



## *Labor and Employment Law Update*

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TEL: 661.636.4830  
FAX: 661.636.4843  
E-mail: [sls@kern.org](mailto:sls@kern.org)  
[www.schoolslegalservice.org](http://www.schoolslegalservice.org)

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### DEALING WITH EMPLOYEE INQUIRIES

Over the past few weeks there have been a significant number of inquiries regarding the ability of Districts to adjust the responsibilities of bargaining unit employees and concurrently their salaries. The requests center around either “enhancing” an employee’s job description, together with an increase in pay in order to have them assume the responsibilities of employees who have been laid off in order to conform to economic reality, creation of a new job description to “bridge” certain missing areas or simply granting an increase deemed to be an administrative necessity to certain individuals.

Regardless of the outcome, failure to bargain with the union over any of these matters, or, in fact, any matters whose final determination is reached without the concurrence of the exclusive representative, will fall under one of two Unfair Labor Practices. The District may be guilty of either a unilateral change in the terms and conditions of employment, or, conversely, of negotiating directly with an employee and bypassing the exclusive representative.

In general, the Public Employer (District) must offer to negotiate any changes that are within the scope of representation (mandatory subjects of bargaining) with the exclusive representative PRIOR to implementation. This preclusion holds true whether the collective bargaining agreement (CBA) has expired or not! The mandatory subjects of bargaining in an expired contract continue in effect until a new agreement is reached. The expiration of the CBA only affects those items which are permissive subjects of bargaining and are not statutory. (Dues withholding is not a mandatory subject of bargaining, but is a statutory obligation... absent the statutory language, a district could, upon expiration of a CBA, refuse to deduct dues and remit them to the union) In order to implement a change without the exclusive representative’s concurrence, the union would have to waive its right to bargain. PERB defines a waiver as a clear indication by the union that it does not desire to negotiate a matter. The foregoing can be accomplished (depending on the circumstances) by offering the union an opportunity to bargain

with a fixed amount of time for a response; failing to respond would constitute a waiver of the right to bargain. This type of waiver would not be used in contract negotiations, but perhaps regarding a small change in a stipend, a handbook or like situation.

This particular topic has been dealt with over many years, from the inception of the National Labor Relations Act through and to labor relations legislation being crafted today. From the standpoint of the regulating authorities, regardless of the labor law in question, this ability of the exclusive representative to be the only conduit between employees and employers is inviolate. Any discussion with individual employees regarding outcomes in the future that do not deal with implementation of agreed-upon terms and conditions of employment may quickly evolve into one or another of the problems that are the subject of this update. At times the discussion could seem innocuous or even informative and “feel” like the right thing to do. For instance, insecure financial situations, such as the one we now find ourselves, could lead to general meetings where statements such as “if things get any worse, we’ll have to implement furlough days as a means of maintaining fiscal solvency” can result in a finding of “negotiating directly with employees,” since the union could easily maintain solvency through agreement to pay a portion of their benefits, elect benefit cuts, freeze step and column, or similar concessions.

Although the opportunity for discussion with employees outside the bargaining context appears to be arising more frequently, the best solution is to present items such as fiscal situations, as a matter of fact without speculation as to how they will be dealt with in the future. When presented with questions regarding predictions of the future, any options discussed should be couched in terms of the result of bargaining with the exclusive representative. Discussions with individual employees regarding any change in their status without bargaining with the exclusive representative are expressly prohibited. (Gov. Code 3543{a}).

If there are any questions regarding the foregoing, please do not hesitate to call our office.

Daryl V. Valdez  
Bargaining Specialist

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