MCAA
Mechanical Contractors Association of America

IceMiller
LEGAL COUNSEL

2025 COLLECTIVE BARGAINING GUIDE AND LEGAL ANALYSIS

MSCA Mechanical Service Contractors of America
PCA Plumbing Contractors of America
NCPWB National Certified Pipe Welding Bureau
MANUFACTURER / SUPPLIER COUNCIL MCAA Adding Value to Your Supply Chain
JRGF John R. Gentille Foundation

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Introduction

By Ryan Poor, Ice Miller, LLP and John McNerney, MCAA General Counsel

This 2025 Edition of the MCAA/Ice Miller Collective Bargaining Guide updates the original Ice Miller/MCAA Guide that has accompanied the joint collective bargaining seminars since 1998, with biennial updates tied to the presentation of those seminars.

Much of the issue coverage and scope of discussion in this Guide owe a debt to MCAA's former outside labor counsel, Michael H. Boldt of Ice Miller (now retired) and his partners, Ryan Poor and Emmanuel (Manolis) Boulukos, and other labor and employment lawyers on Ice Miller's national roster. MCAA staff also contributed their insights in preparing each biennial seminar. In that regard, John McNerney has been a significant contributor – as collaborator and guide – both to those seminars and to this Guide's most recent updates, providing keen insights and a wealth of industry knowledge.

The topic coverage and scope of discussion in this edition of the Guide is measured and limited, aimed to address the basic needs of busy MCAA contractors and their local association staff. It provides a concise explanation and analysis of the basic elements of the most important legal issues in collective bargaining activities. This Guide does not provide a comprehensive, broad scope, legal issue analysis – and intentionally avoids comprehensive and extended legal analyses more appropriate for law treatises. The primary aim here is to provide concise coverage of essential legal issues that management representatives will need in their collective bargaining activities.

As in all areas of federal, state and local laws and regulations, the pace and scope of changes to applicable laws, rules, regulations. guidance, and judicial precedent and oversight is burgeoning in labor and employment law.

Every two or four years, the regulatory churn that may affect, upend, overturn, retract, or restore various rules, regulations and governing decisions is nearly overwhelming. No one static publication can cover all permutations of labor and employment rules across the country at all government levels at any one time. Certainly, this Guide has no such pretension.

Instead, it is a basic, plain English text covering some fundamentals, designed to help the busy management representatives engaged in multiemployer collective bargaining to begin to command the elements of the process they need to pursue successful collective bargaining negotiations. Success is defined as competitive collective bargaining agreements that ensure industry market competitiveness and successful employer project performance over time, while at the same time maintaining informed, effective, and collaborative labor/management relations for the long term.

We should note that some topics and coverage in this edition is based on questions and comments from local MCAA affiliates and questions derived from their specific bargaining experiences. The editors solicit and are eager to receive specific input from local MCAA contractors and local affiliate staff pertaining to the scope and coverage of this publication going forward.

So, with that limited scope, this edition is the initial presentation of the Guide as an "e-book." We plan to use this format to ensure more timely editing and revisions as compared with a printed edition and to improve the quality of the presentation over time.

Below, as a tribute to Michael H. Boldt's initial work in the development of the Guide, is Mike's Preamble to the First Edition of the Guide.

Preamble to the First Edition of the Guide

by Michael H. Boldt, Ice Miller LLP

If you are reading these materials, you are probably anticipating or preparing for, or are in the middle of, collective bargaining negotiations. You might be critiquing your past collective bargaining negotiations or preparing to assess the bargaining approaches of others in your organization. You may be a first-time participant wanting to know what to expect, an experienced business person who has recently entered into a bargaining relationship, or a seasoned veteran of the collective bargaining process looking for fresh ideas on approaching bargaining in the future. Whichever describes you, you are reading these materials because you have a desire to learn about the process of collective bargaining negotiations. With that in mind, this guide and legal analysis will cover both practical aspects of the negotiation process and the legal framework for bargaining. While this book refers to and discusses several statutes and National Labor Relations Board and court cases, the book is intended for a non-lawyer audience, so citations to statutes and the full legal citations to the cases are not included; lawyers who review the book should have no difficulty finding the cases from the basic citation information that is included. Much of the substance of these materials can be applied to collective bargaining negotiations generally. Some of the principles will be specific to the construction industry. Whatever your reason for reading these materials, it is our goal that you gain substantive knowledge that will improve your understanding of the bargaining process to assist you in preparing properly for negotiations and to make your bargaining experience more successful.

Part 1:
PREPARING AND ORGANIZING FOR NEGOTIATIONS

1.1 NEGOTIATION: WHAT IS IT?

Everyone negotiates, practically all the time. We negotiate consciously and subconsciously. Obvious (conscious) negotiations include business deals (such as buying or selling a business, purchasing materials, purchasing insurance, purchasing automobiles), negotiating legal disputes, and collective bargaining. Non-obvious (subconscious) negotiations include family matters (such as where to go to dinner, where to go on vacation, when your kids will do their homework) and negotiations with colleagues at work (such as who will take a particular assignment).

The same basic principles are involved in *all* of these negotiations. Tactics will vary from situation to situation. Ultimately, however, you seek to achieve a goal through negotiations. To succeed, you need to have a plan.

There are only three basic ways to get others to agree with you:

you can ***convince*** them to agree;

you can ***buy*** their agreement; or,

you can ***force*** them to agree.

In this section, this book discusses how to negotiate. What are the basic principles? What do you need to negotiate successfully? We discuss negotiations in general first and then deal with special considerations regarding collective bargaining.

1.2 GETTING A NEGOTIATION PARTNER/ADVERSARY

It seems obvious but remember it "takes two to tango." In order to negotiate, there must be someone to negotiate with. Sometimes you pick your adversary, sometimes you do not. What unfolds in negotiations is often affected by this basic difference.

1.2.1 "YOU PICK" SITUATIONS

Many times, the "you pick your adversary" situations are also obvious – buying a car, buying a house, buying insurance. Even if you face a situation in which you need a car, a house, or insurance, you still choose a car dealer or seller, a real estate agent or homeowner, or an insurance agent to deal with.

1.2.2 "YOU DON'T PICK" SITUATIONS

Some of the "you don't pick your adversary" situations are also obvious – settling an auto accident claim or negotiating about a raise with your boss. One not so obvious situation in which you do not pick your adversary is when negotiating a collective bargaining agreement. In the construction industry, while you may have selected which *unions* you will deal with, you do not pick the unions' negotiators and – in this context – it is actually *unlawful* for the parties to engage in coercion over the selection of bargaining representatives.

1.3 DEFINE GOALS AND ALTERNATIVES

Before you begin negotiating, you need to know what you want – your ultimate objective. Superficially, what you want again seems obvious – if you are negotiating with an owner, you want to be selected to be the contractor; if you are negotiating with a union, you want a new collective bargaining agreement; if you are negotiating with a supplier, you want a reasonable price and reliable delivery.

However, to negotiate effectively, having goals is not enough. You need to define specific alternatives – *in advance of negotiating* – so that you know what you will do if you do not get exactly what you want.

Why is it important to define your alternatives *in advance* of actually negotiating? After all, if you do not get exactly what you want, you can just re-calibrate and "see what you can get" – correct?

That is true in a sense, but knowing in advance is a question of peace of mind, and even more importantly a question of *leverage*.

There is a general term, or acronym, used to describe the analysis of what you will do if you do not get exactly what you want. The first time we saw the term, it was in the book *Getting to Yes* by Fisher and Ury of the Harvard Negotiation Project. It is B-A-T-N-A. What does that stand for?

It is an acronym for:

Best
Alternative
To a
Negotiated
Agreement

You need to know your BATNA to decide how you are going to approach negotiations. You need to know how hard a stance to take in support of your position. It, more than anything else, tells you how aggressive you can be in going after your ultimate goal, i.e., how much leverage do you have? If your **BATNA** is ***acceptable***, you can afford to be firm in pursuing your objective. If your **BATNA** is ***unacceptable***, you may need to get creative and explore other alternatives, tactics, or trade-offs.

The following examples illustrate the importance of this point.

1.3.1 SITUATION 1 – NEGOTIATING WITH A SUPPLIER

Your ultimate goal in this case is to purchase supplies from a reliable supplier at a good price. What do you need to consider to develop your BATNA?

Obviously, the principal question to address is whether there are alternate reliable suppliers in the area. If you have the option of more than one supplier to deal with, *you* have leverage in dealing with any particular supplier. Conversely, if there is no other "game in town," you have little or no leverage and must figure out how to conjure some leverage or be faced with a "take it or leave it" offer from the one available supplier.

1.3.2 SITUATION 2 – BUYING A CAR

The first question is to be honest with yourself: do you need a car or simply want one?

If you simply want one, your BATNA is no new car, and you have leverage, at least if you are disciplined enough that you won't buy one if you don't get the deal you want. However, if you have no other means of getting around and you really need a car, the salesman has the leverage.

1.3.3 SITUATION 3 – COLLECTIVE BARGAINING AGREEMENT

As you approach negotiations, you know that your ultimate goal is to get a new agreement. If you do not reach agreement initially, consider what you and the union will do. Will the union strike? If so, can you "take" it?

If the union will likely strike and you are prepared, then you can be more resolute in your position and put the union in the position of having to strike if it does not agree with what you want – you have the leverage.

If the union will likely strike, but you are *not* in a position to weather a strike, then you need to find a way to reach an agreement. The union has the leverage, and you must plan in advance how to manage your and, more importantly the union's, expectations to see that you get an agreement on some terms even if they are not optimally what you want.

If the union is not likely to strike, and you know the union does not want to strike, you may have leverage even if you cannot take a strike because the union's need to avoid one (it's BATNA) may be even greater than your difficult position. How will you play that hand?

But remember, unlike other bargaining relationships in life, you will be at the table with the union again and how you handle those negotiations is important.

1.4 ANALYZE THE SITUATION

Analyze your BATNA in every situation.

If you know what you are going to do if you do not get everything you want – and you can live with it – RELAX! Because in that case, you:

Still have to negotiate in good faith

Still have to discuss

Still have to persuade

But YOU CAN'T LOSE

If you know what you must do if you do not get everything you want, and you cannot live with it, you have to make a deal at some price. At least knowing that in advance should promote more rational decision-making when having to settle for less than optimum choices.

PRACTICAL TIP:
Taking A Strike

For a multi-employer bargaining unit (MEBU), "taking a strike" means maintaining MEBU cohesion. Will the members of the MEBU allow their projects to sit idle long enough – and refuse to sign interim agreements – to send the message to the union that the strike will not cause the employers to change their position? Will the owners of ongoing projects support the strike, recognizing that the employers' goals are to keep labor costs, and thus the owners' costs, under control? Are projects governed by PLAs with no-strike clauses going to undermine the effectiveness of "taking the strike"? These are among the factors that must be considered when evaluating whether the MEBU can "take a strike." Also, MEBU members should consider the applicability, scope, and effect of project, prime contract, general conditions, and/or subcontract terms in evaluating the full cost of work stoppages. Pay careful attention to contract document provisions addressing suspension of work, requirements to man jobs, and the effect of clauses on termination for cause or convenience, and even *force majeure* clauses either including or excluding strikes and work stoppages in elements of time or cost adjustments stemming from project delays due to labor issues on the project.

1.5 EXERCISING LEVERAGE

Assume you have leverage. Should you exercise it? The answer is different in different contexts.

Consider the question of leverage in *non-business negotiations* such as a car purchase, a house purchase, or family matters. How does the answer whether to exercise all the leverage you have in a given situation vary among those three types of negotiation?

When buying a car, most people believe that if they have any leverage, they should exercise it. The assumption of that negotiation is that the dealership/salesperson will be exercising any leverage they have, and actually *expect* the customer to do the same. Additionally, it is a classic type of "you pick the adversary" negotiation discussed earlier. You know that you picked the dealership, and probably the salesperson at that dealership, and you never need to do business with that dealership or person again if you choose not to, so there is little downside to exercising all the leverage you have.

When buying a house, it is similar, but not the same. Certainly, "you pick the adversary" within reason. Houses, especially older homes, are not as much of a fungible commodity as cars, and the universe of real estate agents and homeowners you may have to choose from is more limited. You may find yourself dealing with the same real estate agent again if he/she has another house listing that you are interested in at a later date. The homeowner may be offended by a too-aggressive stance on your part, and choose not to deal with you if you exercise leverage excessively.

Family matters are a very delicate issue for most people. After all, you *live with* your spouse and children. Exercising leverage as fully as you can is a very bad idea if you value your marriage and home life.

Are there different considerations of leverage in *commercial negotiations*? In construction, what factors do you need to consider in connection with negotiating with owners, suppliers and unions? Are they different from one another?

Owners vary in sophistication, and in the extent of their participation in the construction marketplace. Some owners may be experienced developers of commercial properties whose skills and approach may be much the same as the car salesperson – professional, expecting in a non-bidding situation that you will exercise all the leverage you have, and prepared to do the same in return. Others may be building a commercial building as a once-in-a-career project for a corporate headquarters or the like, and may be offended by heavy-handed tactics just as a homeowner would; to some extent this may go to how much leverage you have as opposed to how aggressively you should exercise it, but you had better be thoughtful about it.

Suppliers are similar to the car salespeople, except for the fact that you are almost certain to need to deal with them again in the future on projects when you do not have all the leverage. The question here is whether you negotiate a really hard bargain this time, or take a less aggressive stance, letting the supplier know it, so that you may establish a favorable relationship for the future.

Unions, as is discussed in the next section of this book, occupy a different place in the negotiating universe than all of the negotiating adversaries referred to previously. They are the ultimate "you don't pick" adversary with whom, in many instances, you have a legal duty to negotiate, and with whom you are virtually guaranteed to negotiate on many future occasions and under many different economic conditions. Each time you negotiate with a union, you know that you are creating part of a negotiating history and a relationship that you will live with – good or bad.

1.6 CONCLUSION ON NEGOTIATIONS GENERALLY

Many times, the thought processes described above are subconscious, and some of you may have been doing a great job instinctively for a long time. However, you will inevitably be a better negotiator if you make an effort to approach it consciously and analyze your BATNA and your leverage in every negotiation and as to each individual goal, not just the end game. All of that could and should be employed in all negotiating.

1.7 NEGOTIATION AND COLLECTIVE BARGAINING

1.7.1 NATURE OF COLLECTIVE BARGAINING

Collective bargaining in the United States is an oddity, because it is seemingly contrary to the American ideals of capitalism and the free-market economy. In fact, collective bargaining is a *permitted* type of restraint of trade and price fixing; the employees, through their union, are allowed to threaten collectively to withhold, and actually withhold, their "product" – labor – to coerce a business or a collection of businesses into agreeing to their demands. Once their demands have been negotiated and reduced to writing, the result is an agreement that fixes the price of the "product" for a fixed term in a fixed area, and may restrain individuals who are covered by the agreement from selling their labor at any greater or lesser price to that business or group of businesses. In almost any other context in this country, such agreements to restrain trade and fix prices are violations of civil laws – antitrust laws – punishable by triple damages. Sometimes violations result in criminal penalties as well.

Construction collective bargaining is allowed some type of limited antitrust exemptions – but not all bargaining approaches and proposals enjoy such exemptions. See the caution statement below.

Collective bargaining is the equivalent of drafting a private system of laws – creating legislation to govern the relationship between a group of employees and their employer or employers, usually over a period of years. To engage in collective bargaining effectively, you must realize that it is an exercise in which "fairness" and "equity" are not necessarily the basis on which a bargain is struck, or even the measure of a good bargain. While we recommend that a sense of fair play be employed so that a generally equitable bargain is struck, the ultimate test of collective bargaining negotiations is not fairness, but "acceptability" – that is, when one side's position is *acceptable* (which may or may not also be fair or equitable) to the other side, there will be a contract, and not before.

CAUTION:
Collective Bargaining Is Subject To Some Antitrust Rules

Antitrust is still a relevant topic for collective bargaining. In one well publicized case, the National Electrical Contractors Association, Inc. (NECA) and the International Brotherhood of Electrical Workers (IBEW) were sued by the National Constructors Association (NCA) over an alleged price-fixing scheme involving a mandatory contribution for non-NECA members to an industry promotion fund. Under the terms of the NECA-IBEW national agreement, the industry fund contribution was required for "all construction agreements in the electrical industry" – meaning that the IBEW had to include the contribution in all of its agreements, even with non-NECA members. NCA alleged that it had enjoyed a competitive advantage prior to the institution of the mandatory contribution because its members neither paid the contribution nor dues to NECA. NCA argued that the industry fund contribution was an attempt by NECA to eliminate that competitive advantage, and that it constituted price-fixing in violation of the Sherman Act. The courts agreed, holding that the requirement to include the contribution in all IBEW contracts constituted price fixing, and they placed a permanent injunction on NECA and the IBEW, prohibiting them from entering into, maintaining or enforcing the contribution clause.

Accordingly, it is important to emphasize that price-fixing and antitrust issues are not limited to the boardrooms of corporate America, but also apply directly to bargaining in the construction industry. Any clauses affecting competitive advantages (which, as discussed above, could potentially include clauses requiring contributions to industry promotion funds, or, as discussed later in this publication, broad "most favored nation" clauses) should be discussed with legal counsel before they are agreed to or implemented so as to avoid the years of costly litigation that the parties in this case endured.

While the NECA/NCA litigation happened some time ago now (in the 1980s) – the matter of antitrust sensitivity and compliance within the MEBU and among the MEBU member companies ***remains a very real concern across a number of issues and areas of operation of the MEBU*** in actual bargaining and in relation to other MEBU member competitors (for example job targeting program operations, the scope of non-compete agreements, trust fund operations and information, and other and other more current examples) not just the applicability of the CBA's most-favored-nation clause design and operation. MEBU members and associated local affiliates should ensure that their experienced local labor counsel is up to speed on the latest developments with respect to federal and state antitrust enforcement relating to MEBU issues and operations and the current contours of the limited statutory and non-statutory antitrust exemptions for local collective bargaining.

1.7.2 GENERAL RULES/CONCEPTS

We are going to devote the initial portion of these materials to the preparation necessary for successful bargaining, starting with selection of a bargaining team and a chief spokesperson. First, however, some very general rules and concepts about the overall negotiation process are in order. These concepts will be helpful in understanding and applying the rest of the materials in this portion of the book.

First, good negotiators try to make bargaining a win/win situation. You have to live with the other side all through the term of the agreement you negotiate, so one goal should be to make it livable for both sides. Many inexperienced management negotiators often forget that (absent some change in circumstances) they will have to negotiate with the union again when the agreement expires. If you make the union a big loser this time around, you can bet it will be much harder to achieve your goals the next time around.

Second, stick to the issues that are on the table. Do not attack the other side or its negotiator personally. It hurts your credibility and may affect the relationship throughout the agreement if you stray from the central purpose of attaining a good agreement.

Third, keep an open mind. The union may propose alternative solutions for issues that will work just as well as your original idea. Keeping an open mind does not mean abandoning your objectives; it means simply remaining open to considering different ways of achieving those objectives.

Fourth, bargaining is about solving problems and dealing with issues, not securing specific positions or proposals. A proposal is just one possible solution to a problem – yet just one solution that someone has identified. Consider concentrating on the problem and leaving the drafting of language until after you and the union have agreed on the solution. When parties become fixated on proposed language, they can lose sight of the intention or reasoning behind that language, and that can inhibit solving the problem and reaching an agreement.

Fifth, listen to the other side's proposals. Do not cut the union off in mid-explanation. This goes along with the "open mind" principle. Even if you think the union's proposal will not solve the problem or issue (as you see it), you may be able to learn how the union is thinking, and redirect its proposal by using its own reasoning. The ability to be a good listener is a skill that all members of a bargaining team should possess.

Sixth, do not bargain with yourself. If you have made a proposal on an issue, don't make another move on it until the union has countered or otherwise responded. Why should you, in effect, counter your own proposal? It is natural to want to reach the end result as quickly as possible, and this drives some negotiators to anticipate the union's counter with a new proposal before a response has been received, but you should avoid this temptation.

Seventh, recognize that there is a psychological aspect to the process of proposals and counterproposals that *cannot* be excluded from bargaining or skipped over. Bargaining is a process, and it has to play out in its own time – even if it is not necessarily efficient. You may think you know where it will end up, but it has to get there *naturally*. Otherwise, you risk sending the wrong *signals* and getting a worse deal. You should address all proposals in the process, as you will never know what agreement you could have reached if you do not allow the process to work as it should.

Finally, try to avoid procedural impasses. It is almost impossible to reach an agreement if you get into a standoff, where each side thinks it is the other's turn to make a proposal or where neither side will make a move from its previous position. Whoever moves to break this impasse is perceived as losing face, and if neither side moves, the dispute cannot be resolved even if the parties are otherwise reasonably close to reaching an agreement. This can be avoided by making it clear at the outset what the pattern of proposals will be, and by addressing the procedural issue with regard to specific proposals if any questions do arise. You may also be able to "package" a group of proposals in order to move things forward.

PRACTICAL TIP:
Create Safeguards Against Bargaining Theatrics, Abusive Conduct

If the other side resorts to personal attacks, theatrical outbursts, or rude behavior, just adjourn until the next meeting date. Consider the practice followed by some MEBUs of walking out at the first instance of such conduct. This sends the message that you will listen when they behave, and not until then. It is always a good idea to set the next meeting arrangements at the beginning of any negotiating season. That way, if a walk-out is necessary, it does not create a procedural impasse regarding the next meeting. Also, as stated below, choosing a neutral location for the negotiation sessions makes walking out easier for both parties – and so allows constructive use of that reaction to negative bargaining approaches.

1.8 SELECTION OF THE NEGOTIATING TEAM

Collective bargaining negotiations rarely take place between two individuals. Each side usually selects a team

of representatives to negotiate on its behalf. There are at least three different roles that must be filled in the negotiating process: 1) chief negotiator/spokesperson; 2) fact person (knowledgeable about industry economics and players); and 3) note taker/scribe. Each of these roles serves a specific purpose at the bargaining table. Accordingly, each role should be filled by a person specifically and well-qualified for that role. One person may make an excellent spokesperson, but that same person may be ill-equipped to respond to requests for information about the industry and will not have time to take detailed notes of the proceedings. Another person may possess a deep understanding of the industry and the employer group but may lack the experience and patience to be the spokesperson or the organizational skills to be the recordkeeper. The recordkeeper should have sufficient knowledge and background in the industry to discern the significant elements of the discussion. It is therefore essential to take some time to think about who should be participating at the negotiating table and what their specific roles will be.

1.8.1 NEGOTIATOR'S ROLE AND CHARACTERISTICS

The chief negotiator/spokesperson is the most significant position on the team and sometimes the most difficult position to fill. The chief negotiator should be someone with experience in negotiating collective bargaining agreements, preferably someone at least as experienced as the union's chief negotiator. He or she must possess good negotiating instincts – which are as much art as science – such as the ability to read other people and anticipate their actions. It is also necessary for the spokesperson to have a general knowledge of the operations of the industry and its economics, and he or she should be at least somewhat familiar with the law of collective bargaining, so as to avoid inadvertent unfair labor practices or unintentionally obligating the employers to provide financial or other private information. So, it is advantageous if the spokesperson is an articulate speaker and is good at drafting and revising written proposals precisely.

In addition to these qualifications, there are several personal characteristics that make a good chief negotiator, such as ***patience*** (it is said that true genius is nothing but a greater capacity for patience); ***humor*** (to relieve tension and create rapport); equanimity ***or a thick skin*** ("he who is slow to anger appeaseth strife"); ***integrity*** (personal integrity adds institutional credibility, which is a fundamental element of a successful negotiation); and ***credibility, most importantly.*** *It is essential that the chief negotiator is respected* – by both the management group and the union. He or she must either have that respect already or be someone you know can attain it quickly.

Selecting the negotiator. It is generally advisable to avoid selecting your organization's ultimate authority figure (CEO/decision maker/chairman of the Labor Relations Committee) for the chief negotiator position. Although you might think it makes logical sense to have the person with ultimate authority sitting at the table to make decisions, it does not make sense from a negotiating standpoint because it greatly reduces your bargaining options. If a party needs to discuss an issue with a higher authority before reaching a decision, that party can avoid being forced to give an on-the-spot response. The need to get approval provides a buffer between the parties at the table (which helps to retain credibility and rapport – "it's not me that disagrees with you" – and ensures that you will have time to discuss and consider the union's proposals and your answers before responding. It is important to reserve the same right of ratification as the union has (this is not *automatic*; you must reserve it specifically) in order to maintain an appropriate balance of decision-making leverage. This is not possible if the ultimate authority figure is sitting at the table.

Consistent with avoiding having the ultimate authority figure at the table, the limits on the authority of the chief negotiator should be clearly spelled out in advance of the negotiation and not left to assumption by the other team members or the multiemployer group. (See sample notice below.) These limits must be made clear to the negotiator, to the rest of the team, and to the union at the appropriate time.

CAUTION:
The Bargaining Team Must Have Some Authority to Reach Agreement

Notwithstanding our comments here about leverage and tactics, it is absolutely critical, in a legal sense, that the persons at the bargaining table have the authority to agree on matters at some level without consulting a higher authority. For example, the bargaining team must be able to make a proposal on the subject and reach tentative agreement on it if the proposal is accepted by the union. Otherwise, the employer side may be found not to be bargaining in good faith.

The MEBU should advise the union of the scope and limits of its bargaining authority in the terms of bargaining ground rules with a statement that satisfies the duty to bargain in good faith while at the same time reserving ultimate authority in the MEBU's bargaining committee or board, as appropriate for the group.

Following is a sample draft notice for that purpose that might be considered – however, engagement of competent local labor counsel is advised for these types of compliance issues and notifications.

> "The MEBU bargaining committee engaged in negotiations with the UA LU#____ hereby expressly advises the union negotiating committee that the local MEBU bargaining committee is fully authorized by its governing board/authority to enter into negotiations, receive, evaluate and accept or reject any and all CBA [collective bargaining agreement] proposals initially in the process to eventually recommend acceptance of such tentative settlement to the ultimate authority for the MEBU bargaining committee which is the MEBU overall association bargaining committee or board as a whole."

1.8.2 ROLES OF OTHER TEAM MEMBERS

Selecting the chief negotiator first is also important because you should know who will fill that role before selecting the other members of the negotiating team. The other members of the team should have personalities that are compatible with, and knowledge that is complementary to, that of the chief negotiator.

The roles of the fact person (information provider) and the note taker/scribe (recorder/secretary) are relatively clear. The fact person will be called on as necessary during private discussions to develop your position and at the table to provide the information necessary to support your position. The person selected for this role should be someone with the requisite knowledge and the credibility to support his or her statements. He or she should also be articulate and able to convey the information in a way that the union representatives will understand. Obviously, the ability to analyze wage and benefit demands and alternatives and proposed language regarding other terms and conditions of employment objectively is key for this role. Objective analysis is essential to moving the process forward.

The recorder/secretary also should be selected carefully. While this role may seem menial and the position trivial, it is just as important as the other two; it is of ***critical*** importance. You may hope that no grievances or unfair labor practice charges will be filed during the term of the new agreement, but if they arise, negotiating history (notes and minutes) often can be very important to grievance resolution. Although the chief negotiator will likely take notes during the process, it is not reasonable or advisable to expect that the chief negotiator be relied on to perform the recording function and still carry on the task of leading the discussion. The recorder/secretary should therefore be someone capable of making a thorough and accurate record of the negotiations. His or her notes should record all proposals and all discussions that take place at the table, by date, time, and speaker, and they should contain enough detailed information so that when you look at the notes months and years later, it will be clear what was said and/or proposed.

In addition to the chief negotiator, fact person, and recorder/secretary, you will need labor relations staff to be

available during the negotiations – either at the table or away from it. The staff should be able to access information on very quick notice; assemble and organize it for use by the team; and know the objectives of the negotiation from the management perspective.

PRACTICAL TIP:
Choose Your Bargaining Team Carefully; Consider the Broad Range of Perspectives, and Be Aware that Neither Side Can Object to the Other Teams' Members

Traditionally, construction industry multiemployer bargaining teams have been comprised exclusively of company principals. In some cases, association executives serve on the committee, and in some few instances the association executive is the lead negotiator or even the sole negotiator. It is more common, however, for the company principals to lead and conduct the bargaining. It is rare for association attorneys or other professional negotiators to participate at the table. However, in recent years, and perhaps in response to the growing practice of selective union job actions against employers on the bargaining committee, local MEBUs are increasingly turning to the use of attorneys or paid professional collective bargaining representatives to conduct the negotiations. It is settled NLRB law that the composition of either side's bargaining group is not a mandatory subject of bargaining. Stated differently, the other side may not legitimately object to whomever the MEBU chooses to have conduct the bargaining; neither may the employer group object or seek to bargain about who represents the union at the table. An unfair labor practice charge may be necessary in extreme cases when a party refuses to meet because of who is on the other's bargaining team.

PRACTICAL TIP:
Electronic and Stenographic Recordings Are Permissible Only With Mutual Agreement

Despite the importance of good records and what transpires in negotiations, it is an unfair labor practice to record bargaining sessions electronically unless both parties agree. It is even questionable whether stenographic recordings made by a professional court reporter are permissible without mutual agreement in subsequent grievance or dispute resolution proceedings. Moreover, and on the potential downside, such verbatim recordings may be harmful to the bargaining process itself, if negotiators are aware that their every word will be recorded word-for-word. So that process could inhibit constructive discussion. On balance, then, it may well be the better practice to have someone knowledgeable enough about the industry and the issues designated to take detailed notes of salient points discussed. In sum, the past character and local bargaining history and experience should dictate the best choice in respect to documenting the discussions in some form or other.

1.8.3 FUTURE NEGOTIATIONS/SUCCESSION PLANNING

In selecting the team, also keep in mind the importance of experience and the need to train future negotiators. ***When you negotiate, you will need experienced negotiators, because the union certainly has them***. There are undoubtedly some experienced negotiators in your organization, but those experienced negotiators no doubt do not want to, and cannot, negotiate your agreements forever. When they step out of the picture, you do not want to send someone to take their place who has not seen or participated in a number of sessions from the planning stage through the negotiation and administration stages. Succession planning is crucial for bargaining teams in multiemployer construction bargaining.

Succession planning requires devotion of important human resources to the process. We have often heard construction employers complain, “I’m not in business to negotiate contracts; I’m in business to build buildings.” ***This can be a dangerously short-sighted view if you are a union contractor and want to stay in business as one – it is important for your future leaders to know how to negotiate.*** As you compile your list of team members, remember that you need to include “up and comers” from influential members of the multiemployer group – people who will be, or already are, valuable to their employers in other capacities. Their employers should let them know that collective bargaining negotiations are important and that their performance on the negotiating team will count in their evaluation as potential long-term employees and leaders of their companies and the association.

1.8.4 SELECTING AND USING LEGAL COUNSEL

You also need to consider the need for and use of legal counsel in your collective bargaining negotiations.

The law of collective bargaining is constantly changing, and other applicable employment, wage and hour, procurement, antitrust, licensing and myriad other federal, state and local laws and regulations are constantly in flux. As we related in the introduction, the regulatory churn among settled and not-so-settled precedents and rules represents a tangle of policy volatility. For example, NLRB rules on union recognition come and go, up or down, depending on the political make-up of the Board, Title VII anti-bias and affirmative action requirements are the frequent subject of legal challenges and executive actions, and OSHA also often finds itself challenged in court. Procurement rules affecting labor policies are continuing political footballs – punted over and back across the midfield line for decades now. ERISA rules and Taft-Hartley plan operations, rules and regulations, with administrative guidance thrown in, also deeply implicate the roles that collective bargainers and management trustees have to play in the employee benefits arena. And, ever more prominently, state and local jurisdictions take ever-wider excursions into the field of workplace law and regulation to address various local concerns – all of which bargainers must be aware of as to impacts on their CBAs and the trust funds they establish.

All of this to state the obvious. We recommend, and the vast majority of MCAA local affiliates respect the necessity of retaining competent local labor and employment law counsel as a necessary part of successful labor contract negotiations and subsequent contract administration. In this day and age, even a very good and competent hometown general practitioner of the law cannot meet the welter of labor and employment law coverage that the industry is facing.

Also, in this vein, lawyers also are usually good wordsmiths. They are practiced in the art of drafting legally binding documents (which includes collective bargaining agreements) concisely and clearly. Anyone who has ever operated a business under or litigated about a poorly drafted agreement can attest to the importance of careful drafting. The bottom line is that it is important to retain competent counsel and use them in the collective bargaining process – either at the table or away from it. Again here – bargaining experience is crucial in our view. Remember, the union is in the business of labor contract negotiations – and most surely every local has competent specialized legal counsel backing them on every issue along the way. Management has to keep up to gain and maintain competitive agreements, gain market share, and build collaborative labor relations over the long term – immediate overarching gains or exploitative bargaining can be counterproductive – as has been learned many times in the past when market share was diminished with non-competitive settlements.

There are some important inter-personal qualities required for successful representation in addition to drafting skills to consider in selecting legal counsel. First, make sure that counsel is a problem-solver and not a problem-creator; that is, a lawyer who is committed to helping clients solve problems rather than raising complications. Second, select a lawyer who is experienced with labor relations issues. A lawyer who devotes significant time to labor law will be a much greater asset than a general practitioner. Finally, choose a lawyer or a law firm with a good reputation in the legal community and the labor industry – and breadth of expertise across labor, employment, and employee benefits law disciplines. A strong reputation can go a long way with a union before the parties even sit down at the table.

1.9 SELECTING A MEETING PLACE

Spend some time thinking about the time and place for meetings. The location of the meeting place can be particularly important. Although it may seem like a good idea to conduct negotiations on your own turf, we recommend that you always negotiate in a place that you can walk away from, if necessary. The ability to walk away from the table if offensive proposals are presented, or if the other side becomes insulting or uncivil, can create leverage – leverage that you will not have if you hold the meeting in your own offices. In selecting an appropriate space, you should plan on having two or three rooms available for caucuses/mediation. The location for the meetings should also be easy to get to, so you do not spend too much of your time traveling and so that you do not have to wait too long to have information or documents delivered to you from your association office. You should discuss with the union ahead of time who will be responsible for making the necessary arrangements and who will pay for meeting rooms.

PRACTICAL TIP:
Bargaining Meeting Expenses Are Not Reportable Expenses Under LM-10, LM-30 Reporting Requirements

If parties agree in advance to share bargaining meeting expenses, room rental, coffee and bagels, the Labor Department has taken the position that these are not the types of expenses that are reportable under the Landrum Griffin Act on either LM-10 or LM-30 forms.

1.10 TIMING OF MEETINGS

It is also helpful to decide ahead of time when you will meet and how long the meetings will last. Timing and duration can be important aspects of collective bargaining. You should plan on scheduling enough time to deal with all of the issues that might be presented, but you should not begin negotiations so far in advance that there is no pressure at all to come to an agreement. It is a natural "law" that the amount of work you have will expand or contract to fit the amount of time you have allotted for its completion. If you allow too much time, your negotiations will likely become bogged down on unimportant details. If you do not allow enough time, you may not have the opportunity to address all of the issues you need to resolve.

With regard to the duration of meetings, each of the negotiating sessions needs to be sufficiently long to be productive. Try to agree with the union in advance on the duration of meetings to avoid one side planning on a one-hour meeting while the other plans on staying all day. But also recognize that once you get into a meeting, circumstances may change, and schedules might have to be adjusted accordingly. As a general rule, try to avoid marathon sessions unless absolutely necessary. Marathon sessions inevitably reduce both sides' capacity for rational thought and careful consideration of proposals, and often turn negotiations into a "war of attrition."

Also put thought into scheduling time between meetings – allow enough time to review and compare proposals and to prepare responses. If you schedule your meetings too closely together, you increase the risk that you will make poor decisions. **The time between meetings is not negotiation "down time" – it is critical work time.**

1.11 ORGANIZING AND ANALYZING DATA

There are many acceptable systems for organizing relevant collective bargaining data and information. The one imperative is that you assemble the data in a *useful format*. Before negotiations, decide whether you are going to use: 1) a bargaining book, with separate sections for the current agreement, union proposals, management proposals, tentative agreements, area and industry wage and benefit information, and certain new laws; and/or

2) a laptop computer with word processing and spreadsheet software; or 3) some other method. Regardless of the method selected, the important concept is that the data is available at the bargaining table, and that someone is there who is responsible for its maintenance and manipulation. It is also extremely beneficial – even critical – to have someone on the bargaining team that is adept at using a spreadsheet or other tool to compute the total costs of various proposals and responses, including the effect of overtime and other factors so that you can determine, in real time, the potential costs of individual proposals and the cumulative effect on the total package. You do not want to get to the end of bargaining and realize you inadvertently misunderstood the financial impact of your agreement, creating practical and potential legal issues. Additionally, although assembling an old-fashioned "bargaining book" may seem anachronistic these days, the compilation and segregation of the data in this categorical scheme still adds some heuristic value (analytical perspective) by employing an organizing scheme in addition to the value of the access to all information over computer media and the Internet.

Having good information available to you is of little use if you do not have the tools to analyze it properly. You will certainly need a laptop computer on hand with Internet access. You may be able to find specific information that has already been analyzed and formatted. Information on UA/MCAA wage rates, benefits, and other general employment statistics are readily available from the MCAA, the Bureau of Labor Statistics (BLS) and other government agencies, as well as the Construction Labor Research Council (union rates), PAS, Inc. (non-union rates), the Institute for Construction Employment Research (specialized topic research), and other pay and benefits consultant services. BLS can be the source for pay and compensation data and provide consumer price increase (CPI) information and trends nationwide and in particular areas. BLS also publishes the employment cost index and construction material cost index – both of which may be pertinent in the negotiations. (See www.bls.gov). Similarly, the Labor Department's Office of Labor Management Standards (OLMS) public disclosure files can provide information on local unions' LM-2 financial data disclosures available to the public. And the Department of Labor's Wage and Hour Division provides access to Davis-Bacon wage rates by craft and locality nationwide, which may be useful in negotiations as well considering the competitiveness of the union rate on prevailing wage projects in the area. The Construction Labor Research Council (CLRC) can provide customized research combining trends on union wage and benefits rates, open shop rates, as well as CPI and ECI and construction material cost escalation trends in particular areas. (See www.clrcconsulting.org). Details on the local multiemployer pension plan can be accessed from the plan's 5500 Form on file with the Department of Labor's Employee Benefits Security Administration (EBSA).You should review these materials as a part of your pre-negotiation preparations and have them on hand to support your position at the table.

Before starting negotiations, you should determine who will be responsible for collecting and maintaining the information. It could be a bargaining team member or a staff person in your office. However, the information needs to be accessible to the bargaining team at all times – both for tactical reasons (credibility and the ability to react) and legal reasons (the authority to bargain and bargain in good faith).

1.12 DEVELOPING A STRATEGY

Developing a strategy requires a systematic focus on outlining your approach to bargaining and your end goals in the mechanical, piping, and service industries marketplace. Both of these items need to be addressed by your management team before bargaining begins.

1.12.1 DECIDING ON AN APPROACH

It is not necessary to know the extent of your authority or even the specific goals of the MEBU in order to develop the approach (or approaches) you will take to bargaining. However, developing an approach can be done more effectively if you have a general understanding of your bargaining goals. Will you be seeking to change the agreement dramatically? Maintain the status quo? Change a few items and allow the union to make some changes as well?

If you do not plan to change the agreement significantly, or at all, you may want to adopt a "reactive approach,"

where you will wait for union proposals throughout. If you plan numerous changes to the agreement, you may find that a "proactive approach" best suits your needs. If so, plan to make aggressive proposals and counterproposals to use as the basis for all future discussions. If there are likely to be important and common issues that will be addressed by both sides, a "win/win" or "get-to-yes" approach (otherwise referred to as "mutual gains" or "interest-based bargaining") will usually get you further than an emphasis on confrontation or bullying.

PRACTICAL TIP:
Make An Informed Choice

Bargaining can be adversarial or collaborative. Many MEBUs conduct bargaining the same way as they always have simply because that is the way it has always been done. There are several very good sources of information for bargaining teams on how to transform bargaining relations from adversarial, zero-sum contests into "win/win" or interest-based market relations. While none of these approaches can be used to change a union's fiduciary duty to fairly represent its members' interests, they may be used to expand the union's understanding of its membership's interest in employer market competitiveness. The Federal Mediation and Conciliation Service (FMCS) provides this type of consulting to local bargaining groups for free, or in some cases a nominal charge. In addition, numerous academic/university business school programs provide those same types of services for a fee. Contact MCAA staff for a list of references.

1.12.2 DEVELOPING GOALS

Before you begin bargaining, you have to know what you are going to bargain about. As with any other business venture, you need to start by developing some business marketplace or work force goals. Developing goals is a multi-layered process that requires significant attention.

The importance of this process cannot be overstated, because the success of your negotiations will be both determined and measured by these goals. In other words, goals are the foundation that supports your position during bargaining and the parameters by which your success will be measured when negotiations are completed. The more time you spend developing accurate and attainable goals the more likely you are to succeed in attaining them, because you will understand the reasons for needing to attain them and you have the information to support those reasons. Likewise, your success will be measured by the extent to which you are able to meet your pre-selected goals – if you get more than you asked for, you may not have asked for enough; if you get less, you may have failed at the table. As with all aspects of MCAA and local affiliate business operations, evaluating, planning, and pursuing essential business operations goals is essential to organizational success – the same is true for planning collective bargaining outcomes.

Your bargaining goals should be developed in concert with your business's and association's authority body – the membership of the association as a whole (through a survey or meetings) and/or the elected Labor Relations Committee. These groups are responsible for the ultimate well-being of your business and/or association. These groups may want input into strategy discussions also. However, the development of goals is separate from development of specific proposals, which is generally better accomplished without the ultimate authority group involved. That group obviously has the right to approve proposals, but remember the old adage that "a camel is nothing but a horse that was designed by a committee."

1.12.3 INITIAL PREPARATION – SOME QUESTIONS TO ASK AND ANSWER

In order to develop effective and attainable goals, you must first collect, organize, and review background information on the marketplace, the industry's performance, and previous negotiations. This process should

begin once the team is in place and responsibilities have been allocated, but before bargaining begins. Although there could be no end to the types of information that might be relevant to developing goals, we suggest that you begin with the following subjects and answer the questions posed in each part.

1.12.3.1 BARGAINING UNIT OPERATIONS

For most of you as construction companies and associations, the bargaining unit is well settled. However, there remains an ongoing need to identify the work performed by each of the craft unions with which the multiemployer association and its members bargain and note areas of potentially overlapping jurisdiction. Changing technologies and new methods of performing the work often affect previously settled jurisdictional lines. Each employer in the multiemployer bargaining unit should keep information on the number of its employees working in the various trades; this is especially important for employers who are negotiating on their own instead of as part of a multiemployer group. So, a key question is – has the jurisdictional alignment among the crafts changed? Is it changing? Has the union attempted to expand the work it claims as coming within its jurisdiction? Likewise, have technological changes affected jobsite work performance or work assignments? Has off-site prefabrication or modular construction impacted jobsite work assignments, and are CBA adjustments necessary to accommodate that impact? (See, for example, the discussion of BIM/CAD work below.)

1.12.3.2 MANAGEMENT ATTITUDES, STRENGTHS, WEAKNESSES

Several questions should be answered about the multiemployer bargaining unit. Is everyone united behind the goal of getting a more competitive agreement? Is the multiemployer bargaining unit willing to take a strike? Do some contractor representatives have a special relationship with any of the unions or any of the particular union representatives? Do you have any “loose cannons” that you want to keep out of sensitive discussions?

You need to understand these strengths and weaknesses of your team and your constituency in order to make tactical decisions before and during the negotiations. (See discussion above on assessing the MEBU members’ ability and willingness to take a strike or maintain a lockout.)

1.12.3.3 SUMMARY OF PREVIOUS NEGOTIATIONS

Review what happened in previous negotiations. Did the contractor side obtain its objectives the last time? Did the union or contractor side make a last-minute concession that might provide a clue to reactions to similar issues this time around? Were there any union “shenanigans” that you need to be on guard against this time? Did the contractors pull any “stunts” that are likely to make the union particularly wary, or out for revenge? If so, and any of these past issues are judged present, are there ways to address them ahead of bargaining or away from the bargaining table? Is there a labor/management cooperative committee (LMCC) or other forum where ruffled feathers can be smoothed over ahead of actual negotiations in a way that doesn’t involve discussing actual terms and conditions of employment. Put again, it is important to note that actual terms and conditions of employment are outside the scope of proper LMCC consideration – those terms and conditions of employment are the sole province of CBA negotiations.

1.12.3.4 CURRENT VS. PRIOR AGREEMENTS

Were there any changes made the last time, or even before that, that you want to reverse? Any former contract language which seemed to be outmoded which might now be useful again because of differing economic conditions or legal requirements?

1.12.3.5 SIDE AGREEMENTS

During the term of the agreement which is expiring, were any written side letters entered into? If so, should they be inserted into the main agreement? If they have outlived their usefulness, do you want to propose to eliminate them? Have any practices grown up during the term of the agreement that are now commonly in use and should be formalized in the agreement? Do some of those practices restrict productivity, and, if so, should they be specifically prohibited?

CAUTION:
Side Agreements May Not Be Ignored

To the extent that side agreements, written or underwritten, develop during the term of a collective bargaining agreement, they may become a custom, usage or practice that is part of the status quo that may not be changed unilaterally by an employer. As a result, such agreements do not simply expire or fade away at the end of a collective bargaining agreement. Even such agreements that concern permissive subjects of bargaining may prove to be problematic if they are not accounted for since unions or employees may seek to have them applied in the future, giving rise to disputes, perhaps even grievances. Side agreements should be identified and evaluated in preparation for negotiations.

(In evaluating the effect of clarifying preexisting custom and practices, side agreements or MOUs that may not have a settled interpretation, the management team should assess the "risk of non-attainment" in deciding whether to propose clarifying existing side deals that may not be consistently applied. If the union accepts the re-opening and then rejects the plausible ambiguity that management has enjoyed under the past practice, then the risk of non-attainment will have been the loss of the beneficial ambiguity going forward.

1.12.3.6 GRIEVANCE ANALYSIS

Were there any grievances filed during the term of the agreement? Should the resolutions of them be incorporated in the agreement? Or, should the agreement be changed to avoid the impact of grievance outcomes? Did the grievance process work well, or, if not, should it be changed?

1.12.3.7 JURISDICTIONAL DISPUTES

What was the experience with jurisdictional disputes during the term of the prior agreement? Did any occur? What unions were involved? What was the outcome? Should you propose different procedures for resolving jurisdictional questions so they will not be as disruptive even if they do recur? Do you need to make complementary proposals in more than one set of negotiations so that all the parties will be bound to one jurisdictional dispute resolution procedure to minimize the possibility of work stoppages over them? Should you consider proposing changing the work jurisdiction description in one or more agreements? Are any technological changes likely to increase the possibility of jurisdictional disputes that you can anticipate and head off by changing the agreement? (See discussion below on the matter of work jurisdiction as to the scope of the unit as permissive rather than mandatory subjects of bargaining.) (Also, see below for a discussion of the two prominent types of jurisdictional dispute resolution mechanisms available in the industry – the Employer/Building Trades Plan for the Settlement of Jurisdictional Disputes, and the National Labor Relations Board's jurisdictional dispute resolution mechanism under Section 10(k) of the National Labor Relations Act (NLRA). There are significant differences between them as outlined below.)

1.12.3.8 ANALYSIS OF UNION TEAM AND THEIR PROBABLE DEMANDS

Try to identify who in the union you will be negotiating with, and assess their skills, abilities and approaches. Are they experienced? Do they have any particular conflicts with any members of the management team or any of the contractors? Are any of them running for re-election or newly elected? Will they need help from you in selling the agreement to their membership? Will they be looking for more money in wages, fringe benefits, or both? Are they more interested in hiring restrictions or other work rules or overtime issues? As stated above, the U.S. Department of Labor's Office of Labor Management Standards (OLMS) provides public disclosure of local union financial data reporting forms (LM-2s that may contain helpful information pertaining to union finances and strike funds and the like.

1.12.3.9 OPEN SHOP GROWTH AND COMPETITION

Be up to date on the extent of competition presented by the open shop. Backing up your claims of significant competition with facts about the number and size of jobs lost to the open shop is much more effective than mere assertions supported only by anecdotal data. As mentioned above, BLS union-representation rate data may be used as a proxy to indicate market share trends generally. BLS can provide that data by craft and by state in most cases (however, for some states and localities BLS does not have enough data to provide a report). CLRC can provide custom research providing that data for particular areas for sponsoring CLRC member groups. Similarly, Dodge Reports and other commercial data publishers may provide forward-looking market forecasts for particular areas.

PRACTICAL TIP:
Joint Labor/Management Market Share Studies May Be Constructive

In some local areas, labor/management cooperative committees have agreed on joint projects to assess union/open shop market share, demographics, and competitiveness issues in their areas. Such studies (often conducted by outside third parties) have been useful in defining bargaining mutual interests and goals and objectives going forward. Potential sources for such studies/research include: local business schools or prominent academics. Also, the Construction Labor Research Council and other construction industry consultant services can be engaged to perform customized studies for particular regions or markets in an area.

Note to all Guide Users: CLRC is an arm of the sponsoring union-signatory employer groups (MCAA among them), and exclusively provides services to sponsoring associations and their local affiliates as an extension of the national association labor staff. CLRC is not a commercial enterprise providing services generally to the public. All CLRC research projects are subject to the approval of the sponsoring employer organizations.)

1.12.3.10 NEW LEGAL REQUIREMENTS

Have any new laws been enacted which require insertion of new provisions? Do any recent court or administrative (Board) rulings need to be accounted for? As noted above, the pace of regulatory and statutory changes at all levels of governmental authority requires constant consultation with competent labor counsel in the course of negotiating and administering a CBA – it's a fact of life.

1.12.3.11 MARKET OUTLOOK – THE ECONOMICS

Are the major public and private owners in your market planning more or less work? Check the capital budgets and plans of those owners in your area. Much of this material may be available on economic development websites pertaining to your area.

1.12.3.12 OTHER CRAFT SETTLEMENTS

Assess the likely impact of other craft settlements recently in your area. Will the union want to leap-frog other craft settlements, or catch up for its own past concessions? Similarly, are other crafts or other unions in your area making needed wage or benefits changes or concessions? What are the wage and benefits packages of non-union construction employers and in industrial/production employment generally in the area?

1.12.3.13 MANAGEMENT AIMS

Rank these in importance based on the construction market as of the time you will be negotiating – these will not always rank in the same order: 1) maximize profit; 2) maintain control; 3) reduce non-productive time, methods, and work rules; 4) improve productivity and competitiveness; 5) recapture/expand market share; 6) counter open-shop competition; 7) improve work force standards and performance.

Part 2:
SETTING MANAGEMENT OBJECTIVES AND PREPARING PROPOSALS

2.1 LOCAL BARGAINING BACKGROUND

The background and history of the parties and the union(s) in question are extremely important in developing a bargaining strategy and preparing for negotiations. Some questions that should be answered include the following:

1. *Strikes* – Have there been strikes in the recent past? The last time there was one, what was it over? Will all trades honor a picket line in support of a strike by only one trade? Which trade is the trend-setter?
2. *Market Share* – Is construction activity in the area down or up? If there is lots of work going to union contractors, that will make the unions feel they are in the driver's seat; little activity with many members on the bench may make them more likely to moderate their demands to increase competitiveness.
3. *Open-Shop Market Share* – Related to the level of activity is the status of the open shop. Is the open shop busy while the union side is not? Or, is there no activity at all so that neither union nor open shop contractors are busy?
4. *Employment Forecast* – Are large publicly funded projects coming to an end so that the union contractor segment will soon run out of work even if it has been extremely busy recently? Is a large private sector project about to start for which you will need to improve your competitive position relative to the open shop? Are there existing projects under project labor agreements?

We assume you will know this type of information. The question is, will you have facts and backup information available in a way that you can communicate it effectively to the union in a timely manner?

2.2 SETTING MANAGEMENT OBJECTIVES

In setting objectives for the multiemployer bargaining unit, you should consider the following before negotiations begin:

1. ***Setting Objectives*** – Who has authority to set objectives? Will the association or the full group of negotiators set objectives? Or, are there one or two very influential contractors who will actually make the decisions for the whole group? Will objectives be set in some formal process? At meetings? Written surveys? Internet poll?
2. ***Economic Assessment*** – What does management want? With regard to financial improvements, do you need relief from high wage rates? Do you need targeted relief? Do you need to put the brakes on fringe costs? Do you need to negotiate the specific fringe costs so that you will no longer let the union decide how to spend a certain pot of money?
3. ***Work Rule Changes –*** With regard to changes in contract language, will you include weekend make-up days at straight time? Work rules on equipment changes during the course of a shift? Crew mix provisions? Subjourneymen? Apprentices? Composite crews? Combination workers?
4. ***Contract Duration*** – How long should the contract last, given the economics and current bargaining leverage; do you want one, two, three, or more years? Consider economic forecasts and the expiration dates of other bargaining agreements in the construction industry and area in settling upon a proposed expiration date. Also, are there big projects coming into the market that would impact bargaining leverage in the foreseeable future? Moreover, it is prudent to consider the union leadership election cycle and the impact of local union politics on contract settlement negotiations and eventual union

membership approval. Seeking agreements that do not expire immediately before or after union elections may reduce or avoid the impact of "political promises" on negotiations.

5. ***Pragmatism*** – What will management give? With regard to acceptable wage increases, have you quantified what you are willing to agree to? Be realistic in setting your goals at the beginning so you don't need to readjust them afterwards simply because they were unreasonable at the outset. What are acceptable fringe benefit increases? It is important to quantify this as well and be sure to decide whether you are willing to negotiate a total package that you will let the union decide how to spend, or whether you will negotiate the specific contributions you will agree to. Proper allocation of monetary increases to benefit funds can have a big impact on employer positions in relation to the benefits funds. As many MEBUs have learned the hard way, adequate pension plan funding can be a crucial element in union employer market competitiveness. Bargaining parties as settlors and sponsors of the funds have a stake in the plan's funding – as do plan trustees as fiduciaries of the plan. Pragmatism is an often-overlooked virtue in collective bargaining negotiations. Also, it often is useful to reduce all terms and conditions items to per hour costs to allow specific quantitative analysis of them and to facilitate trade off negotiations in settling the pact. (The Construction Labor Research Council can be engaged to provide labor contract costing to aid in negotiations for MCAA local affiliates as affiliates of a CLRC sponsoring group – MCAA.)

6. ***Work Rules*** – What are the acceptable noneconomic terms? Will you agree to any changes in apprentice ratios or other work rules if proposed by the union? Can coffee breaks or clean up time be addressed – and what is the per hour cost impact of that?

7. ***Non-negotiable Items*** – What items are non-negotiable deal-breakers? Will you refuse to agree to expansion of subcontracting rules and restrictions? Will you agree to be bound by jurisdictional dispute decisions of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry or some other group or agency? Is acceptance of the Industrial Relations Council (IRC) for the next contract settlement advantageous for the MEBU given work forecasts or other local conditions?

8. ***Trade-offs*** – What items do you consider as potential trade-offs? If you know what the union is likely to want because you have done a good job of analyzing its objectives, are there any trade-offs you want to try to set up or engineer by the approach you take to the process? Will you agree to interest arbitration for successor agreements, either under the IRC procedures or some other form of extended bargaining or arbitration?

2.3 PREPARING MANAGEMENT PROPOSALS

It is often said that the best defense is a good offense; that is because it's true. One of the truisms of negotiations is that parties who have high aspirations obtain more than those who do not. Know what you want. Do not just react to union proposals – advance your own agenda. Let the union know that you have some concerns of your own that you intend to address and that you will not simply be reacting to union demands. Passive approaches are recommended only for those who want to maintain the status quo.

Know your limits on economic proposals. Spend time computing and figuring what the costs to the multiemployer bargaining unit will be for different combinations of economic packages. In doing so, you should look at the total, cumulative financial impact of wages, hours, and other benefits of employment. Because economic proposals are generally negotiated as the final component of a collective bargaining agreement, wages and benefits can usually be negotiated in tandem. That is, the level of wages can be tied to the level of benefits and vice-versa. With regard to fringe benefits, pay close attention to ERISA and pension/health and welfare funds. Know what is in them now. What are the benefits? What is the funding status of the pension plan? Does the welfare fund have a deficit or a reserve? Get a sense of the limits of your ability to negotiate about the terms of the trust itself. Remember, negotiators are acting in their role as settlors of the funds – not like fund trustees who are held to be plan fiduciaries – those are distinctly different legal perspectives – and key differences at that. Explore that analysis of the different roles of settlors and fiduciary/trustees with your local labor counsel in planning for negotiations.

Decide how you will present data and your proposals to the union. Consider:

1. ***Position papers*** – Will you present the union with written proposals or written statements of concerns/issues? Will you exchange only lists of issues? Will you exchange written documents only after a conceptual agreement is reached?
2. ***Financial data*** – Will you use charts to demonstrate your position? Will you use other written materials? Will you try not to show costs, but simply stick to proposals? (See the note in Section 3.8.2 below regarding the risks of "pleading poverty.")
3. ***Cost calculations*** – Will you use the Construction Labor Relations Council costing program? Will you share your calculations with the union?

PRACTICAL TIP:
Prepare Carefully for IRC or Arbitration Presentations

If you have agreed to interest arbitration in the event of a bargaining stalemate or expect that a negotiating impasse might eventually go to a settlement umpire such as the UA/MCAA/PHCC Industrial Relations Council, be aware that all experienced participants report that the manner of presentation of initial bargaining interests and proposals can be very important at those arbitration procedures. The sophistication of the material and presentation – in terms of substance, market relevance, and analytical precision (not just word processing graphics) can make a big difference in gaining a constructive settlement.

CAUTION:
Informing MEBU Members on Status of Bargaining

The bargaining team should consider the extent to which information about the status of bargaining should be shared with non-bargaining team members of the MEBU, and the manner for doing so. For example, a page on the association website may be effective, but may also be a source for leaks of sensitive information posted there. Decisions on information sharing in any form must be made keeping in mind the possibility that it may be shared with the Union and individual employees as well.

Part 3:

THE NATIONAL LABOR RELATIONS ACT

Collective bargaining is a process created by federal statute. It is a product of the early 20th Century, an outgrowth of the labor movement, and promoting it is the ultimate mission of the National Labor Relations Act and various other federal laws designed to improve working conditions and to prevent industrial strife. Any discussion of collective bargaining in the construction industry, therefore, must begin with its origin – the National Labor Relations Act.

3.1 GENERAL PURPOSES

The National Labor Relations Act (NLRA) was enacted in 1935 and has two basic purposes: 1) to decide questions concerning representation of employees by unions; and 2) to resolve unfair labor practice charges. For its first purpose, the NLRA authorizes the establishment of rules for determining the standing of unions to act as exclusive bargaining representatives for employees in units appropriate for bargaining. For its second purpose, the NLRA calls for procedures for policing the bargaining relationships established under the representation rules and for enforcement of other employer-employee relations rules involving activity protected by the NLRA. These two purposes often overlap; that is, the determination of representation issues and the resolution of unfair labor practice charges both stem from the policy of giving employees the right to choose for themselves whether to bargain collectively or separately with their employers, while at the same time protecting them from unscrupulous or improper infringements (by employers or unions) on that right.

Before an employer bargaining obligation exists, the issue of union representation must be resolved. Two different sections of the NLRA establish means by which unions can become the representatives of employees for purposes of collective bargaining. These are Section 9(a) and Section 8(f). Section 9(a) applies to *all* employers covered by the NLRA, including construction employers. Section 8(f) applies *only* to construction employers.

Most union-signatory contractors in the construction industry enter into bargaining relationships through the mechanism of Section 8(f). That is, most union-signatory contractors take advantage of a special construction industry provision in the NLRA that allows a contractor to sign an agreement with a union without consulting its employees, or without even having employees. In contrast, all union-employer bargaining relationships under Section 9(a) are established by employees affirmatively choosing union representation. ***A detailed description of the differences between Sections 8(f) and 9(a) is beyond the scope of these materials, but highlighting the most important distinctions is helpful and important for construction multiemployer bargaining units and individual employers.***

Prehire vs. Majority Status Relationships – Section 8(f) and Section 9(a) bargaining relationships are different in three fundamental respects: 1) to whom they apply; 2) how they are established; and 3) how long they last. Section 8(f) applies only to employers, employees, and unions in the building and construction industry. Under Section 8(f), there is no requirement that a majority of a contractor's employees support the union, no requirement that a contractor even have any employees at the time the agreement is signed, and no requirement that a contractor consult any employees that it may have before signing a collective bargaining agreement with a union. Conversely, under Section 9(a), which applies to all employers, employees, and unions covered by the NLRA, a union must show that it has the support of a majority of a contractor's employees in order to represent the contractor's employees. For a Section 9(a) relationship to be established, an employer must have more than one employee, and the employer may not pick a union to represent any such employees – the employees must choose.

Right to Terminate Relationship vs. Continuing Duty to Bargain Successor Agreement – Under Section 8(f), a contractor has no bargaining obligation or duty to observe any terms and conditions of employment until it signs a collective bargaining agreement. Once that agreement expires, the contractor is free to stop bargaining with the union and to change working conditions unilaterally. The contractor is free to sign another agreement,

or to walk away from the relationship altogether. Once a union has been selected under Section 9(a), however, a contractor has a duty to meet and confer with the union *before* an agreement is reached, a duty to observe the terms and conditions of such agreement *during its term*, and a duty to bargain in good faith for a *new* agreement each time an existing one expires. ***A Section 9(a) bargaining obligation is forever – or at least until the contractor goes out of business, the union announces it no longer wishes to represent the employees, or the employees vote the union out.***

Each of these particular relationships will be discussed further below.

3.2 METHODS OF DETERMINING REPRESENTATION QUESTIONS UNDER SECTION 9(A)

As noted above, the only requirements for establishing a bargaining relationship under Section 8(f) are that the employer is ***engaged primarily in the construction industry*** *and signs an agreement* with a union of which building and construction employees are members to represent its employees engaged (or who, upon their employment, will be engaged in the building and construction industry). Under Section 9(a) there are different rules. A bargaining relationship can be established under Section 9(a) only by voluntary recognition, certification following a representation election, or by order of the National Labor Relations Board (Board).

3.2.1 VOLUNTARY RECOGNITION

Voluntary Recognition is one method by which a union can become the exclusive Section 9(a) representative of a group of employees. This occurs when a union informs an employer that the union has been authorized by a majority of the employer's employees in an appropriate unit to represent them for purposes of collective bargaining and the employer agrees voluntarily to recognize the union upon viewing evidence of the union's majority support. If the employer views evidence (typically in the form of signed authorization cards) sufficient to satisfy itself that the union claim is correct, the employer may then recognize the union and begin bargaining with the union as the employees' Section 9(a) exclusive representative. An employer wishing to avoid recognizing the union as the Section 9(a) representative must take care to refuse to examine authorization cards allegedly signed by the employer's employees. Frequently, unions will tender such cards to employers in the hope that the employer will view the cards and thereby obligate itself to recognize and bargain with the union. (Note: NLRB rules on voluntary recognition have been subject to some regulatory churn and volatility in recent years – so, MEBUs should consult with experienced local labor counsel when considering union recognition language and union requests for majority status recognition.) In one view, the union must actually produce authorization cards that the employer must review simultaneously with the decision to grant recognition – the other view is that merely some indication of majority support that is acceptable to the employer is sufficient to validate voluntary recognition.

Conversion of Section 8(f) relationships into Section 9(a) majority status relationships sometimes occurs inadvertently. Whether such conversion has occurred is a very tricky area of the law, with new developments having occurred in each of the past several years. If you want to avoid conversion of a Section 8(f) relationship into a Section 9(a) relationship – intentionally or inadvertently – be very wary of language proposed by a union speaking in terms of "*majority representation*" of employees.

The Board has held that an employer can agree to be bound as a Section 9(a) employer based on contract language alone, "where the language unequivocally indicates that (1) the union requested recognition as the majority or Section 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or Section 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown *or offered to show*, evidence of majority support." *Staunton Fuel & Material, Inc. d/b/a Central Illinois Construction*, 335 NLRB 717 (2001).

This holding was effectively overturned by the United States Court of Appeals for the District of Columbia in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), which held that contract language standing alone cannot establish the existence of a Section 9(a) relationship where the record indicates only an 8(f) relationship exists. The court held that allowing conversion of the relationship under these circumstances eliminates exactly

what the National Labor Relations Act was designed to foster – *employee* choice whether to be represented by a union or not. Since the Nova Plumbing decision, a continued tension has existed between its holding and the Board's approach to the issue; the Board has not repudiated its holding in *Staunton Fuel*. *See, e.g., Kings Fire Prot., Inc.*, 362 NLRB 1056 (2015). The Board's General Counsel has also continued to apply the *Staunton Fuel* analysis in advice memoranda. To add confusion, the NLRB has implemented and rescinded regulations on conversion of 8(f) relationships – and we can likely expect more changes under future Boards.

Nevertheless, in many cases, the Board has sidestepped the apparent conflict between *Nova Plumbing* and *Staunton Fuel* by pointing to record evidence demonstrating that the union actually enjoyed majority support at the time the recognition agreement was executed. See *M&M Backhoe Service, Inc.*, 345 NLRB 462 (2005) *enforced* 469 F.3d 1047 (D.C. Cir. 2006); *see also Raymond Interior Sys.*, 357 NLRB 2174 (2011) ("[T]he result here would be the same under the D.C. Circuit's decision in *Nova Plumbing* as under *Staunton Fuel & Material* . . ."). Because of the ever-changing landscape in this area, experienced labor counsel should be consulted when dealing with these issues.

CAUTION:
Review Recitations of Union Status as the Employees' Representative

Given the continuing uncertainty in this area of Board law, employers should remain extremely wary of any contract language that refers to Section 9(a) or majority status with language regarding a showing of majority support or an offer to show majority support, and should have any such proposals evaluated by legal counsel.

Additional Caution – Review with Counsel: The NLRB takes the position that it has the discretion whether or not to apply the law of any one federal court of appeals on any given issue; when it does not, the law under this national statute may not be uniform nationwide due to differing rules applied in different federal court jurisdictions nationwide. The MEBU may want to review previously existing documents, such as bargaining authorization response, benefit participation agreements, and other correspondence with legal counsel to see if there has been any recitation of union majority representation status accepted by the MEBU in the past, and if so, to decide if the current state of the law requires some remedial action with respect to that written record.

Unions Use 9(a) Conversion as a Tool to Fight Raids on Jurisdiction

With perhaps increasing frequency as competition among the various building trades increases, Section 8(f)/9(a) conversion has become a tool in jurisdictional disputes, and in some cases raiding of signatory contractors among the various crafts. A local union that is seeking to defend itself from the organizing raid of a competing craft may seek to gain some greater stability in its employer base by converting to 9(a) status and thereby preventing a raid at the expiration of the 8(f) agreement. In many cases the defensive union will seek 9(a) conversion through voluntary recognition or through an NLRB election.

CAUTION:
Beware Agreeing to Convert to 9(a) – It Can Be a Double-Edged Sword

Under some circumstances in local areas, the 8(f)/9(a) distinction has far greater political appeal to the union than it has in corresponding practical effect on MEBU members. Put another way, the parties will have to judge the practical effect and political consequences in their geographic area over the nature of the representation format and possible conversion from 8(f) to 9(a) status. For example, in some areas some or all of the employers may be very easily converted by successful organizing elections by the union, so the conversion to 9(a) status for some or all of the employers may be of diminished practical significance; yet, the union may see other political or practical advantages to that conversion and would value it as a key bargaining goal, and employers may believe that agreeing to it is a way to "get something for nothing." However, conversely, if conversion would destabilize the MEBU in marginal union/non-union areas, if the MEBU is in a weak competitive posture in the market, or if benefits funding issues are threatening the stability of the MEBU there could be sudden and very negative consequences for the bargaining unit and benefit plans if a 9(a) conversion forced some employers to reconsider their bargaining status.

3.2.2 CERTIFICATION

A second way a union can become the exclusive Section 9(a) representative of employees is by certification following a Board-conducted election. To achieve this, a union first must solicit authorization from employees. Authorization may be given by employees on cards or petitions. The Board will also "accept electronic signatures in support of a showing of interest if the Board's traditional evidentiary standards are satisfied." Depending on the language used, employees may give the union their authorization to seek election and/or to act as their bargaining agent. When a union has such authorization from at least 30% of the employer's employees in an appropriate unit, it may file a petition with the Board seeking an election. The union must also make a demand for recognition on the employer. If recognition is refused by the employer, the Board may direct the election process to go forward. The Board must also determine if the unit petitioned for is appropriate. If the unit is appropriate, and if no other impediment to an election exists, such as a Section 9(a) collective bargaining agreement with another union, an election will be held. If at least 50% plus one of the votes cast are in favor of union representation, and no valid and outcome-determinative challenges or objections to the election are filed, the union will be certified by the Board as the representative of the employees in the bargaining unit and collective bargaining must begin.

NOTE:

In *Cemex Construction Materials Pacific, LLC,* 372 NLRB No. 130 (2023), the Board held that once a union shows an employer evidence of majority support, the employer must either recognize and bargain with the union or the *employer* must request a secret ballot election to challenge the union's claim of majority status – and it must do so "promptly," which the Board held would normally be interpreted to require an employer to file its petition within two weeks of the union's demand for recognition. Additionally, and perhaps more significantly, if the employer is found to have committed any unfair labor practice charges leading up to or during the pendency of the election that would otherwise require setting aside the election, the election petition (whether filed by the employer or the union) may be dismissed and – rather than re-running the election – the employer may be ordered to recognize and bargain with the union, without the union having to win the election. At the time of publication of this Guide, the *Cemex* decision is on appeal, but this precedent is controlling at the Board.

Employees eligible to vote in Section 9(a) representation elections in the construction industry include: (1) employees currently working for the employer in the bargaining unit the union seeks to represent (which is generally a specific craft); (2) employees who worked for the employer in that unit on at least 30 days in the 12 months immediately prior to the filing of the election petition; and (3) employees who performed some work for the employer in the 12 months immediately prior to the filing of the election petition and who worked for the employer in that unit on at least 45 days in the 24 months immediately prior to the filing of the election petition. For purposes of the 30 and 45 days of work rules, a partial day of work counts as a day of work. These eligibility criteria were established in *Daniel Construction Co.*, 133 NLRB 264, 266-67 (1961), *as modified*, 167 NLRB 1078, 1079 (1967); *see also Steiny & Co.*, 308 NLRB 1323, 1324-26 (1992); and are commonly referred to as the *Daniel-Steiny* formula.

The 30- and 45-day rules can have a significant impact on representation elections in the construction industry because employers sometimes enter into one-time project agreements whereby an open shop employer agrees to sign a collective bargaining agreement that is effective for only one project. The intent of such agreements is to allow the employer to be "union" for that project only. However, employees working for that employer on that project may work enough days to become eligible voters in elections conducted among that employer's employees in the next 12 or 24 months.

OBSERVATION:

In some areas where Section 8(f) agreements were not renewed upon expiration, the local union has sought to convert the former MEBU members to 9(a) status in company-by-company elections – rather than by election among all the members of the local and workers eligible under the *Daniel-Steiny* formula for all former MEBU signatory employers.

COMMENT:
Determining an Appropriate Bargaining Unit

The examination of whether the petitioned-for unit is appropriate generally centers on the "community of interests" among and between the employees in the unit. The petitioned-for unit need not be the most appropriate unit, only an appropriate unit. Recent Board decisions place the burden on the employer to prove that additional employees belong in a unit rendering the petitioned-for-unit appropriate. The employer must show that the additional employees share "an overwhelming community of interest" with employees in the petitioned-for unit. See *Specialty Healthcare & Rehab Ctr. Of Mobile, Inc.,* 357 NLRB No 174 (2011). In construction, traditional craft lines typically determine the unit.

The politically charged issue of which employees will be judged joint employees with other employers has been the subject of several revolving Board actions over recent years. Joint employers are responsible for each other's unfair labor practices and bargaining obligations. Although the contours of the legal requirements are constantly shifting, the basic evaluation concerns the extent to which the organizations codetermine or share responsibility for terms and conditions of employment.

The Supreme Court's 1951 decision in the Denver Building Trades case (*National Labor Relations Board v. Denver Building Council,* 341 US 675 (1951)) found that general contractors and subcontractors on job sites are independent contractors of one another. The decision has survived several legislative attempts to overturn it, so the Board would be taking on Supreme Court precedent if it attempted to apply the joint employer paradigm to jobsite contractor relationships. In addition, the NLRB recently stated, in respect to certain regulations on the topic, its agreement that the Denver Building Trades decision precludes treating a general contractor and subcontractor as joint employers *solely* because of the general contractor's overall responsibility for overseeing operation on the jobsite, and "absent evidence that a firm possesses or exercises control over particular employees' essential terms and conditions of employment, that firm would not qualify as a joint employer . . ." (88 Federal Register 73959 (10/27/2023)) Thus, the prime contract and subcontract relationship on construction industry projects is not legally sufficient as a general matter to make a subcontractor's employee's joint employees with the prime contractor, even in light of some shared authority or control with respect to project/jobsite multiemployer safety rules and practices, drug testing, project security policies, or other contractual requirements. However, the Board has stated that the extent of the relationship may be determined on a case-by-case basis. The definition of joint employment can also vary by agency (i.e., DOL/OSHA/NLRB) and, as with any regulatory authority, is subject to change. Labor counsel should be consulted for specific analysis of joint employer status.

3.2.3 BARGAINING ORDERS

Although recognition and certification are the primary methods of establishing a Section 9(a) relationship, there is one other method for a union to obtain bargaining rights. If an employer is found to have committed serious unfair labor practices during the course of an election campaign, the Board may order the employer to bargain with the union if it finds that a fair election would not be possible because of the unfair labor practices – even if the union lost the election by a significant margin. Bargaining orders are rare, and extremely rare in the construction industry since most construction industry relationships are initiated under Section 8(f). (See, however, the *Cemex* discussion, above.)

3.3 UNFAIR LABOR PRACTICES

An unfair labor practice is conduct by an employer or a union that interferes with the purposes of, and has been prohibited by, the NLRA. Under the NLRA, only an employer (including an employer agent such as a multiemployer bargaining association) or a union can be liable for the commission of unfair labor practices – individual persons or employees cannot. However, the actions of individual agents (such as union business agents or employer supervisors or superintendents) can be attributed to the union or the employer and thus can result in findings that the unions or employers committed unfair labor practices.

3.3.1 EMPLOYER UNFAIR LABOR PRACTICES

An employer may not:

1. ***Interfere with, restrain or coerce employees*** with respect to their exercise or non-exercise of the right to engage in *protected concerted activity*. Protected concerted activity is activity engaged in by or specifically on behalf of two or more individuals (concerted activity) for purposes of addressing concerns regarding wages, hours or other terms and conditions of employment. A union does not need to be involved in order for activity to be considered protected concerted activity. In fact, any time two or more individuals act together (or one individual for or on behalf of others) to address concerns regarding wages, hours or working conditions, their activity can be deemed protected. For example, two non-union employees conferring or complaining about jobsite safety concerns are engaged in protected concerted activity.

CAUTION:
NLRA Rights in a Non-Union Setting

Section 7 of the NLRA guarantees covered employees, union and non-union alike, the "right to self-organization, to form, join or assist labor organizations, to bargain collectively…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…." Section 8(a)(1) makes it a violation of the Act for an employer to "interfere with, restrain, or coerce employees in the exercise" of these rights. This means that even in the absence of representation by a union, employee conduct may be protected by the Act.

In order for an employee's activity to fall within the coverage of Section 7 (and thus Section 8(a)(1)), such activity must meet several conditions. First, the "topic" that the activity relates to must be "protected," i.e., it relates to wages, hours, and/or other terms and conditions of employment. Second, the activity must be "concerted," which can take the form of activity by two or more employees that is for mutual aid or protection, or by single employees acting on the authority of other employees, bringing group complaints or attempting to induce group action. Employers may also violate an individual employee's Section 7 rights by attempting to preempt an employee from engaging in protected concerted activity – for example by terminating an employee to stop him/her from attempting to induce group action relating to a term or condition of employment.

Most non-supervisory employees in the private sector are covered by the NLRA. In any situation in which a union or non-union employee complains about terms and conditions of employment on behalf of or affecting more than one person, employers should consult legal counsel before engaging in any adverse employment actions (i.e., discipline or termination) based on the possibly protected activity.

2. Dominate or assist an employee organization as the exclusive representative of its employees. Employee committees formed by an employer for purposes of dealing with matters affecting wages, hours or working conditions may be employee organizations. Examples of such committees/employee organizations may include Total Quality Management (TQM) committees, safety committees, action committees, and absenteeism committees. The basic rule on this matter was laid out in the NLRB's *Electromation* decision. (*Electromation, Inc.*, 309 NLRB 990 (1992), aff'd *Electromation v. NLRB*, 35 F.3d 1148 (7th Cir. 1992).

3. Discriminate in matters of employment against or in favor of any employee because of the exercise or non-exercise of rights to engage in protected activity – for example, membership or non-membership in, support or non-support of, labor organizations.

4. Retaliate against any employee for filing unfair labor practice charges or testifying in NLRA proceedings.

5. Refuse to bargain in good faith with an appropriately recognized or certified bargaining representative of employees.

3.3.2 UNION UNFAIR LABOR PRACTICES

PRACTICAL TIP:
Employee Use of Social Media and Labor Law Rights

The Board has continued to assert the rights of employees to engage in protected, concerted activity through other avenues. In particular, the Board has sought to protect employees' rights to engage in protected, concerted activity through social media and has found employers' social media policies to be overly broad where they could be read to prohibit, among other things:

- Protected criticism of the employer;
- Posting pictures on social media sites of employees engaged in protected activities (for example, strikes) or posting pictures of unsafe working conditions;
- Protected conduct where the policy lacked definitions of broad terms, examples of properly prohibited activity or any limits to indicate that it excluded Section 7-protected activity;
- "Misleading" social media posts, because employee criticism of an employer's labor policies is protected so long as it is not maliciously false;
- An employee from posting without prior permission from his employer;
- Discussing pay rates and other terms and conditions of employment;
- Discussing disciplinary actions or investigations; and
- Disclosing complaints about terms and conditions of employment to the public or the media.

In *Hispanics United,* 356 NLRB 368 (2012), for example, the Board affirmed an Administrative Law Judge's finding that an employer violated the employees' protected, concerted rights when terminating them because they posted complaints about fellow employees on Facebook. The employer informed each employee that the decision to terminate their employment was because, in the employer's eyes, the employees' Facebook posts "constituted bullying and harassment and violated [the employer's] policy on harassment." Nevertheless, the Administrative Law Judge found that the employees' conduct did not forfeit their right to engage in protected, concerted activity under Section 7 of the Act. The posts were not made at work or during working hours, the subject was related to co-worker criticisms of employee job performance, the posts were not unprotected "outbursts," and the employer could not demonstrate any violation of its zero-tolerance, anti-harassment policy.

On the other hand, the Board has stated that social media activity is not protected if it is "egregiously offensive or knowingly and deliberately false," or if the comments "publicly disparage [the] employer's products or services without relating [the employee's] complaints to any labor controversy."

Caution: When contemplating adverse employment consequences for any employee – bargaining unit or non-bargaining unit personnel – for social media activity, consult experienced labor and employment law counsel, as this area of labor and employment law is developing (and changing) rapidly and the line between protected and unprotected conduct and as to lawful and unlawful policy language can be very nuanced.

A union may not:

a. ***Restrain or coerce employees*** with respect to protected activity.

b. ***Restrain or coerce employers*** in the selection of their representatives for bargaining purposes.

c. ***Discriminate against an employee*** for the exercise or non-exercise of the right to engage in protected activity. One exception to this is the enforcement of a lawful union security clause in the states that have not enacted "right-to-work" laws. A lawful union security clause is one that requires an employee to pay to the union dues and fees uniformly required as a condition of acquiring or retaining membership in the union. Employees who object to such a requirement may assert their right to pay the union only those fees representing the cost of providing representation services to the employees in the unit. Under most union security clauses, employees who refuse to pay the required fees may be terminated by the employer at the request of the union.

d. ***Refuse to bargain in good faith*** with an employer for whose employees the union is the bargaining representative.

e. ***Engage in prohibited strikes and boycotts*** (See Appendix I).

f. ***Impose excessive or discriminatory membership fees***.

g. ***Engage in featherbedding*** (i.e., require hiring more employees than needed or pay for services not performed).

h. ***Strike or picket health care institutions without giving at least 10 days' notice***

PRACTICAL TIP:
"Membership" Does Not Mean Membership

Union security clauses that go beyond the payment of dues and fees uniformly required as a condition of acquiring or retaining membership in the union are unlawful. Unlawful clauses are those that require: (a) actual membership in the union; or (b) in the case of an employee who asserts the right to pay representation fees only, payment of full membership dues and fees where the amounts go beyond the amounts necessary to provide representation.

Despite the fact that "actual membership" may not be required, it is not unlawful to negotiate a clause which states that "membership" is required. In *Marquez v. Screen Actors Guild,* 119 S. Ct. 292, 159 LRRM 2641 (1998), the collective bargaining agreement contained a union security clause that required each employee to become a "member in good standing" of the union, and did not define "member in good standing." The Supreme Court of the United States held that a union does not violate its duty of fair representation when it negotiates a union security clause that requires "membership in good standing" without defining the term in the collective bargaining agreement.

So, the law suffers from wordplay ambiguity – the clause may say "membership," but it can't be enforced that way. Under the *Beck* decision – all that can be required is a covered worker has a right (under the union's duty of fair representation to that worker) to have the right to be considered a dissenting non-member, paying only what is required for the union to represent that employee in the bargaining unit contract administration. (So, dissenting non-members will not be paying amounts and dues that support other union activities such as lobbying and other local or national union programs.)

Weingarten Rights

A 1975 decision of the Supreme Court of the United States (*NLRB v. J. Weingarten,* 420 US 251 (1975)), provided that a union employee who was called into a meeting with management and, who reasonably believed that the meeting might lead to discipline, was entitled to insist, upon the employee's request, that a fellow employee be present during the interview. Such rights of union-represented employees became known as "Weingarten" rights.

In *Epilepsy Foundation of Northeast Ohio,* 331 NLRB No. 92 (2000), the Board extended the Weingarten rule to non-union settings. But the decision was overturned by the Board in *IBM Corp.,* 341 NLRB No. 148 (2004), which held that employees in non-union settings were not entitled to Weingarten rights. Even so, it is important to emphasize that even non-union employees still have rights under the National Labor Relations Act.

At this time, employers are not obligated under *Weingarten* to advise employees of their rights to request witnesses to be present.

Employers would do well to check with experienced labor counsel with respect to current rules and procedures.

COMMENT:
Employer Notices Regarding Union Dues and NLRA Rights – A Perennial Political Football

The issue of union dues is an ever-evolving matter. Often, the current law is modified to reflect the stances of current political leadership. Employers should take note of changes in the political climate and should plan accordingly.

In 2001, President Bush's Executive Order 13201 took the internal union administration issue of notifying employees of their rights concerning payment of dues and fees and expanded it to a union employer government contract compliance issue as well. In particular, this executive order required government contractors to post notices advising employees of their rights regarding payment of dues and fees. Within days of taking office, President Obama issued Executive Order 13496, repealing Executive Order 13201 and revoking the requirement that federal contractors inform employees of their rights regarding the payment of union dues or fees.

In addition, Order 13496 requires federal contractors to provide notice to their employees of their rights under federal labor laws. Specifically, the Order requires that covered contractors provide notice of employee rights under the NLRA. The required notice lists employees' rights under the NLRA to form, join, and support a union and to bargain collectively with their employer; provides examples of unlawful employer and union conduct that interferes with those rights; and indicates how employees can contact the National Labor Relations Board, the federal agency that enforces those rights, with questions or to file complaints. As the contrasts between these two Executive Orders make clear, the rules they mandate are subject to frequent change as the political composition of Washington D.C. evolves from election to election.

EO 13496 remains in effect currently. Copies of the Order 13496-required posting are available at: https://www.dol.gov/agencies/olms/poster/labor-rights-federal-contractors.

CAUTION:
Right-to-Work States

Section 14(b) of the National Labor Relations Act authorizes individual states and territories of the United States to prohibit union security clauses that would otherwise be authorized by the National Labor Relations Act. Section 14(b) states:

> *Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.*

As of the preparation of this publication, the states that have right- to-work legislation on their books, thus prohibiting mandatory payment of fees to unions as a condition of employment, are: Alabama; Arizona; Arkansas; Florida; Georgia; Idaho; Indiana; Iowa; Kansas; Kentucky; Louisiana; Mississippi; Nebraska; Nevada; North Carolina; North Dakota; Oklahoma; South Carolina; South Dakota; Tennessee; Texas; Utah; Virginia; West Virginia; Wisconsin; and Wyoming. Employers should not rely on this list as authoritative at any future date. Instead, if a question arises about whether a state in which you are doing business is a "right to work" state, be sure to investigate the issue at that time.

In addition, state right-to-work laws often use different language to achieve similar means. While each state listed above has enacted right-to-work laws, the language of these laws may vary from state to state. Each state may prescribe different procedural requirements, have different state-agency oversight, and establish different penalty regimes. Employers should review state-specific right-to-work language so as to better understand their obligations in each individual state.

See National Conference of State Legislatures for a resource guide on this topic: https://www.ncsl.org/labor-and-employment/right-to-work-resources.

3.3.3 PROHIBITED BOYCOTT AGREEMENTS

Under Section 8(e) of the National Labor Relations Act, employers and unions may not enter into agreements to refuse to do business with other employers on the basis of their labor relations policy, such as whether they are union or non-union. Such an agreement is called a hot cargo agreement. Section 8(e) generally prohibits agreements not to subcontract to employers on the basis of their union/non-union status. However, there is an exception to Section 8(e) for work performed on the jobsite in the construction industry. This exception is discussed further below in section 3.10.

3.3.4 FILING OF UNFAIR LABOR PRACTICE CHARGES

Construction contractors may be faced with unfair labor practices committed by unions. Some may involve the illegal picketing of a construction site; others may involve the duty to bargain itself.

The only legal procedure available to *stop* union unfair labor practice conduct is to file an unfair labor practice charge with the Board. For example, a contractor whose employees have stopped work in response to unlawful picketing is generally not entitled to go into court and obtain an injunction against the work stoppage even if its collective bargaining agreement has a no-strike clause. This is so because the strike by the employees is usually a sympathy strike which is generally not subject to injunctive relief. In addition, an injunction cannot usually be obtained because the activity involved is an unfair labor practice and the law provides that only the NLRB can decide unfair labor practice cases. Similarly, if a union commits the unfair labor practice of bargaining

in bad faith, the employer may not sue the union directly in federal or state court to enjoin its refusal to bargain in good faith. The only legal remedy available is through the Board by filing an unfair labor practice charge.

An unfair labor practice charge is initiated by completing a form and filing it with the proper Board regional office. Forms are available from all Board regional offices and online at www.nlrb.gov. ***Any person may file a charge, not just the employer that is subject to the allegedly unlawful conduct.***

Once an unfair labor charge is filed, a local office of the Board investigates to determine if a violation of the Act may have occurred. If the local office concludes the charge has no merit, it dismisses the charge. The charging party may appeal to the Board's general counsel in Washington, requesting that the charge be reinstated. If the local office concludes preliminarily that the charge has merit, or if the General Counsel so concludes after an appeal of a local dismissal, the matter goes to trial before an Administrative Law Judge unless the parties settle.

WHO TO CONTACT:

The National Labor Relations Board's main office contact information is:

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001

For a complete list of all of the National Labor Relations Board's regional field offices, go to the NLRB website at http://www.nlrb.gov.

Priority Charges – *Secondary boycott, recognition picketing, and jurisdictional dispute charges are considered* priority charges. Additionally, if the investigation provides the investigator with reasonable cause to believe that certain of these unfair labor practices are occurring, the Board may seek an injunction from a federal district court to halt the conduct pending a final decision. In some cases – secondary boycotts for example – the Board *must* seek an injunction if it has reasonable cause to believe an unfair labor practice is being committed.

Before filing a charge, the employer should already have collected evidence, including statements of witnesses. The employer should be prepared to have its witnesses available to talk to the Board investigator in person, preferably on the day the charge is filed. If the Board decides there is reasonable cause to seek an injunction, the employer's witnesses will have to appear in court and testify. It is not necessary to be represented by an attorney in filing these charges, but it is generally advisable to employ one because of the need to be familiar with the law and the procedures followed by the Board.

The remedies for construction industry unfair labor practices include cease and desist orders that require the union to stop its unlawful activity. In ***secondary boycott* cases**, the union is ordered to stop the unlawful picketing and return to work. In ***recognition picketing cases***, the union is ordered to stop picketing if the picketing has continued for more than a reasonable period, which may not exceed 30 days, without the filing of an election petition. This remedy may be accompanied by a direction of an election – but only if a petition has been filed. In ***jurisdictional dispute cases***, the union is ordered to stop the course of activity (picketing, striking or the threat of same). This may be accompanied by an order holding a Section 10(k) hearing – an expedited procedure for resolving the disputed work assignment. [Note that a Section 10(k) proceeding is not available if the parties have agreed to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. See the material at 3.10.7.]

Although beyond the scope of this Guide, and outside of the discussion here, Sections 301 and 303 of the Labor Management Relations Act (LMRA) provide a federal court cause of action against unions for violations of collective bargaining agreements and damages caused by unlawful secondary activities.

3.3.5 ESTABLISHMENT OF BARGAINING RELATIONSHIP IN THE CONSTRUCTION INDUSTRY

As discussed above, the two primary means of establishing Section 9(a) exclusive representative status for bargaining apply to all employers, including those in the construction industry. These are: 1) voluntary recognition; and 2) certification after an election. Each of these means is dependent upon the union actually

attaining majority status and proving to the employer's and/or the Board's satisfaction that it enjoys such majority status.

If a union achieves majority recognition or certification under Section 9(a), the employer and the union each have a duty to bargain with each other over the terms of an initial agreement and a new agreement once a collective bargaining agreement expires. Such a duty continues until: 1) the employees vote to decertify the union as their representative; 2) the union disclaims interest in further representing the employer's employees or the employer withdraws recognition if the union has actually lost majority support; or, 3) the employer goes out of business.

Voluntary recognition under Section 9(a) is not frequently utilized by unions seeking bargaining rights in the construction industry, because Section 8(f) specifically permits an employer engaged primarily in the construction industry to enter into a collective bargaining agreement with a union *without* any showing of majority status by the union.

Section 8(f) for the construction industry was added to the NLRA in the Landrum-Griffin Act of 1959 because of the relatively short duration of employment on many construction projects. The Board's election machinery was viewed as impractical since after completion of a project or a phase of a project employees are typically released, and new employees are hired for the next project or the next phase. The assumption was that permanent certification or recognition of a union was generally inappropriate because of the loss of "majority" status of the union among employees due to the turnover of employees from project to project.

Section 8(f) permits easy "organizing" of open shop contractors. Once a project is bid and awarded to a contractor or group of contractors, and either before or after work on the project has begun, open shop contractors may be approached by unions representing employees in the trades to be employed on the project and asked to sign collective bargaining agreements. It is legal to sign such agreements *even if a contractor has not hired* any employees for the project, but *only* because of Section 8(f).

Some such "prehire" agreements are a type of "project agreement" that have no application to employees at a headquarters facility or on other construction projects. However, they need not be so limited. When entering into such agreements, it is advisable to make sure they do not conflict with any other agreements to which the contractor may be signatory, and they are explicitly limited – in *all* documents signed – to the intended project *only*.

There are very important differences between contracts signed pursuant to Section 8(f) and contracts signed after collective bargaining negotiations with a union that has been recognized or certified union under Section 9(a).

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

2. Contracts signed pursuant to Section 8(f) do not prevent the filing of petitions for elections that could lead to certification of the incumbent ***or another union***. Contractors need to be aware that merely signing a Section 8(f) agreement does not mean that they are free from going through a Board election. Also, a Board election that results in certifying a union as the representative of employees will certify the union as the representative of the employer's employees on all of a contractor's projects/jobsites in the geographic area covered by the certification.

3. Upon expiration of a Section 8(f) contract, a Section 8(f) contractor has no duty to bargain a new agreement with the union.

4. Despite the fact that a Section 8(f) contractor has no duty to bargain upon the expiration of a Section 8(f) agreement, ***a Section 8(f) contractor may be bound to a new collective bargaining agreement if it had previously delegated bargaining authority to a multiemployer association and failed to timely withdraw such authority before the start of negotiations for a new collective bargaining agreement*** or if the authorization (memorandum of agreement, letter of assent, or similar document) signed by the contractor contains an evergreen clause and the contractor did not give notice of termination.

5. Other considerations, such as the union's ability to seek a Section 9(a) election or the potential for withdrawal liability from benefit funds may also impact the practical realities of terminating a Section 8(f) relationship.

PRACTICAL TIP:
Beware Forgotten Out-of-Town Agreements

Frequently local agreements have "evergreen" clauses which automatically roll-over signatory status until an explicit withdrawal is made. In some cases, traveling contractors may have signed local agreements with evergreen clauses, and have left the area (without formal termination of the agreement) only to find on returning to the area that the bargaining relationship has continued in effect during the absence under the automatic renewal provisions of the local agreement, leading to problems when the local union or benefit funds seek payment for work under the evergreen clause or octopus clause stretching to cover work even in other areas. As with all other business agreements, contractors should keep track of all such agreements and their renewal and other terms and may want to consider inventorying all such agreements and taking timely steps to terminate those from areas in which they do not perform work actively.

CAUTION:
Conversion Confusion

As discussed in greater detail above in section 3.2.1, the Board has held that if an employer signs separately or includes in a collective bargaining agreement a statement that the employer is satisfied with the union's representation that it has attained majority status and recognizes the union voluntarily under Section 9(a), the employer may be held to have a Section 9(a) relationship with that union even if the employer has not actually seen any proof of majority status. Conceivably, an employer could sign off on such language without understanding or even knowing it has done so. As this area of Board law has been subject to frequent changes, check with experienced labor counsel on the state of the law when considering these issues.

CAUTION:
Extraterritorial "Octopus" Clause Can Unwittingly Bind Employers to Labor Pacts in Other Areas

In signing "me-too" agreements or out-of-area agreements, employers should be careful in understanding the language covering the territorial scope of the agreement. In some cases, even specific area local agreements have language that would bind the employer to a certain craft agreement in other areas for that type of work. In those cases, such an "octopus" clause could result in a conflict with other choices of craft in such other area. An example of such a clause found in at least some UA agreements states: "The Employers shall abide by legally established Agreements of the Locals of the United Association in whose jurisdiction they are contracting for work."

3.4 THE EMPLOYER IN NEGOTIATIONS

Negotiations may be conducted by employers in three basic bargaining configurations: single employer bargaining; multiemployer bargaining; or coordinated bargaining.

3.4.1 MULTIEMPLOYER BARGAINING IN THE CONSTRUCTION INDUSTRY

Multiemployer bargaining is traditional in the construction industry. It occurs when: 1) two or more employers that individually have a legal obligation or desire to bargain with a craft union decide to negotiate one agreement with that union covering all such employers; and 2) where the union also agrees. Multiemployer bargaining started as an attempt to curb union strength and defend against certain union tactics – the divide and conquer strategy of whipsaw strikes, pitting one or more employers with a lot of work at a particular time against other employers that had little work, for example.

If a contractor desires to engage in multiemployer bargaining, it is advisable to assign bargaining rights to the MEBU in writing. Assignments of bargaining rights may apply only to mandatory subjects of bargaining; or, they may be expanded to apply to both mandatory and permissive subjects of bargaining; and/or may also assign the right to administer the collective bargaining agreement during its term. Restrictive terms may also be included in an assignment of bargaining rights. These restrictive terms are covered in detail in the discussion of assignment of bargaining rights, below.

It should be noted that it is possible for a multiemployer unit to be certified as an appropriate unit for a Section 9(a) relationship, pursuant to an election or otherwise. Although the general rule is than a single employer unit is presumptively appropriate, a controlling history of collective bargaining on a multiemployer basis, the employers' intent and other factors of a community of interest could result in a finding that a union is entitled to an election on a multiemployer basis. See, for example, Regional Director Decision in *Architectural Contractors Trade Association*, Case 07-RC-12559, August 6, 2014.

COMMENT:

Bargaining Realities and Structural Flaws in Multi-Employer Bargaining Approach

Multiemployer bargaining worked well for a long time, and is still the predominant configuration in the construction industry. However, alternatives to it are becoming more common. There is more than one reason for this. On occasion, for example, individual members of multiemployer groups sign interim or retroactive agreements and work through a strike. The Supreme Court found such interim agreements permissible when an impasse in negotiations occurred, even though the Court also found that the impasse was not sufficient justification for abandoning the multi-employer bargaining unit altogether. *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 109 LRRM 2257 (U.S. 1982). When that happens, the other employers in the multiemployer group are at a disadvantage. The remaining members of the group find themselves getting whipsawed, effectively having no bargaining leverage and being forced to settle on undesirable terms. In other words, the desertion of the interim agreement signers allows the union to again employ the whipsaw or divide-and-conquer strategy the multiemployer bargaining was designed to avoid. The employers that do not sign interim agreements cannot achieve their desired deal because of the loss of bargaining leverage caused by the desertion of the employers that signed the interim agreement.

Another circumstance that has undermined multiemployer bargaining to some extent is the increase in project agreements on major, long-running projects. These typically contain no-strike/no-lockout clauses that are iron-clad for the life of the project agreement (which frequently runs beyond the expiration date of local area agreements). Thus, a major project employing a substantial percentage of the locally available union labor may go on without interruption even while a strike takes place against the contractors of the area (who may or may not be working under the instant project labor agreements or national agreements insulated from the work stoppage by the union involved). This significantly reduces the bargaining power of the multiemployer bargaining unit in the local collective bargaining agreement negotiations.

PRACTICAL TIP:

"Exclusive" Bargaining Relationship Is a One-Way Street

As a practical matter, MEBUs have no legal right under the NLRA to insist that the union deal with the MEBU exclusively. So, the union has a right to be the exclusive representative of a group of employees, but may deal freely with other MEBUs or employers in the area without fear of unfair labor practice restraints. In fact, for employers to attempt to insist on exclusivity, i.e., the union will refrain from dealing with any other employers, would invite antitrust challenges. However, despite the lack of NLRA protection, a recitation of exclusivity in the union/employer recognition clause of a CBA may provide some contractual limits on a union direct dealing with MEBU members who have assigned bargaining rights to the employer bargaining Agent. For example, the MEBU might consider some form of the following MEBU recognition language: "The employers recognize the union as the sole and exclusive representative of employees covered by the CBA, and the union likewise and in the same manner recognizes the MEBU bargaining Agent as the sole and exclusive representative of employers covered by this CBA and will not enter into direct dealing with individual employers covered by this pact during its term for any matters relating to the provisions or terms and conditions of the CBA."

With this parallel language, a union that deals directly with a MEBU employer during the term of the CBA may be subject to a grievance for direct dealing in violation of the contract.

COMMENT:
"Most Favored Nation" Clauses Not Affected by National Agreements or PLAs

In some instances, specific site project agreements – a national maintenance agreement, for example – may have more favorable rates or working conditions (foreman selection, or crew mix, for example) from the employer's perspective than the local area bargaining agreement. In some cases, where the local agreement has a "most favored nation" (MFN) clause, attempts have been made to invoke the MFN clause and transfer the project agreement terms into the local agreement. Most often those attempts fail because of restrictive language in both the project agreement and the local agreement that specifically exempts site-specific agreements from the operation of the MFN clause.

However, there is a narrow caveat to the general rule. In one case, there was an exception where a local union granted a local MEBU member company a PLA in the jurisdiction of the local CBA with a shorter term of CBA coverage under the PLA than the three-year term in the local MEBU CBA – and the Board and appeals count allowed the MFN on differing terms to operate to reduce the term for the local CBA to match the PLA. *NLRB v. Irvin-McKelvey,* 475 F2d 1265 (3d Cir. 1973). Some have questioned whether union recognition of Section 8(f) prehire status under a PLA could operate through the MFN clause to reduce Section 9(a) union representation status in the MEBU to be reduced for all to 8(f) status. McKelvey covered a specific "term" of the contract – contract duration; the court distinguished other "provisions" of the CBA – such as union recognition language.

So, a MFN clause that recited broader application as follows: "In the event the union offers any other terms and conditions of employment or other provisions of a CBA to members of the MEBU or non-members of the MEBU in the jurisdiction of this CBA during its term, then those terms and conditions or other more favorable provisions shall be made available to all employers working under this CBA – MEBU members and non-members alike." Even in this case, however, a very broad carve out of PLAs or national agreements in the CBA and the national agreement or PLA would operate to nullify the operation of this broader MFN language in most cases, most likely. In addition to other factors, the outcome may depend on how 9(a) status was achieved – by voluntary recognition or election. At this point the discussion remains hypothetical.

Pros and Cons of Multiemployer Bargaining

PROS: Multiemployer Bargaining Allows Employers to:

1. Present a united front;
2. Take easy advantage of a pool of skilled labor through the union referral hall (given that all employees referred out to any employer know that they will always receive the same rates, benefits and working conditions);
3. Eliminate competition among the employers for labor (at least in terms of not having to worry about adjusting pay and benefits to attract workers from their union competitors in the MEBU);
4. Reap significant cost savings in the negotiation process and end up with an agreement that applies equally to their unionized competition;
5. Take advantage of an association or at least a centralized authority for administering the agreement and dealing with grievances, if any, as well as Taft-Hartley jointly administered benefit plans, and any labor/management cooperative committee activity support as well.

CONS: Multiemployer Bargaining:

1. Prohibits an employer from bargaining for its own special issues (although in an 8(f) arrangement, the union may have most of the leverage);
2. May require each employer to be bound by an interpretation of the agreement, or a grievance settlement or arbitration result, that the individual contractors may object to or have been able to defend better on their own;
3. Reduces an employer's ability to get a leg up on its competition through cost control measures, such as wages and benefits;
4. May limit the employer's ability to find and train its own, preferred employees.

PRACTICAL TIP:
Selective Strikes Undermine MEBU Cohesion

Another threat to MEBU cohesion is a union's ability to call a selective strike/job action against only members of the bargaining committee, threatening even the long- term effectiveness and viability of the group as a whole. One way MEBUs dealt with this threat is to hire a professional bargaining representative to represent the group in negotiations, insulating the cohesion of the group, and preventing resort to single employer or even model agreement bargaining. As noted previously, in a Section 9(a) relationship it would be an unfair labor practice for either side to object or refuse to bargain because of the selection of representatives. Section 8(f) arrangements are less formal, but practically the outcome is the same; if bargaining is to take place, each party will have to deal with whomever represents the other side.

COMMENT:
For the Lawyers – A Discussion of Some Board Cases on 9(a) Conversion in a Multi-Employer Unit

In *Donaldson Traditional Interiors,* 345 NLRB 1298 (2005), the Board found a multi-employer unit appropriate on the basis that the 8(f) relationship between the Plasterers and an employer association has converted to a 9(a) relationship. The association, on behalf of its individual members, had voluntarily recognized the Plasterers as the 9(a) representative of a majority of employees employed by each association member and had been presented with stacks of authorization cards for the employees of each such member. The arrangement was memorialized in a subsequent collective bargaining agreement between the parties. On this basis, the Board denied a petition brought by the individual association members, the association itself, and a second union, the Bricklayers, all of whom had requested single-employer units represented by the Bricklayers. (For a more expansive discussion of 9(a) recognition in multiemployer units, see the NLRB's "An Outline of Law and Procedure in Representation Cases," Chapter 14, which can be found at https://www.nlrb.gov).

Although there is not a great deal of authority dealing with this issue in the construction industry, two cases have arisen that should be noted. First, in *Comtel Systems Technology,* 305 NLRB 287 (1991), the Board held that the merger of Section 9(a) employers with Section 8(f) employers in a multiemployer bargaining group did not convert the Section 8(f) relationships to those under 9(a). Although the facts of the case are complicated, the general premise is that a Section 8(f) employer, Comtel, signed an agreement that was presumed to be a Section 9(a) multiemployer agreement. Comtel – for reasons that are not explained in the case – filed an election petition with regard to its own employees and the union with which the multiemployer group (to which it belonged) had a Section 9(a) relationship. The union resisted the petition by claiming that *Comtel* had a 9(a) relationship, and the petition was barred. The Board sided with Comtel, stating as follows: "an employer that has designated a multiemployer association as its collective-bargaining representative will be bound by any agreement reached by that association, but the agreement will not be binding as anything other than an 8(f) agreement in the absence of a showing that a majority of the employees in the employer's covered workforce had manifested their support for the union before the employer became bound by the agreement." The Board continued, "where, as here, (1) a union seeks full 9(a) status as the exclusive bargaining representative of employees in a multiemployer unit, and the multiemployer group voluntarily extends such recognition, (2) within a reasonable time after such recognition is extended, a question is raised about the existence of majority support among the employees of a member employer at the time the association is granted recognition [Note: the Board declined to comment on what would happen if the question was raised outside of Section 10(b)'s 6-month limitations period, and (3) the record fails to show that a majority of the single employer's employees supported the union at that time, we conclude that allowing an election in which the views of the single employer's employees can be ascertained before they are merged into the larger unit is a reasonable means of striking a 'balance between the legitimate and often conflicting congressional policies embodied in Section 8(f) and the Act as a whole.'"

Consistent with the above, the Board held that the Comtel-union relationship was presumptively an 8(f) relationship, that Comtel's act of joining the multiemployer group and assenting to the agreement did not make it subject to a 9(a) relationship, and that it did not merge its employees into the larger unit "unless majority support among the Comtel employees was manifested prior to that assent." Finally, and most significant to our discussion, the Board held that if a union wanted to achieve Section 9(a) status "in a construction industry multiemployer association – and therefore eliminate the potential for 8(f) proviso elections that would test its majority during a contract's term – it must have the manifest support of a majority of the employees of any individual employer whose employees it seeks to merge into the unit under a 9(a) agreement."

COMMENT:
For the Lawyers – A Discussion of Some Board Cases on 9(a) Conversion in a Multi-Employer Unit (continued)

In the second case, *Arbor Construction Personnel, Inc.,* 343 NLRB 257 (2004), the Bricklayers petitioned for an election at one member of a multiemployer unit with which they had an agreement. However, the employer successfully resisted the election petition by establishing that it had a Section 9(a) relationship with the Cement Masons through another employer association to which it belonged. The Board held that because the employer had established a Section 9(a) relationship through one multiemployer unit, "a petition for a single-employer unit will not be entertained." Unlike in the *Comtel* decision, however, no employer contested the fact that the multiemployer relationship was a Section 9(a) relationship, and the Board did not evaluate this issue.

3.4.2 SINGLE-EMPLOYER BARGAINING

One obvious alternative to traditional multiemployer bargaining is negotiating on a single-employer basis. This involves one contractor bargaining a contract with each union with which it has a bargaining relationship. Any contract agreed upon applies to that contractor only.

One option is for a single employer to adopt local area agreements (doing this is sometimes called signing a "me too" agreement). An employer that is not bargaining as part of a multiemployer group may generally adopt a local area agreement with a craft union. To do so, the employer may sign an Acceptance of Working Agreement and/or Participation Agreement form for benefit fund payments that may contain an agreement to accept the local area agreement. ***An employer that does so should review the form carefully to be certain whether it contains an assignment of bargaining rights for future negotiations, or territorial jurisdiction provisions that would affect the employer's operations elsewhere***. The documents also should be reviewed, carefully, to determine whether they purport to grant Section 9(a) recognition to the union. [See section 3.2.1, above, discussing *Staunton Fuel*, the extension of Section 9(a) recognition, and the Board's current position regarding conversion.]

PROS & CONS:
Pros and Cons of Single-Employer Bargaining

PROS

A single employer does not have to agree just because the other employers want to. In multiemployer situations a majority of the employers usually carries the day and may collectively agree to something that an individual employer would not agree to on its own. This may occur in response to the threat of a strike, or in response to a strike itself, in circumstances where the individual employer would have been willing to take a strike, while others would not. Examples of the kind of clauses that some employers may be concerned about include significant subcontracting restrictions and work preservation clauses that may limit legitimate dual-shop operations. Individual employers bargaining on their own have more control over their own destiny on such issues.

A single employer may decide to hire permanent replacements for employees who strike if the employer negotiates to impasse and strike. Permanent replacements might ultimately decide to decertify the union resulting in the employer becoming open shop. However, this could also be a "con" because the employer may want to remain union since most of its work is union, or it may fear that it will not be able to develop an effective personnel strategy that ensures a reliable supply of qualified employees, and/or because it is concerned about multiemployer pension withdrawal liability.

The strategy of contractors negotiating individually with unions could work to the advantage of all if several employers do it. If several employers all withdraw their rights and insist on separate negotiations, the union's resources may be taxed to cover all these separate sets of negotiation with its limited personnel (something the unions may not have fully considered in their support of pro-organizing legislation that would lead to multiple 9(a) individual relationships).

CONS

A single employer must negotiate on its own or pay a professional to do it. A single employer bargaining on its own will find negotiations difficult because the persons assigned to negotiations will probably be less experienced than whoever does it for the union. Thus, the employer may be at a disadvantage depending on its experience and ability as a negotiator. Hiring a professional negotiator will likely cost the employer more than the dues to a professional multiemployer association or other professional fees it may have paid in the past.

As a practical matter, particularly in Section 8(f) situations, the single employer may be unlikely to obtain significant deviations from the multiemployer agreements on core terms because of the limited nature of the duty to bargain and the likelihood of MFN clauses in the multiemployer agreements (see discussion in 3.4.2.2 below on MFN clauses)

A single employer can be isolated. All of the other contractors in the group, either individually or through an association, could settle on a collective bargaining agreement leaving the union to strike one employer alone. In this case, the union would have many working members elsewhere whose dues would support the strike. However, this negative feature goes hand in hand with the employer's rights at impasse, such as the right to hire replacements, etc. mentioned above as a "pro."

PROS & CONS:
Pros and Cons of Coordinated Bargaining

PROS

Many of the efficiencies and tactical advantages of using professional negotiators are present as in the case of traditional multiemployer bargaining.

It is less likely that a contractor will find itself isolated as in the single-employer bargaining situation because the discussions will be coordinated with a common thread running through all of them.

CONS

It looks sufficiently like multiemployer bargaining for the Board to say it still is multiemployer bargaining.

It is less likely that an individual contractor will affirmatively attain new terms in the collective bargaining agreement than if negotiating as an individual. There still will be some tendency to be controlled by the wishes of the group or the sense of the group in this context.

Recommendation Regarding Bargaining Configuration: In normal circumstances, a strong multiemployer association bargaining unit is preferable to coordinated employer bargaining, also for the same reason – it promotes stability and development of a qualified work force to the benefit of owners and contractors alike.

3.4.2.1 WITHDRAWAL FROM MULTIEMPLOYER BARGAINING

Of course, before engaging in single-employer bargaining, if an employer has previously assigned its rights to a multiemployer group, it must first withdraw the assignment of those rights from the multiemployer group. The employer should consult legal counsel to ensure that the withdrawal is accomplished effectively.

A critical factor for effective withdrawal of bargaining rights is timing. *Before* the deadline in the expiring collective bargaining agreement for giving notice of an intent to terminate or modify that agreement, ***and before negotiations actually commence,*** the employer should do the following. *First*, the employer should send written notice to the multiemployer group of its unequivocal intent to withdraw the right to bargain on its behalf from the multiemployer group. *Second*, the employer should send such written notice to the union or unions involved. *Third*, it may also be necessary (depending on the employer's plans, as to bargaining proposals and a possible lockout strategy) to notify federal and state mediation agencies somewhere between 90 and 60 days before the collective bargaining agreement expires. The employer should inform the agencies of the expiration date of the collective bargaining agreement and that it is conducting negotiation on its own and not as part of a multiemployer association or unit. *[See FMCS Form F-7 in section 3.7, below.]*

Two decisions of the Board have had a significant impact upon the timing and process for effective withdrawal of bargaining rights from multiemployer associations. The cases are *Chel LaCort*, 315 NLRB 1036 (1994) and *James Luterbach Construction Co.*, 315 NLRB 976 (1994).

Section 9(a) Relationships – In *Chel LaCort*, the Board held that employers in Section 9(a) relationships that assign bargaining rights to a multiemployer association must effectively withdraw those bargaining rights ***before actual negotiations begin***, even if negotiations begin much earlier than called for under the collective bargaining agreement itself, even if the employer had no reason to know that negotiations were going to begin

early, *and* possibly even if the multiemployer association deliberately concealed the fact of early negotiations from one or more of the employers that had assigned bargaining rights to it.

Section 8(f) Relationships – In *Luterbach*, the Board ruled that a Section 8(f) contractor is not bound automatically to a new collective bargaining agreement negotiated by a multiemployer association to which the employer had assigned bargaining rights in the past, but which had split off from the previous group and to which the employer had not assigned its bargaining rights. Two members of the Board's panel (three (3) of the Board's five (5) members are involved in deciding many cases) held that a Section 8(f) contractor is bound to a successor Section 8(f) contract negotiated by a multiemployer ***association only if the employer takes some affirmative steps to put the union on notice that it intends to be bound by the successor agreement.*** A third member of the NLRB held that a Section 8(f) contractor was obligated to a new Section 8(f) contract if the *multiemployer association* gave notice to the union that it had bargaining rights and was bargaining on behalf of such Section 8(f) contractor. The test enunciated in *Luterbach* stated that a non-signatory employer is bound by multiemployer bargaining only if the employer (1) was part of the multiemployer unit prior to the dispute, and (2) "has, by a distinct affirmative action, recommitted to the union that it will be bound."

As noted in subsequent decisions, however, *Luterbach* "did not involve an evergreen clause granting continuing bargaining authority, and the NLRB's test does not account for such an agreement. Indeed, the NLRB stressed that the *Luterbach* test only applies to resolve ambiguity about the employer's commitment to be bound." See *Carpenters Health v. Management Resource Systems, Inc.,* 837 F.3d 378 (3d Cir. 2016).

CAUTION

It is important to not overread *Luterbach* for negotiations for successor pacts under a Section 8(f) prehire union recognition status. In a recent administrative action, an employer group challenged a union's withdrawal from actual negotiations to recognize a rival MEBU bargaining agent. The union was attempting to force the employers to leave one association and join another as their bargaining agent and then to appoint that rival association as settlor of the benefits funds as well.

The target MEBU filed a number of unfair labor practice charges contesting the union's attempt to force them to choose another bargaining agent- and the target MEBU relied on *Luterbach* to try to defeat the union's withdrawal from negotiations to favor the rival group. The NLRB Regional Director issued an opinion letter that reads in pertinent part:

> *"The Union did not violate Section 8(b)(3) [unlawful refusal to bargain with the employer] of the Act by withdrawing from multi-employer negotiations for a successor 8(f) CBA. Deklewa . . . . The Board has never found that merely commencing Section 8(f) bargaining creates a 9(a) relationship. . . . The issue in Luterbach was whether an employer that did not timely withdraw its designation of a multi-employer association as its bargaining representative would be bound by the contract that the association signed. Indeed, the Board noted in Luterbach itself that even where an individual 8(f) employer could not withdraw from its bargaining representative, the employer's bargaining representative always has the right to withdraw from 8(f) bargaining . . . Here, the Union is itself a bargaining representative, and thus retained its right under Deklewa to lawfully withdraw from 8(f) bargaining. (Emphasis added) (Ironworkers Local 25 and Great Lakes Fabricators and Erectors Association, 07-CB244366 and 07-CC-250720, December 1, 2020, NLRB Region 7 Regional Director Terry Morgan.)*

Actual Negotiations

In ***Retail Associates, Inc.,*** 120 NLRB 388 (1958), the Board first stated the actual negotiations rule as follows:

> *We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each has committed itself to the other, absent unusual circumstances*

The Board has applied that rule in many circumstances. For example, in Carvel Co., 226 NLRB 111, enforced 560 F.2d 1030 (1`st Cir. 1977), the Board held that once proposals are given by one party to another, negotiations have commenced and a subsequent withdrawal by an employer from multiemployer bargaining is untimely.

In *Chel LaCourt*, the Board refused to allow an employer to withdraw from an association once negotiations had begun by the exchange of proposals even though the negotiations had begun several months prior to the deadline set forth in the agreement for negotiation of reopening, and even though the general membership of the multiemployer association as a whole had not been informed of the onset of negotiations.

Sample Duration and Notice of Termination Clause

This agreement shall be in full force and effect from _____, 20__ and continuing through _____, 20__. In the event that either party to this Agreement wishes to terminate or modify this Agreement, written notice shall be given to the other party at least sixty (60) days prior to the expiration date. In case no such notice is given by either party, the Agreement shall continue in effect from year-to-year until such written notice is given at least sixty (60) days prior to the subsequent anniversary date.

PRACTICAL TIP:
Calendar Dates for Assignment or Withdrawal of MEBU Bargaining Rights

Both employers and associations must pay close attention to the timing of assignment and withdrawal of bargaining rights relative to contract notice periods and the beginning of negotiations, and to actions that may be interpreted as assignment of bargaining rights to multiemployer associations.

Practical Tip – To avoid inadvertent negative consequences in failing to parse the niceties of *Chel La Cort* and *Luterbach* correctly, the MEBU bargaining agent should – very early on in their CBA renewal bargaining planning – review their recognition status with the union, check all written bargaining authorizations from MEBU members for accuracy and currency, and with the advice of competent labor counsel, plan how to advise the union of the status and membership of the MEBU and just what employers are currently represented by the group. Careful records of bargaining assignments and accurate membership lists should be maintained, and if appropriate, shared with the union on a timely basis.

3.4.2.2 "MOST FAVORED" EMPLOYER CLAUSES

Single-employer bargaining may also be affected by the inclusion of "most-favored" employer clauses in local area agreements. Such local area agreements frequently contain clauses (often referred to as "most favored nation" clauses) providing that if the union agrees to more favorable terms (that is, better than in the local area agreement) with one employer in an area, it must extend those more favorable terms to *all* employers signatory to the area agreement. Such clauses are lawful if they are drafted appropriately.

A clause providing that the union will extend more favorable terms to *all* employers is generally *lawful*. A clause providing that the union will not *agree* to more favorable terms with any other employer (other than those covered by the local area agreement) is generally *unlawful*; such clauses may violate anti-trust laws because they essentially constitute an agreement between the union and management to fix wages for all work done by union-represented employees of any employer in the union's jurisdiction that is not part of the multiemployer bargaining unit.

Additionally, when bargaining with a single employer in a *Section 9(a) relationship*, if a union relies on such a clause as the basis of a refusal to bargain over terms different from the multiemployer bargaining unit area agreement, such may also constitute an unfair labor practice (failing to bargain in good faith).

The existence of a lawful "most-favored" clause in an agreement, therefore, does not prevent employers from bargaining over more favorable terms. In fact, a single employer bargaining with a union under Section 9(a) may *require* the union to bargain over proposals for different terms from the local area agreement even if the local area agreement contains a lawful "most-favored" employer clause (also referred to sometimes as a "me too" clause). The union will not want to agree to different terms with a single-employer because of a fear of having to extend such terms to the employers signatory to the local area agreement; but, if the union refuses to agree to such proposals *because of* the "most-favored" clause, the union may be bargaining in bad faith.

Project agreements are generally not seen as triggering "most-favored" employer clauses because they are seen as dealing with a specific geographic area; however, there should be an express and explicit specific carve-out in the actual language CBA language for project and national agreements granted by the union. In the absence of that explicit carve out, the operation of the MFN clause on a project or national agreement in the area remains possible. See Drafting Tip, below.

Invoking a "most favored employer" clause – Some "most favored employer" clauses are self-executing – that is, if a more favorable provision is agreed to in another agreement, the more favorable provision is automatically considered to be part of the agreement containing the "most favored employer" clause. In effect, the CBA reserves the discretion in signatory employers to adopt the more favorable terms in their CBA without further negotiations with the union – with qualifications as noted in the Practical Tip below. Other "most favored employer" clauses simply call for the parties to negotiate over whether and how to implement the more favorable provision in their agreement.

An employer bargaining with a union in a *Section 8(f) relationship* may also advance proposals that differ from the local area agreement. However, since neither the union nor the employer has a *duty* to bargain in good faith under Section 8(f), the union does not commit a refusal to bargain unfair labor practice by refusing to agree on the basis of the "most-favored employer" clause.

PRACTICAL TIP:
Self-Executing MFN Clauses Better for Employers

A self-executing MFN clause generally may be preferable from the employer's point of view because it avoids opening up negotiations on other provisions, and may even avoid bargaining on the specific change if the change is clear. However, if the required amendment is not clear on how to narrowly amend the agreement, or if the relative judgment about whether a provision is more or less "favorable" to the employer is reasonably questionable, then an automatic amendment may be challenged by the union as a refusal to bargain and as an unfair labor practice which could justify an NLRB order to go to bargaining over the change. Still, since a MEBU does not enjoy a legally sanctioned exclusive bargaining relation with the union, a MFN clause may be a fair defense against whipsaw tactics in the area.

3.4.3 COORDINATED BARGAINING

Another alternative to traditional multiemployer bargaining is *coordinated bargaining*. Coordinated bargaining occurs when employers seek to obtain *individual* contracts but to do so at the same time or using the same spokesperson.

Under this scenario, several employers could hire one negotiator. It could be an individual (an experienced labor negotiator, an experienced labor lawyer, etc.) or a professional association. It could even be the association that previously bargained as the multiemployer group representative.

This, however, can be tricky and is a tactic that should be discussed, in detail, with experienced labor counsel.

There are circumstances in which the Board might find that the use of the multiemployer association as the bargaining representative for the coordinated effort is simply a disguised form of the multiemployer bargaining format. In that case, the Board would not give effect to the intended individual nature of each bargaining unit and agreement.

DRAFTING TIP:

MFN clauses that allow for adjustments for competing agreements in the area are lawful and legitimate ways to protect the competitive position of MEBU member companies in the market relative to non-members or other firms that travel into the market area and enjoy more favorable CBA terms and conditions or other provisions in their CBA's relative to the local agreement. It is important that the MFN clause recite both *different terms and conditions of employment* and *all other provisions of the CBA* – as some courts have made a distinction between actual terms and condition of employment – *e.g.*, pay and benefits and hours and schedules, and then other provisions of the CBA, *e.g.*, union recognition language, the term of the CBA, industry funds payment, etc. In one older case, a local employer MEBU was successful in enforcing a MFN challenge against a union that allowed another MEBU member company a shorter term of the CBA on a project-only agreement in the market that was not granted to MEBU members on other jobs in the market area. The local CBA did not carve out the PLA, so the MFN clause operated to allow all non-PLA project MEBU members to have the truncated CBA term that the union allowed the MEBU member on the project-only agreement in the area. (*NLRB v. Irvin-McKelvey,* 475 F2d 1265 (3d Cir. 1973).

The following scenarios illustrate the coordinated bargaining approach. First, Company A, Company B, and Company C are all to be represented by Spokesperson X. Spokesperson X makes it clear to the union that he or she is *not* negotiating a group contract but individual contracts for Companies, A, B and C. If this is done correctly, the result is an individual contract for each contractor. Each contractor, and perhaps each project, is an individual bargaining unit. Negotiations would no longer result in one agreement covering one large multiemployer unit.

Such coordinated bargaining could also be accomplished in different formats. One could have Spokesperson X contacting the union and saying that he represents Company A one day, the next day he will be representing Company B, and the next day he will be representing Company C. This is taxing on the union's resources much the same as the group of employers all negotiating individually. It is also rather taxing, however, on Spokesperson X.

Another format for coordinated bargaining is to have Spokesperson X come into one meeting with the union and inform the union that he or she represents all three companies, A, B, and C, that are each negotiating individual contracts. Spokesperson X could further state that if the union prefers, and in order to avoid strain on the limited resources of both sides, the discussions could take place all at one time – as long as the union understands and agrees that three separate contracts are being negotiated, and that each contract must be ratified independently by each contractor and independently by the union for each contractor. See, for example, IBEW Local 46, 302 NLRB 271 (1991).

3.4.4 STRICT ASSIGNMENTS OF BARGAINING RIGHTS

Another variant of multiemployer bargaining, at least in the way it has traditionally been carried on in many areas, is to continue to bargain on a multiemployer basis but to change significantly the nature of the assignment of bargaining rights. It is possible to write a very tight and strict assignment of bargaining rights agreement in which the employers promise not to enter into interim agreements or retroactive agreements. Using such a restrictive assignment form, all employers assigning rights may agree that if one or more employers are struck, all others will lock out, and/or that if the bargaining committee deems that an offensive lockout should be called – one not in response to a union strike, but a lockout to put pressure on the union – all employers in the group agree they will participate in the lockout. [See example on the next page.] If an employer violates one of the above pledges, the employer may be subject to suit for damages by the other employer members of the group. Legal counsel should be consulted to discuss both the labor and the anti-trust issues that may be involved in this approach. One problem with damage suits to encourage discipline in the employer ranks is the problem of determining actual damages for violations. One way to address that would be to consider adding a standard liquidated damages amount in the assignment (along with attorney fees). However, that too can be difficult to enforce – again experienced legal counsel is needed for this as the impact on employer solidarity can be affected as a result of these considerations.

Permissive Subjects of Bargaining – Take care to address the scope of bargaining rights assigned. Assignments of bargaining rights could include only mandatory subjects of bargaining – and probably do include *only* such subjects unless they state otherwise. To include permissive subjects, an assignment of bargaining rights should include all subjects which may *lawfully* be bargained. This will ensure that permissive subjects of bargaining, such as industry promotion fund clauses, are included within the scope of the association's authority to bargain on behalf of the assigning employer. (See the Collective Bargaining Agent

Authorization, set forth below.)

The undersigned Employer hereby assigns its bargaining rights to the Committee designated by the (Name of Association) (Association) for the purpose of negotiating and administering a collective bargaining agreement by and between said Association and (Name of Union), and agrees to abide by and be bound by all the terms and conditions and other provisions thereof, by any amendments thereto, and further agrees to ratify and accept said collective bargaining agreement and the terms and conditions and other provisions thereof as fully and completely as if made by the undersigned. The undersigned Employer understands and agrees that administration of the collective bargaining agreement includes interpreting its terms and resolving grievances thereunder. [The foregoing assignment of bargaining and administration rights covers all matters (mandatory and permissive subjects) which may lawfully be bargained between employers and unions under the National Labor Relations Act, as amended.]

The undersigned Employer additionally agrees to the following:

If collective bargaining negotiations between said Association and said union do not produce an agreement by the expiration date of the current agreement, or any extension thereof, between said Association and said union, the Employer will not enter into any agreements with said union which would allow the Employer to continue operations in the event that a strike is called and engaged in by said union against said Association or any member thereof or any other employer that has assigned its bargaining rights to said Association;

In the event such a strike against any of the aforesaid employers occurs, the Employer will immediately cease any and all of its operations which would be governed by the terms of any collective bargaining agreement reached in negotiations between said Association and said union until such time as the aforesaid strike has ended; and

In the event that an impasse is reached in negotiations between said Association and said union, the Employer will, upon direction from said Association's bargaining team, immediately cease any and all of its operations described in the preceding paragraph until said impasse is resolved or for such other lesser period of time as determined by said Association's bargaining team.

This authorization may not be modified or revoked by the undersigned except by written notice, registered mail, return receipt requested, to the Association at least four (4) months prior to the expiration of the collective bargaining agreement contemplated by this authorization.

IN WITNESS WHEREOF, THE UNDERSIGNED HAS SET HIS HAND OR CAUSED THESE PRESENTS TO BE SIGNED BY HIS DULY AUTHORIZED REPRESENTATIVE, THIS _____ DAY OF _____, 20___.

OBSERVATION:
Strict Assignments Make the MEBU Stronger, But May Scare Off Some Employers

Using any of these variations on the assignment of bargaining rights form could make the multiemployer bargaining group more effective than the less restrictive forms of such an assignment that have allowed the whipsaw tactics that have weakened multiemployer bargaining units in the past. They certainly leave the multiemployer bargaining units less susceptible to such divide-and-conquer and whipsaw tactics. However, these variations on the assignment of bargaining rights forms generally do not affect preexisting project agreements or national agreements in the area in which the no-strike/no-lockout pledges already exist. Also, many contractors might withhold bargaining rights rather than agree to be so tightly bound – and potentially subject to liquidated damages assessments, or court challenges, and attorneys' fees.

3.5 THE UNION IN NEGOTIATIONS

Unions have the same legal capacity as employers to use the three basic configurations of single, multi-, or coordinated craft bargaining. *Just as union agreement is a prerequisite to multiemployer bargaining, employer agreement is a prerequisite to multi-craft bargaining*. The only circumstance in which employers would be *required* to bargain on a multi-craft basis would be one in which the unions obtained *certification* from the Board on a multi-craft basis following an election conducted by (or order of) the Board in a single bargaining unit consisting of more than one craft. It is possible, although unlikely, that a group of craft unions could petition the Board collectively to hold a multi-craft election among all of an employer's craft employees, regardless of craft. If the unions won such an election, the employer would be legally obligated to bargain with those unions on a multicraft basis.

Unions can also engage in coordinated craft bargaining – even to the extent of one union placing a representative of another union on its bargaining team. An employer may not refuse to bargain with a union because of who the union names to its bargaining team any more than a union can refuse to bargain with an employer because of who the employer names to its bargaining team.

For example, it is an unfair labor practice for a union to refuse to meet because the multiemployer bargaining unit's labor attorney is at the table.

PRACTICAL TIP:
Beware Attempted Multi-Craft Bargaining

If a union seeks multi-craft bargaining or names representatives of another craft to its bargaining team, it is advisable to consult legal counsel or an employer association to determine what additional precautions and preparations should be undertaken before the bargaining process begins.

3.6 PROJECT AGREEMENTS

Project agreements are collectively bargained agreements that cover only the work performed on a specific project. These project agreements may take the form of "one employer, one craft, one project" (for example, the UA Specialty Construction Agreement) or "all employers, all crafts, one project" (for example, the *Boston Harbor* PLA discussed below).

3.6.1 ONE EMPLOYER, ONE CRAFT, ONE PROJECT

This type of project agreement occurs when one contractor (either a contractor that formerly or usually operates open shop, or a union signatory contractor working outside of its home area), enters into an agreement with one craft for a specific project. It is accomplished by signing either a national specialty agreement, or some form of a craft's local area agreement. To limit the scope of the agreement, such an agreement should be in writing and state that: (a) the agreement binds the employer to the agreement *only* for the one project; and (b) when the project is completed, the employer has no further obligations under the project agreement or any other agreement, including the local area agreement.

3.6.2 ALL EMPLOYERS, ALL CRAFTS, ONE PROJECT

This type of project agreement, generally referred to as a project labor agreement (PLA), is often used for large, long-term projects involving unusual circumstances, such as the Boston Harbor clean-up. It is generally the result of an owner's requirement for a union-built project, or of some circumstances that call for variance from the local area agreements. Such PLAs almost always contain a no-strike/no-lockout clause that is to remain in effect for the duration of the project, even if the local area agreements expire in the meantime. In many cases, these PLAs also contain special terms concerning manning requirements, subcontracting provisions, wage and benefit rates, overtime rules, or other matters.

Typically, all contractors on the project must agree to be bound by the PLA as a condition of being awarded work on the project. Such PLAs also usually incorporate all the terms of the local area agreements, with a proviso that they are controlled by any inconsistent provisions contained in the project agreement itself. This means that usually all contractors also must abide by – ***but not necessarily become or remain signatory to the local area agreements*** – as a condition of working on the projects.

Following a decision of the Supreme Court of the United States issued in 1993, *Building & Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 142 LRRM 2649 (1993) (referred to as the *Boston Harbor* case), PLAs are now generally lawful on public as well as private projects. Under *Boston Harbor*, public projects may utilize PLAs without being preempted by the NLRA as long as the public entity involved is acting as an "owner" and not attempting otherwise to regulate labor relations policies of private sector employers.

PLAs had been used in the past on many large-scale federal and public Depression-era projects – and public and private construction project purchasers have always enjoyed the authority to use their sound proprietary discretions in setting performance terms and specifications (including labor performance) on their jobs. However, the Boston Harbor catapulted the federal/public agency PLA issue into the realm of high-pitched union/non-union national labor politics – and that political "ping-ponging" has continued through Presidential administrations since 1992 to the present day.

PLAs on public projects are still challenged frequently under theories of preemption under the Employee Retirement Income Security Act (ERISA). Additionally, state procurement statutes and state bidding statutes have been invoked in various locations in attempts to invalidate PLAs on large public projects. The law around the country is not uniform. In a very few locations, such PLAs on public projects have been struck down on either ERISA preemption or state bidding/procurement statute grounds. In most other locations, the courts have found ERISA preemption inapplicable and found either that there is no state bidding/procurement statute or that the state bidding/procurement statute does not prohibit the PLAs. Contractors need to be aware of the law in the jurisdiction in which they operate.

In *Glens Falls Building and Construction Trades Council (Indeck Energy Services, Inc.)*, 350 NLRB 417 (2007), the Board held that a non-construction industry owner and a union had violated Section 8(e) of the Act by entering into a PLA. The Board found that the agreement was not protected by the construction industry proviso to Section 8(e) because it was not entered into in the context of a collective-bargaining relationship. The Board found that the employer's primary purpose was not to establish terms and conditions of employment for any of its employees, but to "remove the threat of union opposition to its efforts to secure regulatory approval of its cogeneration plants."

In addition to legal challenges, the question of PLAs continues to percolate in the political arena. In 1992, President GHW Bush issued a *ban* on federal project PLAs in the wake of the *Boston Harbor* decision and in the heat of a tight political race seeking support of non-union contractors in his pitched re-election campaign. After that, in 1993 President Clinton revoked Bush's ban and put in a EO *encouraging* consideration of PLAs on federal projects. Then, President George W. Bush issued EO's on both direct federal and federally assisted projects – but did allow PLAs on federal projects but only at the discretion of the successful bidder. Then, President Obama overturned the Bush EO and issued his own EO requiring merely consideration of PLAs on direct federal projects. Surprisingly to some, first term President Trump stayed out of the PLA fray and allowed the Obama precatory EO to stand during Trump's first term. Then, President Biden issued an EO more strongly requiring consideration of PLAs on direct federal projects at $35 million or more – with a presumption in favor of PLA use. As of this writing, bid protesters have successfully challenged the Biden PLA preference as an unlawful set-aside not permitted by any specific legislative exemption to the full and open competition requirements under the Competition in Contracting Act.

Despite the roiling political dispute over PLAs under Federal procurement policy, PLAs remain widely used in the private sector under the National Maintenance Agreement for industrial construction and industrial facility rebuilding. State and local agencies also frequently use PLAs under federal grant program funding. And, in the absence of an outright ban at the federal project level, federal agency Contracting Officers retain wide discretion to use PLAs on projects in the sound exercise of their proprietary discretion based on specific project requirements.

COMMENT:
PLAs and Non-Union Employees' Right to Strike

As discussed in connection with 3.3.2 of this book, even employees not represented by a union have the right to engage in strikes. Yet, when employees normally not represented by unions work under PLAs, the no-strike provision in the PLA waives their right to strike because they are covered by the PLA, and represented by one or more unions, while working under grievance dispute resolution procedures which allow the unions to waive employee rights to engage in what otherwise would be protected concerted activity. The waiver of the right of workers to strike under a PLA is a real benefit to owners and is a significant reason why they may prefer them over non-PLA projects.

PRACTICAL TIP:
Expect Owners to Continue to Favor PLAs As Project Manning Tools

Despite the continuing controversy concerning use of PLAs mandated by public agencies on direct federal or federally funded construction projects, PLAs remain a viable and frequently chosen proprietary contracting strategy by public agencies and private sector purchasers nationwide. As construction workforce demographics and skills deficits present a growing problem for successful and timely project completion, often under unique circumstances, purchasers lock in the skilled workforce availability provided under project labor agreements and the no-strike clauses these agreements almost always provide. Still, the impact of PLAs on local negotiations often is problematic. As has been noted, if a large percentage of union members/employees are working in the MEBU area under project or national agreements with no-strike provisions, then the union's hand in maintaining hard and attenuated bargaining will be strengthened because union employees are fully employed and are under no pressure to settle.

PRACTICAL TIP:

When assessing the breadth of no-strike provisions, employers and their bargaining agents should be aware that not all work stoppages are covered by typical no-strike clauses. For example, “sympathy strikes” must be specifically listed to be covered by broad no-strike pledge under court decisions as they are not addressable under the CBA’s grievance dispute mechanism.

MCAA Commentary

In the seeming non-ending and ever-recurring public policy debates concerning public agency project labor agreement requirements going back to the early 1990s and before, MCAA has consistently taken the position strongly in favor of PLA’s as very sound project proprietary decisions by public agency purchasing authorities. PLAs often make good business sense in MCAA’s position, as sound hedges in favor of adequate manpower provisions – top workforce skill and project manning provisions and availability – for those projects that are not otherwise available to the project purchaser in a non-union context. In 2022, MCAA, in conjunction with the UA, under the auspices of the national labor/management cooperative committee of the Mechanical Industry Advancement Fund (MIAF), commissioned a ground breaking study by the independent, non-partisan and internationally recognized international industry cost consulting firm, Independent Project Analysis (IPA), to assess the relative performance of union-only large building and industrial projects compared with non-union and mixed non-union/union projects in the IPA database. IPA analyzed some 1,550 domestic US projects in their database from 2000 to 2022, ranging in size from $200,000 to over $6 Billion covering some 2,000 points of performance analysis on each project. IPA found, in Quantifying the Value of Union Labor in Construction Projects (December 2022), that union projects were 14% more productive than non-union jobs (there was a 15% advantage in the union pipe trades relative to the open shop). Overall, union projects were 4% more cost effective as compared with non-union project outcomes. Moreover, union-only projects significantly reduced the risk of substantial cost and schedule overruns, as compared with open shop jobs, owing to more reliable project staffing and superior workforce and supervisory skills in the union sector in the assessment of project managers.

3.7 FEDERAL MEDIATION AND CONCILIATION SERVICE (FMCS)

Before discussing the duty to bargain itself, a few words are in order about the Federal Mediation and Conciliation Service (FMCS). The FMCS was created as part of the Taft-Hartley Act in 1947. The Taft-Hartley Act (the Labor Management Relations Act of 1947) sought to limit the power of the labor movement by amending the NLRA. Significant amendments included the exclusion of supervisors from coverage and the application and enforcement of employee rights not to join a union and to refrain from engaging in concerted activity, in addition to the formation of the FMCS. Once this agency was created, it assumed the mediation and conciliation duties that the Department of Labor had previously performed. The FMCS is empowered by the Taft Hartley Act to use mediation and conciliation to prevent or minimize the disruptive effect of labor disputes on interstate commerce.

The FMCS’s obligations to provide conciliation services are intertwined with certain obligations imposed by the Taft-Hartley Act upon employers and unions. Under the Taft-Hartley Act employers and unions are required to make every effort to reach agreement on the terms of collective bargaining agreements. If they are unable to reach agreement, they are directed to participate fully and promptly in meetings called by the FMCS.

Whenever renewal or renegotiation of a collective bargaining agreement is to take place, Section 8(d) of the Labor-Management Relations Act requires the parties, as part of their duty to bargain, to notify FMCS. The statute requires that the party (union or employer) desiring to modify the agreement to serve notice on the other party at least 60 days before the contract expires and then, within 30 days after filing the 60-day notice, notify the FMCS of the existence of the contract dispute.

The giving of such notice is critical and has a significant impact upon the rights of the parties, assuming agreement on the terms of a new contract is not reached. The party that initiates the bargaining process (sends the initial notice of intent to terminate, modify or renegotiate) has the burden of notifying both the FMCS and the state mediation agency. A failure to meet the burden of notification may render illegal those economic actions (such as strikes or lockouts) which are otherwise available and lawful in the event an impasse is reached.

For example, if a union serves notice upon employers that it wishes to modify and renegotiate a contract, but fails to provide the requisite notice to FMCS and the appropriate state mediation agency, a strike by the union to support its bargaining demands is illegal and the strikers may be fired (a much different proposition than permanently or temporarily replacing employees, which could have serious implications for the union and the employer, such as the possibility of decertification if the employer's new employees do not want union representation).. In fact, even if the union notifies the agencies appropriately, but calls a strike in fewer than 30 days after the notice was served, the strike is nonetheless illegal, and the strikers may be fired.

The significance of being the *initiating* party with the burden of providing notice is underscored by the realization that the employer, in a situation where the union was the initiating party and failed to give notice, could still lock out the employees once 30 days passed after the union's notice to the employer of an intent to modify the contract, even if the notice had not been given to the agencies, or had been given to the agencies but less than 30 days had passed since notice was given.

In any case where the employer initiates the bargaining process, the employer bears the notification burden. The employer in such cases may not lock out employees until at least 30 days have passed after timely notice is given to the FMCS and the state mediation agency.

Significantly, employers and unions in Section 8(f) relationships are technically not subject to the FMCS provisions because the FMCS provisions are an adjunct to the duty to bargain in Section 9(a) relationships under Section 8(d), and parties to Section 8(f) relationships are not subject to the duty to bargain upon expiration of a Section 8(f) agreement. Notice to the mediation agencies is not mandatory for those in 8(f) relationships, but the agencies will likely assist if requested, so sending the notice is something the parties may wish to consider.

FMCS Services

In addition to participating directly with bargaining parties in an attempt to help them resolve collective bargaining agreements, the FMCS provides a number of services to employers and unions outside of collective bargaining itself in an attempt to further cooperative labor/management relations. In addition to bargaining resolution, FMCS has a broad portfolio in facilitating formation and operation of local labor/management cooperative (or cooperation) committees. – that address specified labor/management conditions – separate and apart from actual contract negotiations, which are the sole province of the bargaining parties and not the LMCC. See note below on LMCCs. For further information, visit the FMCS website (www.fmcs.gov).

3.8 DUTY TO BARGAIN

After an agreement expires, employers and unions that have Section 9(a) relationships are required to bargain in good faith to resolve terms of new or renewed collective bargaining agreements. The methods of establishing Section 9(a) relationships are discussed above.

As noted previously, many construction industry relationships today are not Section 9(a) relationships; they are instead Section 8(f) relationships, meaning they are based upon contracts entered into without the union demonstrating any majority support among the employees of the employer. Most bargaining relationships existing in the industry today were simply entered into by an employer and a union agreeing to sign the contract without even knowing who the employees would be when work on any project was started. However, the generally understood rules of the game followed by all collective bargaining negotiators are based on the existence of a duty to bargain. Accordingly, the discussion that follows is premised on the assumption that a duty to bargain, enforceable under Section 9(a), is in effect.

3.8.1 NATURE OF COLLECTIVE BARGAINING

As mentioned above, Section 8(d) of the National Labor Relations Act defines the duty to bargain. In relevant part, it states:

> ...to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, for the negotiation of an agreement.... but such obligation does not compel either party to agree to a proposal or require the making of a concession....

It is a relatively simple statement, although there are literally hundreds of volumes of cases interpreting and applying it.

The statutory duty to bargain results in bargaining of a different nature than that involved in virtually all other commercial bargaining. The first and overriding difference is that the employer has a *duty* to bargain. When a contractor negotiates with an owner about building a project, with a supplier about buying materials, or with an insurance carrier for liability insurance, the employer is under no obligation to try to reach an agreement. If the contractor does not like the deal offered, the contractor can walk away from the deal. If the contractor does not think the other party's offer makes any business sense, it can walk away and find another party to deal with.

But, if the contractor is an employer in a Section 9(a) relationship with a union, it *must* bargain with *that union*. The employer cannot stop bargaining with a union just because the union's offer is unreasonable. The employer cannot seek out another union that may be more reasonable to bargain with. If the employer tried to do so, it would commit an unfair labor practice and could be ordered by the Board to resume bargaining. The order could be enforced by a United States court of appeals.

This leads to consideration of a second distinction – an employer bound by a Section 9(a) relationship *cannot* exercise leverage as completely as it can in other commercial contexts. It cannot walk into a first meeting with the union, put a final offer on the table, and say "take it or leave it."

The Section 9(a) employer must listen to the union's proposals and evaluate them in good faith to try to reach an agreement with that union. If the employer does not try to reach an agreement, and if it assumes a "take it or leave it" position at the outset and never modifies that position, the employer will be found to have bargained in bad faith and will be ordered to begin bargaining in good faith. A Section 9(a) employer may engage in "hard bargaining" and insist on its position, but if it does so without explaining the basis of its position, or the basis of its refusal to agree to union proposals, it may be found not to have bargained in good faith.

Another distinction between bargaining with a union and bargaining with other business entities is that the union is, at core, not a business entity. A union is composed of its members; with few exceptions, its members must ratify any agreement reached. In some instances, even when the business manager or other representative of the union with whom the employer is dealing understands the business aspects of a situation and would be willing to come to a reasonable agreement, that person may be unable do so because the

members of the union would not ratify it. At times, the rank-and-file union membership operates on an *emotional* level without regard to good common business sense and pragmatism. When this occurs, a business manager, who depends upon being elected by that rank-and-file membership in order to keep his job, may take positions at the bargaining table that appeal to the sentiment of the membership.

CAUTION:
Paying Over Scale Can Be a Form of Prohibited Direct Dealing

An employer's duty to bargain is a duty to bargain with the union that represents its employees, not the employees themselves. The practice of bargaining with individual employees is called "direct dealing," and has been held, under longstanding precedent of the Board and courts, to violate Sections 8(a)(1) and 8(a)(5) of the Act. The rationale for finding direct dealing to be a violation of the Act is that circumventing the duly appointed bargaining agent would be such is in derogation of the employer's duty to bargain with the union – in other words, it undermines the collective bargaining process.

The prohibition against direct dealing covers, among other things, an employer's attempt to raise wages or offer incentive compensation to an individual or group of employees when such additional compensation has not been provided for in the collective bargaining agreement. There are certain exceptions to this general rule, for example when the union has explicitly or implicitly waived its right to bargain over the additional compensation.

3.8.2 DUTY TO SUPPLY INFORMATION

The duty to bargain also includes the duty to supply information upon request. Information that must be supplied by an employer to a union upon request is not just information sufficient to back up the employer's bargaining position. Any information requested by the union which is *relevant and reasonably necessary* for the union to fulfill its role as bargaining representative must also be supplied.

Even though, as noted above, Section 8(f) contractors are not generally subject to the duty to bargain upon expiration of a Section 8(f) agreement, they are subject to the duty to bargain *during the term* of a Section 8(f) agreement to which they are signatory. Accordingly, the duty to supply information described above does exist for Section 8(f) employers *during the term* of their Section 8(f) agreements.

PRACTICAL TIP:
Information Flow is a Two-Way Street

The union also has a duty to supply information to the employer, but employers rarely ask the unions to do so, primarily because in many circumstances unions do not have any information that the employers do not already have for themselves. However, when it comes to certain aspects of the operation of Taft-Hartley funds, union officials may have more information than employers. Employers should take advantage of the union's statutory duty and request the union to supply the employers with necessary information.

IMPORTANT CAUTION:
Pleading Poverty Means Sharing Financial Data

"Pleading poverty" can trigger an obligation to provide the union with economic data. If an employer asserts an inability to pay, the good faith bargaining obligation requires an employer to provide support of this claim. An employer must be certain that it does not go to the bargaining table and plead poverty or an inability to pay unless it is prepared to open its books and records to an accountant selected by the union to prove its claim. By pleading poverty, the employer's financial records become relevant and reasonably necessary to the bargaining process. Claims about market competitiveness, on the other hand, do not trigger individual company financial disclosure requirements, but may require disclosure of the industry or area information underlying the claim. See *NLRB v. Truitt Mfg. Co.,* 351 US 149 (1956) ("Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.")

3.8.3 REMEDY FOR NOT BARGAINING IN GOOD FAITH

Generally, the remedy for not bargaining in good faith is a cease-and-desist order – in other words "stop bargaining in bad faith and start bargaining in good faith." This does not sound like much of a penalty, and in reality, it is not. There are, however, circumstances in which the consequences are much more severe.

If an employer bargains *in good faith* to impasse, it can inform the union that it will implement its final offer. In contrast, consider the following scenario and its consequences. Assume that an employer association proposes a wage reduction because of competitive pressures and the union does not agree. The employer association believes it has reached an impasse and places the wage reduction into effect immediately. The union then calls a strike in response to its actions. An employer individually, or all the members of the association, hires replacement employees and continues working at the new reduced wage levels the employer proposed. Next, assume that the union comes to the employer and says "Okay, you win!" and offers to have all of its members return to work and the employer says "No, we have replaced all the employees."

Under these facts, if the Board decided that the employer had not bargained in good faith, or had not reached what the Board believed to be an impasse, the strike would have been, from the outset, *an unfair labor practice strike* (a strike that is caused or prolonged by an employer's unfair labor practice), and the employers could not legally hire permanent replacements for the strikers. When the strikers offered to return, they were entitled to *immediate* reinstatement even if it meant terminating the replacements. The employers, therefore, would owe those strikers *back pay and benefits* from the date they offered to return to work until the employer actually let them return – and the pay would probably *not* be at the lower wages the employer may have paid the replacements, but instead at the rate of pay in the expired collective bargaining agreement.

In this example, the remedy is far from innocuous, because the employer would pay twice for the work done by the replacements – once to the replacements, and once to the strikers. Understand that it generally takes many months, and sometimes years, for an unfair labor practice to be heard and resolved by the Board. If the employer had maintained its same position on not rehiring strikers throughout that entire period of time, the liability for back pay and benefits could be staggering.

Generally, the remedy for failure or refusal to bargain in good faith is to restore the parties to where they were before the unfair labor practice was committed (*status quo ante*) and to compensate the employees for any losses they incurred as a result of the unfair labor practice. Before any employer or group of employers takes an impasse position and "goes unilateral" or hires replacements, labor counsel should be consulted to obtain an opinion as to whether the Board is likely to find bad faith bargaining or a failure to reach impasse. As you can see from the above example, the consequences of being wrong can be very significant.

3.9 MANDATORY/PERMISSIVE/ILLEGAL SUBJECTS OF BARGAINING

3.9.1 SECTION 9(A) CONTRACTORS

As a participant in the bargaining process, it is essential to know the difference between mandatory and permissive subjects of bargaining. Anything that affects "wages, hours, and other terms and conditions of employment" – the language used in Section 8(d) of the Act – is a mandatory subject of bargaining. *Mandatory* subjects of bargaining are those about which:

1. you must bargain at the request of the other party, although you need not agree;
2. you must explain your position, but you may lawfully go to impasse over them.

Permissive subjects of bargaining are any subjects that are not mandatory, but are not illegal.

An example of an *illegal* subject would be a "hot cargo" clause outlawed by Section 8(e) of the NLRA, such as a union-signatory subcontracting clause not limited in application to jobsite work. Another example of an illegal subject would be a provision calling for the hiring of only male employees or employees of certain ages.

Essentially, the parties may bargain about anything that is not illegal. The distinction between mandatory and permissive subjects of bargaining relates only to whether a party is required to bargain about a proposal and whether the subject is one over which the parties can lawfully go to impasse.

For example, a multiemployer association could not insist on inclusion of an industry promotion or industry advancement fund clause in a contract to the point of refusing to enter into a collective bargaining agreement with a union over the issue if that were the only issue unresolved. Similarly, a contract interest arbitration clause to arbitrate settlement negotiations, or a second-tier bargaining clause like the Industrial Relations clause are both permissive subject of bargaining – as are supervisory wages and proposals to change or expand the union's work jurisdiction as an expansion of the scope of the bargaining unit. (See IRC and CAD/BIM discussions below) Going to impasse over a permissive subject of bargaining is not allowed, and the association's actions would be an unfair labor practice in a 9(a) context.

If an employer in negotiations reaches a point of impasse and is likely to take a "final" position in which it will insist on an agreement on the terms of that final position to the point of taking a strike, the employer should consult with counsel to determine whether the outstanding issues are mandatory or permissive. If they are permissive, the employer may not insist upon them as a condition of entering into the agreement.

Mandatory Subjects of Bargaining

The following is a partial list of mandatory bargaining subjects:

- Grievance dispute resolution and associated arbitration procedures (not interest arbitration for contract settlement)
- Bonuses and profit-sharing plans
- Changes in working hours, schedules
- Coffee breaks and clean-up time
- Discharge procedures
- Duration of the negotiated agreement
- Fringe benefits
- Holidays
- Job classifications
- Hiring halls
- Incentive pay
- Layoffs
- Management rights clause
- No strike clause
- Pensions, retirement
- Physical examinations for employees
- Re-employment, recall, reinstatement of strikers
- Retroactivity of the collective bargaining agreement
- Safety
- Seniority
- Site access for union representatives
- Subcontracting unit work
- Union security clause
- Check-off of union dues/fees
- Vacation
- Bargaining unit work performed by supervisors
- Employee non-competition agreements
- Work rules
- Drug testing (current employees – not applicants)
- Smoking policies
- Gifts (turkeys, hams at holidays)

Permissive Subjects of Bargaining

Some examples of permissive subjects of bargaining:

- Whether to engage in multiemployer bargaining
- Whether benefits for employees who are retired will be changed
- Industry promotion or industry advancement funds
- Labor-management committees (Taft-Hartley 301(c)(9) committees – see insert
- Payroll deduction contributions to political action committees
- Contract settlement interest arbitration
- Scope/definition of bargaining unit
- Second-tier bargaining procedures
- Supervisor (and other non-unit employee) wages, hours, other terms
- Union recognition language
- Internal union affairs (such as ratification procedures or strike votes)
- Recording/transcribing negotiations
- Settling unfair labor practice charges

Illegal Subjects of Bargaining

Examples of illegal subjects of bargaining:

- Contributions to a union's organizing fund (see also the Labor-Management Cooperation Committee discussion below)
- Mandatory political action check-off clauses
- A subcontracting clause that requires refusal of delivery of supplies to jobsites if the supplies are delivered by non-union represented drivers.
- Preferences based on age or other protected characteristics and classifications.
- Union oversight, audits, participation in employer association industry improvement funds operations
- Employer contributions to union organizing funds
- CBA distinctions among participating employers based on business location

Supervisors – Who Are They?

As noted, bargaining about supervisor wages, benefits and working conditions is a permissive, not mandatory, subject of bargaining. Contractors are not obligated to bargain about them, but many contractors and MEBUs do. Indeed, in many MCAA CBAs (and construction CBAs generally) "lead men" and foremen/jobsite supervisors are often included. Contractors and MEBUs should be aware of who their supervisors are.

The Board has decided several cases that clarified the definition of "supervisor" under Section 2(11) of the NLRA. Notably, under Section 2(3) of the Act, supervisors are excepted from the definition of "employee."

Section 2(11) of the Act defines supervisor as:

"[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

In *Oakwood Healthcare,* 348 NLRB 686 (2006), the Board, among other things, defined a supervisor's authority to "assign" work as being able to designate an employee's place of work, appointing the employee to a work time (i.e., shift or overtime), and/or giving significant overall duties to an employee. In contrast, choosing the order in which an employee completed discrete tasks, or instructing an employee – on an ad-hoc basis – to perform discrete tasks did not constitute the "assignment" of work consistent with the Act's definition of supervisory status.

In *Golden Crest Healthcare Center,* 348 NLRB 727 (2006), the Board explained further than the power to assign was not merely the power to "request" than an employee take an assignment – instead, it required the power to require compliance with such a request.

More generally, the Board in Oakwood noted that supervisory status requires that the employer delegated to the supervisor the authority to direct work and the authority to take corrective action – and that the supervisor would suffer consequences if he or she failed to do so. Moreover, in order to qualify as a statutory supervisor, the employee must be fundamentally aligned with management, not his or her fellow workers.

OBSERVATION:
Permissive Subjects Do Not "Convert" to Mandatory Subjects

In some instances, questions are raised about how or whether a permissive term in an agreement can be stricken in successor agreements; or, if an otherwise permissive term is already in an agreement up for re-negotiation, whether the parties must bargain about it because of its inclusion. Also, there are related questions of whether discussions of a permissive subject in negotiations constitute some sort of waiver of the right not to talk about it and convert the subject into a mandatory subject. The answer to both questions is "no." A permissive subject of bargaining remains so whether it is already in an agreement up for renegotiation or if it has been talked about previously and then dropped.

COMMENT:
"Complete Agreement" Clauses – Contract Integration – Zipper Clause

Often the parties include a "complete agreement" clause, sometimes also called an "integration" or "zipper" clause in an attempt to foreclose any obligation to bargain at mid-term over a subject until the collective bargaining agreement expires. These clauses usually state something to the effect that during bargaining leading to the agreement, each party had the right to bring up any subject for bargaining that it wished to bring up, and that the collective bargaining agreement is the complete agreement on all issues such that each party waives the right to bargain over anything during the contract term. Beware that if the parties are in a 9(a) relationship, and one of the parties requests to bargain over a mandatory subject that the parties did not actually bargain over in negotiations leading to the agreement, the other party may refuse to bargain based on the zipper clause, but neither party may act unilaterally to change the status quo regarding the subject until the expiration of the agreement when the parties are again obligated to bargain regarding all mandatory subjects of bargaining. *Jacobs Manufacturing,* 94 NLRB 1214 (1951).

DRAFTING TIP:
Savings and Severability Clauses

As a safeguard against changes in the law during the term of the agreement, the agreement should include a "*savings and severability*" clause providing that if any particular provision of the agreement is found to be, or becomes, illegal, unlawful or unenforceable, it will not affect the enforceability of the remaining provisions of the agreement. Other key elements that may be included in such a clause to address changes in the law are:

1. a provision for midterm negotiation for a replacement clause;
2. a statement of whether the no-strike clause will remain in effect during any such midterm negotiation;
3. a reference to all possible sources of applicable laws – court or agency decisions, statutes, regulations, executive orders, ordinances, etc.;
4. a provision for suspension of unlawful provisions automatically upon the change in the law that render them unlawful without any requirement that the parties litigate over the issue separately among themselves; and
5. a provision for restoration of the agreement to its prior status if the reason for the unlawfulness of the clause is removed.

3.9.2 SECTION 8(F) CONTRACTORS

Technically, in an 8(f) relationship there is no such thing as a mandatory subject of bargaining once an agreement has expired. In such a case, there are no mandatory subjects of bargaining because there is no duty to bargain – at all – over the terms of a new agreement once an agreement between parties to a Section 8(f) relationship expires. Every topic is permissive at that point.

It is also important to remember that a union in a Section 8(f) relationship need not follow any rules of bargaining either, and can insist to impasse, and possibly strike, over permissive subjects. It may be possible to have any such strikes and picketing characterized as recognitional in nature, and thus limited in time.

Deklewa

In 1987, the Board issues *John Deklewa & Sons,* 282 NLRB 1375 (1987). The *Deklewa* decision represented a major policy shift in the Board's approach to Section 8(f) of the National Labor Relations Act. In *Deklewa,* the Board announced these principles to be applied in all Section 8(f) cases:

1. Section 8(f) agreements would remain enforceable throughout their term and could not be repudiated unilaterally until their expiration date. Attempted repudiations could be addressed through the "bargaining in good faith" unfair labor practice sections (Sections 8(a)(5) and 8(b)(3)).
2. Agreements under Section 8(f) would not bar a petition seeking an election to be certified as a Section 9(a) representative.
3. In processing an election for certification, the appropriate unit would "normally" be a single-employer unit, instead of the larger multiemployer unit in which bargaining may have taken place previously.
4. Upon expiration of a Section 8(f) agreement, the union would enjoy "no presumption of majority status and either party [might] repudiate the 8(f) bargaining relationship."

The Board in *Deklewa,* also announced that it was "abandoning" the "conversion doctrine" under which many 8(f) relationships converted automatically to Section 9(a) relationships once a majority of the employees working for the employer were members of the union. The status of the "conversion doctrine" has continued, however, to be the subject of frequent litigation before the Board. Note the discussion of the "conversion doctrine" and the extension of Section 9(a) recognition set forth in Section 3.2.1 concerning the *Central Illinois Construction* and *Nova Plumbing* cases.

Note – In recent instances where Section 8(f) agreements lapsed, local unions have merely filed representation election petitions with the NLRB, and under Daniel/Steiny voter eligibility rules (see Section 3.2.2), virtually always win readily in union representation elections. In some few cases, not all employers in the former 8(f) MEBU have been organized by election, so their signatory status becomes unclear and pension liability issues can arise.

CAUTION:
Some Aspects of the Duty to Bargain in an 8(f) Relationship Are Not Clearly Settled in NLRB or Court Decisions

As a practical matter, if the employer intends to enter into future agreements with a union, it is advisable to follow the general rules about the duty to bargain in good faith, and the distinctions between mandatory and permissive subjects of bargaining. The lack of any duty to bargain is, however, something that should be kept in reserve. As a last resort, the employer can assert a "no duty to bargain" or "take it or leave it" position on mandatory or permissive subjects.

If a Section 8(f) employer does so, charges filed against it for bargaining conduct would likely be dismissed. However, Section 8(f) employers that engage in preliminary negotiations with unions for new collective bargaining agreements, particularly when those alleging that having begun the negotiating process, the employers are bound to continue with some sort of enforceable duty to bargain.

While such a result seems to be inconsistent with Section 8(f) status as discussed above, the Board has yet to rule specifically on this question. Employers should watch Board case developments carefully on this subject.

Recall, also, that the duty to supply information under Section 8(d) of the Act exists while the agreement remains in effect (which may be during a period of negotiations conducted prior to expiration).

3.10 SPECIFIC LEGAL ISSUES TO ANTICIPATE DURING BARGAINING

3.10.1 SUBCONTRACT CLAUSES

3.10.1.1 UNION SIGNATORY CLAUSES

The Supreme Court of the United States has held that, under Section 8(e) of the NLRA, **in the construction industry** it is legal for a construction industry union to bargain for a clause that prohibits the subcontracting of work to be done **at the construction site** to any firms except those who have existing agreements with the appropriate craft union. Not only is it legal, it is *arguably* a mandatory subject of bargaining, and a union may be able to strike to obtain it. This was a hotly contested issue for many years until the Supreme Court's decision in *Woelke & Romero,* 465 US 645 (1982), and, while not so hotly *contested* now, it is still hotly *debated*.

At least one case, known as *Sun-Land Nurseries*, 793 F.2d 1110 (9th Cir. 1986), has held that it is legally permissible to go so far as listing by name the appropriate unions with which a company must have an agreement for jobsite work in order to be eligible to receive subcontracts. In that case, the subcontracting clause stated that jobsite work could be subcontracted only to employers that had contracts with particular unions, specifically, the members of the AFL-CIO Building and Trades Council. The employer in question, Sun-Land Nurseries, had recently decertified the Teamsters after a dispute. Sun-Land then entered into a collective bargaining agreement with an *independent* (non-AFL-CIO) union and attempted to get work on the project. Sun-Land was told it was not eligible for any work from signatory contractors on the basis that it did not have a contract with one of the "approved" unions. Sun-Land sued, alleging that the subcontract clause was broader than permitted under the National Labor Relations Act, the *Woelke & Romero* decision, and applicable antitrust laws. Sun-Land Nurseries lost that case.

Other cases have been decided upholding the legality of **two-way subcontracting clauses**. These are clauses that prohibit a contractor from subcontracting to a company that does not have an agreement with the appropriate union and also from *accepting* subcontracts *from* a general contractor who does not have a

contract with the appropriate union. *See, for example, Laborers Local 210 v. Associated Gen. Contractors, Labor Relations Div.*, 844 F.2d 69 (2d Cir. 1988). Very few contracts with these clauses are in existence and specialty subcontractors, such as mechanical and electrical contractors, are unlikely to agree to include them in their agreements since they are the ones who most frequently are able to receive contracts from open shop general contractors.

PRACTICAL TIP:
Consult Counsel About Subcontracting Clauses

If any questions exist about the legality or enforceability of subcontract clauses an employer wishes to propose, or which are proposed for an employer's consideration, the employer should consult experienced labor counsel to determine whether it needs to bargain about the clause and just what it is getting into if the clause is inserted into its agreements.

3.10.1.2 WORK PRESERVATION CLAUSES

Clauses that prohibit *all* subcontracting of *bargaining unit work* (work preservation clauses) are *lawful* for any employing industry, construction or not. Such clauses are mandatory subjects of bargaining. The object of such a clause is to keep all bargaining unit work with the employer so that the employer's employees, whom the union represents, will perform that work. Such a clause does not attempt to dictate or control the labor relations policies of another employer. It is an attempt to preserve bargaining unit work. This is why it does not violate Section 8(e). An example of such a clause is set forth in the text box below.

The limits of work preservation have been the subject of much litigation over the years. Two important decisions of the Supreme Court of the United States describe generally the parameters. They are: *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967); and *NLRB v. Plumbers & Pipe Fitters Local 638 (Enterprise Association)*, 429 U.S. 507 (1977).

In *National Woodwork*, the Court decided that any clause that protected work traditionally done by the bargaining unit, or "fairly claimable" by the bargaining unit, does not violate Section 8(e). The case involved a clause in a collective bargaining agreement that permitted employees to refuse to install pre-cut doors because the work of cutting doors to fit had always been traditional work of the bargaining unit employees. The Court found that the clause was intended to preserve bargaining unit work; that it was not intended either to acquire work the employees had never performed, or to require the employees of the pre-cut door manufacturer to become union. Therefore, the clause was lawful.

In *Enterprise Association*, the court found that a lawfully written work preservation clause could be applied lawfully *only* to employers who had a "right to control" the work at issue. In that case, a subcontractor bid on and obtained a job from a general contractor that required the subcontractor to install pipes that had been threaded and cut by the manufacturer of the pipes. The Court held that since the subcontractor did not have control of whether pre-threaded and pre-cut pipes were to be installed, it would be unlawful to enforce the otherwise lawfully written work preservation clause by permitting employees to refuse to install them.

Work Preservation Clause

The clause reads as follows: To protect and preserve for the Building Trades employees covered by this Agreement all work they have performed and all work covered by the Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work; it is agreed that all of the work requiring sketching and fabrication shall be performed by employees hereunder, **either in the shop or on the jobsite** within the geographical jurisdiction of [Local 38].

Even though this clause applied away from jobsites (specifically "in the shop") the court held that it could be a lawful work preservation clause if the union could establish that its members had historically performed the sketching and fabrication work performed within the local's jurisdiction.

This case is one of many that points out the need for very close scrutiny of the language of subcontracting provisions, as well as the facts concerning the historical performance of work, in deciding whether a subcontracting restriction in a collective bargaining agreement is valid.

CAUTION:
Law Doesn't Allow Collusion to Avoid Work Preservation Clause

Some words of caution are still in order. The courts and the Board will not allow a subcontractor and a general contractor to attempt to take advantage of the "right to control" test by engaging in collusion to take work out of the subcontractor's control simply to avoid application of an otherwise valid work preservation clause. *Electrical Workers (IBEW) Local 501 (Atlas Constr. Co.),* 216 NLRB 417 (1975). Additionally, there is likely to be more litigation over this issue in the years ahead as technological developments make prefabrication of certain assemblies and subassemblies to be installed on construction sites more prevalent, challenging the unions' claims to be preserving historical bargaining unit work.

3.10.1.3 AREA STANDARDS CLAUSES

Clauses that prohibit subcontracting of bargaining unit work except to subcontractors that pay their employees at least an equivalent amount of wages and benefits as contained in the employer's collective bargaining agreement with the union (known as area standards clauses) are also lawful for any employing industry, construction or not. Such clauses are mandatory subjects of bargaining. The object of such a clause is to remove any economic incentive for subcontracting bargaining unit work to any other employer. Such a clause does not attempt to dictate whether any potential subcontractor is "union" or not. It is another type of "work preservation" clause that does not violate Section 8(e).

3.10.2 ANTI-DUAL SHOP/DOUBLE-BREASTING CLAUSES

Anti-dual shop clauses are provisions attempting to require that any other construction businesses in which the signatory contractor has any control or ownership are also covered by the terms of the collective bargaining agreement in which the anti-dual shop clause is contained.

The Board has decided cases holding that some clauses with these objectives are illegal under Section 8(e) of the NLRA. One such case is *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766 (1989).

There were several issues before the Board in the *Schebler* case, but the one of concern here is whether its so-called integrity clause violated Section 8(e) of the NLRA. In this regard, the Board held that since the clause affected affiliated companies merely on the basis of common *ownership* and not because they were so closely affiliated that they were a "single-employer", the clause was illegally broad. In other words, even a dual shop operation properly established (one that is not a single employer under the tests of common ownership, common management, centralized control of labor relations and interrelationship of operations) would be covered by the clause. If such a clause is proposed at the bargaining table, the Board should find it illegal as was the case in *Schebler*.

However, it is risky to simply refuse to discuss a clause that an employer thinks is an illegal anti-dual shop clause. A clause that is written so that it defined other shops only in terms of the single-employer tests would be lawful.

Counsel should review any such clauses in light of the analysis in Schebler and similar cases before declaring at the bargaining table that it is illegal.

Additionally, refusing to agree to a proposal simply because it is illegal and without giving any other reason can be dangerous because the law can change. If presented with a clause believed to be illegal, an employer may say the clause is illegal, but should also point out why it would not agree to it even if it were legal. There are several possibly good reasons, as discussed below. A Board decision that is instructive on anti-dual shop clauses is *Painters District Council 51 (Manganaro Corp., Maryland)*, 321 NLRB 158 (1996). In that case, the Board concluded that the anti-dual shop clause proposed was a mandatory subject of bargaining. *Manganaro is a very complicated decision, but it illustrates that employers that want to oppose such clauses should do so on principle as well as on the basis of illegality.* [See the text box below for details.]

Schebler: The Anti-Dual Shop "Integrity Clause"

The "Integrity Clause" in *Schebler* stated as follows:

SECTION ONE: A 'bad faith employer' for the purposes of this Agreement is an Employer that itself, or through a person or persons subject to an owner's control, has ownership interests (other than a non-controlling interest in a corporation whose stock is publicly traded) in any business entity that engages in work within the scope of SFUA Article I herein above using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreement or, if such business entity is located or operating in another area, inferior to those prescribed in the agreement of the sister local union affiliated with Sheet Metal Workers' International, AFL-CIO in that area.

An Employer is also a "bad faith employer" when it is owned by another business entity as its direct subsidiary or as a subsidiary of any other subsidiary within the corporate structure thereof through a parent-subsidy and/or holding company relationship, and any other business entity within such corporate structure is engaging in work within the scope of SFUA Article I herein above using employees whose wage package, hours, and working conditions are inferior to those prescribed in this Agreement or, if such other business entity is located or operating in another area, inferior to those prescribed in the agreement (of the sister local union affiliated with Sheet Metal Workers' International Association, AFL-CIO in that area.

SECTION TWO: Any Employer that signs this agreement or is covered thereby by virtue of being a member of a multiemployer bargaining until expressly represents to the union that it is not a "bad-faith employer" as such term is defined in Section 1 herein above and, further, agrees to advise the union promptly if at any time during the life of this Agreement said Employer changes its mode of operation and becomes a "bad-faith employer." Failure to give timely notice of being or becoming a "bad-faith employer" shall be viewed as fraudulent conduct on the part of such Employer.

SECTION THREE: Whenever the union becomes aware that am Employer has been or is a "bad faith employer," it shall be entitled, notwithstanding any other provision of this Agreement, to demand that the Agreement between it and such "bad-faith employer" be rescinded. A claim for recission shall be processed by the union as a contract grievance in accordance with, and within the time limits prescribed under, the provisions of SFUA Article X of this Agreement.

Despite the Board's finding that the integrity clause in *Schebler* was unlawful, the Board found a very similar clause to be a lawful and mandatory subject of bargaining in *Manganaro Corp*. The *Manganaro* clause stated as follows, in pertinent part:

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

The finding of lawfulness of the foregoing clause apparently turns on the word "**exercises**." Under this clause, the mere **potential** for control of a separate firm would not be sufficient to bring that second firm within the coverage of the Agreement. In other words, the Board found that if an employer actually exercises management, control or majority ownership over a second firm, the two firms would, of necessity, fail the separate employer test, i.e., the two firms would constitute a single employer.

Caution: The complexity of the language of anti-dual shop clauses such as those in Schebler and Manganaro underscore the need for the parties to scrutinize proposed anti-dual shop clauses extremely carefully, probably seeking the advice of experienced labor counsel to determine whether the clause is likely to be found lawful or unlawful by the Board.

If an anti-dual shop clause is broad enough that it would require application of the agreement to a firm that is truly a separate employer, then it has a secondary objective and is illegal under Section 8(e) and unenforceable (see the anti-dual shop clause discussion above).

In a related context, the Board is frequently called upon to decide whether two or more nominally separate businesses should in fact be considered one single employer for purposes of applying the National Labor Relations Act to that employer's relationships with its employees – regardless of whether an anti-dual shop clauses exists. To do so, the Board applies a test first announced by the Supreme Court of the United States in Radio Union Local 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255 (1965). The Court said that the four controlling factors for determining whether two or more nominally separate enterprises constitute a single employer are:

1. The interrelation of operations of the enterprises;
2. Common management of the enterprises;
3. Centralized control of labor relations; and
4. Common ownership of the enterprises.

The Court said that no one factor is controlling but that the "totality of circumstances" must be reviewed in each case to determine whether the enterprises are in fact a single employer.

The question frequently arises in the construction industry when a union signatory contractor is accused of creating another business enterprise to operate on an open shop basis. This is commonly referred to as a "double breasted" operation. If the two firms are found to be separate employers, the non-union firm is not bound by the union firm's collective bargaining agreement, nor must it recognize or bargain with the union. If the two firms are found to be a single employer, however, the non-union firm will still have no obligation to apply the existing contract to its employees if the combined employees of both firms do not constitute a single appropriate unit for bargaining. *Peter Kiewit Sons Company,* 231 NLRB No. 13 (1977). Conversely, if the two firms are deemed to be a single employer, and if the combined employees of both firms are deemed to be an appropriate unit for bargaining, the non-union firm will have an obligation to apply the existing contract to its employees. *Naccarato Construction Company,* 233 NLRB No. 1394 (1977).

While anti-dual shop cases may be advocated as appropriate choices in some areas of the country, other contractors facing significant market challenges in other areas may want to resist them. Additionally, anti-dual shop clauses sometimes have unintended consequences. If an employer’s collective bargaining agreement contained a broad type of anti-dual shop clause, the employer might not even be able to invest, as a passive investor, in other companies such as a small construction company that was doing residential construction, without, according to the terms of the clause, applying its collective bargaining agreement to that company.

3.10.3 THE UNION POLITICAL ACTION COMMITTEE CHECK-OFF

Political action committee check-off clauses for bargaining unit employees are permissive subjects of bargaining. That is, they are permissive so long as the “checkoff” is optional with the employees. It is an unfair labor practice for a union to insist to the point of impasse and strike on inclusion of a voluntary check-off in an agreement.

Additionally, such a check-off that does not give an employee the option to refrain from participating is an *illegal* subject of bargaining. Thus, agreeing to a clause which *required* political action check-offs would be illegal for both the employer and the union.

PRACTICAL TIP/CAUTION:
Trade Association Payroll Deduction/PAC Check-Off

In August 2005, the Federal Election Commission, for the first time, authorized trade association member companies to provide payroll deduction check-offs for their executive and administrative personnel who decide to make contributions to their company's trade association political action committee. (The standard rules requiring the company representative to the association to first authorize PAC solicitation in a prior authorization form still apply). However, there are expansive requirements in these rules that require caution. In the PAC check off rules for trade association member company exempt employees, organized labor insisted on a wide-ranging requirement that may inhibit the use of the association check off. That is, if the trade association member company allows its exempt employees to have a payroll deduction service for sending contributions to that company's trade association PAC, then that company and any of its corporate affiliates (no matter if the related company or affiliate is a member of that association) must also allow any of its union-represented workers to also request payroll deduction for contributions to their union PAC and the employer may not charge those union employees anything more than reasonable cost for providing the payroll deduction service.

An MEBU may want to consider agreeing to a union proposal to add or increase the voluntary PAC checkoff for union members in return for the union waiving whatever right it has under the FEC rules to insist on PAC checkoff by other employees of the employers or their affiliates.

3.10.4 INDUSTRY FUND CONTRIBUTIONS

Industry fund contributions are also permissive subjects of bargaining. In essence, an industry fund clause is one in which the union agrees with the employer to use the collective bargaining agreement as the collection mechanism for the money to finance multiemployer bargaining unit operations conducted by the industry fund. Neither employers nor unions can insist to impasse that such clauses be included in the collective bargaining agreements.

Additionally, if an employer assigns bargaining rights to an association, and does not specifically state that the assignment includes all subjects which may be bargained lawfully under the NLRA, or that it applies to both mandatory and permissive subjects of bargaining, the association that receives the bargaining rights may be found not to have the right to bind the assigning employers to an industry promotion fund clause.

The Board generally holds that an assignment of bargaining rights, without a specific reference to permissive subjects of bargaining, is an assignment only of the right to bargain on *mandatory* subjects of bargaining.

One case addressing industry fund contributions is worthy of note. In *U.A. Local 342 Apprenticeship & Training Trust v. Babcock & Wilcox Construction Co., Inc.*, 396 F.3d 1056 (9th Cir. 2005), the employer was signatory to the union's national maintenance agreement, which incorporated the terms of local agreements on the issue of benefit fund contributions. The local agreement in question provided for a mandatory contribution to an apprenticeship training fund and a voluntary contribution to an industry promotion fund. However, the local agreement provided that the employer was obligated to make an additional payment to the apprenticeship fund if it opted to not make the industry fund contribution. The employer in this case refused to make the extra contributions and the apprenticeship fund sued to collect. In refusing to pay, the employer relied on the national agreement's policy committee's decision that the local agreement's extra payment was "contrary to the spirit and intent" of the national agreement. Even so, the court sided with the fund, and held that the

language of the agreement was clear, and the employer was required to make the extra contribution to the apprenticeship fund. The court further held that the position of the policy committee was not entitled to deference in this case and that the fund, as a non-party to the master agreement, had not agreed to be bound by its grievance process where deference would have been given to the policy committee's position.

Two additional items are also worthy of note.

First, ***the case did not address any antitrust issues*** (i.e., such as those raised in the NCA/NECA/IBEW case, discussed above) in reaching this decision, but had it done so it might have noted the lack of competitive impact on a third-party, as was the determining factor in the NCA/NECA/IBEW case.

Second, the case also did not address, but nonetheless raises, an interesting issue of whether the contribution in question was a permissive subject of bargaining (as it would be if it were characterized as an industry fund contribution) or a mandatory subject of bargaining (as it would be if it were characterized as an apprenticeship fund contribution).

Employers should keep all of these potential issues in mind, and consult legal counsel, if they intend to negotiate a similar provision.

CAUTION:

If encountering proposals considering whether to negotiate some substitute payments in lieu of industry funds for non-MEBU me-too signer employers that exercise their right to line out industry funds as permissive subjects of bargaining – tread very carefully with experienced labor and antitrust counsel. Such clauses can come under U.S. Department of Justice (DoJ) antitrust scrutiny – and have not so long ago.

The Beck Decision and Political Contributions

In *Communication Workers of America v Beck,* 128 LRRM 2729 (1988), the Supreme Court of the United States issued a decision in a case which had been brought by an employee who was not a member of a union and who objected to paying the equivalent of full union dues under a union security clause. The employee, Beck, argued, among other things, that such compulsory payments would require him to support political causes for which the union spent some of its dues receipts.

The Court held that a lawful union security clause cannot compel a non-union member bargaining-unit employee, over the employee's objection, to pay any more to the union that represents the employee than the amount necessary to support union activities "germane to collective bargaining, contract administration, and grievance adjustment." The Court reaffirmed an earlier decision in which it had held that a provision of the Railway Labor Act did not permit a union, over the objection of non-members, to expend compelled agency fees on political causes, and held that the same was true under the National Labor Relations Act.

Unions are now under an obligation to advise employees of their Beck rights. In the case of *California Saw & Knife Works,* 320 NLRB 224 (1995), the Board imposed an affirmative obligation on the part of unions to notify members of their Beck rights prior to the time the employees become subject to a union security clause, and then to issue at least annual reminders thereafter.

3.10.5 SUBSTANCE ABUSE TESTING CLAUSES

Clauses permitting employers to require their employees, as a condition of employment, to undergo tests to determine the presence of drugs or alcohol in their systems are more and more frequently becoming a subject of collective bargaining. Such clauses are often proposed by employers or employer associations on their own initiative. Such clauses are also frequently mandated by owners as a condition of awarding work on both public and private projects. As federal, state and local laws pertaining to drugs and what is permissible to use and what is not and at what levels of indicia of use and/or impairment can vary frequently. Competent labor counsel should be engaged to bring drug policies and testing procedures up to date frequently.

Such clauses provide for testing employees in one or more of the following circumstances.

3.10.5.1 UNSCHEDULED ("RANDOM") TESTING

Unscheduled testing involves the selection of one or more employees on an unscheduled basis for testing. It involves no suspicious behavior or other cause on the part of the employee selected. Random testing has been upheld in some circumstances in the public sector (for some government employees) and has been mandated for some categories of private sector employees (truck drivers, for example). Random testing is prohibited specifically in some jurisdictions by statute, ordinance, regulation or case law. Of particular note, the Americans with Disabilities Act (ADA) excludes from its limitations on medical examinations tests for the illegal use of drugs, but does not so exempt random alcohol testing in most circumstances – potential exceptions include employees who are required by law to be tested and employees in certain safety-sensitive positions. A review of the law concerning random drug testing should be made before seeking to require it in any state or locality. The UA and the MCAA have included a type of random testing (unannounced, unscheduled testing of employees in safety-sensitive positions) in the UA/MCA drug testing provision.

3.10.5.2 "FOR-CAUSE" TESTING

Testing for "cause" involves selection of employees for testing on the basis of some belief based on observation or other reason by the employer that the employee possesses, has used, is under the influence of or is impaired by, or has ingested drugs or alcohol on the job. Observations by supervisors or other management personnel may satisfy the "cause" requirement. In some cases, reports that the employer believes to be reliable may satisfy the "cause" requirement. "Close calls" (near misses or near accidents) may also satisfy the "cause" standard. Obviously, close calls are closely related to the "post-accident or injury" type of testing referred to below.

3.10.5.3 POST-INCIDENT/ACCIDENT OR INJURY TESTING

As the name implies, this testing consists of sending employees who have been involved in an on-the-job incident/accident or injury for testing to determine whether drugs or alcohol played a part in the incident. Notably, OSHA guidance allows drug testing to determine the root cause of a workplace incident that harmed or could have harmed employees, but caution that employers should test all employees whose conduct could have contributed to the incident, not just employees who reported injuries. Blanket post-accident or close call alcohol testing is also severely limited by the ADA. Consult with experienced labor counsel in setting – and enforcing - policies relative to for-cause, random, and post-accident/post-incident testing.

3.10.5.4 PRE-EMPLOYMENT TESTING

Pre-employment testing involves testing individuals prior to beginning employment with the employer (or before working in the area, in the case of a multiemployer local area agreement). Pre-employment testing of individuals for *illegal drug use* is permissible and does not violate ADA. Pre-employment testing of individuals

for *alcohol use* may be done only consistent with the ADA guidelines for medical examinations. This means such testing may not be done before a tentative decision to hire an individual has been made. The difference in testing procedures for alcohol and drugs are due to the fact that under the ADA, tests for alcohol are considered medical examinations, while tests for illegal drug use are not.

All of the types of testing discussed above are mandatory subjects of bargaining except pre-employment testing. Since random, "for cause," or post-accident or injury testing is a condition of employment, an employer must bargain with unions that represent its employees about whether such testing will be conducted and the consequences of a positive test. Employers must bargain about whether discipline, including termination, can be imposed on employees who test positive. Employees may be entitled to have union representation at the site of collection of specimens for testing, although the union representative should not be entitled to observe the actual voiding of the specimen any more than the collection site personnel themselves, who generally do not make such observations. Employers must bargain about whether employees will receive counseling and/or treatment for drug or alcohol abuse.

Since applicants are not employees, the Board has held that employers need not bargain about *pre-employment* testing. Accordingly, pre-employment testing is a *permissive* subject of bargaining.

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

3.10.6 HIRING HALL CLAUSES

For employers engaged primarily in the construction industry, hiring and referral hall clauses are permitted specifically by Section 8(f) of the NLRA. As noted above, Section 8(f) agreements may provide for the employer to give the union advance notice of any vacancies that exist and even provide for exclusive union referral of applicants. In addition, such agreements may establish minimum training, experience, or longevity periods with the employer or in the industry or geographical area that must be met by all applicants for employment (both regular union members and off-the-street registrants/applicants). Unions operating hiring or referral halls may not discriminate on the basis of union membership or non-membership, and owe a duty of fair representation to all registrants, even registrants who are not members of the union.

Many older cases have held that hiring hall clauses are mandatory subjects of bargaining. However, those cases were decided before the NLRB ruled that parties were under no duty to bargain over the terms of new Section 8(f) agreements. Since current Board authority holds that there is no duty to bargain under Section 8(f), and since hiring clauses are authorized specifically under that section, there is now some question whether such clauses continue to be mandatory subjects of bargaining in the Section 8(f) context.

Exclusive hiring hall clauses are those in which the employer agrees that it will not hire any employees for bargaining unit jobs except those referred to the employer by the union. However, even in these cases, ***the employer should negotiate to retain the right to accept or reject referrals.*** Generally, these clauses provide that if the union cannot refer a sufficient number of qualified individuals within a specified number of hours (most often 24 or 48), the employer may then hire from any source it chooses. Even exclusive hiring hall provisions should include specific exceptions when such are necessary for the contractor to meet affirmative action goals under applicable executive orders, or state and/or local hiring preferences.

In making referrals and understanding the referral process, it is important to know that, as noted earlier, there are certain union referral practices for which an employer could be held liable. For example, a union is not permitted to discriminate in its referral practices based on whether an individual is or is not a union member. In addition, a union is not permitted to discriminate in its referral practices based on race, color, religion, sex, national origin, age, disability or other characteristics that may be protected by applicable laws or regulations.

However, if a union does so discriminate, an employer that has made the union its *exclusive* source for obtaining new employees may be held liable, along with the union, for discriminatory hiring practices. Contractors should therefore push for inclusion of *indemnification* clauses that would obligate the union to indemnify the contractor for any and all losses, including attorney's fees, arising out of the union's operation of its hiring hall. Such clauses could include indemnification only, could include the union's duty to defend the employer, or could include other provisions to otherwise protect the employer from liability.

An additional issue that arises with regard to referrals through union hiring halls is a "key man" or "by name" referral. These are referrals whereby employers want to be able to call the union and request individuals with certain key skills or request individuals by name when the employer knows of the particular work ability of such individuals. In some cases, these arrangements have been challenged as a form of adverse impact race or sex discrimination presenting the prospect of circumventing hiring workers of particular race or sex, and therefore the operation of such clause on each employer EEO profile for bargaining unit jobs should be examined. As long as such "key man" or "by name" requests are not subterfuges for unlawful discrimination, such clauses are lawful. Examples of the types of subterfuges for unlawful discrimination that could be involved are when requests for individuals by name are used by an employer to deliberately screen out all minorities or women, or in situations where requests for certain skills are made when the specific skills are not needed but the contractor knows that requesting such skills will again screen out minorities or women.

A collective bargaining agreement may also include a *non-exclusive hiring hall clause*. Nonexclusive hiring hall clauses are those which provide that the employer may request the union to send the employer employees, but that the employer is not required to do so and thus remains free at all times to hire from any source it chooses. Employees hired by the employers, whether through the hiring hall or not, will be covered by the union security clause of the agreement which can require payment of fees to the union after the 7th day of employment (if lawful under state right to work laws).

It is strongly recommended that employers negotiate for the right to reject *any* applicant referred by the union. However, the right to reject may not be used by the employer to discriminate against an applicant on the basis of protected characteristics such as those mentioned above.

Finally, of course, hiring hall clauses are not required. Agreements that are silent on the subject do not require an employer to call the union for referrals but allow the employer to hire employees from any source it chooses. Some agreements provide for such "open hiring" expressly.

NOTE:
The Right to Reject Referred Applicants

In some instances, there are questions relating to whether an employer has a **contractual** obligation to automatically accept applicants referred/called from the hiring hall. ***Unless the contract requires it, employers have no obligation to automatically accept referrals.*** The actual hiring decision rests solely in management's discretion, and the hiring hall provisions and the management rights clause of the collective bargaining agreement usually say so. Since grievance procedures apply generally to employees and not applicants, decisions to reject applicants should not be covered as "grievable" under typical contract grievance procedures.

CAUTION:
Beware Age-Related Referrals

As the demographic composition of most skilled crafts continue to advance to the upper age brackets, some agreements are being amended to insert requirements that a certain percentage of applicants referred/called from the hiring hall must be from certain age groups – that is, a certain number must be age 50 or older. On their face, these requirements may violate laws against age-based distinctions in employment under many state and local age discrimination laws.

3.10.7 JURISDICTION CLAIMED IN UNION CONSTITUTION VS. JURISDICTION IN COLLECTIVE BARGAINING AGREEMENT

In the constitution of most building trades unions is a statement of the work jurisdiction claimed by the union. In recent years, for various reasons including technological developments and a changing marketplace, unions have amended their constitutions to add to their constitutionally claimed jurisdiction. Theoretically, unions could delete items from their claimed jurisdiction, but we are not aware of any unions having done so.

When a national union expands it constitutional definition of its jurisdiction, contractors can expect that they will soon receive proposals from the local unions to expand the scope of jurisdiction in the collective bargaining agreements to incorporate the newly added tasks. Contractors and MEBU negotiators need to be alert for this. There is nothing in the National Labor Relations Act that makes unions' claims of jurisdiction over something – even if it is in the unions' constitutions – binding on the employers who enter into collective bargaining agreements with those unions. In other words, *just because a union includes some tasks within its own constitutional definition of its work jurisdiction does not mean contractors need to agree to include those tasks as work covered in their collective bargaining agreements*.

Union negotiators will likely tell contractors that the contractors *must* add such work to the definition of covered work. They may further claim that their own good standing status with the parent union depends on their defense of the constitutionally claimed work jurisdiction. However, regardless of the local union negotiators' union membership obligations, a union's constitutional claims of jurisdiction are *not* binding on contractors. ***To the contrary, a proposal to expand the scope of work covered by a collective bargaining agreement as an expansion of the scope of the bargaining unit, even if it is based on expansion of a union's constitutional jurisdiction, is a permissive subject of bargaining. Accordingly, for contractors in 9(a) relationships, it is not something the union may lawfully insist on including in the agreement over contractors' objections.***

OBSERVATION:

Proposed Expansion of Bargaining Unit to Include Off-Site BIM/CAD Employees

Over the course of several past UA Conventions, the UA amended its constitution to expand its jurisdiction to extend to include Building Information Modeling (BIM) and Computer-Assisted Design (CAD) tasks associated with mechanical components of projects. The new descriptions can be found in the UA Constitution (Revised and Amended at San Diego, California, and Calgary, Alberta, August 23-27, 2021, Las Vegas, Nevada, August 8-12, 2011) under "Jurisdiction of the Work of the United Association" found at pages 181 and following Point 1 (plumbing) (p. 182), Point 29 (fire suppression) (p. 184), and Point 37 (process piping) (p. 187).

Local employer bargaining groups may expect UA local unions to propose to add BIM/CAD work to the scope of work provisions of employees covered under the collective bargaining agreements, and to propose to include personnel performing BIM/CAD functions in the bargaining units. The contractors/MEBUs are not obligated to agree to such proposals. In areas where BIM/CAD work is covered by the CBA, employers will need to make sure that coverage is consistent with CBA bargaining unit requirements, and that benefits participation meets ERISA requirements.

Contractors in 9(a) relationships may advise the UA that the expansion of the scope of the bargaining unit is a permissive subject of bargaining and that the contractors do not agree to them.

Contractors in 8(f) relationships may do the same. Contractors in 8(f) relationships may also take the position that persons who perform all work off-site (in a home office, for example) may not be covered by 8(f) agreements in any event. The Board has held that persons whose work is not performed at the site of construction as part of combining materials into a structure are not eligible for coverage in 8(f) agreements. See *Const., Bldg., Materials & Misc. Drivers, Local 83,* 243 NLRB 328 (1979); and *Forest City/Dillon-Tecon Pacific,* 209 NLRB 867 (1974).

DRAFTING TIP AND CAUTION:

Adopting UA Constitution Jurisdictional Points by Reference Could Import Later Expansion Unintentionally into a CBA

If a local collective bargaining agreement states that it incorporates by reference only the complete scope of work jurisdiction as contained in the UA Constitution, the MEBU should insist that the reference specifies which edition of the UA Constitution is being referenced. A general incorporation statement that does not identify the specific date and edition of the UA Constitution may find that its collective bargaining agreement automatically incorporates future expansions of jurisdiction without even knowing it.

3.10.8 CRAFT JURISDICTION/JURISDICTIONAL DISPUTE ISSUES

Even if a union does not seek to expand its claimed jurisdiction, another issue to be alert to at the bargaining table is that of craft jurisdiction, particularly overlap with that of other crafts. Most collective bargaining agreements contain very detailed provisions setting forth the jurisdiction of work claimed by the union and covered by the collective bargaining agreement. Unfortunately, it is all too common for craft jurisdiction clauses of different agreements to overlap and provide that some work is claimed by more than one craft and covered by more than one collective bargaining agreement that a single employer might sign with other crafts – for example, a laborers CBA might have overlapping jurisdiction with the scope of work of a local plumbers CBA.. More often than might be expected, contractors find themselves having signed more than one agreement that either expressly or implicitly cover some of the same work. In an attempt to avoid such problems, contractors are urged to keep abreast of the craft jurisdiction clauses contained in any and all of the craft agreements they sign.

However, whether an individual contactor has signed two or more agreements covering the same work, it is still possible that other contractors on a jobsite may have signed agreements with other crafts that cover some of the same work covered in a given contractor's agreement. In such circumstances, it is possible for jurisdictional disputes to arise as between crafts employed by other employers on the site, and workers covered by employers that actually assigned the work to a competing craft.

A jurisdictional dispute occurs when a union claims that work being performed on a construction site by employees who are not its members should be performed by its members. A jurisdictional dispute can occur when non-union employees are performing the work (in this context it is probably also recognitional or organizational in nature). A jurisdictional dispute can occur, as noted, when employees of another contractor that has a contract with another craft union are performing the work. Finally, one can occur when the union is one of several unions that has a contract with the contractor whose employees are performing the work, and claims that the contractor assigned the work to the wrong craft union.

Whenever any jurisdictional dispute exists, virtually any action taken by a union, other than pursuing a contractual grievance and arbitration remedy, to force or coerce a contractor to assign work to the union's members is an unfair labor practice.

1. A threat to shut down the job if the work is not reassigned is an unfair labor practice.
2. A threat to shut down another job if the work is not reassigned is an unfair labor practice.
3. A threat against another contractor to get that contractor to pressure the "offending" contractor to reassign the work is an unfair labor practice.
4. Picketing with the object of carrying out any of the above threats is also an unfair labor practice.

In a jurisdictional dispute case there are two issues to be resolved:

1. The question of who should be doing the work – the resolution of this does not involve a question of illegality – it is lawful for the dispute to exist.
2. The possible unfair labor practice – the means chosen to enforce such a claim – is the action taken to enforce the claim unlawful?

If the action taken to enforce the claim is picketing, the National Labor Relations Board (Board) is empowered to proceed to federal court to enjoin the picketing while the jurisdictional question is being resolved. The Board can also seek to enjoin threats, but seldom does since little purpose is served. Only the Board can file for an injunction to prohibit jurisdictional dispute picketing or threats. The Board can do this after investigation following the filing of an unfair labor practice charge.

Once a jurisdictional dispute is brought before the Board by the filing of an unfair labor practice charge, the award (assignment) of the work will be resolved in one of two ways.

A voluntary method of resolution agreed on by the competing unions and the employer who will employ the people who will do the work.

A Board determination – if the parties cannot agree on a voluntary method of resolution within ten days after the filing of the charge, the Board will decide the award of the work in a proceeding held under Section 10(k) of the Act.

The Board Section 10(k) hearing is mandatory, not voluntary, once the Board processes have been invoked. At the Section 10(k) hearing, the Board will consider collective bargaining agreements, area practices and other factors, and will actually award the work to one of the competing groups of employees. Once a jurisdictional dispute has been resolved and an award of the work made, it is not an unfair labor practice for the unit to whom the work was awarded to picket or threaten to picket to enforce the award. Therefore, employers must accept the award issued by the Board or face the prospect of having their jobs shut down by lawful picketing.

The most common alternative to the Board Section 10(k) proceeding is agreement to be bound by a document known as the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The Plan has been approved and is administered by the North America Building Trades Unions (NABTU) (formerly the Building and Construction Trades Department (BCTD)) of the AFL-CIO and the craft-signatory employer associations – MCAA, NECA, NACA, SMACNA, and TAUC. The differing factors, or at least the different priority given to the various factors, used to determine assignments of work by the Board and under the Plan are contrasted in the 10(k) Factors text box, below.

Under either the Board Section 10(k) proceeding or the Plan, all that is decided is the award of the work to one of the competing groups. Neither the Board nor the Plan will direct the payment of back pay or any other damages in the event that the work has been assigned previously to a group other than the one to which the work is awarded through the proceeding.

Factors Considered in 10(k) Proceedings

FACTORS CONSIDERED BY THE BOARD (all relevant facts considered)

Employer Preference as to who will do the work. (This is not hard to determine since the contractor presumably awarded the work to the group it preferred.)

Economy and Efficiency--which group can more economically and efficiently perform the work. This, of course, requires a comparison of wage and fringe levels of the unions involved and also whether the disputed work is a part of a larger job, the rest of which one union may be qualified to do.

Collective Bargaining Agreements-do any or all of the unions have collective bargaining agreements with the contractor that specifically cover the work in dispute?

Board Certification-the Board will consider it relevant if one or more of the unions won a Board-conducted election which covered the specific work in dispute.

Skills of the Competing Groups-the Board will examine any facts presented that show that one group possesses greater or more appropriate skills for performing the work in dispute.

Similarity to Other Work-if none of the competing groups has a history of performing the work in dispute, the Board will examine facts presented which would show the work in dispute is similar to work traditionally and customarily performed by any of the competing groups.

Prevailing Practice-is there a history of one group performing this work for other contractors in the same geographic area or specific segment of the industry?

Awards in Prior Cases-the Board will look to see if the same parties have ever before submitted the same dispute to an arbitrator or to a neutral agency such as the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (Plan). Note: a prior award is only – really significant if all the parties to the current dispute (contractor and all competing groups of employees) were parties to the prior award.

FACTORS CONSIDERED BY THE PLAN

Whether a previous decision or agreement of record between the parties to the dispute governs.

Whether there is an applicable agreement between the crafts governing the case.

The established trade practice in the industry and prevailing practice in the locality.

Because efficiency, cost or continuity and good management are essential to the well-being of the industry, the Arbitrator shall not ignore the interests of the consumer or the past practices of the employer. (Article V, Section 8 of the Plan)

CAUTION AND DRAFTING TIP:
Avoid Paying Twice for the Same Work – Subcontracting Violations/Damages

Related to this jurisdictional dispute issue is the impact of a subcontracting clause. As discussed above, subcontracting clauses often require the signatory contractor to subcontract work covered by its agreement only to other firms who are also signatory to the same agreement with the same craft union. Under the grievance procedure utilized to resolve alleged subcontracting violations, the contractor could be obligated to pay back pay and benefits if it subcontracted the work covered by its agreement with one craft to an employer that was signatory to an agreement with another craft covering the same work.

3.10.9 PAID HOLIDAYS

In some areas of the country, unions and employers have agreed to agree to ***paid holidays*** in construction industry collective bargaining agreements. In the past, most construction industry collective bargaining agreements ***simply recognized certain holidays*** throughout the course of the calendar year as days on which no work would be performed except in cases of emergency. Occasionally the agreements would provide that if work did need to be performed on those holidays, it would be paid for at premium rates. However, employees were generally not paid for holidays that were not worked.

In some areas, contractors and unions that find themselves competing with the open shop for qualified employees have begun to agree to include paid holidays in agreements to match the pay and benefit practices of some of the open shop competition. Such clauses typically provide that eligible employees will receive a normal day's pay (usually 8 hours at straight time) for each of the paid holidays negotiated into the agreement even though the employees do not work on such holidays. Obviously, the cost of providing such paid holidays should be taken into account when computing the cost of the overall wage and benefit package.

Additional considerations regarding holidays are necessary when the holidays are "paid" as opposed to "unpaid" time off. Most collective bargaining agreements that provide paid holidays also provide certain minimum eligibility requirements. Often these include a minimum number of hours worked for the employer during the course of a calendar year, working the last scheduled day before and the first scheduled day after the paid holiday, and similar provisions to prevent paid time off abuses. Also, such paid holidays may be considered paid work hours but may not be hours worked for benefits contribution purposes in CBAs that distinguish benefits payments on the basis of hour worked versus hours paid. You should ensure you understand correctly the requirements of the CBA and the applicable trust documents in this regard.

CAUTION:
Federal Prevailing Wage Compliance and Holiday Pay

Federal prevailing wage compliance issues sometimes arise with respect to collective bargaining agreements that allow holiday pay at straight time rates, without benefits contributions or that call for benefits payment only on time worked as opposed to hours paid. In such cases, some federal compliance officers may take the position that the terms of the agreement are superseded by the prevailing wage determination, and that an employee on a prevailing wage job who is paid for not working on a holiday must be paid both the straight time wage **and benefits pay**, as the prevailing wage determinations require pay and benefits to be included in the wage determination. If these circumstances arise, the employer involved should check with legal counsel and or the project's prevailing wage compliance officer for guidance.

PRACTICAL TIP:
Federal Holidays Are Not Automatically Recognized Holidays Under Local Collective Bargaining Agreements

Questions frequently arise as to how the bargaining agreement handles those predictable circumstances when a President declares a national holiday for the federal workforce. For example, if the President declares the day after Thanksgiving to be a federal holiday, or the day before the 4th of July, often bargaining parties question whether that declaration applies to the private sector workforce and then whether workers under the agreement are entitled to the time off or premium pay for working on that day. The short answer is that the federal workforce holiday schedule is not incorporated in any way in the time-off provisions of the typical local area collective bargaining agreement. The federal personnel administration law (5 USC § 6103 and EO 11582) sets out the standard federal holidays, and states that if they fall on Saturday, they are to be observed on Friday; if on Sunday, then on Monday. Unless the local agreement incorporates the federal alternate scheduling, then the holiday schedule in the local agreement operates independently of the federal law.

3.10.10 APPRENTICE DAY SCHOOL – PAID TIME

Increasingly, at least in some areas of the country, unions and employers are proposing that some of the apprentices' classroom time take place during regular work hours, or during specific hours at the direction of the employer or apprentice program. Unions have proposed in some cases that apprentices be paid for the hours spent in such classroom instruction.

Whether to agree to pay the apprentices for such hours is a matter for the employer to negotiate with the craft union. Under the Department of Labor's regulations implemented pursuant to the Fair Labor Standards Act, the Department has published 29 C.F.R. § 785.32 entitled "Apprenticeship Training." It provides as follows:

As an enforcement policy, time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:

a. the apprentice is employed under a written apprenticeship agreement or program which substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the U.S. Department of Labor; and

b. such time does not involve productive work or performance of the apprentice's regular duties. If the above criteria are met, the time spent in such related supplemental training shall not be counted as hours worked unless the written agreement specifically provides that it is hours worked. The mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that such time is hours worked.

Accordingly, it appears that time spent in classroom instruction need not be considered hours worked for purposes of the Fair Labor Standards Act minimum wage and overtime requirements. Employers may agree to pay for such time, but are not obligated to count it as time worked in the absence of specific agreement to the contrary.

3.10.11 CONTRIBUTIONS TO UNION ORGANIZING EFFORTS

In some cases, proposals may raise questions relating to unions seeking additional funds to use in their quest to organize the employees of non-union or open shop contractors. While generally, the union signatory

contractors may view union efforts in this regard as a positive development for market competitiveness, **any request that employers help subsidize union organizing efforts should be turned down categorically, as *there are potential major legal problems in that context*.**

Direct contributions to a union's treasury, or a union-administered fund, for the purpose of underwriting union organizing efforts is likely a violation both of the criminal provisions of Section 302 of the Taft-Hartley Act and of Section 8(a)2 of the National Labor Relations Act. The Taft-Hartley provisions contain a broad prohibition on providing money to unions directly. Section 302(a) states as follows:

It shall be unlawful for any employer or association of employers … to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value -

1. to any representative of any of his employees … ; or
2. to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer …

Section 302(b) is a corresponding section that makes it unlawful for a labor organization to request or accept the payments the employers are prohibited from making under Section 302(a).

Labor Management Cooperation Committees

Labor-Management Cooperation Committees (LMCCs) are authorized by the Taft-Hartley Act and were enacted into law in 1978. Some contractor groups and unions have asked if these can be used to support union organizing efforts.

Taft-Hartley Act Section 302(c)(9), which authorizes LMCCs, permits employers to provide:

…money or other things of value…to a plant, area or industry-wide labor management committee established for one or more of the purposes set forth in Section 5(b) of the Labor Management Cooperation Act of 1978.

Thus, payments under Section 302(c)(9) are lawful only if made to a "labor-management committee" and only if that committee is established for one or more of the purposes set forth in Section 5(b) of the Labor Management Cooperation Act. Commentators seem to agree that the Section 5(b) reference is in fact to Section 6(b) of Public Law 95-524. That section states as follows with respect to purposes:

It is the purpose of this section

1. To improve communication between representatives of labor and management;
2. To provide workers and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;
3. To assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;
4. To study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant, area or industry;
5. To enhance the involvement of workers in making decisions that effect their working lives;
6. To expand and improve working relationships between workers and managers; and
7. To encourage free collective bargaining by establishing continuing mechanisms for communication between employers and their employees through federal assistance to the formation and operation of labor-management committees.

Caution: It is worth emphasizing that organizing per se is not a permissible activity for a labor-management cooperation committee.

Labor Management Cooperation Committees (continued)

The FMCS is authorized to provide assistance to such committees, but the statute authorizing such assistance states (29 U.S.C. § 175A(b)(3)) states:

No grant may be made under the provisions of this section to any labor management committee which the Service finds to have as one of its purposes **the discouragement of the exercise of rights contained in [Section 7 of the National Labor Relations Act]**, or the interference with collective bargaining in any plant, or industry. (emphasis added).

In addition to the prohibition on FMCS contributions, it would be questionable for a committee itself to use its funds for influencing employee choice, as employer contributions are allowed under the statute if, and only if, the committee is fulfilling one of its established purposes. Additional issues could be raised by Section 8(a)(2)'s prohibition against an employer's financial support of a labor organization and the LM-10/LM-30 reporting requirements for persuader payments.

The statute goes on to enumerate several exceptions to the broad prohibition, but none of the exceptions (Section 302(c)(1)-(9)) cover contributions to unions, or even to joint union-management funds that have organizing employees of other employers as one of their purposes. The criminal penalties for violating the above-described prohibitions are set forth in Section 302(d)(2). That provision states as follows:

> …any person who willfully violates this Section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000 or imprisoned for not more than five (5) years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this Section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one (1) year, or both.

Additionally, in the National Labor Relations Act Section 8(a)(2) provides that it is an unfair labor practice for an employer:

> …to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it… (emphasis added)

Accordingly, employers should be wary of the consequences of entering into any agreements to contribute money, on any basis, to unions for any purpose, and specifically for the purpose of helping organize employees of other employers. However, there may be cases where industry events at local training centers to advertise industry opportunities and training opportunities are the type of industry promotion that LMCCs and industry employer associations can support in the overall interest of industry promotion. Local labor counsel can help sort out distinctions between various types of activities and events.

3.10.12 THE INDUSTRIAL RELATIONS COUNSEL – THE "COUNCIL" CLAUSE

Many collective bargaining agreements between affiliates of the MCAA and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (UA) contain what is known as an "IRC clause" or the "Council clause." The clause obligates parties to submit issues that are unresolved after negotiations to the Industrial Relations Council for the Plumbing and Pipefitting Industry (IRC) for resolution. (The IRC also can be used for grievance settlements.) When used to settle CBA negotiations, the IRC can be classified as a type of second-tier bargaining (not exactly interest arbitration), and

when used to settle grievance disputes on CBA interpretation, the IRC is properly considered grievance arbitration.

The IRC is the creation of the Mechanical Contractors Association of America, the Union Affiliated Contractors of the National Association of Plumbing, Heating, Cooling Contractors, and the UA. It has been in existence since approximately 1950.

The IRC's charter agreement and its policies provide that the service it performs for employers and unions that submit unresolved collective bargaining agreements to the IRC is a type of "continued negotiation," also characterized as second-tier bargaining. The "continued negotiation" theory of the IRC policy is that the employer and union have not submitted issues to the IRC for adjudication, but instead have appointed the IRC's management-appointed representatives and union-appointed representatives as the management and union representatives, respectively, of the employer(s) and union that are parties to the submission to the IRC. It is important to note the distinction between second-tier bargaining and interest-arbitration – because several legal consequences flow from that characterization. Simply put, the IRC second-tier bargainers theoretically could reach an impasse and not settle the agreement. In true interest arbitration eventual settlement is implied in the stipulation to arbitrate.

The National Labor Relations Board has ruled that the "council clause" is a non-mandatory subject of bargaining. *Mechanical Contractors Assn. of Newburgh*, 202 NLRB 1 (1973) ; *Plumbers Local 387 (Mechanical Contractors Assn. of Iowa)*, 266 NLRB 129 (1983) In this sense, the IRC is the same as true interest arbitration (where the parties unequivocally ab abandon their right to not settle the pact, as a mandatory subject of bargaining. Where the IRC and interest arbitration differ is on the ability of the panel to impose further IRC stipulations in successor pacts. Since the IRC is second-tier bargaining, the IRC bargaining representatives of the primary bargaining parties are in fact free to agree to further IRC stipulation in successor agreements (just as they are empowered to settle any other permissive subjects of bargaining if they so choose). Under true interest arbitration (where the bargaining parties have assigned their rights and gave up their rights go to impasse or reject settlements altogether), the Board has held that the interest arbiter cannot perpetuate itself in successor pacts – as that would permanently displaced the parties right to choose their bargaining representatives in the future. *Laidlaw Transit, Inc.*, 323 NLRB 867 (1997); *IBEW Local 135 (LaCrosse Electric)*, (271 NLRB 250 (1984).

CAUTION:

Be Aware That Adoption of the IRC Clause, or Any Interest Arbitration Clause, May Effectively Convert an Existing 8(f) Contract, Into a Limited Type 9(a) Agreement.

The IRC clause, like other interest arbitration clauses, could be understood, if perhaps even misconstrued, by courts to constitute is an agreement-to-agree to a successor agreement. So, If the IRC second-tier bargaining procedure is considered the equivalent of interest arbitration (where the parties foreswear their right to decline settlement), then it may be considered agreement to agree to a successor pact that overrides the otherwise applicable right of employers in a Section 8(f) CBA to walk away from an expired 8(f) agreement. There is no judicial authority on this point with this interpretation, either way. However, if the court were to analyze the differences with the IRC bi-level, second-tier bargaining as contrasted with true interest arbitration where the original parties actually foreswear their right to reject settlement), then the use of an IRC clause in a Section 8(f) context would not override the *Deklewa* privilege of the employers to walt away from an expired 8(f) CBA. As this is an unsettled question of law, consultation with experienced labor counsel is highly recommended.

3.11 OTHER STATUTES THAT LIMIT BARGAINING CHOICES

Maintaining a bargaining relationship with a union and reaching a collective bargaining agreement with a union does not immunize an employer from the impact of other laws regulating the workplace and the employment relationship.

3.11.1 ANTI-DISCRIMINATION STATUTES

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, sex, national origin, religion, and color. The Age Discrimination in Employment Act prohibits discrimination on the basis of age (40 and older). The Americans with Disabilities Act prohibits discrimination against individuals with physical or mental disabilities, requires reasonable accommodations, and regulates medical inquiries and examinations. The Family and Medical Leave Act requires employers to provide unpaid leave to eligible persons whether they have agreed to such provisions in their collective bargaining agreements or not. The Genetic Information Nondiscrimination Act (GINA) prohibits employment discrimination on the basis of genetic information.

An employer and a union may not legally agree directly to provisions that are inconsistent with these statutes. For example, an employer and a union cannot agree to exclude workers from equal opportunity for employment on the basis of their sex, race, age, or religion. This would be an example of an *illegal* subject of bargaining, discussed above.

An employer and a union may not do so indirectly either. If the agreement an employer reaches with a union contains a hiring hall clause in which the employer agrees to hire exclusively from the referrals sent to the employer by that union, the agreement will not insulate the employer from liability for unlawful discrimination practiced by the union. If the employer agrees to use a union's hiring hall, it should make certain that the collective bargaining agreement states that the hiring hall must be operated on a nondiscriminatory basis, and then it should monitor the union's actions in operating the hiring hall. If the union refers only young employees, men, and/or persons of a certain race, and discriminates in referrals on the basis of age, sex, or race, the employer could be liable for discrimination under Title VII or the Age Discrimination in Employment Act.

In a landmark 2009 decision, *14 Penn. Plaza v. Pyett*, 556 U.S. 247 (2009), the Supreme Court of the United States held that under certain circumstances, federal employment discrimination claims can be subject to binding resolution under the arbitration clause of a collective bargaining agreement. In order for the decision of a labor arbitrator to have a preclusive effect on later litigation of the same claim, the arbitration clause must explicitly mandate the arbitration of the type of discrimination claim at issue.

PRACTICAL TIP:
Indemnification from the Union

An indemnity clause from the Union can be helpful in prompting legal compliance and lessening damages on the employer if there is a lawsuit or violation for job bias or other legal adverse actions. For example, such a clause could potentially provide some protection for liability arising out of a Union's discriminatory hiring hall practices.

One area of concern for many contractors is potential liability for jobsite harassment of which the Union is aware (or for which Union members or officials are culpable), but takes no steps to prevent or remedy. It is conceivable that a Union could agree to indemnify a contractor for liability arising out of such harassment. However, it is critical to note that the employer – not the Union – is legally responsible for providing its employees with a workplace free of unlawful harassment and discrimination. Consequently, whether a court would enforce such an indemnification clause is far from clear. Contractors should consult with counsel before attempting to include such a clause in a collective bargaining agreement. See also note on Union Indemnification for pension plan withdrawal liability below.

CAUTION:
Caveat on Security/Background Checks

One issue that has arisen in recent years concerns owner/client-imposed background or security checks and credentials. Little or no authority exists on this subject, but it is likely to be treated similar to drug testing – a mandatory subject of bargaining for the existing workforce and a permissive subject for new hires. This issue may be of greater significance with the increasing incidence of such credentialing for federal project sites including those for the Department of Homeland Security, National Institute of Standards and Technology and the General Services Administration. In addition to worrying about whether a background check needs to be done for a certain project, employers must also exercise caution in how such checks are performed. A federal statute called the Fair Credit Reporting Act makes many types of background investigations "consumer reports" and "investigative consumer reports," both of which require a notification and release before the investigation is done and certain notifications in the event such a report is a factor in a decision for an adverse employment action. Certain state and local laws also may affect the information available and its use. For example, "ban the box" laws may prohibit employers from inquiring about an applicant's criminal history at the application stage of the hiring process. Employers should consult with legal counsel about the legality and method of background checks in their geographic area.

Also beware that it may be a violation of nondiscrimination laws to exclude applicants based on criminal history information. The Equal Employment Opportunity Commission (EEOC) has issued guidance concerning the potential adverse (disparate) impact of the use of arrest and conviction records on the basis of race and national origin. The EEOC has indicated that in making employment decisions related to criminal records, employers should consider (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense, conduct, and/or completion of sentence, and (3) the nature of the job held or sought. With regard to arrests, the EEOC has stated that arrests do not establish that criminal conduct has occurred, and an employment decision based solely on the fact of an arrest is not job-related and consistent with business necessity (the employer's burden to rebut disparate impact), but an employer "may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question." Again, state and local laws may impose different requirements or restrictions.

3.11.2 ERISA

As general background, the employer also needs to be aware of some general provisions of ERISA, the federal law regulating pension and welfare benefit plans. The construction industry's multiemployer pension, health and welfare, apprentice and other plans are all ERISA plans. The multiemployer plans are also Taft-Hartley plans. The Taft-Hartley Act requires that they be governed by written trust agreements and administered by trustees. Half of the trustees must be appointed by the union and half by management.

As employers, however, contractors may be part of the group that has the authority to appoint the trustees who will be subject to ERISA's fiduciary rules in administering the plans. Employer trustees on the boards of those plans are not employer representatives, or at least are not permitted under ERISA to act in the best interests of the employers. ERISA trustees – both on the union and the employer side - are required to act solely in the interests of the "participants" and "beneficiaries" of the plans which means the *employees and plan beneficiaries*, not the participating employers or unions.

Thus, it is important to find out how much control over trust funds can be obtained at the bargaining table and write that control into the collective bargaining agreement. Employers should consult with counsel who

understand ERISA's provisions to find out how much can be achieved at the bargaining table to gain control over already existing multiemployer trust funds. This requires obtaining and reading the trust agreements. In some cases, little control can be acquired. Resistance to increasing the union's or the trustees' level of control may be all that is achievable.

If an employer is starting a new trust fund through the collective bargaining process, the employer has more opportunity to place controls on the discretion and authority of the trustees. Again, legal counsel should be consulted to determine the options and the best course to pursue.

Additionally, under ERISA, employers that withdraw completely or partially from underfunded multiemployer pension plans will generally be liable for a portion of the plan's unfunded vested benefits. The resulting liability is known as "withdrawal liability" and the computation of this liability is determined by statute. A complete withdrawal generally occurs when an employer (i) permanently ceases to have an obligation to contribute under the plan or (ii) permanently ceases all covered operations under the plan.

There is a special rule for withdrawing employers under clause (ii) above if the plan is for work performed in the building and construction industry. In the case of such a plan, an employer has liability for a complete withdrawal only if (i) the employer ceases to have an obligation to contribute under the plan, but then (ii) (A) continues to perform ***work in the jurisdiction of the collective bargaining agreement*** of the type for which contributions were previously required, or (B) resumes such work within five years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

The law regarding ERISA withdrawal liability is extremely complex and requires consultation with employee benefits counsel experienced in these issues. Because withdrawal liability can be substantial depending on the health of the particular plan, legal advice should be sought *before* entering into or withdrawing from a multiemployer pension fund, including when terminating 8(f) agreements.

OBSERVATION:
Indemnification of Employers for Withdrawal Liability

At least two United States Courts of Appeal *(Pittsburgh Mack Sales & Serv. Inc. v. Int'l Union of Operating Eng'rs, Local Union No. 66,* 580 F.3d 185 (3d Cir. 2009) and *Shelter Distribution, Inc. v. Gen. Drivers, Warehousemen & Helpers Local Union No. 89,* 674 F.3d 608 (6th Cir. 2012)) have upheld clauses in collective bargaining agreements by which unions agreed to indemnify the employer if the employer is assessed withdrawal liability as a result of withdrawing from a multi-employer pension plan. In the 2012 case, the indemnification language in the collective bargaining agreement article requiring contributions to the multi-employer pension plan was simple and straightforward:

> "The Union shall indemnify the Company for any contingent liability which may be imposed under the Multiemployer Pension Plan Amendments Act of 1980."

In each of the cases, the unions argued to the courts that such indemnification clauses were void as against the public policy embodied in ERISA that requires employers be held liable for withdrawal liability. The courts rejected that argument. The courts found that the employers remained liable to pay the withdrawal liability and found no basis in law for prohibiting the unions from agreeing to reimburse the employers after they did so – in such circumstances, the fund still received the payment, and the policies underlying the system of withdrawal liability were given effect.

CAUTION:

Can Non-Bargaining Unit Employees Participate in Taft-Hartley Plans?

Non-bargaining unit employees may sometimes participate in Taft-Hartley plans, but care must be taken to ensure that the trusts and plans are administered according to the rules written in the documents. Occasionally, bargaining parties, and even trustees themselves, may not know how the plan documents define participants and beneficiaries. This can lead to unintended consequences including contributions on behalf of persons who are not eligible for benefits from the plans. This can occur when contributions are made on behalf non-bargaining unit employees of a contributing employer and the plan either does not permit coverage of such persons, or the employer has not signed a proper participation agreement the written agreement required to permit contributions and accrual of benefits. It can also occur when contributions are made on behalf of "alumni" (formerly active union members) who have retired or moved to positions with contributing employers who are not actually eligible for coverage under the terms of the plan.

A case illustrating this is *Guthart v. White,* 263 F.3d 1099 (9th Cir. 2001). In that case, a member of the IBEW (Guthart) transferred from a bargaining unit position with one union signatory contractor to a supervisory/estimator position with another union signatory contractor, but maintained his membership in the union. Both employers were signatory to a collective bargaining agreement with the IBEW. Both employers contributed on Guthart's behalf to the Electrical Workers Health & Welfare Trust Fund for the work he performed. When his wife later sought benefits from the fund for cancer treatments, her claim for benefits was denied, and the denial was upheld by the court.

The trust agreement's definition of an employee eligible for coverage was a person "covered by a collective bargaining agreement requiring contributions to the fund." The collective bargaining agreement did not apply to the work Guthart was performing for the second employer. Since Guthart did not meet the definition of an employee on whose behalf contributions were permitted, the court determined that Guthart was not covered, the fund could not legally pay the benefits, and the claim was denied.

The Guthart case serves as a reminder of several important points with respect to Taft-Hartley retirement and welfare funds. First, simply because an individual is a current member of a union in good standing, and works for a union signatory employer, he or she is not necessarily eligible for coverage under a Taft-Hartley fund. While it is legally permissible for non-bargaining unit employees, such as supervisors and estimators, to be participants in such funds, such is permitted only if all of the requirements of the Taft-Hartley Act are met. A collective bargaining agreement and/or trust agreement that does not provide specifically for contributions on behalf of employees not performing bargaining unit work will not satisfy the Taft-Hartley Act's requirements with respect to non-bargaining unit employees. This is the case even for "alumni" – non-bargaining unit employees who were once bargaining unit employees clearly covered by the plans.

CAUTION:
Can Non-Bargaining Unit Employees Participate in Taft-Hartley Plans? (continued)

In order for non-bargaining unit employees to be covered, the collective bargaining agreement, or another separate written agreement, must specify that the employee is eligible for coverage, and specify the "detailed basis" on which contributions are to be made to the funds on the employee's behalf. Other agreements that could satisfy this obligation would be participation agreements specifically providing for such coverage and including a schedule of contributions, or any other written instrument clearly setting forth such an agreement. In addition, the parties must be certain that the trust agreement itself allows such contributions to be made. An employer cannot make an effective written agreement with a union that certain non-bargaining unit employees will be covered unless the trust agreement itself authorizes the trustees to accept contributions on behalf of such non-bargaining unit employees.

Do not assume anything. Even a longstanding practice, one which has gone on without challenge for many years, is not sufficient to overcome the lack of a written agreement satisfying the Taft-Hartley Act's requirements.

Another issue is that the trustees of Taft-Hartley funds are **obligated** to deny coverage to individuals who do not satisfy the definition of an employee, and/or with respect to whom any of the Taft-Hartley Act's requirements (such as the written agreement requirement) are not satisfied. Trustees who pay benefits to ineligible individuals may find themselves personally liable to the fund for repayment of any amounts so paid.

Also, an employee can become a non-bargaining unit employee without transferring to a supervisory position. Instead, a person can become a non-bargaining unit employee for purposes of a particular collective bargaining agreement by performing what is normally bargaining unit work, but doing so outside the geographic territory covered by the agreement. For example, if an agreement is in effect between a union and an employer covering the State of Indiana only, it does not cover work, even bargaining unit-type work, performed in Illinois. Such an agreement that specifies that "$x" per hour will be contributed for all "work performed under this agreement" does not permit contributions to be made legally under the Taft-Hartley Act for work performed in Illinois.

Review carefully any contributions to Taft-Hartley funds to be certain:

- that any employee on whose behalf contributions are made is eligible for coverage; and,
- that the contributions are made pursuant to a written agreement with the union or the trust fund that sets forth the detailed basis on which the contributions are to be made on behalf of such employees.

Failure to do so means that significant contributions may be made for nothing, and that employees who believe they are building up credits toward retirement, or are eligible to have health care expenses covered, may be eligible for neither.

3.11.3 OCCUPATIONAL SAFETY & HEALTH ACT

Another primary federal law is the Occupational Safety & Health Act (OSHA). OSHA requirements must be complied with regardless of any terms contained in any collective bargaining agreements. Unions generally are concerned with safety and want to work on safe work sites. However, unions, like employers, may object to some of OSHA's regulatory provisions as being ineffective and overly burdensome. No matter how employers and unions may feel about such regulations, they may not lawfully enter into agreements in conflict with OSHA

requirements and may not lawfully interfere with the rights of individual employees to make complaints and bring potential safety issues to the attention of the appropriate regulatory officials.

PRACTICAL TIP:
Unions Do Not Share OSHA Responsibility

Employers – not unions – bear OSHA compliance responsibility. Therefore, an OSHA compliance clause in an agreement should give employers wide management rights discretion to ensure safe worksites. Also, in addition to reserving the unilateral right to make workplace safety/OSHA required accommodations, the MEBU should also legislate safety compliance authority reservations specifically in the broader management rights clause of the CBA.

3.11.4 FAIR LABOR STANDARDS ACT

The federal Fair Labor Standards Act (FLSA) (29 USC § 201 et seq.) provides for a minimum wage for all hours worked and for the payment of overtime for hours worked in excess of forty in the employer's established workweek. Issues regarding various interpretations of the definition of "hours worked" result in frequent questions from employers as to whether particular activities must be paid and counted as working time for purposes of computing overtime. The questions most often arise with waiting time, on-call time, rest and meal periods, travel time and various other activities. The following is a general description of the current state of the law on some of these topics. It should be noted that courts engage in an extremely fact-intensive analysis of whether certain time spent by employees counts as compensable hours worked, so employers should consult legal counsel for advice regarding specific scenarios. This analysis becomes particularly thorny when the use of computers and cell phones away from the workplace blurs the lines between working and non-working time.

Waiting time – Waiting time is generally compensable if an employee is "engaged to wait" (such as a fireman at the firehouse waiting for an emergency) as opposed to "waiting to be engaged" (such as a person who shows up early for work to drink coffee before the start of the shift).

Travel Time – Travel time from/to home and the worksite is not considered hours worked under the FLSA. Travel during the day as a part of the work, such as travel from site to site, is considered hours worked. Travel for a special one-day assignment in another city is work time, minus the normal commuting time. Travel away from home for more than a day can be considered hours worked if it occurs during the normal workday. The rules regarding travel away from home for more than a day and for time spent in training can be complicated, and legal counsel should be consulted if there
is any question.

On-Call Time – Generally, time spent on-call is considered hours worked if the employee is required to remain on the work premises or if the employee is otherwise so restricted that the time cannot be used for his/her own purposes. Time spent on-call is not generally considered hours worked if the employee must simply be available at some place other than a work site (i.e., by pager or phone) if contacted.

Meal and Break Periods – Employers are required to compensate employees for short meal and rest/break periods unless the break is for the benefit of the employee such that the employee is completely relieved from duty and free to use the time for his/her own purposes. For purposes of determining whether the break time is compensable, the Department of Labor has taken the position that employers should pay employees for breaks of twenty (20) minutes or less. The Department has stated that bona fide meal periods of thirty (30) minutes or more generally do not need to be compensated if the employee is completely relieved from duty during that time.

Additional information on these and other wage-related topics can be found at the Department of Labor's website at http://www.dol.gov.

3.11.5 PAID SICK LEAVE

On September 7, 2015, President Obama issued Executive Order 13706, to establish mandatory paid sick leave for certain employees of federal contractors. On September 30, 2016, the U.S. Department of Labor (DOL) issued regulations (the "Final Rule") implementing Executive Order 13706. These rules have remained in effect through the publication of this Guide.

Under the Final Rule, the paid sick leave requirement applies to certain categories of federal contracts that, "result from solicitations issued on or after January 1, 2017 (or that are awarded outside the solicitation process on or after January 1, 2017)." This includes procurement contracts for construction covered by the Davis Bacon Act (DBA), but not contracts subject only to Davis Bacon Related Acts, which the DOL describes as, "Acts under which Federal agencies provide financial and other assistance to construction projects through grants, loans, guarantees, insurance and other methods, but do not directly procure construction services."

Although a full description of the Final Rule is beyond the scope of this publication. The following is a non-exhaustive list of key provisions of the Final Rule.

1. Covered employees accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract.
2. Employers have the option to provide at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue leave based on hours worked.
3. Employees must be allowed to carry over accrued, unused paid sick leave from one year to the next, but contractors may limit total accrual of available leave to 56 hours.
4. Generally speaking, paid sick leave must be reinstated for an employee who is rehired within 12 months of a separation of employment. There is no requirement under the Final Rule or Order that accrued leave be paid out upon termination, but doing so may be required under state law, local law, or a CBA. The Final Rule addresses the ramifications of such a payout: Where, "a contractor [makes a payment upon separation of employment] in an amount equal to or greater than the value of the pay and benefits the employee would have received…had the employee used the paid sick leave, the contractor is relieved of the obligation to reinstate an employee's accrued paid sick leave upon rehiring the employee within 12 months of the separation"
5. Employees may use paid sick leave for their own physical or mental illnesses, injuries or medical conditions; to obtain diagnosis, care, or preventative care from a health care provider; to care for family members (defined very broadly); and, in certain instances, for similar purposes related to domestic violence, sexual assault, or stalking.
6. Employers may require certification only for absences of three or more consecutive full days
7. Employers may not use paid sick leave required under the Final Rule toward the fulfillment of DBA fringe benefit obligations.
8. A contractor's existing PTO policy can fulfill the paid sick leave requirements of the Executive Order as long as it provides employees with at least the same rights and benefits required by the final rule requires.
9. A MEBU contractor may fulfill its obligations jointly with other contractors – that is, as though all of the contractors are a single contractor – through a multiemployer plan that provides paid sick leave in compliance with the Final Rule and Order. However, each contractor (not the plan) is responsible for any violation that occurs during its employment of the employee.

CAUTION:

Contractors should be aware that the federal paid sick leave requirement sets the floor on covered contract – but state law or local law (or CBA) may contain paid sick leave requirements in excess of the federal rule. Employers must comply with the more generous requirement.

3.11.6 STATE LAWS

In addition to the federal statutes discussed above, state laws that are not preempted by federal laws may also impose some limitations. For example, some state laws on paid sick leave have a type of preemption for construction industry collective bargaining agreements, with the state (and sometimes local) authority granting a type of bargaining or employee benefits preemption for bargaining agreements in the construction industry, so that employers that have employees with CBA coverage are exempt from the state mandated benefits – in deference to industry bargaining and industry standard setting in the bargaining process.

The point to take away from this is that, absent some special statutory treatment for collective bargaining relationships, employers and unions may not lawfully agree to provisions that are inconsistent with any of these statutes.

3.12 IMPASSE, STRIKES, LOCKOUTS AND YOUR LEGAL RIGHTS

The law provides that when the parties are at impasse in bargaining – vaguely defined as a situation in which no further progress or change of position by either party appears imminent or likely to occur in the foreseeable future – the parties have certain rights, so long as the impasse is over mandatory subjects of bargaining. The Board's practical definition of an impasse is based on the "I'll know it when I see it" approach, and is not any more certain than the definition given above.

At impasse, employers may implement their proposals so that, if employees do not strike, the employees will be subject to any changes in mandatory subjects of bargaining the employers are proposing. The implementation of proposals at impasse *does not* mean the employers have no further duty to bargain. It does not create a new agreement, rather it only allows the employers to implement the changes they have proposed while bargaining continues. Parties in 9(a) relationships are not relieved of the duty to bargain after impasse occurs, but must continue to try to reach an agreement.

Employers may lock out their employees, in effect, rendering them unemployed, to attempt to force the employees and unions to agree to a contract on the employers' terms. If employers lock out employees, the employers may hire *temporary* replacement employees to do the work of the locked-out employees. They may not under any circumstances hire *permanent* replacements for locked out employees.

If at impasse an employer does not lock out employees, the union is permitted to call a strike. If the employees strike over the terms of a new collective bargaining agreement, and their strike is neither caused nor prolonged by any employer unfair labor practice, the employer is free to hire *permanent* replacements for those employees.

The permanent replacements are entitled to work so long as they and the employer are satisfied with the employment relationship. This means that even if the union announces the strike is over and the strikers are ready to return to work, the employer does not need to terminate (fire) the replacement employees to make room for returning strikers. However, the employer may reach an agreement with the union to do so. That is why the employer should inform the replacements that their employment may be terminated as a result of such an agreement. Failure to inform the replacements that such a possibility could subject the employer to a wrongful discharge or breach of contract claim *by the replacements* if they are fired as result of such an

agreement. If and when a replacement leaves, however, a striker on whose behalf an unconditional offer to return to work has been made must be offered the opportunity to return.

Employers are not permitted to obtain injunctions prohibiting strikes over terms of a new collective bargaining agreement, although employers may be permitted to obtain injunctions to prohibit mass picketing and violence which physically interferes with the access to work locations and prevents the employer from being able to work or receive deliveries. *[See Appendix on picketing.]*

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

CAUTION:
Define "Permanent" for Permanent Replacements

Employers must take care to be sure that the replacement employees are told that they are "at will" employees. The replacement employees should also be told that their employment may be terminated as a result of an agreement between the employer and the union, or as a result of an order of the Board that the employer re-employ the striking employees.

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APPENDIX I: CONSTRUCTION SITE STRIKES, PICKETING AND BOYCOTTS

Lawful and unlawful construction site strikes, picketing and boycotts do occur. At the outset, it is important to distinguish between strikes and picketing. A *strike* is a negative action – a withholding of services. *Picketing* is an affirmative action – the patrolling of a jobsite, usually by individuals carrying picket signs, advertising a dispute with an employer. An individual employee may go on strike, and not picket. An individual may picket an employer and not be on strike if the individual is not employed by the employer.

Occasionally, work on construction jobsites is interrupted by picketing in support of strikes or boycotts. Such picketing occurs in a variety of circumstances for a variety of reasons. Some picketing at construction jobsites is lawful and must be permitted although it may be limited in scope. Other such picketing is unlawful, and steps can be taken to stop it.

The first source to examine to see what can be done to prevent or stop interference with the progress of the project is the contract of the contractor that is the object of the picketing. Many times, a clause in such a contract will give a general contractor or construction manager the leverage to order the contractor being picketed to solve the problem immediately or face cancellation of its contract for the work.

If this is not possible or practical, the only remaining solution to the problem of picketing is to become familiar with the limits of a union's legal rights to picket and with an employer's legal rights to respond to picketing. The following is a very brief discussion of the different forms such picketing may take and of the limitations that the Board and the courts have placed on the union's rights to picket at construction sites.

A. Types of Picketing

Regardless of its object, picketing at a construction site usually looks the same to an observer. However, the object, or purpose, of any given picketing activity determines the type of picketing involved and calls into play the appropriate set of legal standards used to regulate such picketing activity. The types of picketing usually encountered are: 1) Recognition Picketing, 2) Informational Picketing, 3) Area Standards Picketing, 4) Secondary Boycotts, and 5) Jurisdictional Picketing. Many of these will be defined and discussed in the following sections and possible contractor responses to each type will be suggested.

B. Construction Site Picketing: Picketing for Recognition

Recognition Picketing is picketing by a union to require or force an employer to recognize the union as the collective bargaining agent for the employer's employees on the jobsite.

Such picketing is illegal if:

1. The employer's employees are already represented by another union (Section 8(b)(7)(A)), or
2. There has been a Board conducted election within the previous twelve months (Section 8(b)(7)(B)).

However, absent a recent election or an existing agreement with a union, recognition picketing is legal so long as it does not continue beyond "a reasonable period of time not to exceed 30 days without the filing of a representation petition" (Section 8(b)(7)(C)). Once a petition has been filed, such picketing may continue until a valid election has been held.

Because in most situations the picketing union really does not want an election, such picketing is often disguised as picketing for another purpose.

1. Informational Picketing.

2. Area Standards Picketing.

3. Picketing to protest an alleged unfair practice.

Area Standards Picketing is not addressed specifically in the National Labor Relations Act. However, the Board and the courts have determined that maintaining area wage standards is a legitimate union objective and have held that picketing in support of that objective is lawful activity. Accordingly, picketing to inform employees and the public that a given employer does not pay its employees an amount equivalent to area wage and fringe standards is permitted to continue indefinitely; it is considered to be in support of a dispute between the union and that employer.

Whenever this occurs, attempts should be made to determine if the picketing union is really protesting the employer's wage standards. If the union has made no attempt to find out what the employer pays its employees, recognition may be the actual object of the picketing. Similarly, if the employer does pay its employees the area standard, and if the union knows it, recognition may be the real object of the picketing. If recognition is *only one* of many objects, the picketing may be limited to no more than thirty (30) days without the filing of a petition.

The types of questions to be answered to try and detect a recognitional object of the picketing are:

1. Did the union contact the contractor, or anyone else, to find out what the contractor's wage and benefit levels were? If not, the picketing may not be area standards.

2. What do the picket signs say? They may imply a recognitional object.

3. Before the picketing began, did the union ask the contractor to recognize it or to sign an agreement? If so, the picketing may not be area standards.

All the clues must be examined to see if *at least one* object of the picketing is recognition as bargaining representative.

Informational Picketing is sometimes difficult to distinguish from area standards picketing. Informational picketing is, however, defined in the National Labor Relations Act. The same section of the Act which prohibits picketing for recognition or organization for more than thirty (30) days without the filing of a petition (Section 8(b)(7)(C)) also states:

Nothing in this paragraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of *truthfully advising the public* (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, *unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment not to pick up, deliver or transport any goods or not to perform any services*. (emphasis added)

Therefore, picketing which is directed to the public informing the public that the employer does not have a contract with the picketing union is lawful and may continue indefinitely as long as it does not cause employees of any other employer to cease work or fail to pick up or deliver goods to the picketing premises.

The activity of the picketing union must be examined to see if the real object of the picketing is to reach the public.

If it is not, and if it is directed at employees for a recognitional or organizational purpose, then the picketing may be limited to no more than thirty (30) days without the filing of a petition. Additionally, picketing for the purpose of advising the public is not Informational Picketing if it has the effect of causing employees to stop work or to fail to pick up or make deliveries.

Determining whether picketing at a construction site is Area Standards Picketing or Informational Picketing is sometimes difficult. It is advisable to contact labor relations counsel when any picketing at a construction site begins so that the factors to be considered in determining whether the picketing is really disguised recognitional or organizational picketing are all taken into account.

If sufficient evidence can be gathered to show that one of the real objects of such disguised picketing is to

require recognition, then such picketing can be stopped (by Board processes) after 30 days if a petition for an election has not been filed.

Normally, this point is not reached, however. The union, by picketing the common situs (jobsite of two or more contractors with construction employees on the job), is actually attempting to coerce recognition or the removal of the non-union employer from the job by enmeshing the employees of neutral employers in its dispute with the non-union employer. Such conduct is called "secondary" and is illegal under the National Labor Relations Act and will be discussed in the next section.

C. Secondary Boycott

In the construction industry, picketing for organization and recognition frequently involves the law concerning secondary boycotts as well. *Secondary boycott* is the term usually used to describe a situation in which a union pickets, strikes or threatens or induces employees or individuals to withhold service when *an* object is to force or require one employer to cease doing business with another employer or person. The question involved in these cases is whether the boycott, picketing, threat or whatever is an attempt to involve a neutral *(secondary)* employer in a labor dispute between the union and a *primary employer* (the one with whom the union has its dispute).

There are many ways these situations can develop. In the construction industry it is usually where several contractors or subcontractors are working on one construction site. This gives rise to what is commonly known as the common situs picketing problem. Typical cases have union and non-union subcontractors working side by side on one construction site. A union picks a non-union subcontractor and pickets the entire construction site claiming:

1. The non-union subcontractor does not pay union sale; or
2. The non-union subcontractor will not recognize the union – remember, this is legal, at least for a reasonable period of time; or
3. The non-union subcontractor committed unfair labor practices.

The union subcontractor's employees respond by walking off the job and work on the project stops. Since the picketing may be legal because of a bona fide dispute between the union and the primary employer, the problem for the rest of the contractors is how to get their employees back to work. Usually, the employees will not return if they need to cross a picket line. What steps can be taken to get the other employees back to work when the picketing may be legal and cannot be stopped immediately?

The Board has set up a test, a set of rules, to determine the conditions and limitations under which picketing of one of several employers at one location is permissible. The basis for the Board's test is that it is illegal under Section 8(b)(4) of the NLRA for the union to appeal to the employees of the *neutral (secondary)* employers to stop work. This is because the object of such an appeal would be to cause the secondary employers to stop doing business with the primary employer.

How can you prove that this is one of the union's objectives if the union will not say so but just continues picketing? The Board's test can be used to seek out this object even where the union on the surface does not direct its activity at the secondary employers or their employees.

The Board's test is called the *Moore Dry Dock* test. (*Moore Dry Dock*, 92 NLRB 547 (1950)). It provides that picketing a common situs (site) is legal if it satisfies the following criteria:

1. The picketing must be strictly limited to the *times* when the *situs* of the dispute is located on the secondary employer's premises (or the *common situs*).
2. At the time of the picketing the *primary employer* must be engaged in its *normal business* at the site.
3. The picketing must be limited to *places reasonably close* to the site of the dispute – the primary employer.

4. The picketing must *disclose clearly that the dispute is with the primary employer*.

This rule suggests several questions which must be answered to determine if the picketing violates the secondary boycott provisions.

1. *Picket signs* – do they clearly identify the primary employer, i.e., employer with whom union has a dispute?
2. Is there direct evidence of the union's attempt to involve neutral employers or employees in the dispute?

   Such as:

   (a) Statements to other employees.

   (b) Statements to other employers.

   (c) Fines of supervisors or other union personnel working behind picket lines.

   (d) Statements of pickets or business agent – ask them: "What will it take to resolve the dispute?"

Additionally, there are established techniques to use if the above questions do not provide the answer. The two most common ones are the "Reserved Gate" and the "Separate Work Schedule" for the primary employer. Each will be described below.

1. The Reserved Gate

To make use of this technique the primary employer with whom the picketing union has a dispute must be determined. Then a gate or entrance should be established for the exclusive use of the employees, suppliers and visitors of that employer. This reserved gate or entrance should be as far from all other entrances to the construction site as possible without making it hidden from public view or practically inaccessible since the union has the right to public recognition. Notice of the establishment of the separate gate should be sent to the picketing union and all unions and contractors on the jobsite.

The reserved gate should be marked with a large sign easily readable from the roadway by which employees or suppliers of the employers on the project approach the site. The sign should state:

"THIS GATE IS RESERVED FOR THE EXCLUSIVE USE OF (name of primary Co.), ITS EMPLOYEES, SUPPLIERS AND OTHER VISITORS OF (name of primary Co.).

SUCH PERSONS MAY NOT USE ANY OTHER ENTRANCE TO THIS PROJECT.

NO OTHER PERSONS ARE PERMITTED TO USE THIS GATE."

A corresponding sign should be placed at the gate for the neutral employers (those who do not have a dispute with the union):

"THIS GATE IS RESERVED FOR THE EXCLUSIVE USE OF (name of neutrals), THEIR EMPLOYEES, SUPPLIERS AND OTHER VISITORS OF (name of neutrals).

NO OTHER PERSONS ARE PERMITTED TO USE THIS GATE."

Once these gates have been established and are used as marked, the union must restrict its picketing to the gate reserved for the primary employer. If it does not, this is evidence of an illegal object under *Moore Dry Dock* test and Section 8(b)(4) and the NLRB, upon filing of a charge, can seek to enjoin the illegal picketing.

Caveat in Reserved Gate Cases:

GATES MUST BE KEPT "UNCONTAMINATED" OR "SANITARY" – FAILURE TO DO SO CAN JEOPARDIZE AN UNFAIR LABOR PRACTICE CHARGE AND ALLOW THE UNION TO LAWFULLY PICKET THESE CONTAMINATED ENTRANCES.

Remember, it is the *union*, or *neutral*, gate which must be kept uncontaminated. As a practical matter, the only way to ensure non-contamination is to station someone at the union/neutral gate to ask everyone who seeks to come through it:

1. "which contractor do you work for?" or
2. "which contractor are you delivering to?" or
3. "which contractor are you coming to visit?"

Ideally, you should require those entering to sign and state their purpose.

What do you do when the picketing union confines its picketing to the reserved gate, but the employees of the other contractors stay off the job anyway?

This can happen when the unions that represent these other employees say their members will not "work behind" any picket line. If they say this, and their members refuse to come to work when the Reserved Gate system has been established properly, they are likely engaging in a secondary boycott prohibited by Section 8(b)(4)(B). An unfair labor practice charge could be filed against each union involved. Such may be filed by any person.

However, this can happen without any overt reference to the union's response to the picket line. For example, all unions report that their members are "sick"; or the employees do not show up and no reason at all is offered. If such action is in support of the picketing union's dispute, it may still be a secondary boycott prohibited by Section 8(b)(4)(B). An unfair labor practice charge could be filed but there are obvious problems of proving what is behind the failure of the employees to show up for work.

There are options in addition to the filing of an unfair labor practice charge. One option is a lawsuit for damages. Any contractor who is damaged by the union's actions in keeping its members off the job can file a lawsuit against the union in federal court. This lawsuit is to recover damages suffered as a result of the union's action. Additionally, the "discovery" procedures of the court system may produce the proof needed to establish the unfair labor practice.

Another option is to hire replacement employees. Any contractor whose employees do not report for work may hire other employees to take their places. If the union refuses to supply new employees when the contractor calls for them, this is some evidence that the union is behind the failure of the employees to report and may assist in proving the unfair labor practice. Also, if the union refuses to supply people, the contractor can hire anyone it pleases. When the contractor begins hiring new employees, it can inform the old employees that they are being replaced. It can also tell the union and the nonworking employees that if it turns out that they are engaging in a secondary boycott, they will be fired when the contractor learns of it. Obviously, these are extreme measures and before they are undertaken, labor relations counsel should be consulted.

2. Separate Work Schedule of Primary

Remember, if a primary employer is not present or engaged in "normal operations" when picketing occurs the union's picketing is probably for a secondary objective. Separate work schedules are useful when reserved gates are not practical or feasible or where unions take the position of refusing to work behind any picket line if it is on any gate to the project. Picketing can be confined to the different work schedule of the primary

disputants. It is critical that the union be notified of the work schedule change. The work schedule change must be adhered to in a consistent, regular fashion.

D. Construction Site Problem: Secondary Consumer Handbilling and Bannering

A union tactic used more frequently in recent years to get around some of the secondary boycott provisions discussed above is *consumer handbilling* of secondary employers in circumstances in which *picketing* would be an unlawful secondary boycott.

A special proviso to Section 8(b)(4) states, in pertinent part:

> [N]othing contained in [Section 8(b)(4)] shall be construed to prohibit publicity, *other than picketing*, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, *as long as such publicity does not have an effe*ct of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick-up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. (emphasis added)

In the late 1980's, the Supreme Court of the United States decided a case holding that handbilling by a union, unaccompanied by patrolling or picketing, at entrances to a shopping mall, with handbills urging consumers to boycott all stores in the mall because one of the mall tenants was using an open shop contractor for construction remodeling, was not unlawful because of the foregoing proviso to Section 8(b)(4). Thus, even though the employers targeted by the handbilling were *secondary*, and even though an object of the handbilling was clearly to cause secondary employers to pressure the mall tenant to cease doing business with the open shop contractor, the activity was allowed to continue and could not be enjoined under Section 8(b)(4)'s secondary boycott provisions.

In a trend beginning with multiple decisions issued by the Board in 2010 and 2011, the Board declared it is also *lawful* for unions to hold banners or place inflatable objects at the entrances of employers that have business relationships with the primary employer with whom the union has a labor dispute. In this regard, the Board considers the display of banners or balloons to be closer to handbilling than picketing, assertedly because of the non-confrontational, non-coercive nature of stationary banners. Therefore, the Board has held even though the employers targeted by the bannering were *secondary*, and again even though the objective of the bannering was clearly to influence the employers to cease doing business with the union's primary employer, unions have been allowed to conduct such activity.

Employers who have been targeted by bannering or other forms of stationary signals should diligently record the circumstances and effects of such union activity. The Board has stated that bannering is lawful because it does not have the same confrontational or coercive effect as a traditional picket line. If the union uses banners as the equivalent of picket signs – patrolling or creating barriers to enter or exit the employer – such bannering may become picketing, in which case it would be subject to the general discussion about types of picketing dealt with in this Appendix and may no longer be lawful. The Board has also noted that bannering may be unlawful if it disrupts the employer's operations directly. Employers should take note of how many union agents hold the banners, how close the banners are to business entrances and exits, whether the union agents constantly move the banners, or if union agents verbally or physically engage employees or patrons.

Contractors working on new or remodeling construction of retail establishments, such as shopping malls, restaurants, hospitals, hotels, etc., may find that handbilling or bannering is directed at the owners or others associated with the project. Most of the solutions to secondary boycotts discussed above are not applicable to consumer handbilling or bannering activity and, in such cases, experienced labor counsel should be contacted to determine the appropriate course of action.

SUMMARY OF REQUIREMENTS FOR AFFIRMATIVE ACTION PROGRAMS FOR PROTECTED VETERANS AND INDIVIDUALS WITH DISABILITIES

Although there are currently (at the time of publication of this Guide) no federal affirmative action requirements related to females and minorities, there may be state and local requirements. You should consult experienced labor and employment counsel to determine if any such obligations may apply.

Construction contractors with 50 or more employees and a direct federal contract (or subcontract) of $50,000 or more must prepare a written affirmative action program covering individuals with disabilities for each of its locations with 50 or more employees within 120 days after being awarded the contract. Similarly, every construction contractor with a direct federal government contract or subcontract entered into or modified after December 1, 2003 and valued at $100,000 or more must take affirmative action to employ and advance "protected veterans," which include disabled veterans, recently separated veterans, active-duty wartime or campaign badge veterans, and Armed Forces service medal veterans. Such contractors with over 50 employees must prepare a written affirmative action program covering protected veterans for each of its locations with 50 or more employees within 120 days after being awarded the contract.

Both the program for individuals with disabilities and the program for protected veterans must be in writing and the contractor must review and update it annually. These affirmative action programs must include, at minimum, the following:

- *Invitations to Self-Identify.* Covered contractors invite all applicants to identify themselves as an individual with a disability (IWD) and a protected veteran, before an offer of employment is made. The invitations must be repeated when an individual is hired (but before the individual starts work). In addition, the invitations to self-identify as an individual with a disability must to extended to current employees, within the first year after the contractor enters into a direct federal contract, and again at least every five (5) years. At least once between invitations, the contractor must remind employees that they can self-identify as an individual with a disability at any time. Historically, there has been a specific form that must be used for the invitations to self-identify as an individual with a disability. With the reorganization of the Office of Federal Contractor Compliance, the form is not currently (at the time of publication of this Guide) available on the OFCCP website. The required content of the form can still be found in Appendix B to Part 60-300 of Title 41, Chapter 60 of the Code of Federal Regulations (ecfr.gov/current/title-41/subtitle-B/chapter-60/part-60-300-appendix). The invitations to self-identify as a protected veteran do not need to follow a specific form, but must (a) state that the contractor is a Federal contractor required to take affirmative action to employ and advance in employment protected veterans pursuant to VEVRAA; (b) summarize the relevant portions of VEVRAA and the contractor's affirmative action program; (c) state that the individual does not have to self-identify; (d) state that the information will be kept confidential; and (e) state that the information will not be used unlawfully nor will the information (or the refusal to provide it) subject the applicant to any adverse treatment. The invitation to identify as a protected veteran at the pre-offer stage should only request a response as to whether the individual is a protected veteran – it should not request that the individual identify the specific protected veteran category to which he or she belongs. The post-offer invitation can ask the individual to identify the specific protected veteran category to which he or she belongs, but it is not required to do so.
- *Utilization Goals (IWD) and Hiring Benchmarks (Protected Veterans).* As of the time this publication, the utilization goal for IWDs is 7%. Contractors are required to conduct a utilization analysis against this goal. This goal is measured by job groups, not the entire workforce, unless the contractor has 100 or fewer total employees in which case a single utilization analysis for the entire workforce may be used. This utilization analysis, therefore, requires that direct federal construction contractors create job groups containing positions with similar pay, job duties and levels of responsibility.

The hiring benchmark for Protected Veterans was 5.2% in 2024. The OFCCP historically published an updated benchmark on its website around March of each year. This benchmark measures against the entire workforce. Contractors must analyze its hiring each year to determine whether the benchmark was met.

These two analyses, and supporting documentation, must be maintained for three years

- *Written Plan.* The following list is a basic description of the sections that are required to be included in the written affirmative action plan. The analyses described above and the data collection described below should not be included in the written plan as they are confidential analyses. The written plan must be made available for review by applicants or employees upon request.

  Policy Statement. The VEVRAA and Section 503 regulations require that the policy statement be part of the program. The statement must also be posted on bulletin set out specific requirements for the policy statement.

  Review of Personnel Processes. This section includes a description of the contractor's periodic review of its personnel practices, including steps to ensure that the individuals covered by the plan are not discriminated against. This section should describe any modifications that have been made or new processes that have been developed. The review must be described in such a way that it can be evaluated by the contractor and, when audited, the OFCCP. Contractors must be careful of the language used in this description to avoid admissions of some form of discrimination.

  Physical and Mental Qualifications. This section includes a description of the contractor's schedule for periodic review all physical and mental job qualification requirements to ensure that, to the extent qualification requirements screen out or tend to screen out qualified disabled individuals or Veterans, they are job related and consistent with business necessity and the safe performance of the job. A specific schedule for the review must be included.

  Reasonable Accommodation to Physical and Mental Limitations. In this section, the contractor must affirm its policy to make reasonable accommodation to the known physical or mental limitations of all otherwise qualified individuals with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of the business.

  Harassment. The contractor must state that it will (or already has) develop and implement procedures to ensure that its employees with disabilities and Veterans are not harassed because of their disability or Veteran status.

  External Dissemination of Policy, Outreach, and Positive Recruitment. This section includes a description of the contractor's outreach and recruitment programs designed to recruit individuals with disabilities and veterans. The OFCCP recognizes that the scope of a contractor's efforts in this regard will depend on the size of the contractor, its resources, and the extent to which existing practices are adequate.

  Internal Dissemination of Policy. To assure greater employee cooperation and participation in the contractor's efforts with respect to the disabled and Veterans, this section should include a description of the contractor's internal procedures to communicate its obligations to employees. Again, the scope of activities will depend on the contractor's size and resources.

  Auditing and Reporting System. This section should describe the contractor's required audit and reporting system that measures the effectiveness of the AAP; indicates any need for remedial action; determines the degree to which the contractor's objectives are being attained; determines whether individuals with known disabilities and Veterans have had the opportunity to participate in all contractor sponsored educational, training, recreational and social activities; and measures the contractor's compliance with the AAPs specific obligations.

  Responsibility for Implementation. In this section, an official of the contractor must be assigned the responsibility for implementing the affirmative action program and should be given the necessary management support and staff to implement the program.

Training. This section must state that all personnel involved in recruiting, screening, selection, promotion, and discipline are trained to ensure that the affirmative action program is implemented.

- *Data collection analysis.* The contractor shall document the following information regarding applicants and hires on an annual basis. This information must be kept for three (3) years:
  - The number of applicants who self-identified as protected veterans or individuals with disabilities or who the contractor knows are protected veterans or individuals with disabilities;
  - The total number of job openings and total number of jobs filled;
  - The total number of applicants for all jobs;
  - The number of protected veterans and individuals with disabilities hired; and
  - The total number of applicants hired.

APPENDIX II:
PREVENTING HARASSMENT

Although not related directly to collective bargaining, contractors and unions are each obligated to work to prevent harassment in the workplace, including on the jobsite. Federal law prohibits employment harassment on the basis of sex, race, color, national origin, religion, disability, and age. State and local laws may prohibit harassment based on other characteristics. Employers should develop, publish and enforce policies that prohibit harassment in the workplace by owners, managers, supervisors, fellow employees and customers. The following is a sample of a policy that can be a starting point for an employer to develop an anti-harassment policy for use in its own operations. Note that some state and local jurisdictions may require specific language and other elements not included in this general policy. You should consult with labor and employment counsel to determine the legal requirements in your jurisdiction.

ANTI-HARASSMENT POLICY AND COMPLAINT PROCEDURE

Purpose

The Company's policy is to promote a respectful work environment. In addition, the Company intends to maintain a workplace free of sexual and other harassment and intimidation, including harassment based on race, color, sex (with or without sexual conduct), religion, national origin, protected activity (i.e. opposition to prohibited discrimination or participation in the complaint process), age, disability, veteran status or any other protected categories. Harassment will not be tolerated by the Company. The Company is also committed to ensuring that its employees are not subjected to harassment by non-employees. Accordingly, this policy applies to management, non-management employees, customers, vendors, and others with whom we have a relationship.

What is Harassment?

Sexual and other harassment is a form of misconduct that undermines the integrity of the employment relationship. Harassment is not only offensive, but it may also harm morale and interfere with our effectiveness and our ability to fulfill our responsibilities to our customers. All employees must be allowed to work in an environment free from unsolicited and unwelcome sexual overtones and harassment in any form. It is also important to recognize that the workplace travels with us wherever we go (including conferences, meetings, casual get-togethers after work). Accordingly, harassment is not tolerated on Company property, jobsites, or any other location.

Sexual harassment, for purposes of this policy, is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (1) submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Examples of Conduct that Constitute Harassment

Sexual harassment does not mean occasional compliments of a socially acceptable nature. However, sexual harassment does include, but is not limited to, actions such as:

- sex-oriented verbal "kidding" or abuse, crude or offensive language, jokes, or pranks.
- possession, display, or distribution of photographs, drawings, objects, or graffiti of a sexual nature (employees should keep in mind that this type of material may not be placed on walls, bulletin boards, or elsewhere on Company property or jobsites, nor should it be circulated in the workplace).
- subtle or other pressure for sexual activity.
- epithets, slurs, put-downs, negative stereotyping, or threatening, intimidating or hostile acts.

- physical conduct such as patting, pinching, or constant brushing against another's body.
- explicit demands for sexual favors, whether or not accompanied by implied or overt promises of preferential treatment or threats concerning an individual's employment status.
- offensive sexual flirtations, advances or propositions.
- any other offensive, hostile, intimidating, or abusive conduct of a sexual nature.

Keep in mind that this Policy applies not only to sexual harassment, but to harassment in general. Therefore, the above activities or conduct that relate to an individual's race, sexual orientation, gender identity, age, religion, national origin, disability, and any other protected category may also violate our Policy. For example, written or graphic material that defames or shows hostility or aversion toward an individual or group (including religious groups) violate this Policy.

Complaint Procedure

We have adopted a complaint procedure that assures a prompt, thorough, and impartial investigation of all complaints, followed by swift and appropriate corrective action where warranted. We encourage employees to report harassment and other inappropriate conduct before it becomes severe or pervasive. While not all incidents of harassment violate the law, we intend to prevent and correct harassment and other inappropriate conduct before it rises to the level of a violation of law.

Any employee who believes that he or she has been a victim of some form of sexual or other harassment or other inappropriate conduct or behavior should report the incident immediately to _____. No one will be subject to adverse treatment or retaliation because they report harassment or provide information concerning such reports.

Responsibility of Supervisors, Managers and Others

All supervisors and other members of management are held accountable for the effective administration of this Policy. If a supervisor or other member of management is advised of any alleged violation of this Policy, or if he/she independently observes conduct which may be prohibited by this policy, he/she must immediately report the matter to _____ so that an appropriate investigation can be initiated. Under no circumstances will the individual who conducts the investigation or who has any direct or indirect control over the investigation be subject to the supervisory authority of the alleged harasser.

In addition to the above, any employee who is aware of any conduct or other circumstances that may violate this Policy must report this to _____.

Confidentiality

The complaint and information collected during such an investigation will be kept confidential to the extent possible and will not be disclosed unnecessarily or to persons not involved directly in conducting the investigation and determining what action, if any, to take in response to the complaint. Complete confidentiality cannot be guaranteed because an effective investigation usually requires revealing certain information to the alleged harasser and potential witnesses.

Remedial and Corrective Action to be Taken by the Company

Following the receipt of a complaint, management will initiate a prompt investigation. Typically, this investigation will involve an initial interview with the complainant and interviews with any other individuals who are involved, including the accused employee. If, following a complaint of sexual or other harassment, an investigation reveals that some act of sexual or other harassment, or other inappropriate conduct or behavior in violation of this policy, has occurred, prompt and appropriate corrective action will be taken. If no determination can be made because the evidence is inconclusive, the parties will be informed of this result and of any preventive measures that will be undertaken, which may include counseling, training, and/or monitoring.

The person who engaged in inappropriate conduct or behavior in violation of this Policy will be subject to sanctions or penalties, up to and including suspension and/or immediate termination of employment. If the offender is not a Company employee, we will take reasonable measures to the extent we can exercise any control over the problem.

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