

## Bargaining “in Good Faith”: Legal Obligations and Pitfalls

The 1935 Wagner Act imposed the legal obligation on employers to bargain in good faith at the request of the union. The 1947 Taft-Hartley amendments to the National Labor Relations Act extended this bargaining obligation to unions, and added some specifics. So breaches of the law’s requirements by either side at the bargaining table constitute unfair labor practices (ULPs), which are processed by the NLRB.

For the most part, provisions in public sector laws that set the parameters for “good faith bargaining” are modeled quite closely on the NLRA.

The requirements of the legal obligation to bargain in good faith are partly spelled out in some specifics in the NLRA – in Section 8(d) – and some that have developed under case law. So, for example, there are what are known as *per se* violations of the obligation:

- refusing to execute a written document once an agreement reached;
- unilateral changes in terms and conditions of employment; or
- direct dealing with unit employees (that is, bypassing the union as the exclusive representative of all employees in the bargaining unit.)

With *per se* violations, the very fact that an act has occurred is sufficient to establish a ULP; there’s no need to prove motivation, or any other aspect of the context in which the act occurred.

But in large part, the obligation to engage in good faith bargaining is just a general one; the parties are obligated to meet at reasonable times and confer in good faith with respect to wages, hours of employment, and other conditions of employment. It is clear that the obligation to bargain in good faith does not compel the making of concessions or reaching final agreement on a contract. It’s the process, not the end result, that the law examines.

Whether a party has met its obligation is determined by examining the “totality of conduct”; whether it can be said that it approached negotiations with a “sincere resolve” to reach agreement. (In another context, U.S. Supreme Court Justice Potter Stewart famously said that he couldn’t give a precise definition of pornography, but that “I know it when I see it.”) Bad faith can be proven by showing, for example, that a party’s conduct adds up to surface bargaining, that it showed no willingness to make concessions, or that it engaged in dilatory tactics.

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