

Federal Labor Laws

Paul K. Rainsberger, Director
University of Missouri – Labor Education Program
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XVI. The Subject Matter of Bargaining

A. Classification of Subjects of Bargaining

1. All subjects that may be proposed in collective bargaining are classified in one of three subject matter categories.¹ The classification of a subject is important for determining:
 - a. Whether it is legal to attempt to negotiate inclusion of that subject into a collective bargaining agreement,
 - b. Whether either party may insist that the other negotiate over the topic, to the point of impasse, and
 - c. Whether it is legal to strike or lockout to force acceptance of the proposal.
2. The three classifications of the subjects of bargaining are "mandatory" subjects, "illegal" subjects and "permissive" or "voluntary" subjects. Each category is discussed below. In addition, examples of subjects which raise issues concerning the distinction between categories are also discussed.

B. Mandatory Subjects of Bargaining

1. Broadly defined, a mandatory subject of bargaining is any topic directly related to the wages, hours and other terms and conditions of employment of bargaining unit members. Certain topics which are essential for the ongoing determination of wages and working conditions are also mandatory subjects of bargaining.
2. The following list includes commonly negotiated examples of mandatory subjects of bargaining:
 - a. Wages are clearly a mandatory subject of bargaining. Other forms of compensation which constitute a substitute for the traditional payment of wages are also mandatory subjects.
 - 1) Shift differentials,² commissions,³ incentive pay plans,⁴ overtime premiums,⁵ paid holidays,⁶ paid

¹ *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958).

² *Smith Cabinet Mfg. Co.*, 147 NLRB 1506 (1964).

vacations⁷ and severance pay⁸ are all forms of wages which are mandatory subjects.

- 2) Profit sharing⁹ and stock purchase plans¹⁰ constitute deferred compensation or non-cash wages and are mandatory subjects of bargaining. However, a one-time, unilateral grant of stock to employees where the amount given is not tied to any employment-related factors may not be a mandatory subject.¹¹
 - b. Work schedules,¹² breaks,¹³ vacations,¹⁴ holidays,¹⁵ overtime procedures¹⁶ and other issues concerning the hours of work are mandatory subjects.
 - c. Fringe benefits, including insurance packages,¹⁷ pension plans and other retirement benefits for active workers,¹⁸ and other benefits are mandatory subjects.

³ *The Register-Guard*, 339 NLRB 353 (2003).

⁴ *Libby, McNeill & Libby*, 65 NLRB 873 (1946).

⁵ *Braswell Motor Freight Lines*, 141 NLRB 1154 (1963).

⁶ *Singer Mfg. Co.*, 24 NLRB 444 (1940).

⁷ *Jimmy-Richards Co.*, 210 NLRB 802 (1974).

⁸ *Adams Dairy, Inc.*, 137 NLRB 815 (1962).

⁹ *Kroger Co v. NLRB*, 399 F.2d 455 (6th Cir. 1968), but profit sharing plans designed to repay past, accrued liabilities to employees are non-mandatory subjects. See, *R.E. Dietz Co.*, 311 NLRB 1259 (1993).

¹⁰ *Richfield Oil Co.*, 110 NLRB 35 (1954).

¹¹ *North American Pipe Corp.*, 347 NLRB No. 78 (2006).

¹² *Timken Roller Bearing Co.*, 70 NLRB 500 (1946).

¹³ For an unusual twist on the question of breaks, see, *Chemtronics, Inc.*, 236 NLRB 178 (1978).

¹⁴ *Great S. Trucking Co.*, 127 F.2d 180 (4th Cir. 1942).

¹⁵ *Bradley Washfountain Co. v. NLRB*, 192 F.2d 144 (7th Cir. 1951).

¹⁶ See, e.g., *Fall River Sav. Bank*, 260 NLRB 911 (1982).

¹⁷ *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949); *Larry Geweke Ford*, 344 NLRB 628 ((2005). But see Part F, *infra*, concerning the distinction between mandatory and permissive aspects of insurance coverage.

- d. Work rules,¹⁹ safety practices,²⁰ seniority systems,²¹ disciplinary procedures,²² grievance procedures²³ including grievance arbitration²⁴ and other conditions of work are mandatory, including:
 - (1) Provisions concerning the performance of bargaining unit work by supervisors,²⁵
 - (2) Meals provided by the employer,²⁶ and the price of in-plant food and service.²⁷
 - (2) Layoff and recall procedures,²⁸ and
 - (3) Union use of bulletin boards.²⁹
- 3. If a subject is classified as a mandatory subject, the following rules apply to negotiations over that topic:
 - a. If a mandatory subject of bargaining is proposed by either party, the other party must negotiate over that subject.
 - b. It is legal to insist, to the point of impasse, that a mandatory subject of bargaining be included in a contract.

¹⁸ *Paul Mueller Company*, 335 NLRB 808 (2001); *Mississippi Power Co.*, 332 NLRB 530 (2000); *Inland Steel Co.*, 77 NLRB 1 (1948). If the employer seeks to discontinue participation in a pension plan and the union does not bargain over this action, they may have waived that right, see, *Associated Milk Producers*, 300 NLRB 561 (1990).

¹⁹ *Miller Brewing Co.*, 166 NLRB 831 (1967).

²⁰ *NLRB v. Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967).

²¹ *United States Gypsum Co.*, 94 NLRB 112 (1951).

²² *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940).

²³ *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945).

²⁴ *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

²⁵ *Crown Coach Corp.*, 155 NLRB 625 (1965).

²⁶ *Ramada Inn South*, 206 NLRB 210 (1973).

²⁷ *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979). See, also, *U.S. Postal Service*, 302 NLRB 767 (1991), where video game (from which profits were used to fund social activities) was removed unilaterally.

²⁸ *Hilton Mobile Homes*, 155 NLRB 873 (1965).

²⁹ *NLRB v. Proof Co.*, 242 F.2d 560 (7th Cir. 1957).

- c. It is legal to strike or lockout to obtain a mandatory subject of bargaining.

C. Illegal Subjects of Bargaining

1. A subject of bargaining is classified as an illegal subject if it would violate specific provisions of Taft-Hartley or some other state or federal laws.
2. The following list includes some examples of illegal subjects of bargaining:
 - a. Hot cargo clauses which violate Section 8(e).³⁰
 - b. Closed shops or improper union shops (e.g., a union shop with a grace period of less than 30 days in an industry other than construction, or any union shop agreement in a "right to work" state).³¹
 - c. Agreements which condition representation on full union membership.³²
 - d. Clauses which discriminate illegally on the basis of race, sex or other invidious classifications.³³
3. If a subject is classified as an illegal subject of bargaining, the following rules apply to negotiations over that topic:
 - a. Negotiating an illegal subject of bargaining is unlawful. Consequently, insisting on the negotiation of an illegal subject, to the point of impasse, is also unlawful.
 - b. If an illegal clause is included in a collective bargaining agreement, that clause is void and unenforceable.
 - c. A strike or lockout to obtain an illegal subject is an illegal strike.

³⁰ See, e.g., *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766 (1989). Hot cargo clauses are defined and regulated by 29 USC § 158(e). For a discussion of hot cargo issues, see Outline XXX.

³¹ *Penello v. Mine Workers*, 88 F.Supp. 935 (D.C.D.C. 1950). Union security agreements are regulated by 29 USC §§ 158(a)(3), 158(b)(5) and 164(b). The limits on union security agreements are discussed in Outline XXII.

³² A possible violation of §8(a)(3) or 8(b)(2).

³³ *Hughes Tool Co.*, 147 NLRB 1573 (1964).

D. Permissive Subjects of Bargaining

1. Subjects that are neither mandatory nor illegal are classified as permissive subjects of bargaining. While the list of possible permissive subjects is infinitely long, there are several distinct categories of commonly negotiated or proposed permissive subjects.
2. Some subjects of bargaining are classified as permissive because they represent efforts to negotiate on behalf of persons who are not part of the bargaining unit. Some examples include:
 - a. Pension benefits for persons who have already retired.³⁴
 - b. Expansion of the bargaining unit.³⁵
 - c. Pre-employment drug testing.³⁶
3. Additional topics are classified as permissive because they concern matters which are internal matters for either the union or management. For example, the following subjects would constitute permissive subjects:
 - a. The price of the employer's product.
 - b. Matters relating to internal union discipline (*e.g.*, removal of fines of members who cross a picket line).³⁷
 - c. Basic capital investment decisions that are based on factors other than labor costs.³⁸
4. Certain proposals are permissive subjects of bargaining because they deal with the means of reaching an agreement, not the terms of that agreement. Some examples include:
 - a. Coordinated bargaining.³⁹
 - b. Designation of negotiators.⁴⁰

³⁴ *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). This and related issues are discussed in Part F, *infra*.

³⁵ *Douds v. Longshoremen (ILA)*, 241 F.2d 278 (2d Cir. 1957).

³⁶ *Star Tribune Div.*, 295 NLRB 543 (1989).

³⁷ *Universal Oil Products Co. v. NLRB*, 445 F.2d 155 (7th Cir. 1971).

³⁸ *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

³⁹ *AFL-CIO Joint Negotiating Committee (Phelps Dodge Corp.) v. NLRB*, 459 F.2d 374 (3rd Cir. 1972).

- c. Contract ratification procedures.⁴¹
 - d. Interest arbitration.⁴²
 - e. Strike settlement agreements.
 - f. Neutrality and card check provisions.⁴³
5. Finally, some subjects are permissive because the connection between the topic and the wages, hours and working conditions of the bargaining unit is remote at best. Some examples are:
- a. Voluntary contributions to political action committees of either the employer or union.
 - b. Contributions to industry advancement funds.⁴⁴
 - c. Use of the union label.⁴⁵
6. If a subject is classified as a permissive subject of bargaining, the following rules apply to negotiations over that topic:
- a. Either party may make proposals over permissive subjects of bargaining, and if the parties choose to negotiate, any agreement reached is enforceable.
 - b. Neither party may insist, to a point of impasse, that negotiations over a permissive subject be conducted.
 - 1) The fact that a permissive subject is included in one contract does not make negotiations over that subject mandatory during the next negotiations.⁴⁶
 - 2) It is unlawful at impasse to condition acceptance of a mandatory subject to the willingness of the other party to negotiate over a permissive subject.⁴⁷

⁴⁰ *General Electric Co.*, 173 NLRB 253 (1968).

⁴¹ *NLRB v. Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956).

⁴² *Printing Pressmen Local 252 (Columbus)(R.W. Page Corp.)*, 219 NLRB 268 (1975).

⁴³ *Pall Biomedical Products Corp.*, 331 NLRB 1674 (2000); *Pall Corp. v. NLRB*, 275 F.3d 116 (D.C. Cir. 2002).

⁴⁴ *Carpenters Local 2265 (Mill Floor Covering)*, 136 NLRB 769 (1962).

⁴⁵ *Kit Mfg. Co.*, 150 NLRB 662 (1964).

⁴⁶ *Printing Pressmen Local 252*, *supra*, note 42. Also, when a permissive subject is included in a contract, it does not become mandatory for the life of the contract. *Pittsburgh Plate Glass*, *supra*, note 34.

- c. A strike or lockout to obtain a permissive subject of bargaining is an illegal strike.

E. Cases involving the distinction between mandatory and illegal subjects

1. In some circumstances, the classification of a subject depends not on its subject matter, but on the specific provisions proposed. In these cases, the line between mandatory and illegal clauses must be carefully observed.
2. Union security agreements may be either mandatory or illegal subjects, depending on the location of the bargaining and the specific terms of the agreement. Closed shop agreements are unlawful in all states, and so-called right-to-work states have outlawed union shop agreements. Specific questions concerning the legal limits of other forms of union security agreements are discussed in Outline XXII.
3. In general, work preservation clauses are mandatory subjects of bargaining. However, certain forms of work preservation may be illegal subjects if such agreements constitute hot cargo clauses under § 8(e)⁴⁸ or featherbedding agreements under § 8(b)(5).⁴⁹
4. Non-discrimination clauses are mandatory subjects and clauses which call for racial segregation are illegal subjects.

F. Cases involving the distinction between mandatory and permissive subjects.

1. Because neither side can insist to the point of impasse on the inclusion of a permissive subject, making bargaining over a mandatory subject contingent on acceptance of a permissive subject is not lawful.
2. The distinction between mandatory and permissive subjects is the central issue in a number of categories of proposals, including:
 - a. Drug testing programs.⁵⁰ A drug testing program for active workers is a mandatory subject, but pre-employment drug screening of applicants is a permissive subject.
 - b. Bonuses. If the bonus is characterized as a form of wages it is a mandatory subject, but if it represents a gift or gratuity

⁴⁷ *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747 (6th Cir. 2003); *R.E. Dietz Co.*, 311 NLRB 1259 (1993)..

⁴⁸ *National Woodwork Manufacturing Association*, 386 NLRB 612 (1967).

⁴⁹ *Teamsters Local 456 (J.R. Stevenson Corp.)*, 212 NLRB 968 (1974).

⁵⁰ *Johnson-Bateman Co.*, 295 NLRB 180 (1989); *Star Tribune Division*, *supra* at note 36.

from the employer it is a permissive subject. This distinction may turn on the regularity of the bonus, uniformity in the amount and whether payment is dependent on the performance of financial condition of the employer.⁵¹

- c. Insurance benefits. Benefits are mandatory subjects, but the selection of an insurance carrier is a mandatory subject only if it has a direct impact on benefits.⁵²
- d. Union recognition. Although a management rights clause is a mandatory subject, a union recognition clause is a permissive subject.⁵³
- e. Basic capital changes. The decision to radically change the nature of the employer's business is often a permissive subject, but the effects of such a decision are mandatory subjects.⁵⁴ Similarly, the classification of management's efforts to implement technological change depends on the impact of the change on the bargaining unit.
- f. Work assignment issues are generally mandatory subjects. However, unit definition issues are permissive. This distinction will arise in cases in which management seeks the right to assign work to persons outside the bargaining unit.⁵⁵
- g. Bargaining procedures may be either mandatory or permissive subjects. Ground rules, procedural prerequisites to bargaining, strike settlement agreements, ratification procedures and the selection of bargaining representatives are all permissive subjects. Use of mediators or interests arbitration as a means of resolving bargaining disputes is a permissive subject.⁵⁶
- h. Pensions. Benefits for active workers are mandatory but benefits for retirees are permissive. Bargaining on behalf of individuals who are not part of the bargaining unit will be required only if conditions applicable to those non-unit

⁵¹ *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965).

⁵² *Connecticut Power & Light Co. v. NLRB*, 476 F.2d 1079 (2nd Cir. 1973).

⁵³ *NLRB v. Borg-Warner Corp., Wooster Div.*, *supra* at note 1.

⁵⁴ *First National Maintenance v. NLRB*, *supra* at note 38.

⁵⁵ *Antelope Valley Press*, 311 NLRB 459 (1993).

⁵⁶ See, e.g., *American Medical Response*, 346 NLRB 1004 (2006); *Vanguard Fire & Security Systems*, 345 NLRB 1016 (2005).

persons vitally affect terms and conditions of work for the bargaining unit.⁵⁷

G. Case XVI-A: Subject Matter of Bargaining

1. Of the items listed that are not discussed above, the following considerations would determine the appropriate classification:
 - a. The price and quality of food sold in employer controlled cafeterias are mandatory subjects. Even if the food is provided by an outside contractor, the employer normally would retain control over the conditions under which it is sold.⁵⁸
 - b. The right to honor a picket line is a mandatory subject as long as it does not attempt to give workers the right to honor an illegal picket line. Therefore, the right to honor a legal picket line is a mandatory subject, but the right to honor any picket is an illegal subject.
 - c. Contributions to political action committees are permissive subjects only if they are legal clauses. Thus, while voluntary contributions are permissive subjects, mandatory contributions would be illegal under the Federal Election Campaign Act of 1976.⁵⁹
 - d. The basic capital decisions of the employer are generally permissive subjects although the effects of those decisions are mandatory subjects.⁶⁰ Successor clauses⁶¹ and various types of work preservation clauses are mandatory subjects.

⁵⁷ *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, note 34, *supra*.

⁵⁸ *Ford Motor Co. v. NLRB*, note 27, *supra*.

⁵⁹ 29 USC § 441.

⁶⁰ *First National Maintenance Corp. v. NLRB*, *supra*, at note 38. For a discussion of this area of the law, see Outlines XIX and XX.

⁶¹ *Mine Workers (Lone Star Steel Co.)*, 231 NLRB 573 (1977).

Case XVI-A: Subject Matter of Bargaining

For each of the following potential subjects of bargaining indicate whether the subject is a mandatory (M), illegal (I) or permissive (P) subject:

- Wages and hours of bargaining unit members
- A pension plan for active workers
- Pension benefit increases for retirees
- The price and quality of food sold in vending machines in the company cafeteria
- A union shop agreement in a right to work state
- A union shop agreement in other states
- A management's rights clause
- Contract ratification procedures
- Strike settlement agreements
- The right to honor any picket line
- The right to honor a legal picket line
- Insurance benefits
- Seniority agreements
- Separate seniority lines for men and women
- Voluntary contributions to a political action committee
- Mandatory contributions to a political action committee
- Work rules
- A successor clause
- Safety and health practices
- Contributions to an industry advancement fund
- A work preservation clause
- The length of a probationary period