

Federal Labor Laws

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Part Four – The Duty to Bargain

XV. The Duty to Bargain – General Considerations

A. Definition of the Duty to Bargain

1. The basic requirements of the duty to bargain are specified in § 8(d) of Taft-Hartley, which defines the duty as:

[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.¹
2. The duty to bargain applies both to the negotiation of a collective bargaining agreement and the negotiation of grievances arising under an agreement.
3. The intent of § 8(d) is to require the parties to negotiate. Whether the negotiations lead to an agreement is left to the relative economic power of the parties.
4. Under § 8(d) the parties are required to provide notice of any intent to terminate or modify an agreement both to the other party and to the Federal Mediation and Conciliation Service. The notice requirements are discussed in Part D of this outline.
5. The Board and courts have found seven traditional indications of bad faith bargaining:²
 - a. Delay tactics,
 - b. Unreasonable bargaining demands,
 - c. Unilateral changes in mandatory subject of bargaining,

¹ 29 USCA § 158(d).

² *Homestead Nursing & Rehabilitation Center*, 310 NLRB 678 (1993); *Atlanta Hilton & Towers*, 271 NLRB 1600 (1984).

- d. Efforts to bypass the union,
- e. Failure to design an agent with sufficient bargaining authority,
- f. Withdrawal of already agreed upon provisions,
- g. Arbitrary scheduling of meetings.

B. Enforcement of the Duty to Bargain

1. The duty to bargain, as defined in § 8(d), is enforced through unfair labor practice procedures. Sections 8(a)(5) and 8(b)(3) make refusals to bargain by employers and unions, respectively, unfair labor practices.
2. In enforcing the duty to bargain, the Board recognizes two broad types of violations:
 - a. Failures or refusals to comply with the affirmative obligations of the duty to bargain are known as "per se" violations.
 - b. "Bad faith" violations include all cases in which it appears that one party is failing to make a sincere effort to reach an agreement. These cases are determined on a case-by-case basis.
3. Case XV-A: Failure or Refusal to Bargain: The situations described below are examples of the distinction between the two types of violations:
 - a. The attempt to negotiate the inclusion of an illegal contract clause into a collective bargaining agreement is a "per se" violation. The union may not realize that the particular clause would be illegal,³ but this good faith would not prevent a § 8(b)(3) violation.³
 - b. This is a combination of tactics, which taken together, indicate that the company is making no legitimate effort to reach an agreement. Although "bad faith" violations depend on the unique facts of each case, this set of facts would tend to indicate a violation.⁴
 - c. This is a "per se" violation. The execution of any agreement reached by the parties, if requested by either party, is

³ See, e.g., *Royal Components, Inc.*, 317 NLRB 971 (1995).

⁴ For a similar case showing a §8(a)(5) violation, see *Radisson Plaza Minneapolis*, 987 F.2d 1376 (8th Cir. 1993).

specifically required under the duty to bargain, as defined in § 8(d).⁵

Case XV-A: Failure or Refusal to Bargain

In each of the following situations, indicate whether the conduct constitutes a "per se" or a "bad faith" violation of the duty to bargain:

- a. In its efforts to reach a first agreement with Megalomania Industries, the local bargaining committee of the Extrusion Workers attempts to negotiate language that would require all workers to join the union after 15 days of employment under the contract.
- b. During negotiations, Megalomania Industries agreed to meet once a week with the Extrusion Workers bargaining committee. However, for 12 weeks in a 15 week period, the company has cancelled the meetings, and in the three which were held, the company rejected all union proposals without explanation and without providing any counterproposals. In the fifteenth week, the company made a "take it or leave it" proposal which would have maintained the status quo. One day after the meeting, the company put out a newsletter suggesting that workers should pressure the union committee to accept the "firm but fair" offer.
- c. After the Extrusion Workers and Megalomania Industries reach agreement on a first contract, the company refuses the union's request to sign the completed agreement.

C. Duration of the Duty to Bargain

1. The duty to bargain begins as soon as the union is properly selected as the bargaining agent for a group of workers, through certification by the NLRB, legal voluntary recognition, or the issuance of a bargaining order.
 - a. After certification by the NLRB, the union is conclusively presumed to have the right to bargain for one year.⁶ If that year elapses without a contract being negotiated, the union continues as the bargaining representative unless the union is decertified or the employer withdraws recognition in good faith.
 - b. From 2007 until 2011, if an employer voluntarily recognized a union, the employer was required to post a notice informing all employees of the recognition. The notice triggered a window period of forty-five days during which a

⁵ See, e.g., *Highland Park Manufacturing Co.*, 110 F.2d 632 (4th Cir. 1940). For a §8(b)(3) violation concerning a union refusal to sign an agreement, see *Longshoremen (Lykes Bros. S.S. Co.)*, 443 F.2d 218 (5th Cir. 1971).

⁶ *Brooks v. NLRB*, 348 U.S. 96 (1954).

petition for an NLRB representation election would be timely.⁷

- 1) In 2011, the Board overruled the *Dana* decision and returned to the concept of a “recognition bar,” under which an employer that voluntarily recognizes a union for purposes of collective bargaining has an obligation to negotiate with that union for a reasonable period of time.⁸
 - 2) Based on the circumstances of each case, a “reasonable period of time” for purposes of bargaining in circumstances of voluntary recognition is at least six months but no more than one year.
- c. In bargaining order cases based on an employer unfair labor practice campaign that destroys majority support for the union, the duty to bargain commences on the date the union achieved majority status, or on the date the employer commenced its unfair labor practice campaign, if the union had majority support on that date.⁹
2. In ongoing bargaining relationships, the union is presumed to continue to represent workers from one contract to the next, unless the employer withdraws recognition or the union loses a certification or decertification election.
 3. In all cases, an employer's withdrawal of recognition must be based on proof that the union no longer represents a majority of the unit.¹⁰ The employer must have objective evidence of the union's loss of majority status.¹¹
 - a. If the employer improperly withdraws recognition from an incumbent union that still enjoys majority support, the employer has violated its duty to bargain.
 - b. Decline of union membership to less than a majority, and even a majority deauthorization vote, is inadequate evidence to support an employer's withdrawal of representation. These may demonstrate that a majority does not wish to

⁷ *Dana Corp.*, 351 NLRB No. 28 (2007).

⁸ *Lamons Gasket Co.*, 357 NLRB No. 72 (2011); *Smith's Food & Drug Centers, Inc.*, 320 NLRB 844 (1966).

⁹ *California Gas Transport, Inc.*, 347 NLRB No. 118 (2006).

¹⁰ *Levitz Furniture Co.*, 333 NLRB 717 (2001).

¹¹ *NLRB v. Curtis Matheson Scientific*, 494 U.S. 775 (1990).

remain members but do not necessarily show that the majority does not wish to be represented.¹²

- b. Permanent replacements for economic strikers are not presumed to either support or oppose the union. An employer may not withdraw recognition simply because it has employed sufficient strike breakers to outnumber striking bargaining unit members.¹³
4. If an employer unlawfully refuses to recognize or bargain with an incumbent union, an insulated period will be enforced during which the employer cannot challenge the union's majority status. The insulated period will be at least six months and can be extended up to one year, depending on the complexity of the negotiations, the passage of time since bargaining began, the number of bargaining sessions, the level of progress made, and whether impasse has been reached.¹⁴
 5. While a collective bargaining agreement will normally bar any NLRB representation election for the term of the contract (up to three years), there is an open or window period near the end of the term of the contract bar during which representation petitions are timely.
 - a. The open period begins 90 days prior to the end of the contract bar and ends 60 days prior to the expiration.¹⁵ In the health care industry, the window period is between 120 and 90 days before expiration.¹⁶
 - b. If a valid petition is filed during the window period, the incumbent union continues to have the right to negotiate.¹⁷ If an agreement is reached, but the union loses the election, the contract is voidable.
 - c. If another union has won bargaining rights for that unit as a result of the election process, it has the right to accept or reject the contract negotiated by its predecessor.¹⁸

¹² *Sparks Nugget*, 230 NLRB 275 (1977); *Orion Corp. v. NLRB*, 515 F.2d 81 (7th Cir. 1975).

¹³ *NLRB v. Curtis Matheson Scientific*, note 10, *supra*.

¹⁴ *Lee Lumber*, 334 NLRB 399 (2001).

¹⁵ *Deluxe Metal Furniture Co.*, 121 NLRB 995 (1958).

¹⁶ *Trinity Lutheran Hospital*, 218 NLRB 199 (1975).

¹⁷ *Dresser Industries*, 264 NLRB 1088 (1982).

¹⁸ *American Seating Co.*, 106 NLRB 250 (1953).

6. The duty to bargain exists during the duration of a collective bargaining agreement, except to the extent that the right to bargain over a specific issue has been waived.

D. Procedural Prerequisites to Bargaining

1. If a collective bargaining agreement is in effect, §8(d)(1) requires a party seeking to terminate or modify that agreement to provide 60 days notice of the intent to negotiate prior to the expiration date of the contract.
2. Under §8(d)(3), if no agreement is reached within 30 days of giving notice, the party seeking modification or termination must also notify the Federal Mediation and Conciliation Service and any state mediation agency of the existence of the dispute.
3. The 60 day and 30 day notice periods constitute "cooling off" periods during which the right to strike or lockout is suspended. The terms of the old collective bargaining agreement remain in effect until the full 60 day or 30 day period has elapsed, even if the contract has expired.
4. The party initiating the proposed termination or modification is responsible for notifying the mediation service as well. Failure to give timely notice will bar that party, but not the other side, from striking or locking out workers until the full notice period has passed.¹⁹
5. If the existing contract has provisions for mid-term reopening of the contract, the statutory notice provisions do not apply to such reopeners.²⁰
6. Many collective bargaining agreements contain additional notice requirements different than the statutory notice periods. The effect of missing a contractual notice deadline depends on the specific agreement.
 - a. In some cases, the contractual notice period has the same effect as the statutory notice, in that the contract (and its no-strike/no-lockout clause continues in effect until the notice period has elapsed.
 - b. Other clauses have a more drastic effect. If the contractual notice period under these agreements is not met, the contract is automatically renewed for a given period, usually one year.²¹

¹⁹ *United Artists Communications*, 274 NLRB 75 (1985).

²⁰ *Schaeff Namco*, 280 NLRB 1317 (1986).

²¹ See, *Office Employees Local 42 v. UAW Local 174*, 523 F.2d 783 (6th Cir. 1975). Cf., *Associated General Contractors*, 190 NLRB 383 (1971)(adequate notice).

- c. No contract notice provision supercedes the statutory notice. Irrespective of the contract provisions, the statutory notice requirements must be met.
7. To avoid disruptions, the health care industry is subject to different notice requirements:
- a. Notice to the other party must be given 90 days prior to the expiration of the agreement or the intent to terminate or modify an agreement under §8(d)(4)(A).
 - b. Notice to the FMCS must be given 60 days in advance of the expiration, termination or modification date.
 - c. Before a health care institution can be struck or picketed, 10 days notice to the FMCS and the institution must be given under the provisions of § 8(g). This notice requirement applies only in the event of a labor dispute directed at the health care facility. It does not apply to primary picketing by other unions directed at other employers at a facility.²²
 - d. Before an initial contract is negotiated, under §8(d)(4)(B), 30 days notice must be given to the FMCS before a strike may occur.
 - e. The parties to a labor dispute in the health care industry are required to accept the services of the FMCS.

E. The Federal Mediation and Conciliation Service

- 1. Title II of Taft-Hartley established the Federal Mediation and Conciliation Service as an independent agency directed to provide mediation and related services to the parties to labor disputes. The FMCS is designed to be a neutral force in the resolution of bargaining disputes.
- 2. The FMCS provides three distinct types of services:
 - a. The Service will make available mediators whenever it is notified of the existence of a labor dispute. The role of a mediator is to attempt to remove any extraneous barriers to negotiations. Mediators should not be involved in the relative merits of each side's position in a dispute. Their role is to get the parties to talk.
 - 1) Acceptance of the services of a mediator in private sector bargaining is usually voluntary. While the Service will make a mediator available, the parties are within their rights if the services are refused.

²² *Painters Local 452 (Henry C. Beck Co.)*, 246 NLRB 970 (1979).

- 2) In the health care industry, acceptance of the services of a mediator is mandatory.
 - b. The FMCS also serves as a voluntary source of arbitrators for labor disputes. The FMCS makes available the services of an arbitrator only if the parties request that it do so.
 - c. If the President declares a national emergency dispute under Title II of Taft-Hartley, the FMCS has specific responsibilities for coordinating the statutory procedures for resolving such disputes.
3. In addition to the FMCS, many states have mediation services that must also be notified in the event of a party's intent to terminate or modify a collective bargaining agreement.

F. Withdrawal from a Multi-Employer Bargaining Unit

1. Entry into a multi-employer bargaining arrangement is voluntary. However, if an employer has agreed to bargain as part of a multi-employer unit, it is bound by any resulting agreement.²³
2. An employer may withdraw from a multi-employer unit by serving notice on the union prior to the commencement of negotiations for a new agreement.²⁴

²³ *Kroger Co.*, 148 NLRB 569 (1964).

²⁴ *Retail Associates*, 120 NLRB 388 (1958). If bargaining has begun, withdrawal can occur only with consent of the other parties. See, *Teamsters Local 378 (Capital Chevrolet Co.)*, 243 NLRB 1086 (1979).