

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

**THE ABCS OF LABOR AND
EMPLOYMENT LAW**

UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION,
AFL-CIO, CLC

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

This how-to book 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 workers and treat them fairly. This is not a technical primer for identifying legal violations so lawyers can file cases.

The objectives of campaigns and bargaining should always control legal strategies. Rather than asking if a company action enables a legal tactic, we should ask if a legal tactic advances the goals of the campaign or representation. Would the legal tactic lead to 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 not, unions should avoid diverting 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 governmental agencies often lack the resources or inclination to fully enforce them. Worse yet, legal actions often proceed far too slowly to make any difference.

If unions decide to pursue legal strategies, unions must confront the limitations of conventional legal wisdom and challenge our lawyers to try new legal tactics and find ways to overcome legal limitations. When lawyers say no to a legal strategy, we should challenge lawyers to confirm that the laws in fact prohibit unions from doing what they need to do.

We, like companies, must challenge our attorneys to assess the risks and benefits of any legal strategy. Does the downside of a legal strategy risk the union's treasury or just a notice posting? Would the success of a legal strategy move the Union a long way towards winning 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 suggestions and corrections to the International Legal Department.

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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 take or participate 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 companies. The NLRA does not cover 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 if the person takes any one of the following actions using "independent judgment" or "effectively recommends" any of these actions:

- hires workers,
- "responsibly" directs workers,
- assigns workers,
- transfers workers,
- rewards workers,
- promotes workers,
- disciplines workers,
- suspends workers,

- discharges workers,
- lays off or recalls workers,
- resolves worker grievances or other workplace issues, or
- effectively recommending any of these actions.

(Note: The definition of “supervisor” under other laws may be different.)

What does exercising independent judgment mean? Persons exercise 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 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 sends a cashier home for being late one time too many according to the company’s time and attendance policy. The front end manager is not exercising independent judgment. But, a front end manager exercises independent judgment when the manager sends a cashier home because the cashier is in the front end manager’s opinion or judgment not 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 time cash registers are open, and ensures that the store has enough cashiers.

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 higher-level managers hold the person responsible if the other workers don’t do their job correctly. If the person only tells other workers to do their jobs the way company policy or practice requires, the person does not responsibly direct and is instead a lead worker.

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 rotate the vegetables before spraying them as the policy requires.

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 investigation.

Example: A department manager has the authority to effectively recommend if whenever the manager suggests that the plant manager write up a worker, the plant manager does so based on the department manager’s recommendation and the plant manager does not independently investigate the matter.

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 never exercises that 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 for several years, the manager probably does not possess the 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 include transfer among the manager’s authority.

Secondary factors: In addition to the above primary factors showing supervisory authority, the Board also considers certain secondary factors. These factors alone would not make someone a supervisor. But combined with the occasional exercise of minor primary supervisory authority, the existence of secondary factors can make someone a supervisor.

Primary factors checklist:

- 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 jobs by for example recommending against interviewing applicants?
- Does the person have the authority to direct or tell other workers what to do and do other workers 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 merit raises and do higher-level managers rarely change the evaluations the person prepares?
 - ◆ Is the person present for evaluation meetings or discuss evaluations with workers?

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

Secondary factors checklist:

- 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 more 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 workers or the company’s business?

Supervisors in bargaining units: 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 make and implement managerial policies.

Independent contractors: Independent contractors are persons who are typically paid a set price for work rather than hourly 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 not an independent contractor and is instead a worker.

What Is the National Labor Relations Board (Board)?

The Board is the federal agency that enforces the NLRA and holds union representation elections. Its headquarters is in Washington, D.C. The Board has numerous regional offices throughout the country, each headed by a Regional Director. Larger regions have sub-offices.

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

The General Counsel: The General Counsel investigates charges alleging that companies committed unfair labor practices 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 committed ULPs. The Board also supervises and holds elections, a task it delegates to Regional Offices.

The Board is comprised of five members who the President appoints for 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 including findings of fact based on the evidence offered during hearings. Because civil service rules govern the appointment and tenure of ALJs, they are insulated from the political process.

What Is an Unfair Labor Practice (ULP)?

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

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

- Threaten, coerce or intimidate workers because of their support or activities for the union, the campaign or a worker association.
- 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 companies.

- ◆ Coerce means to restrain, dominate or force. Intimidate means to frighten.

- Ask or interrogate workers about the union, the campaign or a worker association, or what concerns led to the workers' interest in the union, campaign or worker association.

- Promise or grant benefits to get workers to abandon their support for the union, campaign or worker association.

- 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.

Examples: Supervisors who talk on cellphones or walkie-talkies, photograph, videotape, record or write on clip boards while watching workers engage in protected activity, if they don't normally use these devices or clip boards when supervising.

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

- Surveil workers while they are 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, campaign hangouts or other location.

- Adversely change any working condition, or discipline or discharge workers because they supported or participated in the union, campaign or a worker association.

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 talked to organizers or campaign supporters, participated in actions, attended meetings, or accompanied organizers on homecalls.

Ñ 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 watching.

Ñ And company took adverse action against worker.

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

Other company ULPs:

- Creating company unions by sponsoring, supporting, controlling or financially or otherwise assisting worker groups.
- Discriminating against, disciplining or discharging workers for cooperating with or participating in Board investigations or cases.
- Failing to bargain in good faith, including
 - ◆ Unilaterally changing working conditions without first giving the union advance notice and a meaningful opportunity to bargain.
 - ◆ By-passing unions 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 when workers 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) in a manner that constitutes a secondary boycott prohibited by Section 8(b)(4) of the NLRA. This is a complex area of law.
- Picket (or threaten to picket) a company where an object 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 do not violate the NLRA when they engage in this 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. This picketing is often called informational picketing or "proviso" picketing.

How Do Unions Start ULP Cases?

The first step is to file a ULP charge with the appropriate Board Regional Office. Unions can obtain charge forms from any Board Regional Office or from the Board's website (www.nlr.gov). The website also contains addresses of Regional Offices. Each Regional Office has an information officer who will assist representatives to complete charge forms.

Anybody, including representatives and workers, may file ULP charges. The person who files the charge is called the charging party. The company the charge is filed against 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 Board will not issue a complaint 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 other objective. The union should consider whether:

- The charges will get the company to back off.
- 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

Inoculation is preparing workers to withstand the company's campaign and unlawful conduct. Inoculation attempts to diminish the intimidating effect of company conduct by educating workers on what to expect and helping them to prepare responses to company conduct.

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

Company conduct that workers expect and does not surprise them has less impact on them. And, company conduct is less intimidating when workers know how to respond to company conduct in a way to diffuse or deflect supervisors' questions or comments.

So, before the union is prepared to demonstrate that a substantial number of workers support the campaign, unions advise workers to:

- avoid attracting attention at the workplace by, for example, distributing literature to co-workers or wearing union clothing
- change the subject when talking about the campaign and a supervisor or a co-worker who may report the conversation to the company walks by and
- evade answering supervisor questions about the union or campaign if possible

The extent workers respond in ways that do not disclose their sentiments also makes it harder for the company to identify, target and pressure supporters early in the campaign.

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

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 Board to protect workers.

Later in the campaign when a large number of supporters are active, the risk of the company retaliating against workers can openly support the campaign is much less. The company can continue to operate if it terminates a few supporters, but can't if the company terminates one-third of its workforce.

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.

How Are ULP Charges Investigated?

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

Affidavits: The Board and the union 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 a copy to the company attorney.

Dealing with Board Staff

Every representative should be familiar with the Board Regional Offices that cover their union's jurisdiction, and get to know Board agents and 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 issue complaints or refrain from settling cases out from under the union.

Differences of opinion between unions and Board agents occur, and the union's position will not always prevail. Nevertheless, representatives should not

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

Representatives begin their relationship with the Board 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 (ALJ) has begun. If a hearing has begun, the ALJ — not the Regional Director — must approve the settlement.

The Board will attempt to convince the union to settle. The Board, 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 Board involvement or approval. The Board 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 Board 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 seeing the demeanor of the worker and supervisor when lawyers 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 union 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 Board General Counsel is represented by an attorney assigned from the Board's Regional Office, called 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, the Board will order the company to stop or cease and desist from committing 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 Board 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 relationship, the Board 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 union representative should request that the Board “seek a Section 10(j) injunction” on the charge form or cover letter.

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

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Workers have broad rights to distribute (documents such as handbills and things such as lanyards and wrist bands), to talk to each other and the general public, to solicit and to wear stickers or buttons at the workplace. 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 the 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 non-work time and in non-work areas to distribute literature about the union, campaigns, and political issues that affect the workplace. Company rules prohibiting workers from distributing literature in non-work areas during non-work times are unlawful.

Having said that, the National Labor Relations Board allows companies to restrict distribution during work time and in work areas if (1) companies establish the restriction before workers begin union or campaign activity, and (2) companies consistently enforce the restriction in a way that does not discriminate against union or campaign activity. Important to the authority of companies to restrict distribution are the meanings of work time, non-work time, work areas and non-work areas.

When Is Work Time and Non-work Time?

Work time is only the time when workers actually perform their job duties. Non-work 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 walk to or are in 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 got 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 worker's work area and began to work again.

For this reason, non-work time is much broader than just meal and other breaks.

Which Parts of the Workplace Are Work Areas and Which Are Non-work Areas?

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

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

“Mixed use areas” are non-work areas. Mixed use areas are areas where workers work but also where they spend non-work time. For example, hallways are non-work mixed use areas where socializing occurs, even though work incidental to the facility’s main operation occurs in hallways.

Even areas that are otherwise work areas can be converted to non-work 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 an area to take breaks is not a work area when used for breaks.

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

The law guarantees workers the right to talk to each other at the workplace about the union or campaigns, and political issues that affect the workplace. If the company allows workers to talk about other subjects during work time, a company cannot restrict workers from talking about these and related subjects while working even though the company claims that the conversation interferes with productivity.

Subjects Workers Have the Right to Talk About

Workers have the right to talk about all workplace issues such as working conditions, organizing, campaigns, bargaining, 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 those bills.

What About Worker Rights to Talk to Outsiders?

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

The right to talk to outsiders includes the right to talk other outsiders, including the company's business partners, investors, vendors, suppliers and advertisers.

UFCW companies 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 admitted that both Safeway's practice and the law allow for certain dialogue between workers and customers.

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) companies establish the limitation before workers begin union or campaign activity, and (2) companies consistently enforce the limitation in a way that does not discriminate against union or campaign activity.

Companies may not ban solicitation during non-work time. Stores, however, may restrict work time solicitation on salesfloors when the store is open, even if the workers involved are all on non-work time.

What Does Solicitation Mean?

Solicitation means asking a worker to sign an authorization card at the time the solicitor makes the request. An authorization card is a document workers sign to organize a union through Board representation elections, worker free choice process or card check agreements. The law defines solicitation in this way because worker productivity can be interrupted when one worker asks another to sign an authorization card. If the worker agrees to sign a card, the productivity of both workers is theoretically interrupted while they stop work, the worker completes the card, signs the card, and then returns the card to the soliciting worker who stood by during this time.

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 co-workers of a campaign meeting
- asking a union-related question or talking about whether the union is good or bad
- stating favorable opinions about the union or “soliciting” other workers to support the union or vote for representation
- asking co-workers to participate in the campaign or meet organizers
- asking co-workers 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 co-worker if the co-worker 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 and Buttons?

Most workers have broad rights to wear union and campaign 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 political candidates who take positions on workplace issues.

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

The Right to Wear Stickers or Buttons During Non-work Time in Non-work Areas

Workers have the broadest rights to wear stickers and buttons when they do so during non-work time in non-work areas.

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

Workers who do not work in processing plants have broad rights to wear stickers or buttons while working in work areas and on salesfloors. Contracts (under for example no-discrimination or union activity clauses), past practices and the National Labor Relations Act (NLRA) protect these rights. 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 non-workplace 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 buttons, including religious and sports team buttons, in the presence of supervisors. 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.

Restrictions on Stickers or Buttons are Presumably Unlawful.

Companies almost always violate the NLRA 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
- productivity
- safety
- damage to property or product or
- public image.

What Are Threats to Discipline?

To restrict stickers or buttons because they are a threat to discipline companies must prove that workers wearing them pose actual threats to discipline. Companies may not just speculate 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 over a “Scab” button did not, by itself, justify restricting Scab buttons.

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?

Companies may not restrict stickers or buttons unless they prove that stickers or buttons threaten safety. For example, workers retain the right to wear stickers on hardhats placed 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 the stickers obscure important workplace information.

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 restrict workers wearing stickers or buttons relying only on the speculation that they may fall into or damage machines or products.

There is no threat of property damage if workers do not wear stickers or buttons near machines or products. In one case, the company did not prove a threat of property damage based on the possibility of buttons falling off because the company permitted workers, supervisors and guests to wear plastic name tags attached with clips, and workers carried pencils, both loose and clipped, steel rulers without clips, cigarettes, and other things in their shirt pockets.

Thus, even if companies prove that stickers or buttons threaten damage to property or product, they may not restrict them during times when they pose no threat, such as when workers are no longer on the work-floor or when lines are not running.

Important: Rules protecting the right to wear stickers and buttons may not apply to processing plants because of U.S. Department of Agriculture requirements. However, if the Agriculture Department or a company attempt to restrict stickers or buttons because of Agriculture Department requirements, unions should insist on receiving copies of those requirements.

What Are Threats to Public Image?

In rare cases, companies may restrict stickers or buttons to protect their public image. However, 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. Companies may not prohibit stickers or buttons merely because they have dress codes or uniform policies.

Rules based on public image must be narrow. For example, they may not apply to a group of workers 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 the company's uniform dress code attracted customers and increased profits was rejected. This is because the business of grocery stores does not traditionally require the same rigor of appearance as other, higher end retailers or service industries. The aprons and smocks of cashiers, clerks and meatcutters worn over white shirts and dark slacks are not the equivalent of traditional uniforms of servers in, for example, world class restaurants.

To base restrictions on stickers or buttons on threats to public image, companies must prove that:

- Public image is particularly important to the company's business
- Worker appearance contributes to the company's public image which the company controls through dress codes as part of its business plan
- Stickers or buttons unreasonably interfere with an important 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 in frequent 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 these rights do not turn on the pleasure or displeasure of customers.

Size and color of stickers or buttons

Companies may not restrict reasonably sized and unobtrusive stickers or 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 small, inconspicuous and unprovocative, and did not detract from the dignity of the company or reduce business.

Companies Almost Never May Restrict Worker Rights to Distribute, Talk to Customers or Wear Stickers or Buttons Based on Contract No-Strike Clauses.

Workers continue to possess these rights under contracts unless the no-strike clause explicitly prohibits workers from specifically distributing literature, talking to customers or wearing stickers and buttons.

Because the NLRA 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 or during bargaining by explicitly stating that unions are giving up these specific rights.

Example: A no-strike clause that waives the right to strike or boycott, does not waive worker rights to talk to customers about contract disputes, handbill during non-work time or even picket.

No-strike clauses rarely specifically waive these rights. 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 Require 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 rule prohibiting buttons only after workers begin to wear campaign stickers
- did not consistently enforce the rule before workers began to engage in protected activity
- discriminatorily enforces the rule by previously allowing 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: Company 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, or otherwise remark on, for example, company policies, working conditions, or how supervisors supervise or co-workers work. Similarly, companies cannot discipline workers for using company logos in such online comments. Company policies that restrict this right to post online violate the NLRA by being overly broad.

Companies Must Bargain Over Work Rules 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, 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 or 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
- off-duty workers from visiting the interior of company facilities other than facilities where they work, and
 - ◆ the company clearly communicated 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.

Even with such a policy, companies may not exclude off-duty or off-site workers from exterior, non-work areas of the company's facilities unless business reasons justify the exclusion.

What Rights Do “Salts” Have?

Who Is a Salt?

A salt is a worker who at the Union's discretion has obtained a job at a company to assist in organizing 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.

The NLRA Protects Salts.

Because they are considered workers, salts possess the same rights under the NLRA as other workers. Specifically, the NLRA protects salts or workers who work for target companies who attempt to convince co-workers (1) to support the union and become active in campaigns, and (2) to obtain non-trade secret information about companies. And, salts have the same rights to distribute, talk, solicit, wear stickers and buttons, and to access company property as other workers.

The NLRA protects salts even if they hide their connection to the union.

The National Labor Relations Board holds that companies may not discharge salts who intentionally omit their connection to the union on employment applications for falsifying the application. A salt's failure to disclose a union connection is not analogous to falsifying an application in a material way because an applicant's prior union activity is not a legitimate basis for hiring or refusing to hire an individual.

Suggestions for salts

Salts should:

- Fill out employment applications completely and accurately. But without disclosing that they worked for, are paid by or are a member of the union.
- If salts are asked about having worked at a union job, they should have a response ready to deflect the question and put themselves in the best possible light:
 - ◆ “Yes, I have and I know that there is no union here and that's fine with me.”
 - ◆ “Yeah, but there were too many rules and those dues were murder.”
 - ◆ “I had to join the union to keep the job.”
 - ◆ “Yes, I've worked union and non-union. Frankly, I like having just one boss – that's why I'm here.”

- If salts left a union job and are asked why, they may want to consider responding:
 - ◆ “It was too far to drive.”
 - ◆ “I couldn’t make the schedule they gave me work with my spouse’s/family’s schedule.”
- If salts were laid off or their store closed, salts should tell the target company so.
- Salts should keep a daily log of significant events. They should write in their logs after work and away from the job.
- After salts are hired, they should follow the company’s rules and work requirements, and do all that is asked of them and more. They should regularly ask their bosses how they are doing and record the responses in their logs. Similarly, they should note any compliments they receive.
- Salts should also note in logs:
 - ◆ any union-related comments made by supervision
 - ◆ if salts or co-workers are asked or forced to work off the clock
 - ◆ all poor sanitation, health or product handling practices
 - ◆ complaints that co-workers have about the company or their jobs, and
 - ◆ instances when co-workers solicit each other while they are on work time or on the salesfloor area by for example selling Girl Scout cookies, items to support sports teams or other school activities, Mary Kay, Avon, raffle tickets, betting pools, etc. Salts should write down details including date, time, location at workplace, names of workers, and the names/titles of any supervisors or managers who were nearby.
- Salts should try to learn as much as possible about the company and its business without being conspicuous, including:
 - ◆ the management structure inside and outside the workplace

- ◆ whether the company transfers workers between jobs, departments and stores or facilities
 - ◆ other workers' pay rates
 - ◆ the system of scheduling
 - ◆ the identities of suppliers and vendors
- Salts should obtain copies of employment documents, including handbooks, personnel policies, training materials, company policies and similar materials.

UNION ACCESS TO COMPANY PROPERTY AND INFORMATION

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

Union representatives generally have the right to engage in protected activity, unless the company has a pre-existing, consistently and non-discriminatorily enforced 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 participate in actions or campaigns, or to join worker associations, inviting workers to meetings, soliciting, handbilling, picketing and talking to workers while they work except to the extent it unduly interferes with workers performing their jobs.

To lawfully exclude representatives, companies must have established their no-solicitation/no-distribution policy before representatives begin to engage in protected activity. It's unlawful for companies to establish new policies or to begin to enforce dormant policies in response to protected activity.

Additionally, 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 company 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 company property proves that the company discriminatorily excluded union representatives.)

Example: A plant discriminatorily 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 a shopping center landlord orders union representatives off of the center's parking lots or 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 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 directly 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.

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 to do so. Solicitation is not representatives introducing themselves to workers, talking to workers 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, make it harder for the company to identify and target campaign supporters, and make workers less frightened -- and more willing -- to talk to representatives.

Can Companies Exclude Representatives from All Private Property?

No. Companies may only exclude representatives from their 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.

Shopping centers: For example, companies in shopping centers 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 everyone. Instead, companies in shopping centers 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 for these services is typically only a few hundred dollars.

What Is 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 Board 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 an activity is to use the persuasiveness of the activity's message to impact workers, customers and the general public. Activities that the union conducts in a way that disrupts a company's operations for short durations of time is unlikely to persuade a company to accede to the union or campaign's demands.

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. Unions have 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 a machine to assess safety grievances.

- to prepare to bargain first 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 organizing and other campaigns.

Who Can the Union Get Information and Documents From?

Unions may get information from any individual, including those who work for the target company. The type of information the union is getting is more important 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 is generally known in the industry

Example: The union can obtain information about the way a plant slaughters and processes chickens and the machinery used in that process because workers acquire this knowledge while working in plants.

- Information available through basic investigation or research like interviewing workers, visiting worksites or through the internet

- Unions can also generally obtain and use any other information, including documents, as long as the information is not a confidential trade secret.

What Is a Trade Secret?

A trade secret is confidential information that first, is financially valuable to the company because, if disclosed, it would give the company's competitors a significant economic advantage and second, the company takes steps to keep secret. Information may be a trade secret if:

- The company invested a large amount of effort or money to develop the information
- It would be difficult for competitors to develop the information

Examples:

- Scientific formulas, like the formula for Coca-Cola
- Manufacturing processes and industrial patterns
- A company's unique computer or accounting system

Information is not a trade secret just because it is embarrassing to the company or might injure the company's reputation. Information related to the company's unlawful conduct is never a trade secret.

What Is Confidential Information?

Confidential information is information that the company has taken steps to keep confidential, and that no one outside of the company knows.

- Does the company limit access to the information to only a few of its own workers, executives and other persons working for the company?

Examples: Company limits access to product information to only approved personnel who access the information on a special computer using a special password

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?

Example: Company locks information in a safe and orders those who have access to not disclose the information

Note: Companies who print “confidential” on a few truly sensitive documents may protect those documents as confidential

But printing confidential on the bottom of all company documents, including documents that are obviously not sensitive, does not protect those documents.

Similarly, general confidentiality provisions at the end of documents generally will not by itself make those documents confidential.

Information that the company does not take steps to keep secret will not be confidential.

Examples:

Ñ Chicken feed formula was not confidential 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 confidential because the company mailed a pamphlet about the machine to all of its shareholders even though the pamphlet was labeled “confidential.”

When in doubt whether information is a trade secret, unions should consult attorneys.

VOLUNTARY RECOGNITION OF UNIONS AS WORKERS' COLLECTIVE BARGAINING REPRESENTATIVES

Companies may voluntarily recognize unions as the collective bargaining representatives of their workers without Board elections when a majority of bargaining unit workers choose 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 a company and corporate citizen
- boycott the company
- petition governments by filing charges or court cases against companies
- encourage local governments to pass resolutions condemning companies
- request government officials to comment on companies and
- associate with unions, community and other allied groups.

The determination of whether a majority of workers support the union is usually made by an independent neutral party. The neutral party compares signed authorization cards or petitions against a list of workers under a worker free choice and majority verification agreement. These agreements are also referred to as process or card check agreements.

To ensure that workers will be able to exercise their choice free from coercion and intimidation, worker free choice 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 agreement should prohibit the company's managers, supervisors, management consultants, attorneys and other agents from saying anything against the union, organizing or collective bargaining, or say that the company opposes union representation. The agreement 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 representation.
- Require the parties to bargain a contract. The agreement should also provide that if the parties fail to reach agreement, they will 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 all disputes related to the process agreement to a previously selected neutral party to resolve in expedited final and binding arbitration.
- Waive the parties' rights under the National Labor Relations Act to file election petitions; challenge the appropriateness of the unit; file ULP charges related to the agreement, the agreement's process or the union's recognition demand; or to directly or indirectly assist or support anyone who files a petition or charge with the Board.

THE NATIONAL LABOR RELATIONS ACT: REPRESENTATION ELECTIONS

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The Process

Filing election petitions: The first step in the National Labor Relations Board's election process is the union filing a petition for election (or RC petition). ("RC" comes from the docket number the Regional Office will assign to the petition.) Unions should use forms located on the Board's website and electronically file election petitions. Unions must also electronically send or "serve" the company with a copy of the petition.

Showing of interest: Along with the petition, the union must also electronically file with the Regional Office evidence or a showing of interest that at least 30 percent of the workers in an appropriate bargaining unit have chosen the union to be their collective bargaining representative. 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.

Unions should not serve companies with copies of the showing of interest.

Electronic cards: The Board permits workers to electronically sign cards as long as unions follow the procedures on the Board's website.

If the showing of interest consists of electronic cards, the Board's procedures require the union to file a declaration signed by a union representative stating that workers electronically signed the cards, the union e-mailed accurate cards to the Board and describing the union's electronic controls safeguarding the accuracy of the cards.

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

Hearings: Absent an agreement, the Regional Office should schedule a hearing 8 days from the date the union electronically filed the petition and the Office issued its hearing notice. If the union electronically files the petition early in the day, the Regional Office should be able to e-mail the hearing notice the same day. The Regional Office can extend the 8-day period by 2-4 days for good reason, or longer if the company shows extraordinary circumstances.

Important: Because Regional Offices are required to hold hearings soon after the union files the petition, unions who use attorneys for hearings should coordinate with the attorneys before filing petitions to ensure that the attorneys are available to prepare for and attend the hearing.

The hearing is conducted by a hearing officer who is usually a Board agent from the Board's Regional Office. At the hearing, both the union and company present evidence supporting their positions.

Limited hearing: The main potential issues for the hearing are: whether the company and union are subject to the NLRA, and the scope of the bargaining unit.

Before the hearing, the company must file a position statement:

- stating the issues the company wants to litigate
- identifying which workers the company wants to include or exclude from the unit, including their classifications and work locations
- explaining the reasons for the company's position and
- provide a list of all workers in the unit, including their job classifications, shifts and locations.

The Regional Office should hold a hearing only if the company raises issues concerning a significant portion of the unit of about 20% or more. If the issues the company raises affects a smaller part of the unit, the Regional Office should forego the hearing and schedule an election. In which case, the Regional Office holds a hearing over the issues after the election.

At the beginning of the hearing, the union will state its position on the issues the company raised. The hearing will cover only those positions of the company that the union disagrees with.

Important: No hearing should occur if the union agrees with all of the company's positions.

At the end of the hearing, the hearing officer should require the company to orally argue its position, instead of taking several days or a week to prepare a written argument or brief. Hearing officers should allow companies to file briefs only for good reason.

Regional Director's decision and direction of election: After the hearing, the Regional Director issues a decision and direction of election describing the bargaining unit, resolving other issues and scheduling the election. Many Regions will issue decisions within days of the close of the hearing.

Scheduling election: The Regional Director should schedule elections for as soon as possible.

Worker or *Excelsior* list: Companies must electronically provide the union and Board with a worker or Excelsior list within 2 days after the Regional Director issues the decision and direction of election. (This list is called the “*Excelsior* list” after the case that first required it.) The worker list must include workers’ full names, personal cellphone numbers and email addresses, and location, shift and job classification.

Appeals or requests for review of decisions and directions of elections: Either party may appeal the Regional Director’s decision by filing a request for review of the decision with the Board. Requests for review are due 14 days after the Regional Director issues the decision. The Board grants requests for review only in cases raising important issues. Requests for review should not postpone elections. In rare cases, the Board will stay (hold up) the election, pending its ruling on the request for review.

Elections: Ordinarily, the Region will hold the election even if the Board has not decided the request for review, and will impound the ballots pending the Board’s ruling.

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.

Board 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 vote based on whether:

- their name appears on the worker list
- they still work for the company or
- they are supervisors or they should be in the unit.

If the number of challenged ballots could change the outcome of the election, the Board will determine whether the workers who cast them were eligible to vote. If the number of challenges is not large enough to change the election outcome, the Board will not decide their eligibility.

Authorization Cards

Authorization cards authorize the union to represent the signer for collective bargaining purposes.

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 sees 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 Board keep cards confidential. Cards may, however, be entered into evidence during Board 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 Board will not count cards solicited by supervisors under circumstances that reasonably tend to coerce or interfere with worker free choice.

Example: The Board has ruled that it is inherently coercive for first line supervisors to solicit cards from workers they can write up 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 worker free choice agreement.

Excelsior List

A company’s failure to produce a substantially complete list of names and accurate contact information can be the basis for setting an election aside, especially where the number of omissions or bad addresses would determine the election outcome by equaling or exceeding the difference in the vote.

Example: The Board has set aside elections where the worker 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 (1) employed during the payroll period immediately before the date of the decision and direction of election or the date the Regional Director approves the parties' election agreement, and (2) 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 over 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 Board will only hold elections in "appropriate bargaining units." 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 and organizing committees should devote a lot of thought into the scope of the unit.

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 Board cannot combine security guards into bargaining units of workers who are not also guards. Nor can the Board 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.

Community of interests: In making unit determinations, the Board 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 and organizing committees can think of like these factors.

Unions attempting to exclude workers from a unit must identify as many of the excluded workers working conditions as possible that are different from those of the unit workers. Unions attempting to include workers in a unit should identify all of their working conditions that are similar to those of the unit workers.

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

Before filing petitions, organizers should coordinate with attorneys so attorneys can help identify the facts necessary to justify the unit, to help 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.

What If a Company Objects to the Bargaining Unit in the Petition?

When a company contends that the bargaining unit the union included in the petition is not appropriate, the Regional Director will determine whether the workers in that unit share a community of interest that is sufficiently different from workers the union excluded from the unit.

Important: Organizers should try to anticipate the company's position and investigate how the jobs of the workers the company may seek to include are different from the jobs of the workers in the petitioned-for unit. And, how the jobs of any workers the company may seek to exclude are similar to the jobs of the other workers in the unit.

Other issues: The Board 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, for example), 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. (Note: Given the opportunity, the Trump Board will likely rule that temporary workers should not be included in units with 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 share a community of interest with the permanent workers.

Alternatively, unions may file a separate election petition for the temp agency workers.

Board Election Bars

There are several matters that bar or preclude the holding of elections.

Election Bar

The NLRA precludes the Board 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 Board's certification of a union as the representative of workers. The Board 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 during the term of the contract up to three years. So, if the contract term is 4 years, for example, the contract bar precludes an election for the first 3 years of the contract.

Window period: The Board imposes a 30-day window period for filing petitions for units covered by an existing contract. To be timely, petitions must be filed between 90 and 60 days before the contract expires – or the end of the 3rd year of the contract.

For healthcare companies, petitions must be filed between 120 and 90 days before contracts expire or the end of the 3rd year.

Petitions may also be filed any time after the last day of the contract's 3rd year.

Recognition Bar

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

Election Objections

The Board may overturn elections because the company or the union violated election rules or committed election objections or ULPs that affect the outcome of the election.

Following the election, the losing party may file objections. Objections are due 7 days after the vote tally and must describe the objections. At the same time, unions must file offers of proof of evidence that would prove the objections.

Examples of objections include:

- most ULPs (threats, interrogation, surveillance, promises or grants of benefits, discrimination, discipline or discharge)
- the company holding mandatory captive audience meetings with worker groups within 24 hours of election
- holding raffles or similar activities during the 24-hour period if participation in the activity is limited to voters
- campaigning near the polling area
- a company's failure to provide the worker list (or a reasonably complete or accurate list) or timely post the Board's election notice,
- using a supervisor as an election observer

Certain actions of the Board agent conducting the election may also constitute election objections, such as failing to adequately police the polling area or showing favoritism towards the company.

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 because worker misconduct is almost never that threatening.

If the Regional Office's investigation reveals 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 usually consolidate the objections and challenges with the ULPs and schedule a hearing before an ALJ.

The losing party may file an appeal or "request for review" of the hearing officer's decision on the objections and challenges. The Board will review the decision if it feels the appeal raises significant issues.

Practical Point

Unfortunately, this objections process can be lengthy, frequently taking more than a year. If a union believes it can win a second election, the union should consider refraining from filing objections and instead file another petition for a new election. That new election could be held as early as one year after the earlier election. This may be preferable to waiting for a final Board ruling on objections.

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 unit members must sign a decertification petition. Companies usually initiate decertification drives. Decertification efforts 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 and bargain collectively.

Most states have laws that protect the right to organize and bargain collectively for at least some 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 companies to resolve bargaining disputes through interest arbitration.

Interest arbitration is an arbitration where the arbitrator sets contract terms that the parties are unable to agree to. The union and company present evidence and make arguments about why the arbitrator should set the provision in accordance with their contract proposals. The union and public company base their arguments on evidence showing the company's financial ability or inability to afford the proposals, the importance of the proposals to workers, and what similar public-sector companies provide their workers.

Limited space prohibits comprehensive review of all of these laws. This chapter attempts to only summarize some common parts of these laws. Representatives should contact state or local public-sector labor relations agencies or the state AFL-CIO to obtain more information about the relevant public-sector 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) are public workers.

In addition, many workers who do not directly work for state or local governments may also be public workers if their company 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 company is not a governmental entity.

What Is PERB or PERC?

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

Organizers working on public sector campaigns 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 better than the NLRA because workers are assured that at the conclusion of the process they will have a contract. The NLRA does not guarantee that the workers will ever get a contract.

Some recent laws require bargaining units to vote annually or each contract term to keep their union representation and dues check-off provisions. Other recent laws reduced the number of topics that a public sector union may bargain over.

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 require the institution to recognize and collectively bargain with unions authorized to represent the institution's workers. Or, the state constitution may recognize the right of public workers to union representation. Or, a governor may have signed 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 political influence and community coalition building is important in all campaigns, they are particularly important in organizing public workers. This is because the persons who typically control the company'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.

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 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 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 attorneys’ fees and submit to intrusive discovery and depositions. This could lead to pressure on campaigns to back off. Third, litigation consumes a lot of the campaign’s time and distracts the union from the campaign.

To avoid these possible problems, unions must support or justify all negative facts in their communications with reliable sources of information. In addition to lowering legal risk, this approach also 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 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 union makes a factual statement during 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 standard or this protection of the First Amendment requires the company to prove that the union made the factual statement knowing it was false or recklessly disregarding whether it was false. (So, under the law, the term “actual malice” does not mean ill will 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, information or source.

On the other hand, if 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 a government report.

For example, if the First Amendment protection 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 protection 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 stores actually had sanitation problems – and not just that the newspaper reported problems – would be difficult.

The First Amendment protection also protects communications involving “matters of public concern” about “public figures.” As discussed below, matters of public concern are issues in the press, politics or public domain that potentially affect more people 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.

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 matter should be defamatory unless the union knew that the

communication's factual statements were false or the union recklessly disregarded whether they were false.

* * *

Summary

- It is important to carefully document factual statements in communications to protect the union's treasury, to avoid pressure on campaigns to tone down their messages, and to maintain credibility of the current 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 protection because the union made the statement knowing it was false or recklessly disregarding whether it was false.
- The First Amendment protection 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 people 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 should have collected documentation for every negative fact in the communication 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, the statement cannot injure anyone's reputation. And, it is unlikely any company would bother to sue, even if the statement was untrue.

Example: If the communication said: "Walmart's sales in 2017 were \$500 billion," but Walmart's sales were really closer to \$450 billion, the communication would enhance Walmart's reputation by exaggerating Walmart's success. It would not hurt Walmart's reputation. And, Walmart is not going to sue because the union publicly credited it with more sales than it really had.

Example: In contrast, the statement: "Numerous states have issued reports finding that many products Walmart sells are dangerous to families" is negative.

Only statements of fact can be defamatory.

What Are Statements of Fact?

Definition: A fact is information that can be verified or objectively proven to be true or false. Another way to think of factual statements is that they are not subject to reasonable argument: after someone confirms through investigation or research that a fact is true, no one should be able to reasonably disagree with their conclusion.

Example: The statement that "numerous workers have been injured on the job in a 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 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, people could reasonable think that a plant is unsafe because workers operate many potentially dangerous machines at a fast pace. 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 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 characterization or generalization nevertheless undermine the campaign’s credibility or opens the campaign up to criticism 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 consider factual statements as an average reader would understand them within the entire communication. For this reason, unions must be prepared to justify factual statements in 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 saying that whatever the company did was a crime even if the specific statements do not individually mention crimes.

Example: In contrast, a communication discussing how the company committed civil or non-criminal violations of the National Labor Relations Act makes clear that when the communication says the “NLRB is prosecuting the company for unfair labor practices,” 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” would be put in the correct context if it also refers to the 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.

* * *

Summary

- Only statements of fact can be defamatory.
- Is the statement capable of being objectively proven true or false? If yes, 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 by 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?

Opinions

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 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 unions license to use intemperate, abusive, or insulting language if they believe such rhetoric to be an effective means to make their point.

What Is rhetorical hyperbole?

Statements that are merely annoying or embarrassing or just a vigorous epithet are rhetorical hyperbole. 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.

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.

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 negotiations as "blackmail." The court found the term blackmail to be rhetorical hyperbole because it was hard to believe that any reader would not have understood that the newspaper meant to criticize the developer's hard negotiating proposals. No reader could reasonably have thought that the newspaper was charging the developer with a crime.

Examples:

- Walmart 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”
- Walmart 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 dangerous.

Strategy: To avoid problems with implied facts, communications should explicitly state the facts on which the communications 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 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 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 give language its ordinary meaning 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 defames, the words are not defamatory. Communications that are defamatory only with a 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.

* * *

Defamation in Labor Disputes

The Supreme Court has ruled that to prove that factual statements unions make during labor disputes are defamatory, companies must prove that the union made the statement in violation of the First Amendment protection by proving that the union made the factual statement knowing it was false or recklessly disregarding whether it was false.

This section discusses what a labor dispute 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 Protection?

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 protection 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 with credible, documented sources of information.

For example, if in a labor dispute, the union states 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 because the union has no reason to disbelieve the New York Times.

If there’s no labor dispute and the First Amendment protection does not apply for other reasons, the union may have to prove that the factual statement is true. In the above example, the union may have to fly someone to China to interview the factory’s workers to prove that the factory employs underaged girls.

Consequently, if during labor disputes, a union bases negative factual statements 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 that unions make during labor disputes are defamatory only if companies prove that the union made the statements in violation of the First Amendment protection.
- The First Amendment protection 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 protection applies 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 previously stated that it had ceased trying to organize the store's workers and disclaimed interest in organizing them. Rejecting the argument, the court found that the union's disclaimer of interest 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 Protection?

A union communicates a negative false statement of fact in violation of the First Amendment protection when the union knew the fact was false or recklessly disregarded whether it was false. When the First Amendment protection applies, it is very difficult for companies to prove defamation.

Inaccuracy alone does not violate the First Amendment protection. Even a communication that contains a dozen mistakes does not prove knowing falsehood or reckless disregard of falsity if the author in good faith believed that the facts were true. In other words, if the union publicized the communication in good faith, the union has not violated the First Amendment protection.

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 protection.

Unions violate the First Amendment protection 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, as long as the union does not have any specific reason to doubt their accuracy. On the other hand, if the union knows from its own information or other sources that the news reports are wrong, the union didn't really rely on the news reports, but 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 stating that the company offers poor healthcare.

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 protection 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 protection when the court believes that the union in good faith misunderstood what a worker said, the court may find that the union violated the protection if the court doesn't believe that the union ever spoke to the worker.

* * *

Summary

- The First Amendment protection 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 protection, 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 unintentionally written 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.

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 what the union said.

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 the 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 statements.

* * *

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:

- a 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 protection 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 protection, 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 matters of public concern and public figures.

What Are Matters of Public Concern?

A matter of public concern is an issue or controversy that potentially affects more people than the people directly involved. While matters of public concern frequently arise in the political or governmental context, a matter of public concern is also 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 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 protection 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 protection applies to all communications about general public figures, the First Amendment protection 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 Firestone's litigation over her divorce from an heir of one of America's wealthiest families. The article stated 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 to get divorced. 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 several press conferences 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 any 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 publicly respond. Rather, the matter of public concern and the person's involvement in it must precede the communication.

Example: A researcher sued Senator William Proxmire for awarding him the Golden Fleece Award for research of stressful animal behavior. The Court held that the researcher was not a public figure because the researcher applied for federal research funding, local newspaper reports of grants the researcher received or access to the media as demonstrated by the fact that some newspapers and wire services reported the researcher response to the 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 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 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 coop beyond just 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.

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 determines 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.

* * *

Summary

- The First Amendment protection 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

Â 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 differ on whether advertisements alone will make a company a public figure.
- 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 negative factual statements in communications including matters of public concern directed at public figures. 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 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.

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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, and to a lesser extent, the interpretation and enforcement of contracts.

The National Labor Relations Board (Board)

As the federal agency that enforces the NLRA, the Board 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 unfair labor practice charges with the Board can help create bargaining leverage, avoid bargaining impasse and convert economic strikes into ULP strikes.

The Courts

More often than the Board, 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 arbitration 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 arbitrators the final say on interpreting contracts and the issue whether companies violated them. Although arbitration clauses almost always provide that arbitrator 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 an agreement on employment matters that unions raise. This obligation prohibits companies from changing any working condition without first notifying the union and giving the union a meaningful opportunity to bargain before making the change.

Specifically, the NLRA imposes the obligations to:

- "Meet at reasonable times and confer in good faith." This requires companies to meet with unions at reasonable intervals and frequency, and prohibits companies from unreasonably dragging out bargaining when unions are available to meet.
- 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 to Bargain

The obligation to bargain begins on the date companies recognize unions or workers win Board representation elections (even if the Board 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 employment terms companies have not changed. And, companies may not unilaterally change terms without first bargaining with unions.

Union representatives have the right to represent and advocate for bargaining unit members even before the Board certifies unions, before parties sign contracts, and even if companies have not changed working conditions. 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.
- Managers must discuss with representatives worker questions, concerns or complaints, such as schedules, hours and discipline. When representatives do so, they in effect grieve issues before the parties establish grievance procedures. In addition, representatives should request relevant documents and information.
- Representatives should let workers know that the union is trying to go to bat for them even before the Board 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 and process grievances under the contract 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 Board does not ultimately certify the union, the Board will dismiss the charges.)

After certification or recognition

To give unions the chance to organize new bargaining units and reach agreement on contracts, the Board 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 Board 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, the obligation to bargain prohibits companies from changing working conditions before they bargain to impasse over those changes.

Waiver of the Company's Obligation to Bargain

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. If unions fail to do so, the Board will rule that unions waived the company's obligation to bargain over the changes that union representatives 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 Board 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 failed to demand bargaining at that time. The Board 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 a company's 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 and arbitrators' contract interpretations that are not incorporated into contracts.

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 Board requires zipper clauses to "clearly and unmistakably" waive company obligations to bargain over the particular employment term at issue. As waivers of NLRA rights, the Board construes zipper clauses narrowly.

Unions should similarly construe zipper clauses narrowly. Unions should generally take the position that zipper clauses 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 the particular working conditions in dispute because zipper clauses are contract terms over which arbitrators have the final say. 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 Board 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 the zipper clause 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

Impact

Once parties reach impasse over a contract proposal or other working condition, companies have fulfilled their obligation to bargain and may then unilaterally implement their final positions on contract terms or other matters, as long as the parties have reached impasse over every change companies 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 bargained to impasse over each of the terms they implement.

However, if the company's proposal combines, ties or links terms with other terms, the company must implement all of the terms in the proposal. The company may not implement some but not all of terms the company's proposal linked together.

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 – after reaching impasse -- unilaterally implement only the wage cut without the profit sharing plan.

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.

Definition

Parties reach bargaining impasse when they are deadlocked on at least one mandatory subject of bargaining so that they cannot reach agreement on the whole

contract and it is futile to continue talking. Parties may also reach impasse on individual issues separate from contracts or while contracts are in effect.

How unions can avoid impasse

If unions approach bargaining as negotiating an overall contract rather than negotiating over separate contract provisions, 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 repeat thereafter the union's intent to bargain one overall contract. Unions should also consistently and repeatedly state that they are conditioning their agreement to company proposals on the parties reaching agreement on the overall contract.

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 Board to those compromises when arguing that the parties have not yet reached impasse. (Having said that, the Board 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 their positions on at least several proposals that they are willing to make in case the parties seem to be reaching impasse. (Again, the Board 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 modify 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 use mediators and then use them to demonstrate flexibility and a willingness to compromise.

- Where possible, file ULP charges alleging that companies bargained in bad faith. Bad faith bargaining charges or, better yet, bad faith bargaining complaints the Board General Counsel issues preclude companies from declaring impasse.

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 bargaining obligations or the unions' status as bargaining representative, even after reaching impasse.

Example: Companies may not implement proposals that grant companies the authority to unilaterally re-set wage rates, merit raises or change contract terms or policies at their sole discretion.

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 company 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 Board 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 most recent — conduct and statements.

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 motions, revealing an absence of a sincere intent to reach common ground or agreement with unions.

Examples

- Agreeing to minor issues or proposals but not to 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 a meaningful opportunity to bargain. A company's obligation to refrain from unilaterally changing employment terms begins on the date workers win their election or companies recognize unions, and continues during contract terms and even 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 asking their opinions on proposals, bargaining positions or contract terms.

Unlawfully withdrawing recognition

Companies bargain in bad faith when they withdraw recognition of the union unless the company possesses evidence clearly showing that a majority of workers did not support the union at the time the company 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" 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.

Board 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 Board to order companies to agree to union proposals.

If companies’ bad faith bargaining caused any workers to lose hours, pay, benefits or their jobs, remedies can include backpay. For example, the Board 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

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
- dues check-off
- 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
- layoffs & recalls
- raises including merit raises
- worker physicals
- promotions
- workplace safety and health
- 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 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

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.

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.

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 a contract on permissive subjects, nor bargain to impasse over permissive subjects. 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 current contracts that are still in effect. While either party may request to

revisit or bargain over a provision in a 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 are permissive subjects and 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 they 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 means the process 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 union security clauses that require workers to become union members or pay dues and fees equal to membership dues as a condition of employment. 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 check-off clauses that require companies to deduct or check off dues and fees from the wages of those workers who sign dues check-off authorization or assignment forms and to forward the deducted amounts to the union. Dues check-off 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 check-off clauses. In right-to-work states, worker payments to the union are voluntary. Again, check-off authorizations are typically irrevocable for up to one year.

Automatic Revocation of Check-off Forms Because a Worker Resigned Membership

Check-off 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. Check-off forms that only refer to membership are automatically revoked if the worker exercises the right to resign membership. In contrast, check-off 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, workers who resign their union membership may object to paying fees for purposes other than collective bargaining, contract administration, representation, grievance processing, union administration and organizing. These costs are called "chargeable" expenditures. 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 Beck objector will be required to only pay an amount equal to the chargeable expenditures.

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 arbitrations. For several reasons, unions should lean in favor of arbitration rather than Board charges.

Ñ **More neutral decision-maker.** Many of the Board'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 through arbitration than at the Board.

Ñ **Deferral.** When ULP charges could be resolved through arbitration, the Board will almost always defer them to arbitration, rather than prosecute companies in ULP proceedings. Afterwards, the Board will adopt arbitrators' decisions unless they clearly undermine NLRA rights. Even if the Board ultimately rejects the arbitrator's decision, the Board case would be postponed until after arbitration.

Ñ **Delay.** Arbitrations usually result in quicker final decisions than ULP proceedings.

Ñ **Remedies.** While remedies arbitrators can award are theoretically the same as the Board, there is a greater chance of persuading arbitrators that justice requires extraordinary remedies than the Board. 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 policies or that companies deviated from

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 company managers or supervisors knew about the practices and implicitly agreed to them by failing to stop them. Arbitrators are unlikely to find past practices when 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 contract 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 a company's 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 company's case. 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

A company's obligation to provide documents and information extends to documents and information relevant to bargaining proposals, workplace issues, disputes or matters, and the union's investigation of workplace issues or arguments unions make, even in the absence of a grievance.

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 Board rarely finds that companies can withhold a document or information because it is confidential, proprietary or privileged. When the Board 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. This means that the company must provide the documents and information under a mutually agreeable confidentiality agreement.

Company refusal to produce documents

The obligation to provide relevant documents and information is one that the Board enforces relatively vigilantly. If unions file ULP charges over company refusals to produce documents or information, the Board 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 that is 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 workplace safety and health inspections.

When Companies Accuse Unions of Violating Contracts with Grievance Procedures that do not Allow Companies to File Grievances

When companies claim that unions violated contracts whose grievance procedures do not envision the company filing grievances, unions should consider whether their interests would be better served by having judges -- rather than arbitrators -- decide the dispute before agreeing to arbitrate the dispute.

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 written 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 later. 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 a grievant's 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 the language was unfavorable until it checked with attorneys about arbitrating the grievance. In the end, if the literal language is clear, arbitrators and the Board 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 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 compromised language.

- Unions may consider proposing provisions from a collection of suggested language the International has compiled. These provisions are available at the “Suggested Contract Language” link at <http://www.ufcw-contracts.org>.

- 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 that 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. Lawyers can also 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, unions should 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 its meaning.

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 in front of the bargaining committee 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 arising before the contract expired
- contract rights the parties intended to arbitrate even after the contract expired.

Examples: Rights to hours, schedules, vacations, etc., based on seniority, sick, disability or other leave.

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

In general, unions and their members have the rights to engage a wide-range of economic actions against companies. 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

Except as restricted by no-strike clauses, the NLRA broadly protects the rights of workers 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. Those actions include:

- Withholding their labor by striking, engaging in sympathy strikes or honoring picket lines. Sympathy strikes are strikes in support of workers in other bargaining units.
- Picketing, handbilling, attending demonstrations and participating in other actions during breaks and outside of work hours. Picketing typically involves workers carrying picket signs or wearing "sandwich" boards attached with strings 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. Picketing is discussed in more detail in the Picketing chapter.
- Circulating and signing petitions or asking customers to do so.

Clearly and Unmistakably Waiving Worker Rights to Engage in Economic Activities

The Board's waiver rule and no-strike clauses

Unions may waive the right of workers to engage in actions 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 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 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 strikes or slow downs 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 covers 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 and 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 happen during 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 only permit companies to narrowly restrict certain specifically identified actions.

No-strike clauses are not the sources of worker rights nor do they give workers or unions rights. So, instead of checking no-strike clauses to identify what rights unions and workers have, unions should read no-strike clauses to find out 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 that action.

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 Board 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 Board 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 because the company requested or demanded that the union refrain from taking the action.

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 Board 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 prove that it established the policy prior to the time workers engaged in protected activity and consistently enforced the policy in a non-discriminatorily manner.

Example: If the company allowed workers working on the salesfloor 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?
 - ◆ distributing literature away from the workplace, for example, nearby neighborhoods?
 - ◆ talking to customers?
 - ◆ attending rallies?
 - ◆ publicity?
- Is there an arbitrator decision ruling that the particular action violates the clause?

- Did the union expressly address and explicitly waive the right to engage in the specific action in a side agreement or during bargaining?

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, shareholders' meetings or warehouses, or wearing stickers or buttons at the workplace would not necessarily cause damages especially 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 yes and if the union believes an arbitrator would be less likely to award damages or large amounts of damages to companies, the union should ask 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.

Strikes

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

Notices to Open Contracts and Strike

When unions intend to bargain new contracts and may strike, the NLRA requires them to provide certain notices to the company and other entities such as the Federal Mediation and Conciliation Service (FMCS).

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))
- 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: For healthcare companies, written notices must state the precise date and time unions will strike or picket. If the union 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.

Contract Ratification

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

Accretions and After-Acquired Stores or Facilities

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 than true accretions are contract 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 or opens after the parties sign the contract after the union shows that a majority support the union in the stores or facilities
- include those workers in the agreement's existing bargaining unit and
- apply the agreement to those workers.

Successorship

The NLRA requires certain successor 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 38% -- of the predecessor's workers and
- continue to operate in a manner that by-and-large keeps the bargaining unit appropriate.

The NLRA generally permits successor companies to change and set initial working conditions and does not require successors to assume contracts.

Contract Requirements

Most contracts attempt to bind successors. 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.

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 regarding the acquisition, its structure, terms, financing and other details from the company and by subpoenaing the same information and documents from the prospective successor company. Companies are very reluctant to disclose such information and documents.

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

STRIKING FOR BARGAINING AND TO ORGANIZE

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The Right to Strike

The National Labor Relations Act protects workers' right to strike.

(For issues related to strikes in the context of collective bargaining, see the Collective Bargaining chapter.)

Strikes that the NLRA protects involve workers withholding their labor to improve their working conditions, the working conditions of other workers who work for the same company or to protest unfair labor practices. Workers who honor other strikers' picket lines or strike in sympathy with other strikers are called sympathy strikers. The NLRA does not protect slowdowns, or partial strikes where workers refuse to perform some of their duties or to work overtime.

Although actions such as picketing, handbilling and boycotts happen during strikes, those actions are not strikes because they do not necessarily involve the withholding of labor.

Short or "intermittent" strikes: Workers have the right to engage in multiple, short strikes – one day, one week long – as long as they:

- strike over wages, benefits, other working conditions or unfair labor practices
- completely stop working
- are not paid for the time they strike

Example: Work slowdowns and refusals to perform work while being paid for the time they slow down or refuse to work.

- could have been replaced by the company

Example: Even though workers struck for one day only, it was possible that the company could have hired other workers to replace the strikers.

Thus, the National Labor Relations Board has ruled that the NLRA protected 3 short, one-day strikes occurring over 2 weeks and 4 strikes taking place over one month because workers struck for protected purposes, ceased working, did not collect pay during the strikes and the company had the opportunity to replace them.

The NLRA protects "disruptive" strikes: Because the point of strikes is to disrupt company operations, the NLRA protects disruptive strikes as long as the

disruption is caused by the withholding of labor and not violence, property damage, sabotage, etc.

Sit-down Strikes and Work Stoppages at the Workplace

The NLRA also protects worker rights to engage in sit-down strikes as long as they:

- strike for a protected purpose
- do not seize the workplace and exclude the company and its managers
- are not violent and
- cause no disruption of the company's business other than that caused by withholding their labor.

On the other hand, the Supreme Court ruled that sit-down strikers lost the right to strike when 95 strikers occupied several plant buildings for 9 days and chased all managers out of the buildings under threats of violence. During that time, strikers destroyed company property and engaged in two gun fights with police.

Companies May Not Terminate or Discriminate Against Strikers

Technically, companies 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 companies may refuse to reinstate economic strikers unless and until their pre-strike jobs become available or a job substantially equivalent to their pre-strike job opens up during the year following the end of the strike.

Companies may not permanently replace ULP strikers.

Economic strikes

Economic strikes are those strikes taken to increase bargaining leverage to force companies to agree to better contracts, including 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 the workers the company hired during the strike were hired for permanent positions or permanent employment. Companies must prove that they and the new workers intended to establish a permanent and not temporary employment relationship for the duration of the strike.

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 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 must reinstate economic strikers at the end of the strike.

Retail workers returning to work: The threat of retail companies permanently replacing strikers is less serious than that of non-retail companies.

The NLRA requires companies to recall returning strikers to any available substantially equivalent job. This means that retail companies must reinstate almost every economic striker because:

- high worker turnover in retail results in constant numerous openings and
- most retail jobs are similar enough to be substantially equivalent to each other.

In other words, there will almost always be openings in a retail store similar enough to the jobs strikers held before the strike to which retail companies must reinstate strikers.

ULP Strikes

While they may permanently replace economic strikers, companies may not permanently replace ULP strikers. After 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 are those strikes workers engage in to at least in part protest ULPs companies committed. To prove a ULP strike, unions must show that the

ULPs at least partially motivated workers either to begin striking or to continue the strike at some point.

Setting up ULP strikes

The key to a ULP strike is identifying ULPs and evidence showing that those ULPs at least partially motivated workers to strike or to continue striking. Such evidence may include:

- papers, slides and powerpoints shown or distributed to members during meetings
- messages on handbills and picket signs and
- press releases or statements to the press.

Messages in ULP strikes: The main message of ULPs may be economic or something other than ULPs, as long as unions set up and conduct ULP strikes so that strikers are aware:

- of at least a few ULPs and
- that part of the strike's purpose is to protest those ULPs.

ULPs that companies commonly commit during bargaining:

- bad faith bargaining, including surface bargaining and unilateral changes
- unlawful statements
- contracting out bargaining unit work
- 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 union supporters or picketers.

PICKETING

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Picketing means workers:

- carrying picket or other signs, or wearing “sandwich” boards attached together with strings
- parading, patrolling or walking back-and-forth or in an oval in front of or next to entrances to company facilities or stores or parking lot driveways and
- attempting to coercively cause workers or customers to change their conduct through confrontational picketing instead of using a message to persuade them to change their conduct.

The National Labor Relations Board also considers picketing to be other activities that are functionally equivalent to picketing defined in this way.

How to Conduct Picketing to Maximize the Chances the National Labor Relations Act Will Protect the Picketing and that the Picketing Will Not Be Unlawful.

To increase the chances that the NLRA will protect picketing and courts will not rule picketing to be unlawful, picketing should be conducted:

- peacefully
- in an orderly way
- without physical confrontation and
- unobstructively or without blocking store or facility entrances, or parking lot driveways. Blocking means people can't walk through picketers to enter or exit facilities or stores, or can't drive through driveways or parking lot traffic lanes.

If the point of picketing is to communicate a message in a way to draw attention to the message and not to dissuade workers from working or customers from shopping, picketing should:

- be conducted away from entrances and driveways and
- not include any message requesting workers to strike or customers to boycott.

Picketing the Primary Company's Other Stores and Facilities

Unions may picket the company's other stores and facilities, affiliated corporations or operations as long as there is common control over the HR functions or labor relations of the struck location and the other picketed locations. The primary company or location is the company or location that the union has the direct or primary dispute with.

Handbilling Instead of Picketing

Important: If there is no common control over labor relations, Unions retain the rights to engage in other, non-picketing First Amendment actions against the company's other locations such as handbilling, publicizing negative messages and boycotting.

Researching and Collecting Evidence that there is Common Control over the Labor Relations of the Struck and Other Locations

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

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 locations?

Example: Does the corporate home office ultimately decide final contracts or employment disputes for both locations?

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

Example: Does the parent company's human resources department control the labor relations of the primary and target locations?

- 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 checks for the primary and targeted locations?
- 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 make up for weak evidence of common control of labor relations with evidence of significant corporate relationship or common operations.

To show significant corporate relationship or common operations, unions should research the corporate names, corporate structure, and the names of all primary and targeted locations, and the corporate structure of their divisions, affiliates, subsidiaries and operations of all locations.

- Are the names of the targeted locations the same as the primary location? How is the primary location 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 name on the collective bargaining agreement is just a paper entity, is the name of the actual primary location the same as the targeted location?
- Do primary and target locations share the same or related parent, sister or affiliated corporations?
- Do primary and target locations share common owners, directors, officers, executives or managers?
- Who owns, holds or manages primary and target locations' real estate?
- Do primary and target locations share common tradenames, trademarks or logos?

- 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 locations share central or regional offices?
- Are any of the primary and target locations' records centrally maintained through, for example, interconnected computers?
- Do the locations 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 means picketing to cause the:

- workers of the secondary companies to cease working or
- vendors to cease making 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's business generally. 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 handbill the secondary companies' customers requesting that they boycott the secondary company until it stops selling the primary company's products.

This is because the First Amendment and the NLRA fully protects handbilling as an exercise of Constitutional free speech rights.

Recognitional Picketing

When unions engage in "recognitional picketing," the NLRA allows companies to ask the Board to file for a court order stopping the picketing or to hold a quick representation election. This means that when the union has a "recognitional objective," picketing a company may result in the Board holding an election before the union is ready.

Recognitional objective means that the objective or purpose of the picketing is to force the company to:

- recognize the union as the collective bargaining representative of the company's workers
- bargain a collective bargaining agreement and
- establish an ongoing bargaining relationship.

Examples: Picket signs that say that the company should sign a contract, agree to the terms of a contract or become a union company.

The objective of picketing is also recognitional if the purpose is to force the company to:

- hire union members
- reinstate numerous union supporters or
- implement noneconomic employment conditions that can be implemented only if the company signs the union's contract.

Example: Picketing to force the company to agree to non-economic working conditions, such as seniority, scheduling and days off, because this implied that the company should sign a contract with the union.

Exception

Informational or "proviso" picketing: Even if the union has a recognitional objective, picketing should not violate the NLRA:

- if it only truthfully advises the public including consumers that the company does not employ members of, or have a contract with, the union
- as long as the picketing does not have the effect of interfering with deliveries or cause the company's workers to strike.

Area standards picketing: In contrast to recognitional picketing, genuine area standards picketing does not violate the NLRA. Area standards picketing is picketing whose sole objective is to protect the union's employment standards from the unfair competition from non-union companies.

For the area standards exception to apply, the union's demands must focus only on the company's economic costs such as wages and benefits. Importantly, the union must focus on the total economic cost package and not the particular benefits the union's contract provides.

Important: the Board will rule that area standards picketing is really unlawful recognitional picketing if the union has not collected information showing that the company's labor costs are lower than area standards labor costs.

Because area standards picketing protects area standards labor costs, the Board frequently rules that picketing is not area standards picketing if its purpose is to pressure companies to adopt non-economic working conditions, such as:

- seniority
- grievance procedures
- particular benefits
- double time for work performed before 8 o'clock in the morning as the union's contracts require.

WEINGARTEN OR RIGHT TO WITNESS RIGHTS

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What Are Weingarten Rights or the Right to a Witness for Meetings with Supervisors?

The National Labor Relations Act 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 whether they are formal closed-door meetings or simple work floor conversations if the discussions could result in discipline.

These rights to witnesses 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 Supervisor?

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 during the previous week. 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 previously warned the worker that the assistant 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. 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 person 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 salesfloor 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. After a service, the manager 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 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.

When 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 workers 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 workers 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 to:

- hear everything everyone says and take notes
- 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.
- ensure 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 workers and ensuring that workers do not admit 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 may 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 workers to:

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

The Weingarten witness should also tell the worker 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 workers unless and until a shop steward or union representative is present.

Otherwise, the company has three choices:

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

- deny the worker's demand for a witness and immediately end the discussion or
- give the worker 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 worker, the worker has the right to refuse to answer without discipline. If the company continues to question the worker, the company violates the NLRA and the union can file an unfair labor practice charge.

DUTY OF FAIR REPRESENTATION

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

What Does This Mean Legally?

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

Unions violate their duty of fair representation or DFR if they discriminate against workers 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 workers, or workers' grievances, problems or issues irrationally, arbitrarily or in bad faith.

Unions do not act irrationally or arbitrarily if they make decisions on workers' grievances or problems based on legitimate reasons and for the most part consistent 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 worker's grievance or actively address the member's concern.

If the union's file shows that it represented the member well, the Board 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

The duty of fair representation applies to all employment matters for which unions are members' exclusive bargaining representative, including grievance processing and contract bargaining.

The duty of fair representation 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 contracts protesting for example the company's discriminatory treatment of members, instead of representing members before the Equal Employment Opportunity Commission or state human rights agencies on charges 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.

WORKPLACE SAFETY AND HEALTH: OSHA

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What Is OSHA?

The Occupational Safety and Health Act is the federal law that requires companies to provide safe and healthy work places. OSHA established the Occupational Safety and Health Administration (also OSHA) to:

- establish minimum safety and health standards that companies must meet and
- inspect workplaces to enforce these standards.

OSHA is located in the federal Department of Labor. Federal OSHA only covers private sector workers.

However, 22 states operate their own job safety and health programs that enforce the federal OSHA requirements and cover both private sector and state and local government workers. Additionally, five states have state plans that apply only to 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.

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

Although OSHA provides workers with protections and legal rights that make it a useful tool for unions in many instances, OSHA is a small agency with limited resources and a limited number of inspectors. There are fewer than 1,838 inspectors to inspect the 8 million workplaces under the OSHA's jurisdiction. Federal OSHA has enough inspectors to inspect workplaces once every 159 years. In addition, political constraints further diminish the agency's effectiveness. For example, Republicans seek to roll back or delay implementation of important protections that the Obama administration instituted.

Because of these limitations, unions should use the collective bargaining process to make sure that companies provide safe and healthy working conditions. Union representatives, shop stewards and safety committee members should constantly monitor workplaces and raise any unsafe conditions with companies. Even in the absence of contract language requiring the company to assure a safe workplace, unions still have the right to demand that companies address and

correct workplace safety or health hazards. If nothing else, companies violate their authority under management rights clauses when they permit unsafe workplaces.

When they allow a workplace to be unsafe or unhealthy, companies violate the management rights clause because arbitrators consistently rule that companies must exercise their management rights authority in a reasonable manner. It is unreasonable for companies to fail to remedy unsafe or unhealthy workplaces.

Standards versus the General Duty Clause

OSHA sets 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 issues such as reporting of injuries and illnesses, access to medical and exposure records, personal protective equipment and communications to workers of workplace hazards. A company's violation of these 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 excessive heat or cold.

Even where OSHA has not set forth a standard addressing a specific hazard, companies are responsible for complying with the general duty to provide a workplace free from hazards that are causing or may 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 evidence proving that:

- workers are exposed to a hazard
- 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 is 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 an OSHA standard or the general duty clause is a powerful strategy in getting a company to address a hazard or worker illness. The union can initially demand that the company fix the problem, citing the OSHA standard, and if necessary, threaten to file a grievance or an OSHA complaint.

Unions can argue OSHA standards or the company's obligation under a General Duty Clause during grievance meetings.

Note: The threat of filing an OSHA complaint may be a better first step than actually filing a complaint. The union loses its leverage of an OSHA threat if the union files a complaint, but OSHA fails to cite the company for a violation.

The Right to Know About Workplace Hazards

Workers and unions have the right to access important company documents about workplace safety and health conditions. Unions can use this information to identify, document and correct hazardous conditions.

Access to Records on Exposure to Hazardous Agents

OSHA's Access Standard (Access to Employee Exposure and Medical Records) gives current and former workers and their union the right to get the results of any hazardous exposure monitoring conducted in the workplace.

What information do exposure records contain: Exposure records can reveal whether the company exposed workers 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. OSHA's Access Standard provides workers and the union the right 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 toxic substances in the workplace

- copies of any reports, including ergonomic reports, findings, analyses, conclusions or recommendations relating to worker exposure to toxic substances or harmful physical conditions issued by any health and safety consultant or the company, such as repetitive motion.

How to Obtain Workplace Monitoring or Exposure Records

In union-represented workplaces, unions can use the company's obligation to bargain to require companies to provide health and safety documents, including hazardous condition exposure records.

Unions and workers may also obtain copies of exposure records by making a written request to the company. OSHA requires companies to give workers access to these records within 15 working days after the request.

Companies' failure to honor these requests violates OSHA and the National Labor Relations Act.

Access to Medical Records

This same OSHA Access Standard gives workers and former workers access to their individual medical records. A worker can also designate the union as the worker's designated representative and authorize, in writing, that the company release the worker's medical records to the union.

Aggregate information: The union can also get records of aggregate or collective medical test results (such as analyses using worker medical records) that do not identify individual workers. Note: Unions have independent rights to medical information under the NLRA.

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 can use these records to show that a health problem is broader than just one worker.

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

Does HIPAA Shield Companies from Providing Medical Records?

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 the NLRA and OSHA rules. This manual discusses HIPAA in another chapter.

Exposure and medical records can be very technical. For this reason, the assistance of a trusted physician or other qualified person is helpful to understand 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 have been close to or above the OSHA standard for several months. The workers in this area then ask for the results of any hearing tests (medical records) the company has recently conducted. If these tests show a pattern of hearing loss, then a noise hazard likely exists in this area. The union or safety committee should then demand that the company abate the noise problem in this area. The OSHA noise standard requires companies to abate hazards by employing engineering controls as a first step in reducing noise levels.

Also under the access to medical records 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 right 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, OSHA will protect worker privacy.

Worker Rights to Know About Hazardous Chemicals on the Job

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

• identify hazardous chemicals used in the workplace (hazardous chemicals include dusts that may be combustible or that can cause reduced lung function and lung disease)

- 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 to easily determine where the company uses the chemical, as well as what chemicals workers can look for in each work area. The company must make the list 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 companies will implement the Hazard Communication Standard. Companies must make the program available to workers or unions, upon request.

Safety Data Sheets

Companies must keep Safety Data Sheets (SDSs) for each hazardous chemical in the workplace. SDSs contain important safety and health information about hazardous chemicals, including ingredient information, any adverse health effects and exposure control information, including appropriate personal protective equipment. Workers get information on the health effects of workplace chemicals primarily through SDSs. Companies must make these SDSs accessible to all workers during each work shift. Companies must also make SDSs available to unions.

Labeling

All containers of hazardous chemicals must be labeled with (1) an 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. OSHA, though, does not require labels on portable containers into which workers have transferred hazardous chemicals from labeled containers, so long as the transferring worker intends to immediately use the chemicals in the portable containers.

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 upon hire, and must provide additional training whenever the company introduces a new hazard into the work area or if the company moves a worker to an area where the company uses different chemicals. The company must conduct trainings in a language that the worker understands.

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 of that substance.

How to obtain chemical information under this standard

- Any worker can request copies of the list of hazardous chemicals, the SDSs or the written Hazard Communication Program.
- Unions may also obtain copies of the hazardous chemicals list, SDSs and the written 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. (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 locations: Companies must maintain the logs in each of their establishments or locations where they conduct business, perform services or conduct industrial operations. For example, grocery companies operate 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
- injured or sick workers' names and
- the number of work days lost or restricted days, and whether the injury or illness resulted in transfer. 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 work day or shift.

What Information Is Available?

OSHA 300 Log: The full OSHA 300 log contains information that can be used by unions and safety committees to determine the changes that companies must make to prevent injuries and illnesses from occurring or continuing. Unions can use the information to determine where most injuries or illnesses occur or what types of injuries occur most frequently. This information helps unions to prepare for contract negotiations or raise health or safety issues with companies mid-contract.

OSHA Form 301 Incident Report: In addition, companies must record each injury or illness on the OSHA Form 301 Injury and Illness Incident Report within seven calendar days after the company receives notice that an injury or illness occurred. The Form 301 Incident Report records information on how each injury or illness occurred and typically contains more explanation than appears on the OSHA 300 Log.

Form 300-A Summary: 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 that occurred during the past year — not the types of injuries or where they occurred.

How to Obtain OSHA Logs and Reports

OSHA 300 Log: 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 company must leave the names of injured or ill workers on the OSHA 300 log, except in certain privacy concern cases. Privacy concern cases are injuries or illnesses occurring 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 a copy of the log or a way to copy the log, upon request. Companies that fail to provide requested OSHA 300 logs violate OSHA.

Unions can check company logs for accuracy and completeness. If unions suspect that companies are falsifying records, unions may file a grievance or OSHA complaint. Accurate recordkeeping on these logs is an OSHA top priority.

OSHA Form 301 Incident Report: Workers can also obtain a copy of the OSHA Form 301 Incident Report. The Union can obtain OSHA Forms 301, but only with the information identifying injured workers removed.

OSHA's recordkeeping standard prohibits companies from discriminating against a worker for exercising OSHA rights, including requesting injury and illness records.

OSHA Enforcement

Federal OSHA operates several offices regionally around the country. These Regional Offices carry out the inspection and enforcement duties of OSHA.

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. A union should also consider filing an OSHA complaint if the union has exhausted all other avenues to compel the company to address the hazard. Complaints usually trigger workplace inspections, but not always. If the OSHA Regional Office considers a complaint not serious, or if the filing party does not submit the complaint as a signed written document, OSHA may simply notify the company that the agency received a complaint and ask the company to verify that the company has addressed the issue. If an OSHA

inspection finds violations, OSHA will issue citations, require the company to correct hazards and may also fine the company.

OSHA gives workers and unions the right to file complaints. Upon request, OSHA will not reveal to the company which worker filed the complaint. However, to ensure that OSHA actually carries out the inspection, the OSHA complaint must be written and signed by the worker or the union.

Workers and unions have the right to:

- be present during the inspection's opening conference when the OSHA inspector explains the inspection's purpose and scope
- 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 union should remind the OSHA inspector to give the union a copy of any citations. OSHA requires companies to post citations at the work place for all workers to see.

An OSHA citation states the:

- OSHA Standard that the company violated
- nature of the violation – hazards identified
- date by which the company must correct or abate the hazard(s)
- proposed penalty.

OSHA posts the hazards and violations found during a worksite inspection on its website: www.osha.gov.

What Happens After an OSHA Inspection Takes Place?

If the company agrees with the citation, the company must correct or abate the hazards by the time period specified on the OSHA citation and must pay any penalty.

Companies may request an informal conference with OSHA within 15 days from the day the company receives the citation. The purpose of the conference is to discuss issues raised during the inspection or to reach an informal agreement regarding abatement of hazards or proposed penalties. Affected workers or union representatives have the right to participate in the informal conference.

A company has 15 days to contest any citation (by filing a "Notice of Contest") which entitles it to a hearing before an administrative law judge. The affected workers or union may also file a Notice of Contest within the 15 days, but only to dispute the length of time the citation allows the company to abate the hazard. A company's request for an informal conference does not extend the 15 days that the company has 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 must be filed with the 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. OSHA does not require them to have an attorney.

Companies usually settle OSHA citations prior to hearing. The agency and the company can settle any citation without the consent of workers or the union. 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, on numerous occasions, the UFCW has secured a major role during negotiations 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:

- requesting 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 injuries or illnesses.

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

Grieving retaliation or discrimination: In union-represented workplaces, workers can also file grievances over company discrimination or discipline. It would never be just cause for a company to discipline a worker for requesting health and safety documents or filing an OSHA complaint.

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 map out hazards 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 prohibits companies from discriminating against disabled workers in all aspects of employment.

What Does the ADA Prohibit?

The ADA prohibits discrimination against workers based on their disability who can perform the job. Specifically, the ADA prohibits companies from discriminating against disabled workers in job training, promotion, discharge, worker compensation and all other working conditions.

The ADA also prohibits companies from discriminating against disabled job applicants. For example, companies cannot use requirements that would screen out a disabled worker who can perform the job unless the requirement is job-related and required by the business.

Example: A requirement to lift 75 pounds if only certain jobs require the strength to lift that weight.

Example: A bus company that requires a commercial driver's license criteria for a mechanic's helper job which does not require driving buses if an applicant who cannot get a commercial driver's license due to diabetes or other disability.

Example: A company that refrains from hiring a disabled worker for failing to achieve a 100% score on a functional capability test must show that a 100% score is job-related and that the 100% score is necessary to enable the worker to perform the job.

The ADA also requires companies to reasonably accommodate disabled workers so that the disability will not prevent the worker from performing the job, unless the accommodation imposes an undue hardship on the business.

The ADA also prohibits a company from refusing to hire a disabled worker because the company believes that the worker may require an accommodation to do the job.

Example: A company discriminates based on disability when it refuses to hire a worker who can perform the job because the worker was previously diagnosed and treated for carpal tunnel and the company believes that the worker may again suffer from carpal tunnel and need an accommodation.

Example: A company discriminates based on disability when it refuses to hire a worker who can perform the job because the worker previously suffered back problems and the company believes that the worker may again suffer back problems and need an accommodation.

The ADA also prohibits a company from contracting with a third party that has policies and practices that discriminate against the company's workers.

What Companies Are Covered by the ADA?

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

Who is Disabled Within the Meaning of the ADA?

The first step toward ADA protection is to determine who is considered disabled.

A worker is disabled if the worker:

- has a physical or mental impairment that substantially limits the worker's ability to perform one or more major life activities
- previously had a disability and now is disability free or
- is perceived as disabled even though the worker does not have an impairment or the impairment is not limiting the worker's ability to perform a major life activity.

Example: A worker with diminished vision in one eye which does not affect the worker's ability to perform the job and the company forces the worker to take leave or fires the worker based on the belief that the worker cannot perform the job.

An impairment affects the functioning of body systems and generally results from a disorder of the body's or mind's vital processes.

A major life activity includes basic activities such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Major life activities also include the operations of all major bodily functions such as the immune, cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive systems.

A worker's impairment substantially limits the performance of a major life activity if the worker is unable to perform the activity the same way most people in the general population perform the activity.

Example: The ability to lift is a major life activity. The inability to lift over 25 pounds may be considered a disability if the inability stems from an physical or mental impairment. So an inability to lift over 25 pounds due to slight stature, a sedentary lifestyle or advanced age will not constitute a disability. By contrast, an inability to lift due to disfigurement from an accident, degeneration of the body tissue/muscles resulting from a neurological condition or disease should constitute a disability.

Example: A worker with a chronic ankle injury which restricts the worker's ability to walk more than a half mile or stand longer than an hour has an impairment that substantially limiting the major life activities of walking and standing.

Example: A worker who can see with only one eye has an impairment that substantially limits the major life activity of seeing.

In determining whether an impairment is an ADA disability, an individualized assessment must be conducted to determine how the impairment affects the worker's performance of a major life activity. A company cannot rely on how an impairment usually affects those with a particular impairment because impairments range in severity. The assessment of the impairment must be made without regard to the medicine or other efforts taken to mitigate the effects of the impairment.

Individualized assessment means that a company must assess how an impairment affects a particular worker and how it limits one or more major life activities of that worker.

Example: The limiting nature of a worker's epilepsy must be assessed without regard to the medicine the worker takes to control the frequency and severity of the seizures. If without medicine the epilepsy limits a major life activity of the worker, the worker is disabled.

Are Impairments Common in Industries Where UFCW Members Work Considered ADA Disabilities?

Yes, impairments such as carpal tunnel syndrome, fibromyalgia and lifting limitations may be considered disabilities.

Is Obesity a Disability Within the Meaning of the ADA?

The EEOC takes the position that obesity that is more than 100% over normal body weight constitutes a disability.

What Does It Mean That the Disabled Worker Must Be Qualified for the Job?

To be qualified, the disabled worker has to:

- satisfy the job's requirements such as education, skills, experience and licenses and
- possess the ability to perform the job's essential functions, with or without reasonable accommodation.

A job's essential functions are the duties that the company actually requires for the job. If the company does not require workers in the job to perform the function, then the function is not essential. The factors to be considered include the company's job description and judgment, the time spent performing the function by current and past workers, and the impact on the job of not performing the function.

Example: Climbing, squatting, and kneeling were essential functions of the auto plant technician because the job required continuous inspecting all around, over and underneath cars. A worker disabled by multiple sclerosis whose restrictions prohibited the worker from climbing, squatting or kneeling and long-duration standing and walking was unqualified for the job.

What Conditions Are Excluded from the Definition of Disability?

A worker currently using unlawful drugs or unlawfully using prescription drugs is not disabled. Where the worker no longer uses drugs or is participating in or completed a rehabilitation program, the worker is not excluded from the definition of a qualified worker with a disability.

What Is a Company's Obligation When a Disabled Worker Poses a Direct Threat?

Companies who refuse to hire a disabled worker or assign the worker a particular job because the worker poses a direct threat to the health or safety of the disabled worker or other workers must individually assess the threat based on medical judgment and objective evidence to determine whether the worker can safely perform essential functions of the job. The company must consider the:

- duration of risk
- nature and severity of potential harm and
- likelihood and imminence.

Even if the assessment shows a threat to safety or health, the company must also must show that the risk cannot be eliminated or reduced by reasonable accommodation.

Is a Transgender Person Considered Disabled?

No. The ADA expressly excludes transsexuals from the definition of disability. Disability also does not include gender identity disorders not resulting from physical impairments. However, a growing number of courts hold that transgender discrimination violates Title VII's prohibition on sex discrimination.

What Rights Does a Pregnant Worker Have When Pregnancy Prevents Her From Performing Her Job as Usual?

Pregnancy itself is not a disability within the meaning of the ADA. However, women who suffer impairments during pregnancy including high blood pressure, anemia, and gestational diabetes, can be disabled. Additionally, a pregnant worker may be entitled to an accommodation under anti-discrimination if the company accommodates other workers who suffer impairments.

What Is a Reasonable Accommodation?

A reasonable accommodation is a modification or adjustment of the work or workplace to enable the worker to perform the essential functions of the job.

The accommodation will not be reasonable if it causes the company undue hardship.

The ADA requires the worker to request an accommodation. Once the company receives a request, the company is required to cooperate with the worker (and the worker's union representative) to determine a reasonable accommodation. The requirement to engage a worker in finding a reasonable accommodation is a continuing duty of the company because of the changing nature of limitations resulting from disabling conditions.

To find a reasonable accommodation which will enable the worker to perform the job, the company should: (1) analyze the job to determine the job's purpose and essential functions; (2) find out the disability limits the worker's ability to perform the essential functions and how the accommodation can overcome the limitations; (3) consult with the worker to identify possible accommodations and their effectiveness; and (4) select the most appropriate accommodation for both worker and company.

A reasonable accommodation can include:

- making existing facilities accessible to disabled workers
- reallocating or redistributing nonessential or marginal job functions to other workers
- modified work schedules such as part time work, and waiver from shift rotation or overtime
- extended leave beyond existing policies
- reassignment to a vacant position where (1) the transfer is reasonable and (2) the company can show undue hardship (accommodation not reasonable on its face if another worker qualifies for position based on seniority)
- acquisition or modification of equipment
- appropriate modifications of examinations, training materials or policies and
- provision of qualified readers or interpreters.

Example: Six months leave to diagnose and treat condition was a reasonable accommodation given evidence that the company could have continued to cover position with substitutes.

Example: Scooter, reaching device or man lift may be reasonable accommodations to enable clerk restricted from standing to perform the job's essential functions in retail store.

Example: Allowing cashier to sit throughout the shift because the cashier's osteoarthritis made it difficult to walk or stand for long periods is not a reasonable accommodation where the store needs its limited number of workers to perform tasks throughout store.

When Does the ADA Allow a Company to Not Provide a Reasonable Accommodation?

The ADA requires a company to reasonably accommodate a disabled workers unless the accommodation would impose an undue hardship on the business because the accommodation would result in significant difficulty or expense. Courts look at the cost of the accommodation compared to the finances of the facility and the company, the impact on the ability of the company to conduct business and the impact on other workers in performing their jobs.

A requested accommodation that would violate the seniority provisions of a collective bargaining agreement constitutes an undue hardship on the business and other workers.

How Does FMLA Relate to ADA's Reasonable Accommodation?

A worker's right under the Family and Medical Leave Act to unpaid leave in response to the worker's own serious health condition is separate from the worker's rights under the ADA. Companies are required to comply with a worker's rights under each law. For the requirements of the FMLA, please see the FMLA chapter.

While time on FMLA leave may be counted as ADA leave, a worker's exhaustion of FMLA leave cannot limit the amount of ADA leave a company may be obligated to provide as a reasonable accommodation.

The ADA does not require a company to provide a certain amount of leave. Rather, under the ADA, a company may be obligated to provide leave as an accommodation that is longer than prescribed by existing company policy or the governing collective bargaining agreement.

What Are Requirements Regarding Medical Inquiries?

The ADA prohibits medical examinations or inquiries into whether a worker is disabled or the nature or severity of the disability unless the inquiry is job related and required by the company's business.

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 company must prove business necessity.

A medical inquiry constitutes discrimination without proof that the worker is disabled.

Example: A company requirement that workers identify all medicines they take constitutes an impermissible medical inquiry because it will likely disclose disabilities.

What Are Acceptable Medical Inquiries?

A company is permitted to inquire 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) the company subjects all workers for the position to the examination; (2) the examination is treated as a confidential medical record; and (3) withdrawal of an employment offer is based only upon reasons which are job-related and a 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 files separate from other worker information.

Certain exceptions to the confidentiality requirement are made for management or safety personnel who need to know about a worker's disability or medical restrictions.

Unions have the right to obtain worker's medical information when necessary for bargaining about accommodations or that is relevant to a labor dispute or grievance, but must comply with the same confidentiality requirements required of the company.

What Is Protected Activity Under the ADA?

Protected activity under the ADA includes:

- filing a charge
- participating in an investigation, proceeding or hearing
- opposing illegal activity
- exercising or asserting a right, including
 - ◆ requesting an accommodation
 - ◆ aiding or encouraging another worker to exercise an ADA right.

How Is the ADA Enforced and What Are Its Remedies?

The ADA adopts all the enforcement procedures and remedies provided for violations of Title VII.

To enforce the ADA, a worker must file a charge with the EEOC within usually 180 days following the violation. If a state or municipality has a fair employment practices agency, the worker will have 300 days to file the charge with EEOC.

If the EEOC does not resolve the complaint within 180 days or issues a no cause finding, the worker 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 reinstatement, backpay, and compensatory and punitive damages.

The ADA does not preempt any federal, state, or local law which may grant equivalent or greater protection to disabled workers.

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 a federal 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. This includes refraining from discriminating in employment against qualified individuals based on disability.

What Is a Covered Federal Contractor?

Covered federal contractors are businesses that have contracts or subcontracts with the federal government, and the value of the contract or subcontract exceeds \$10,000.

How Does the Rehabilitation Act Address Disabilities?

The Rehabilitation Act is interpreted the same as the Americans with Disabilities Act (ADA) for determining whether a company has discriminated against disabled workers and applicants.

What Type of Affirmative Action Must Federal Contractors Take?

A federal contractor must reasonably accommodate the known physical and mental limitations of disabled workers unless the contractor can show an undue hardship on the business.

A federal contractor must establish meaningful contacts with social service agencies and other community organizations so that disabled workers can obtain advice, technical assistance, and job referrals.

A federal contractor must 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 detailing the policies, practices, and procedures the contractor will implement to comply with the Rehabilitation Act. The contractor must make this affirmative action plan available to the U.S. Department of Labor

Office of Federal Contract Compliance Programs (OFCCP) or any job applicant or worker who requests it.

Enforcement

A worker who believes that the company has discriminated in violation of the Rehabilitation Act can file a complaint with the OFCCP by calling 1-800-397-6251. A worker must file a complaint within 180 days of the act the worker alleges is discriminatory. A worker may also file a class action complaint.

The OFCCP investigates to determine whether a violation has occurred. If the OFCCP finds reasonable cause of a violation, the OFCCP will attempt to remedy the discriminatory conduct through settlement. If OFCCP is unable to remedy the violation, it may refer the complaint to the Labor Department's Solicitor's Office for enforcement.

The Labor Department may initiate administrative proceedings or refer the case to the Justice Department for court proceedings.

There is no private right of action under the Rehabilitation Act. The Labor Department has 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
- enjoining illegal company conduct.

DOL 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 and illnesses.

These laws result from a historic "compromise" where workers gave up the right to file lawsuits against companies for injuries caused by the companies' negligence in return for companies compensating to some extent most job related injuries, regardless of whether the companies were negligent or the workers were at fault. Workers compensation generally do not compensate for intentionally self-inflicted injuries and injuries resulting from willful worker misconduct.

Companies are required to pay insurance premiums to pay for the workers' compensation insurance.

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 loss of wages for time they can't work because of injuries or illnesses. The amount of benefits depends on the nature, severity and duration of the injury.

Special compensation is often awarded to workers for injuries that cause permanent loss, or loss of use, of a body part. This compensation is payable without regard to wage loss.

Permanently disabled workers may 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 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 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 insurance companies 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 chapter 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:

Do's 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 any 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 lawfully 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 most labor or employment lawyers do not 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 cash register 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 for certain illnesses and conditions.

Qualifying workers have a statutory right to take leave that 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 company and show they qualify for leave.

FMLA is designed to work along with company workplace rules, including company absentee 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.

FMLA grants workers up to 26 workweeks of leave under certain circumstances to care for a family member who is “covered active duty” military or a “covered servicemember.”

What Workers Are Eligible for FMLA Leave?

An eligible worker:

- has worked for the company before taking leave, for a combined 12 months or more over the last 7 years (need not be consecutive);
- has worked at least 1,250 hours for the company in the 12 months prior to when the leave starts; and
- works for a company that employs 50 or more workers either in the same facility or within a 75-mile radius of worker’s job site. (Public agencies are not required to meet the 50-worker threshold.)

What Conditions Qualify for FMLA Leave?

An eligible worker can use up to 12 workweeks of leave, over a 12-month period, when the worker cannot work because of the worker’s own serious health condition.

An eligible worker can use up to 12 workweeks of leave, over a 12-month period, when the worker needs to care for a spouse, a child under 18 years old, or a parent with serious health condition.

The worker can also use up to 12 workweeks of leave, over a 12-month period, to care for a child *older than* 18 if the child cannot care for the child's self because of a mental or physical disability as defined by the Americans with Disabilities Act. A worker who is not biologically related to the child is a parent under FMLA so long as the worker is responsible for caring and financially supporting the child.

Caring for a family member with a serious health condition includes providing psychological comfort for a family member receiving inpatient or home care.

An eligible worker can take up to 12 workweeks of leave, over a 12-month period, for the birth of a child or to prepare for and accept placement of a new foster care or adopted child and for bonding with the new child. A married couple employed by the same company can take a combined total of up to 12 workweeks leave for birth, placement, and bonding, however each may use the remainder of their individual 12 workweek allotment for other FMLA qualifying conditions.

An eligible worker can take up to 12 workweeks of leave, over a 12-month period, because of a qualifying exigency of a family member arising out of the family member being on covered active duty or having been notified of an impending order to covered active duty (re: deployment to foreign country).

An eligible worker who is a family member (including next of kin) of a covered servicemember can take up to 26 workweeks of leave, over a 12-month period, to care for the covered servicemember.

Does the Term “Spouse” Include Same-Sex Couples?

Under the FMLA, “spouse” includes (1) individuals in lawfully recognized same-sex and common law marriages, and (2) marriages that were validly entered into outside of the United States, if such marriages could have been entered into in at least one state.

How Can Workers Use Their FMLA Leave Allotment?

Workers can use leave in different amounts—weeks, days, hours, or even smaller amounts if the company permits smaller leave times for non-FMLA leave. The amount of FMLA leave a worker uses will depend upon the reason for the 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 that week will not count against the worker's FMLA entitlement unless the worker was scheduled to work on the holiday.

How Is the “12-Month Period” Determined?

A company use one of the following methods to calculate the “12-month period” during which the worker can take allotted leave:

- a calendar year from January 1 through December 31;
- any fixed 12-month period such as the company's fiscal year or the year beginning on a worker's anniversary date;
- a 12-month period measured *forward* from the first date a worker uses the 12-week leave allotment; or
- a “rolling” 12-month period which looks *backward* from the first day of requested leave.

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 leave beginning October 1 of the previous year. The rolling 12-month method requires a look back to July 2 of the previous year to determine how much leave the worker has used in the 12 months between July 2 of the previous year and July 1 of the current year. Based on this look back, the worker used 8 weeks of leave and thus has only 4 weeks leave available to use until October 1 of the current year.

A company must notify workers in writing of the 12-month calculation method it will use. If a company fails to do this, the worker has the right to use the most favorable 12-month calculation method.

The Union has the right to bargain over which 12-month calculation method to use.

What Notice Must a Worker Give a Company to Activate the Right to FMLA Leave?

A worker who needs to take leave must give the company sufficient notice, either orally or in writing, that the leave is for an FMLA qualifying reason. A worker does not need to mention the term "FMLA", but must provide sufficient information to indicate that the leave qualifies under FMLA. If a worker fails to provide sufficient notice, then FMLA will not protect the worker's leave.

The notice for leave must indicate:

- the condition requiring leave;
- the start date of the leave;
- when leave is expected to end; and
- what essential job function the worker cannot perform, when asking leave for the worker's own illness or injury.

Workers must notify the company before leave begins (except in unusual circumstances):

- if leave is foreseeable, the worker must notify the company 30 days before the start of the leave; or
- if a worker does not know of the need 30 days before leave is to begin, the worker must tell the company **as soon as** the worker knows of the need.

Example: A worker admitted to a hospital for emergency surgery and the following day diagnosed with cancer *provided* sufficient notice of leave for an FMLA qualifying reason when the worker told the company within 3 days of the surgery about his required treatment and regularly communicated with company about such treatment.

Example: A worker who suffered from chronic diabetes that began the previous year *failed to provide* sufficient notice that the worker's 3 leave days qualified for FMLA because the worker's leave request simply stated "illness" and the health clinic's certification failed to indicate the chronic condition or provide any supporting facts.

Example: A worker whose previous back injury had caused little or no time off from work *failed to provide* sufficient notice when the

worker hurt his back again and remained off work for 4 days because the worker provided no detail when calling in sick that would differentiate his absences from ordinary sick days.

What Impact Do Company Attendance Policies Have on FMLA Leave Requests/Use?

Workers must follow company rules regarding notice of each part or full day's leave *unless* the notice requirements interfere with FMLA rights.

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 an FMLA qualifying reason did not violate the FMLA because the worker failed to timely submit FMLA certification and call-in daily during her absence in accordance with the company policy which provided for termination for 3 or more consecutive days absence without notice.

How Must a Company Respond to a Worker's FMLA Leave Request?

A company must respond to a 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 an eligible worker or otherwise provide a reason why the worker is not eligible; and
- give the worker a written notice of rights and responsibilities.

A company that has a significant number of non-English speaking workers must translate all required notices to into a language which workers' understand.

What Must the Company Provide in the Written Rights and Responsibilities Notice?

The company must provide a written rights and responsibilities notifying the worker:

- of the worker's requirements to secure FMLA leave and the consequences of not satisfying them;
- that leave counts against the worker's FMLA leave allotment;
- the "12-month period" method the company uses to calculate the amount of available FMLA leave ;
- whether the worker must submit a health care provider certification form and, if so, the deadline.
- whether the worker has a right to substitute paid leave for unpaid leave and whether the company requires the worker to do so; and
- whether the worker must 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 tell the worker:

- in writing, that it either approves the leave request or the reason for disapproval;
- in writing, how much leave the worker can use based on the information from the worker's health care provider and the remaining leave allotment;
- how often to submit recertification; and
- whether the company requires a return to work certificate.

If the worker has a dispute with the company over leave, the worker should complain in writing to the company because FMLA requires the company to document all FMLA-related disputes with workers.

Example: Company violated FMLA by failing to give the worker individualized notice that it would count the worker's leave against the worker's FMLA allotment. Because of this, the worker exceeded the

FMLA leave allotment by having surgery that she could in fact have postponed.

Law Requires Worker to Prove That Condition Qualifies for FMLA Leave

A worker must prove that leave is for a condition that qualifies for FMLA leave. Generally, FMLA leave is used for a “serious health condition” of the worker or the worker’s family member.

To prove this, a company can require a worker to submit a medical certification form completed by a Health Care Provider. The company must provide the worker at least 15 calendar days to return the form. If the certification is incomplete or unclear, the company must give the worker written notice of additional information needed and 7 calendar days to clarify the form.

The certification must state: (1) when the serious health condition began; (2) how long the condition is expected to last; (3) appropriate medical facts about the condition; and (4) a statement that the worker cannot perform at least one essential function of the job.

What Is a Serious Health Condition of a Worker or Family Member?

Under FMLA, a serious health condition is an illness, injury, impairment, or physical or mental condition that causes the worker or family member an inability to work, attend school, or perform other regular daily activities and:

- requires inpatient care of an overnight stay in a medical facility and related subsequent treatment; or
- requires continuing treatment which is either:
 - ◆ a period of more than 3 consecutive, full calendar days during which a worker or family member is incapacitated (i.e., cannot perform an essential job function or the worker’s family member cannot perform at least one daily living activity), 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 when a *chronic serious health condition* incapacitates a worker or family member, 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 occurs within 7 days after incapacity begins.

Example: A worker potentially qualified for FMLA because the worker suffered urinary retention and genital herpes, which both incapacitated the worker for 2 work days and 2 weekend days, required a doctor's visit, and continuing treatment of prescriptive medicine.

Example: A worker potentially qualified for FMLA because the worker took leave for 4 consecutive days with migraine headaches and two health care providers evaluated the worker. This qualifies as a chronic serious health condition even if only one of the two providers confirmed the worker's condition.

What Rules Govern Substitution of Paid Leave for Unpaid 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, meaning that a company can count a worker's accrued sick and vacation leave against the worker's time on unpaid FMLA leave.

An unrepresented worker may voluntarily agree to this requirement. But in a union-represented workplace, the company cannot unilaterally substitute accrued paid leave for unpaid FMLA leave and instead must bargain over this issue.

A company can count time on workers compensation or temporary disability as running concurrently with the worker's unpaid FMLA leave entitlement. However because workers compensation or temporary disability plans is *not*

unpaid leave, the company cannot substitute any accrued paid leave (i.e., vacation or personal leave) for the concurrent FMLA leave.

Example: A company violated the FMLA when it counted a worker's sick and vacation leave days against her FMLA leave while the worker was receiving disability benefits pursuant to a union negotiated, short-term disability benefit program.

How Does A Worker's Time On FMLA Leave Impact Other Benefits?

The FMLA prohibits a company from reducing worker's benefits earned prior to taking leave because the worker takes FMLA leave.

The FMLA also provides that a company cannot use unpaid FMLA leave as a negative factor in employment decisions. Though the FMLA does not entitle a worker to the accrual of seniority or benefits during unpaid leave, a company must make any benefit accrued prior to taking leave available to the worker upon returning from leave.

Example: Where a company has a monthly perfect attendance bonus, a worker with perfect attendance before taking unpaid FMLA leave will continue to be eligible for the bonus after returning from leave because FMLA prohibits counting FMLA leave as an absence. If the company calculates the monthly bonus based on hours worked, however, the worker who spent a portion of the month on unpaid FMLA leave will receive a lesser amount than a worker who worked the entire month.

A company must treat a worker on unpaid FMLA leave like other workers on unpaid leave with regard to earning benefits prior to taking leave.

Example: A company requires workers to work a minimum number of hours in the prior year to qualify for health insurance coverage. A worker who failed to meet the minimum number of hours in the prior year because the worker took unpaid FMLA leave would not qualify for health insurance coverage in the same way as any other worker would fail to qualify for coverage because they failed to satisfy the minimum number of hours worked in the prior year.

How Does the FMLA Protect a Worker's Rights to Return to Work Following 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 company 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 violated the FMLA by delaying a worker's return by requiring the worker to submit to numerous tests unrelated to the reason for his FMLA leave before allowing him to work.

The union can monitor worker conditions upon returning from leave to ensure that:

- the company returns the worker to the same or equivalent job with the same or equivalent benefits;
- FMLA leave is not counted as an absence under any attendance policy, including a no-fault policy; and
- the worker earns 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 requiring payment for bonuses not based on hours worked or production. A company may prorate benefits based on hours of work, such as production and hours of work bonuses.

How Do FMLA Rights Differ From Americans with Disabilities Act (ADA) Rights?

First, unlike FMLA, the ADA does not provide leave to care for a family member with a disability.

Second, unlike the FMLA which provides set amounts of leave available to eligible workers, the ADA examines the circumstances surrounding a worker's own disability and the company'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 worker to perform the essential functions of the job in question.

A company must evaluate a worker's rights under each law separately and award the greatest benefits allowable under each law.

A serious health condition under FMLA is not the same as an ADA disability. A serious health condition addresses temporary incapacity which prevents a worker from performing at least one essential function of the job regardless whether the worker has an ADA disability. A disabled worker may use FMLA leave for periods of incapacity associated with the worker's disability; but may require additional leave beyond the amount granted by the FMLA if additional leave would constitute a reasonable accommodation.

A worker has the right to use FMLA leave in small increments as medically necessary. Under the ADA, a disabled worker may use increments of leave as a potential reasonable accommodation.

If a worker qualifies for FMLA leave, the worker has a right to take leave even though a reasonable accommodation would allow the worker to continue working.

A worker who uses FMLA leave has the right at the end of the leave to return to the same or equivalent job with equivalent benefits. If the worker cannot perform the job at the end of the leave period, the FMLA does not provide any additional rights. However, the worker may have ADA rights.

Under the ADA, the right to return to the same job following leave depends upon whether the worker can perform the essential functions of the job with or without reasonable accommodation. If the worker cannot perform the same job, the ADA may obligate the company to place the worker in a vacant equivalent or lower paying job which the worker is able to perform with or without a reasonable accommodation.

Can State or Local FMLA Leave Laws Provide More Leave for Workers?

Yes, where a jurisdiction has a mini-FMLA law, the company has to provide workers leave rights under those laws. The worker should be aware of the worker's FMLA rights and investigate how state or local law may provide additional leave rights. The mini-FMLA laws may have different eligibility standards, may cover smaller companies, and may cover additional worker or family member conditions.

A company can count FMLA leave off against the leave provided by the mini-FMLA laws only if the qualifying reasons for the leave are the same.

A few states and the District of Columbia have also enacted paid family and medical leave insurance laws.

How Do Sick Leave Laws Factor Into Family Leave Rights?

Several states and municipalities have enacted paid or unpaid sick leave laws. Workers qualify for sick leave because of the worker's own or a family member's health condition. Under certain laws, workers qualify for leave to seek medical and other types of assistance when they have been victims of domestic violence, sexual assault, or stalking.

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 company policies do not conflict with FMLA rights;
- company practices do not conflict with FMLA rights;
- a company does not force a worker to transfer to another job to prevent use of FMLA leave;
- a company maintains job benefits on existing terms during FMLA leave; and
- a company transfers a worker only when necessary to better fit with use of intermittent or reduced schedule leave and the transfer does not conflict with the bargaining agreement.

A company may temporarily transfer a worker who is scheduled to take intermittent or reduced schedule leave to a position that better accommodates such recurring leave if:

- the transfer does not violate the terms of the collective bargaining agreement;
- the transfer is not used to discourage use of FMLA leave;

- a company pays a worker pay and benefits equivalent to worker's regular position; and
- a company returns a worker to the worker's regular position following the end of intermittent or reduced schedule leave.

A company cannot use the FMLA to weaken union representational rights and bargaining agreement provisions. The company must observe any employment benefit 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 a company over the 12-month period used to calculate use of FMLA leave allotment;
- bargaining with a company that seeks to have workers count paid leaves against their FMLA leave allotment;
- ensuring job transfers during intermittent or reduced schedule leave use do not conflict with bargaining agreement or discourage worker's use of FMLA leave;
- representing workers in FMLA disputes with a company; 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 FMLA rights.

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 company practices, under FMLA; and
- 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 provided sufficient evidence that a company retaliated for use of FMLA leave to care for the worker's daughter when the company fired the worker within 2 weeks of her return to work.

How Does a Worker Enforce FMLA Rights?

A worker may file an FMLA claim with the U.S. Department of Labor's (DOL) Wage and Hour Division. The Labor Department will investigate, try to settle if it finds reasonable cause, and may file a lawsuit against the company.

A worker may directly sue the company, as the FMLA has no requirement to file an administrative charge.

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 action. A worker has 3 years if the company willfully violated 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 DOL's Wage and Hour Division at 1-866-487-9243; or
- access the U.S. Department of Labor's web page at www.wagehour.dol.gov

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 a worker's health without the worker's written authorization.

HIPAA does not apply to companies acting as an employer. HIPAA does not cover, for example, healthcare information contained in human resources personnel files. So, companies may not rely on HIPAA to deny unions information they need to represent workers or for grievances.

However, it applies to companies when they act as a health care provider (for example, a plant with its own healthcare clinic) or as 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 the healthcare plan or the healthcare provider supplies, the authorization must be signed and dated by the worker, and must:

- specifically describe the information that can be disclosed
- identify who the plan or provider is authorized to disclose the information to, for example, "my spouse"

- 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 any 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) 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.

WAGE AND HOUR LAWS

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Federal Fair Labor Standards Act (FLSA)

The FLSA requires most private sector companies to pay a national minimum wage and 1 1/2 times the regular rate for all hours worked over 40 in a workweek. It also regulates child labor and requires companies and state and local governments to keep certain records.

Do States Have Their Own Wage and Hour Laws?

Many states and local governments have wage and hour laws which require companies to:

- pay minimum wages higher than the federal minimum wage rate (some local governments require companies to pay an even higher living wage)
- pay overtime premiums for more than eight hours of work in a day.
- provide breaks after a specified number of hours worked

State and municipal laws may not provide protections that are less than those the FLSA provides.

Who Does the Federal FLSA Cover?

The FLSA generally covers workers of companies who have income of at least \$500,000 annually, subject to several exceptions or exemptions discussed below. State laws may cover workers that the FLSA does not cover.

The FLSA Requires Companies to Pay Minimum Wage.

As of 2018, the federal minimum wage is \$7.25 per hour.

To determine whether a company is paying minimum wage, divide the total pay for hours worked up through 40 by the number of hours worked up to 40. This amount must be at least as high as the minimum wage rate.

A company violates federal law when it deducts expenses or other charges, such as the costs of work tools, uniforms, knives, cashier shortages or damage the worker causes to company property, from wages so that it reduces the hourly wage rate below the minimum wage rate. State laws may prohibit deductions entirely. Piece rates must average at least the minimum wage for every hour worked.

Youth minimum wage: Companies may pay workers younger than 20 a minimum wage of \$4.25 for the first 90 calendar days of employment, so long as they do not displace another worker.

State and local minimum wage rates: To check if a state or local government has a minimum wage rate higher than the federal rate, check www.dol.gov/whd/minwage/america.htm.

Companies must pay the highest of the federal, state or local minimum wage rate.

The FLSA Requires Companies to Pay for All Hours Worked.

Companies must pay workers for all hours worked, including:

- reporting to work early

Example: A cashier's schedule begins at 8 a.m., but the manager asks the cashier to begin working at 7:45 a.m. The company must pay the worker starting at 7:45 a.m.

- time waiting:

- ◆ for the manager to open the facility

Example: Meatcutters are scheduled to begin work at 4:30 a.m. Their manager does not arrive to open the store until 4:50 a.m. The company must compensate for the 20 minutes spent waiting.

- ◆ while repairs are made or equipment is installed

Example: A meatcutter waits for a band saw to be fixed. The store must pay for this time.

- ◆ for product

Ñ Pre-shift and post-shift activities if they are integral and indispensable to the worker's job. So, companies must pay for time workers spend putting on and taking off (donning and doffing) necessary safety and sanitation equipment.

Because some courts have interpreted the FLSA to not require companies to pay for donning and doffing certain items, unions should check whether state laws require companies to pay for that time.

- Work performed during meal periods.

Example: Deli manager calls deli clerk back from break to help with rush of customers.

- Time workers spend to perform tasks at other company locations.

Example: After the shift, the manager asks a baker to drop off bags of flour at another store on the baker's way home. The company must pay for the time spent travelling to the other store.

However, companies do not have to pay for time spent on a regular commute to and from work.

- Time the company prohibits workers from leaving the premises, unless the company allows workers to do what ever they want to during the time they're required to stay at the premises.

- Time workers spend in company meetings and mandatory trainings. Companies, though, do not have to pay for trainings that are voluntary, outside working hours and not directly related to work.

Example: A company requests sales clerks to take an internet training on good customer service. The company must pay for that time even if clerks do the training at home.

- Civic or charitable activities at the company's request.

Example: A supervisor asks workers to staff a fundraising table for Children's Miracle Network. The company must pay for that time.

- Time workers spend to get medical attention 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 company requires the medical attention.

Example: A meatcutter receives on-site medical attention for an on-the-job cut. The company must pay for this time.

- Time between split shifts unless the company completely relieves the worker from duty, the worker may use that time for the worker's own purposes, and the company tells the worker that the worker can leave the facility and the time the worker must return to work.

Hours worked do not include:

- vacation, holiday sick or other leave.

Example: A worker works 4 ten-hour days and then is on paid vacation for the 5th day. The worker is not entitled to overtime because vacation does not count toward hours worked.

Companies may not:

- allow workers to “volunteer” time for work or
- reduce hours worked by rounding down time worked that is less than an hour.

Rest and Meal Periods

The FLSA does not require companies to provide breaks. But it requires companies who provide breaks to pay for short breaks of up 20 minutes. This is because as a practical matter workers cannot use short breaks for their own purposes.

Example: A plant policy provides workers with a 15 minute break for every 4 hours worked. The grocery must pay for these breaks.

Companies do not have to pay for meal periods of 30 or more minutes, as long as the company:

- completely relieves the worker of any duties during the meal period
- does not require workers to remain in their work area.

Example: On a busy day, a manager requires bakery clerks to eat lunch in the bakery. The company must pay for this time.

Although the FLSA does not require companies to provide breaks, many states do. Some states require companies to provide meal periods longer than 30 minutes and others require meal periods after a certain number of hours worked. Several states require paid rest periods. A list of state laws regarding meal periods is available at www.dol.gov/whd/state/meal.htm and rest periods at www.dol.gov/whd/state/rest.htm.

The FLSA Requires Companies to Pay 1 1/2 Times the Regular Rate for Hours Worked in Excess of 40 per Workweek.

Federal law requires companies to pay covered workers a premium for all hours worked over 40 in a workweek equal to 1 ½ times the worker's regular rate.

A workweek consists of 7 consecutive days. Companies may begin their workweeks on any day of the week, but may not change that day week to week.

The regular rate is calculated by dividing the total pay for all hours worked during the workweek by the number of hours worked during the workweek.

The regular rate includes all promised payments, including:

- commissions
- bonuses for good attendance, production, quantity or quality of work
- shift differentials.

The regular rate does not include payments:

- the company decides to make in its sole discretion
- for vacation, holiday, sick or other leave.

Private sector companies cannot provide workers with compensatory time off ("comp time") instead of paying for overtime.

Many states have better overtime requirements than federal law.

Example: California requires 1 1/2 time pay for more than 8 hours of work in a day and for the first 8 hours of work performed on the 7th day of work in a workweek. California also requires double time pay for work over 12 hours in one day and over 8 hours on the 7th day of work.

Exemptions to the FLSA overtime requirements

FLSA does not cover

Executives: Executives are managers: (1) whose primary duty is the management of the company's overall business or a department or division, (2) who possess the authority to hire, fire or promote at least 2 workers or effectively recommend such actions, and (3) who the company pays at least \$455/week.

Example: Store and assistant managers, plant managers, chief executive officers, divisional and regional vice presidents/managers.

Management means determining:

- materials, supplies, machinery, equipment or tools
- merchandise to be bought, stocked and sold
- the distribution of materials or merchandise and supplies
- the safety and security of workers or property or
- planning and controlling the budget.

Salaried means receiving a set amount of pay that the company may not reduce because of the quality or quantity of the work performed. Workers are not salaried if the company reduces pay because:

- workers don't work because of "operating requirements of the business" or "work is not available"
- jury duty, to testify or military leave.

Having said that, company may reduce compensation for:

- absences for personal reasons, other than sickness or disability
- absences that exceed the number of days the company's sick or disability policies allow
- violations of safety rules
- suspensions for violations of workplace conduct rules.

Administrative: The FLSA does not cover administrative workers. Administrative white collar workers who are (1) salaried, (2) earning at least \$455/week, and (3) whose primary duties require them to exercise discretion and independent judgment when performing office or non-manual work related to the management of operations. They are not workers working on a production line or providing service to customers.

Administrative workers work on tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, marketing, research, safety and

health, human resources and labor management, worker benefits, public and government relations and computers.

Example: Human resources director, office manager, and executive and administrative assistants.

Professional: Professionals are exempt: salaried workers who earn \$455/week, and whose primary duties require (1) specialized, advanced study or (2) creativity, invention or imagination, usually licensed or possess advance college degrees.

Example: Lawyers, doctors, artists.

The FLSA Requires Companies to Keep Accurate Records.

Companies must keep the following information for every worker for 3 years:

- name, home address, occupation, sex and birthdate if under 19 years old
- hour and day workweek begins
- total hours worked each workday and each workweek
- total earnings
- regular rate for any week when overtime worked
- total overtime pay for workweek
- deductions from pay
- total wages paid each pay period and
- date of payment and pay period covered.

State law may impose additional record keeping requirements.

Federal Law Restricts Child Labor

The FLSA restricts the type of work, number of hours and times of day minors may work.

Workers younger than 18 cannot (1) work in hazardous occupations such as manufacturing, meat or poultry processing, or (2) operate hazardous equipment

(for example, meat slicers, power jacks, paper balers). Children under the age of 14 may not work in any non-farm jobs, except for several specific exceptions.

Workers who are 14 or 15 years old may work:

- up to 3 hours on a school day and 18 hours per school week
- up to 8 hours on a non-school day and 40 hours during a non-school week and
- between 7 a.m. and 7 p.m. during the school year.

Workers who are 16 or 17 years old may:

- perform non-hazardous jobs and
- work unlimited hours during a workweek.

There are no restrictions on the jobs and hours of workers age 18 and older.

State laws may provide additional child labor protections. A list of state child labor laws is available online at: www.youthrules.dol.gov.

The FLSA Protects Nursing Mothers

The FLSA requires companies at least 50 workers to permit nursing mothers to take unpaid breaks at reasonable times as frequently as they need to express breast milk in a private location other than a bathroom for one year following the child's birth. Companies with fewer than 50 workers must provide reasonable breaks to nursing mothers unless they can show undue hardship to their business.

The FLSA Protects Workers' Complaints that Companies are Violating the FLSA and Prohibits Companies from Retaliating Against Workers for Filing Claims.

The FLSA protects the right of workers to complain to companies about FLSA violations and prohibits companies from retaliating against workers who assert their FLSA rights.

Workers May Not Waive FLSA Rights

Workers may not waive their rights under the FLSA. Any agreement to waive those rights is unenforceable even if workers willingly sign them.

State Wage Payment Laws

Many states have laws requiring companies to pay full wages every regularly scheduled pay day weekly, bi-weekly, semi-monthly or monthly. Many states require companies to provide statements of wages for each pay period.

How to Protect and Enforce Federal and State Wage and Hour Rights

Workers May File Their Own Lawsuits.

The FLSA and many state laws grant workers the right to file their own lawsuits for wage and hour violations.

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.

In private lawsuits, workers 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) attorneys' fees. The possibility of attorney fees means that lawyers will more likely agree to represent workers on a contingency fee basis.

Workers May File a Complaint With the U.S. Department of Labor.

The Labor Department's Wage and Hour Division also enforces the FLSA. The Wage and Hour Division has investigators in offices throughout the country. Those offices are listed at www.dol.gov/whd/.

Although the Wage and 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 the nearest Wage and Hour Division office.

If the Wage and Hour Division determines that a worker's complaint has merit, it will typically try to settle with the company for wages owed. If no settlement is reached, the Wage and Hour Division may file a lawsuit on the worker's behalf.

Only the government may bring a lawsuit to impose criminal penalties.

FLSA Statute of Limitations

Workers have 2 years from the time the payment was due to file a FLSA claim for a company's failure to pay wages. A worker has 3 years when the company willfully failed to pay.

State Law Cases

Some state wage laws may allow workers to file their own lawsuits to enforce their rights under state law. State agencies or the state attorney general's office may also enforce those rights. These lawsuits can include claims for violations of the federal FLSA.

One advantage of state lawsuits is that workers can include similarly situated workers in the lawsuit through a true class action where those other workers do not have to do anything to be covered by the lawsuit, including filing any consent forms in court.

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 earned wages.

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 prohibits companies from paying male and female workers different wage rates, bonuses, profit sharing, life insurance, vacation and holiday pay for equal work on jobs that require equal skill, effort and responsibility 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.

What Constitutes Equal Work?

In applying the law, the courts require that the job responsibilities and conditions be almost identical. Courts decide whether jobs are the same based on actual job duties and conditions rather than job titles, classifications or descriptions.

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 of production or quality of work or
- any factor other than sex.

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. The Equal Pay Act does not require workers to first file charges with the Equal Employment Opportunity Commission (EEOC) before filing lawsuits, though the EEOC also enforces the Equal Pay Act.

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.

To file a charge with the EEOC, workers need only contact the local EEOC office. 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 other EEOC charges, 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 file the lawsuit within two years of the violation, even if the worker filed an EEOC charge.

What Is the Lilly Ledbetter Fair Pay Act?

The Lilly Ledbetter Act provides that companies violate federal anti-discrimination law each time they pay wages, benefits or other compensation, or adopt or apply a discriminatory pay practice that discriminates based on race, color, religion, sex, national origin, age or disability. This law does not apply to promotions or terminations.

What is the Statute of Limitations for Lilly Ledbetter Act Claims?

Under the Lilly Ledbetter Act, workers can file claims based on any discriminatory payment within 180 days of the discriminatory payment, even years after the company first began to discriminate against them. The statute of limitations for all discriminatory payments does not run from the first discriminatory payment. This is because the Lilly Ledbetter Act states that a new act of discrimination occurs each time companies pay discriminatory wages or benefits. Thus, the statute of limitations effectively resets with each discriminatory payment.

How Does the Lilly Ledbetter Act Affect Equal Pay Remedies?

The Lilly Ledbetter Act allows workers to recover back pay for the two-year period prior to the date they filed their claims, if the discriminatory practices occurred during that time. Thus, if a worker files a claim of wage discrimination based on a paycheck from 2018, the worker may recover back pay for all of the discriminatory wages in the two years prior to her claim. The company would also owe any backpay for discriminatory payments the company paid during litigation.

EMPLOYMENT ANTI-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 (Title VII) is the principal federal law that prohibits employment discrimination based on the protected classes of race, color, religion, sex (including pregnancy) or national origin. Title VII prohibits a company, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining from using race, color, religion sex, or national origin, 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 a worker for asserting these rights, opposing discrimination, and participating in Title VII proceedings.

A company may violate Title VII based on two theories. The company may intentionally discriminate against a worker because of the worker's protected class. The company may also use a neutral selection standard that disproportionately disadvantages workers in a protected class.

The Equal Employment Opportunity Commission (EEOC) has principal responsibility for enforcing Title VII. A worker who believes that s/he was discriminated against must file a charge with the EEOC within 180 days after the alleged discriminatory act. Where the EEOC has cooperation agreements with states and municipalities that have anti-discrimination laws, the local agencies will investigate the allegations and the EEOC will review those investigations. Filing a Title VII claim with a cooperating state or local agency extends the filing deadline to 300 calendar days after the alleged discriminatory conduct occurred.

Title VII provides several remedies to prevailing plaintiffs, including equitable remedies which place the victim of discrimination in the place the victim would have been absent the discrimination, compensatory damages, punitive damages, and attorneys' fees.

What Entities Does Title VII Cover?

Title VII covers private companies who employ 15 or more workers. Title VII also covers public companies, including the federal government.

Title VII also covers employment agencies which Title VII defines as any person who procures workers for a company.

Title VII covers labor organizations with 15 or more members in their capacities as worker representatives.

What Is Disparate Treatment Discrimination?

A worker proves disparate treatment discrimination by showing that a company used race, color, national origin, sex, or religion to treat similarly situated workers differently. Workers with the same or similar education, knowledge, experience, seniority, or other requirements for the job are similarly situated.

The worker initially shows that:

- the worker is a member of protected class;
- the worker met the qualifications for the position;
- the company did not hire, promote, or provide another condition of employment; and
- the company hired, promoted, or provided another condition of employment to a worker not within the protected class

The company responds to the worker's evidence by providing a non-discriminatory reason for the challenged action. If the company can provide a nondiscriminatory reason, the worker in turn has to show pretext, i.e., that the offered reason was not the true reason for the adverse action against the worker.

What Is Disparate Impact Discrimination?

Disparate impact discrimination occurs when a company's neutral policies have a disproportionate negative impact on workers from a protected class even if the company does not intentionally discriminate against those workers. The policies can include any selection procedure which has a disparate impact on hiring, promotion, or other employment or membership opportunities of workers of any race, color, religion, sex, or national origin.

If a challenged policy has a disparate impact, the company must prove that the policy is job-related and consistent with business necessity and that the company cannot accomplish the business objective using with less disproportionate impact on workers in the protected class.

Example: Lifting requirements for jobs may disparately impact women workers because many women cannot lift as much weight as men. If workers challenge the lifting requirement as discriminatory based on sex, the company must show that the requirement is job-related and consistent with business necessity.

Example: A requirement that a worker obtain a certain score on a language test may disparately impact workers who learned English as a second language. If the language requirement is challenged as discriminatory based on national origin, the company must show that the level of English proficiency required is job-related and consistent with business necessity.

How Does Title VII Protect Pregnant Workers?

Based on a 1978 amendment to Title VII called the Pregnancy Discrimination Act (PDA), a company:

- must not discriminate against a worker on the basis of pregnancy, childbirth, or related medical conditions, and
- must treat a worker affected by pregnancy, childbirth, or related medical conditions the same as other workers not so affected but similar in their ability or inability to work. In other words, a company must not treat pregnant workers less favorably than other workers.

Does Title VII Require A Company to Accommodate a Pregnant Worker Due to Pregnancy-Related Restrictions?

Pregnant workers may obtain an accommodation under the PDA. The PDA requires companies to treat pregnant workers the same way as non-pregnant workers with a similar ability or inability to work.

Example: A company may need to accommodate a pregnant worker who is unable to perform heavy lifting due to her pregnancy in the same way the company accommodates non-pregnant workers with similar lifting restrictions.

Of course, if a pregnant worker has a pregnancy-related impairment that qualifies as a disability within the meaning of the Americans with Disabilities Act, the worker has a right to a reasonable accommodation unless it creates an undue hardship for the company's business.

Under What Circumstances Is A Company Required to Accommodate A Pregnant Worker Due to Pregnancy-Related Restrictions?

A company must accommodate a pregnant worker if:

- the company accommodates non-pregnant workers with a similar ability or inability to work;
- failure to accommodate the pregnant worker creates a significant burden on the pregnant worker; and
- if the company's justification is not sufficiently strong to justify the burden on the pregnant worker.

Example: A company that accommodates a large percentage of non-pregnant workers with lifting restrictions may be found to discriminate against pregnant workers unless the company can justify the burden that failing to accommodate pregnant workers places on them.

Pregnant workers face a significant burden when a company accommodates a large percentage of non-pregnant workers; but fails to accommodate a large percentage of pregnant workers who have a similar inability to do the job.

Example: A company that routinely provides light duty for non-pregnant workers will have difficulty justifying refusing to provide light duty to a pregnant worker with similar inability to work as the non-pregnant workers.

Are There State/Local Laws That Require Companies to Make Reasonable Accommodations for Pregnant Workers?

Yes, many states, the District of Columbia, and several cities have enacted laws that require some companies to provide reasonable accommodations to pregnant workers. Workers should contact the fair employment practices agency or department of labor in the state or city where they work to determine whether local laws exist and their coverage.

What Other Ways Does Title VII Protect Pregnant Workers?

Title VII prohibits a company from changing a worker's terms and conditions of employment after an announcement that she is pregnant or trying to become

pregnant. Title VII also prohibits a company from making assumptions about a pregnant worker's attendance, schedule, or ability to perform her job and making changes based on those assumptions.

What Is Illegal Workplace Harassment?

Workplace harassment is a form of intentional discrimination based on race, color, religion, sex, or national origin. Harassment may violate Title VII and a company'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

The totality of circumstances determines whether conduct rises to the level of unlawful harassment. The following factors help determine whether harassment violates Title VII:

- frequency of the unwelcome conduct based on race, color, religion, sex, or national origin (pervasiveness);
- whether the conduct is physically threatening or humiliating or a mere offensive remark; and
- whether the conduct unreasonably interferes with a worker's job performance.

Harassment can take the form of racial, religious, sexual, or national origin insults, name-calling and off-color jokes or displays of racially, religiously, ethnically, or sexually suggestive or derogatory material. This type of conduct is often referred to as "hostile work environment" harassment and may violate Title VII even if the worker can still satisfactorily perform work.

Harassment, particularly sexual harassment, can also involve "quid pro quo" harassment, in which a worker suffers negative consequences for refusing to submit to a supervisor's requests, such as sexual advances. A company that takes negative action against the worker under these circumstances unreasonably interferes with the worker's job.

Companies are responsible for maintaining a harassment-free workplace through policy and practice. If harassment occurs, companies must take action reasonably calculated to end the harassment.

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, but that occurred because of an individual's sex, such as sabotaging a female worker's job.

Example: Unlawful sexual harassment of female police officers included disappearance of case files, work product, and destruction of their property. Male police officers engaged in these activities to force females out of the police department.

Example: A company created a hostile work environment when a supervisor subjected a female worker to 4 months of repeated propositioning and physical touching. When the company fired the worker for complaining about the harassment, the company committed unlawful "quid pro quo" harassment and retaliated against the worker for asserting her right to be free of discrimination.

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 a harassment investigation.

Does Title VII Protect Against Sexual Orientation Discrimination?

Two federal appeals courts covering Vermont, Connecticut, New York, Illinois, Indiana, and Wisconsin hold that sexual orientation discrimination is a type of sex discrimination. These courts reason that sexual orientation refers to a person's predisposition or inclination toward sexual activity or behavior and that a person's sexual orientation cannot be defined apart from sex. Therefore, sexual

orientation is a function of sex and sexual orientation discrimination is sex discrimination.

However, one federal appeals court covering Alabama, Florida, and Georgia holds that Title VII does not protect against sexual orientation discrimination.

Does Title VII Protect Transgender Workers from Discrimination?

Yes, several federal appeals courts collectively covering Kentucky, Michigan, Ohio, Tennessee, Alabama, Florida, Georgia, Alaska, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington recognize that discrimination based on a worker's transgender identity or gender nonconformity is sex discrimination that violates Title VII. Several district courts in other jurisdictions also recognize that transgender discrimination is sex discrimination.

Title VII prohibits discrimination against a man or woman based on failing to conform to socially-constructed gender expectations or stereotypes.

How Does Title VII Protect Workers from Discrimination Based on Religious Beliefs and Practices?

If a worker's religious observance or practice conflicts with a company rule, the company must accommodate the observance or practice unless the company demonstrates that doing so will impose an undue hardship on the business.

Example: If a worker cannot work on the worker's Sabbath, a reasonable accommodation may include allowing the worker to use paid or unpaid leave, allowing swapping schedules, or modifying schedules, if schedule modification can be achieved without undue hardship on business operation.

Does Title VII's Prohibition on Race and National Origin Discrimination Protect Workers with Criminal Histories?

In certain circumstances, a company's conduct toward workers with criminal histories may violate Title VII. EEOC guidance instructs and some courts have held that a company's use of an individual's criminal history in making employment decisions may violate Title VII.

A company violates Title VII if it treats racial minorities with criminal histories less favorably than nonminority persons with criminal histories. Additionally, a company using a neutral policy that excludes a worker with a criminal history from employment opportunities may engage in disparate impact discrimination against a protected class based on race or national origin unless the policy is job-related and consistent with business necessity.

An arrest does **not** establish criminal conduct and therefore exclusion from employment based on arrests is not a job-related policy consistent with business necessity. Exclusions based on arrests which have a disparate impact on workers of a particular race or national origin may therefore violate Title VII's prohibition against discrimination.

What Is Union's Role in Fighting Workplace Discrimination?

Title VII covers unions in their representative capacity.

Discrimination, including harassment, impacts a worker's terms and conditions of employment. Therefore, a union must treat a discrimination complaint like it treats other complaints. A union must investigate discrimination allegations with the same seriousness it investigates other matters. If the investigation appears to support that a company discriminated against a worker, a union should attempt to remedy discrimination in the same way it attempts to remedy other violations of the collective bargaining agreement. Unions may seek remedies under the collective bargaining agreement, through EEOC administrative procedures, and possibly through court action.

Unions do not control the workplace and therefore a union cannot be held liable for a company's discrimination.

A union will violate Title VII if it discriminates in its role in representing workers. A union cannot treat represented workers differently in handling grievances or other matters based on race, color, religion, sex, or national origin.

Example: A union discriminated against Black workers in violation of Title VII for failing to challenge discriminatory discharges of probationary workers and refusing to assert racial discrimination as a ground for grievances.

Example: A union violated Title VII for intentionally avoiding asserting a sex discrimination grievance for a female member assigned to work near a male member who assaulted her because the union deferred to the desires of its male members.

How Should a Union Respond When It Represents Both Harasser and Victim?

The union can take the following steps when it represents both the worker who alleges harassment and the worker accused of harassment:

- encourage the member to report harassment to the company because the company must maintain a non-discriminatory workplace;
- be familiar with and refer workers to the company anti-discrimination policy and procedures;
- inform the alleged victim of the 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 the accused worker of right to file a grievance over discipline while letting the worker know that the company must take measures reasonably calculated to end any harassment.

Title VII Protects Against Retaliation

Title VII's anti-retaliation provision prohibits a company from interfering with a worker's efforts to secure Title VII's basic guarantees. A company violates Title VII if it discriminates against a worker for opposing any practice prohibited by the law. The company also violates Title VII if it discriminates because the worker filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing in connection with rights protected by Title VII. A worker who alleges retaliation must show that the company's action could dissuade a reasonable worker from making or supporting a charge of discrimination.

Example: A company unlawfully fired a worker after the worker, who opposed discrimination, provided evidence of discrimination in response to the company's investigation of a discrimination complaint.

Example: A company unlawfully fired a worker who alleged discrimination based on race even though the investigation failed to prove discrimination because Title VII protects from retaliation workers who allege discrimination.

Example: A company unlawfully fired a worker in retaliation for the worker's fiancée filing a sex discrimination charge against the same company. The worker was within the zone of interest that Title VII protects.

How Workers 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.

A worker can contact EEOC by:

- calling 1-800-669-4000 (1-800-669-6820 TTY) or
- emailing info@eoc.gov.

Requirement to File Charge

Prior to filing a Title VII claim in court, a worker must file an administrative charge with the EEOC or with a state or local agency that cooperates with the EEOC.

In general, a worker needs to file a charge with the EEOC within 180 calendar days after the alleged discriminatory act occurred.

Filing a Title VII claim with a cooperating state or local agency extends the deadline to 300 calendar days after the alleged discriminatory act occurred.

Mediation

If the parties agree, EEOC will hold voluntary mediation to attempt to resolve the complaint before beginning a formal investigation. If mediation does not resolve the complaint, the complaint returns for formal investigation.

Investigation and Determination

The EEOC 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 not

reached, EEOC may litigate the complaint or issue the complainant a right-to-sue letter.

If the 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-sue letter allows the complainant 90 days to file a claim in federal or state court making the same allegations of discrimination that the administrative agency reviewed.

Court Action Under Title VII

Right to a Jury Trial

A worker suing in court under Title VII has a right to a jury trial for 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; and
- the possibility of limited compensatory and punitive damages for unlawful intentional discrimination, but not for disparate impact discrimination.

What Is the Federal Anti-Discrimination Law Title 42 U.S.C. Section 1981?

Title 42 U.S.C. §1981 is a federal law that prohibits intentional discrimination in employment based on race and national origin discrimination and retaliation.

A worker proceeds directly to federal or state court to enforce rights under Section 1981 because the law does not provide for administrative proceedings prior to court. A worker may sue a company of any size workforce. A worker may also sue a manager or supervisor of a company.

A worker who alleges discrimination or retaliation has 4 years following the alleged discriminatory action to file a Section 1981 lawsuit.

Remedies under Section 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 that provides a cause of action when defendants, acting under color of state law, deprive plaintiffs of U.S. constitutional or federal statutory rights. Section 1983 does not provide substantive rights, but is a vehicle to enforce existing rights such as the Equal Protection Clause, which prohibits governmental discrimination. Section 1983 may provide a cause of action for workers of state and local governments (or possibly their contractors) who face intentional discrimination based on race, color, religion, sex, or national origin.

A worker can file a Section 1983 claim directly in court without first submitting the claim to an agency. The Section 1983 statute of limitations is the same length as the statute of limitations for personal injury claims in the state where the lawsuit is filed. Section 1983 remedies include reinstatement, back pay, injunctive relief, and possibly compensatory and punitive damages.

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 analyses developed under Title VII to 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 a worker has more time than Title VII allows to file a discrimination charge. For example, the District of Columbia provides one year for an individual to file a charge of discrimination.

- Certain states and municipalities cover companies with fewer workers than the 15-worker minimum required under Title VII.
- The laws of some jurisdictions provide greater protection by prohibiting discrimination against additional protected classes of workers. For example, many states and the District of Columbia prohibit discrimination based on sexual orientation and certain 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 workers than Title VII. For example, California requires reasonable accommodation to the medical needs of pregnant workers and requires companies to grant leave to pregnant workers.
- 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 that protects workers over the age of 40 from age based job discrimination. Age discrimination occurs most frequently in hiring, 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 similarly situated worker younger than 40 because of age. For example, the worker proves disparate treatment when the worker is qualified for a promotion, but the company nevertheless promoted a worker younger than 40 who is no more qualified for the promotion.

Courts often look to inconsistent company positions or disingenuous company actions to find that the company discriminated against workers on the basis of age.

Examples:

- when the company claims it used a fair evaluation process to lay off the poorest performers, but laid off only older workers
- when the company eliminates positions held by older workers, and then creates new positions with similar duties and fills the new positions with younger workers
- when companies offer buy-outs or early retirement incentives that appear to be intended to force older workers to retire

If the company provides a non-discriminatory reason for its actions, workers must show that this motive was false or that the company would not have taken the adverse action but for the workers' ages. Workers 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," "she lacks energy or enthusiasm" or the company wanted "new" or "younger" "blood" as evidence of discrimination.

Anti-Retaliation Protection

It is unlawful for companies to retaliate against workers for filing or participating in age discrimination cases. (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 are 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 lay-off an older worker if lay-off is based on the contract's seniority system and not the worker's age. The law also permits disparate treatment to observe a bona fide worker benefit plan that provides benefits based on longevity or seniority. Workers 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 may also file age discrimination claims with state or local fair employment agencies. The ADEA does not require workers to file charges with both the EEOC and state agencies.

If workers want to sue their companies in court for ADEA violations, they must first file charges with the EEOC or state agency. See www.eeoc.gov for EEOC locations, charge forms and filing information. See www.workplacefairness.org/complaintdisc for state-specific filing information.

Timeframe for Filing an ADEA Charge

Workers initiate EEOC proceedings by filing charges within 180 days of when the company discriminated against them (or within 300 days, if there is a state law against age discrimination). Workers utilizing the union's grievance and arbitration procedure generally will not have their filing deadlines extended with the EEOC. The timeframe for filing state law charges varies, and is often longer than 180 days.

Investigation and Determinations That Companies Likely Discriminated

The 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 and Lawsuits

At the end of its investigation, the EEOC will issue "right to sue" letters that permit workers to file a lawsuit in court. Workers have 90 days from the receipt of that letter to file a lawsuit in court or risk losing their right to file. In very rare cases, the EEOC may sue the company itself. Workers pursuing age discrimination claims are entitled to jury trials.

Class Action Lawsuits

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.

Arbitration Clauses in Collective Bargaining Agreements

Clauses in collective bargaining agreements that clearly and unmistakably require the parties to arbitrate age discrimination claims require workers to arbitrate age discrimination claims and waive their right to file lawsuits.

What Remedies Can Be Awarded for Age Discrimination?

Courts may award workers reinstatement, back pay, front pay, benefits, jobs, promotions and transfers, and court orders or injunctions 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 2 times the worker's back and front pay. A violation is willful where the company 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 their ADEA rights, the ADEA imposes strict requirements on all settlement agreements involving workers over 40 years old, before any waiver or release of rights or claims is effective:

- workers knowingly and voluntarily waive or release ADEA claims
- waivers must be written in plain English
- releases and waivers must expressly state that the worker is waiving age discrimination claims
- waivers cannot apply to ADEA claims that could arise in the future
- workers must receive something of value for signing a waiver or release, such as a payment above that to which the worker was already entitled
- workers must be given at least 21 days to consider signing the waiver or release, and seven days after signing to change their minds (workers who leave employment as part of a buy-out or 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.

Although a settlement agreement may waive the right to file claims in court, the agreement cannot prohibit workers from filing EEOC charges or participating in EEOC investigations. Such provisions are invalid and unenforceable. Therefore, even after settling, workers may still file EEOC charges, assist with investigations, testify, and cannot be required to return their settlement payments if they do so.

LAWS PROHIBITING FEDERAL CONTRACTORS FROM DISCRIMINATING (THE OFCCP)

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What Is the OFCCP and What Does it Do?

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 contractor's facilities will be subject to the same regulatory requirements, regardless of where the federal contract is performed.

The OFCCP requires all companies with contracts worth at least \$50,000 and who employ at least 50 workers to develop written affirmative action programs that commit companies to meet specific goals and establish procedures to reach those goals.

Who Does the OFCCP Protect?

OFCCP investigates discrimination complaints filed by workers and unions based on race, color, religion, sex, national origin, disability or veteran status. Sex discrimination includes gender identity, transgender status, pregnancy, and sex stereotyping, such as assumptions based on a worker's caregiving responsibilities or failure to conform to traditional gender norms.

Some forms of discrimination that the OFCCP investigates involve hiring, sexual harassment, hostile work environment, compensation disparities, access to health care and other fringe benefits, failure to accommodate pregnant workers, vigorous recruitment of veterans, and employment practices that discourage hiring and promoting disabled workers.

How Does the OFCCP Enforce the Law?

When a complaint is filed, the OFCCP can recommend enforcement actions to the Labor Department. The Labor Department can also recommend that either the Justice Department or Equal Employment Opportunity Commission (EEOC) file a lawsuit under Title VII. Generally, the OFCCP will refer individual complaints of discrimination directly to the EEOC.

What Relief Is Available for OFCCP Violations?

The Labor Department may “debar” a contractor that violates the law — meaning that the company loses its federal contracts for a period of time — or the

DOL may suspend any contract and 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 that a federal contractor discriminated against them 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 benefit 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: plans companies maintain solely to comply with workers' compensation, unemployment compensation or disability insurance laws, and government plans.

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 fiduciaries. Plan fiduciaries are trustees and all 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 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, purchase plan assets. ERISA also prohibits transactions between a plan and parties involved with the plan, such as companies and unions (although there are some exceptions). For example, a pension plan cannot loan money to companies, even if the companies repay the loan with interest.

How Can Workers Find Out What Their Plans Provide?

The plan administrator must comply with worker requests for information or documents and furnish them with copies of plan documents, summary plan descriptions (SPDs), 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. For multiemployer plans (plans with more than one company who bargain the plan with unions) the administrator is usually a joint board of union and company trustees.

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 SPD must identify the plan administrator. It is important to request documents in writing from the plan administrator. A court can award penalties only if the worker requested the documents from the plan administrator.

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 Internal Revenue Service and the Department of Labor. These reports, called Form 5500 reports, are available on request from the DOL and online through the DOL's website at www.efast.dol.gov. The plan administrator also must provide this 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 results of the initial appeal, workers have the right to file their own lawsuits in federal or state court.

Who Enforces ERISA?

Three federal agencies enforce ERISA:

- DOL
- IRS
- 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.

Unions or workers may file complaints with the DOL by sending letters describing the violation or calling their local DOL office. If the union decides to file a complaint with the DOL instead of helping the member file a lawsuit in court, the union must aggressively and continuously demand that the DOL pay attention to the matter. Although the DOL has primary responsibility for enforcing ERISA, it lacks the resources to police the thousands of existing plans.

Neither the IRS nor the PBGC has authority over claims against funds.

Can Companies Discriminate Against Workers Because of ERISA Benefits?

No. Companies cannot discipline or 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 vesting for benefits or retiring.

Do Other Federal Employment Laws Apply to Plans?

Yes. For example, the Family and Medical Leave Act requires companies to continue the health coverage of workers on 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. 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. 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 pension 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 2018, the most the PBGC will pay for a benefit under a single company plan is \$5,420.42 per month for a regular lifetime pension at age 65 or \$4,878.42 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 multiemployer plans. It is rare for multi-employer plans to fail. The PBGC insures defined benefit plans only. There is no similar protection for 401(k) plans.

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 companies to offer workers and their families the option of paying the premiums for health care coverage when there is an "interruption in coverage."

What is 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).

An interruption in coverage 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. An interruption in coverage 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.

What Are the Obligations of Plans to Notify Workers and Their Families That They Have the Right to Continue Their Healthcare Coverage?

COBRA requires company plan administrators to notify workers and their families of their right to choose to continue healthcare coverage within a specific

time period, usually 44 days after an interruption in coverage, such as separation of employment or reduction in hours.

When workers and their family live in the same household, the plan does not have to separately notify each family member in addition to notifying the worker. Otherwise, the plan must separately notify each family member.

To make sure they receive COBRA notices, workers should make sure that their companies and their health plans have their current address and addresses for all family members who do not live with them.

How Much Time Do Workers or Their Dependents Have to Choose Coverage and Begin Paying Premiums?

Workers or their families have 60 days from the date of notice to choose coverage by sending a letter or a 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 the coverage back. Once the worker chooses 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?

Usually, but not always. Companies must offer COBRA coverage at a premium that is no more than 2% higher than their cost of providing coverage to workers.

The company's group rate is often cheaper than buying individual insurance. However, the Affordable Care Act, commonly called Obamacare, established a system of government-provided subsidies for individuals to purchase health insurance in state or federal marketplaces. Subsidies help low wage workers afford health coverage. If the worker or family members are eligible for ACA-subsidized insurance premiums, then the worker's cost may be less than COBRA. Workers can get information about the ACA coverage from www.healthcare.gov.

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 Labor Department also enforces COBRA based on complaints workers submit to any DOL 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 families 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 families. 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.

IMMIGRATION

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Introduction

There are many individuals in the United States from foreign nations in a variety of immigration statuses. Individuals who enter the U.S. intending to stay, with or without documentation, are immigrants and include refugees and asylees. Individuals who enter for a temporary period not intending to stay are technically non-immigrants and usually enter on visas.

The federal Immigration and Nationality Act (INA) govern the rights of immigrants and non-immigrants. The INA requires all individuals who receive wages to be employment eligible. The U.S. Department of Homeland Security and U.S. Department of Labor administer the INA.

The INA defines three categories of individuals for work authorization:

- nationals of U.S. defined as citizens and nationals,
- "aliens" defined as any persons who are not citizens or nationals, and
- "permanent residents" defined as aliens who permanently reside in the U.S.

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 that protect workers in the workplace also apply to 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 company. This includes the right to join with other workers to talk about and try to change working conditions, be involved in organizing and other campaigns, sign authorization cards, participate in worker committees, vote in elections, file grievances, file unfair labor practice charges with the National Labor Relations Board (NLRB) and engage in all other rights workers have under the National Labor Relations Act (NLRA).

Generally under current law, a company that violates the NLRA by discharging an undocumented immigrant does not have to reinstate the worker or pay back pay for the period following discharge unless the worker can show that the worker has U.S. work authorization.

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 work-authorized immigrant workers.

State employment laws generally protect immigrant workers, including state workers compensation laws, anti-discrimination laws and most unemployment compensation laws.

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 it represents. 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.

What Responsibilities Do Companies Have When Hiring Workers?

The INA 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 must use to complete to determine work authorization.

A company must complete a Form I-9 for each new worker and retain the Form I-9 throughout the worker's employment.

A worker has a choice of documents to present to show identity and work authorization. Importantly, the company cannot ask for more or different documents if the documents the worker presents are genuine on their face and relate to the worker presenting them. 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 authorization.

When is Re-Verification of Work authorization Appropriate?

When the documents a worker uses to show work authorization have expiration dates, the worker must obtain new work authorization to continue to work. The worker should file for a new employment document 90 days before expiration of the current authorization. However, a company may not re-verify the worker's identity.

The law also prohibits a company from re-verifying workers who used U.S. passports or permanent resident cards to verify their authorization to work.

A company can ask workers authorized to work based on their asylees or refugees status and workers with temporary protected status to renew their work authorization cards.

What Is E-Verify and When Can A Company Use the System?

E-Verify is a computer database that a company can – but is not required – to use to check workers' work authorization. U.S. Citizenship and Immigration Services (USCIS), an agency within Homeland Security, and the U.S. Social Security Administration administer E-Verify. If the worker is not a citizen, the company uses the USCIS database to confirm work authorization. E-Verify does not replace the Form I-9. Rather the company may use E-Verify to confirm information provided on Form I-9.

Workers have the following protections against companies improperly using E-Verify. Companies that use E-Verify must:

- use E-Verify only for new hires and not pre-screen applicants,
- use E-Verify uniformly and not selectively,
- promptly provide workers who have tentative non-confirmations with information about how to challenge the tentative non-confirmation, including the written notice E-Verify generated,
- give workers 8 work days to contact Social Security or 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 timely contact Social Security or Homeland Security, and

- give workers who receive tentative non-confirmations the option of visiting the local Social Security office to update their records or calling Homeland Security directly to resolve the tentative non-confirmation. The phone number is on the Social Security referral letter.

Some state laws require companies to use E-Verify in their states.

Problematically, E-Verify contains no mechanism to enforce these worker protections. If companies violate these protections, workers can file charges with the Immigrant and Employee Rights Section of the U.S. Department of Justice, which handles immigration-related employment discrimination, and the Equal Employment Opportunity Commission (EEOC), which enforces Title VII prohibitions against national origin discrimination.

What Is E-Verify for Federal Government Contractors?

A federal contractor subject to E-Verify must verify all new hires as well as existing workers assigned to a covered contract. A federal contractor must use E-Verify if:

- the federal contract was awarded after September 8, 2009,
- the contract contains a written FAR E-Verify clause,
- the contract's performance period is 120 days or more,
- the contract's value is more than \$150,000, and
- at least part of the contract work is performed in U.S.

What Is the IMAGE Program?

ICE operates the Mutual Agreement Between Government and Employers (IMAGE) program as a best hiring practices program. The IMAGE program is voluntary and encourages companies to perform self-audits to ensure that their workers have work authorization.

Like E-Verify, the IMAGE program provides no enforceable worker protections against discriminatory reverifications. If companies violate worker protections, workers can file charges with the Immigrant and Employee Rights Section of the Department of Justice and EEOC.

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. Social Security sends letters to companies identifying workers whose names fail to match their SSNs in an effort to obtain correct information for its records so that each worker's social security account is properly credited with earnings.

The Social Security letter asks companies to check their records and, if their records are accurate, to notify their workers that there may be errors with their SSN information. The letter also requests companies to update Social Security about any changes in the SSN information their workers provide.

Are Social Security Number No-Matches Related to Work Authorization?

No-matches do not by themselves show that workers lack work authorization. This is why Social Security letters emphasize that SSN no-matches do not indicate that workers lack work authorization. The letters also warn companies not to take adverse actions against workers based solely on SSN no-matches.

This is because no-matches can be caused by typos, name changes (including as a result of marriage), and hyphenated last names, which are common among immigrants, and other errors in Social Security records.

Therefore, a worker's failure to correct a no-match does not provide a company with evidence that the worker lacks work authorization. However, if a worker used that social security number as proof of work authorization, the company has to ask the worker to correct the SSN or present another work authorization document to prove work authorization.

How Should Unions and Workers Respond to Social Security Number No-Match Letters?

After finding out a company has received a SSN no-match letter, unions and workers should request a copy of the letter to confirm that the company actually received the letter, that Social Security sent the letter recently, and that the letter actually lists the worker.

Some companies lie about receiving SSN no-match letters or will produce outdated no-match letters. In response to such worker targeting, the union can file

a grievance or inform the worker of the right to file a discrimination charge with the Department of Justice's Immigrant and Employee Rights Section or EEOC.

If the company received a valid, timely SSN no-match letter, workers can visit their local Social Security office or ignore the letter.

Social Security will take no action if a worker decides to ignore the letter. However, the company may attempt to discipline or discharge contrary to Social Security's warning.

In response, unions can handle the no-match by:

- watching closely the company's response to ensure the company treats all workers with no-matches the same,
- filing a grievance, or
- bargaining with the company for a contract provision that:
 - ◆ requires the company to immediately notify workers and the union when the company receives a no-match and
 - ◆ prohibits the company from discriminating against or otherwise adversely treating workers whose names appear on a no-match letter.

What is An ACA No-Match and How Should the Union Respond?

The Affordable Care Act requires companies to submit certain information on covered workers to the Internal Revenue Service (IRS) for tax compliance. The information includes the social security or taxpayer identification numbers of the covered worker and dependents. If a company does not have a worker's or dependents' social security or taxpayer identification numbers, the company can provide the applicable names and dates of birth for covered workers and dependents.

If the IRS receives notification that a worker's SSN does not match Social Security's records, the union should notify the company that:

- a no-match is not evidence of lack of work authorization and warn the company against taking action against the worker;

- IRS regulations recommend steps for the company to take to show good faith compliance upon receiving a no-match notice;
- the company can ask the worker for SSN information three times: at hire and by the end of each year of the worker's first two years of work;
- IRS considers these steps good faith compliance, that the regulations do not require additional action by the company, and that IRS will not impose a penalty on the company; and
- the union will challenge any adverse action against the worker.

What Are I-9 Audits?

Homeland Security and the Labor Department audit Forms I-9 completed for every worker and maintained by the company to establish compliance with the work authorization requirements of the Immigration and Nationality Act.

Following an inspection, ICE can notify the company that its records contain violations. For example, the Notice of Suspect Documents states that certain workers do not appear work authorized, advises the company of possible criminal and civil penalties for continuing to employ the workers, and gives the company and workers an opportunity to present documentation of work authorization.

The I-9 audit process lacks protections for immigrant workers, including:

- no set time for workers to submit additional work authorization documents,
- no mechanisms to prevent companies from immediately terminating workers with no-matches,
- no prohibition of Form I-9 audits during labor disputes, and
- no process protecting worker rights while workers correct documents or challenge no-matches.

What Actions Can Unions Take Regarding I-9 Audits?

Unions can respond to the possibility of I-9 audits by bargaining to require a company:

- to immediately notify the union when the company receives notice of a I-9 audit and to provide the union with a copy of the notice

- to request, on the union's request, that ICE postpone the audit,
- to provide workers with written notice of their rights and responsibilities,
- to immediately notify the union of the audit results and provide the union with a copy of the results, and
- to request an extended amount of time from ICE or Labor Department during which workers can submit updated work authorization documents.

What Is Discretionary Relief and When Can It Help Workers?

Homeland Security, through USCIS or ICE, has the prosecutorial discretion to not seek deportation of an immigrant for a period of time by deferring action on the case— in other words, giving the case lower priority based on humanitarian reasons or administrative convenience. Deferred action is not an entitlement and does not grant the individual legal immigration status.

The government grants deferred action based on the totality of circumstances surrounding an individual's presence in the U.S.

An individual granted deferred action is work authorized and must apply for a work authorization document.

Unions can assist workers who exercise their worker rights to apply for deferred action if companies retaliate against them by trying to have ICE deport them. The NLRB, U.S. Department of Labor, and EEOC will assist workers in obtaining deferred action so that the workers can remain in the U.S. to pursue their federal rights before these administrative agencies.

Parole is another form of discretionary relief granted by Homeland Security which can allow workers at risk of deportation to remain in the U.S. Homeland Security grants parole for urgent humanitarian reasons or for significant public benefit. One reason for parole is to allow a witness to participate in legal proceedings involving agencies such as NLRB, EEOC, and Labor Department. Unions can assist workers to obtain parole for these and other reasons.

What is the Status of Deferred Action for Childhood Arrivals?

In 2017, the Trump Administration began phasing out the Deferred Action for Childhood Arrivals (DACA) program created in 2012 under the Obama

Administration. Several lawsuits challenged termination of the DACA program, and the courts imposed a preliminary injunction halting ending the program.

Under the preliminary injunction, all immigrants who previously received DACA may request renewal if their DACA expired on or after September 5, 2016 by filing the appropriate USCIS forms.

If an immigrant previously received DACA and the DACA expired *before* September 5, 2016 or the DACA grant was previously terminated, the individual can file a new initial DACA request on the appropriate USCIS forms.

Immigrants may apply for work authorization through USCIS at the same time they renew their DACA.

Immigrants may contact USCIS by calling 1-800-375-5283 or visit www.uscis.gov.

Immigrant workers should not pay exorbitant fees or rely on notaries public to file for DACA; instead, they should seek assistance from their unions, community organizations, and churches.

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 contract language suggestions:

Translation of this Agreement, Other Company Documents and During Meetings: The Company agrees that a mutually agreeable translator will, at the Company's expense:

- Translate into the languages workers read all employment-related documents, including this Agreement, disciplinary documents, policies, handbooks, procedures and notices. The English version of this Agreement will govern if there are any discrepancies with the translated versions. The Company agrees to pay for a mutually acceptable translator to translate during all meetings that workers not fluent in English attend.

Work Authorization: The Company will not require or ask for proof of immigration status or work authorization, or require any worker to verify work authorization documents, except as required by law.

- Before the Company requests a worker to verify or re-verify his or her work authorization documents, the Company will first meet with the Union and the affected worker.

Leaves of Absence During Renewals of Work Authorization or Attempts to Rectify Other Work Authorization Problems: The Company agrees to treat a worker's period of removal from employment due to the expiration of a worker's work authorization document as a leave of absence, and that workers may take unpaid leaves of absence to resolve any other work authorization problems.

- The leave of absence begins the date the work authorization document expires or the worker begins to resolve other work authorization problems and continues for 90 calendar days. The Company will grant an additional 90 calendar day extension of the leave of absence, if the worker requests leave in writing and provides documentation showing that the worker filed the work authorization renewal application or that the worker is attempting to resolve other workplace authorization problems. The Company may grant additional extensions of the leave of absence at the Company's discretion.
- The Company will reinstate the worker to the worker's former position without loss of seniority when the worker provides the renewed work authorization document or resolves the other work authorization problem.

Terminations Based on Lack of Work Authorization: If a worker is unable to rectify the work authorization problem and the Company terminates the worker based on lack of work authorization, the Company will rehire the worker with no loss of seniority if the worker subsequently corrects the problem within 90 calendar days of the date of the termination. If the worker corrects the problem within 1 year, the worker will receive preference for reemployment.

Leave for Immigration Agency or Court Proceedings: Workers have the right to take up to 90 days unpaid leave for purposes of preparing for or attending federal immigration agency or immigration court proceedings, provided the worker requests the leave in advance unless emergency circumstances prevent the worker from requesting leave in advance. Workers may take this leave as needed and are not required to take the leave in one consecutive block of days. The Company may extend this leave at its discretion.

Reinstatement After Leave of Absence: The Company will reinstate all workers when returning from any leave provided by this Agreement or any law

without requiring the worker to complete or provide any immigration documentation or information required of employment applicants.

No Adverse Action Against Worker for Updating Employment Records:

The Company agrees that workers have the right to update or attempt to update their personnel records to a reflect change in identity, name, federal work authorization document, or Social Security Number. The Company may not discipline, discharge, discriminate or retaliate against, or take any other adverse action against a worker because the worker updates or attempts to update any of these documents or information, regardless of the information or documents the worker presented at the time of hire. The Company will modify its records to reflect the update, and will not request more or different documents or information from the worker.

Social Security Number Discrepancy or No-Match: If the Company receives information, by correspondence, phone, electronically or otherwise, from the Social Security Administration indicating that the name and Social Security Number that the Company reported on the Wage and Tax Statements (Form W-2) do not match with Social Security's records, the Company agrees that:

- upon receipt of the notice, the Company will notify the Union and provide a copy of the notice to all workers listed on the notice and to the Union;
- the Company will not take any adverse action against any worker, including discharge, discipline, lay off, retaliation or discrimination;
- the Company will not require workers listed on the notice to provide copies of their Social Security cards, complete new I-9 forms, or provide new or additional proof of work authorization or immigration status;
- the Company will not contact any other governmental agency, and the Company will contact Social Security only for the purpose of providing any updated SSN information provided by workers or as a result of Company's correction of its own records; and
- the Company will not ask any workers about their Social Security numbers.

E-Verify: The Company will register or participate in the E-Verify program, or any other similar program designed to electronically verify work authorization, *only* if legally required to do so.

If participation in E-Verify is legally required, the Company will:

- provide the Union with a copy of the Memorandum of Understanding with the Department of Homeland Security;
- only use E-Verify for new hires as that term is defined by federal regulation at 8 C.F.R. §274a;
- if required to use E-Verify pursuant to its obligations as a federal contractor, only use E-Verify at the federal contract site and at no other job location;
- in the event of a tentative nonconfirmation, provide the affected worker a copy of the tentative nonconfirmation notice and notify the Union of the tentative nonconfirmation;
 - ◆ if the affected worker chooses to contest the tentative nonconfirmation, the Company agrees that the affected worker has the right to Union representation to contest the tentative nonconfirmation;
 - ◆ the Company agrees that it will not take any adverse action against the affected worker during the period when the worker is contesting the tentative nonconfirmation;
 - ◆ if the affected worker and the Union notify the Company that the tentative nonconfirmation has been issued in error, the Company agrees that there will be no break in the affected worker's employment while the worker contests the tentative nonconfirmation;
 - ◆ provide any worker issued a final nonconfirmation by the E-Verify program up to 120 days to correct the problem and, after the problem is corrected, reinstate the worker to his or her former position with seniority intact;
- if a worker is displaced due to disqualification from employment due to the application by the Company of E-Verify or a similar work authorization verification program, the incoming replacement worker will be paid at wage and benefit eligibility levels of the worker who was displaced.

Notice from Government Agency Regarding Work Authorization Status: The Company will notify the Union and shop steward within 24 hours by

telephone or in-person if the U.S. Department of Homeland Security or any other federal or state agency contacts the Company for any purpose or if the Company receives a search and/or arrest warrant, administrative warrant, subpoena or other request for documents concerning any bargaining unit worker. The Company will provide the Union, upon request, with all information, including documents the Company received from any agency, regarding these matters within 24 hours of the request.

- If any government agency is auditing the Company, the Company agrees to meet with the Union to negotiate the type of documentation needed for the audit and the timing of Company's activities in the audit. When the Company receives the results of the audit, the Company will provide the Union with copies of all documents the Company received, including any list identifying workers with any alleged deficiency in their I-9 form, work authorization or identity documents. The Company will also, within 2 days, meet with the Union to discuss and agree to the manner of verification, the length of time provided to workers to establish that they are authorized to work, and negotiate over any other related-issues, including but not limited to reinstatement rights and/or severance pay.

What Anti-Discrimination Laws Specifically Protect Immigrant Workers?

Title VII of the Civil Rights Act of 1964

The chapter on employment discrimination laws more fully discusses the anti-discrimination law Title VII. That said, Title VII prohibits discrimination based on national origin and protects documented and undocumented immigrants.¹ 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 basing any employment decision on the individual's national origin, including recruitment, hiring, promotion, layoff, firing, or other terms and conditions of employment.

¹ A company that violates 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 work authorization.

Title VII prohibits harassment based on national origin, including using ethnic slurs which create a hostile work environment for workers. When harassment occurs, the company must take measures reasonably calculated to end it.

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 effective performance of the job requires fluency.

A company that imposes an English-only rule must demonstrate that such rule is job-related and consistent with business necessity.

The Immigration and Nationality Act

The Immigration and Nationality Act prohibits companies from discriminating against workers or job applicants based on citizenship, immigration status, national origin, or document abuse.

Workers who believe they have suffered discriminated can file a charge with the Immigrant and Employee Rights Section of the Department of Justice if:

- the discrimination occurred within the last 180 days, and
- the worker has work authorization.

Individuals can contact the Immigrant and Employee Rights Section by calling 1-800-255-7688 or emailing ier@usdoj.gov.

If a union is uncertain about a worker's work authorization status, the union may file a charge with the EEOC.

After the Immigrant and Employee Rights Section investigates a charge, the agency has 120 days to prosecute the company. If it decides not to prosecute the company, it must notify the worker. 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.

Is There A Process That Halts ICE Enforcement When Undocumented Workers Attempt to Protect Their Rights?

To prevent companies from exploiting ICE to retaliate against workers, ICE has agreed with the U.S. Department of Labor, National Labor Relations Board, and the Equal Employment Opportunity Commission to not take immigration enforcement action at companies where workers assert their workplace rights.

Workers and unions gain this protection by filing complaints with the Labor Department, NLRB, and EEOC and also when workers notify the NLRB of organizing and bargaining activity. ICE identifies for the Labor Department, NLRB, and EEOC the companies ICE is targeting for immigration enforcement. In turn, agencies will notify ICE of those companies from ICE's list that the agencies are already investigating. For these companies, ICE will withhold immigration enforcement, including Form I-9 audits, unless there are national security or federal criminal reasons for ICE to continue enforcement. This process is called "deconfliction."

It is unclear how long deconfliction will last given the Trump Administration's anti-immigrant actions. However, unions and workers should continue using the deconfliction process by filing charges with the agencies and asking the agencies to urge ICE to withhold investigation and enforcement activities.

Do Immigration Officers Have the Right to Enter Company Premises?

No, immigration officers may enter only public areas (for example, public waiting rooms) of a business and must leave when the business owner or person in control of the site asks the officers to leave. Immigration officers may enter non-public areas of a business only if the officers have a judicial warrant or consent of the owner or person in control of the site. If consent is denied, the officer must leave and obtain a judicial warrant to enter.

What Type of Warrant Authorizes Immigration Officers to Enter Company Premises?

To enter and search a company's premises for immigration violations, an immigration officer must have a search and entry warrant issued by a federal court and signed by a judge, a judicial warrant. Warrants issued by ICE or Homeland Security are not judicial warrants, but simply administrative warrants.

Administrative warrants do not empower ICE to enter or search non-public workplace areas.

What Are Workers' Rights When Facing Questioning By Federal Immigration Officers?

Immigration officers may ask workers about their identity, citizenship, or other lawful status. However, workers have the right to remain silent and refuse to answer any questions (including questions about the worker's identity). Workers should not sign anything without first speaking with an immigration lawyer.

When Are Immigration Officers Authorized to Arrest Individuals for Immigration Violations?

Immigration officers are authorized to arrest an immigrant if the officer has probable cause to believe the immigrant is in the United States unlawfully and is likely to escape before an arrest warrant can be obtained.

What Actions Should the Union Take in Planning for An Immigration Raid?

Unions should conduct know-your-rights training, including training all workers on their right to remain silent to an immigration officer, not to sign anything unless reviewed by the worker's lawyer, and to contact a lawyer if detained.

Unions should develop a communication team and rapid response team that includes immigration rights and criminal lawyers, to respond to issues during a raid.

Unions should create a plan to reach out to resources helpful to immigrant workers, including embassies, consulates, and detention centers.

Unions should train represented workers to respond as a unit during a raid and not separate themselves based on immigration status.

Unions should advise workers to organize personal documents, including immigration documents, and notify a trusted family member or friend where to access them. Unions should advise workers to record doctors' names, medications, and other important medical records and notify trusted family members or friends where to access them.

Unions should advise workers each to record important childcare information and identify a trusted family member or friend to care for the worker's children if the worker is detained on immigration matters.

Unions should advise workers to keep the Union's contact information for assistance as well as contact information for immigrant rights organizations in the workers' geographical area.

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 private-sector companies with at least 100 full-time workers or 100 full and part time workers who total 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 and
- 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 at a single facility that continues to operate
- that causes an employment loss during a 30-day period
- affecting either
 - ◆ at least 1/3 of the full-time workers, but no fewer than 50 workers or
 - ◆ at least 500 full-time workers.

An employment loss is a:

- layoff exceeding 6 months in length or
- reduction of hours in work of more than 50 percent in each month of a 6-month period.

Who Receives Written Notice of Plant Closing or Mass Layoff?

Companies must notify unions 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 layoff or closing is permanent or temporary
- the date of the first 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 violate the WARN Act unless they prove:

- workers continued to work at another company facility
- unforeseeable circumstances prevented companies from giving the full notice and the company gave notice as soon as possible or
- giving notice would have hampered getting money that could improve faltering operations and the company gave notice as soon as possible.

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 bargained severance pay or other employment benefits.

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 federal 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.

This chapter also doesn’t cover state election law, because it varies from one state to another. For example, while most states permit unions to contribute dues-based treasury funds to candidate campaigns, the rest require unions to make such contributions from PACs financed only with voluntary member contributions.

Because the UFCW’s federal PAC is administered entirely at the International, this paper does not cover issues related to establishing or administering PACs, or the reports federal PACs must periodically file.

How Can Unions Communicate with Members about Federal Campaigns?

Treasury Money May Be Used

Unions may use treasury money to communicate with members about federal elections and others in the union’s “restricted class.” Unions’ restricted class includes members, union executive staff, and the immediate family living in the households of members or executive staff. These communications include one-on-one conversations while representatives service, handbills, meetings, email, texts, phone and mail.

Coordination with Candidate Campaigns and Parties Is Permissible.

A union may coordinate any election-related communication directed at members with the campaigns of federal candidates and political parties. A union can, for example, discuss with campaigns what messages the union should direct to members, including how to more precisely target messages towards the group. Coordinating these communications does not make them “contributions” to the candidates or parties.

“Express Advocacy” About Candidates and Reporting

For legal purposes, the content of these membership communications can be divided into two categories: express advocacy and everything else. Express advocacy explicitly calls for the election or defeat of a candidate for federal office. For example, “vote for” or “vote against” are express advocacy. Other communications, even if they mention candidates are not express advocacy.

The union must file a report with the FEC if the combined cost for outside vendors to produce member publications that are mainly devoted to express advocacy exceeds \$2,000 for any primary or general election cycle. Importantly, the \$2,000 threshold does not include the costs of printing union magazines or newsletters whose express advocacy is less than 1/2 of the publication’s total content. While the threshold includes payments to vendors to draft, produce, design and publish publications, the threshold excludes union overhead such as time staff spend writing or producing publications.

Union Distribution of Candidate and Party Materials

Unions must use federal PAC money to pay the costs of (i) copying or distributing, either to members or the public, materials produced by federal campaigns or political parties. The FEC treats these costs as “in-kind” contributions that count towards the union’s PAC campaign contribution.

This rule does not apply if unions produce their own materials that in part quote campaign materials.

Candidate Appearances at Union Events

Federal candidates may address members at meetings or other events. And, unions may bar candidates the union opposes. Union officers may speak at these events. The union may open the events to news media, but not to the general public.

Unions may use treasury money to pay for the costs of these events and do not have to file a report about these events. The candidate’s campaign must pay the costs to travel to event.

At these events candidates and union officers also may ask members to contribute directly to the candidate’s campaign. However, union officers and staff should not handle contribution materials such as envelopes or collect contributions.

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 officials who are candidates for federal office to travel to and appear at union events as long the official appears and speaks only in an official capacity and neither the official nor the union campaigns.

After Citizen's United, Unions Can Use Treasury Money to Communicate with the General Public about Federal Campaigns?

Unions express advocacy that is coordinated with campaigns or parties and directed at the general public are in-kind contributions. Unions may use treasury money to pay for express advocacy communications aimed at the general public. Unions may also use treasury money to pay for other partisan or political communications that fall short of express advocacy but still influence elections, such as election-time criticism or praise of candidates.

Unions may disseminate these communications by any means, such as:

- shirts, hats, buttons, bumper stickers, yard signs and other materials displayed to the general public
- flyers, direct mail and phone banks
- newspaper, radio and television advertisements
- social media, text messages and digital advertising.

Unions May Not Coordinate with Candidate Campaigns or Parties Express Advocacy Aimed at the General Public.

Because unions may not use treasury money to contribute to campaigns or parties, unions may not coordinate express advocacy communications aimed at the general public with campaigns or parties. This is because express advocacy that unions coordinate with campaigns are in-kind contributions. This includes union endorsements of candidates, unless the endorsement does not cost the union any money if, for example, made on free social media or a website, as discussed more fully below.

Specifically, unions can't coordinate with candidates or political parties:

- express advocacy at any time
- other messages that can only be interpreted as supporting or opposing a particular candidate at any time or
- mere mentions of House and Senate candidates, even if they aren't election-related within 90 days of a primary or general election, or mentions presidential candidates within 120 days before a state's presidential primary or caucus through the general election.

To avoid coordinating with campaigns or parties, unions should not:

- consult with the campaign or party about any aspect of any express advocacy communication, unless targeted at members
- receive any suggestion from the campaign or party about any aspect of the communication or
- use private campaign or party information to develop the union's communication or to decide where to publicize the communication.

Potential Federal Taxation of Political Communications Aimed at the General Public

For many unions, using their general treasury funds to make public political communications would trigger an onerous federal tax on that political spending. Specifically, unions could pay a tax equal to 35% of the lesser of the cost of the political spending or the union's net investment income. Net investment income means interest, dividends, capital gains, rents and royalties, minus any expenses incurred to earn that income. Ordinarily, all net investment income isn't taxable to unions, but public political communications risk that income to tax up to the cost of the communications.

To avoid risking being taxed on public political communications, unions should pay for those communications with funds deposited into a political-only account separate from the union's general treasury. While this account may be funded with union-treasury funds, it should be separate from the union's regular treasury accounts and have its own IRS Employer Identification Number (EIN).

To ensure that the union correctly sets up and funds the political account, unions should consult with their accountants and attorneys.

Self-Identification Statements on Express Advocacy Communications to the General Public

Each express advocacy communication must state in a “clear and conspicuous manner”:

- the full name of the union or PAC that paid for the communication 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 committee.”

This statement must appear on printed items (such as a flyers, mail pieces, print advertisements and signs), inside a box outline in a color clearly different from the color of item’s background in at least 12-point type. A bigger font size is required for signs larger than 2’ by 3’.

Statements on radio and television advertisements must say at the end:

“Paid for by [name of union or PAC], [street address, 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 this same message visually for at least 4 seconds and at least 4% of the picture height.

Reporting Independent Expenditures to the FEC

Unions must report independent expenditures to the FEC. Money used to pay for express advocacy communications aimed at the general public are “independent expenditures,” meaning they were made independent from – and not coordinated with – a campaign or party. Unions should consult their accountants and attorneys to be sure they comply with FEC requirements.

Electioneering Communications

"Electioneering communications" must include the same statements express advocacy aimed at the general public requires. Electioneering

communications are radio or television advertisements that are broadcast 30 days before a primary or 60 days before a general election and refer to a candidate without express advocacy, even if it has nothing to do with the election. Unions must also report electioneering communications to the FEC.

Unions should use their political account to pay for electioneering communications and should not coordinate electioneering communications with candidates or parties.

Other Public Advocacy

Unions may use treasury money to pay for legislative, policy and other messages to the general public that are not express advocacy or electioneering communications. These messages are sometimes called “issue advocacy.” The Federal Communication Commission requires broadcast advertisements to include statements similar to those for independent expenditures. Additionally, some states regulate issue advocacy by requiring unions to register with state agencies, report the advocacy and to include statements identifying the union.

Voter Registration and GOTV

Unions may use treasury money to engage in non-partisan voter registration and get out-the-vote (GOTV) drives directed at the general public. Non-partisan means there is no message saying how anyone should vote, not even indirectly by tying preferred issue positions to the election. Instead, all messages must concern how to register, how to cast a ballot and whether to vote. Partisan voter registration or GOTV drives must follow the rules for independent expenditures.

What About Union Internet Communications: Social Media, Websites and Digital Advertising?

A union may post express advocacy messages and candidate endorsements on the union’s social media sites, including its website and on YouTube. No self-identification statement is required. Unions should treat the minimal costs of such postings to be independent expenditures.

If a union pays for digital advertising on someone else’s social media site, then the union must comply with the rules for paid express advocacy and electioneering communications. Generally it’s best to include the self-identification statement or, if that’s not practical, at least link to the statement.

Union Officer's Public Appearances With Candidates

Union officers may appear at federal campaign events in their "unofficial" capacity as long as:

- they do so on their own time or
- they make up the time sometime during the following weeks and document it.

To ensure that an officer's appears in an unofficial capacity, the officer cannot say that the officer is there on behalf of the union, although the officer may be identified with the officer's union title.

The union cannot pay any out-of-pocket expenses for the appearance because that would be an unlawful in-kind contribution to the candidate out of the union's treasury.

Alternatively, the campaign can pay the union for all of the expenses of the officer's appearance, including the officer's working time.

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.

All Union Federal PACs Share a Single Contribution Limit

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

Can Union Facilities, Equipment or Telephones be Used for Federal Election Activity Directed at the General Public or Loaned to Federal Campaigns?

A union may allow a candidate or political 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. 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 must be paid in advance. Whenever candidates or

parties pay for using union resources, the union should sign a written agreement with that campaign or party in advance.

Another alternative is for a union's federal PAC to pay the union for the candidate or party's use of union facilities, equipment or staff time, and treat that as an in-kind contribution by the PAC to the candidate or party.

Meeting room exception if written policy in place

A union that customarily makes its meeting rooms available to clubs, community organizations and other groups for free may make the rooms available to candidates without reimbursement.

Union Staff Working Directly for Federal Campaigns

During work time: Unless the union's PAC or the campaign reimburses the union, staff assigned during work time to work directly for a campaign or a political party constitutes an unlawful union in-kind contribution from the union's treasury equal to the amount of total compensation and benefits attributable to that time and all out-of-pocket expenses the union pays in connection with the staff's campaign work.

During vacations, holidays, personal and other paid time off: Union staff have the right to work on campaigns during their own paid time off. The union can encourage staff to volunteer for campaigns on their personal time, such as weekends, vacation, personal days or after the end of workdays. Unions can also coordinate volunteers. But the union cannot require staff to use their time off to do so. Union records must reflect that staff used paid personal time, when unions coordinate campaign volunteers.

During unpaid leave: Union staff may take an unpaid leave of absence to work for a federal campaign. The staff may continue to earn seniority like anyone else taking unpaid leave for any other reason. However, if the union continues to pay the union (as employer) share of benefits during the leave, then the union would make an unlawful in-kind contribution from the union's treasury to the campaign. These benefits may continue uninterrupted if either the staff pays for them personally, or the union's PAC or the campaign reimburses the union.

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

Union staff may use the union's facilities for "occasional, isolated or incidental" volunteer federal election activity that is directed at the general public.

This means the staff's own political activity, not activity that is union-directed. But in order for this not to cross the line, the volunteer activity must not:

- prevent the staff from completing work for the union
- interfere with the union carrying out its normal activities or
- exceed one hour per week or four hours per month, whether undertaken during or outside of working hours.

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

Unions may solicit PAC contributions only from its restricted class: members, union executive staff and the immediate family living in their households. Also, unions do not 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. Only U.S. citizens and lawful permanent U.S. residents can contribute to a union's PAC.

How Must a Union Solicit Its Restricted Class?

When soliciting PAC contributions, a union must state. Because the PAC checkoff form states the PAC's political purpose and that members can refuse to contribute without reprisal, representatives and shop stewards do not have to say this to members.

If the solicitor suggests that the member contribute a specific amount or the check-off form does so, the union 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.

PAC contributions must be voluntary and paid separately from dues. Unions must record the names of members who make cash contributions of more than \$100 per year per.

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

To make sure that the union properly solicits members to contribute, the payroll deduction or check-off form itself should include all of the required statements unions must make when soliciting members. 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 they lawfully solicited members.

The International PAC check-off form:

**AUTHORIZATION FOR
UFCW POLITICAL CHECKOFF**

I hereby 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 UFCW Active Ballot Club Political Action Committee. 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 Political Action Committee 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 Contribute to the PAC through the Company's Payroll Deduction System?

Upon the union's written request, companies must allow members to use the company's payroll deduction system to contribute to the PAC if executives of the company, any company division, subsidiary, affiliate or any other part of the company use payroll deduction to contribute to the company's PAC or any trade

association PAC. For example, if executives of Kroger subsidiaries QFC or Fred Meyer in the Northwest contribute to the trade association Retail Industry Leaders Association PAC, Kroger must allow UFCW members to use payroll deduction to contribute to the PAC.

To find out if the company has a federal PAC, unions can ask the company or check whether any PAC under the name of the company has filed reports at the FEC's website: http://www.fec.gov/finance/disclosure/imaging_info.shtml. (Corporations and unions must include their name in the name of their PACs.)

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 its members to contribute to the UFCW's Active Ballot Club Political Action Committee 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, Section 114.5(k)(1) of the Federal Election Commission regulations requires the Company to also permit the Union's members to use the same payroll deduction system to contribute to the UFCW's PAC.

The Union will provide the Company signed PAC assignment or check off forms for those workers 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 payroll deductions commencing the payroll period immediately following the period when the Union provides the assignment forms.

Even if the company does not use PAC payroll deduction for its executives, the union may still bargain for the company's agreement to use the payroll deduction system for PAC contributions.

A sample provision is:

(a) The Company agrees to deduct contributions to the United Food and Commercial Workers International Union Active Ballot Club from the wages of all workers who sign political checkoff forms. The Company agrees to deduct contributions beginning the first payroll period after the Union provides the Company with a checkoff form signed by the worker. The Company will cease deducting contributions from those workers who the

Union notifies the Company in writing have revoked their checkoff authorization.

(b) The Company agrees to wire all contributions to the Union within 10 days of the date the Company deducts the contributions to an account the Union designates. The Company agrees to simultaneously provide the Union with the total amount of the contributions, and a list of the names, addresses, occupations and contribution amounts for each contributing worker.

[PROPOSE ONLY IF COMPANY FIRST RAISES THESE ISSUES:]

(c) The Union agrees to indemnify the Company against all liability arising from actions the Company takes in compliance with this provision.

(d) The Company and the Union agree that the fringe benefits workers earn includes the Company's actual expenses of using its payroll deduction system to deduct political contributions.

Cost of using the company's payroll deduction system

However the union obtains PAC check-off, the law requires the union to pay all administrative costs. But the company may only charge the union for the "actual expenses" the company additionally incurs for the 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. Here is sample contract language that says so:

The Company and the Union agree that the fringe benefits workers earn includes the Company's actual expenses of using its payroll deduction system to deduct political contributions.

Attached is a legal opinion the International used to help persuade a company that the union did not have to pay more for the cost of administering the PAC checkoff.

At least one company has claimed that the cost for using its payroll deduction system was more than minimal. The following is the text of a letter the union used to help persuade the company to abandon its position:

This is to request a detailed explanation of how Safeway justifies its assertion that it actually costs Safeway \$1.50 per employee to deduct UFCW PAC contributions. As you know, Sec. 114.5(k)(1) of the Federal Election

Commission Regulations requires the Union to reimburse Safeway "only" "for the actual expenses incurred" in making Safeway's payroll deduction plan available to the Union.

At the same time Safeway provides this explanation, please also include copies of all backup documents and relevant computer software programs, including user and technical manuals for all pertinent payroll systems and all documents that demonstrate the amount of time it takes clericals to input information for those employees who elect to check off PAC contributions, such as documents reflecting their salaries and benefits, to the extent Safeway included such costs in the \$1.50 figure. Along these lines, please include the name and telephone number of your contact at Safeway's payroll software supplier so we can not only verify Safeway's costs, but also help determine if there are less expensive ways to use the payroll software.

Thank you for your response. We will contact you as soon as our professionals have had the chance to review Safeway's response.

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

Local Unions are the "collecting agents" of all PAC contributions that companies check off. While the PAC is ultimately responsible for meeting all requirements concerning the collection and transmittal of contributions to the PAC, Locals can ensure that the FEC does not fine the PAC for failing to comply with those requirements by timely forwarding contributions to the PAC.

Forwarding checked off contributions within 30 days of receipt from companies: Federal law requires Locals to forward to the PAC all contributions no later than 30 days from the date the Local receives the contributions from the company.

Depositing PAC contributions into transmittal accounts: Locals should deposit all PAC contribution checks into the union's non-interest-bearing, political transmittal account and not into the union's general treasury account. If the check combines PAC contributions and dues, after the union deposits the check into its general account, the union should transfer the amount of the contributions into the political 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 the transmittal account, the union can write one check in the amount of the PAC contributions and forward that check to the PAC, and transfer the balance into the union's treasury account.

Maintaining contribution records: Locals are required to “retain all records of contribution deposits and transmittals” for 3 years. Federal election law does not require Locals to report their collecting agent activities.

Member Rights to Distribute Political Literature, Wear Political Buttons or Stickers, and Talk with Coworkers and Customers About Political Issues

The rights of workers to distribute literature, wear stickers or buttons, and talk to coworkers or customers about political issues, legislation and 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 communications that relate to working conditions are protected under no-discrimination and union-activity provisions of the contract or past practices, as well as the National Labor Relations Act.

For example, if the company allows workers to speak to each other about non-work topics, this 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 engaged in protected activity and the company could not interfere when they wore buttons opposing right-to-work legislation while working in work areas.

Can Unions Pay the Expenses of Delegates to National Political Party 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.

For the same reason unions cannot pay the salaries of union staff loaned to federal campaigns, unions cannot use treasury money to pay the salaries of officers to attend conventions as delegates. Rather, the time union officers actually attend conventions as delegates must be the officers’ own time, such as vacation or other leave in accordance with the union’s normal policies.

On the other hand, if the officers also engage in union business, such as attending meetings called by for example the International or the AFL-CIO call

during the convention, the union could pay part of the officers' salaries and allocate their expenses between the union and the PAC. Such an allocation, however, would be appropriate only if the officers would have normally engaged in such union business even if they had not attended the convention as delegates.

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 officer 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 officer engaged in convention business. The union could pay the entire expenses for the day that the officer engaged in union business. However, either the PAC or the officer out of the officer's personal funds would have to pay expenses for the days the officer did not engage in union business and instead only attended the convention as a delegate.

December 20, 2005

Geralyn A. Luty
Vice President and Regional Director
UFCW Region 7 - Northwestern
3633 - 136th Place S.E., Ste. 207
Bellevue WA 98006

Dear Ms. Luty:

You have asked for 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's Active Ballot Club political action committee if the parties agree to include such expenses as a fringe benefit to unit employees. It is my legal opinion that if the parties agree that these expenses constitute a fringe benefit to unit employees, 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 will be included as part of the benefit package to employees under a collective bargaining agreement. See FEC Advisory Opinion 1981-39. When they so agree, the FEC ruled in this Advisory Opinion that the regulation does not require Unions to reimburse these expenses. *Id.*

Consequently, it is my legal opinion that if Safeway and the UFCW memorialize their agreement during recent contract negotiations to include the actual expenses of Safeway's use of its payroll deduction plan to deduct PAC contributions as a fringe benefit to employees, FEC regulations, including Sec. 114.5(k)(1), will not require the Union to reimburse Safeway for these expenses. An agreement in a form similar to the one I forwarded you in late November 2005 would fulfill these requirements.

Feel free to call me if you have any questions.

Yours truly,

George Wiszynski
Assistant General Counsel

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 protect them from company retaliation for reporting misconduct in certain circumstances.

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 laws. Almost all states have at least one whistleblower protection law that protects workers who suffer retaliation for reporting illegal conduct. 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.

Federal Whistleblower Protection Laws

There are a number of federal whistleblower protection laws that govern various regulatory areas. Under these laws, whistleblowers who face retaliation file complaints with the Labor Department's Occupational Safety and Health Administration which will investigate. Each federal law has its own deadline for filing complaints, ranging from 30 to 180 days after the retaliation. Workers can file complaints online at www.whistleblowers.gov or over the phone. Workers are entitled to reinstatement, backpay, compensatory damages and under some statutes, punitive damages.

The following are some regulatory areas that federal laws protects.

Food Safety: The FDA Food Safety Modernization Act provides whistleblower protection to workers who report a food or drug safety violation to a company, the federal government or a state attorney general. Moreover, federal

law protects workers who refuse to participate in a practice that violates federal food and drug safety laws.

Workplace Safety and Health: As discussed in the "Workplace Safety and Health" chapter, OSHA protects workplace safety and health whistleblowers.

Corporate & Financial Fraud: The Sarbanes-Oxley Act protects whistleblowers who report certain corporate and securities fraud to federal agencies, law enforcement, Congress or supervisors.

Federal Environmental Violations: Several laws protect whistleblowers who report environmental law violations. These violations involve, for example, air and water pollution, solid waste disposal, toxic substances and chemical releases.

Federal Contract Fraud

The False Claims Act provides that workers who companies discharge, discipline or otherwise discriminate against for whistleblowing on federal government contract fraud are entitled to double damages for loss of salary, damages for reputational harm, injunctions 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 U.S. Justice Department will file claims in federal court.

If the federal government declines to pursue the matter, the False Claims Act permits private parties to file actions on behalf of the federal government and themselves in federal court. The party who files a claim is entitled to 10-30 percent of the fraud damages and civil penalties recovered, plus attorneys' fees and costs.

SERVICE CONTRACT ACT (PROTECTIONS FOR WORKERS WHO WORK FOR FEDERAL CONTRACTORS)

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What Is It?

The Service Contract 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 federal contractors who provide services for more than \$2,500.

How Does the Service Contract Act Protect Workers?

The law requires federal contractors to:

- pay prevailing wage rates
- 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 and
- provide safe and sanitary conditions.

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 workers of the predecessor contractor the right of first refusal to work for the successor contractor. The contractor must hire as many workers as needed to perform the contract.

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, canceling contracts, and barring companies from receiving federal contracts for 3 years.

WORKER PRIVACY PROTECTION LAWS

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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 forms kept in files separate from personnel files. The ADA 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
- persons administering first aid require the information to administer emergency medical care.

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.

IMPORTANT: Companies may not use the ADA to deny the requests of unions for worker medical information.

For information on HIPAA, see that chapter of this manual.

Telephone Calls 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 sufficient 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.

Exceptions to the Electronic Communication Privacy Act make its protections of emails inapplicable to workplace emails. Companies may access and disclose information workers store on company computer systems, and 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 job must be based on a legitimate business purpose. A rule that automatically bars all 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 locations. Companies must bargain with unions over the

placement of additional cameras. Companies may not avoid this obligation by asserting that the information is confidential. Rather, companies must protect the information under mutually agreeable procedures that meet both parties' needs.

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 or working conditions on social media (such as Facebook or Twitter). Instead, the NLRA protects workers' online discussions of their working conditions. Companies violate the NLRA if they discriminate against or punish workers for discussing workplace issues on social media or institute across-the-board bans on such discussions.

REEMPLOYMENT RIGHTS AFTER MILITARY SERVICE

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What Law Governs Reemployment Rights After Military Service and What Does It Require?

The Uniformed Services Employment and Reemployment Rights Act (USERRA) generally requires companies to rehire workers who have been on leave from the company while completing military service, including training.

Who Is Eligible for Reemployment Rights Under USERRA?

For reemployment rights, a worker must:

- have a permanent civilian job (including probationary, part-time or seasonal position)
- notify the company prior to leaving for military service except when precluded by military necessity or notification is otherwise impossible or unreasonable
- not have exceeded the five-year limit on the total amount of military service
- have been honorably discharged and
- report back to work in a timely manner or submit a timely application for reemployment.

When Must the Worker Provide Notice to the Company?

The law does not specify the amount of advance notice required, but workers should provide notice as far in advance as possible 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 years of military service a person can perform while retaining reemployment rights. A worker receives a new five-year entitlement when the worker starts with a new company.

The cumulative five-year limit does not include the worker's time spent for:

- required drills, annual training and other training certified by the military as necessary
- service performed during a declared war, national emergency, critical missions or operational mission or
- service for more than five years to fulfill required service because the worker is unable to obtain release from service. For example, sailors who are at sea when the 5-year obligation ends.

Do Reemployment Rights Apply If the Worker Volunteered for Military Service or State Call-up?

USERRA applies to voluntary and involuntary military service in peacetime and wartime. However USERRA does not apply when the state, and not the federal government, calls up National Guard members. For example, when a state governor calls up the National Guard to assist with disaster relief. 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 Military Service?

Yes. USERRA gives workers the right to continue health insurance coverage for the worker and the worker's dependents during military service. Companies can require workers who serve up to 30 days to pay only the normal worker share of the premium for health insurance. For longer periods of service, companies can charge workers up to 102% of the premium. The right to health insurance coverage ends the day after the worker's deadline to apply for reemployment or 18 months after beginning military service, whichever comes first.

Upon the worker's return to work, companies must immediately reinstate health coverage for workers and their dependents, without waiting periods.

If a company offers benefits (such as holiday pay or life insurance) not based on seniority status to workers on leaves of absence, then the company may have to provide those same benefits to workers on military service leave.

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.

How Soon After Completing Military Service Do Workers Have to Report Back to Work or Apply for Reemployment?

If a worker served for fewer than 31 consecutive days, then the company must allow workers enough time to return home plus an additional eight hours to rest. After this, 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 must report at 6 a.m.

Workers who serve between 31 and 180 days must verbally or in writing apply for reemployment no later than 14 days after completing their service. Workers who serve for more than 181 days must submit applications for reemployment no later than 90 days after completing their service. If meeting any this deadline is impossible or unreasonable through no fault of the worker, the worker must reapply as soon as possible after the deadline.

These deadlines can be extended up to two years to accommodate a workers' hospitalization for an injury or illness related to their military service.

Workers do not automatically forfeit their reemployment rights by failing to meet these deadlines. However companies can treat workers' failure to do so as unexcused absences under the company's existing policies.

Can Companies Require Workers to Prove That They Actually Performed Military Duty?

Yes. A worker who served more than 31 days must, upon the company's request, provide documentation of their service. A company cannot delay reemployment, if such documentation does not exist or is not readily available.

What Are Companies Required to Provide to Returning Workers Upon Reemployment?

Returning workers are entitled to:

- prompt reinstatement, which generally is a matter of days, not weeks, depending length of absence
- accrued seniority and seniority-based benefits, as if continuously employed, including for example, rate of pay and pension vesting
- training, retraining and other accommodations and
- special protection against discharge, except for cause, for 180 days following military service of 31-180 days, or one year following military service longer than 180 days.

Are Returning Workers Always Entitled to Their Old Jobs?

Workers who serve fewer than 91 days are entitled to the job the worker would have had absent the military service, provided that the worker is or can become qualified for that job. If after reasonable efforts, the worker cannot become qualified for this job, the worker has the right to return to the job the worker had prior to military service.

Workers who serve more than 90 days are entitled to the job the worker would have had absent the military service or 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?

A worker must be, or become, qualified for the job to have reemployment rights, but the law requires the company to make reasonable efforts to train the worker. If a worker can't become qualified after reasonable efforts, and if not disabled, the company must employ the worker in any other qualified position of lesser status and pay, with full seniority.

What If a Returning Servicemember Is Disabled?

Companies must make reasonable efforts to accommodate workers with disabilities that they incurred or aggravated during military service. If the company cannot reasonably accommodate the worker, the company must reemploy the worker in a position that is the closest in terms of status and pay and full seniority to the position to which the worker is otherwise entitled.

A disability need not be permanent. For example, if a worker breaks a leg during military training, the company may have to reasonably accommodate the worker, or 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 applicants because they are servicemembers. The law also forbids companies from retaliating against workers for assisting or participating in an investigation or proceeding under USERRA.

A company violates the law if the worker's service was a factor motivating the adverse action (not necessarily the only factor) unless the company proves that it would have taken the adverse action regardless 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 check with their unit commander. If this fails, the worker may contact the Ombudsmen for the National Committee for Employer Support of the Guard and Reserve, who can provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members.

Enforcement

Workers who believe their company has violated their USERRA rights may contact the Veterans' Employment and Training Service (VETS) (www.dol.gov/vets/) of the U.S. Labor Department. VETS must investigate all complaints and, if VETS determines that the alleged action occurred, VETS will attempt to make companies comply. If VETS does not resolve the complaint,

workers may request that VETS refer complaints to the U.S. Attorney General who may file court actions on behalf of the workers.

Workers may also file private actions with their own attorney prior to either seeking assistance from the Labor Department or referral to the Attorney General.

Workers who have suffered from a violation may be entitled to lost wages or benefits (double lost wages for willful violations), reasonable attorneys' 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 job applicant to take any kind of lie detector test
- use, accept, refer to or inquire concerning the results of any worker's or job applicant's lie detector test
- discharge, discipline discriminate in any manner, or threaten to take any such action against any worker or job applicant on the basis of lie detector test results or because the worker or job applicant refuses, declines or fails to take a lie detector test.

Exceptions That Allow Companies to Use Lie Detector Tests

Theft or embezzlement: Companies investigating workplace financial loss such as theft or embezzlement may request workers to take polygraph tests under certain circumstances. Companies cannot require workers to take the test. The investigation must relate to a specific incident or activity that has occurred. To request that workers take tests, companies must meet several strict 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 a statement that fully explains the particular theft or embezzlement and the basis for testing particular workers and
- companies must keep copies of those statements for at least 3 years and make them available to the Labor Department's Wage and Hour Division.

Legally controlled substances: Companies who dispense legally controlled substances may use polygraphs for job applicants and as part of

ongoing investigations of crimes or other misconduct involving or potentially involving company loss.

Security Services: Armored car, security alarm and security guard companies can require tests for job applicants filling positions protecting facilities, materials or operations affecting health or safety, national security or currency.

Under these exceptions, companies may use the test results or the workers' refusal to take the test as evidence against them. However, companies must possess additional evidence before taking any adverse action against them.

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.

Enforcement

Workers adversely affected by a company's violation of this law may sue in federal or state court within 3 years of the violation. Workers may be entitled to employment, reinstatement, promotion, backpay and attorneys' fees and costs.

A worker may also file a complaint with the DOL, which may seek civil penalties of up to \$10,000.