

MANAGEMENT RIGHTS AND IMPACT BARGAINING

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Agenda

- To discuss briefly the concept and scope of “inherent” management rights
- To provide an overview of an employer’s bargaining obligations pursuant to M.G.L. c. 150E
- To discuss the differences between mandatory, permissive, and illegal subjects of bargaining

Agenda

- To review the difference between “decisional” bargaining and “effects” or “impact” bargaining and what that obligation entails
- To take a look at when “impasse” is reached and when the employer can implement its decisions
- To discuss defenses that an employer may have to a failure to bargain charge
- To analyze some current impact bargaining issues that are facing employers

Management Rights: Introduction

- Generally speaking, the employer retains the right to manage its organization except as restricted by a collective bargaining agreement.
- A management rights clause contained in a collective bargaining agreement may reserve specific rights to an employer.
- A zipper or scope clause can affect when either party can force the other to bargain mid-contract.
- An evergreen clause (about which more later) can limit the employer's right to implement changes.

Legal Background: The Duty to Bargain

- The duty to bargain is found in Section 6 of M.G.L. c. 150E
- It provides that an employer and union must:
 - ⌚ Meet at reasonable times (including meetings in advance of the employer's budget-making process), and
 - ⌚ Negotiate in good faith about wages, hours, standards of productivity and performance, and any other terms and conditions of employment.

Legal Background: The Duty to Bargain

- Neither party is compelled
 - to agree to a proposal, or
 - to make a concession.
- The obligation is to bargain in good faith to agreement or impasse.
- The general rule is that upon reaching impasse, an employer may implement its last position.

Legal Background: Subjects of Bargaining

Three Categories of Bargaining Subjects

- (1) Mandatory – a party may insist on its inclusion and the other party cannot refuse to discuss it.
- (2) Permissive – neither party may insist on bargaining, but both sides may agree to bargain.
- (3) Illegal – violates public policy.

Legal Background: Mandatory Subjects of Bargaining

- Mandatory Subjects of Bargaining are those with a direct impact on wages, hours, and other terms and conditions of employment
- Wages can include:
 - Base pay
 - Overtime Rate
 - Incentive/bonus pay
 - Premium pay
 - Longevity pay
 - Deferred wages or pensions/403(b)

Legal Background: Mandatory Subjects of Bargaining

- Hours of Work – including:
 - Starting time
 - Quitting time
 - Duration of Shift
 - Overtime Practices
 - Shift Bidding Practices
 - Days Off
 - Breaks / Meal Time

Legal Background: Mandatory Subjects of Bargaining

- Other Terms and Conditions of Employment - including:
- Benefits
 - Health Insurance
 - Disability
 - Life Insurance
- Paid or unpaid time off – including:
 - Vacation
 - Holidays
 - Sick Time
 - Personal Time
 - Leaves of Absence

Legal Background: Mandatory Subjects of Bargaining

- Standards of Productivity and Performance (*e.g.*, class size)
- Job Duties/Work Assignments
- Work Rules
- Attendance Policies
- Discipline and Discharge
- Layoffs/Reductions in Force/Bumping
- Subcontracting/Bargaining Unit Work

Legal Background: Mandatory Subjects of Bargaining

- Seniority
- Drug Testing
- Grievance and Arbitration
- Union Dues/Union Security

Legal Background: Permissive Subjects of Bargaining

- Permissive subjects of bargaining are those about which neither party may insist on bargaining, but both sides may agree to bargain or a party may waive its right not to bargain by not being careful not to preserve its right not to bargain.
- Permissive subjects are those which involve core managerial decisions.

Legal Background: Permissive Subjects of Bargaining

- Examples of some matters which have been found to be core managerial decisions under the circumstances include:
 - Whether to provide certain services to the public
 - Whether to hire additional employees to do bargaining unit work
 - Whether to abolish or create positions
 - Whether to reorganize/restructure

Legal Background: Permissive Subjects of Bargaining

- Examples of subjects found to be permissive subjects of bargaining **under the circumstances** include:
 - Minimum manning decisions
 - The loss of *ad hoc* or unscheduled overtime opportunities
 - Discontinuing providing private police details at liquor service establishments
 - Using polygraph examinations in the investigation of criminal activity by police officers
 - School curriculum decisions.

Legal Background: Permissive Subjects of Bargaining

- Decisions that are outside the employer's control, but the impact of such decisions generally must be bargained.

Legal Background: Illegal Subjects

- Bargaining over “illegal” subjects of bargaining violates public policy.
- An example of a subject found to be an illegal subject of bargaining **under the circumstances** was a parity provision.
- Evergreen Clause that would cause a CBA to continue beyond 3 years?
See Boston Housing case.

Mandatory vs. Permissive Subjects

- Balancing Test: Employer's legitimate interests in maintaining its managerial prerogative to effectively govern vs. impact on employees' terms and conditions of employment
- Factors
 - the degree to which the subject has a direct impact on terms and conditions of employment or whether instead it is far removed from employee's terms and conditions of employment
 - whether the subject involves a core governmental decision

What are an Employer's Bargaining Obligations?

- Decisional Bargaining – An employer has an obligation to provide notice and an opportunity to bargain to resolution or impasse over the *decision* and impact before it makes a change to a pre-existing condition of employment, or implements a new condition of employment.

Examples:

- Health Insurance Premium Percentage Contribution
- Work Hours
- Promotional Procedures

What are an Employer's Bargaining Obligations?

- Impact Bargaining – An employer has an obligation to provide notice and an opportunity to bargain to resolution or impasse over the *impact* of the decision on mandatory subjects of bargaining.
 - Decision to reduce workforce is a core managerial decision, and employer need not bargain over the decision itself
 - However, the implementation of the decision will impact employees' wages, hours, and other terms and conditions of employment, and must be bargained
 - e.g., method of accomplishing the reduction (layoffs vs. attrition), timing, terms of separation, etc.

Impasse: How do Parties Get There?

- The Division of Labor Relations generally finds that parties have reached impasse only when the parties have negotiated in good faith on bargainable issues to the point where it is clear that further negotiations would be fruitless because the parties are deadlocked.
- This requires an assessment of the likelihood of further movement by either side and whether they have exhausted all possibility of compromise.

Impasse: Factors to Consider

- The good faith of the parties in negotiations
- The length of the negotiations
- The importance of the issues as to which there is a disagreement
- The contemporaneous understanding of the parties as to the state of negotiations

Impasse: DLR Examples

- Where one party indicates a desire to continue bargaining, Division finds the parties have not exhausted all possibilities of compromise, and have not reached impasse.

Comm. of Mass., Comm’r of Admin. & Finance, SUP-4075 (1999)

- Where parties have bargained for over two years, and have exchanged and rejected each others’ final offers, Division declares impasse despite union’s assertion it was “prepared to engage in further negotiations.”

City of Worcester, MUP-05-4542 (2007)

Contract Waiver Defense

- Union must have knowingly and unmistakably waived its right to bargain about the change
- Employer bears the burden to show that the collective bargaining agreement clearly, unequivocally and specifically authorizes its actions
- When contract language exists but is ambiguous, bargaining history or the manner in which the parties have implemented the disputed contract provisions are helpful

Legal Background: Employer Prohibited Practice

Prohibited Practices by Employer contained in M.G.L. c. 150E, §§ 10(a)(1) through 10(a)(6)

- An allegation that an Employer has failed to bargain over the impacts of a permissive subject normally results in the filing of a charge under:
 - M.G.L. c. 150E, § 10(a)(5) - refusal to bargain in good faith with the exclusive representative
 - M.G.L. c. 150E, § 10(a)(1) – interfere, restrain, or coerce any employee in exercise of any right under Chapter 150E

Legal Background: Employer Prohibited Practice

- Remedies for violation of finding that Employer committed a prohibited practice
 - M.G.L. c. 150E, § 11 grants DLR broad authority to fashion appropriate orders to remedy an Employer's unlawful conduct
 - DLR has stated that it recognizes distinction between employer's failure to bargain over a decision and its failure to bargain over impacts of a decision, and fashions remedies to reflect that distinction.

Legal Background: Employer Prohibited Practice

- Remedies continued:

- Division has stated that in most impact bargaining situations the appropriate remedy will:

“[s]trike a balance between the right of management to carry out its lawful decision and the right of an employee organization to have meaningful input on impact issues while some aspects of the *status quo* are maintained.”

Town of Burlington, 10 MLC 1387, 1388 (1984)

Recent Case Law: Supreme Judicial Court

- Boston Housing Authority v. National Conference of Firemen and Oilers, Local 3, Docket SJC-10569
 - Decided by Supreme Judicial Court on October 22, 2010
 - An appeal of an arbitrator's award that found that the employer violated the parties' collective bargaining agreement when it laid off sixteen employees
 - SJC finds that arbitrator exceeded the scope of his authority when ordered reinstatement of the employees
 - Basis of this decision is that M.G.L. c. 150, § 7(a) renders an evergreen clause invalid

Recent Case Law: Supreme Judicial Court

- BHA case highlights several aspects of management rights and impact bargaining:
 - The parties' collective bargaining agreement contained a minimum staffing provision. Provisions such as this serve as an express limitation on an employer's right to reduce force
 - The parties in this case met and exchanged proposals over the impact of the employer's decision to lay off employees

Recent Case Law: Supreme Judicial Court

- In addition to the topics covered today, the BHA case could have a significant impact on labor relations going forward:
 - Grievance and arbitration procedure provision lapses at the expiration of contract
 - Potential for parties to begin negotiating earlier and settling quicker

Recent Case Law: Division of Labor Relations

- Sheriff's Office of Worcester County and NEPBA, Local 555, 36 MLC 147, SUP-09-5462
 - Decided by the DLR on April 1, 2010
 - The issue in this case was whether the Sheriff's Office unilaterally implemented a new promotion policy for bargaining unit members without first notifying and bargaining with the Union in violation of M.G.L. c. 150E, §§ 10(a)(5) and 10(a)(1)

Recent Case Law: Division of Labor Relations

- Facts of Case:

- The parties' collective bargaining agreement contained a Management Rights clause that contained the following language:

“[T]he County and the Sheriff will not be limited in any way in the exercise of the functions of management and will have retained and reserved unto itself the right to exercise, without bargaining with the Union, all the customary powers, authority and prerogatives of management and government, including but not limited to the following items.”

Recent Case Law: Division of Labor Relations

- That clause was followed by 37 specific management rights that included descriptions as well as the employer's bargaining obligations (impact and/or decision)
- Examples of these include:
 - Management could make the determination of new employee classifications and ranks; provided that the wages for such classifications and ranks would be subject to negotiations with Union
 - Management reserved the right to increase, diminish, change or discontinue operations in whole or in part, provided, however, the Sheriff negotiates over impacts of any direct layoff of officers resulting from action specified in agreement, prior to layoff

Recent Case Law: Division of Labor Relations

- A number of the management rights listed in the Clause provided that the Employer did not have any bargaining obligations since the parties did not include a bargaining obligation in the item itself.
- Examples of these include:
 - The determination of the level of services to be provided
 - The training of officers, including, but not limited to in-service and physical fitness training
 - The hiring, appointment or promotion of officers, including the determination of qualifications and requirements for the position or rank

Recent Case Law: Division of Labor Relations

- Following the introductory paragraph and the 37 specific items, the parties included the following language:

“and the Sheriff will have the right to invoke these rights and make such changes in these items as the Sheriff in his sole discretion may deem appropriate without negotiation with the Union; except to the extent expressly abridged by a specific provision of this Agreement.”

Recent Case Law: Division of Labor Relations

- The dispute in this case concerned the Employer's unilateral implementation of a promotional testing procedure
 - This implementation occurred after the Employer had met with the Union and discussed input on a new testing process
 - The Employer and the Union set up a management and labor committee to investigate the issue
 - After more than two years, the Sheriff instituted its new policy
 - The Union then filed a charge of prohibited practice

Recent Case Law: Division of Labor Relations

- As we have seen, the Division found that promotion procedures are mandatory subjects of bargaining
- Despite this, the Division found that the Sheriff did not violate the law
 - The Sheriff successfully raised the defense of contract waiver, arguing that the parties' collective bargaining agreement gave them the right to implement the new policy

Recent Case Law: Division of Labor Relations

- The Division found that the Sheriff's Management Rights clause was specific as to the parties' bargaining obligations
- Even though the language was unambiguous, the Division looked at the bargaining history and determined that it was clear that the Union had specifically waived its right to bargain about promotions
 - The bargaining history showed that employer received this language in exchange for a nearly 20% pay raise to bargaining unit members

Recent Case Law: GPS Usage

City of Worcester, MUP-05-4409 (2007)

- City uses a radio system and snow/sanding inspectors to track the location of DPW sanders
- In order to increase efficiency of operations through better tracking and monitoring, City seeks to utilize GPS technology
- Employer assigns GPS phones to DPW sanders, requires employees to carry phones while on duty
- Employees not required to carry phones during breaks, or when off-duty

Recent Case Law: GPS Usage

- In conjunction with radio system and snow/sanding inspectors, City uses GPS phones to track locations of sanders.
- Union files charge with Division, alleging City committed unfair labor practice by failing to bargain with union before implementing GPS requirement.

Recent Case Law: GPS Usage

- Division dismisses the Union's charge, finding:
 - The requirement to carry GPS phones does not alter the wages, hours, or other terms and conditions of employment (i.e., not a mandatory subject of bargaining)
 - GPS requirement also did not impact any mandatory subjects of bargaining
 - As a result, no bargaining required

Recent Case Law: GPS Usage

- Division Ruling (cont'd)

“A public employer may alter procedural mechanisms for enforcing existing work rules without bargaining, provided that [it] does not change underlying conditions of employment”

- GPS requirement is nothing more than “an effort to make the City’s use and monitoring of its sanding operations more efficient,” and does not constitute a change in terms and conditions of employment

Recent Case Law: GPS Usage

- Key factor:
 - GPS policy did not change any existing workplace rules (*e.g.*, standards of productivity and performance)
 - If it had, there would have been a bargaining obligation

More “Efficiency” Cases

- Surveillance Cameras
 - Employer’s unilateral installation of surveillance cameras in parking area to monitor custodians’ departure times not a violation of the Law
 - Done in response to specific concern about custodians leaving work early and falsifying time cards. Did not alter existing work rules

Duxbury School Comm., MUP-1446 (1998)

More “Efficiency” Cases

- Time Clocks
 - Employer’s unilateral installation of time clocks not a violation of the law, so long as underlying attendance & tardiness standards are not changed
 - Simply more efficient method of tracking attendance and enforcing existing work rules

City of Leominster, MUP-2526
(H.O. 1977)

More “Efficiency” Cases

- Sick Leave Monitoring
 - Employer’s unilateral institution of required sick leave reporting form not a violation where it does not change the criteria for granting sick leave
 - However, change to eligibility standards is a mandatory subject of bargaining (e.g., requiring doctor’s certification)

Town of Wilmington, MUP-4688
(1983)

Conclusion

- Know the difference between mandatory and permissive subjects of bargaining.
- Be careful not to waive your right to refuse to bargain over permissive subjects.
- Know your bargaining obligations: decision vs. impacts.
- Identify existing workplace rules and procedures that can be improved/enforced more efficiently, often with minimal bargaining.

Conclusion

- Be careful not to waive your management rights
- Review and strengthen your CBAs
 - Management rights clauses
 - Evergreen clauses
 - Zipper clauses
 - Grievance and arbitration procedures

An Ounce of Prevention is Worth a Pound of Cure

- Preventive maintenance is always easier than damage control.
- Make sure to seek qualified legal advice from an attorney specializing in labor and employment law before taking action.

Questions?





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