store at 4:30 a.m. Their manager does not arrive to open the store until 4:50 a.m. The company must compensate the workers for those 20 minutes spent waiting.

- A split shift occurs when the worker works more than one period of time during a workday
 - ◆ Time between shifts can be paid or unpaid
 - ◆ A worker must be paid unless the worker is completely relieved from duty to use time effectively for the worker's own purposes and:
 - A company gives a worker advance notice that a worker may leave job site and
 - A company gives a worker advance notice of time certain to resume work

When Is a Worker "Off-Duty"?

- A worker is "off-duty" only when:

- ◆ The worker is completely relieved of work **and**
- ◆ The break is long enough to enable the worker to use time effectively for the worker's own purposes

Rest and Meal Periods

- Short rest periods of 5 to 20 minutes length constitute hours worked that must be paid.
 - ◆ Breaks of less than 20 minutes are generally not sufficiently long for a worker to use for the worker's own purposes and thus be "off-duty".
 - ◆ Federal law does not mandate rest periods but where provided they must be paid time.

Example: As company policy, a grocery store provides its workers with a 15 minute break for every 4 hours worked. The grocery store must compensate workers for that break.

- ◆ 8 states do require paid rest periods for adult private sector employees. In these states, a denial of these rest periods would violate both state and federal laws. A list of state laws regarding rest periods is available online here: www.dol.gov/whd/state/rest.htm.
- ◆ A company cannot offset other work time against paid rest period.
- Meal periods of 30 or more minutes are unpaid time
 - ◆ An employee must be completely relieved of work during a meal period,
 - ◆ A company cannot require its worker to perform any duties, and
 - ◆ A company cannot require worker to remain at machine or desk; but may require its worker to remain on job site.

Example: On a busy day, the store manager requires deli workers to eat lunch in the deli. The company must compensate the workers for that time.

- ◆ Although the FLSA does not require a company to provide meal periods, 21 states have meal period requirements. In these states, a denial of meal periods would violate both state and federal laws. A

list of state laws regarding meal periods is available online here:
www.dol.gov/whd/state/meal.htm

FLSA Requires Overtime Rate for Hours in Excess of 40 per Workweek

- Federal law requires companies to pay non-exempt workers a premium for all hours worked over 40 in a week equal to at least 1 and ½ times the worker's regular wage rate for non-overtime hours.
 - ◆ A company must pay 1 and ½ times the rate at which the worker's regular rate and not merely 1 and ½ times the minimum wage rate.
- The worker's regular rate includes all promised payments. For example, this includes:
 - ◆ Commissions;
 - ◆ Bonuses for incentives, including for accuracy, good attendance, production, quantity or quality of work, continuation of employment;
 - ◆ Where a bonus is paid in lump sum for given period, it must be divided into weekly equivalent for purposes of calculating regular rate; and
 - ◆ Shift differentials.
- The worker's regular rate does not include:
 - ◆ Totally discretionary payments—both the fact that the payment is to be made and amount of payment are determined at sole discretion of employer
 - ◆ Vacation, holiday, sick, or other leave.

Example: An hourly worker works 4 ten-hour days and then is on paid vacation for the fifth day of the work week. The worker is not entitled to overtime because vacation day does not count toward hours worked.
- The worker's regular rate is calculated by:
 - ◆ Totaling all of the worker's payments for employment during the workweek;

- ◆ When the worker is paid at different rates, divide the total payment for all hours worked during the week by the number of hours worked in the workweek.
- ◆ Dividing total pay by total number of hours worked in workweek
- ◆ When a worker earns bonuses or shift premiums these amounts must be included in total pay to determine regular rate

Example: An employee paid biweekly at rate of \$12 per hour plus \$100 attendance bonus for two weeks, working a schedule of 56 hours per week would earn total weekly pay, including overtime pay, as follows:

Employee works 56 hours at \$10 per hour + \$50 (weekly bonus equivalent) = \$722 straight time compensation

$\$722 \text{ (straight time compensation)} \div 56 \text{ hours worked} = \12.89 regular rate

$\$12.89 \text{ per hour} \times 1 \text{ and } \frac{1}{2} = \19.34 overtime rate

40 straight time hours \times \$12.89 regular rate = \$515.60 straight time earnings

16 overtime hours \times \$19.34 overtime rate = \$309.44 overtime earnings

$\$515.60 \text{ straight time earnings} + \$309.44 \text{ overtime earnings} = \825.04 for total earning per week

- Overtime calculated on 80 hour basis is permissible:
 - ◆ In hospitals or establishments engaged in care of sick, aged, or mentally ill, and
 - ◆ When an employee is paid 1 and $\frac{1}{2}$ times regular rate for all hours worked in excess of 8 hours per day
- Private companies cannot require nonexempt workers to use compensatory time off (“comp time”) instead of paying for overtime work at the regular rate. Note that public sector employers may be allowed to use comp time.
- Many states have better overtime standards than federal law. For example, California requires time and one-half for work over 8 hours

per day and work performed on the 7th day of work in a workweek, and double time for work over 12 hours per day and work over 8 hours on the 7th day of work.

Federal Law Restricts Child Labor

- Federal law restricts companies in the types of work, number of hours and times of day they may employ children.
- Except for several specific exceptions, children under the age of 14 may not work in any non-farm jobs.
- Workers under age 18 cannot (1) work in certain hazardous occupations such as manufacturing, meat and poultry packing, and processing; or (2) operate hazardous equipment (for example, meat slicers, power jacks, paper balers).
- Workers who are either age 14 or 15 may work only outside of school hours:
 - ◆ For a maximum of 3 hours per school day and 18 hours per school week,
 - ◆ For a maximum of 8 hours per non-school day and 40 hours per non-school week, and
 - ◆ Between the hours of 7 am and 7 pm, except from June 1 through Labor Day when they can work until 9 pm.
- Workers who are either age 16 or 17
 - ◆ May perform jobs not declared hazardous by Secretary of Labor; and are
 - ◆ Not subject to restrictions on hours.
- Workers age 18 and older are not subject to restrictions on jobs and hours
- State laws may provide additional child labor protections. A list of state child labor laws are available online at: www.youthrules.dol.gov

FLSA Savings Clause Requires Compliance with More Favorable State and Municipal Laws

- A company must comply with higher minimum wage and more favorable overtime provisions.
- A company is required to pay where the state has broader definition of hours worked.

Example: Court required employer to pay for time spent donning and doffing protective gear at beginning and end of shift where state law did not allow for collectively bargained waiver of hours worked for changing clothes – *Spoerle v. Kraft Foods Global, Inc.*, 614 F.3d 427 (7th Cir. 2010)

- A state may require premium pay for night or weekend hours.
- Certain states require rest breaks even though there is no federal requirement.
- Certain states require meal period even though there is no federal requirement.
- States may limit how many hours a worker can work.
- Certain states may impose higher standards for child labor.

Company Violations of FLSA

Off-the-Clock Work Violates FLSA

- A company is responsible for supervising workforce to ensure that workers are paid for all work performed.
 - ◆ A company must pay for work performed before official start of shift.
 - ◆ A company must pay for work performed during meal period.
 - ◆ A company must pay for work performed after shift formally ends.
 - ◆ A company cannot request or allow workers to “volunteer” time for work. For example, retail companies may not allow workers to “volunteer” on their days off to set up displays or seasonal decorations.

Improper Deductions from Wages

- A company cannot deduct for breakage.
- A company cannot deduct for business expenses if deduction will reduce wage below required minimum wage or overtime compensation.
- A company cannot deduct for cost of a worker's negligence if deduction would reduce wage below required minimum wage or overtime compensation.

Misclassification of Workers to Avoid Minimum Wage or Overtime Pay

- *Exempt workers:* The FLSA contains several exemptions from minimum wage rate and overtime requirements. The most common are the so-called white collar exemptions for those workers whose primary duties are executive, administrative (this is not routine clerical work), and professional workers.
 - ◆ **Executive:** Exempt executives are salaried workers whose primary duty is management of the company or a company department or subdivision, and who regularly supervise two or more full-time workers, have the authority to hire or fire workers, or whose suggestions and recommendations about hiring, firing, promotion or other change in status of other workers are given particular weight. Examples include store or plant managers and assistant managers, but not department managers or foremen.
 - ◆ **Administrative:** Exempt administrators are salaried workers whose primary duty is non-manual work directly related to the company's management or general business operations or the company's customers, and that includes the exercise of discretion and independent judgment with respect to significant matters.
 - ◆ **Professional:** Exempt professionals are salaried workers whose primary duty is the performance of work requiring advanced knowledge in a field of learning that is customarily acquired by a prolonged course of education (usually, a college degree) and that requires the consistent exercise of discretion and judgment.
- **What does being paid on salary basis mean?** These white collar exemptions require that companies pay workers on a salary basis at a rate not less than \$455 per week. Salary basis means regular receipt

of a predetermined amount for each pay period. Full salary must be paid for any week in which the worker performs any work, regardless of the number of days or hours worked.

- ◆ A worker is not salaried if the company fails to pay the worker for days the worker is ready, willing and able to work, even when work is not available.
- ◆ A worker is salaried even if the company does not pay the worker for: absences from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; jury or witness fees received; or unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions.
- *Independent Contractors*: Misclassifying workers as independent contractors and failing to pay minimum wage and overtime violates the FLSA.
 - ◆ Where an employer controls the means, manner, and nature of work, the worker is an employee who must be paid minimum wage and overtime.
 - ◆ Minimum wage and overtime is *not* required for persons:
 - Who control means and manner in which they perform work and
 - Who generally are in business for themselves.

Retaliation for Asserting Rights, Protesting Wage Violations

- The FLSA makes it unlawful to “discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding.” – 29 U.S.C. §215(a)(3)
- A worker establishes a prima facie case of retaliation when the worker:
 - ◆ Files a complaint – can be oral complaint to company official,
 - ◆ Suffers adverse action by the employer, and

- ◆ There is a causal connection between the worker's activity and the adverse action.
- Examples of retaliation include:
 - ◆ Discipline or discharge for disputing wages or claiming unpaid wages,
 - ◆ Any retaliation for filing a perceived wage and hour violation, or
 - ◆ When the employer calls or threatens to call immigration authorities when workers assert rights under FLSA.

Companies Are Required to Keep Accurate Records

A company violates federal law for failing to keep accurate records, in addition to any failure to properly pay for hours worked. Federal law requires companies to keep the following records for each worker:

- Employee personal information including name, home address, occupation, sex, and date of birth if under age 19;
- Hour and day workweek begins;
- Total hours worked each workday and each workweek;
- Total daily or weekly straight-time earnings;
- Regular pay rate for any week when overtime worked;
- Total overtime pay for workweek;
- Deductions from or additions to wages;
- Total wages paid each pay period; and
- Date of payment and pay period covered.

A company must retain these records for a minimum 3-year period.

State law may impose additional record keeping requirements on the employer.

State Wage Payment Laws

- Many states have laws requiring that company provide full, on-time payment of wages on regularly scheduled pay days.
- For example, 44 states have wage payment laws that require pay to be weekly, bi-weekly, semi-monthly, or monthly.
- Also, many states require companies to provide workers a statement of wages for each pay period.
- States may also define wages more broadly than federal law

How to Protect and Enforce Federal and State Wage and Hour Rights

Workers May File Their Own Lawsuits for FLSA Violations

- The FLSA, along with many state laws, provides a private right of action that gives workers the right to file their own lawsuits for wage and hour violations. Under the FLSA, worker lawsuits can recover (1) unpaid wages and overtime; (2) an equal amount in additional damages if the company was aware of the wage violations; and (3) attorney's fees. The attorney fee provision means that lawyers are more likely to represent workers with credible claims on a contingency fee basis.
 - ◆ There is no private right of action to enforce child labor or recordkeeping requirements. Enforcement is limited to government action only.
- *Class-action Lawsuits:* Workers may file FLSA lawsuits on behalf of similarly situated workers and obtain a court-ordered notice to those workers informing them of their right to join the lawsuit. Workers seeking to join the suit must file a written consent form with the court.

Workers May File a Complaint With the Wage-Hour Division of the U.S. Department of Labor

- The Wage-Hour Division of the U.S. Department of Labor also enforces the FLSA. The Wage-Hour Division has hundreds of investigators in offices throughout the nation, which are listed at www.dol.gov/whd/

- Although the Wage-Hour Division may initiate its own investigations, most investigations are triggered by worker complaints. Workers are not required to file formal papers to make a complaint or to initiate an investigation. A worker may make a complaint by simply calling 1-866-487-9243 or visiting any wage-hour office.
- If the Wage-Hour Division determines that a worker's complaint has merit, it will typically try to work out a voluntary settlement with the company that will result in payment of the wages owed. If no settlement is reached, the Wage-Hour Division may file a lawsuit on the worker's behalf to compel payment.
- Only the government may bring a lawsuit to collect civil money penalties or impose criminal penalties for minimum wage, overtime or child labor violations, or to obtain injunctive relief.

FLSA Statute of Limitations

- A worker has 2 years from the time the payment was due to file a FLSA claim for a company's failure to pay wages unless the company knowingly failed to pay wages which is when a 3-year statute of limitations applies.

Worker Recordkeeping

- Where companies fail to keep accurate records, agencies and courts will accept workers' sworn testimony as to their best estimate of unpaid hours worked. The burden then shifts to the company to disprove the workers' estimates.
- Workers who suspect that the company is not maintaining accurate time records should maintain their own written records including recording the dates and hours of day the worker worked, any agreement for work or pay, and any deductions from or additions to the hourly rate.

Workers' Oral Complaints to the Company

- An oral complaint to the company about a violation of the FLSA rights is activity protected by the FLSA.
- The worker's complaint to the employer must be (1) sufficiently clear and detailed so that employer reasonably understands the complaint as an assertion of FLSA rights; and (2) call for the protection of FLSA rights.

State Law Remedies

- Certain state wage laws may provide private right of action in state court or may also be enforced by the state agency and/or state attorney general's office. Certain state laws may, like under FLSA, provide for recovery of unpaid wages as well as equal amount in liquidated damages
- Additionally, state theft of service laws permit criminal prosecution for a company's failure to pay workers their wages for work performed. Specifically, state theft of service laws provide recovery for the worker when:
 - ◆ A company secures work from a worker knowing that the worker engaged work in expectation of pay and
 - ◆ A company demonstrates intent not to pay

Workers May Not Waive FLSA Rights

- Workers may not waive their rights under the FLSA to minimum wages or overtime premiums. Any waiver that workers sign is unenforceable.

Concerted Action Involving Wage and Hour Violations Is an Effective Organizing Tool

- An employee who engages with one coworker to protest violation of minimum wage or overtime provisions engages in concerted action protected by FLSA as well as National Labor Relations Act
- If an employer retaliates by harassment, reducing hours of work, reducing pay rate, or termination, the employer violates anti-retaliation provisions of FLSA
- The U.S. Department of Labor can investigate and request a court order to reinstate a worker more quickly than National Labor Relations Board

SERVICE CONTRACTS ACT

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What Is It?

The Service Contracts Act is the federal law that governs minimum labor standards for workers of contractors that provide services to the federal government.

Who Is Covered?

Workers of companies that have contracts with the federal government to provide services in excess of \$2,500.

What Protections Does the Service Contract Act Afford Service Workers?

The law requires covered companies to:

- pay wage rates at least equal to area prevailing wages, and
- provide health and pension benefits, compensation for work injuries, unemployment compensation, life, disability, sickness and accident insurance, and vacation and holiday pay consistent with prevailing benefits for comparable workers in the area.

If workers are covered by a collective bargaining agreement, no successor contractor may pay wages or benefits below those contained in that agreement.

When a service contract worth at least \$150,000 expires or is completed, and a follow-on contract is awarded for the same service, at the same location, the successor contractor must offer the displaced non-managerial workers a right of first refusal to work under the new contract before hiring new workers. The contractor does not have to hire everyone, but must take as many qualified workers as needed to perform the contract.

The law requires companies to provide safe and sanitary conditions.

How Is the Service Contract Act Enforced?

The Labor Department may bring a civil action to enforce the Service Contract Act.

Remedies include withholding payments to contractors for amounts due workers, cancellation of contracts, and barring companies from future contracts for a three-year period.

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Introduction

There are many individuals in the United States from foreign nations in a variety of immigration statuses, including many with temporary visas. Individuals who enter the U.S. intending to stay, with or without documentation, are immigrants and include refugees, asylees, and those in temporary protected status. Individuals who enter for a temporary period are non-immigrants and usually enter on visas. For simplicity, this chapter will use the term “immigrant” to refer both to those individuals here temporarily and those who enter intending to stay, unless it is necessary to distinguish them.

The rights of entering individuals, immigrant and non-immigrant, are governed by the federal Immigration and Nationality Act (INA), as amended. Under the INA, all individuals who receive wages are required to be employment eligible. The U.S. Department of Homeland Security (DHS) administers the INA and delegates administration to certain other federal agencies such as the U.S. Department of Labor (DOL).

The INA defines three categories of individuals for employment eligibility including: (1) nationals of U.S. defined as citizens and nationals, (2) aliens defined as any persons not citizens or nationals, and (3) permanent residents defined as aliens who permanently reside in the U.S. As indicated, this chapter will use the general term immigrant for individuals other than citizens, nationals, and permanent residents.

What Are The Rights Of Immigrant Workers?

Generally, all federal laws which protect workers in the workplace protect immigrant workers regardless of their immigration status.

Immigrant workers have the right to organize, to form a union, and, through their union, to bargain collectively with their employer. This includes the right to join with another worker or attempt to get another worker to join in talking about and changing employment conditions, be involved in organizing and other campaigns, sign authorization cards, participate in worker committees, vote in elections, file grievances against companies, file unfair labor practice charges with the National Labor Relations Board, and all other rights workers have under the National Labor Relations Act (NLRA).¹

¹ Generally, under current law, a company who has violated the NLRA by discharging an undocumented immigrant does not have to reinstate the worker or pay back pay for the period

Immigrant workers, regardless of status, are protected by other federal employment laws, including federal anti-discrimination laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act as well as federal wage and hour laws such as the Equal Pay Act, the Fair Labor Standards Act, and Family and Medical Leave Act. In addition, the INA prohibits companies from discriminating against workers because they are immigrants.

Immigrant workers are generally protected by state employment laws, including state workers compensation laws and anti-discrimination laws.²

What Responsibilities Do Companies Have When Hiring Workers?

The Immigration and Nationality Act requires a company to hire and retain only workers who are authorized to work in the U.S. *Form I-9* is the form a company is required to use to determine employment eligibility.

A company is required to complete a *Form I-9* for each new worker within 3 days after the worker is hired. The employer must review and record information about the worker's identity and work authorization on the *Form I-9*. The employer must retain the *Form I-9* throughout the worker's employment. The law prohibits knowing hire and continued employment of workers who are not work authorized.

A worker has a choice of documents to present to show identity and work authorization. And the employer cannot ask for more or different documents if those presented are genuine on their face and relate to the worker presenting them. Department of Homeland Security provides a list of documents that satisfy the identity and work authorization requirements. Expired documents are not acceptable for verification.

If the documents presented do not provide the necessary authorization, the worker has a reasonable time to present other documents that show work

following discharge unless the worker can show that s/he is authorized to work in the U.S. These workers may still be eligible for both remedies if the companies had initially failed to comply with immigration laws when hiring them. The law in this area may change with the passage of comprehensive immigration legislation being considered by Congress.

² However, certain states deny unemployment compensation to undocumented immigrants.

authorization. If a worker fails to satisfy the employment eligibility criteria, the employer cannot continue to employ the worker.

What Is Reverification and When Is It Appropriate?

A company is required to reverify its worker's work authorization when the authorization document expires. The worker is required to obtain renewed authorization in order to continue to work and should file for a new employment document 90 days before expiration of the current authorization.

A company is *not* permitted to reverify a worker:

- whose U.S. passport expires after initial verification because citizens are work authorized incident to status
- whose permanent resident card expires after initial verification because permanent residents are work authorized incident to status

A company can ask workers certain who are authorized to work incident to status such as asylees, refugees, and those with temporary protected status to renew their work authorization cards; but cannot bar these workers from continuing to work while awaiting renewed work authorization documents.

What Is E-Verify and When Can an Employer Use the System?

E-Verify is a computer database that a company can voluntarily use to check to determine their workers' employment eligibility. U.S. Citizenship and Immigration Services (USCIS), an agency within DHS, and the U.S. Social Security Administration (SSA) administer E-Verify, and worker data is checked through USCIS and Social Security Administration databases. The Social Security Administration database provides confirmation or non-confirmation of U.S. citizens' employment eligibility. If the worker is not a citizen, the employer uses the USCIS database to provide confirmation or non-confirmation of employment eligibility. E-Verify does not replace the Form I-9; rather the employer may use E-Verify to confirm information provided on Form I-9.

If the worker's information matches the information in the Social Security Administration database and the Department of Homeland Security's database, if necessary, E-Verify sends a confirmation to the employer for that particular worker. If there are any problems or the verification system needs more time, a tentative non-confirmation will appear instead.

Workers have the following protections against improper employer use of E-Verify. Companies are required to:

- Use E-Verify for only new hires (federal contractors can screen existing workers assigned to covered contract) and not pre-screen applicants;
- Use E-Verify uniformly and not selectively.
- Promptly provide workers who have tentative non-confirmations under E-Verify with information about how to challenge the tentative non-confirmation, including providing written notice generated by E-Verify.
- Give workers 8 federal work days to contact the Social Security Administration or Department of Homeland Security to contest the tentative non-confirmation.
- Not take any adverse action against workers because they contest the no-match, as long as workers contact the Social Security Administration or Department of Homeland Security within 8 federal work days. This includes firing, suspending, withholding pay or training, or otherwise interfering with their employment.
- Give workers who receive tentative non-confirmations the option of visiting the local Social Security Administration office to update their records or to call Department of Homeland Security directly to resolve the tentative non-confirmation. The phone number is on the Social Security Administration referral letter.

Some state laws make E-Verify mandatory for companies in their states.

The principal problem with E-Verify is that it contains no mechanisms to enforce protections and ensure employer compliance. If companies violate any of the E-Verify worker protections, workers can file charges with the Office of Special Counsel (OSC) of the Department of Justice which handles immigration-related employment discrimination and the Equal Employment Opportunity Commission (EEOC) which enforces the prohibitions against national origin discrimination under Title VII of the Civil Rights Act of 1964.

What Is E-Verify for Federal Government Contractors?

Certain federal contractors are required to use the E-Verify system if:

- a federal contract was awarded after September 8, 2009;

- the contract contains a written FAR E-Verify clause;
- the contract has a period of performance of 120 days or more;
- the contract's value is greater than \$150,000; the subcontract value is greater than \$3,000 for services or construction; and
- some portion of contract work is performed in U.S.

A federal contractor subject to E-Verify is required to verify all new hires as well as existing workers assigned to a covered contract. A subcontractor is required to provide proof to the contractor that it has complied with the E-Verify process.

What Is the IMAGE Program?

The Department of Homeland Security developed the IMAGE program as a voluntary best hiring practices program. The program requires companies who participate to:

- Sign a memorandum of understanding with Department of Homeland Security, giving Homeland Security the right to audit or review the companies' I-9 forms at anytime;
- Enroll in E-Verify;
- Undergo third party audits twice each year; and
- Enroll in special fraudulent document identification training for a select number of employer executives to better assess whether new hires may be using false documents.

As with the E-Verify program, the IMAGE program appears to provide protections for workers; but there are not enforcement mechanisms to ensure employer compliance. If companies violate any of the above worker protections under the IMAGE program, workers can file charges with the Office of Special Counsel of the Department of Justice which handles immigration-related employment discrimination and Equal Employment Opportunity Commission (EEOC) which enforces the prohibitions against national origin discrimination under Title VII of the Civil Rights Act of 1964.

What Is a Social Security Number No-Match?

A Social Security Number (SSN) no-match occurs when a social security number in Social Security Administration records does not match the name provided with the number. The Social Security Administration sends letters to companies identifying workers whose names fail to match their Social Security Numbers. Social Security Administration sends letters to companies in an effort to obtain correct information for its records so that each worker's record can be properly credited with earnings.

The Social Security Administration letter asks companies to check their records and, if their records are accurate, to notify their workers that there may be errors with their Social Security Number information. The letter also requests companies to update the Social Security Administration about any changes in the Social Security Number information their workers provide.

Social Security Administration letters to companies emphasize that Social Security Number no-matches do not indicate that workers are not work authorized. The letters also warn companies not to take adverse actions against workers solely based on the Social Security Number no-matches.

Are Social Security Number No-Matches Related to Work Authorization?

A no-match between a worker's name and Social Security Number does not, without more, provide a company evidence or constructive knowledge³ that its worker is not work authorized. A no-match does not provide actual or constructive knowledge of lack of work authorization because no-matches occur for many reasons unrelated to employment eligibility. These reasons include typos, name changes, other errors in the Social Security Administration database, and compound last names, common among immigrants.

Therefore a worker's failure to take action to correct a no-match discrepancy does not provide a company actual or constructive knowledge that its worker is not work authorized. There must be other evidence for a company

³ Constructive knowledge is knowledge suggested in light of notice of facts and circumstances that would lead a reasonable individual to know about a certain condition.

to conclude that the worker is not work authorized or undocumented. Only then does immigration law require a company to terminate its worker.⁴

Why Are Social Security Number No-Match Letters Problematic?

Social Security Number no-match letters are problematic because of employers' responses to the letters. Since the Social Security Administration started sending them in the mid-1990's, companies have taken adverse actions against workers whose names appear in the letter, despite the Social Security Administration's specific instruction not to do so. In violation of the law, some companies immediately discharge workers or terminate them if the discrepancy is not corrected within a specified period. Certain companies use Social Security Number discrepancies as the basis for retaliating against workers for asserting their workplace rights, supporting unions, or engaging in other protected activities.

How Should Unions and Workers Respond to Social Security Number No-Match Letters?

Upon receiving notice that a company has received a Social Security Number no-match letter, unions and workers should request a copy of the letter. This is to confirm that the letter was actually received, the letter was recently issued, and the targeted worker was actually listed on the letter. Certain companies say they have received Social Security Number no-match letters even if they have not. Companies will also occasionally produce letters they received years ago. In response to such targeting, the union has the opportunity to respond by filing a grievance or informing the worker of the right to file a discrimination charge with the Department of Justice's Office of Special Counsel and/or EEOC.

If the employer received a valid, timely Social Security Number no-match letter, workers have two options. They can either go visit their local Social Security Administration office to work out the no-match and bring back the information to their employer, or they can ignore the letter.

⁴ For example, a 2008 federal appeals court decision upheld an arbitrator's decision that found that a company lacked just cause to terminate workers after they failed to take action to correct SSN no-matches and awarded the workers reinstatement to their jobs. *Aramark Facility Services v. SEIU Local 1877*, 530 F.3d 817 (9th Cir. 2008).

The Social Security Administration will take no action if a worker decides to ignore the letter. However, the employer may discipline, discharge, or remove the worker from work even though the no-match letter warns against adverse action.

In response, unions can handle the no-match issue by:

- Closely monitoring employer response to ensure all workers who have Social Security Number discrepancies are treated the same;
- Filing a grievance;
- Bargaining with the employer for a bargaining agreement provision which requires immediate notice to the union upon the employer's receipt of a no-match letter involving represented workers; and
- Bargaining with the employer for a bargaining agreement provision that prohibits discrimination, disparate treatment, or other adverse action against workers whose names appear on a Social Security Number no-match letter;

What Are I-9 Audits?

Department of Homeland Security and the U.S. Department of Labor are authorized to conduct audits of the I-9 Forms maintained by the company to establish compliance with the work authorization requirements of the INA. Immigration and Customs Enforcement (ICE), an agency within DHS, typically conducts the audits. ICE can conduct audits without subpoena by giving a minimum of 3 days of notice to a company. ICE can request supporting documentation such as a list of current workers, payroll records, business licenses, and articles of incorporation.

Following an inspection, ICE can notify the employer that its records are in compliance or that there are technical and substantive violations. For example, the Notice of Suspect Documents informs a company that certain workers appear to be unauthorized to work, advises the employer of possible criminal and civil penalties for continuing to employ the worker(s), and gives the employer and workers an opportunity to present additional documentation of work authorization.

I-9 audit process lacks protections for immigrant workers, including:

- The absence of required allowance of time to permit workers to submit additional documentation when an audit reveals problems with workers' identity and work authorization documents;
- No mechanisms to prevent companies from immediately terminating workers with document discrepancies;
- No clear prohibition on I-9 audits during labor disputes; and
- No due process through which workers' rights are protected as they correct documents or contest adverse determination

What Actions Can Unions Take Regarding I-9 Audits?

Unions can respond to the possibility of I-9 audits by taking the following action:

- bargain with companies to establish a requirement that the employer immediately notify the union upon receipt of notice of I-9 inspection
- bargain with companies for a requirement that the employer, upon the union's request, will request that ICE grant an extension before beginning an inspection;
- bargain with companies for a requirement that the employer provide workers with written notice of their rights and responsibilities in response to document inspection; and
- bargain with companies for a requirement that they request more time from ICE or the U.S. Department of Labor within which to submit updated work authorization documentation to the agency.

What Is Deferred Action?

Deferred action is discretionary relief granted by the Department of Homeland Security through its agency U.S. Citizenship and Immigration Services. Specifically, deferred action is an act of administrative convenience which gives some cases lower priority than others. The government decides to grant deferred action based on the totality of circumstances surrounding an individual presence in the U.S.

Deferred action grows out of prosecutorial discretion and is not an entitlement or based in law or regulations. A grant of deferred action does not grant the individual legal immigration status; rather, during the period of deferred action, the government will not seek removal of the immigrant.

An individual granted deferred action is employment authorized and must apply for an employment authorization document.

What Is Deferred Action for Childhood Arrivals?

In June 2012, the U.S. President issued an executive order which grants deferred action status to certain immigrants who entered the U.S. before age 16. Immigrants who are eligible for deferred action are those who:

- Entered the U.S. before age 16;
- Continuously resided in the U.S. for 5 years preceding June 15, 2012 and were present in the U.S. on June 15, 2012;
- Are in school at the time of application, graduated from high school, obtained a GED certificate, or are honorably discharged from the Coast Guard or Armed Forces;
- Have not been convicted of a felony, a serious misdemeanor, or multiple misdemeanors, or otherwise pose a threat to public safety or national security;
- Are under age 31 as of June 15, 2012; and
- Pass a background check.

U.S. Citizenship and Immigration Services (USCIS) examines each application on a case-by-case basis to determine whether the immigrant satisfies all eligibility criteria.

Immigrants granted deferred action status will remain in this status for a 2-year period. The status is subject to review and renewal for successive 2-year periods.

Immigrants granted deferred action can separately apply for employment authorization through USCIS.

Immigrants in removal proceedings or under final orders of removal who can demonstrate they satisfy the deferred action eligibility criteria can request review and receive deferred action.

Immigrants can begin the deferred action application process by contacting U.S. Citizenship and Immigration Services by calling 1-800-375-5283 or visiting the USCIS website at www.uscis.gov.

Local unions can advise their members of the opportunity for deferred action.

Immigrants should not pay exorbitant fees to or rely on *notaries public*; rather they should seek assistance of their unions, community organizations, and churches.

What Is the Union's Responsibility to Immigrant Workers?

A union owes the same duty of fair representation to immigrant workers, whether documented or undocumented, as it owes to all other workers for whom it is the exclusive collective bargaining representative. This means that a union must represent immigrant workers as aggressively and comprehensively as non-immigrant workers.

Unions are *not* responsible, for companies complying with immigration laws during the hiring process because unions have no role in the process and do not represent workers before their hire.

Contract Language Helpful to Immigrant Workers

Contract language can be extremely helpful when dealing with immigration-related employment actions and companies' responses to immigration issues. Here are some suggestions:

- Multilingual contracts and contract language requiring companies to provide neutral interpreters during all disciplinary meetings and investigations, as well as all meetings where supervisors discuss employer policies, rules or how workers should perform their jobs;
- Contract language that restricts companies from requesting anything from workers or participating in any programs that is not required by law (e.g., IMAGE program) especially in relation to employment authorization processes, employer policies around Social Security

Number no-match letters, and participating in other employment verification programs;

- Contract language prohibiting companies from going through I-9 self-audits or requiring workers to re-verify their work authorization after they have already presented documents and proven their work authorization at their time of hire;
- Contract language that requires companies to share as much information as possible with unions, especially in reference to any communications companies give to or receive from the Department of Homeland Security, the Immigration and Customs Enforcement, and the Social Security Administration; and
- Days off for workers to take care of immigration issues or Social Security Number discrepancy matters.

For recommended immigration-related contract language, please contact the UFCW Legal Department.

What Anti-Discrimination Laws Specifically Protect Immigrant Workers?

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (discussed more fully in another chapter) prohibits discrimination based on national origin. Title VII protects documented and undocumented immigrants.⁵ Title VII prohibits a company from denying equal employment opportunity because of an applicant's or worker's birthplace, ancestry, culture, linguistic characteristics common to a specific ethnic group, or accent.

Title VII prohibits a company from making any employment decision based on the individual's national origin, including recruitment, hiring, promotion, layoff, firing, or other terms and conditions of employment.

Title VII prohibits harassment based on national origin, including using ethnic slurs which create a hostile work environment for workers. Where

⁵ A company that is found to have violated Title VII by firing an undocumented immigrant may not be required to reinstate the worker or pay back pay for the period following discharge until the worker can show employment eligibility.

harassment is found, the employer is required to take measures reasonably calculated to end the harassment.

A company cannot base an employment decision on a worker's foreign accent unless the accent materially interferes with job performance.

A company cannot require English fluency unless fluency is required for the effective performance of the job that imposes the skill.

A company that imposes an English-only rule must demonstrate that such rule is job-related and consistent with business necessity.

To find out more about filing charges under Title VII and Equal Employment Opportunity Commission (EEOC) enforcement procedures, please refer to the chapter on Employment Discrimination Laws.

The Immigration and Nationality Act

The Immigration and Nationality Act prohibits companies who have 4 or more workers from discriminating on the basis of:

- citizenship and immigration status in hiring, firing, or recruitment or referral for a fee such as treating an individual differently because they are or are not a U.S. citizen;
- national origin in hiring, firing, or recruitment or referral for a fee;
- document abuse which constitutes unfair documentary practices during the employment eligibility verification and Form I-9 process; and
- retaliation or intimidation.

Workers who believe they have been discriminated against based on citizenship, immigration status, or national origin, or suffered document abuse can file a charge with the Office of Special Counsel of the U.S. Department of Justice if:

- The discriminatory act occurred within the last 180 days;
- The employer has at least 3 workers; and
- The worker is authorized to work in the U.S.
- If a union is uncertain about a worker's work authorization status, the union may be able to proceed under Title VII which prohibits a company

from discriminating against a worker based on national origin discrimination whether or not the worker is documented.

Individuals can contact the Office of Special Counsel of the Department of Justice by calling 1-800-255-7688 or emailing oscrt@usdoj.gov.

After the Office of Special Counsel investigates a charge, the agency has 120 days to prosecute the employer based on the charge by filing a complaint which is tried before an administrative law judge from the Department of Justice. If it decides not to file a complaint, it must notify the worker of that decision. The worker then has 90 days to file a complaint with the Chief Administrative Hearing Office within the Department of Justice.

A successful discrimination claim may result in civil fines up to \$2,500 for each discriminated worker, and remedies include reinstatement, hire, back pay, and attorney's fees.

What Is the Memorandum of Understanding Between the Department of Homeland Security and the U.S. Department of Labor?

The purpose of the Memorandum of Understanding (MOU) between the Department of Homeland Security and the U.S. Department of Labor is to set forth policies and procedures to ensure that the agencies' immigration enforcement activities at the workplace not interfere with workers' employment and labor rights and their enforcement. Specifically, protection of employment and labor rights includes preventing companies from manipulating agencies to punish immigrant workers for asserting their federal rights.

The MOU is designed to protect immigrant workers involved in ongoing labor disputes which include:

- The right to be paid correct wages and overtime pay;
- The right to work under safe conditions;
- The right to workers' compensation, family and medical leave, and employee benefits;
- The right to be free of unlawful discrimination by federal contractors

- The right to form, join, or assist a labor organization, to participate in collective bargaining, or negotiation, and to engage in protected concerted activities for mutual aid or protection;
- The right of union members to union democracy; and
- The right to be free from retaliation for seeking enforcement of any of these rights.

Under the MOU, Immigration and Customs Enforcement (ICE), an agency of Department of Homeland Security, agrees not to conduct enforcement activities during the investigation by the U.S. Department of Labor based on complaints of violation of the listed rights. Specifically, Immigration and Customs Enforcement agrees not to conduct such activities as Form I-9 audits.

Workers and their unions activate the MOU by filing complaints with the U.S. Department of Labor over any of the above-listed rights which the employer is believed to have been violated, including threats to violate these rights. Workers and their unions should make sure that the U.S. Department of Labor accepts the complaint and logs it into its database. Going further, unions on behalf of their members should continue monitor companies and report evidence of violations of workers' rights.

What Other Tools Can Unions Activate to Prevent Company Interference?

Unions have another tool to prevent companies from threatening, firing, or otherwise retaliating against immigrant workers during an organizing campaign or other labor dispute with a company. Immigration and Customs Enforcement (ICE) guidance or Operating Instruction titled *Questioning Persons During Labor Disputes*, ICE Special Agent Field Manual (SAFM) at 233.14(h), advises ICE agents on a course of action during a labor dispute. The guidance instructs ICE agents who receive information during the course of a labor dispute about alleged employment of undocumented or unauthorized immigrants to make a reasonable attempt to determine whether a labor dispute exists. The guidance suggests that ICE contact the NLRB, the DOL, and the state department of labor. If there is a labor dispute underway, the guidance advises ICE to avoid manipulation of the agency by any party to a labor dispute and inappropriate intervention at a worksite.

Unions can inform ICE of attempted employer retaliation against its workers and agency manipulation by informing the Special Agent in Charge for the applicable region that a labor dispute is taking place and asking ICE to

suspend any potential or current enforcement efforts during the pendency of the dispute because of the potential to deprive workers of protected rights.

REEMPLOYMENT RIGHTS AFTER MILITARY SERVICE

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What Law Governs Reemployment Rights After Military Service or Training?

The Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA generally requires companies to rehire workers who have been on leave from the company while completing military service.

Who Is Eligible for Reemployment Rights Under USERRA Following Military Service?

Any worker who meets five conditions. The worker:

- must have a permanent civilian job (including probationary, part-time, or seasonal positions),
- must notify the company prior to leaving for military service or training except when precluded by military necessity,
- must not have exceeded the five-year limit on the cumulative amount of military service,
- cannot be dishonorably discharged, and
- must report back to the job in a timely manner or submit a timely application for reemployment.

Who Must Provide Notice to Companies?

Workers (or officials of the uniformed service) must give advance written or verbal notice to companies.

When military necessity requires, or when notice is otherwise impossible or unreasonable, notice is not required. A determination of military necessity is determined in accordance with Defense Department regulations.

When Must Notice Be Provided?

The law does not specify how much advance notice is required, **but** workers should provide notice as far in advance as is reasonable under the circumstances.

How Is the Five-Year Limit Computed?

Service in the uniformed services, except the types of service described below, counts toward the cumulative five-calendar year limit of military service a person can perform while retaining USERRA rights. When a person starts a new job with a new company, the worker receives a new five-year entitlement.

USERRA's cumulative five-year limit does not include certain kinds of military service or training. Exceptions to the five-year limit can be grouped into three broad categories:

- Unable (through no fault of the person) to obtain release from service or service in excess of five years to fulfill an initial period of obligated service (generally imposed on active aviators or others who undergo extensive initial training in certain technical military specialties).
- Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training or retraining.
- Service performed during time of war or national emergency or for other critical missions/contingencies/military requirements. Involuntary service of this type is exempt from the five-year limit. Voluntary service in support of the mission/contingency/military requirement is also exempt.

Do Reemployment Rights Apply If the Worker Volunteered for Military Service or State Call-up?

USERRA applies to voluntary, as well as involuntary, military service, in peacetime, as well as in wartime. However, USERRA does not apply to state National Guard call-ups for domestic emergencies, such as disaster relief, riots, etc. Any protection for such duty must be provided by state law.

How Much Time Off Are Workers Entitled to Prior to Reporting For Military Service?

Although USERRA does not specify an exact amount of time, a worker, at a minimum, needs to be given sufficient time to travel to the place where the worker will perform the military service.

Does USERRA Give Workers Rights to the Company's Benefits During Periods of Military Service or Training?

Yes. USERRA gives workers the right to elect continued health insurance coverage for the worker and the worker's dependents during periods of military service or training. For periods of up to 30 days of service or training, companies can require workers to pay only the normal worker share of the premium for health insurance. For longer periods, USERRA permits companies to charge workers up to 102% of the entire premium. If workers elect for coverage, the right to that coverage ends on the day after the deadline for the worker to apply for reemployment, or 18 months after the military service began, whichever comes first.

USERRA requires companies to immediately reinstate health insurance coverage for workers and their dependents upon the worker's return. The health plan cannot impose a waiting period and cannot exclude the returning worker based on preexisting conditions (other than for those conditions determined by the federal government to be service-connected). This right is not contingent on an election to continue coverage during the period of service.

If a company offers benefits not based on seniority status (such as holiday pay or life insurance coverage) to workers on leaves of absence, then the company may have to provide those same benefits to workers on service leave. Whether a worker on leave for military service or training is eligible for such benefits depends on the company's leave of absence policies. A company may treat short-term absences differently than extended periods of leave. Therefore, when determining if a worker on service leave is eligible for benefits, the worker should compare the duration of the service leave with a comparable length of leave under the company's policies. Workers may waive their rights to such benefits by knowingly stating, in writing, their intent not to return to work. Since workers are not required to decide if they will be returning to work until their period of service has ended and can change their mind, the statement only waives their right to non-seniority benefits and does not forfeit any other rights under USERRA.

Can Companies Require Workers To Use Earned Vacation While Performing Military Service?

No. Companies may not force workers to use earned vacation for military service. A rare exception is where all workers must take vacation during a plant

shutdown at a certain time of year and a worker's military service coincides with that period.

How Soon Do Workers Have to Report Back to Work or Apply for Reemployment After Completion of Military Service?

If a worker's period of military service is less than 31 consecutive days, then the company must allow workers enough time to travel back to their residence plus a period of eight hours to rest. After a worker has been home for eight hours, the worker must report back to work at the beginning of the company's first full shift on the next full workday. For example, if the worker arrives home at 10 p.m. and the company has a 6 a.m. shift, then the worker is required to report at 6 a.m. If reporting back within this deadline is impossible or unreasonable through no fault of the worker, the worker must report back as soon as possible after the eight-hour period.

After a period of service of 31-180 days, workers must verbally or in writing apply for reemployment no later than 14 days after the completion of service. If submitting the application within 14 days is impossible or unreasonable through no fault of the worker, the worker must reapply as soon as possible thereafter.

After a period of service of 181 days or more, workers must submit applications for reemployment no later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which a worker was hospitalized for or convalescing from an injury or illness that occurred or was aggravated during a period of military service.

In any case, workers who fail to report back to work or request reinstatement in a timely manner do not automatically forfeit their right to reemployment. However, companies can treat workers' failure to report to work or reapply as an unexcused absence under the company's existing workplace rules, policies and practices that normally apply to unexcused absences.

Can Companies Require Workers to Prove That They Actually Performed Military Duty?

Yes. USERRA provides that following periods of military service of 31 days or more, the returning worker must, upon the company's request, provide documentation that establishes length and character of the service and the timeliness of the application for reemployment.

Although USERRA does not address documentation of shorter periods of military service, if doubt exists, companies could contact the worker's military commander about specific periods of service.

Reemployment may not be delayed, however, if such documentation does not exist or is not readily available.

In general, the U.S. Secretary of Labor has determined that the following documents satisfy proof of eligibility for reemployment: discharge papers, leave and earnings statements, training completion certificates, endorsed orders or a letter from proper military authorities.

What Are Companies Required Providing to Returning Workers Upon Reemployment?

Returning workers are entitled to four basic benefits if they meet the above eligibility criteria:

- Prompt reinstatement (generally a matter of days, not weeks, but will depend on the length of absence).
- Accrued seniority, as if continuously employed. This applies to seniority-based rights and benefits as well, and includes rate of pay, pension vesting and credit for the leave period for purposes of pension benefit computations.
- Training, retraining and other accommodations. This is particularly applicable in cases of long periods of absence or service-connected disability.
- Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year.

Are Returning Workers Always Entitled to Their Old Jobs?

USERRA provides that, if the period of service was less than 91 days, the worker is entitled to the job the worker would have had, absent the military service, provided the worker is or can become qualified for that job. If unable to become qualified for a new job after reasonable efforts, the worker is entitled to the job the worker left. For periods of service of 91 days or more, the company may reemploy the returning worker as above (position that would have been

attained or position left), or in a position of similar seniority, status and pay, which the worker is qualified to perform.

What If the Worker Is Not Qualified for the Reemployment Position?

If a worker has been gone from the job for months or years, job skills may have been dulled by a long period without use. A worker must be (or become) qualified to do the job to have reemployment rights, but USERRA requires the company to make reasonable efforts to train the worker.

Reasonable efforts mean actions, including training, that don't cause undue hardship to the company. If a worker can't become qualified in the positions described above, after reasonable efforts, and if not disabled, the worker must be employed in any other position of lesser status and pay, which the worker is qualified for, with full seniority.

What If a Returning Servicemember Is Disabled?

USERRA requires companies to make reasonable efforts to accommodate workers with disabilities that they incurred or aggravated during military service. If a worker returns from military service and is suffering from a disability that the company cannot reasonably accommodate, the company is required to reemploy the worker in some other position that the worker is qualified to perform and which is the nearest approximation of the position to which the worker is otherwise entitled, in terms of status and pay, with full seniority.

A disability need not be permanent to confer rights under USERRA. For example, if a worker breaks a leg during annual training, the company may have an obligation to reasonably accommodate the worker, or to place the worker in another position, until the leg has healed.

How Does USERRA Prohibit Companies from Discriminating Against Workers Returning from Service?

USERRA broadly prohibits companies from discriminating against workers or job applicants because they are members of the uniformed services. The law also forbids companies from retaliating against workers for assisting or participating in an investigation or proceeding under USERRA.

USERRA provides that a denial of employment or an adverse action taken by a company will be unlawful if the worker's service was a motivating factor (not necessarily the only factor) in the denial or adverse action unless the company can prove that the action would have been taken in the absence of the worker's service.

Where Can Workers Go for Information or Assistance?

National Guard and Reserve members with questions or concerns about their civilian job rights should first work with their unit commander. Often commanders or legal assistance attorneys can provide guidance or other assistance that will address concerns and solve problems.

If these efforts fail, the worker may contact the Ombudsmen for the **National Committee for Employer Support of the Guard and Reserve**. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. As mediators, they act as neutrals with a goal of helping bring about solutions to conflicts that are legal and equitable to each of the parties involved.

Enforcement

Workers who believe their company has violated their rights under USERRA and who wish to file a complaint should contact the **Veterans' Employment and Training Service (VETS)** (www.dol.gov/vets/) of the U.S. Labor Department. VETS is required by USERRA to investigate all complaints.

If, as a result of its investigation, VETS determines that the alleged action occurred, VETS will attempt to resolve the complaint by making reasonable efforts to ensure that companies comply with USERRA.

If VETS does not resolve the complaint, workers may request that VETS refer complaints to the U.S. Attorney General. The Attorney General may appear on behalf of workers and file actions in federal court.

However, workers may also file **private actions** with their own attorney prior to seeking assistance from the U.S. Department of Labor, or, once VETS has completed their initial investigation, prior to seeking referral to the Attorney General.

Workers who have been harmed by a violation of this law may be entitled to lost wages or benefits, double lost wages if the violation was willful,

reasonable attorney fees and costs, court orders or injunctions, and contempt orders.

WORKER POLYGRAPH PROTECTION

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What Is It?

The Employee Polygraph Protection Act is a federal law restricting companies' use of lie detector tests for employment purposes.

What Does the Law Prohibit?

The law makes it unlawful for companies to:

- require, request, suggest, or cause a worker or applicant to take any kind of lie detector test,
- use, accept, refer to, or inquire concerning the results of any worker's or applicant's lie detector test,
- discharge, discipline, discriminate against in any manner, or threaten to take any such action against any worker or applicant on the basis of lie detector test results or because the worker or applicant refuses, declines, or fails to take a lie detector test.

Are There Exceptions That Allow Companies to Use Lie Detector Tests?

Yes, there are several:

- **Theft or embezzlement:** Companies who are conducting an ongoing investigation of economic loss such as theft or embezzlement may request workers to undergo polygraph tests under certain circumstances. The ongoing investigation must relate to a specific incident or activity that has occurred. This is not an easy exception for companies to use.
- Companies **cannot demand**, but may request, that workers take the test.
- In order to request that workers take tests, companies must meet several conditions:
 - workers must have had access to the stolen or embezzled property,
 - companies must have a reasonable suspicion that workers were involved in the theft or embezzlement,

- prior to the test, companies must provide workers with a statement that fully and specifically explains the particular theft or embezzlement being investigated and the basis for testing particular workers, and
- companies must retain copies of those statements for at least three years and make them available to the U.S. Labor Department's Wage and Hour Division.
- **Legally controlled substances:** Companies who dispense legally controlled substances may use polygraphs as part of ongoing investigations of crimes or other misconduct involving or potentially involving loss to the company.

In the context of these exceptions, companies may use the results of the test, as well as the workers' refusal to take the test, as evidence against them. However, companies must have additional evidence before they may take an adverse action against workers.

What If Collective Bargaining Agreements or State Laws Conflict with This Law?

Collective bargaining agreements and state laws that provide more protection override this law. However, state laws are invalid to the extent they provide less protection than this law.

Enforcement

Workers adversely affected by a company's violation of this law may sue in state or federal court within three years of the violation. Workers may be entitled to employment, reinstatement, promotion, and backpay, as well as attorneys' fees and costs.

A worker may also file a complaint with the U.S. Labor Department. the U.S. Department of Labor may seek civil penalties of up to \$10,000 against companies that violate the law.

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Introduction

Some states have laws limiting the company's authority to gather personal information on workers or share information with third parties such as lenders and other companies. Information concerning these laws is available from the state's department of labor.

Medical Information

The federal Americans with Disabilities Act (ADA) requires companies to maintain workers' medical histories on separate forms kept in files separate from workers' general personnel information. The ADA also requires companies to treat this information as confidential. Companies may disclose medical information only if:

- supervisors or managers need the information for purposes of duty restrictions or accommodations, or
- first aid personnel might require the information to administer emergency medical care.

Companies May not However Use the ADA to Deny Unions' Requests for Workers' Medical Information.

Medical information includes:

- doctors' reports,
- drug test results,
- family and medical leave request forms,
- return to work releases,
- workers' compensation records,
- information about disabilities, and
- medical histories.

For information on HIPAA, see that chapter of this manual.

Voice Mail and E-Mail

The federal Electronic Communication Privacy Act prohibits companies from knowingly disclosing information obtained from worker telephone conversations. Companies may however monitor calls and emails if they have adequate business reasons for doing so. Companies may not monitor personal phone calls beyond the time it takes to determine the call is personal rather than business-related.

Federal law does not directly regulate email privacy in the workplace. Though the Electronic Communication Privacy Act protects workers' privacy in their emails and other electronically stored materials, several exceptions make it inapplicable in the workplace. Companies may access and disclose information workers store on company computer systems. Companies may also intercept electronic information if they do so as part of their regular operations or to protect company property. Companies may, with worker consent, also monitor, access and disclose systems and electronic information.

Criminal Records

Under both federal and state laws, companies may inquire about felony convictions of job applicants. However, denial of a position must be based upon a legitimate business purpose. A rule that automatically bars all convicted felons may be illegal.

Consumer Credit Reports

Both federal and state laws restrict company use of worker credit information. However, federal law permits companies to obtain credit reports for employment purposes subject to a number of conditions. Before companies obtain credit reports workers must consent in writing. Companies must also certify that they clearly disclosed to workers in writing that companies may obtain their credit reports for employment purposes. If companies choose to take adverse action against workers based on credit reports, companies must furnish workers with copies of the report, provide them with the credit reporting agency's contact information, and inform them that they have the right to contact the agency or creditors if the report's information is inaccurate.

Company Surveillance of Workers

Under the National Labor Relations Act, a union may bargain restrictions on companies' ability to monitor workers' communication and other privacy restrictions. Workplace surveillance cameras, for example, are mandatory subjects of bargaining. Companies must provide unions with information regarding cameras, including their existing locations. Companies must bargain with unions over the placement of additional workplace surveillance cameras. Companies may not avoid this obligation by asserting that the information is confidential. Rather, companies must agree to an accommodation with the union that will meet the needs of both parties.

Company Social Media Policies and Worker Activity on Facebook, Twitter and Other Forms of Social Media

Companies cannot issue rules prohibiting workers from discussing their wages, workplace conditions, and worker or company performance issues on social media (such as Facebook or Twitter). Instead, the things that workers discuss online regarding working conditions that affect more than one worker may be protected activities under the NLRA. If companies discriminate against or punish workers for discussing workplace issues on social media, or institute across-the-board bans on such discussions, they may commit Unfair Labor Practices under the NLRA.

NOTICE OF PLANT CLOSINGS AND MASS LAYOFFS: WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT (WARN)

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What Is the WARN Act?

The Worker Adjustment and Retraining Notification Act requires companies to provide **written notice** of closings or layoffs to workers and unions 60 days before beginning a plant closing or mass layoff.

The law covers companies with at least 100 full-time workers or 100 full and part time workers who work at least 4,000 hours per week, excluding overtime.

A **plant closing** is a:

- temporary or permanent shut down
- of part or all of a single facility
- if the shutdown causes the termination of 50 or more full-time workers
- during any 30-day period.

A **mass layoff** is a:

- reduction-in-force that causes an **employment loss**
- during a 30-day period at a single facility
- that continues to operate with at least 1/3 of the full-time workers (but no fewer than 50), **or** at least 500 full-time workers.

An **employment loss** is a:

- layoff exceeding six months in length, or
- reduction of hours in work of more than 50 percent in each month of a six-month period.

Who Receives Written Notice of Plant Closing or Mass Layoff?

Companies must notify each union that represents workers who will likely suffer employment loss.

Companies of non-union workers must provide written notice directly to every worker who will likely suffer employment loss.

Companies must also notify local governments.

What Information Must the Notice Contain?

The notice must state:

- whether the planned action is expected to be permanent or temporary,
- the date of the 1st-layoff and a schedule of all layoffs,
- the names and job titles of affected workers, and
- information on dislocated worker assistance.

When Must Companies Give Notice?

Companies must give notice at least 60 calendar days before the planned closing or mass layoff.

Companies must give additional notice if the closing or mass layoff is extended more than 14 days beyond the date provided in the original notice.

How Do Companies Violate the WARN Act?

Companies violate the WARN Act if they lay off workers without giving them 60 days' notice.

Companies can avoid liability if they prove:

- workers continued to work at another company facility,
- unforeseeable circumstances prevented companies from giving the full notice and they gave notice as soon as practical, or
- giving full notice would hamper getting business or capital that would benefit company operations and the company gave notice as soon as practical.

How Is the WARN Act Enforced?

Filing lawsuits in federal district courts is the sole means of enforcing the WARN Act. Either the union or the workers may file lawsuits on behalf of all affected workers.

Local governments may sue companies for civil penalties for violating the WARN Act provisions requiring companies to notify local governments.

What Are the Remedies for WARN Act Violations?

Remedies for WARN Act violations include backpay and benefits for up to 60 days. Remedies may include reasonable attorneys' fees.

What Is the WARN Act's Statute of Limitations?

The limitations period for filing WARN Act lawsuits is the most analogous state statute of limitations (which is usually for breach of contract and is often three years).

How Does the WARN Act Relate to Collective Bargaining?

The National Labor Relations Act requires companies to provide unions with information they request about facility closings or layoffs.

Unions cannot waive workers' WARN Act rights in return for previously obligated severance pay or other employment benefits.

WHISTLEBLOWER PROTECTION LAWS

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What Are They?

Workers who report their companies' illegal or otherwise improper activities are often referred to as whistleblowers because they "blow the whistle" on company misconduct.

Because such workers help protect the public from unscrupulous company conduct, some state and federal laws in certain circumstances protect them from company retaliation for reporting misconduct.

Identifying the Applicable Whistleblower Protection Law

There is no single federal law that covers all whistleblower claims. Rather, whistleblower provisions are scattered throughout various federal and state statutes. It is important to recognize that the specific rights available to whistleblowers will depend on the type of problems or illegal practices they report.

To determine whether state law protects whistleblowers, unions should contact the state agency that covers the type of problem the worker blew the whistle on. For example, if the worker reported environmental problems, unions should contact state environmental agencies. If the problems concerned food safety, unions should contact state agricultural or health inspection agencies. Unions can also consult attorneys who practice in these areas.

State Protection

Almost all states have at least one whistleblower protection law that protects workers who suffer retaliation for reporting illegal conduct. State whistleblower protection rights may exist under:

- a single whistleblower law,
- laws relating to specific industries, regulatory laws, or state departments or agencies, for example, healthcare, food safety or worker safety.

Federal Whistleblower Protection Laws

The False Claims Act

The False Claims Act provides that workers who companies discharge, discipline, or otherwise discriminate against for blowing the whistle on government contract fraud are entitled to double damages (for loss of salary), special damages (for harm to reputation), a court order or injunction, and attorneys' fees. The False Claims Act prohibits companies from knowingly submitting false claims to the federal government, or knowingly making false statements in connection with federal claims. In many cases, the Justice Department will file claims in federal court.

If the government declines to pursue the matter, the False Claims Act permits private parties to bring actions on behalf of the federal government and themselves in federal court. The party who brings such a claim is entitled to 10-30 percent of the fraud damages and civil penalties recovered, plus attorney fees and costs.

Federal Environmental Violations

Several laws provide protection for environmental law violation whistleblowers. A single set of administrative procedures govern these matters.

Complaints arising under any of these laws must be filed with the U.S. Labor Department's Occupational Safety and Health Administration, usually within 30 days of the company's retaliation.

Claimants are entitled to reinstatement, backpay, and compensatory damages. Two of the statutes also allow for punitive damages. Claimants can also recover attorneys' fees and costs.

There are a number of additional federal whistleblower protection laws that govern other distinct regulatory areas, such as ERISA.

The Sarbanes-Oxley Act provides whistleblower protection to workers reporting certain corporate fraud to federal agencies, law enforcement authorities, Congress, or supervisors if that fraud adversely affects the value of the company's stock.

THE LAW GOVERNING UNION COMMUNICATIONS: DEFAMATION & UNION USE OF COMPANY LOGOS OR TRADEMARKS

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Legal Review of Communications or Defamation Law

Introduction

Defamation -- or libel and slander law -- is an important legal topic for campaigners in organizing campaigns and other union representatives in contract campaigns. (In general, defamation is when someone says or prints something that unlawfully injures or “defames” the reputation of another person or entity.) If unions take certain precautions, they can conduct effective publicity campaigns while at the same time minimize the risk of defamation liability. This is important for three reasons.

First, liability for defaming a company can be large. The amount – called “legal damages” -- is measured by the “value” of the “injury” to the company’s “reputation” – a vague concept. The law leaves it up to juries to decide the value in dollars for the injury to reputation with little guidance and few restrictions. Second, if the union’s lawyers cannot persuade courts to dismiss defamation lawsuits early in the litigation process, the union will have to spend more on attorney’s fees. This could lead to pressure on campaigns to back off. Third, litigation consumes a lot of the campaign’s time and for that reason can be a major distraction.

To avoid these possible problems, unions must justify all negative facts in their communications with reliable sources of information. This preserves the credibility of the current campaign and the union’s credibility for future campaigns.

This primer covers the basics of defamation law so unions, first, are better prepared to identify what statements need to be justified, and second, so they can more easily and quickly persuade attorneys to approve their communications.

Overview

As discussed below, defamation is specifically a **false negative** statement of **fact about a company** that is publicized to outsiders or third-parties. Third parties include the press, the general public and even workers and members. Unions have the most protection when they publicize communications in the middle of “labor disputes,” or when the communications are about “matters of public concern” directed at “public figures.”

What Protections Do Unions Have When They Publicize Communications in Labor Disputes or About Matters of Public Concern Involving Public Figures?

If the factual statement is made in the course of a “**labor dispute**,” the Union should not be liable for defamation unless the company meets the First Amendment Free Speech requirement of proving that the union made the statement with “actual malice.” This actual malice or First Amendment standard requires the company to prove that the union made the statement **knowing it was false** or **recklessly disregarding whether it was false**. (So, under the law, “actual malice” does not mean ill will or, literally (or actually), “malice.”)

If the union publicizes a communication in the middle of a labor dispute, all the union has to do is: (1) **justify each negative factual statement** with some **reliable documentation or source of information**, such as a press or government report or what workers have told the union, and (2) verify that the union has **no reason to doubt the document, the source or the information**.

If, on the other hand, the union publicizes the communication **outside** of a labor dispute, the union may have to prove that the factual statement is **really true**, not just that it was reported in a news source or even government report.

For example, if the First Amendment standard applies, the union may rely on newspaper articles to justify factual statements that some of the company’s stores have had sanitation issues. If the First Amendment standard does not apply, the union may have to prove that the stores **actually had sanitation problems, not just that the newspaper reported problems**. To state the obvious, proving that the stores actually had sanitation problems – and not just that the newspaper reported problems – would be difficult.

The First Amendment standard also protects communications involving “**matters of public concern**” about “**public figures**.” As discussed in more detail below, matters of public concern are **issues** in the **press, politics** or **public domain** that **potentially affect more persons than those directly involved**. Public figures are persons, managers, executives and companies who **enter the public debate by publicly commenting about matters of public concern**. Public figures are also those persons or entities whose names are commonly known as household words in the audience the communication targets.

When a company or executive is quoted in the press commenting about matters of public concern, no communication the union makes about the company or executive **on this subject matter** should be defamatory unless the

union knew that the communication's factual statements were false or recklessly disregarded whether they were.

* * *

Summary

- It is important to carefully document factual statements in communications to protect the union's treasury and to avoid pressure on campaigns to tone down their messages, and maintains the campaign's credibility for current campaigns and future campaigns.
- Defamation is a **false negative** statement of **fact** that is publicized to third-parties.
- If the union makes the communication in the course of a "**labor dispute**," the union should not be liable for defamation unless the company proves that the union made the statement in violation of the First Amendment standard because the union made the statement **knowing it was false** or **recklessly disregarding whether it was false**.
- The First Amendment standard also protects communications involving "**matters of public concern**" about "**public figures**."
- Matters of public concern are **issues** in the **press, politics** or **public domain** that **potentially affect more persons than those directly involved**.
- Public figures are persons, managers, executives and companies who **publicly comment about matters of public concern, or whose names are household words**.
- For easier and quicker legal review and approval, campaigners must have prepared documentation for every negative fact in their communications, and verify that the union has **no reason to doubt** the **source or information**.

* * *

What Is Defamation?

This section discusses the basics of “defamation” and gives an overview of the types of statements that may or may not be defamatory, including “statements of facts,” “opinions,” and “rhetorical hyperbole.”

Definition

Defamation is a **false negative** statement of **fact** communicated to third parties, such as the media, the community, the general public, workers, other unions and members.

The factual statement must be **negative**. If it isn't, it is unlikely any company would bother to sue, even if the statement was somehow untrue.

Example: If the communication said: “Wal-Mart’s sales in 2012 were \$400 billion,” but Wal-Mart’s sales were really closer to \$350 billion, Wal-Mart is not going to sue because the union publicly credited it with more sales than it really had.

Example: In contrast, “Numerous states have issued reports finding that many products Wal-Mart sells are dangerous to families” is negative.

What Are “Statements of Fact”?

Only statements of fact can be defamatory.

Definition: A “fact” is information that can be **verified** or **objectively proven**. Another way to think of factual statements is that they are **not subject to reasonable argument**. Once someone investigates or researches whether the fact is true and comes to a conclusion, no one should be able to reasonably disagree with whether the information is true.

Example: The factual statement that “numerous workers have been injured on the job in pork company’s plant” can be verified or proven. Either more than a few workers have been recently injured at the plant or they haven’t.

Example: In contrast, the statement “The pork company’s plant is unsafe” is more difficult to verify because the term “unsafe” is somewhat vague. What might be unsafe to one person might not be unsafe to another. For example, a plant that has many machines that could injure someone operating them at a fast pace may be

“unsafe” to some people. But others may think that plant is safe because no one has been injured in years. Because both of positions are reasonable, the statement -- “the plant is unsafe” -- cannot really be verified as true or not, and therefore is not a statement of fact.

Characterizations and Generalizations

The way communications characterize or generalize factual statements can significantly change the meaning or scope of the factual statement. In which case, unions will need to document or have information to justify **how** the communication **more broadly** generalizes or **differently characterizes** the factual statement.

Example: A communication that states that the company “**uses (present tense)** violence to intimidate workers out of exercising their rights” will require information showing that the company **recently** used violence against its workers. The communication should probably be in the past tense if the union’s most recent information is that the company’s security guards assaulted union supporters 3 years ago.

Example: Likewise, if reports show that the health department found health code violations in 2 out of the company’s 30 stores, the communication should not generalize in a way to imply that most or all of the stores had violations.

Campaign Message Caution

Even if the union can legally justify the generalization or characterization, unions should carefully consider whether the characterizations or generalizations nevertheless undermine the campaign’s credibility or message or opens the campaign up to attack for exaggerating or mischaracterizing information.

Context

Courts interpret factual statements in the **context** of the **entire communication**. When preparing for legal review, unions should therefore **not** consider factual statements in isolation, but instead as an average reader would read them against the whole scope of the entire communication. For this reason, unions must be prepared to justify the factual statement in its context.

Example: Factual statements about what a company has done that appears in a report whose title includes the word “Crime” could be interpreted as stating that whatever the company did was a “crime” even if the specific statements do not individually mention crimes.

Example: A communication discusses how the company committed civil or non-criminal violations of the National Labor Relations Act. This context makes clear that when the communication says the “NLRB is **prosecuting** the company for unfair labor practices (ULPs),” the Union is **not** suggesting that the government has charged the company with crimes.

Example: On the other hand, if the handbill solely says “the government is prosecuting the company for violations of federal labor law,” there is no context to show that the union is really talking only about ULPs. An average reader could understand the union’s message to be that the government has in fact charged the company with a crime. In which case, **this** will be the factual statement the union must justify.

Strategy

Communications should include specific cites to sources. Some courts have ruled that communications that refer to sources help put the factual statements in a safer or more accurate context. Someone who reads the sources the communication cites will understand what the union is saying and, more importantly, not saying.

Example: A communication that solely states: “the government is prosecuting the company for violations of federal labor law” should be put in the correct context if it refers to the National Labor Relations Board (NLRB) and includes the title of the complaint, docket number, the name/address/telephone number of NLRB Regional Office, Regional Director or NLRB attorney prosecuting the ULP case, etc.

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Summary

- Only statements of fact can be defamatory.
- Is the statement capable of being objectively proven true or false? If so, it is a factual statement.

- The vaguer the word and the more meanings it reasonably suggests, the less likely it is to be an objectively verifiable factual statement.
- The scope of the factual statement will be determined by the way the communication characterizes and generalizes the statement, and the entire context of the communication in which it appears.
- Carefully consider whether characterizing or generalizing information more broadly or differently than the source advances the campaign.

* * *

Messages That Are Not Factual Statements: What Are They?

Opinion

Pure opinion alone cannot be defamatory. (But, as discussed below, statements of facts that opinions imply or are based on can be defamatory.)

What Are Opinions?

Opinions are expressions of subjective views, interpretations and conclusions that are **not** capable of being objectively proven.

Example: The statement “The pork company’s plant is unsafe” is really an opinion.

Example: The statement “the company cheats its workers” is an opinion because the term “cheats” is ambiguous. Certain actions like the company sending workers home early so they don’t work their entire schedules may be “cheating” to some people because the company denied workers the opportunity to earn more money. On the other hand, other people may think it’s not cheating because in the end the company paid the workers for all hours worked.

Example: The statement “company is unfair” is opinion. How could someone objectively prove whether the company is or is not “unfair”?

Caution: Communications that say “in my opinion” do not convert factual statements into opinions. Courts and reviewing attorneys will determine if the message is really a factual statement.

Example: The statement, “in my opinion John Jones is a liar,” implies a knowledge of facts that lead to the conclusion that Jones told an untruth.

* * *

Summary

- Pure opinion by itself cannot be defamatory.
- Opinions are expressions of subjective views, interpretations, and conclusions that are **not** capable of being objectively proven.
- Unions’ clever attempts to change factual statements into opinion by saying “in my opinion” don’t work.

* * *

“Rhetorical Hyperbole”

Like opinions, rhetorical hyperbole is not defamatory because the Supreme Court recognizes that speech may “include vehement, caustic, and sometimes unpleasantly sharp attacks.” “This assures,” the Supreme Court said, “that public debate will not suffer for lack of ‘imaginative expression’ or ‘rhetorical hyperbole’ which had traditionally added much to the discourse of our Nation.”

As a result, the First Amendment “gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point.”

What Is Rhetorical Hyperbole?

Statements that are merely annoying or embarrassing or just a vigorous epithet are rhetorical hyperbole and not defamatory. In this way, the First Amendment protects **harsh name-calling**.

Having said that, unions should carefully consider whether this type of hyperbole is effective for campaigns. Hyperbole usually fails to persuade people, and frequently turns people off and could make them more sympathetic to companies.

Heated, vehement, etc., language or name-calling is rhetorical hyperbole. When determining whether communications constitute rhetorical hyperbole, courts consider the context of the communication and how readers would

reasonably understand the communication. One court case illustrates this analysis.

The case involved a small newspaper that covered city council meetings where a developer engaged in hard negotiations with the council over zoning issues and land the developer owned that the city wanted to build a school on. The newspaper characterized the developer's negotiation strategy as "blackmail." The court found the term blackmail to be rhetorical hyperbole because it was simply impossible to believe that a reader who read the word "blackmail" would not have understood exactly what was meant: it was the developer's wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging the developer with the commission of a criminal offense.

Examples:

- Wal-Mart as terrorists
- The manager is a "bloodsucking, plantation-minded boss"
- Manager is a "Little Hitler," the workplace is a "Nazi concentration camp" and company uses "Gestapo" tactics
- Statements describing company as criminals, union-busters and "part of that World War II generation that danced on the graves of Jews"
- Wal-Mart calling a competitor's store "trashy," even if the store was not, in fact, unkempt
- Statement asking "Why has the company finally agreed to stop off-the-clock work? Because the Union demanded it at the bargaining table!"
- Statement attacking company's "sweatshop conditions" and suggesting that "a health emergency exists" in the workplace
- Statements that company discriminates against union members

Limits

Courts have imposed limits, however.

In one case, the union displayed a banner that stated "THIS MEDICAL FACILITY IS FULL OF RATS." The banner did not say that the term RATS referred to a non-union contractor. As such, the banner could have misled a

reader about a rodent problem that the facility did not have. The court ruled the banner was a factual statement and not rhetorical hyperbole.

Be Careful About Facts That Communications Imply

Facts that pure opinions, rhetoric and other messages are **based on or reasonably imply** can still be defamatory. The question is whether a member of the target audience could reasonably conclude that the **communication implies factual statements in addition** to those **explicit in the communication**.

Example: The statement “The plant is unsafe” reasonably implies that the union is aware of some facts showing that the plant is unsafe.

Strategy: To avoid problems with implied facts, communications should state the facts on which they are based. This makes it unreasonable for a reader to imply facts other than those the communication states. (Of course, the union must have the information or documents to justify the stated facts.)

Example: If the communication refers to several specific accidents in the plant that occurred over the past year, it is clear these — and **not** anything else — are the facts on which the union bases its opinion that “This pork company’s plant is unsafe.”

Example: If the communication lists the ULPs that the company committed, it is clear that these are the facts the union believes justify its rhetoric that “the company’s actions against its workers are criminal.” If the communication failed to list those ULPs, a reader could reasonably understand the communication implies that the company has committed crimes.

Caution: Communications that use the word “allege” or simply “ask questions” almost always imply factual statements that the union must justify.

Example: The “question” “Has the company owner stopped beating his wife?” suggests facts that no union will be able to avoid responsibility for by claiming that it’s only a question.

How Communications Should Be Read

When deciding whether a statement is factual, opinion or rhetoric, courts will interpret the communication, giving language its ordinary and popular meaning.

Communications should be interpreted as the targeted audience would understand them, not as lawyers precisely dissect language. In other words, what counts is how an ordinary member of the audience would understand the entire communication in light of surrounding circumstances, not how some English professor hyper-technically interprets it.

If the audience would have to struggle to see how the communication defame, the words are not defamatory. Communications that are defamatory only with a most vivid imagination or hypothetically are not defamatory.

* * *

Summary

- Facts that communications are **based on** or **reasonably imply** can be defamatory.
- The question is whether a member of the targeted audience could reasonably conclude that the communications imply factual statements.
- To avoid potential problems with implied facts, communications should expressly state the facts on which they are based.

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Defamation in Labor Disputes

The Supreme Court has ruled that to prove that a factual statement a union made during a labor dispute was defamatory, the company has to prove that the union made the statement in violation of the First Amendment standard by proving that the union made the factual statement knowing it was false or recklessly disregarding whether it was false.

This section discusses what is a “labor dispute,” what is the First Amendment “actual malice” standard and how unions should prepare for legal review of communications.

What Does the Company Have to Prove to Show That the Union Violated the First Amendment Standard?

It is very difficult to prove that another person made a statement knowing that it was false or carelessly disregarding whether it was.

Importantly, if the First Amendment standard applies, the union does not have to prove that the factual statement was true, but just that the union had **no reason** to believe it was **not** true. The way to do this is for the union to justify every negative factual statement on credible, documented sources of information.

For example, if in the middle of a labor dispute (when the First Amendment standard applies), the union publicizes a communication stating that a large retailer buys merchandise from Chinese factories that employ underaged girls, the union can base this factual statement on a New York Times article discussing it because the union has no reason to disbelieve the New York Times as a source or the relevant facts in the article.

If there's **no** labor dispute, and the First Amendment standard does not apply for other reasons, to dismiss the lawsuit, the union may have to prove that the factual statement is true. In the above example, if the First Amendment standard did not apply, the union may have to fly someone to China and interview the factory's workers to prove that the factory produces the particular merchandise the communication mentions and that the factory employs underaged girls.

It is hard for companies to prove defamation in labor disputes because:

labor disputes are "ordinarily heated affairs; the language that is commonplace . . . might be deemed actionable per se in some state jurisdictions. [C]ampaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions."

Consequently, if during labor disputes, a union bases communications on reliable sources that the union has no reason to doubt, such as the media, the government or worker reports, the union will have a very powerful defense to defamation cases.

* * *

Summary

- Factual statements unions make during labor disputes are defamatory **only if** companies prove that the union made the statements in violation of the First Amendment standard.

- The First Amendment standard requires companies to prove that the union made the factual statement knowing it was false or recklessly disregarding whether it was false.
- If unions base communications they publicize during labor disputes on reliable sources that the union has no reason to doubt, such as media, government or worker reports, the union will have a very powerful defense to defamation cases.

* * *

What Are Labor Disputes?

Courts interpret the term “labor disputes” very broadly to include any dispute between unions and companies over employment matters. The First Amendment standard applies therefore to virtually every statement unions make about companies.

Example: In a case involving UFCW Local 655, the union publicly challenged a grocery store’s nonunion status, prices and discriminatory treatment of African American workers. The company argued that there was no labor dispute because the Union had previously stated that it had **ceased** organizing efforts and disclaimed interest in organizing the company’s workers. Rejecting the argument, the court found that the statement did not matter and instead ruled that a union picketing or boycotting a business which it has not tried to organize (and in some cases cannot organize) nevertheless involves a labor dispute.

What Is the First Amendment Standard?

A union communicates a negative false statement of fact in violation of the First Amendment standard when the union knew the fact was false or recklessly disregarded whether it was false. When the First Amendment standard applies, it is very difficult for companies to prove defamation.

Inaccuracy itself does not violate the First Amendment standard. Even if the communication contained a dozen errors, mistakes or bad judgment, this by itself does not prove knowing falsehood or reckless disregard of falsity, when the author in good faith believed that the facts were correct and truthful. In other words, if the union publicized the communication in good faith, the union has not violated the First Amendment standard. Similarly, no matter how misleading a misquotation in a communication is, it does not by itself establish

that the union publicized the communication in violation of the First Amendment standard.

On the other hand, courts have ruled that the union's failure to interview key witnesses who could confirm the factual statements or to otherwise conduct a complete investigation suggests a deliberate effort to avoid the truth. Such "purposeful avoidance" can be enough to prove that the union publicized the communication in violation of the First Amendment standard.

Unions violate the First Amendment standard when:

- The union made up the communication or where the communication was the product of someone's imagination.
- There are obvious reasons to doubt the truthfulness of the union's sources.
- The union deliberately avoided the truth by failing to conduct a reasonably complete investigation.
- The communication is so inherently unbelievable or improbable that only a reckless person would have publicized it.

News Reports

Unions do not act recklessly by relying on reports of reputable news organizations, if the union does not have any specific reason to doubt their accuracy. On the other hand, if the union knows from its own information from other sources that the news reports are false, they didn't really "rely" on the news reports; they simply tried to hide behind them.

Example: If because of its contact with workers the union knows that statements in a newspaper article about the healthcare the company provides are wrong, the union cannot rely on the article as a basis for its own communication repeating the article's erroneous statements.

Worker Reports

Unions may rely on information workers provide.

Example: In one case, a union based negative statements about a nursing home's patient care on what workers and relatives of residents told the union. The authors of the communication did not have personal knowledge of the nursing home's conditions, or any

other information verifying what the workers and residents' relatives told the union.

Despite this, the court ruled that the union did **not** publicize the communication in violation of the First Amendment standard because the nursing home did not prove that the union had reason to doubt what the workers or residents' relatives said.

Strategy: When relying on worker reports, campaigners must take and keep good, detailed notes of what workers said.

Caution: Campaigners should not rely on the accounts of workers who are likely to later deny ever having spoken to the union. While a court is unlikely to find a violation of the First Amendment standard when the court believes that the union in good faith misunderstood what a worker said, the court may find that the union violated the standard if the court doesn't believe that the union ever spoke to the worker.

* * *

Summary

- First Amendment standard means publicizing a communication knowing its factual statements are false or recklessly disregarding whether they are false.
- Reliance on reports of reputable news organizations cannot violate the First Amendment Standard, unless the union had specific reason to doubt the accuracy of the reports.
- When relying on worker reports, campaigners must take and keep good, detailed notes of what the worker says.
- Campaigners should be careful to avoid relying on the accounts of workers who are likely to later deny ever having spoken to the Union.

* * *

Court Case Discovery

Union representatives should be careful what they say in paper and electronic documents and messages, including emails, and how they say it. This is because in court cases companies can discover or get copies of all documents

and messages unions create. Management attorneys frequently try to twist out of context things representatives say on the spur of the moment, carelessly or without thinking how an outsider, like a judge, might read the document, message or email. Emails are frequently written unintentionally in ways that writers would never speak or write in a paper document.

For this reason, when writing documents and messages, representatives should – **before** sending them – consider how the company, a company attorney or Fox news might be able to misrepresent the meaning. After considering this, the representative may need to rewrite the document or message, or it can't be satisfactorily rewritten, just pick up the phone and call instead of emailing.

Example: Instead of emailing that the action will “kill” the company’s sales or put the company “out of business,” a representative could write that the action is likely to be effective.

In the context of public communications, campaigners should be careful to avoid using language that could make it look like the union exaggerated statements of facts, said something the union lacked a basis for saying, or had reasons to doubt.

Preparation for Attorney Review

Before submitting any communication for legal review, campaigners who want attorneys to quickly approve communications must be prepared to provide copies of articles, reports, or other documents or information justifying all of the communication’s negative factual statements, including how the communication characterizes or generalizes negative facts.

Campaigners should carefully read the **entire** back-up sources to be sure there’s nothing in them that undermines the factual statement the campaigner is using the source to support. While the campaigner may rely on any reputable or reliable source of information, the attorney may require the campaigner to conduct more follow up if the source comes from the labor movement or a UFCW department.

Campaigners should consider creating a copy of communication with footnotes to every factual statement citing sources.

Before speaking with the attorney, the campaigner should have checked with the relevant union staff and departments to verify that the union has **no reason to doubt** the factual statement.

* * *

Summary

The campaigner should be prepared to document that:

- the union is issuing the communication in the midst of a labor dispute,
- there is a documented justification for every negative factual statement in the communication, and
- the campaigner has checked with the relevant union departments and verified that the Union has no reason to doubt the facts.

* * *

Create and Keep a Folder

For every communication, the union should create **and maintain** a separate folder with:

- copy of the communication
- legal approval or a note indicating that legal reviewed and approved the communication
- notes showing the campaigner checked with the relevant union staff and departments to verify that they do not know of any information that contradicts the communications factual statements,
- all back up, and
- an annotated copy of the communication.

Defamation Outside of Labor Disputes

An attorney or court might believe that a communication does not arise in the midst of a labor dispute because it only concerns topics -- such as consumers, the environment, the community, etc.—that do not appear to directly relate to workers or working conditions. If this occurs, the First Amendment standard nevertheless applies if the communication involves a “matter of public concern” about a “public figure.”

As discussed below, a matter of public concern is an issue the media is covering or that is otherwise in the public domain that potentially affects more than the people directly involved. A public figure is someone who publicly comments about a matter of public concern.

While the law technically requires communications to be about matters of public concern to be protected by the First Amendment standard, many courts almost ignore this requirement and focus almost exclusively on whether the target of the communications is a public figure. Therefore, the focus of the legal analysis is preliminarily and primarily on the target of the communication, not its subject matter.

This section discusses what are “matters of public concern,” and who are and are not “public figures.”

What Are Matters of Public Concern?

A matter of public concern is an issue or controversy that potentially affects more persons than the parties directly involved. While matters of public concern frequently arise in the political or governmental context, a matter of public concern is also one that relates to any serious issue relating to, for example, community values, historical events, arts, education or public safety.

According to one defamation expert, matters involving collective action such as the activity of labor unions, publicly-held corporations, political activity or consumer boycotts are likely to always be matters of public concern because they are linked to interests beyond those of the immediate participants.

Examples:

- Health care
- Immigration
- National security and terrorism
- The quality of a product offered to the general public
- Possible consumer fraud
- How large or public corporations are operated or regulated

Private Matters

In contrast, a divorce or a dispute between one customer and a retailer over a single defective product would unlikely affect parties other than those directly involved and in turn usually would not be matters of public concern.

The curiosity of the general public in private matters that do not impact anybody but the direct participants do not transform private matters into matters of public concern.

Example: Private matters that involve the drug use or sexual exploits of rich but private people are not public matters unless and until those family members publicly comment on these matters.

* * *

Summary

- Issues or controversies in the press or public domain that potentially affect more than the direct participants are matters of public concern.
- Matters involving collective action such as the activity of unions, publicly-held corporations or consumer boycotts are likely to be matters of public concern.
- Public curiosity in private matters that do not impact anybody but the immediate participants, such as divorce proceedings, do not transform private matters into matters of public concern.

* * *

Who Are Public Figures?

There are two types of public figures. First, general “all purpose” public figures are well-known celebrities whose names are **household words**. These people are public figures for all purposes, even if they do not publicly comment about any matters of public concern. General all purpose public figures are also defined as people or entities who hold positions of pervasive power or influence, such as Mohammed Ali, Johnny Carson, Ralph Nader, Ross Perot, Jane Fonda and Jerry Falwell. **Few people** have the general notoriety that would make them **general public figures** for all purposes. The First Amendment standard protects all communications about persons and entities who are general public figures whether or not those communications constitute matters of public concern.

More common, the second type of public figure consists of people who are public figures **only for the limited purpose of the particular matters of public concern** into which they voluntarily thrust themselves, thereby inviting attention and comment. Although the First Amendment standard applies to all communications about general public figures, the First Amendment standard **only applies to matters of public concern** or issues **limited public figures voluntarily publicly comment on or place into the public domain or the press.**

Persons or entities who have **publicly commented** about the **matter of public concern** that is the **subject** of the union's **communication** are **public figures** for the purposes of that **matter of public concern.**

Example: Large retailer CEO Joe Smith publicly defends in the press the health insurance the large retailer provides to its workers. If this is the only topic Smith has spoken to the press about, then Smith is a public figure for the topic of that large retailer's health insurance, but **not** necessarily for other topics.

Public figure status requires the person or entity to have voluntarily and affirmatively commented on a matter of public concern before the union publicized the communication.

Example: One court case involved a gossipy piece that Time Magazine ran about Mary Alice Firestone's litigation over her divorce from an heir of one of America's wealthiest families. The article stated that the judge said that the trial produced enough testimony of extramarital adventures on both sides "to make Dr. Freud's hair curl."

Ruling that she was not a public figure, the court found that Mrs. Firestone did not **voluntarily** or freely choose to publicize the propriety of her married life. She was compelled to go to court by the state in order to obtain legal release from the bonds of matrimony. The court rejected Time's argument that she was a public figure because the divorce was publicly notorious.

Nor did the court feel that the fact that Mrs. Firestone held a few press conferences during the divorce proceedings to satisfy inquiring reporters converted her into a public figure because there was no indication that she sought to use the press conferences to thrust herself to the forefront of some public controversy.

Being Newsworthy Alone Is not Enough

In another case, the Supreme Court ruled that a person does not become a public figure solely because a matter involving him was newsworthy. The Court explained that the fact that the matter attracted media attention was not conclusive of public figure status. In other words, a private figure is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.

Persons Do not Become Public Figures Because They Publicly Defend Themselves or Publicly Respond to Someone Else's Communication

Another Supreme Court case ruled that people cannot transform private figures into public figures by issuing communications that prompt them to publicly defend themselves or to publicly respond to communications. Rather, the matter of public concern and the person's involvement in it must **precede** the communication.

Example: A researcher who sued Senator William Proxmire for awarding him the Golden Fleece Award for his research of stressful animal behavior. The Court held that the researcher was not a public figure by virtue of his application for federal research funding, local newspaper reports of grants the researcher received or his access to the media as demonstrated by the fact that some newspapers and wire services reported his response to the announcement of the Golden Fleece Award.

Company Executives Who Publicly Comment on Issues Are Public Figures

While being an executive by itself does not necessarily make someone a public figure, publicly commenting on matters of public concern does.

Example: One court found Mobil Oil's president to be a public figure because he rigorously attempted to thrust Mobil and himself to the forefront of the national controversy over the oil industry. Mobil's president also played a substantial role in spearheading a public counterattack on the movement for oil industry reform. The court noted that the 500-page collection of news clippings also attested to the fact that Mobil's president was outspoken and in turn a public figure.

Example: In another court case, the court found that an officer of the second largest cooperative in the country was a public figure. The officer played an active role not only in the management of the cooperative but also in setting policies and standards within the industry. He held several meetings to which press and public were invited on topics varying from supermarket practices to energy legislation and fuel allocation.

These actions generated considerable comment on both the cooperative and the officer in trade journals and general-interest publications.

Finding the coop officer to be a public figure, the court found that the officer was not merely a boardroom president whose vision was limited to the balance sheet. He was an activist, projecting his own image and that of the cooperative far beyond the dollars and cents aspects of marketing.

Companies as Public Figures

In one case, a court ruled that because of its advertising blitz, a company invited public attention, comment and criticism sufficient to be deemed a public figure for the purposes of a television broadcast questioning the quality of company's product.

Example: A large retailer says in advertising that it provides low prices to customers. The large retailer is a public figure for purposes of communications about its prices (and the First Amendment standard applies to the union's communications on this subject).

Example: In contrast, a company that sold a garbage recycling machine to a Georgia county was not a public figure for the purpose of a report about the problems with the machine because even though the machine's problems were a matter of public concern, **it is the person's role in the matter of public concern, not the matter itself, that is determinative of public figure status.** The company did not publicly join the public controversy or try to influence its outcome.

Government actions against companies make companies public figures for those actions: Courts have ruled that companies become public figures when they undertake practices or activities that lead to their becoming the subjects of governmental enforcement actions aimed not only at ending such practices and activities but also at alerting the public about them.

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Summary

- The First Amendment standard applies to those matters of public concern that public figures actively and voluntarily and publicly comment on.
- To become a limited public figure, a person must:
 - ◆ **before** the union publicizes the communication
 - ◆ voluntarily have commented on the particular matter of public concern that was the subject of the communication.
- Unions cannot transform private figures into public figures by **prompting** them to publicly respond to communications or to publicly defend themselves because persons who only **respond** to communications do **not** voluntarily interject themselves into matters of public concern.
- Persons do not become public figures solely by being newsworthy.
- People who voluntarily engage in a course of conduct bound to invite attention and comment or an activity out of which publicity would foreseeably arise are public figures.
- Company executives who are the company's public face are limited public figures. Executives who avoid the press are not.
- A company can become a public figure through an advertising blitz that invites public attention, comment and criticism. Courts have differed on whether mere advertisements will earn a company public figure status.
- Government enforcement actions against companies make those companies public figures.

* * *

Preparation for Attorney Review

Like preparing for legal review in labor disputes, the campaigner must justify all of the communication's negative factual statements. In addition, **before** contending that the union can publicize a communication about an executive,

manager or company because the communication involves a matter of public concern, the campaigner must also to provide documentation showing that:

- the subject matter of the communication is an issue or topic in the press, before the government or otherwise in the public domain, and
- the target of the communication has previously publicly commented on communication's subject matter.

Unions' Use of Company Logos or Trademarks in Communications

Unions sometimes believe their communications will be more effective if they use the company's logo, trademark or tradename. In general, unions can use company trademarks to publicly comment about the company as long as the union does not appear to pass itself off as the company in the communication.

To avoid legal issues over trademarks, union communications should:

- Be clearly critical of the company, and
- Clearly identify who is responsible for the communication, whether it is the union or another party, such as a worker association or community group coalition.

If the communication is expressly critical of the company and states that it was published by someone other than the company, it is unlikely that anyone who sees the communication would confuse it with something the company might have published.