Collective Bargaining: *Implementing a Four-Day Workweek*

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Collective Bargaining

Union employers face additional and more substantial obstacles. The starting point is the collective bargaining agreement ("CBA") between company and union. Generally speaking, CBA's have so-called management rights clauses which, in general terms, reserve for the company the right to take any action which is not otherwise covered by the CBA. So if a CBA is truly silent about scheduling, the company can perhaps unilaterally impose a four-day week on its union workforce, depending on the specific language of the CBA.

However, it would be unusual for a CBA to not have explicit or implicit provisions governing scheduling, e.g., the definition of a work week, typical hours of work, and so forth. In that situation, the question becomes whether the company can unilaterally change the terms and conditions of employment, or whether it must negotiate the change. The starting point for the analysis is whether scheduling, which involves hours of work, would be a mandatory subject of bargaining or a permissible subject of bargaining. If mandatory, it is subject to collective bargaining, which is the process of negotiating a lawfully binding agreement between the union and the employer. This collective bargaining agreement governs the wages, hours and other terms and conditions of employment and is enforceable typically through the grievance and arbitration procedure.

Mandatory issues of bargaining are those subjects that directly impact "wages, hours or working conditions." These subjects have also been referred to as those that "vitally affect" employees. This means that any subject that either party proposes to bargain over that impacts any of these three areas, has to be negotiated in good faith. These are subjects over which the parties must bargain if they are requested to do so by the other party. This does not mean however, that the parties have to reach agreement, but rather that they have to engage in the process. Mandatory subjects of bargaining include: wages, shift premiums, overtime, premium pay, longevity, pay for training, holidays, sick days, hours of work, work schedules, grievance procedure, workloads, vacancies, promotions, transfers, layoff and recall, discipline and discharge, dues check off, on call pay, severance pay, pensions, health insurance, leaves of absence, tuition reimbursement, job duties, seniority, probationary period, testing of employees, rest and lunch periods, bargaining unit work, subcontracting, no strike clause, nondiscrimination.

Alternative work weeks will almost certainly be considered a mandatory subject of bargaining. As such, if the company raises the issue of a four-day work week in negotiations for a first or a new CBA, the union and the company have to negotiate in good faith over that issue. This duty encompasses many obligations, including a duty not to make certain changes without bargaining. Section 8(d) of the National Labor Relations Act sets forth what is encompassed within the duty to bargain collectively. Section 8(a)(5) of the Act makes it an unfair labor

practice for an employer "to refuse to bargain collectively with the representatives of its employees, subject to the provisions of Section 9(a)" of the Act. The National Labor Relations Board says companies may not, for example:

- Make changes in wages, hours, working conditions, or other mandatory subjects of bargaining before negotiating with the union to agreement or overall impasse, unless (1) the union prevents the parties from reaching agreement or impasse; (2) economic exigencies compel prompt action; or (3) the proposed change concerns a discrete, recurring event scheduled to recur in the midst of bargaining (such as an annual merit-wage review), and you give the union notice and opportunity to bargain over that matter.
- Fail to meet with the union at reasonable times and reasonable intervals.
- Fail to bargain in good faith concerning mandatory subjects of bargaining.
- Engage in bad-faith, surface, or piecemeal bargaining.
- Refuse to furnish information the union requests that is relevant to the bargaining process or to the employees' terms or conditions of employment.
- Refuse to sign a writing that incorporates a collective-bargaining agreement the company has reached with the union.
- Modify any term of a collective-bargaining agreement without the union's consent.

- Make unilateral changes in terms and conditions of employment during the term of a collective-bargaining agreement, unless the union has clearly and unmistakably waived its right to bargain or the change is too minor to require bargaining. (Do not assume that a change you deem minor would be so viewed by the Board.)

If, however, a CBA already exists and is not expired, the company cannot demand that the union modify the CBA. A union need not agree to bargain over midterm modifications to a CBA absent a contractual obligation to do so (such as a "reopener" clause which requires parties to reopen negotiations on certain points if asked to do so). A company may have to offer the unin steep concessions to come to the bargaining table on an alternative work week, so it is advisable to raise the issue when bargaining begins for a replacement to the existing contract.