WE HAVE TO GIVE THEM WHAT?
NEGOTIATING THE FIRST CONTRACT FROM THE EMPLOYER’S PERSPECTIVE

I. Introduction

Much research and case law have been devoted to analyzing employers’ misconduct during union organizing and first contract negotiations. There are certainly instances where an employer takes extreme, illegal, and unethical actions in order to prevent union organizing. For instance, “employer discriminatorily refused to reinstate a key union activist from worker’s compensation leave and imposed a light duty policy to exclude union supporters”, “an employer created an alter ego corporation in an attempt to evade obligations to the incumbent union”, “an employer terminated an independent management company hired to negotiate the first contract as the contract neared completion and subsequently withdrew recognition from the union, allegedly relying on employees’ reports that the union had lost majority support”. Such behavior is not, and should not, be condoned or considered acceptable by management’s inside or outside counsel (or by anyone). Rather, counsel must always put ethical concerns in the forefront when deciding what strategies to use when working with a newly elected union. Even if a client suggests “creative” ways to avoid working with a union who has won a National Labor Relations Board election, counsel must be the voice of reason and ensure that any actions taken by the employer are legal and ethical.

---

1 Ronald Meisburg, Office of the General Counsel, End-of-Term Report on Utilization of Section 10(j) Injunctive Proceedings, page 8 et seq. (June 2010).

2 Rule 1.2(d) of the Model Rules of Professional Conduct provides that “a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law”.

3 Although ethical concerns should persuade counsel not to permit clients to take such extreme actions, at a minimum, the possibility of a legal malpractice claim also should persuade counsel against supporting such acts. Regrets to those undertaking the reading of this monograph expecting to be advised of new tricks and tactics to thwart the statute.
As anyone who has been through a union campaign knows, they can be emotionally charged, hard fought battles. Once a union is elected as the employees’ bargaining representative, however, the real work begins, as the union and the employer begin to hammer away at a mutually agreeable first collective bargaining contract. In some instances, it may take months, or more, before a first contract is reached. Yet, if all parties enter into first contract negotiations leaving behind the emotions of the prior campaign and with the same goal at the outset - to reach a mutually acceptable first contract - an agreement should be reached.

First and foremost, it is important for both parties to remember that the goal of collective bargaining is to create an agreement that properly reflects the needs of their respective organizations. From an employer’s perspective this goal must be top-down driven, i.e. the corporate representatives responsible for negotiations must effectively communicate to all levels of management a clear vision regarding the needs of the employer. The goal is to reach a collective bargaining contract that reflects and meets the needs of the organization at the location where the employees have chosen union representation.

Second, to have successful negotiations, all parties must come to the bargaining table without the emotional baggage that can build up during a campaign. To prevent emotions from permeating negotiations, the individuals conducting the negotiations should not be the same representatives who had a direct impact or emotional tie to the campaigning activity. This includes the attorneys who counseled the parties during the campaign. In some cases, a preliminary meeting between the union and employer representatives can ease initial tensions. Needless to say, ongoing litigation lingering from the campaign makes this a very difficult model, with both sides continuing to protect, and perhaps perfect, their legal position.
Third, it is vital that individuals supervising the new bargaining unit employees are aware of and understand the implications of the union and employer’s new “collective bargaining relationship”. This can be accomplished by conducting management training. Supervisors must understand that, although negotiations will be ongoing, specifics of the bargaining sessions will not be communicated. Moreover, senior management must make clear to supervisors that: (1) whatever happened during the campaign is history; and (2) supervisors cannot treat union supporters differently from non-union supporters (even if done unintentionally). At the same time, management must continue to operate the business as usual, including disciplining employees in a fair and equitable manner. Responsible union guidance to its supporters is equally important.

Overall, the mantra is: “How do we solve these problems and issues?” Both sides must buy into this. It is helpful to have a relationship with the union away from the table, which may take time to develop.

**II. Contract Specifics**

It is not the goal of this paper, nor we are sure that of the reader, to set out a complete sample complete contract here, but we would like to take this opportunity to discuss certain provisions that inevitably arise in virtually all first contract negotiations. As any seasoned negotiator knows, once something goes into a contract, it can be very hard to remove it – and may well become a “strike” issue. As a result, this is the time for both sides to understand their needs and to pick their battles with considered wisdom.\(^4\)

\(^4\) It is difficult to see how “**negotiating in the media**” would assist a first contract, and it is recommended to seek agreement at the outset not to do so.
A. Subjects of Bargaining in Which The Employer Should Consider Flexibility

Compensation is typically a catalyst in employees’ desire for union representation. When addressing these issues in first contract negotiations, an employer’s motto almost always will be “pay for performance”. Recognizing that unions are seeking consistency and predictability, however, an employer must be realistic and prepared to maintain flexibility on these issues. Creative approaches to meeting the needs of both the union and the company, for example, can include red-lining, multiple tiers, and additional compensation for skills and/or knowledge.

While, as noted above, an employer will generally want to maintain their policy of paying for performance, when negotiating compensation, an employer also must take into consideration – and indeed should be aware of – current compensation trends within its industry. In fact, this may be a time for the employer to update a compensation system that has not kept up with industry standard. To this end, an employer may find it useful to have a current compensation survey in hand. However, arming oneself with such a study may be a double edged sword because the union is well within its rights to request this type of information. Of course, if an employer seeks to rely on any document or data during negotiations, it must be prepared to share the information, and the employer definitely wants to make certain that the information is accurate. It will not be productive for either party to engage in a battle over information requests, which ultimately can prolong reaching a mutually acceptable agreement.

As part of any first contract negotiation, the employer should expect the union to request the implementation of a grievance and arbitration system. Such a request is not unreasonable, and the employer should be open-minded in considering the proposal. By providing a forum for disputes, the employer can receive a substantial benefit by having
workplace concerns resolved quickly and efficiently. Moreover, the potential burden on the employer can be limited by an agreement that the cost of arbitration, excluding attorney’s fees, will be shared equally. The employer also can turn this piece of the negotiations to its particular advantage by proposing that the first contract encompass the arbitration of statutory claims, such as claims under the Americans with Disabilities Act, Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Equal Pay Act.

The dues check off provision and the union shop provision are very important to virtually any union. An employer should not be philosophically opposed to either; rather, it should closely examine its bargaining power and strategically negotiate these provisions. A dues check off clause provides for automatic deduction of union dues from employee wages. This provision is essential to the union because it allows for uninterrupted flow of income. While an employer generally should agree to a dues check off provision, at the same time it should ensure that any such provision includes appropriate union indemnification. Additionally, because of the importance of this provision to the union, the employer should consider holding this provision towards the end of negotiations to use as “sweetener” to close the first contract.

5 While unions may object to such a provision because of their concerns over liability based upon the potential for “duty of fair representation” litigation from their members, such a concern generally can be allayed because the burden of proof in such cases is quite high, making the unions’ potential exposure minimal. See Marquez v. Screen Actors Guild, 525 U.S. 33, 44 (U.S. 1998) (stating that, when a union is selected as the employees’ representative, it has a duty of fair representation, which requires a union “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. In other words, a union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.”).

6 In 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456 (2009), the United States Supreme Court held that where a collective bargaining agreement expressly requires statutory and contractual claims be subject to arbitration, the employee member loses the right to proceed with the individual civil action. The Court reasoned that when a provision requiring arbitration of discrimination claims is freely negotiated such that the clause clearly and unmistakably requires arbitration of discrimination claims, there is no legal basis for the Court to strike down the arbitration clause. Additionally, the Court rejected the employees argument that the union cannot waive employees rights under federal anti-discrimination statutes in any circumstances. Importantly, the Court distinguished arbitration clauses where the statutory claim was expressly referenced from those where the claim was referred to generally.
The inclusion of a **union shop provision** in a first contract is not quite as straightforward. Such a provision (as modified in Right-to-Work states) requires all non-union employees to become union members within a specified time period. In cases where the union enjoyed broad support during the election, the employer probably should concede this provision. In situations where the election was very close, however, the employer has a strong argument against inclusion of a union shop provision. Moreover, because employees will have the opportunity to join the union at any time during the life of the contract, the employer can argue that there is no reason to force union membership.\(^7\) Although this contract provision will require some tough negotiating and indeed will test the economic strength of the parties, the closer the election, the more persuasive the employer’s argument.

**B. Subjects of Bargaining in Which The Employer Should Consider a Firmer Stance**

While flexibility is important for both sides in any first contract negotiations, this also is the time for the employer to take a strong stance on certain provisions, all of which are found in many collective bargaining contracts and are likely to be subjects of bargaining.

Although **seniority provisions** may be important to a union and its members, an employer should agree only to a seniority system that reflects what most unions are now accepting as “modern manufacturing,” meaning that the individual must be a flexible and integral participating part of the workflow. More complicated systems – which sometimes result from years of bargaining and resolving difficult issues between the union and the employer – are not helpful in a first contract and indeed can inhibit employee performance, which impacts on the

---

\(^7\) The union’s predictable counter argument will be that, because both union and non-union employees will receive the benefit of representation, it is proper to require all employees to the join the union.
employer’s bottom line, thereby affecting the company’s ability to continue to provide employment for management and bargaining unit members alike.

A management rights clause is a necessary component of any first contract because it preserves management’s ability to run the business in a productive and efficient manner. While philosophies vary as to the length and inclusivity of a management rights clause, a prudent approach is comprehensive language which also includes “catchall” language and reservation of rights language.

A no strike, no lockout clause is a crucial clause that the employer must ensure is part of any first contract (and normally will be the quid pro quo for agreeing to a grievance and arbitration provision). As the term implies, a no strike, no lockout clause provides that, during the life of the collective bargaining agreement, the bargaining unit employees cannot engage in strikes, slow downs or other job actions. As part of such a clause, an employer would be wise to include a provision that prohibits its employees from observing a picket line or strike anywhere.

Neutrality provisions and card check provisions likely will arise in negotiations of a first contract for an employer with multiple locations. While these clauses often are paired together, a collective bargaining agreement can contain one without the other. With a neutrality provision, the union seeks to have the employer remain neutral while the union seeks to organize employees at the other locations. With a card check provision, a union seeks employer agreement that, if the union obtains cards authorizing representation from a majority of a bargaining unit, the employer will recognize and bargain with the union and forgo the statutory secret ballot election. There is no reason for an employer to agree to either of these provisions, barring a union with overwhelming employee support and economic power.
A **successorship clause** provides that, if another entity purchases the employer’s business, the collective bargaining agreement will remain and continue to be in effect through its expiration. These come in a wide variety of permutations and combinations. Some are prohibitively binding on the employer. As a general matter, an employer should not agree to successorship clause in a first contract because the provision negatively affects the potential marketability of the business.

Finally, it is difficult to see how an employer, absent cogent other considerations, would agree to a **defined benefit pension plan**, not to mention a **multi-employer pension plan**. Bargaining hard by either side is not illegal.

C. **Contract Expiration Date**

Although not always garnering much attention, the **contract’s expiration date** can be an extremely important provision in any first contract. While anecdotal evidence suggests that current collective bargaining agreements most often are ranging from three to five years, there is no “right” length, and an employer must consider all variables with regard to contract length and date of expiration. This decision is dictated by the needs of the individual business, and an employer accordingly should select a time frame and expiration date that will have the least impact on the business in the event of a strike.

D. **Healthcare**

Healthcare, the most complex of topics to communicate effectively to anyone, is about to provide the setting for the most cooperative or most truculent of labor relations negotiations. Cost, quality, coverage, mandatory, pool – all have become yet to be defined terms that will be extremely difficult to deal with over the next few years. Cooperation, thoughtful involvement in cost control and sharing, and preventive healthcare are areas where employers
and unions can plough fresh fields of growth in cooperation and openness in problem solving. Much will be written about how employers and unions respond. Hopefully, this will be an upbeat chapter.

III. The Economic Model

While both parties can be creative during the negotiation process to receive the most favorable outcome possible, the party with the greatest economic power – or at least the most believable threat of economic power – ultimately will determine what terms govern the parties’ relationship. The use of such economic power was the basis of the statutory scheme when the National Labor Relations Act (“NLRA”) was first enacted in 1935, and continues today. The original purpose of the NLRA was to level the playing field between workers and employers.\(^8\) While unions’ economic power grew rapidly following the enactment of the NLRA, in today’s economy such power seems to have faded particularly because: (1) the unions’ most powerful economic weapon, the strike, is rarely used in today’s world; and (2) employers view unions as simply an additional cost, bringing nothing of value to the table.

At its peak in the 1950s, union membership was at approximately 35% in private sector employment.\(^9\) In 2009, however, union membership in the private sector had fallen to approximately 7%.\(^10\) With this in mind, a union should recognize that the power it once enjoyed is no longer as potent, and the union therefore must alter its focus in an attempt to re-vitalize its

---


\(^9\) Wachter, supra note 2.

It is important that a union position itself in such a way that the employer begins to view it as a benefit to the organization rather than a burden. One way a union can accomplish this is by agreeing to historically contentious contract provisions that may be of great importance to the employer or agreeing to share in certain costs. For instance, if a union were to agree to the arbitration of statutory claims and/or assistance with healthcare costs and coverage, the employer would be more likely to view the union as an asset to its business, thereby making the idea of representation more palatable. Consequently, a union must be creative to make itself viable in today’s economy.

Although, unions’ economic power has diminished over the last fifty years, unions still continue to use economic power and threats as they become available. While most of the current literature is focused on alleged and actual employer transgressions in first contract negotiations, it should be noted that unions well understand economic reality and can be most adept at using that power when it is available to them. Current examples of a union’s use of economic advantage include corporate campaigns, association organizing, and time restrictions to perform or market control that limit employer options.

First, corporate campaigns, described by some as legal secondary boycotts, involve an analysis by a union of a corporation’s strengths and weaknesses, with a focus on attacking weaknesses in a way that causes or can cause severe economic harm to the employer. Faced with this alternative, the employer may make a business decision to sign a collective

---

11 The labor relations movement has any number of talented, capable and creative leaders. Their legal counselors are among the very best. Now that statutory relief (EFCA) does not seem available, and with our country and economy at a most difficult point, their efforts at forging new relationships with management and creating new opportunities for their members and members-to-be would be important and timely.
bargaining contract with the union(s). Contracts signed under such duress can be extremely burdensome to the employer.

Second, building trades and other association organizing, whether by area standards picketing or other means, can present an extraordinarily powerful force that will cause an employer to make a business decision to sign the union contract. Most often, these will involve association contracts that are extremely onerous to the employer. Further – and this can arise in successful “salting” organizational campaigns – the employer is faced with a decision to sign the association contract or an equivalent contract and/or face economic disaster in that the association contracts have “most favored nations” clauses that do not allow the unions to negotiate other contracts with less onerous provisions.

Third, there are situations where an employer must complete a certain task in a specific time period or risk serious economic consequences to the employer’s business, such as the delivery of a product with a quickly approaching expiration date. Or an employer could have an opportunity to try and compete in certain markets that are “union controlled”. In these instances, to avoid the union’s interference with the completion of this important task or to enter the market, the employer may be forced to sign a contract, sometimes without even being given the opportunity to review the contract in advance. Think of building in certain cities, or being in business on certain waterfronts.

Although the strike seems to be an economic weapon of the past, unions continue to resort to other means in order to place pressure on employers to sign a first contract. Many scholarly articles have been written that address whether such tactics are right or wrong, and how to remedy their use. However, the proverbial “bottom line” is that the contract terms of a first
contract are governed by the economic realities and power of both parties. Both the union and employer are aware of their potential power, and they know how and when to use it.

IV. Conclusion

Reaching a first contract takes skill, hard work and flexibility on the part of both parties. However, a mutually acceptable first contract can be reached if parties leave their emotions at the door and remain realistic about their bargaining positions, strength and needs.