



Information Requests

*[Notes to accompany Labor Bookstore's **Winning Grievances: a Step by Step Guide** webinar, presented by Michael Mauer, Esq.]*

Introduction

One critical element of success in bargaining is understanding how to obtain information. Information derived from statutory or contract requests can help union negotiators carry out their duties: address salaries, benefits and other conditions of employment; investigate and process grievances and prepare cases for arbitration; formulate and carry out a bargaining agenda; and so on. In addition, information requests can serve valuable tactical functions, putting the employer on notice that its feet will be held to the fire on certain issues, and that those issues won't go away until adequately addressed.

Statutory Authority to Make Information Requests

Unions in the private sector have access to the statutory entitlement to information and the enforcement mechanisms of the National Labor Relations Act. And since the general framework of the NLRA serves as a pretty close model for most public sector bargaining statutes, information here on the NLRA is generally applicable to public sector unions as well. Some research will be needed, however, to identify how a particular public sector statute and caselaw tracks or may differ from the NLRA on specific points.

The statutory obligation to furnish information grows out of the duty to "bargain in good faith." One element of that duty is that a unionized employer must "provide, on request, information that is relevant and necessary to the union's performance of its duties as collective bargaining representative." (*NLRB v. Acme Industrial Co.*, 385 U.S. 432 [1967]) The precise parameters of this legal obligation are not spelled out in the NLRA, nor generally in the equivalent public sector statutes, but have been fleshed out in case law pretty thoroughly over the decades.

A second statutory source of the obligation to furnish information lies in public records laws. The Freedom of Information Act applies to records kept by federal agencies, and there are generally equivalent public records laws at the state and local level.

Additional statutory routes to obtaining information lie in reporting requirements overseen by regulatory agencies. So, for example, the federal Occupational Safety and Health Administration, along with corresponding state-level health and safety agencies, has mandatory reporting requirements for employers subject to its jurisdiction. And there is a concomitant public right to review such filings.

Similarly, not-for-profit entities must file IRS Form 990 annually, containing a wealth of financial information, with the IRS. These can readily be obtained online at www.guidestar.org.

Contractual Authority to Make Information Requests

Existing collective bargaining agreements likely will have language specifying precisely what types of information an employer is obligated to furnish both during the life of the contract and in the runup to bargaining, and the format and timing for doing so.

Note: As a general rule, a union's statutory and contractual rights to information are complementary. But language in a collective bargaining agreement may be open to an interpretation that the union has waived a statutory right to obtain particular information, and that any data requests must be limited to those items specified in the contract. So care should be taken in drafting language to be presented at the bargaining table to make sure that such a "knowing and voluntary waiver" has not been made.

Scope of Information Requests

A statutory obligation to produce information arises when the data sought is necessary and relevant for the collective bargaining representative to carry out its duties. Virtually any aspect of contract administration (information needed to evaluate compliance with the terms of a collective bargaining agreement, or to process a grievance) or matter related to bargaining is properly the subject of an information request.

So by way of illustration, information requests under your contract or bargaining statute might include: records of all new hires and existing employees' promotions or pay raises; how specific situations were dealt with in the past ("past practice"); or financial information pertaining to employee pay or benefits.

As a general rule, labor boards uphold the type of liberal standard for "relevance" that is applicable to pretrial discovery proceedings, rather than the narrower standard that applies during trials. So, for example, an information request could flow from hearsay (third party statements) knowledge the union has, even absent a demonstrable factual basis. Information relating to terms and conditions of employment of bargaining unit members (that is, negotiable matters) is presumptively relevant, meaning that the burden rests on the employer to demonstrate a lack of relevance.

There are limits, however, to the scope of information a union is entitled to. Numerous legal decisions have said that a requestor must have more than "a mere suspicion" about something as a basis for a request, and that requests cannot be vague or speculative, amounting to "fishing expeditions." And requests must be made in good faith.

Some slightly different rules apply in the case of financial data. Generally, such data must be furnished only if the union makes a showing that it is especially relevant to matters under discussion at the bargaining table. A union will not prevail in a dispute over the obligation to provide financial information simply by stating that it would be "helpful" to review such data. But if an employer asserts an inability to pay for wages or benefits sought by the union then there is a presumption of relevance of that information.

Note that under public sector open records laws, generally "any person" can make a request of an agency, and almost all public records are subject to disclosure, including those containing financial information. Under these laws, the purpose for the request is not germane to establishing the right to the information requested.

Types of Information Covered

A request pursuant to the terms of a contract or bargaining statute can encompass "data" in whatever form it may exist. So valid requests can include both printed documents and electronic records. It also may be possible for requests to be for factual information. (That is, one can ask for information in the form of answers to questions, rather than simply requesting documents.) That said, employers may not be required to create new records to respond to a request, even if doing so would involve only compiling new information from existing records. So requestors must be prepared to receive an "information dump," designed to require considerable effort to separate wheat from chaff.

In formulating a request under a public records act, it's useful to check the definition of "public record" that generally will be contained in the statute, and likely will be quite broad. One typical example of the definition of "record": "any document, device, or item, regardless of physical form or characteristic." Under such a broad definition, videotapes, audiotapes, work-related e-mails on the employer's servers, computer disks, microfilms, etc. would be encompassed.

Under public records laws, some personnel documentation may be public records (subject to redaction to accommodate privacy concerns.) Often, home addresses are within the definition of disclosable public records.

Timeframes for Processing

The timing of responses to information requests and the completeness of responses are frequent areas of dispute. As a general—though admittedly not very helpful—rule, under bargaining statutes and many public records laws, information must be furnished within a reasonable amount of time. What constitutes "reasonable," though, will vary under the circumstances. The NLRB articulates a "totality of the circumstances" rule, meaning that it looks at factors such as the following:

- The complexity of the information sought;
- The difficulty the employer would have in compiling the information;
- The communication to the union as to anticipated time frames and reasons for any delay;
- Whether the time period for response created an adverse impact on the union; and, of course,
- The amount of time elapsed.

So in one case, a delay of two weeks was found to be an unfair labor practice where only a one-page document was requested. But in another case a delay of over 10 months was ruled not to violate the NLRA where the union didn't prove that the employer could have responded faster, and where the union was not prejudiced by the amount of time that elapsed.

An employer may require the requesting union to share in duplication costs if they are "substantial." As an alternative to bearing this financial burden, the union should consider requesting to examine records, rather than being furnished copies, or making arrangements to copy the documents at its own cost (using a portable copier or simply taking photographs, for example.) Note that cost sharing for the searching of records is not, as a general rule, required.

Here are some suggestions as to framing of initial information requests to head off problems that recalcitrant employers may try to create:

Neither bargaining statutes nor public records laws generally require that information requests must be submitted in writing. Nothing is to be gained, however, in inviting disputes over what was requested and when. So good practice dictates that oral requests either should not be made, or should be followed by a written confirmation of what is being sought.

To avoid having problems with information that quickly becomes incomplete or obsolete, it's advisable to make a request continuing in nature ("Please provide any new information that comes to light after your initial response to this request.")

To head off an argument that since an employer already has responded to an information request it has no obligation to furnish additional documents pursuant to a subsequent request, it's best to make clear that your request isn't considered exhaustive ("The union reserves the right to ask for additional information pertaining to this concern.")

To prevent an employer from failing to produce anything until it has time to compile everything, the initial request should specify that requests are severable ("Please provide information that is available as soon as it is practicable to do so; the union will accept a partial response to this request without prejudice to its position that it is entitled to all documents and information requested.")

Sometimes an employer will take the position that it has no obligation to provide any documents at all since some of the requested information is exempt from disclosure on privacy grounds. To head this off, the information request can state at the outset that the union consents to redaction (when warranted), but that the remainder of the requested information—rather than complete withholding—is requested.

Employer Defenses

Over the years, labor boards and courts have recognized a number of legitimate defenses that an employer can raise to justify a complete or partial refusal to furnish requested information.

One category is the reasonableness of the request itself. As with the "totality of the circumstances" rule on time frames for responding, what constitutes an "unduly burdensome" request is not susceptible to a precise definition. But it is recognized that if, under the circumstances, a request fits within that definition, an employer can decline to comply. Even when this is the case, however, the union can request bargaining over what to produce and in what form. In some instances, it may be simpler for the union to withdraw part of its request, and then to argue that the remainder is not unduly burdensome.

Another category is confidentiality. This may be grounds for nondisclosure, buttressed by existing privacy laws or regulations. But general assertions of confidentiality, even if legitimate, must be weighed against the union's need for the information. And, similar to the scenarios when a claim of burdensomeness is raised, an employer is obligated to bargain on alternative forms of disclosure (for example, redacting names or other identifying information, releasing information as to employees on whose behalf the union furnishes privacy waivers, etc.)

Though the specifics will vary under different state statutes, there may be both statutorily and judicially interpreted exceptions to disclosure. These can include, for example, the following: records protected by attorney - client or physician - patient privilege, or court records under seal; and matters covered by a constitutional right to privacy.

Nondisclosure cannot be justified by citing the availability through alternative means of the information sought. An employer cannot, for example, insist that the union obtain information directly from employees or from a governmental agency, or that the union ask an arbitrator to require the employer to produce information pertaining to a particular case. Similarly, the fact that an employer does not have

information in its possession does not get it out from under an obligation to furnish that information. If the employer can, for example, obtain the information from third parties with whom the employer has a business relationship, it generally has a legal obligation to do so.

As previously discussed, information requests must arise from a union's representation responsibilities. Sometimes an employer will argue that information sought does not relate to a matter at issue in a particular arbitration case, or in bargaining. Or an employer may assert that there is no obligation to produce information on the grounds that it will not raise a certain defense or not make certain factual contentions in a case. Such arguments should not carry the day, however; so long as the union's request meets the test of being "necessary and relevant" for the union to carry out its duties, the employer's legal obligation remains.

Note that as a practical matter, even if an employer has valid grounds for refusing to furnish requested information in whole or in part, the requester must nevertheless be given an explanation of the basis for the denial. Simply declining to respond to an information request will not pass legal muster.

Finally, it is well established that an employer is not obligated to provide requested information in the form most convenient to the union.

Enforcement

Requests made pursuant to an applicable collective bargaining law are enforceable through unfair labor practice proceedings before the NLRB or the equivalent public sector labor board. Refusals to furnish information requests that are grounded in specific collective bargaining agreement language may be challenged through the contract's grievance / arbitration procedure. Similarly, information needed for an upcoming arbitration may be requested by means of a subpoena issued by the arbitrator (or by the American Arbitration Association or other organization under whose auspices the arbitrator was selected.)

Requests for information that are made under a state open records law are enforceable through whatever means are provided in that state law. There may or may not be a required administrative appeal before seeking recourse in state courts. Unlike unfair labor practice cases, where the relief granted will consist of an order for the requested records to be produced, in proceedings under state public records laws, there may be direct financial liability for noncompliance, as well as the awarding of attorney's fees and court costs.

Tactical Considerations

A multitude of tactical calculations can come into play in deciding how to pursue requests for information.

Quite often, there are various tools available to obtain information that is germane to carrying out the union's organizing or representation functions. In deciding which path to take, the initial question to be asked, of course, is whether one source of authority for your request more specifically grants you the entitlement to secure the information you seek. But in addition, other considerations may come into play in choosing among multiple options to compel disclosure: might one type of request yield results more quickly than another, or at a lower cost? will one type generate more publicity that might have a useful collateral impact on your campaign? will one type tip your hand (if that's what you would find helpful in a given instance) or enable you to preserve anonymity (if that's tactically preferable)?

Requests should be framed carefully and artfully. A combination of specificity and generality in formulating the request is most likely to force production of all you seek. So if you know precisely what records the employer has that would be of use to you ("all records of discipline for tardiness") by all means your request should be formulated to reference precisely that. But adding a phrase such as "and of any other infraction similar in nature" will cover other documents that might also have bearing on the matter you're investigating.

Information requests can be used to lock in employer positions. If documents are obtained before an arbitration hearing, for example, that set forth the justification that the employer has for undertaking a specific action, it will be difficult for the employer to switch positions at the hearing.

Perhaps a bit counterintuitively, keep in mind that requests can be made not for information that the employer has, but simply to establish what information the employer does not have. Suppose that the union is trying to build a case using a disparate treatment argument in a discipline case. A request can be made for records of any action taken by the employer with respect to any other similarly situated employees for the purpose of proving that, in fact, no other employee was subjected to the same treatment as the one the union is representing.

In addition to seeking documents for the purpose of using the information in them, another tactical use of information requests is simply to obtain leverage. It may be that the employer wants to avoid the public embarrassment of certain information coming to light (such as instances of harassment or health and safety problems) which will make that request a means of pressuring the employer to resolve the issue at hand. Or if a request would be particularly burdensome—taking up a lot of time to search for records, for example—that can be used as a bargaining chip (putting the union in a position to say, "If you drop your plan to do X, we'll then have no need to pursue our information request.")

If the union is bargaining in a jurisdiction where the employer can unilaterally impose terms and conditions once an impasse in negotiations is reached, information requests can be a valuable impasse avoidance technique. This is because under most bargaining statutes, if there's a pending information request, then legally no impasse can exist. (And keep in mind that there are no time frames for when in the course of negotiations information requests have to be submitted.)

A caution is in order, though, about the tactical use of information requests, since some of these tactics run on a two way street. Employers generally can make requests for information to the union. So in aggressively pursuing information requests, the union must be aware of the risk that the other side will respond by attempting to impose equivalent production burdens on the union.

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