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Texas Public Employer Labor Relations Annual Workshop



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Tools for Success at the Bargaining Table and Beyond

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HOW DOES COLLECTIVE BARGAINING WORK?

- Employer and union each appoint representatives to meet and bargain.
- Committees meet at “good faith” intervals to discuss proposals.
- Both parties must try in “good faith” to reach agreement (“mandatory” vs. “permissive” bargaining topics).
- Neither party is required to accept any particular proposal by the other.
- Tex. Gov. Code ch. 617, §617.002

Preparation by the Principal Negotiator and Employer Team

- Know your bargaining history.
- Know who you're dealing with.
Carefully evaluate union spokesperson and union committee members.
- Analyze current contract thoroughly.
- Obtain input from business operations.
- Know the costs.

Checklist for Employer's Bargaining Preparation

- History of Employer facility.
- Organizational chart.
- Contact information for management.
- List of all facilities, addresses, managers and senior leadership.
- Any materials distributed by union.

Checklist for Employer's Bargaining Preparation (cont'd)

- Gather all previous and current labor contracts, *including* bargaining notes.
- Review HR files for all union committee members and union stewards.
- Review copies of all union grievances and arbitration decisions.
- Conduct current wage/benefit survey.

Checklist for Employer's Bargaining Preparation (cont'd)

- Strike contingency plans.
- Company policy manuals.
 - HR Policies
 - Job descriptions
 - No solicitation, no distribution rules
 - Benefit plan booklets (SPD's, etc.)
- List of employee gripes and complaints.
- Any NLRB ULP charges.

Rules of Labor Contract Interpretation

- The intent of the parties
 - Purpose of contract interpretation is to determine the intent of the parties
 - When two parties dispute the meaning, the general rule is that one party, in order to prevail, must show that the other party knew or had reason to know of the meaning that the first party gave to the agreement. If neither party had reason to know of the other's different meaning, there is no valid contract

Remember, in labor contract negotiations ...

Only the Employer has anything real to give away!

Everything in a labor contract is either a give away or a limitation on the Employer's inherent rights to manage the workplace and operate

Key Contract Clauses

- Preamble
- Recognition
- Management Rights Clause
 - Very important, but...insistence on an overly broad clause concerning the balance of power can become the subject of NLRB unfair labor practice charges
- Example: Union gives up the right to bargain over all decisions and the effects of those decisions for employees
 - Have to be detailed – i.e., include “absenteeism rules” specifically in addition to rules and standards language to meet the NLRB waiver standard

Key Contract Clauses (cont'd)

- Seniority
 - The toughest clause in any labor contract for the Employer.
 - Try to limit it to reduction in work force.
 - Limit bumping rights.
 - Decide whether to have classification, department, or plant-wide seniority (or a combination) for all or varying purposes.

Key Contract Clauses (cont'd)

- Grievance and Arbitration
 - Have provable, documented timeliness requirements with enforceable cut offs.
 - Determine whether to use arbitrators from Federal Mediation and Conciliation Service (“FMCS”) or American Arbitration Association (“Triple A” or “AAA”, which is more expensive).
 - Limit arbitrator’s authority.
 - Limit who can file a grievance to the union only – it is the employees’ legally chosen representative, and it prevents rogue employees from excessive grievance filings.
 - Provide for an arbitration record upon request.

Key Contract Clauses (cont'd)

- Grievance and Arbitration (cont'd)
- Should be limited **only** to **interpretation** of the contract and not broader matters.
 - Allow each party to reject at least one full panel of proposed arbitrators without need of explanation.
 - Grieving party should always strike first from panel.
 - Consider language restricting union's right to Employer information in connection with a grievance or arbitration, **especially** concerning confidential Employer investigation of EEO/harassment complaints.

Key Contract Clauses (cont'd)

- Union v. Employer Benefit Plans
- No Strike/Lockout
- Termination of Benefits
- Zipper Clause
- Successor Clause

Bargaining Strategy

- Reopener Notice – Section 8(d)
 - Union – 60 days
 - FMCS – 30 days
 - Once one party gives notice, other party generally does not have to do so again
 - First contracts are “special”

Bargaining Strategy (cont'd)

- Bargaining Teams
 - Keep them as small as possible.
 - Keep the boss/ultimate decision-maker away from the bargaining table.
- Role of legal counsel:
 - As principal spokesperson at table.
 - As an adviser at bargaining table.
 - As a behind-the-scenes advisor and not at the table.

Bargaining Strategy (cont'd)

- Meetings
 - Timing of first meeting: Bargaining should not begin more than 30 to 60 days before the contract expires.
 - The key – you will normally not reach agreement until there is a crisis/pressure situation.
 - Allow for a sufficient number of meetings so that the union can talk itself out.
 - Check public social media postings of union and committee members throughout the negotiation process.

Bargaining Strategy (cont'd)

- Language First ... Economics Last
- Make the Union present specific proposals (not vague concepts) before offering Employer proposals or counter proposals.
- When you give, always get something valuable in return.

Bargaining Strategy (cont'd)

- No throwaways.
- Develop unifying concepts that hold Employer proposals together and make sense.
- At the Bargaining Table:
 - On stage all the time
 - Demeanor/style
 - Sharp retort
 - Don't throw down the gauntlet, unless you're prepared for war
 - Don't indicate fear or nervousness
 - The "resigned to the strike" ploy

Bargaining Strategy (cont'd)

- Private meetings with Union spokesperson (side bar).
- Documenting progress.
- Contract extension – retroactivity.
- Employer prepares final contract.

Evaluating Important Labor Contract Language: Seniority

- Types
 - Bargaining unit
 - Employer date of hire
 - Classification
 - Building/facility
- Interruptions
 - Supervision
 - Extended leaves
- Competitive
 - Layoff
 - Bumping
 - Job transfer
 - Promotion
 - Training and trial period
- Management Discretion
- Contractual Silence
- Strict Seniority
 - Requires preference to the employee with the longest continuous service without regard to other considerations
 - “Employees shall be laid off in a department in the inverse order of their bargaining unit seniority within the job description affected by the layoff.”

Evaluating Important Labor Contract Language: Seniority (cont'd)

- Modified Seniority

- Sufficient Ability

- Senior employee will be given preference if he or she possesses sufficient ability to perform the job
 - “Senior employee will be retained so long as he or she possesses sufficient ability for the job.”

- Relative Ability

- Seniority is the determining factor only if the qualifications of competing employees are relatively equal
 - “Seniority shall govern if ability is relatively equal.”

- Hybrid

- Must compare and weigh seniority and ability so that if seniority is significantly different and the skills are relatively insignificant, the senior employee must be retained
 - “Seniority and qualifications shall govern.”

Evaluating Important Labor Contract Language: Management Rights

- Tension between reserved rights and implied obligations
- Reserved rights theory: Reserves to the Employer the affirmative right to act unilaterally and in accordance with its own discretion, regardless of union view
- Implied obligation theory: Many rights and obligations are implicit in the contract (by context and necessity) rather than explicit.
- Typical reserved rights management rights section:
 - “Except as specifically restricted by an express provision of this Agreement, the Employer retains and may exercise all management rights and prerogatives in its discretion.”

Evaluating Important Labor Contract Language: Just Cause

- The Employer may discipline, suspend, demote, or discharge an employee so long as such action is not arbitrary, in bad faith, or without just cause.
- The Employer shall neither discipline nor discharge any post-probationary employee without just cause. Just cause means a cause reasonably related to the employee's ability to perform work. The term includes (but is not limited to) any willful violation of reasonable work rules, regulations or written policies.

Labor Contract Language that Does Not Exist: Past Practice

- Does past practice exist within the rights and responsibilities of a labor contract?
 - Maintenance of benefits/standards
 - “With respect to matters not covered by this Agreement which are proper subjects for collective bargaining, the Employer will make no changes without appropriate prior negotiation with the Union.”
 - Zipper clause
- Maybe yes and maybe no!



Labor Contract Language that Does Not Exist: Past Practice (cont'd)

- Zipper clause: Purpose is to waive bargaining during the term of the agreement over: (A) matters specifically referenced; (B) matters discussed during negotiations; and (C) matters known or not at the time of negotiations



- **Waiver of Bargaining**: Therefore, the Employer and the Union for the life of this Agreement each voluntarily and unqualifiedly waive the right, and each agree that the other shall not be obligated to bargain collectively with respect to any subject matter or matter referred to, or covered in this Agreement, or any matter not referenced or covered including past practices even though such subjects or matters may have not been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.
- **Sole Agreement**: This Agreement constitutes the sole and entire existing agreement between the parties hereto and expresses all obligations and restrictions imposed on the Employer. Any pattern of conduct or past practice prior to this agreement shall be deemed merged into this Agreement.

Labor Contract Language that Does Not Exist: Past Practice (cont'd)

- Cannot be used to change express terms in CBA
- Function of past practice
 - Clarify/amends ambiguous language
 - Adds to general language
 - Does not supervene or replace clear contract language that is contrary
- Requirements:
 - Must be clear
 - Must have been consistently followed over a reasonably long period of time
 - Must have been mutually accepted over time by the parties

Labor Contract Language that Does Not Exist: Past Practice (cont'd)

- How to change a past practice:
 - Clean slate memo
 - Bargaining obligation?
 - Announce during bargaining
 - Changed circumstances:
 - “Absent language in a collective bargaining agreement expressly or impliedly to the contrary, once the conditions upon which a past practice has been based are changed or eliminated, the practice may no longer be given effect.”



Grievances: Arbitrability

- Timeliness

- Duty of fair representation (DFR): Union owes a duty of care and loyalty to bargaining unit members
 - Breaches that duty if it acts arbitrarily, discriminatorily or in bad faith in processing or refusing to process a grievance
- For the Arbitrator to decide if timely

- Substantive Arbitrability

- Compel arbitration unless facts and circumstances clearly indicate otherwise



Arbitration: Burdens of Proof in Disciplinary Cases

- How much evidence is required?
 - Generally, preponderance of the evidence
 - But, more serious offenses resembling crimes may suggest need for a greater degree of proof:
 - Clear and convincing
- Burden of Proof: Who must prove what?
 - Under just cause standard, an employer must prove the existence of wrongdoing and that the penalty imposed fits the offense.
 - In court/agency litigation, the employee bears the burden of proof on the prima facie case and the Employer bears the burden to prove a legitimate non-discriminatory reason.

Arbitration: Burden of Proof in Contract

- Burden is on the party asserting a violation
 - Union
 - Except in sufficient ability seniority clauses ('job given to the senior bidder provided he is qualified')
 - Preponderance



Arbitration: Remedies

- Make-Whole Remedies:
An award of damages should be limited to the amount necessary to make the injured whole
 - Upon finding a contract violation, arbitrators have inherent power under a contract to award monetary damages to place the parties in the position they would have been in had there been no violation
- “When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need for flexibility in meeting a wide variety of situations.”
 - Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593, 597 (1960)

Arbitration: Remedies for Improper Discipline



- Discipline Grievance
 - Rescinding of discipline
 - Expunge Record
 - Reinstatement
 - Back Pay
 - May not get any
 - Duty to mitigate
 - Overtime, bonuses, and lost opportunities
 - Benefits

Arbitration: Remedies Beyond Make-Whole



- Generally, labor contracts provide that arbitrators cannot add to/subtract from the agreement
- Discipline to Supervisor?
- Pre-Award Interest
- Post-Award Interest
- Front Pay?
- Punitive damages
- Costs
 - Loser pays?
- Attorneys fees

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