

**SUMMARY: LAW OF COLLECTIVE BARGAINING
IN THE CONSTRUCTION INDUSTRY**

Prepared by:

Michael H. Boldt
ICE MILLER LLP
One American Square
Suite 3100
Indianapolis, Indiana 46282-0200
(317) 236-2327

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I. National Labor Relations Act.

A. General Purposes. The National Labor Relations Act (NLRA) has two basic purposes.

1. Determining Representation Questions -- establishing rules to determine status of unions to act as exclusive bargaining representatives for employees in appropriate units for bargaining.
2. Resolving Unfair Labor Questions -- establishing rules to police bargaining relationships established pursuant to the representation rules.

B. Methods of Determining Representation Questions. Two common methods by which a union can become the exclusive §9(a) representative of a group of employees.

1. Voluntary recognition occurs when a union claims and proves to the employer's satisfaction that the union has been authorized by a majority of employees in an appropriate unit to represent them for purposes of collective bargaining.
 - a. Caveat: an employer wishing to avoid recognizing a union as the representative of its employees must take care to refuse to examine authorization cards allegedly signed by the employer's employees.
 - b. Frequently unions will tender such cards to employers and viewing the cards may obligate the employer to recognize and bargain with the union.
2. Certification following an election conducted by the National Labor Relations Board (NLRB).
 - a. Voter Eligibility. Employees eligible to vote in such an election in the construction industry include:

- (1) employees currently working for the employer in the bargaining unit (generally a specific craft) the union seeks to represent;
- (2) employees who worked for that employer in that unit at least 30 days in the 12 months immediately prior to the filing of the election petition;
- (3) employees performed some work for that employer in the 12 months immediately prior to the filing of the election petition and who worked for that employer in that unit at least 45 days in the 24 months immediately prior to the filing of the election petition;
- (4) Note: for purposes of the 30 and 45 days of work rules, a partial day of work counts as a day.

b. Effect of "One Time" Project Agreements.

- (1) Employers sometimes enter into "one time" project agreements whereby an open shop employer agrees to sign a collective bargaining agreement with a craft to be effective for only one project.
- (2) The intent of such agreements is to allow that employer to be "union" for that project only.
- (3) Note that employees working for that employer on that project may work enough days to become eligible voters in elections conducted among that employer's employees in the next 12 or 24 months.

3. Bargaining Orders. There is one other method for a union to obtain bargaining rights. If an employer is found to have committed flagrant unfair labor practices during the course of an election campaign which cause the union to lose the election, the NLRB may order the employer to bargain with the union if it finds no fair election would be possible because of the unfair labor practices.

C. Unfair Labor Practices. Under the NLRA, only an employer or a union can be liable for commission of unfair labor practices; individuals cannot. However the actions of individual agents (such as union business agents or employer supervisors or superintendents) can result in findings that unions or employers committed unfair labor practices.

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1. Employer Unfair Labor Practices. Employers may not:
 - a. Threaten or coerce employees with respect to their exercise or non-exercise of the right to engage in protected activity;
 - (1) "protected activity" is activity engaged in by or specifically on behalf of two or more individuals for purposes of addressing concerns regarding wages, hours or working conditions.
 - (2) a union need not be involved.
 - b. Dominate or assist an employee organization as the exclusive representative of their employees;
 - (1) Employee committees formed by an employer for purposes of dealing with matters affecting wages, hours or working conditions may be employee organizations.
 - (2) Examples of such committees/employee organizations may include TQM committees, safety committees, and absenteeism committees.
 - c. Discriminate in matters of employment against or in favor of any employee because of exercise or non-exercise of rights to engage in protected activity;
 - d. Retaliate against any employee for filing charges or testifying in NLRA proceedings; and
 - e. Refuse to bargain in good faith with an appropriately recognized or certified bargaining representative of employees.
2. Union unfair labor practices. Unions may not:
 - a. Restrain or coerce employees with respect to protected activity;
 - b. Restrain and coerce employers in selection of their representatives for bargaining purposes;
 - c. Discriminate against an employee for exercise or non-exercise of the right to engage in protected activity;
 - (1) An exception to this is enforcement of a lawful union security clause in non-"Right to Work" states.

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- (2) A lawful union security clause is one which requires an employee to pay to the union dues and fees uniformly required as a condition of acquiring or retaining membership in the union.
 - (a) Employees who object to such a requirement may assert their right to pay to the union only fees representing the cost of providing representation services to the employees in the unit.
 - (3) Under most union security clauses, employees who refuse to pay the fees required by such a clause must be terminated by the employer at the request of the union.
 - (4) Union security clauses that go beyond the payment of dues and fees uniformly required as a condition of acquiring or retaining membership in the union are unlawful. Unlawful clauses are those which require:
 - (a) Actual membership in the union; or
 - (b) In the case of an employee who asserts rights under (2)(a), above, payment of full membership dues and fees where the amounts go beyond the amounts necessary to provide the representation.
 - (c) Paradoxically, despite the fact that actual membership may not be required, it is not unlawful to negotiate a clause which states that membership is required. In Marquez v. Screen Actors Guild, 119 S. Ct. 292, 159 LRRM 2641 (1998), the collective bargaining agreement contained a union-security clause which required each employee to become a "member in good standing" of the union, did not define "member in good standing." The Supreme Court of the United States held that a union does not violate its duty of fair representation when it negotiates a union security clause which requires "membership in good standing" without defining that term in the collective bargaining agreement.
- d. Refuse to bargain in good faith with an employer for whose employees the union is the bargaining representative;

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- e. Engage in prohibited strikes and boycotts;
 - f. Impose excessive or discriminatory membership fees;
 - g. Engage in featherbedding; or
 - h. Strike or picket health care institutions without giving at least 10 days notice.
3. Prohibited Boycott Agreements. Under §8(e) of the NLRA, neither employers nor unions may enter into agreements whereby they agree that the employers will not do business with other employers depending on their labor relations policy such as whether they are union or nonunion.
- a. Such an agreement is called a "hot cargo" agreement.
 - b. §8(e) generally prohibits agreements not to subcontract to employers depending on their union status.
 - c. However, there is an exception to §8(e) for the construction industry. The exception is discussed in Part IX (A)(3) of this outline.

D. Construction Industry in Particular.

1. Representation Questions in the Construction Industry.

- a. Majority Status Under §9(a) of the NLRA. The two means of establishing exclusive representative status discussed above apply to the construction industry.
 - (1) Voluntary recognition requires contemporaneous demand and grant of 9(a) recognition with evidence of majority - may be eroding
 - (2) Certification after an NLRB election

Each results in recognition of the union as a §9(a) representative. Each of these means is dependent upon the union attaining and proving majority status. However, the NLRB has held that if an employer signs separately, or includes in a collective bargaining agreement, a statement that the employer is satisfied with the union's representation that it has majority status and recognizes the union voluntarily under §9(a), the employer has a §9(a) relationship with that union. If the employer does not contest the union's claim within six (6) months of entering into such an agreement, the §9(a) status of the union will be considered to be

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established conclusively whether the union ever represented a majority of the contractor's employees or not. Decorative Floors, Inc., 315 NLRB No. 25 (1994). However, the United States Court of Appeals for the District of Columbia Circuit held, in Nova Plumbing, Inc. v. NLRB, 330 F. 3rd 531 (2003) that the NLRB's decision holding that contract language alone may establish the existence of a §9(a) relationship is incorrect as a matter of law. The court held that language asserting the existence of a §9(a) relationship is a factor to be taken into account, but that actual evidence of the Union's support by a majority of the employees is necessary before a §9(a) relationship can be established. It remains to be seen whether the NLRB will modify its position in response to the court of appeals decision.

b. Pre-Hire Agreements Under §8(f) of the NLRA. Section 8(f) of the NLRA specifically permits an employer primarily engaged in the construction industry to enter into a collective bargaining agreement with a union without any showing of majority status by the union. Such agreements:

- (1) may provide for mandatory union membership after the seventh day of employment;
- (2) may provide for the employer to give the union advance notice of any vacancies which exist and even provide for exclusive union referral of applicants;
- (3) may establish minimum training experience, or longevity levels with the employer or in the industry or geographical area which must be met by all applicants for employment.
- (4) Unions operating hiring or referral halls may not discriminate on the basis of union membership or non-membership of, and owe a duty of fair representation to, all registrants.

c. Differences between §9(a) and §8(f).

- (1) Contract bar rule.
 - (a) Contracts signed after negotiations with a §9(a) (recognized or certified) union prevent, or act as a bar to, recognition or certification of another union as representative of those same employees during the term of the contract, or decertification of the union during the term of the contract.

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- (b) Contracts signed pursuant to Section 8(f) with no demonstration of majority status on the part of the union do not prevent the filing of petitions for elections with the NLRB that could lead to certification or decertification.

(2) Continuing duty to bargain.

- (a) If a union has achieved majority recognition or certification under Section 9(a) of the NLRA the employer and the union each have a duty to bargain with each other over the terms of a new agreement once a collective bargaining agreement expires.
- (b) Upon the expiration of an 8(f) contract, an 8(f) contractor has **no** duty to bargain a new agreement with the union.
 - i) Despite the fact that an 8(f) contractor has no duty to bargain upon expiration of an 8(f) agreement, an 8(f) contractor may be bound to a new collective bargaining agreement if it had previously delegated bargaining authority to a multi-employer association and fails to timely withdraw such authority prior to the onset of negotiations for a new collective bargaining agreement. This is discussed in more detail in Section II(B)(3) of this outline.

2. Unfair Labor Practice Charges. Generally, the only legal procedure available to stop illegal union conduct that is an unfair labor practice is to file an unfair labor practice charge with the NLRB.

- a. Initiating an unfair labor practice charge is accomplished by completing a form and filing it with the proper NLRB regional office. Forms are available from all NLRB regional offices. Any person not just the employer who is subject to the allegedly unlawful conduct, may file the charge. (NLRB Rules and Regulations, Section 102.9)
- b. Frequent construction industry charges include secondary boycott, recognition picketing, and jurisdictional dispute charges. Such charges are considered "priority" charges.

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- c. Remedies for construction industry unfair labor practices include "cease and desist" orders which require the union to stop its unlawful activity.
 - (1) In secondary boycott cases, the union is ordered to stop the unlawful picketing and return to work;
 - (2) In recognition picketing cases, the union is ordered to stop picketing if the picketing has continued too long (more than a reasonable period which may not exceed 30 days) without the filing of an election petition. This remedy may be accompanied by a direction of an election if a petition has been filed;
 - (3) In jurisdictional dispute cases, the union is ordered to stop the coercive activity (picketing, striking or the threat of same). This may be accompanied by an order holding a §10(k) hearing--an expedited procedure for resolving the disputed work assignment.

II. Employer Side Configurations in Negotiations. Bargaining may be conducted by employers in three basic configurations: single-employer bargaining; multi-employer bargaining; or coordinated bargaining.

A. Multi-employer bargaining in the construction industry occurs when:

- 1. Two or more employers who individually have a legal obligation or desire to bargain with a craft union decide to negotiate one agreement covering all the employers with that union; and
- 2. Union also agrees.
- 3. Binding Assignments of Bargaining Rights.
 - a. It is advisable to have assignments of bargaining rights in writing.
 - (1) May apply only to mandatory subjects of bargaining.
 - (2) May be expanded to apply to both mandatory and permissive subjects of bargaining.
 - (3) May also assign right to administer collective bargaining agreement during term

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- b. Restrictive terms may be included in assignment of bargaining rights. Employers may:
 - (1) Promise not to enter into interim agreements or retroactive agreements;
 - (2) Agree that if one or more employers are struck, all others will lock out;
 - (3) Agree that if the bargaining committee deems that an offensive lockout should be called, all employers assigning rights will go along;
 - (4) Agree that an employer who violates one of the above pledges is subject to suit for damages by the other employer members of the group.
 - (5) Agree that the assignment of bargaining rights is effective only for the negotiation of the next collective bargaining agreement and does not extend to the negotiation of future successor agreements.
- c. Such variations could make the multi-employer bargaining group more effective and certainly less susceptible to the union's divide and conquer and whipsaw tactics which have affected many sets of negotiations in the past.
 - (1) Such variations do not deal with preexisting project agreements in which the no-strike/no-lockout pledges are already contained.

B. Single-employer Bargaining.

- 1. Individual Craft Bargaining. Involves one contractor bargaining a contract with each separate craft union with which it has a bargaining relationship. Any contract agreed upon applies to that contractor only.
- 2. Option: Adopt Local Area Agreement.
 - a. An employer that is not bargaining as part of a multi-employer group may generally adopt the local area agreement with a craft.
 - b. To do so, the employer may sign an Acceptance of Working Agreement and/or Participation Agreement form.
 - c. An employer that does so should review the form carefully to be certain that it does not contain an assignment of bargaining rights

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for future bargaining, or contain territorial jurisdiction provisions that would affect the employer's operations elsewhere. Also review it to see if it purports to grant 9(a) recognition.

3. Withdrawal of Assigned Bargaining Rights Necessary. To engage in single employer bargaining, an employer that has assigned rights to a multi-employer group in the past must withdraw those rights effectively.
 - a. Before the time set out in the expiring collective bargaining agreement for giving notice of an intent to terminate or modify that agreement, and before negotiations actually commence:
 - (1) Send written notice to the multi-employer group;
 - (2) Send written notice to the union or unions involved; and,
 - (3) It may also be necessary to notify federal and state mediation agencies somewhere between 90 and 60 days before the collective bargaining agreement expires that:
 - (a) the collective bargaining agreement will expire on "X" date; and,
 - (b) that the employer is conducting negotiations on its own and not as part of a multi-employer association or unit.
 - b. In December of 1994, the NLRB decided two cases which have a significant impact upon the timing and process for effective withdrawal of bargaining rights from multi-employer associations. The cases are Chel LaCort, 315 NLRB No. 154 and James Luterbach Construction Company, 315 NLRB No. 147.
 - (1) Chel LaCort involved employers in 9(a) relationships with unions. The NLRB held that employers in 9(a) relationships who assign bargaining rights to a multi-employer association must effectively withdraw those bargaining rights before negotiations commence. The NLRB held this was so even if negotiations begin much earlier than called for under the collective bargaining agreement itself, and even if the employer had no reason to know that negotiations were going to begin early, and possibly even if the multi-employer association deliberately concealed the fact of early negotiations from the employers that had assigned bargaining rights.

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- (2) In Luterbach, the NLRB dealt with 8(f) contractors. The NLRB ruled that an 8(f) contractor is not bound automatically to a new collective bargaining agreement negotiated by a multi-employer association to which the employer had assigned bargaining rights in the past. Two members of the NLRB held that an 8(f) contractor is only bound to a successor 8(f) contract negotiated by a multi-employer association if the employer takes some affirmative steps to put the union on notice that it intends to be bound by the successor agreement. A third member of the NLRB held that the 8(f) contractor was obligated to a new 8(f) contract if the multi-employer association gave notice to the union that it had bargaining rights and was bargaining on behalf of such 8(f) contractor.
- (3) Both employers and associations must pay much more attention in the future to the timing of assignment and withdrawal of bargaining rights, and to actions that may be interpreted as assignment of bargaining rights to multi-employer associations.

4. "Most Favored" Employer Clauses.

- a. Local area agreements frequently contain "most favored" employer clauses (also known as "most favored nation" clauses) providing that if the union agrees to more favorable terms with one employer in an area, it must extend those more favorable terms to all employers signatory to the area agreement.
- b. Such clauses are lawful if they are drafted appropriately.
 - (1) A clause that provides the union will extend more favorable terms to all employers is lawful.
 - (2) A clause that provides that the union will not agree to more favorable terms with any other employer is unlawful.
 - (a) Such may violate antitrust laws.
 - (b) Such may also violate the NLRA and constitute a refusal to bargain in good faith if the union uses it to refuse to bargain any different terms with an employer with which it is bargaining in a §9(a) relationship.

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- c. A single employer bargaining with a union under §9(a) may require the union to bargain over proposals for different terms from the local area agreement even if the local area agreement contains a lawful "most favored" employer clause.
 - (1) The union will not want to agree different terms with the single employer because of a fear of having to extend such terms to the employers signatory to the local area agreement.
 - (2) If the union refuse to agree to such proposals because of the "most favored" employer clause, the union may be bargaining in bad faith.
 - (3) Project agreements are generally not seen as triggering "most favored" employer clauses because they are seen as dealing only with a specific geographic area—a single project.
- d. An employer bargaining with a union in a §8(f) relationship may also advance proposals that differ from the local area agreement.
 - (1) However, since neither the union nor the employer has a duty to bargain in good faith under §8(f), the union does not commit a refusal to bargain unfair labor practice by refusing to agree on the basis of the "most favored" employer clause.

C. Coordinated Bargaining. Several contractors bargain individual contracts but do so at the same time or use the same spokesperson.

III. Union Side Configurations in Negotiations.

- A. Unions have the same legal capacity as employers to use the three basic configurations of single, multi or coordinated craft bargaining.
- B. Employers would have to agree with unions to bargain on a multi-craft basis in most circumstances.
- C. Unions can also engage in coordinated craft bargaining -- even to the extent of the Carpenters, for example, placing a representative of the Ironworkers or Teamsters on their bargaining team.

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IV. Project Agreements. Two different types of agreements are each frequently referred to as project agreements. As noted above, neither is seen generally as triggering "Me Too" clauses because the geographical area covered by them is limited to one project, and *all* contractors on that project will be subject to it.

A. One Employer, One Craft, One Project.

1. This occurs when a generally open shop contractor, or a generally union signatory contractor working in an area where the contractor does not operate ordinarily, enters into an agreement for a specific project.
2. It is accomplished by signing the local area agreement (or some modification of it) with a provision in writing that:
 - a. the agreement binds the employer to the agreement only for the one project; and
 - b. when the project is completed, the employer has no further obligations under the agreement.

B. All Employers, All Crafts, One Project.

1. This type of project agreement is generally used for large, long-term projects involving unusual circumstances.
 - a. It is usually the result of an owner's insistence upon a "union only" job, or of some circumstances which call for variance from the local area agreements.
 - b. Such project agreements almost always provide that the no strike clause of the local agreements will remain in effect for the duration of the project even if the local area agreements expire during the term of the project.
 - c. In many cases, these project agreements also contain special terms concerning manning requirements, subcontracting provisions, wage and benefit rates overtime rules, or other matters.
2. All contractors on the project must agree to be bound by the project agreement as a condition of being awarded work on the project.
3. Such project agreements also incorporate all the terms of the local area agreements, with a proviso that they are modified by any inconsistent provisions contained in the project agreement itself.
 - a. This means that all contractors must also be signatory to the local area agreements as a condition of working on the project.

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- b. A contractor may or may not be able to do this on a "this project only" basis.
4. As a result of a United States Supreme Court decision in 1993 (the Boston Harbor case), this type of project agreement is now generally lawful on public as well as private projects.
- a. Under Boston Harbor, public projects may utilize such agreements without being preempted by the NLRA as long as the public entity involved is acting as an "owner" and not attempting otherwise to regulate labor relations policies of private sector employers.
 - b. This type of project agreement on public projects is still being challenged under theories of ERISA preemption.
 - c. Additionally, state procurement statutes and state bidding statutes have been used in various locations to invalidate project agreements on large public projects. The law around the country is not uniform. In many locations, such project agreements on public projects have been struck down on either ERISA preemption or state bidding/procurement statute grounds. In other locations, the courts have found ERISA preemption inapplicable and found either that there is no state bidding/procurement statute or that the state bidding/procurement statute does not prohibit the project agreement. Contractors need to be aware of the law in their jurisdiction.

V. Federal Mediation and Conciliation Service (FMCS).

- A. The Federal Mediation and Conciliation Service was created as part of the Taft-Hartley Act in 1947. The FMCS is empowered to use mediation and conciliation to prevent or minimize the disruptive effect of labor disputes on interstate commerce.
- B. The FMCS's obligations to provide conciliation services are intertwined with certain obligations imposed by the Taft-Hartley Act upon employers and unions. Under the Taft-Hartley Act employers and unions are required to make every effort to reach agreement on the terms of collective bargaining agreements. If they are unable to reach agreement, they are directed to participate fully and promptly in meetings called by the FMCS.
- C. Section 8(d) of the Labor-Management Relations Act requires the party (union or employer) desiring to modify the agreement to serve notice on the other party at least sixty days before the contract expires and then, within thirty days after filing the sixty-day notice, notify the FMCS of the existence of the contract dispute.

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- D. The party that initiates the bargaining process (sends the initial notice of intent to terminate, modify or renegotiate) has the burden of notifying the FMCS and also the state mediation agency. A failure to meet the burden of notifying FMCS may render illegal actions such as strikes or lockouts which are otherwise available in the event an impasse is reached.
- E. Note that employers and unions in Section 8(f) relationships may technically not be subject to the FMCS provisions because the FMCS provisions are an adjunct to the duty to bargain under Section 8(d), and parties to Section 8(f) relationships are not subject to the duty to bargain upon expiration of an 8(f) agreement.

VI. Duty to Bargain.

A. Employers and unions who have Section 9(a) relationships with each other are subject to Section 8(d) of the NLRA and have a duty to bargain.

B. Section 8(d) of the National Labor Relations Act defines the duty to bargain.

1. In relevant part it states as follows:

. . . to bargain collectively is the 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, for the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

2. Employer duty to supply information upon request.

a. Information sufficient to back up the employer's position.

(1) An employer must be prepared to back up any claim made at the bargaining table.

(2) Competitive disadvantage, owner's demand for drug testing, etc.

(3) An employer should not go to the bargaining table and plead poverty or an inability to pay unless the employer is prepared to show its books and records to an accountant selected by the union to prove its claim.

b. Information requested by the union which is relevant and reasonably necessary for the union to fulfill its role as bargaining representative.

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- c. Even though, as noted in II (B)(4)(d)(1) of this outline, 8(f) contractors are not generally subject to the duty to bargain, they are subject to it during the term of an 8(f) agreement to which they are signatory. Accordingly, the duty to supply information of the type described above does exist for 8(f) employers during the term of their 8(f) agreements.
 3. Union duty to supply information. The union also has a duty to supply information to the employer, but employers rarely ask the unions to do so.
 - a. In many circumstances unions do not have information that the employers do not have themselves.
 - b. However, when it comes to certain aspects of the operation of Taft-Hartley funds, union officials may have more information than employers.
- C. Nature of NLRA Duty to Bargain. NLRA duty to bargain involves bargaining of a different nature than other commercial bargaining in which employers engage.
 1. Duty. The first and overriding difference is that the employer has a duty to bargain--the employer cannot stop because the union is unreasonable or because the employer would prefer to bargain with a different union, or a different committee. (A frequently asked question is whether either party can object to the presence of certain individuals on the other's bargaining team, such as the company's lawyer or a business agent from another union. The answer is "No." Either party is permitted to select its own representatives for purposes of bargaining; a party may not refuse to meet because of the presence of someone to whom it objects on the other's bargaining team.)
 2. No "Take it or Leave it". An employer cannot exercise leverage as completely as it can in other commercial contexts. The employer cannot walk into a first meeting with the union, put a final offer on the table, and say "take it or leave it."
 3. Nature of Union.
 - a. Collective bargaining is also different from other commercial bargaining because the union is not, at core, a business entity.
 - b. Union positions at the bargaining table are often influenced by local union political concerns, such as the local business manager's desire to get reelected to his job by the union membership.

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- D. Remedy for not bargaining in good faith is a "cease and desist" order.
1. Basically means "stop bargaining in bad faith and start bargaining in good faith."
 2. Collateral consequences of bad faith or surface bargaining are potentially more severe than a simple cease and desist order.
 - a. Legal impasse is possible only after good faith bargaining.
 - b. Strikes over employer positions taken during bargaining found not to be in good faith are unfair labor practice strikes.
 - (1) Affects ability to hire replacement employees.
 - (2) Liability to replacement employees who are later fired.
 - (3) Liability to strikers who offer to return to work but are refused because they have been replaced.

VII. Subjects of Bargaining.

A. Mandatory Subjects.

1. Definition: anything that affects "wages, hours, and other terms and conditions of employment."
2. When an employer and union have a duty to bargain with each other, these are the subjects they must bargain about upon request of the other party.
 - a. Need not agree.
 - b. Must explain position.
 - c. May lawfully go to impasse over them (if bargain in good faith to that impasse).
3. A partial list of mandatory subjects is included in Appendix A.

B. Permissive Subjects.

1. Definition: anything that is not a mandatory subject of bargaining that is not an illegal subject of bargaining.

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2. May bargain about anything that is not illegal.
 - a. Example of illegal subject would be a "hot cargo" clause outlawed by §8(e) of the NLRA such as subcontracting clauses not limited in application to job site work.
 - b. An example of another illegal subject would be provisions calling for the hiring of only male employees.
 - c. As a safeguard against changes in the law during the term of the agreement, the agreement should include a "savings and separability" clause providing that if any particular provision of the agreement is found to be, or becomes, illegal unlawful or unenforceable, it will not affect the enforceability of the remaining provisions of the agreement. Other key elements which may be included are:
 - (1) Provision for midterm negotiation for a replacement clause;
 - (2) Statement of whether the no-strike clause will remain in effect during any such midterm negotiation;
 - (3) Reference to all possible sources of applicable laws--court or agency decisions, statutes, regulations, Executive Orders, ordinances, etc.;
 - (4) Provision for suspension of unlawful provisions automatically upon the change in the law which render them unlawful without any requirement that the parties litigate over the issue separately among themselves; and
 - (5) Restoration of the agreement to its prior status if the reason for the unlawfulness of the clause is removed.
3. The distinction between mandatory and permissive subjects of bargaining only relates to whether a party is required to bargain about a proposal of the other and whether the subject is one that the parties can go to impasse over. A permissive subject is not "converted" into a mandatory subject simply because the parties begin bargaining about it; a party may refuse to bargain about a permissive subject at any time.

C. §8(f) Employers: Duty to Bargain?

1. Both prior to entering into an 8(f) agreement, and after a collective bargaining agreement entered into under §8(f) expires, the 8(f) employer should be found to have no duty to bargain at all.

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- a. This means that at such times there is no difference between mandatory or permissive subjects.
 - b. Everything is a permissive subject.
2. As a practical matter it is advisable, if contractor intends to enter new agreements, to follow the general rules about the duty to bargain in good faith and the distinction between mandatory and permissive subjects of bargaining.
 - a. Establishes generally understood "rules of the game."
 - b. Union, as well as employer, deals better within a framework.
3. As last resort, can assert "no duty to bargain" and "take it or leave it" positions on mandatory or permissive subjects. If the contractor does so, charges against contractor for bargaining conduct should be dismissed.
4. However, 8(f) contractors who engage in preliminary negotiations with unions for new collective bargaining agreements, particularly when those negotiations continue after the expiration of the old 8(f) agreement, may face unfair labor practice charges from unions alleging that having begun the negotiating process, the employers are bound to continue with some sort of enforceable duty to bargain. While such a result seems to be inconsistent with §8(f) status as discussed above, we are not aware that the NLRB has yet ruled specifically on this question. Contractors need to watch NLRB case law developments carefully on this subject.
5. Remember: a union in a §8(f) relationship need not follow any rules of bargaining either and can insist to impasse, and possibly strike over, permissive subjects. It may be possible to have any such strikes and picketing characterized as recognitional in nature, and thus limited in time.

VIII. Other Statutes Limit Bargaining Choices.

- A. Unions and employers are not immune from impact of other laws regarding the work place and the employment relationship.
 1. Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.
 2. The Age Discrimination in Employment Act prohibits discrimination on the basis of age.
 3. The Americans with Disabilities Act prohibits discrimination against qualified individuals with disabilities.

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4. The Family and Medical Leave Act of 1993 requires that eligible employees be granted leaves of absence for certain specified reasons.
 - a. Some special provisions may need to be negotiated to account for maintenance of required benefits during such leaves.
 - b. Some special provisions may need to be negotiated to account for the return to work provisions of the statute.
 5. Occupational Safety and Health Act imposes safety and employee communication responsibilities.
 6. Employee Retirement Income Security Act (ERISA) imposes rules regarding insurance, pension and other benefits.
 7. State laws that are not preempted by federal laws may also impose some limitations.
- B. Employers and unions cannot agree to provisions that are inconsistent with those statutes.

IX. Specific Issues Affecting Construction.

A. Subcontract Clauses.

1. Work Preservation. Clauses which prohibit all subcontracting of bargaining unit work are lawful for any employing industry, construction or not.
 - a. Such clauses are mandatory subjects of bargaining.
 - b. The object and effect of such a clause is to keep all bargaining unit work with the employer so that the employer's employees, whom the union represents, will perform that work.
 - c. Such a clause does not attempt to dictate or control the labor relations policies of any other employer. It is an attempt to preserve bargaining unit work. This is why it does not violate §8(e). (See Part I(C)(3) of this outline.)
2. Area Standards. Clauses which prohibit subcontracting of bargaining unit work except to subcontractors that pay their employees at least an equivalent amount of wages and benefits as contained in the employer's collective bargaining agreement with the union are also lawful for any employing industry, construction or not.
 - a. Such clauses are also mandatory subjects of bargaining.

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- b. The object of such a clause is to remove any economic incentive for subcontracting bargaining unit work to any other employer. It is often referred to as an "area standards" clause.
 - c. Such a clause does not attempt to dictate whether any potential subcontractor is union or not. It is another type of "work preservation" clause that does not violate §8(e).
3. Union Signatory. Solely because of a construction industry exception to §8(e), a clause entered into by employers and unions in the construction industry which prohibits the subcontracting of work to be done at a construction site to any firms except those who are signatory to existing agreements with the union, is lawful.
- a. Such a clause appears to be a mandatory subject of bargaining in the construction industry since the NLRB and the courts have ruled that unions may strike to force an employer to agree to such a clause.
 - b. Some of these clauses restrict subcontracting of the work of the specific union with which the employer has the collective bargaining agreement.
 - c. Some of these clauses restrict subcontracting of any jobsite work of any craft union except to a subcontractor that has an existing agreement with the appropriate craft. These are referred to as "wall-to-wall" clauses.
 - d. Some of these clauses restrict subcontracting of jobsite work except to subcontractors that have existing agreements with specifically named unions.
 - e. Important Limitation--The subcontracting restrictions can only pertain to work to be done at the jobsite. The NLRB has held that the delivery of materials to and from a jobsite is not jobsite work. Be alert to this when negotiating with Teamsters.
 - f. Two-way subcontracting clauses prohibit a contractor from subcontracting to a company that does not have an agreement with the appropriate union and also from accepting subcontracts from contractors that do not have a contract with the appropriate union. One case approving such clauses as mandatory subjects of bargaining is Laborers Local 210 v. A.G.C., 128 LRRM 2060, 844 F.2d 69 (1988).

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B. Anti-Dual Shop Clauses.

1. Require that any other construction businesses in which the signatory contractor has any control or ownership are also covered by the terms of the collective bargaining agreement in which the anti-dual shop clause is contained.
2. Two examples of such clauses are included in Appendix B.
 - a. The first clause was found to be unlawful in Sheet Metal Workers Local 91 and The Schebler Company, 294 NLRB No. 61, 131 LRRM 1609.
 - b. The second clause was found to be unlawful in Alessio Construction, 310 NLRB No. 172, 143 LRRM 1049.
3. If such a clause is proposed to you, consult with counsel because this is a very tricky area. In Painters District Council 51 (Manganaro Corp., Maryland), 321 NLRB 158 (1996), the NLRB concluded that a slightly differently worded anti-dual shop clause was a mandatory subject of bargaining. Manganaro is a very complicated decision. It illustrates that an employer should oppose such a clause on principle as well as on the basis of illegality. An argument based solely on illegality can be negated simply by the issuance of a decision by a board or court.

C. The Political Action Committee Check-off.

1. Political action committee (PAC) check-off clauses are permissive subjects of bargaining so long as the "checkoff" is optional with the employees.
2. A PAC check-off which does not give an employee the option to refrain from participating is an illegal subject of bargaining.

D. Industry Fund Contributions.

1. Industry fund contribution clauses are permissive subjects of bargaining. An industry fund clause is one in which the union agrees with the employer to allow the collective bargaining agreement to be the collection mechanism for the moneys to finance multi-employer association operations, and to allow hours worked under the agreement to determine the amount of money a contractor is obligated to pay to the fund.
2. Employers may not insist to impasse that such clauses be included in collective bargaining agreements.

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E. Substance Abuse Testing Clauses.

1. Mandatory Tests. Clauses permitting employers to require their employees, as a condition of employment, to undergo tests to determine the presence of drugs or alcohol in their systems are more and more frequently becoming a subject of collective bargaining.
 - a. Such clauses are often proposed by employers or employer associations on their own initiative.
 - b. Such clauses are also frequently mandated by owners as a condition of awarding work on both public and private projects.
2. Circumstances Permitting Testing. Such clauses provide for testing of employees in one or more of the following circumstances.
 - a. At Random.
 - (1) Random testing involves selection of one or more employees on a totally random basis for testing.
 - (2) It involves no suspicious behavior on the part of the employees selected.
 - (3) Random testing has been upheld in some circumstances in the public sector (for some government employees) and has been mandated for some categories of private sector employees (truck drivers, for example).
 - (4) Random testing is prohibited specifically in some jurisdictions by statute, ordinance, regulation or decisional case law. A review of the law concerning random testing should be made before seeking to require it in any state or locale.
 - (5) Where random testing is lawful in the private sector, it is rarely employed because it is often considered controversial by unions.
 - b. "For Cause".
 - (1) Testing for cause involves selection of employees for testing on the basis of some belief by the employer that the employee has used, is under the influence of, or has ingested, drugs or alcohol on the job.

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- (2) Observations by supervisors or other management personnel may satisfy the cause requirement.
- (3) In some cases, reports that the employer believes to be reliable may satisfy the cause requirement.
- (4) "Close calls" (near misses or near accidents) may also satisfy the "cause" standard. Obviously, close calls are closely related to the "post-accident or injury" type of testing referred to below.

c. "Post Incident/Accident or Injury".

- (1) As the name implies, this testing consists of sending employees who have been involved in an on-the-job incident/accident or injury for testing to determine whether drugs or alcohol played a part in the incident.

d. Pre-Employment.

- (1) Pre-employment testing involves testing individuals prior to beginning employment with the employer (or in the area in the case of a multi-employer local area agreement).
- (2) Pre-employment testing of individuals for illegal drug use is permissible and does not violate the ADA.
- (3) Pre-employment testing of individuals for alcohol use may be done only consistent with the ADA guidelines for medical examinations.
 - (a) This means such testing may not be done before a tentative decision to hire the individual has been made.
 - (b) Additionally, under the ADA, positive tests for alcohol may not disqualify an individual for employment automatically.

3. Mandatory/Permissive Subjects of Bargaining. All of the foregoing types of testing are mandatory subjects of bargaining, except pre-employment testing.

- a. Since being tested randomly, for cause, or post accident or injury, is a condition of employment, an employer must bargain with unions that represent its employees about whether such testing will

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be conducted and the consequences of a positive test.

- (1) Employers must bargain about whether discipline, including termination, can be imposed on employees who test positive.
 - (2) Employees may be entitled to have union representation at the site of collection of specimens for testing, although the union representative should not be entitled to observe the actual voiding of the specimen any more than the collection site personnel themselves who generally do not make such observations.
 - (3) Employers must bargain about whether employees will receive counseling and/or treatment for drug or alcohol abuse.
- b. Since applicants are not employees, the NLRB has held that employers need not bargain about pre-employment testing.
- (1) Accordingly, pre-employment testing is a permissive subject of bargaining.

4. Caveat:

- a. Some owners (both public agencies and private companies) and certain general contractors may mandate that certain specific types of substance abuse testing be in place with respect to a contractor's work force as a condition of being awarded a contract from such owner or general contractor.
- b. Any drug testing clause negotiated by an employer into an agreement with a union should provide for the substitution of owner-mandated drug testing requirements to the extent such requirements are at odds with the employer's negotiated procedure.
- c. Failure to do so may cause the employer to be ineligible for work from owners who have such requirements.

F. Hiring Hall Clauses.

1. Permitted by §8(f). For employers engaged primarily in the construction industry, hiring and referral hall clauses are permitted specifically by §8(f) of the NLRA.
 - a. As noted in Part I(D)(1)(b) of this outline, §8(f) agreements may:

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- (1) provide for the employer to give the union advance notice of any vacancies which exist and even provide for exclusive union referral of applicants; and
 - (2) establish minimum training experience, or longevity levels with the employer or in the industry or geographical area which must be met by all applicants for employment.
 - b. Unions operating hiring or referral halls may not discriminate on the basis of union membership or non-membership of, and owe a duty of fair representation to, all registrants.
2. Mandatory/Permissive Subject of Bargaining. Many older cases have held that hiring hall clauses are mandatory subjects of bargaining.
- a. However, those cases were decided before the NLRB ruled that parties were under no duty to bargain over the terms of new §8(f) agreements.
 - b. Since there is now no duty to bargain under §8(f), and since hiring clauses are authorized specifically under that section, there is now some question whether such clauses continue to be mandatory subjects of bargaining.
3. Exclusive Hiring Halls.
- a. Exclusive hiring hall clauses are those in which the employer agrees that it will not hire any employees except those referred to the employer by the union. (However, even in these cases, the employer retains the right to accept or reject referrals.)
 - (1) Generally, the clauses provide that if the union cannot refer a sufficient number of qualified individuals within a specified number of hours, the employer may then hire from any source it chooses.
 - (2) Even exclusive hiring hall provisions should include specific exceptions when such are necessary for the contractor to meet affirmative action goals under applicable executive orders such as Executive Order 11246 regarding the employment of women and minorities on certain federal and federally assisted projects.
 - b. Liability for discrimination.

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- (1) A union is not permitted to discriminate in its referral practices based on whether an individual is or is not a union member.
- (2) A union is not permitted to discriminate in its referral practices based on race, color, religion, sex, national origin, age, disability or other characteristics which may be protected by applicable local laws or regulations.
- (3) However, if a union does so, an employer that has made the union its exclusive source for obtaining new employees may be held liable, along with the union, for discriminatory hiring practices.
- (4) Contractors should push for inclusion of indemnification clauses which would obligate the union to indemnify the contractor for any and all losses, including attorney's fees, arising out of the union's operation of its hiring hall. Such clauses could include indemnification only, could include the union duty to defend, etc.

c. "Key Man" or "By Name" Referral.

- (1) Employers frequently want to be able to call the union and request individuals with certain key skills or request individuals by name when the employer knows of the particular work abilities of such individuals.
- (2) As long as such "key man" or "by name" requests are not subterfuges for unlawful discrimination, such clauses are lawful.
- (3) Examples of the types of subterfuges for unlawful discrimination that could be involved are when requests for individuals by name are used by an employer to deliberately screen out all minorities or women, or in situations where requests for certain skills are made when the specific skills are not needed but the contractor knows that requesting such skills will again screen out minorities or women.

4. Nonexclusive Hiring Hall Clauses.

- a. Nonexclusive hiring hall clauses are those which provide that the employer may request the union to send the employer employees,

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but that the employer is not required to do so and thus remains free at all times to hire from any source it chooses.

- b. Employees hired by the employers, whether through the hiring hall or not, will be covered by the union security clause of the agreement which, in a §8(f) Agreement, can require payment of fees to the union after the seventh day of employment.

5. Right to Reject Referred Applicants.

- a. In order to be lawful, a hiring hall clause of any type must provide that the employer has the right to reject any applicant referred by the union.
- b. However, the right to reject may not be used by the employer to discriminate against an applicant on the basis of protected characteristics such as those mentioned above.

- 6. No Hiring Hall Clause. Of course, hiring hall clauses are not required. Agreements that are silent on the subject do not require an employer to call the union for referrals, but allow the employer to hire employees from any source it chooses. Some agreements provide for such "open hiring" expressly.

X. Impasse, Strikes, Lockouts And Employer's Legal Rights.

- A. Bargaining to impasse under §9(a) gives employers certain additional rights.

- 1. Impasse - a situation in which no further progress or change of position by either party appears imminent or likely to occur in the foreseeable future.
- 2. The additional rights exist where the impasse is over mandatory subjects of bargaining.

- B. At impasse, employers may lock out employees to pressure the union to agree to the employer proposals. (In some cases, lockouts may occur in the absence of impasse.)

- 1. Employers may hire temporary replacements for locked out employees.
- 2. Employers may not hire permanent replacements for locked out employees.

- C. At impasse, employers may implement their proposals so that, if employees do not strike, the employees will be subject to any changes in mandatory subjects of bargaining the employers are proposing.

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1. The implementation of proposals at impasse does not mean the employers have no further duty to bargain.
 2. It does not create a new agreement, only allows the employers to enforce the changes while bargaining continues.
- D. If a union calls employees out on strike, and their strike is neither caused nor prolonged by any employer unfair labor practice, the employers are free to hire permanent replacements for those employees.
1. The permanent replacements are entitled to work so long as they and the employer are satisfied with the employment relationship.
 - a. Employers must take care to be sure the replacement employees are told that they are "at will" employees.
 - b. The replacement employees should also be told that their employment may be terminated as a result of an agreement between the employer and the union, or as a result of an order of the NLRB that the employer re-employ the strikers.
 2. If the union announces the strike is over and the strikers are ready to return to work, the employer need not terminate (fire) the replacement employees to make room for returning strikers.
 - a. However, the employer may reach an agreement with the union to do so.
 - b. That is why the employer should inform the replacements that their employment may be terminated as a result of such an agreement.
 - c. Failure to inform the replacements of such a possibility could subject the employer to a wrongful discharge or breach of contract claim by the replacements if they are fired as a result of such an agreement.
 3. If and when a striker replacement leaves, however, a striker on whose behalf an unconditional offer to return to work has been made must be offered the opportunity to return.
 4. These rights of employers would be eliminated if a "Striker Replacement" bill is enacted into law.
- E. Employees have a right to strike over terms of a new collective bargaining agreement.

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1. Employers are not permitted to obtain injunctions prohibiting strikes over terms of a new collective bargaining agreement.
2. In Deklewa, the NLRB stated that §8(f) employers were to be free at all times from strikes or picketing to force them to enter into new §8(f) agreements, but, as a practical matter, striking or picketing for recognition under §9(a) may have the same effect as a strike over terms of a new agreement. The difference is that any such picketing in support of such an objective could continue only for a reasonable period of time not to exceed thirty (30) days.
3. Employers may be permitted to obtain injunctions to prohibit mass picketing and violence which physically interferes with the access to work locations and prevents the employer from being able to work or receive deliveries.

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APPENDIX A

Examples of Mandatory Subjects of Bargaining

The following is a partial list of mandatory subjects of bargaining:

- Bonuses and Profit-Sharing Plans
- Coffee Breaks and Clean-Up Time
- Discharge Procedures
- Drug Testing (of current employees – not applicants)
- Duration of the Negotiated Agreement
- Fringe Benefits
- Grievance/Arbitration Procedures
- Hiring Halls
- Holidays
- Incentive Pay
- Job Classifications
- Jurisdictional Dispute Resolution Procedures
- Layoffs
- Management Rights Clause
- No-Strike Clause
- Pensions, Retirement
- Physical Examinations for Employees
- Retroactivity of the Collective Bargaining Agreement
- Safety
- Seniority
- Site Access for Union Representatives
- Smoking Policies
- Striker Re-Employment, Recall, Reinstatement
- Subcontracting Unit Work
- Surveillance Cameras
- Union Security Clause
- Vacation
- Wages
- Work Hours, Schedules
- Work Performed by Supervisors
- Work Rules

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APPENDIX B

Examples of Anti-Dual Shop Clauses

Clauses Found Unlawful

"In the event that the partners, stock holders or beneficial owners of the company form or participate in the formation of another company which engages or will engage in the same or similar type of business enterprise in the jurisdiction of this Union and employs or will employ the same or similar classifications of employees covered by this Collective Bargaining Agreement, then that business enterprise shall be manned in accordance with the referral provisions herein and covered by all the terms of this contract."

Alessio Construction, 310 NLRB No. 172, 143 LRRM 1049 (1993).

"A 'bad faith employer' for purposes of this Agreement is an Employer that itself, or through a person or persons subject to an owner's control, has ownership interests (other than a non-controlling interest in a corporation whose stock is publicly traded) in any business entity that engages in work within the scope of the [the Standard Form of Union Agreement] Article I using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreement...(W)henever the Union becomes aware that an employer has been or is a 'bad-faith employer,' it shall be entitled, notwithstanding any other provision of this Agreement, to demand that the Agreement between it and such 'bad-faith employer' be rescinded."

Sheet Metal Workers Local 91 and The Schebler Co., 294 NLRB No. 61, 131 LRRM 1609 (1989).

Clauses Found Lawful, Mandatory Subject of Bargaining

To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: if the Contractor performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company, partnership, or other business entity, including a joint venture, wherein the Contractor through its officers, directors, partners, owners or stockholders *exercises* directly or indirectly (including but not limited to management, control, or majority ownership through family members), management, control or majority ownership, the terms and conditions of this Agreement shall be applicable to all such work. (emphasis added)

Painters District Council 51 (Manganaro Corp) Maryland, 321 NLRB 158 (1996).

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