MOST FREQUENTLY ASKED QUESTIONS REGARDING 9(a)/8(f) AGREEMENTS

1. Q. What is the difference between an 8(f) and a 9(a) agreement?

   A. During the term of the agreement there is no difference – contractors must comply with the terms of the contract.

   When a Section 9(a) agreement comes up for expiration, the contractor is obliged, upon request, to meet and negotiate in good faith over the terms of a successor agreement. If neither party gives notice of intent to terminate the agreement, then the old agreement remains in effect. Even where notice of intent to terminate and negotiate a new agreement has been given, the economic terms and working conditions of the expired agreement remain in place until changed by a new agreement or by the employer's lawful, unilateral implementation of changes that have been proposed at the bargaining table by the employer. Changes in a Section 9(a) agreement can be implemented only by agreement with the union or after a bona fide impasse in negotiations has been reached.

   Under a Section 8(f) agreement, there is no duty to bargain a successor agreement. A contractor signatory to an 8(f) agreement can "walk away" from a union relationship when the existing agreement expires. After a Section 8(f) agreement expires, a contractor may unilaterally establish new terms and conditions of employment to be offered to employees without bargaining. A union, however, has the right to picket or strike for a new 8(f) agreement and the union can file an NLRB petition seeking a representation election based on an expired 8(f) agreement.

2. Q. How can a Section 8(f) agreement be converted to a Section 9(a) agreement?

   A. An 8(f) agreement will generally be converted to a Section 9(a) agreement in one of two ways:

      1. The union wins a majority of the votes of employees in an NLRB conducted secret ballot election; or

      2. The contractor signs a document in which recognition on a Section 9(a) basis is voluntarily extended to the union.

   There are two other seldom-used scenarios that could result in 9(a) recognition. Thus, where an employer actually polls his employees on their desire to be represented by the union and if the "poll" indicates a union majority status, then the union will be deemed to have been recognized as a Section 9(a) representative. Further, if an employer at the request of a union actually reviews cards signed by the employees

authorizing the union to act as their representative, then 9(a) status may be conferred on the union as the result of the employer's consent to review cards.

NOTE: If a majority of the employees in an NLRB election vote against being represented by the union, the contractor is barred from entering into an agreement with the union, including a Section 8(f) agreement, for a one year period. This rule presents a real "Catch 22" situation. If the contractor "wins" the election, he cannot continue employing union employees under a contract with the union.

3. Q. What is the most significant change from a contractor's perspective when an 8(f) agreement is converted to 9(a)?

   A. At the time a union achieves Section 9(a) status, the contractor is obligated upon request to meet and bargain with the Union. This is true even if the contractor is signatory to an existing Section 8(f) agreement with the union. The union may propose that the existing terms of the 8(f) agreement continue in place as the terms of their agreement under 9(a), but it can also seek additional wages, benefits and work rules in such negotiations, and incorporate those terms along with the terms from the 8(f) agreement into a new 9(a) agreement.

4. Q. Does a contractor have legitimate defenses against a 9(a) conversion and, if so, what are they?

   A. A union may file for an NLRB election based solely on the existence of an 8(f) agreement, or even a recently expired 8(f) agreement. A contractor's defenses are limited. The prehire agreement alone will permit the NLRB to process the petition, or the Union may file authorization cards signed by at least 30% of the employees in the bargaining unit in support of the petition. The petition must describe an "appropriate" collective bargaining unit. The NLRB traditionally has recognized individual construction crafts as appropriate bargaining units.

5. Q. If I lay off all my employees in a particular craft before an NLRB election, does this exempt me from the 9(a) conversion?

   A. Contractors will not be forced by the NLRB to submit to an election if they do not employ members of the craft. However, the NLRB looks back for a two-year period and allows employees to vote if they worked for the contractor at least thirty days in the last twelve months or forty-five days in the last twenty-four months. An employer seeking to avoid an election claiming that it will not be employing members of the trade in the future will be required to carry the burden of showing that it has permanently eliminated its employment of persons performing the covered work.

6. Q. Is there any way to terminate or cancel a 9(a) agreement?

A. A contractor may send a written notice of cancellation of a Section 9(a) agreement to be effective as of the expiration of the existing contract. However, the contractor has a duty to bargain in good faith over the terms of a successor agreement and cannot change any existing terms and conditions of employment until the union agrees or a bona fide impasse in negotiations is reached. Even then a contractor may only implement the terms of its final offer to the union. The union is free to strike at any time after the contract expires even if no impasse in bargaining has been reached.

7. Q. If I lay off all of my craft employees before the last 24 months of a 9(a) agreement, can I terminate the agreement and walk away?

A. The fact that a contractor is not currently employing a particular trade is not conclusive that it will not employ that trade on subsequent projects. Although a 24-month hiatus in the use of a particular craft is evidence that the contractor's activities no longer encompass such work, in a 9(a) setting that evidence alone is not sufficient to permit the contractor to simply "walk away" from the contract. If it is the contractor's intent at the time it totally ceases performance of bargaining unit work (e.g., subcontracting out all such work in the future or going out of that phase of the contractor's work), it will still have an obligation to meet and discuss with the union the fact that it does not intend to employ that trade thereafter. Depending on a contractor's intent, it will have an obligation to discuss with the union the decision and/or effects of its plan to eliminate the use of such employees. Layoffs and subcontracting are mandatory subjects of bargaining, and where the layoffs are part of a plan to eliminate the bargaining unit work, the contractor will be required to give advance notice to the union and provide an opportunity to bargain over that topic with the employees' representative.

Finally, contractors who lay off craft employees because of their union membership or because they fear an NLRB election, may be charged by the union with committing an unfair labor practice, i.e., terminating employees because of their union affiliation. If the union succeeds in such a claim, the NLRB typically awards back wages, fringe benefits and interest to such "discriminatees."

8. Q. Under a 9(a) agreement, how long do I have to bargain with the union over a successor agreement?

A. The obligation to bargain in good faith does not have a time limit. Negotiations can sometimes drag out for years. If a Section 9(a) contractor is provided with evidence that a majority of its employees no longer wish to be represented by the union, a possibility exists for a decertification election to be conducted by the NLRB. There are a host of pitfalls in this area and specialized representation by a labor attorney is required.

9. Q. If I have no employees in a craft on my payroll when the 9(a) agreement expires, do I have to bargain?

A. Maybe yes, maybe no. See the answers to question 5 and 7. Thus, if the contractor has a reasonable expectancy of recalling employees in the craft, the answer is a definite "yes." If the contractor has permanently ceased employing members of the craft, has notified the union in advance of laying off its craft employees, has offered to bargain in good faith about the decision to layoff the employees and its effects on the employees, and the union does not request bargaining, then there would be no duty to bargain when the agreement expires.

10. Q. The union can demand to reopen the agreement after conversion to 9(a). What is open for negotiation? Can the contractor open the agreement if the union doesn't?

A. See the answer to 3 above. Both sides have the same obligation to meet and bargain upon request when the 9(a) relationship commences. It is rare for a contractor to seek negotiations when a union achieves Section 9(a) status but the contractor has a legal right to do so.

11. Q. Can another union intervene in the election? What is the effect on the contractor?

A. If a competing union has a contract covering the employees in the craft or if it has authorization cards from at least 10% of the employees in the unit, it can intervene in the NLRB election and will be listed on the ballot.

12. Q. Can an employer form another company to circumvent the 9(a) agreement?

A. No. There are no short cuts in labor relations. Changing the name of the company, selling it to family relations, etc. will have no impact on the labor relations responsibilities of the company.

13. Q. What happens when an employer has a 9(a) agreement and wants to sell the company?

A. The existence of a 9(a) relationship with a union does not alone inhibit the ability to sell a company. However, both 9(a) and 8(f) agreements can have so-called "successor clauses" and the enforceability of those provisions in any given situation is dependent on what the language of the contract says.

A purchaser of a company having a Section 9(a) union relationship who also hires all or most of the existing bargaining unit employees inherits a duty to recognize and, upon request, bargain in good faith with the union representing the employees. In certain cases (i.e., a pure asset sale) the purchaser may be able to unilaterally set initial terms and conditions of employment depending on the structure of the deal. Even in a pure asset sale, however, the purchaser cannot discriminate against applicants because they are union members, and if a majority of the new employees authorize the union to represent them, an election petition can be filed and an election will be held. Here again, experienced labor counsel is a must.

14. Q. Does a 9(a) agreement create specific obligations between the employer and employee, such as progressive discipline?

A. The obligation under Section 9(a) is to bargain in good faith with the union on all mandatory subjects of bargaining. The NLRB, however, does not require agreement on any particular subject such as progressive discipline. It is up to the parties to the negotiations to bargain their own terms and conditions of employment.

15. Q. If I decide not to fight a National Labor Relations Board election petition filed by a craft union, what do I have to do?

A. A contractor who signs a written document recognizing a craft union as the Section 9(a) majority representative of the company's craft employees working out of the company's office location or within the designated geographic area of the current Section 8(f) agreement effectively moots a union's representation petition filed with the NLRB. The NLRB will dismiss the petition if such recognition is voluntarily extended, even if the union declines to withdraw it. Legal advice may be needed as to the description of the bargaining unit or the geographic scope of the recognition of the union.

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