2025 Human Resources Symposium – State of Montana

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Overview of Collective Bargaining in Montana

I. **What is collective bargaining?** Collective bargaining is the formal process of negotiation between an employer and an organized group of employees that establishes sets the terms and conditions of work, including salaries, wages, hours, working conditions, and benefits.

a. Local union or "appropriate unit" is a group of employees banded together for collective bargaining purposes.

b. Collective bargaining agreement or CBA is an agreement in writing between an employer and a union setting forth the terms and conditions of employment or containing provisions regarding rates of pay, hours of work or other working conditions of employees.

c. Local unions are often affiliated with national or state trade unions, including Montana State AFL-CIO, Service Employees International Union, Teamsters, United Food and Commercial Workers, International Brotherhood of Electrical Workers, and Laborers' International Union of North America

II. Collective Bargaining in Montana

a. Public Sector. MCA § 39-31-101. Policy. To promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.

MCA § 39-31-201. Public employees protected in right of self-organization. Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.

b. Private Sector. Montana law recognizes and refers to federal law. "The relations between employers and labor unions is a field which is governed by federal law. This Court stated in [a 1993 decision]: *Collective bargaining agreements must be interpreted by application of federal law, not state law.* This is known as federal preemption under § 301 of the Labor Management Relations Act of 1947 (LMRA): Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. *The United States Supreme Court has interpreted § 301 as a congressional mandate to develop a unified federal common law to address labor contract disputes."* IBEW, AFL-CIO, Local

1638 v. Mont. Power Co., 280 Mont. 55, 929 P.2d 839 (1996) (citations omitted).

III. National Labor Relations Act, 29 U.S.C. §§ 151-169[1]

a. **Overview**

i. Purpose of the Act. It is in the national interest of the United States to maintain full production in its economy. Industrial strife among employees, employers, and labor organizations interferes with full production and is contrary to our national interest. Experience has shown that labor disputes can be lessened if the parties involved recognize the legitimate rights of each in their relations with one another. To establish these rights under law, Congress enacted the National Labor Relations Act. Its purpose is to define and protect the rights of employees and employers, to encourage collective bargaining, and to eliminate certain practices on the part of labor and management that are harmful to the general welfare.

ii. What the Act provides. The National Labor Relations Act states and defines the rights of employees to organize and to bargain collectively with their employers through representatives of their own choosing or not to do so. To ensure that employees can freely choose their own representatives for the purpose of collective bargaining, or choose not to be represented, the Act establishes a procedure by which they can exercise their choice at a secret-ballot election conducted by the National Labor Relations Board. Further, to protect the rights of employees and employers, and to prevent labor disputes that would adversely affect the rights of the public, Congress has defined certain practices of employers and unions as unfair labor practices.

iii. How the Act is enforced. The law is administered and enforced principally by the National Labor Relations Board and the General Counsel acting through 52 regional and other field offices located in major cities in various sections of the country. The General Counsel and the staff of the Regional Offices investigate and prosecute unfair labor practice cases and conduct elections to determine employee representatives. The five-member Board decides cases involving charges of unfair labor practices and determines representation election questions that come to it from the Regional Offices.

b. **The Rights of Employees.** The rights of employees are set forth principally in Section 7 of the Act, which provides as follows: *Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain*

[1] See "Basic Guide to the National Labor Relations Act," which is a handy reference guide. https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). Examples of Section 7 rights. Examples of the rights protected by this section are the following: • Forming or attempting to form a union among the employees of a company. • Joining a union whether the union is recognized by the employer or not. • Assisting a union to organize the employees of an employer. • Going out on strike to secure better working conditions. • Refraining from activity on behalf of a union.

i. **The Right to Strike**. Section 7 of the Act states in part, *"Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."* Strikes are included among the concerted activities protected for employees by this section. Section 13 also concerns the right to strike. It reads as follows: *Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.* It is clear from a reading of these two provisions that: the law not only guarantees the right of employees to strike, but also places limitations and qualifications on the exercise of that right.

ii. **Lawful and unlawful strikes.** The lawfulness of a strike may depend on the object, or purpose, of the strike, on its timing, or on the conduct of the strikers. The object, or objects, of a strike and whether the objects are lawful are matters that are not always easy to determine. Such issues often must be decided by the National Labor Relations Board. The consequences can be severe to striking employees and struck employers, involving as they do questions of reinstatement and backpay.

iii. **The Right to Picket**. Likewise the right to picket is subject to limitations and qualifications. As with the right to strike, picketing can be prohibited because of its object or its timing, or misconduct on the picket line. In addition, Section 8(b)(7) declares it to be an unfair labor practice for a union to picket for certain objects whether the picketing accompanies a strike or not. This will be covered in more detail in the section on union unfair labor practices.

c. **Collective Bargaining and Representation of Employees**

i. Collective bargaining is one of the keystones of the Act. Section 1 of the Act declares that the policy of the United States is to be carried out "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

ii. Collective bargaining is defined in the Act. Section 8(d) requires an employer and the representative of its employees **to meet at reasonable**

times, to confer in good faith about certain matters, and to put into writing any agreement reached if requested by either party. The parties must **confer in good faith with respect to wages, hours, and other terms or conditions of employment,** the negotiation of an agreement, or any question arising under an agreement.

iii. Duty to bargain imposed on both employer and union. These obligations are imposed equally on the employer and the representative of its employees. It is an unfair labor practice for either party to refuse to bargain collectively with the other.

iv. The obligation does not, however, compel either party to agree to a proposal by the other, nor does it require either party to make a concession to the other.

v. Section 8(d) provides further that when a collective-bargaining agreement is in effect no party to the contract shall end or change the contract unless the party wishing to end or change it takes the following steps: Bargaining steps to end or change a contract.

    1. The party must notify the other party to the contract in writing about the proposed termination or modification 60 days before the date on which the contract is scheduled to expire. If the contract is not scheduled to expire on any particular date, the notice in writing must be served 60 days before the time when it is proposed that the termination or modification take effect.
    2. The party must offer to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed changes.
    3. The party must, within 30 days after the notice to the party, notify the Federal Mediation and Conciliation Service of the existence of a dispute if no agreement has been reached by that time. Said party must also notify at the same time any State or Territorial mediation or conciliation agency in the State or Territory where the dispute occurred.
    4. The party must continue in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract until 60 days after the notice to the other party was given or until the date the contract is scheduled to expire, whichever is later.

vi. When the bargaining steps are not required. The requirements of paragraphs 2, 3, and 4, above, cease to apply if the NLRB issues a certificate showing that the employees' representative who is a party to the contract has been replaced by a different representative or has been voted out by the employees. Neither party is required to discuss or agree to any change of the provisions of the contract if the other party proposes that the change become effective before the provision could be reopened

according to the terms of the contract. As has been pointed out, any employee who engages in a strike within the notice period loses status as an employee of the struck employer. This loss of status ends, however, if and when that individual is reemployed by the same employer.

vii. The Employee Representative. Section 9(a) provides that the employee representatives that have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining."

viii. What is an appropriate bargaining unit. A unit of employees is a group of two or more employees who share a community of interest and may reasonably be grouped together for purposes of collective bargaining. The determination of what is an appropriate unit for such purposes is, under the Act, left to the discretion of the NLRB. Section 9(b) states that the Board shall decide in each representation case whether, "in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

ix. How the appropriateness of a unit is determined. Generally, the appropriateness of a bargaining unit is determined on the basis of a community of interest of the employees involved. Those who have the same or substantially similar interests concerning wages, hours, and working conditions are grouped together in a bargaining unit. In determining whether a proposed unit is appropriate, the following factors are also considered:

    1. Any history of collective bargaining.
    2. The desires of the employees concerned.
    3. The extent to which the employees are organized. Section 9(c)(5) forbids the Board from giving this factor controlling weight.

x. Who can or cannot be included in a unit. A unit may cover the employees in one plant of an employer, or it may cover employees in two or more plants of the same employer. In some industries in which employers are grouped together in voluntary associations, a unit may include employees of two or more employers in any number of locations. It should be noted that a bargaining unit can include only persons who are "employees" within the meaning of the Act. The Act excludes certain individuals, such as agricultural laborers, independent contractors, supervisors, and persons in managerial positions, from the meaning of "employees." None of these individuals can be included in a bargaining unit established by the Board. In addition, the Board, as a matter of policy, excludes from bargaining units employees who act in a confidential capacity to an employer's labor relations officials.

d. **Collective Bargaining and the Employer**

i. Once an employee representative has been designated by a majority of the employees in an appropriate unit, the Act makes that representative the exclusive bargaining agent for all employees in the unit.

ii. As exclusive bargaining agent it has a duty to represent equally and fairly all employees in the unit without regard to their union membership or activities. Once a collective-bargaining representative has been designated or selected by its employees, **it is illegal for an employer to bargain with individual employees**, with a group of employees, or with another employee representative.

iii. Section 9(a) provides that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative provided: 1. The adjustment is not inconsistent with the terms of any collective-bargaining agreement then in effect. 2. The bargaining representative has been given the opportunity to be present at such adjustment.

IV. The Reciprocal Duty to Bargain

a. **The Duty to Meet, Confer, and Negotiate**: Section 8(d) of the National Labor Relations Act requires the parties "to meet at reasonable times and confer in **good faith** with respect to . . . the negotiation of an agreement . . ." The parties must negotiate with the purpose of trying to reach an agreement.

b. **Definition of Good Faith**.

i. Objective evidence of action satisfying the requirement that the parties to a contract regularly meet and willingly discuss resolution on proposed new contract terms. No demand exists on any party to make a concession or agree to any proposal. http://thelawdictionary.org/good-faith-bargaining/

ii. Good-faith bargaining generally refers to the duty of the parties to meet and negotiate at reasonable times with willingness to reach agreement on matters within the scope of representation; however, neither party is required to make a concession or agree to any proposal. Good faith bargaining requires employers and unions involved in collective bargaining to: use their best endeavors to agree to an effective bargaining process, meet and consider and respond to proposals made by each other, respect the role of the other's representative by not seeking to bargain directly with those for whom the representative acts, and not do anything to undermine the bargaining process or the authority

of the other's representative. https://definitions.uslegal.com/g/good-faith-bargaining/

c. **The Obligation of Good Faith**: Whether the parties are bargaining in good faith must be inferred from the party's conduct at or away from the bargaining table because an intent to frustrate the reaching of an agreement is rarely articulated.

   i. The distinction between lawful "hard" bargaining and unlawful "bad faith" or "surface" bargaining is a difficult one to draw and depends on the facts. Section 8(d) of the NLRA does not compel either party to agree to a proposal or require the making of a concession, but to determine whether a party is acting in good faith, the NLRB will consider the justification for the proposals and the willingness to make concessions.

   ii. PerSe Violations: unilateral changes, bargaining directly with employees, refusal to execute written contract, refusal to meet at reasonable times, refusal to confer, insisting on nonmandatory subjects of bargaining.

d. The Duty to Furnish Information

   i. The Role of Information: collective bargaining process requires that the bargaining partners have adequate information about the immediate subjects at issue. Without the exchange of essential information, the collective bargaining process cannot function properly. Failure to supply relevant information is an unfair labor practice.

   ii. Nature of the Duty to Furnish Information

      1. Intertwined with the duty to bargain in good faith is the duty to supply complete information, upon request, to enable both parties to understand and intelligently discuss the issues raised in bargaining. See, e.g., Oregon Coast Operators Assoc., 113 N.L.R.B. 1338 (1955), aff'd 246 F.2d 280 (9th Cir. 1957).

      2. Employer Defenses: confidentiality or privilege based on employer interests, confidentiality or privilege based on employee privacy or protection, waiver by union.

   iii. When the Duty Exists: The duty arises as soon as the union has elected its bargaining representative, and the duty does not terminate with the signing of the collective bargaining contract but continues through the life of the agreements so far as necessary to enable the parties to administer the contract and resolve grievance or disputes.

   The duty is triggered upon a reasonable, good faith request or demand for information. See NLRB v. Boston Herald-Traveler Corp., 210 F.2d 134 (1st Cir. 1954); NLRB v. Wachter Construction, 23 F.3d 1378 (8th Cir.

1994). Additional considerations are relevance and necessity, availability, and burdensomeness.

Information That Must Be Furnished: financial information, wage information (NLRB v. F.W. Woolworth Co., 352 U.S. 938 (1956)), information concerning hours and other terms and conditions of employment, insurance and pension plan information, work rules, information related to grievances, etc.

V. The Scope of Bargaining

a. Although the original Wagner Act did not establish the subjects of collective bargaining, Section 9(a) provided that designated representatives in the collective bargaining process had authority to bargain with respect to rates of pay, wages, hours of employment, or other conditions of employment. Extrapolating from this language, the Courts and the NLRB developed three categories of bargaining: mandatory, permissive or voluntary, and illegal. ("Most subjects are easily classified as belonging to one or another of the categories. The controversies usually arise over questions of whether a given subject comes under the 'other conditions of employment' area." Bozeman Education Association v. Gallatin County School District, ULP No. 43-79 (1981)).

b. Mandatory subjects of bargaining are those which both parties must bargain in good faith (wages, hours, fringe benefits, and other conditions of employment). An employer may not make a change in a mandatory bargaining subject without providing prior notice to the union and an opportunity to bargain.

c. Permissive or voluntary subjects of bargaining are those topics that address matters other than wages, hours, fringe benefits, and other conditions of employment, over which the parties may bargain, but are not required to do so. Either party may propose a discussion of such a subject, and the other party may voluntarily bargain on it. Neither party may insist to the point of impasse on the inclusion of a voluntary subject in a contract. For example, the employer may not legally insist on bargaining over the method of selecting stewards or the method of taking a strike vote.

d. Illegal subjects of bargaining are those that would require an unlawful act by a party or an act inconsistent with public policy. An illegal subject of bargaining is one where, even if it is included in a collective bargaining agreement, it is unenforceable. For example, clauses requiring a closed shop, union-shop clauses in right-to-work states, hot cargo agreements, and anything that violates any state or federal employment law. Parties are forbidden to bargain about illegal subjects, such as closed-shop provisions, provisions that are inconsistent with a union's duty of fair representation, contract clauses that would discriminate among employees on unlawful bases (race, religion, sex, age, or national origin.)

VI. Impasse and Mediation: Posturing and Presenting the Employer's Position

a. Elements of Impasse: the duty to bargain does not require a party to "engage in fruitless marathon discussions". NLRB v. American National Insurance Co., 343 UlSl. 395 404 (1952). Where there are irreconcilable differences in the parties' positions after full good faith negotiations, the law recognizes the existence of an impasse. NLRB v. Borg-Warner Corp., Wooster Div., 356 U.S. 342 (1958). The existence or nonexistence of an impasse is normally put in issue when, after negotiations have been carried on for a period of time, the positions of the parties become fairly fixed and talks reach the point of stalemate (futile). When this occurs, the employer is free to make unilateral changes in working conditions consistent with its offers that the union has rejected. Factors: bargaining history, good faith of the parties, length of negotiations, importance of the issues as to which there is disagreement, contemporaneous understanding of the parties as to the state of negotiations.

b. Effect on the Bargaining Obligation: when an impasse is reached the duty to bargain is not terminated but only suspended. During the suspension, the employer may not take action disparaging to the collective bargaining process or amount to a withdrawal of recognition of the union's representative status. Newport News Shipbuilding Co. v. NLRB, 602 F.2d 73 (4th Cir. 1979). However, upon impasse, the employer may make unilateral changes in working conditions, but such changes must not be "substantially different or greater than any [offers] which the employer...proposed during the negotiations. Atlas Tack Cor., 226 NLRB 222, 227 (1976), enforced at 559 F.2d 1201 (1st Cir. 1977). Unilateral changes cannot be made in subjects over which there had been no bargaining, and no changes can be made unless there is an overall impasse in bargaining for the agreement as a whole.

c. Exceptions: if the union engages in conduct that prevents the parties from reaching either an agreement or a genuine impasse, or if economic exigencies compel prompt action.

d. Once an impasse is broken, unilateral implementation of a mandatory subject again becomes unlawful. Raven Services Corp. v. NLRB, 315 F.3d 499 (5th Cir. 2003).

e. Mediation Considerations

VII. Waiver, Suspension, and Termination of Bargaining Rights

a. Waiver: the duty to bargain can be waived by unilateral illegal employer action, contractual language specifically waiving the right to bargain about a particular matter, or relinquishment of the right during negotiations, established past practices, failure to protest unilateral action, failure to request bargaining despite knowledge of a contemplated unilateral change. The courts construe the waiver doctrine narrowly. Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 n. 12 (1983). Examples of express agreements of waiver: zipper clauses and

management-rights clauses.

b. Suspension During Illegal or Unprotected Activity: the duty to bargain may be temporarily suspended when the other party is engaged in unlawful activity, such as illegal strike conduct including violence, vandalism, and mass demonstrations at the homes of non-striking employees.

c. Termination: This is a complex body of regulation and law, but the general rule is that the duty to bargain can be deemed to terminate when there is a clear loss of majority in the bargaining unit or after the employees have filed a decertification petition. See Allentown Mack Sales & Service v. NLRB, 522 U.S. 359 (1998).

VIII. What is Due Process?

The phrase "due process in labor arbitration" most often refers to the process followed by arbitrators in disposing of charges of misconduct in discipline and discharge cases. This is not the same as the process followed by employers in deciding to discipline or discharge an employee for misconduct, but they are similar!

The minimum elements of due process in a labor arbitration include notice of the charges, an opportunity to be heard, the right to present information and cross examine witnesses and a decision made by an impartial person.

A. Elements of Due Process

Notice of the Charges. By the time a grievance reaches arbitration there should be no dispute over the content of the charges. Occasionally, the charges are unclear or it is disclosed that the employer considered matters that were not covered by the charges. That evidence may come in, but could upend the decision-making process.

Opportunity to be Heard. Clearly, the arbitration hearing provides the grievant with an opportunity to be heard and respond to the charges. If the parties' grievance procedure is working properly, there should be no surprises here either. If the grievant raises a defense not previously raised at the time of the discipline or in the grievance procedure, it will likely come in, but the arbitrator will focus on the following:

- The belated nature of the defense can raise a serious question of credibility.
- If the grievant was never before given an opportunity to raise the belated defense, it should be given the same weight as if he had.
- If credited and found to be meritorious, the belated defense may require a modification of the remedy.

Opportunity to Present Evidence. Sometimes the grievance procedure has provisions placing restrictions on the issuance of subpoenas, the calling of witnesses aligned with the other side or the presentation of evidence or theories not previously referred to in the grievance procedure. Such provisions clearly place a limit some of the elements of Due Process described, and the procedure should be clearly understood before you start

the process. In the absence of such restrictions, the arbitration hearing provides both parties with the opportunity to call such witnesses and present such evidence, as they deem appropriate and necessary to prove their case. If the grievance procedure is operating properly and there is timely compliance with reasonable information requests, this element of due process is easily met at the arbitration hearing.

B. Must the Employer Provide Due Process?

YES. Under the just cause standard, an employer must provide an employee with due process rights before taking action to discipline. In the past, many arbitrators have interpreted the phrase "just cause" to require employers to provide some elements "Investigatory Due Process." This comes from the "seven tests of just cause," first espoused by Arbitrator Carroll Daugherty 45 years ago, in *Grief Bros. Cooperage,* 42 LA 555 (1964). But is this test any good anymore? This definition of just cause is losing favor among arbitrators and is rarely, if ever, cited by prominent labor arbitrators. In short, the Seven Tests are headed for extinction.

Unfortunately very few union-management agreements contain a definition of "just cause," which means your arbitrator might make one up! If there is no definition in your agreement, consider adding one or still use the 7 tests as a guide.

1. Did the company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed sheets or booklets of shop rules and of penalties for violation thereof.

Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

Note 3: A finding of lack of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiated with the union.

2. Is the adverse action reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

Note 1: Because considerable thought and judgment have usually been given to the development and promulgation of written company rules, the rules must almost always be held reasonable in terms of the employer's business needs and usually in terms of the employee's performance capacities. That's not absolute though. They may be

reasonable in terms of the company's business needs, at least in the short run, but unreasonable in terms of the employee's capacity to obey. Example: A foreman orders an employee to operate a high-speed band saw known to be unsafe and dangerous.

Note 2: If an employee believes that a company rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

3. Did the company, before taking adverse action against an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note 1: An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 2: The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for time lost.

4. Was the company's investigation conducted fairly and objectively?

Note 1: This the most commonly challenged part of the test. Employees claim the investigator is biased, or the right people were not talked to. Make sure you have an experienced investigator.

Note 2: In some disputes between an employee and a management person there are not witnesses to an incident other than the two immediate participants. In such case it is particularly important that the investigator question the management participant rigorously and thoroughly just as an actual third party would.

Note 4: The investigation should include an inquiry into possible justification for the employee's alleged rule violation.

5. At the investigation did the company "judge" obtain substantial and compelling evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be fully conclusive or "beyond all reasonable doubt." There is a dispute among arbitrators about the standard – is it clear and compelling or preponderance of the evidence. Consider adding to the CBA!

Note 2: When the testimony of opposing witnesses at the arbitration appeals hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. Your witnesses credibility is key.

6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If the company has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the company may avoid a find of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules a written.

Note 3: For an arbitral finding of discrimination against a particular grievant to be justified, he and other employees found guilty of the same offense must have been in reasonably comparable circumstances.

Note 4: The comparability standard considers three main items - the degree of seriousness in the offense, the nature of the employees' employment records, and the kind of offense.

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

Note 1: A trivial proven offense as such does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," and "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the company may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Hot Topic!

Social Media

In the last decade, NLRB has focused on enforcement efforts in the area of technological advances involving social media activities. Following the Obama administration, the NLRB in *Boeing Co.*, 365 NLRB No. 154 (Dec. 15, 2017) created what was considered an employer-friendly standard in analyzing employee's use of social media. Following Boeing, the NLRB was willing to consider an employer's interest in protecting its reputation to justify limitations on employee social media expression. For example, in *Bemis Company*, 370 NLRB No. 7 (Aug. 7, 2020), the NLRB found lawful an employer's social media policy requiring employees to be "respectful and professional when using social media tools." The employer's social media rule prohibited employees from disclosing proprietary employer information and required employees to respect the rights of co-workers. In *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132 (July 24, 2020) the NLRB found lawful an employer's rule that prohibited employees from communicating to any customer or third party any disparaging claim, "the effect of or intention of which is to cause embarrassment, disparagement, damage or injury to the reputation, business, or standing" of the company. But employers soon learned that the ability to limit employee social media activity or employee statements about the company was not unfettered. In *Union Tank Car Company*, 369 NLRB No. 120 (July 17, 2020), the NLRB found that the employer unlawfully maintained a non-disparagement rule that prohibited statements that "are intended to injure the reputation of the Company or its management personnel with customers or employees." The NLRB clearly found problematic the rule's prohibition against statements to other employees.

The NLRB has taken an aggressive approach to social media policies. This has proven problematic for some employers because the NLRB has taken the position that efforts to severely restrict the ability to share employment information interferes with Section 7 rights. Rules which impact discussions between employees almost universally are considered unlawful. Employers thus generally cannot limit employees' comments on:

- Website articles or blogs. *Valley Hosp. Med. Ctr.*, 351 N.L.R.B. 1250, 1252 (2007).
- Social media posts. *Desert Cab, Inc. (ODS Chauffeured Transportation)*, 367 N.L.R.B. No. 87 (Feb. 8, 2019) (finding Facebook private posts critical of employer protected); *North West Rural Elec. Coop.*, 366 N.L.R.B. No. 132 (July 19, 2018); *Gen. Motors LLC* 369 NLRB No. 127 (July 21, 2020) [discussing standard applied to social media postings, holding that the *Wright Line* burden-shifting framework applied and that after causal connection is established between discipline and Section 7 activity (e.g. abusive social media positing), employer must prove it would have taken the same action in the absence of the section 7 activity to avoid liability); *FDRLST Media, LLC v. National Labor Relations Board*, 35 F.4th 108 (3d Cir. 2022) (post on microblog (Twitter) by supervisory employee of media company, using his personal account, that "first one of you tries to unionize I swear I'll send you back to the salt mine" was not a threat of reprisal for protected union activity under the NLRA).

- Emails. *Mexican Radio Corp.*, 366 N.L.R.B. No. 65 (Apr. 20, 2018); *Dalton Schools, Inc.*, 364 N.L.R.B. No. 18 (June 1, 2016).
- Text messages. *Laurus Technical Inst.*, 360 N.L.R.B. 1155 (2014) (employee sent coworker concerted protected text messages regarding employer favoritism in assigning leads and inherently concerted discussion of job security); also see *Salon/Spa at Boro, Inc.*, 356 N.L.R.B. 444 (2010)); *Cordua Restaurants, Incorporated v. National Labor Relations Board*, 985 F.3d 415 (5th Cir. 2021) (employer discovered through unauthorized access to personal text messages that employee solicited coworkers to join in his lawsuit and fired him; full reinstatement upheld as employee's protected activity was found to be a motivating factor in the decision to fire him); *Hitterman v. List Industries, Inc.*, 2022 WL 2663400, at *21 (N.D. Ind., July 11, 2022) (pro-Union private text thread that contained some message of sexual nature was found to have "some chance" of establishing that it constitutes protected activity)

And don't forgot Montana's own spin on this! In Section 39-2-307, MCA, employees are offered protection for their lawful expression of free speech on social media:

> 39-2-307. **Employer access limited regarding personal social media account of employee or job applicant -- conditions for exceptions -- employer retaliation prohibited -- penalties.** (1) Except as provided in subsection (2), an employer or employer's agent may not require or request an employee or an applicant for employment to:
>
> (a) disclose a user name or password for the purpose of allowing the employer or employer's agent to access a personal social media account of the employee or job applicant;
>
> (b) access personal social media in the presence of the employer or employer's agent; or
>
> (c) divulge any personal social media or information contained on personal social media.
>
> (2) An employee shall provide, if requested, to an employer or employer's agent the employee's user name or password to access personal social media when:
>
> (a) (i) the employer has specific information about an activity by the employee that indicates work-related employee misconduct or criminal defamation, as provided in 45-8-212;
>
> (ii) the employer has specific information about the unauthorized transfer by the employee of the employer's proprietary information, confidential information, trade secrets, or financial data to a personal online account or personal online service; or
>
> (iii) an employer is required to ensure compliance with applicable federal laws or federal regulatory requirements or with the rules of self-regulatory organizations as

defined in section 3(a)(26) of the Securities and Exchange Act of 1934, 15 U.S.C. 78c(a)(26); and

(b) an investigation is under way and the information requested of the employee is necessary to make a factual determination in the investigation.

(3) Nothing in this section:

(a) limits an employer's right to promulgate and maintain lawful workplace policies governing the use of the employer's electronic equipment, including a requirement for an employee to disclose to the employer the employee's user name, password, or other information necessary to access employer-issued electronic devices, including but not limited to cell phones, computers, and tablet computers, or to access employer-provided software or e-mail accounts;

(b) prevents an employee from seeking injunctive relief in response to the provisions of subsection (2); or

(c) prevents the prosecution of a person for violating privacy in communications under 45-8-213.

(4) An employer may not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or job applicant for:

(a) not complying with a request or demand by the employer that violates this section; or

(b) legal expressions of free speech by the employee or job applicant, as protected in 39-2-904, made on personal social media.

(5) The provisions of subsection (4)(b) do not apply if the expression:

(a) by an employee or job applicant violates an employer's written policy; or

(b) violates the terms or conditions of the employee's employment contract.

(6) (a) As used in this section, "personal social media" means a password-protected electronic service or account containing electronic content, including but not limited to e-mail, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, internet website profiles or locations, and online services or accounts, including password-protected services or accounts to which an employee may post information, data, or pictures.

(b) The term does not include a social media account that is:

(i) opened for or provided by an educational institution and intended solely for educational purposes; or

(ii) opened for or provided by an employer and intended solely for business-related purposes.

(7) (a) An employee or an applicant for employment may bring an action against an employer for violating this section within 1 year in a small claims court. An employee or an applicant for employment may also have a cause of action under 45-8-213.

(b) Damages are limited to $500 or actual damages up to the limit provided in 3-10-1004. Legal costs may be awarded to the party that prevails in court.

(8) If an employer gains information improperly under this section and subsequently is involved in a computer security breach as provided in 30-14-1704, the employer is subject to penalties under 30-14-142.

The NLRB's scrutiny naturally has expanded beyond social media. According to the Memorandum of the General Counsel, the area of electronic surveillance is now emerging as another increasingly problematic area for employers in terms of section 7 rights. The Memorandum provides examples of potential but otherwise legitimate practices that may interfere with concerted activities, including the following:

- Recording employee conversations at work, especially prevalent in warehouse settings,
- Using keyloggers and software that takes screenshots, webcam photos, or audio recordings throughout the day for employees using computers—whether in call centers, offices, or at home,
- Tracking movement using wearable devices, security cameras, and radio-frequency identification badges, and
- GPS tracking devices and cameras keeping tabs on drivers on the road.

The Memorandum also identifies afterhours monitoring as a potential red flag when "employers continue to track employees' whereabouts and communications using employer-issued phones or wearable devices, or apps installed on workers' own devices." Social media monitoring also continues to present a concern this time in the context of pre-employment screening efforts, including "scrutinizing applicants' social media accounts" during the employment application process.

The Memo makes clear that the recommended framework by the General Counsel for protecting employees from employer's potential abuse of technology is to hold that an employer has presumptively violated the Act "where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the Act." To rebut this presumption, the employer would have to establish that the practices at issue are **narrowly tailored to address a legitimate business need** that cannot otherwise be met through means less damaging to employees' rights. In this proposed balancing test of the respective interests of the employer and the employees, the General Counsel recommends that "[i]f the employer's business need outweighs employees' Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the technologies," the Board should require the employer **to disclose to employees the technologies it uses to monitor and manage them**, its reasons for doing so, and how it is using the information it obtains. According to the General Counsel, this approach will provide employees with information they can use to "intelligently exercise their Section 7 rights and take appropriate measures to protect the confidentiality of their protected activity if they so choose." The General Counsel also recommends that the Board explore other safeguards and assurances to protect employees' right by discussing proposals to require employers to limit who may

access information obtained through electronic surveillance and algorithmic management, and to permit employees to respond before imposing discipline based on such information.

This Memorandum follows the NLRB's expansion of when an activity is "concerted" for Section 7 purposes. In March 2021, the Board issued Memorandum 21-03 stating that when a single employee speaks about certain social justice issues, the speech is "inherently concerted" (and protected) regardless of whether any of the traditional bases for concertedness are satisfied. So long as the speech is about a matter of "common concern in the workplace," Section 7 protections apply. In January 2022, in a brief filed in a pending Section 7 case, General Counsel urged the adoption of the new standard and if adopted, a mass of previously unprotected speech will fall within Section 7's ambit.

The combination of these two Memoranda and the NLRB General Counsel's intent to make sweeping changes in employee rights should give all employers cause for concern.

Key Take Aways for Employers: Given the proposed framework and guidance from the Office of General Counsel, employers should expect closer scrutiny of their electronic surveillance and automated management practices by the NLRB. To ensure compliance with the Act, it is important for employers to consider the following: (1) analyze electronic monitoring and automated management practices to determine if they inhibit employees' rights to engage in concerted activities; (2) if section 7 rights may be impacted by surveillance rules, ensure that employers have well documented legitimate business reasons for implementing the monitoring practices; (3) assuming such reasons exist, take steps to limit the scope of electronic surveillance to work hours and work areas only and analyze overall surveillance practices to ensure that they are narrowly tailored to business needs; (4) with regard to pre-employment screening, avoid social media monitoring; (5) beware of reliance on electronic and automated tools in discipline and discharge; and (6) as a general rule, promote transparency by disclosing any surveillance and productivity monitoring practices to employees, and limit those who have access to the data that is gathered through these practices.

Common Terms and Acronyms Used In Labor Law.[2]

Administrative Law Judge or ALJ	A civil service appointee of the National Labor Relations Board who conducts unfair labor practice hearings in the region where such cases originate.
Agency Shop	A union security clause whereby all members of a bargaining unit must pay a service fee, the equivalent of dues, whether or not they are union members.
Arbitration:	The referral of collective bargaining or grievance disputes to an impartial third party. Usually the arbitrator's decision is final and binding, although there is "advisory arbitration" in which the decision of the arbitrator is taken under advisement by the parties.
Award	The final decision of an arbitrator which is binding on both parties.
Bargaining Rights	The rights outlined in Section 7 of the National Labor Relations Act. Rights of workers to negotiate the terms and conditions of employment through chose representatives. The bargaining agent is designated by a majority of the workers in a bargaining unit to represent the group in collective bargaining.
Bargaining Unit	A group of workers who bargain collectively with the employer. The unit may include all the workers in a single location or in a number of locations, or it may include only the workers in a single craft or department. Final unit is determined by the NLRB, or agreed to jointly by the union and the employer.
Boycott	The term originated in 1880 when an Irish landowner, Captain Charles Boycott, was denied all services. Today the expression means collective pressure on employers by refusal to buy their goods or services.
Cease and Desist Order	An order to stop an action, to not repeat the action, and to take action to undo the wrong. A cease and desist order issued by the NLRB is a final order in an unfair labor practice case. It requires the guilty party to stop any conduct found to be in violation of the law and to take positive action to remedy the situation.
Central Labor Council	A city or county federation of local unions which are affiliated with different national or international unions.
Certified Union	A union designated by federal or state labor relations boards as the exclusive bargaining agent of a group of workers.
Closed Shop	An agreement between an employer and a union that, as a condition of employment, all employees must belong to the union before being hired. The employer agrees to retain only those employees who belong to a union. The closed shop was declared illegal by the Taft-Hartley Act.
Consumer Picketing	Picketing of a retail establishment that is legal if directed toward getting consumers not to buy a particular product of a supplier or of a

[2] https://teamster.org/content/definitions-common-labor-terms#071 and
https://www.dol.gov/general/aboutdol/history/glossary
https://en.wikipedia.org/wiki/Right-to-work_law
https://en.wikipedia.org/wiki/Garrity_warning

	producer with whom a labor dispute exists. Such picketing is illegal if it is aimed at getting customers to stop shopping at the store or at other parties, such as store employees or delivery to prevent personnel from crossing the picket line.
Duty of Fair Representation (DFR)	A union's obligation to represent all people in the bargaining unit as fairly and equally as possible.
Employee Retirement Income Security Act (Erisa)	This law requires that persons engaged in the administration and management of private pensions act with the care, skill, prudence, and diligence that a prudent person familiar with such matters would use. The law also sets up an insurance program under the Pension Benefit Guarantee Corporation (PBGC) which guarantees some pension benefits even if a plan becomes bankrupt.
Escalator Clause	A clause in the union contract which provides for a cost-of-living increase in wages by relating wages to changes in consumer prices. Usually the Consumer Price Index is used as the measure of price changes.
Exempt Employee	An employee who is not covered by the Fair Labor Standards Act and is therefore not eligible for time-and-one-half monetary payments for overtime. Exempt employees are generally paid a salary rather than an hourly rate.
Fact Finding	Investigation of labor-management disputes by a board, panel, or individual. A report is issued by the panel describing the issue in dispute, and may make recommendations for a solution.
Fair Labor Standards Act	Passed in 1938, this law set minimum wages and overtime rates and prohibited child labor for industry connected with interstate commerce.
Family And Medical Leave Act (FMLA)	Federal law establishing a basic floor of 12 weeks of unpaid family and medical leave in any 12-month period to deal with birth or adoption of a child, to care for an immediate family member with a "serious health condition", or to receive care when the employee is unable to work because of his or her own "serious health condition."
Federal Mediation and Conciliation Service (FMCS)	Independent agency created by the Taft-Hartley Act in 1947 to mediate labor disputes which substantially affect interstate commerce.
Garrity Warning	Advisement of rights usually administered by state or local investigators to their employees who may be the subject of an internal investigation. The Garrity warning advises subjects of their criminal and administrative liability for any statements they may make, but also advises subjects of their right to remain silent on any issues that tend to implicate them in a crime.
Good Faith Bargaining	Negotiations in which two parties meet and confer at reasonable times with open minds and the intention of reaching agreement over a new contract.
Grandfather Clause	A contract provision specifying that employees on the payroll before a specified time will retain certain rights and benefits even though newer employees are not entitled to these rights.
Grievance	Any type of worker dissatisfaction including violations of the collective bargaining agreement, violations of law, violations of employer policies, violations of fair treatment, and violations of past

	practices. The definition of a grievance is usually part of the contract, and therefore may vary from one contract to another. Grievance Procedure: A procedure usually established by a collective bargaining agreement to resolve disputes, problems or misunderstandings associated with the interpretation or application of the collective bargaining agreement. It consists of several steps with the last step of the procedure, usually being arbitration.
Hot Cargo Clauses	Clauses in union contracts permitting employees to refuse to handle or work on goods shipped from a struck plant or to perform services benefiting an employer listed on a union unfair list. Most hot cargo clauses were made illegal by the Taft-Hartley Act, but there are some exceptions.
Illegal Strike	A strike that is called in violation of the law, such as a strike that ignores "cooling off" restrictions, or a strike that disregards a "no strike" agreement signed by the Union or imposed by a court of law.
Illegal Subjects of Bargaining	An illegal subject of bargaining is one where, even if it is included in a collective bargaining agreement, it is unenforceable. For example, clauses requiring a closed shop, union-shop clauses in right-to-work states, hot cargo agreements, and anything that violates any state or federal employment law.
Impasse	In general usage, a term referring to a situation where two parties cannot agree on a solution to a dispute. In legal usage, if impasse is reached, the employer is legally permitted to unilaterally impose its latest offer.
Informational Picketing	Picketing done with the express intent not to cause a work stoppage, but to publicize either the existence of a labor dispute or information concerning the dispute. Picketing done with the express intent not to cause a work stoppage but to publicize either the existence of a labor dispute or information concerning the dispute.
Injunction	A court order which either imposes restraints upon action, or directs that a specific action be taken and which is, in either case, backed by the courts power to hold disobedient parties in contempt.
Just Cause	A reason an employer must give for any disciplinary action it takes against an employee. An employer must show just cause only if a contract requires it. Most contracts have just cause requirements which place the burden of proof for just cause on the employer.
National Labor Relations Board (NLRB)	Agency created by the National Labor Relations Act, 1935, and continued through subsequent amendment, whose functions are to define the appropriate bargaining units, to hold elections, to determine whether a majority of workers want to be represented by a specific union or no union, to certify unions to represent employees, to interpret and apply the Act's provisions prohibiting certain employer and union unfair practices, and otherwise to administer the provisions of the Act.
National Labor Relations Act Of 1935 (NLRA)	Federal law guaranteeing workers the right to participate in unions without management reprisals. It was modified in 1947 with the passage of the Taft-Hartley Act, and modified again in 1959 by the passage of the Landrum-Griffin Act.

	The National Labor Relations Act, generally known as the Wagner Act, was passed in 1935 as part of President Franklin D. Roosevelt's "Second New Deal." Among other things, the Act provided that a company could lawfully agree to be any of the following: A closed shop, in which employees must be members of the union as a condition of employment. Under a closed shop, an employee who ceased being a member of the union for whatever reason, from failure to pay dues to expulsion from the union as an internal disciplinary punishment, was required to be fired even if the employee did not violate any of the employer's rules. A union shop, which allows for hiring non-union employees, provided that the employees then join the union within a certain period. An agency shop, in which employees must pay the equivalent of the cost of union representation, but need not formally join the union. An open shop, in which an employee cannot be compelled to join or pay the equivalent of dues to a union, nor can the employee be fired if he or she joins the union.[9] The Act tasked the National Labor Relations Board, which had existed since 1933, with overseeing these rules.
Open Shop	Where employees do not have to belong to the union or pay dues to secure or retain employment in a company, even though there may be a collective bargaining agreement. The Union is obligated by law to represent members and non-members equally regardless of whether it is an open shop or a union shop.
Past Practice or Binding Past Practice	A customary way of doing things not written into the collective bargaining agreement. Past practices can sometimes be enforced through the grievance procedure if the practice has been longstanding, consistent, and accepted by the parties.
Picketing	The stationing of persons outside a place of employment to publically protest the employer and to discourage entry of nonstriking workers or customers. Most picketing takes place during strikes although there is also informational picketing conducted against nonunion business establishments.
Prevailing Wage	Generally the wage prevailing in a locality for a certain type of work. It is a wage determinant for many federal construction projects. (Prevailing wage does not necessarily refer to union wages.)
Railway Labor Act Of 1926 (RLA)	This law regulates labor relations in the railway and airlines industries, guaranteeing workers in these industries the right to form a union and bargain collectively. The RLA severely controls the timing and right to strike. Also, bargaining units under the RLA are usually nation-wide, making it more difficult for workers to form a union.
Reopener Clause	Clause in a collective bargaining agreement providing for reopening negotiations on wage rates, etc., during the term of the agreement.
Right-To-Work States	States which have passed laws prohibiting unions from negotiating union shop clauses in their contracts with employers covered by the NLRA. In 1997 there are 21 "right-to-work" states. Unions often refer to these as "right to work for less" states. Right to work states include North Dakota (adopted 1947), South Dakota (adopted 1946), and Wyoming (adopted 1963), but not Montana.

Sabotage	From the French word "sabot" or wooden shoe which workers threw into the machines to keep them from working. Workers have been perpetually fearful that new machines would take their jobs away from them and sabotage was one of their early answers to the Industrial Revolution. It was also a part of strike violence where strikers incapacitated machines or buildings in order to shut down production.
Seniority	A worker's length of service with an employer. In union contracts, seniority often determines layoffs from work and recalls back to work.
Strike	A temporary work stoppage by workers to support their demands on an employer. Also called a "turn out" early in the nineteenth century.
Subject Of Bargaining, Mandatory	Those items included under wages, hours, and other terms and conditions of employment over which an employer must bargain. An employer may not make a change in a mandatory bargaining subject without providing prior notice to the union and an opportunity to bargain.
Subject Of Bargaining, Voluntary	Subjects of bargaining other than those considered to be mandatory (see mandatory subject of bargaining). Either party may propose discussion of such a subject, and the other party may voluntarily bargain on it. Neither party may insist to the point of impasse on the inclusion of a voluntary subject in a contract. For example, the employer may not legally insist on bargaining over the method of selecting stewards or the method of taking a strike vote.
Surface Bargaining	Often referred to as a perfunctory tactic whereby an employer meets with the union, but only goes through the motions of bargaining. Such conduct on the part of the employer is considered as violation of the employer's duty to bargain, Section 8(a)(5) of the NLRA.
Taft-Hartley Act or Labor Management Act (LMRA) Of 1947	An amendment of the NLRA which added provisions allowing unions to be prosecuted, enjoined, and sued for a variety of activities, including mass picketing and secondary boycotts. In 1947 Congress passed the Labor Management Relations Act of 1947, generally known as the Taft–Hartley Act, over President Harry S. Truman's veto. This law repealed some parts of the Wagner Act, including outlawing the closed shop. Section 14(b) of the Taft-Hartley Act also authorizes individual states (but not local governments, such as cities or counties) to outlaw the union shop and agency shop for employees working in their jurisdictions. Any state law that outlaws such arrangements is known as a "right-to-work law." In 1947, Congress passed the Taft-Hartley Act which outlawed the closed shop, jurisdictional strikes, and secondary boycotts. It set up machinery for decertifying unions and allowed the states to pass more stringent legislation against unions such as right-to-work laws. Employers and unions were forbidden to contribute funds out of their treasuries to candidates for federal office, supervision was denied union protection, and the unions seeking the services of the National Labor Relations Board had to file their constitutions, by-laws, and financial statements with the U.S. Department of Labor. Their officers also had to sign a non-communist affidavit.

Unfair Labor Practices	Those employer or union activities classified as "unfair" by federal or state labor relations acts. Under the NLRA, employer unfair labor practices include employer threats against protected collective activity, employer domination of unions, discrimination against employees for collective activity, and employer failure to bargain in good faith with union representatives. Union unfair labor practices include failure to represent all members of the bargaining unit and failure to bargain in good faith, secondary boycotts. The RLA and many state public sector labor laws contain definitions of unfair labor practices which are similar to the NLRA definitions.
Unilateral Change	Any change an employer makes without the union's consent. The subject of unilateral change is ever changing due to Board and Court Rulings. However, unilateral change falls into 3 categories; unilateral change before a first time contract, during bargaining, and during the contract's terms. The Board recognizes that an employer must bargain all changes in regards to hours of work, rate of pay, and other conditions of employment with the employee's bargaining representatives. Generally, these changes must be bargained to impasse before a change is implemented.
Union Shop	Form of union security provided in the collective bargaining agreement which requires employees to belong to or pay dues to the union as a condition of retaining employment. It is illegal to have a closed shop which requires workers to be union members before they are hired. The union shop is legal, except in so-called right-to-work states, because it requires workers to join the union or pay dues within a certain time period after they are hired.
Weingarten Rights	The rights of employees covered by the NLRA to request union representation during investigatory interviews if they reasonably believe that the interview could result in their being disciplined. Weingarten rights also guarantee the rights of union representatives to assist and counsel employees during interviews which could lead to discipline.
Zipper Clause	A standard contract clause which precludes any renegotiation of conditions covered in the contract during the life of the contract. It is designed to prevent the employer from trying to change the contract before the next round of bargaining.