REFUSAL TO BARGAIN
UNFAIR LABOR PRACTICES

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Who Enforces Labor Laws?

National Labor Relations Board
- National Labor Relations Act (1935)
- **Covered**: most workers in the private sector, plus employees of the USPS.
- **Excluded**: supervisors, independent contractors, public employees, agricultural workers, among others.

Montana Board of Personnel Appeals
- Collective Bargaining for Public Employees Act (1973)
- **Covered**: state, county and city employees, workers in school districts, fire districts, 2- and 4-year higher education, some others.
- **Excluded**: supervisors, elected officials, private sector employers.
What is an Unfair Labor Practice?

- Actions by an employer or union that violate labor law.
  - §§ 8(a) and (b) of the NLRA

- Statute of limitations: Filed within 6 months of the date of the event or conduct.

- NLRB and BOPA utilize different procedures to handle ULP charges.

- In absence of MT law to the contrary, BOPA generally follows NLRB precedent.
Duty To Bargain

NLRA § 8(d)

(d) [Obligation to bargain collectively] For the purposes of this section, 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, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Mont. Code Ann. § 391-31-305

39-31-305. Duty to bargain collectively -- good faith. (1) The public employer and the exclusive representative, through appropriate officials or their representatives, have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2).

(2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or the public employer's designated representatives and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising under an agreement and the execution of a written contract incorporating any agreement reached. The obligation does not compel either party to agree to a proposal or require the making of a concession.

(3) For purposes of state government only, the requirement of negotiating in good faith may be met by the submission of a negotiated settlement to the legislature in the executive budget or by bill or joint resolution. The failure to reach a negotiated settlement for submission is not, by itself, prima facie evidence of a failure to negotiate in good faith.
Subjects of Bargaining

- **Mandatory Subjects**—Must discuss
  Wages, Hours Working, Conditions
  Also called terms and conditions of employment.

- **Permissive Subjects**—May discuss, don’t have to
  Retiree benefits, hiring practices for new employees, waivers of statutory rights

- **Prohibited Subjects**—Illegal
  Union security clauses in public sector, things that violate the law.
Decision vs Effects

- **For changes to mandatory subjects**
  Bargaining obligation applies to the decision and to the effects of that decision.

- **For changes to permissive subjects**
  Bargaining obligation only applies to the effects of the managerial decision on wages, hours and working conditions.

- **Even if not required to bargain decision, may have to complete effects bargaining before implementing change.**

See *Metropolitan Teletronics Corp.*, 279 NLRB 957 (1986); *Laurel Education Association v. Yellowstone County School District Nos. 7&70*, ULP 6-09.
Refusal to Bargain by Union or Employer

- Unilateral Change
- Direct Dealing
- Removing Unit Work/Contracting Out
- Information Requests
- Bad Faith
Bad Faith

- Generally involves process issues.

Examples:

- Refusing to meet at reasonable times and places for bargaining.
- Insisting on bargaining over a permissive or illegal subject.
- Surface bargaining
Unilateral Change

- Employer has obligation to notify their employees’ union and provide it an opportunity to bargain before making changes to represented employees’ wages, hours, and working conditions.

- Unilateral change is a type of refusal to bargain ULP.
Bargaining Proposed Change

**Notice**
- Employer provides notice of possible change to mandatory subject
- Timely; avoid “fait accompli”

**Demand to Bargain**
- Union may accept proposed change, or
- Union must promptly request bargaining

**Bargain**
- If requested, must bargain in good faith
- Notice of intended change sufficiently in advance to allow for bargaining
Defenses to Unilateral Change Allegation

- **Waivers**
  - Contractual - Clear and unmistakable
  - Inaction - but cannot be presented as *fait accompli*

- **Economic exigency**
  - Heavy burden

- No change was made - consistent with past practice
- De minimus
- Not mandatory subject of bargaining
Reassigning Unit Work and Contracting Out

- Removing work from a bargaining unit that has traditionally performed the work.

- Employer must provide union with an opportunity to bargain before moving work to employees outside of the bargaining unit, or hiring a contractor to perform bargaining unit work (contracting out).

- Unilateral change is a type of refusal to bargain ULP.
Direct Dealing

- Employer going around union and negotiating directly with employees about changes to a mandatory subject.

- Do not share proposals with represented employees if they have not previously been shared with union.

- Must involve back and forth exchange regarding a mandatory subject of bargaining.
Information Requests

- Unions and Employers have the right to request and obtain information that is relevant to contract negotiations, contract enforcement, or grievance investigation and/or processing.

- Important to respond promptly.

- Failure/refusal to provide information is a type of refusal to bargain ULP.
Researching and Finding Information

- Where to find statutes
- Researching caselaw
- When to call counsel
Tips for Avoiding Refusal To Bargain ULPs

- Ongoing communication between labor and management.

- Understand what it means to bargain in good faith and follow the principles.

- When you spot a potential issue, take time to research or consult an expert.