Background Brief on …

Collective Bargaining

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Approximately 250,000 employees in public and private employment in Oregon are represented in a collective bargaining agreement. Collective bargaining consists of negotiations between an employer and a group of employees to determine employment conditions. Both federal and state law requires collective bargaining for employers and bargaining units who have either voted in an election conducted by the National Labor Relations Board, Oregon Employment Relations Board, or when the employer has voluntarily recognized the employees' union. Collective bargaining activities of most private sector employees who work in the private sector and the United States Postal Service are regulated by the National Labor Relations Act. Federal employees are covered under the Federal Service Labor-Management Relations statute, and state and local employees in Oregon are covered under the Public Employee Collective Bargaining Act.

National Labor Relations Act

The National Labor Relations Board **(NLRB)** is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act **(NLRA)**, the primary law governing relations between unions and employers in the private sector. The NLRB is responsible for conducting elections to determine whether employees desire union representation; investigate unfair labor practice allegations made by employees, unions, and employers; facilitate settlements and decide cases pertaining to unfair labor practices charges, and enforce orders issued by the Board. The NLRA guarantees the right of employees to organize and to bargain collectively with their employers, and to engage in other protected concerted activity with or without a union or to refrain from all such activity. The Act outlines the basic rights of employees to form or

join a union; collectively bargain for a contract that sets wages, benefits, hours and other working conditions; discuss wages, working conditions or union organizing with co-workers or a union; work with co-workers on improving working conditions by raising complaints with an employer or a government agency; strike and picket their employer, depending on the purpose or means of the action; choose not to join a union or engage in union activities; and organize co-workers to decertify a union. The NRLA also outlines prohibited activities for employers and unions, such as threatening job loss, retaliating against employees who join or support a union, refuse to process grievances of employees who criticize union officials or do not join a union, and take adverse action against employees who do not support the union.

The NLRA does not cover a number of employee groups, including agricultural laborers, domestic workers, supervisors, independent contractors, federal employees, whose collective bargaining rights are administered by the Federal Labor Relations Authority, and employees of entities subject to the Railway Labor Act such as railroads and airlines, which are protected by the National Mediation Board. However, states are allowed, under the Act's provisions, to establish guidelines for exempt groups, and can further regulate collective bargaining and make collective agreements enforceable under state law.

Oregon Public Employee Collective Bargaining Act

The evolvement of public employee collective bargaining has taken place over the past several decades, beginning in the 1959 legislative session. Public employees were first able to conduct collective bargaining in 1963 via the enactment of a law that permitted employees to organize and bargain with their employers regarding "employment relations", which included, but was not limited to, "matters concerning wages, salaries, hours, vacations, sick leave, holiday pay and grievance procedures." Slight changes were made through the years in regards to the employee groups covered under the public sector bargaining statute and the issues that these groups could meet and confer about.

In 1969, as a result of a major reorganization in state government and because of an increasing concern in the legislature about public employee bargaining, the independent State Civil Service Commission was abolished and personnel management for state service was centralized in the personnel division of the Governor's Executive Department. The Civil Service Commission was retitled the Public Employee Relations Board. By 1971, while a number of local governments were bargaining with labor organizations representing their employees, other local governments refused to bargain. A task force was created to develop a framework of law and regulation that would permit orderly collective bargaining, and submitted their findings to the 1973 Legislative Assembly.

The Public Employee Collective Bargaining Act **(PECBA)** became effective in October 1973. The PECBA administers the laws governing employment relations and public employers and employees in the state, counties, cities, school districts, transportation districts, and other local governments as well as private employers not subject to NLRB jurisdiction. Employees that are not covered under the PECBA and cannot organize include elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under section 41, Article I of the Oregon Constitution, or persons who are confidential employees, supervisory employees or managerial employees.

The Employment Relations Board **(ERB)**, who is responsible for enforcing the PECBA, performs similar duties as the NLRB. Examples of responsibilities include determining appropriate bargaining units and conducting elections regarding collective bargaining representation for employees; resolving disputes over union representation and collective bargaining negotiations, and issuing declaratory rulings and orders in contested case adjudications of unfair labor practice

complaints, appeals from state personnel actions, and related matters.

Election Process

Private sector employee groups covered under the NLRA must file a petition with the NLRB from at least 30 percent of employees in a proposed bargaining unit. The Board staff in turn investigates to ensure that the union is qualified, the Board has jurisdiction, and no existing labor contracts would bar an election. Next, the NLRB seeks an election agreement between the employer and the union that sets the parameters and logistics, such as ballot language, the size of the bargaining unit, and a method for determining who is eligible to vote. Once the agreement is in place, the parties authorize the NLRB Regional Director to conduct the election; if no agreement is reached, the regional director can order the election to be held and set the conditions in accordance with existing rules and decisions.

If a union is already in place, a competing union can file an election petition if the labor contract is about to expire or has expired. Thirty percent of the employees must show interest before this type of election petition can be acknowledged. This normally results in a three-way election, with the choices being the incumbent union, the challenging union, or no representation. If none of the three options receives a majority vote, a runoff is conducted between the top two vote-getters.

Elections are typically held at the worksite but can be conducted off-site or by mail if employees are dispersed over a wide geographic area or other circumstances. Elections are generally held within 30 days from the date of the Director's order or authorization. An election can be postponed if one of the parties files charges alleging conduct that would interfere with employee free choice in the election.

Post-election, the NLRB issues a formal certification of the union as the duly designated collective bargaining representative or a certification of the results of the election in the event the union does not receive the support of a majority of the unit employees. Failure to bargain with the union after certification is considered an unfair labor practice.

Employee groups subject to the NLRA can also organize under what is known as "card check," in which an employer can be persuaded to voluntarily recognize a union after showing majority support by signed authorization cards or other means. If a union is voluntarily recognized, its status as the employee group's bargaining representative cannot be challenged during a "reasonable period," defined as no less than six months and no more than one year, after the parties' first bargaining session. These sorts of arrangements are made outside of the NLRB process.

In Oregon, the PECBA also allows the card check authorization to take place in which employee(s) or the labor organization acting on behalf of the employees can file a petition to the ERB for organizing. If the Board finds that more than 50 percent of the bargaining unit's employees have signed authorizations designating the labor organization as the employees' bargaining representative, and that no other labor organization is currently certified or recognized as the exclusive representative of any of the unit's employees, the Board shall certify the organization as the exclusive representative.

A representation election can take place instead of card check if 30 percent of the employees in the bargaining unit request an election within 14 days after a majority of workers have signed the authorization cards. In those circumstances, the representation election must be conducted on-site or by mail no later than 45 days after the date the petition was filed. The ballot must include only those labor organizations designated to be placed on the ballot by more than 10 percent of the employees in the proposed bargaining unit, and a provision for marking no representation. The labor organization that receives the majority of the votes cast will be certified by the ERB as the bargaining unit's exclusive representative.

Articles in a Collective Bargaining Agreement

Most items included in a collective bargaining agreement are common amongst all bargaining units. Examples include wages and fringe benefits, vacation time, grievance procedures, arbitration, health and safety, nondiscrimination clauses, no-strike clauses, length of contract, management rights, discipline, seniority, and union security.

The NLRA states that some managerial decisions such as subcontracting and other operational changes may not be mandatory bargaining subjects, but an employer must bargain about the decision's effect on unit employees. Agreements in the building and construction industry and other industries can include specific items such as the requirement for the employer to notify the union about job openings and ability for the union to refer qualified applicants for such jobs.

The PECBA defines items that can be discussed in the collective bargaining process as "employment relations," which is defined under statute to include, but is not limited to "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures, and other conditions of employment." Employment relations cannot include subjects that are determined to be permissive, non-mandatory subjects of collective bargaining, subjects determined by the ERB to have a greater impact on management than on terms and conditions of employment, or wages and hours, and subjects that have an insubstantial effect on these items.

Some groups of bargaining units have explicit items that are either required to be included or excluded from the agreement. For employees covered in ORS 243.736, such as first responders, the "employment relations" definition includes safety issues that have an impact on the on-the-job safety of the employees or staffing levels that have a significant impact on employees' on-the-job safety. The definition of "employment relations" for school district bargaining excludes items such as class size, the school or educational calendar, standards of performance or criteria for evaluation of teachers, the school curriculum, reasonable dress, grooming and at-work personal conduct requirements respecting smoking, gum chewing and similar matters of personal conduct, the standards and procedures for student discipline, and the time between student classes.

Bargaining Process

All employers under a collective bargaining agreement are required to act in "good faith" with the certified labor organization that represents the employees, actively participating in deliberations so as to indicate intent to find a basis for agreement.

Under the NLRA, the obligation to bargain is imposed equally on the employer and the labor organization, but does not compel either party to agree to a proposal by the other, nor does it require either party to make a concession to the other. However, refusing to bargain collectively with the other is an unfair labor practice. If no agreement can be reached after sufficient good faith efforts are practiced, the employer can declare impasse and implement the last offer presented to the union. The union has the right to disagree that true impasse has been reached, file an unfair labor practice charge for failing to bargain in good faith, and leave it to the NRLB to determine whether true impasse was reached. If the Board rules in favor of the union, the employer will be asked to return to the bargaining table, and has the right to seek a federal court order to force bargaining.

The PECBA includes a number of steps designed to help the parties reach agreement. The public employer and the employees' labor organization are initially required to meet and bargain directly with each other, and both parties are to participate in good faith negotiations for at least 150 calendar days before either party may unilaterally request the assignment of a mediator. For a new bargaining unit, the 150 days begin when a labor organization is first recognized or certified; for negotiations over a successor agreement or a reopener in a current agreement, the 150 calendar days begin when

the parties meet for the first bargaining session and have exchanged their initial proposals.

Each party typically has a bargaining team that generally meets in face-to-face negotiation sessions during this stage of the process. The parties may adopt bargaining ground rules, such as the traditional "position/proposal-based" process, in which the parties usually identify the issues for bargaining and then exchange and discuss proposals in an attempt to reach agreement on those issues. Some parties use a variety of other collaborative processes.

If the parties do not reach agreement in direct bargaining, they move to mediation. The ERB's State Conciliation Service is responsible for providing the mediation services. Once the initial 150 calendar days of bargaining has expired, either party can initiate the mediation process by written request. The parties may mutually agree to go to mediation prior to the expiration of the 150-day period; under these circumstances, the request for mediation must be signed by both parties.

Once the request for mediation is made, a mediator is appointed, the parties are notified of the appointment, and a mediation session is scheduled as soon as a mediator and the members of both bargaining teams are available. If the first session is unsuccessful, additional mediation sessions may be scheduled. The PECBA mandates that parties remain in mediation for a minimum of 15 calendar days, in which one or two sessions typically occur. After the 15 day time period, the parties may continue in mediation or either party can initiate the next step in the process by declaring an impasse in the negotiations.

The PECBA provides for an expedited bargaining process for employer proposals to change in certain working conditions during the term of a collective bargaining contract. Under this process, an employer must give the union notice of its intent to change a condition that imposes a bargaining obligation, and the union may file a demand to bargain within 14 days after the employer's notice. The required bargaining obligation ceases 90 days after the employer's notice to the union. At that time, if no agreement has been reached, the employer may implement its change. The parties may jointly request mediation during the 90-day period. Binding arbitration cannot be initiated during the 90-day period.

Strike vs. Arbitration - PECBA

Under the PECBA, the final step in the collective bargaining process depends on the type of work done by the employees in the bargaining unit. Most bargaining units are designated as strike-permitted. However, certain represented groups are expressly prohibited from striking.

The final step for an employer of a strike-permitted employee bargaining unit is the right to implement its final offer, or to jointly agree with the labor organization to resolve their labor dispute through binding interest arbitration. The employer of a strike-permitted bargaining unit may implement its final offer after completing the prior steps of the PECBA bargaining process. Under current ERB case law, the employer is required to provide the union reasonable notice (five days) of its intent to implement. An employer may implement all or a portion of its final offer.

A strike can take place only after completing the prior steps of the PECBA bargaining process in good faith and giving 10 days notice of their intent to strike by certified mail to the ERB and the public employer. The notice must specify the first day of the strike and the reasons for the strike, including the list of unresolved issues. The notice may be sent during the 30-day cooling off period, although a strike cannot occur until after the 30-day period. A lawful strike may only occur after the labor agreement has expired or pursuant to a reopener provision in a collective bargaining agreement, negotiations under the mid-term expedited bargaining process or the renegotiation of an invalid provision in the agreement.
Examples of bargaining units that are prohibited from striking include police officers, firefighters, 911 dispatchers, parole officers, corrections

guards, deputy district attorneys, and employees of mass transit districts, transportation districts, and municipal bus systems. As an alternative to a strike by the employees and final offer implementation by the employer, labor organizations and employers of strike-prohibited units must use binding interest arbitration. The binding arbitration process is initiated by the petition filed with the ERB along with the final offer. The Board then sends notice to the parties that binding arbitration has been initiated.

Prior to the arbitration hearing, unresolved mandatory subjects submitted to the arbitrator in the parties' "last best offer" packages shall be decided by the arbitrator, basing their findings and opinions on the interest and welfare of the public; the reasonable financial ability of the government unit to meet the costs of the proposed contract giving due consideration and weight to the other services, provided by, and other priorities of, the unit of government as determined by the governing body; the ability of the government unit to attract and retain qualified personnel at the wage and benefit levels provided; the overall compensation presently received by the employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance, benefits, and all other direct or indirect monetary benefits received; and the comparison of the overall compensation of other employees performing similar services with the same or other employees in comparable communities (defined as those with the same or near the same population within Oregon). An interest arbitration award becomes the parties' contract.

Strikes - NLRA

Labor union members covered under the NLRA have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This includes the right to strike, which is protected by the NLRA if they are determined to be lawful. The determination may depend on the purpose of the strike, its timing, or strikers' conduct and such issues often have to be decided by the NLRB.

A lawful strike falls under two classes: "economic strikers" if the strike's object is to obtain higher wages, shorter hours, or better working conditions; and "unfair labor practice strikers" that are protesting an unfair labor practice committed by their employer. Economic strikers cannot be discharged, but can be replaced. If the employer has hired permanent replacements, strikers are not entitled to immediate reinstatement, but entitled to be recalled to jobs as openings occur, if they offer unconditionally to return to work. Unfair labor practice strikers cannot be discharged or permanently replaced. Absent serious misconduct on their part, unfair labor practice strikers are entitled to have their jobs back even if employees hired to do their work have to be discharged.

Strikes that violate a no-strike provision of a contract are not protected by the NLRA, and striking employees can be fired. Picketing can also be lawful or unlawful depending on its purpose, timing, or misconduct. At worksites with one than more employer, such as a construction site, picking is only permitted if the protest is clearly directed exclusively at the primary employer.

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