



# Collective Bargaining for the Federal Contractor

Sarah Nash, Partner  
Labor & Employment Group  
Pilieromazza PLLC

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# Sarah Nash



Sarah L. Nash  
Partner  
Pilieromazza PLLC  
Labor & Employment  
202.857.1000  
snash@pilieromazza.com

Sarah serves as Chair of PilieroMazza's Labor & Employment Group, one of the few legal practices in the U.S. with a multi-jurisdictional labor and employment practice dedicated to advising government contractors on their compliance obligations. She advises government contractors and commercial businesses on a wide variety of labor and employment issues.

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# Learning Objectives

- Review basic NLRA concepts
- Understanding the unique labor law requirements that apply to federal contractors
- Familiarize yourself with the Service Contract Act timelines that apply when negotiating collective bargaining agreements (CBAS)
- Knowing how to bid a contract that includes a unionized workforce
- Identify Impact and Potential Liabilities

# What is the NLRA?

- Federal statute passed by Congress in 1935 to address the “inequality of bargaining power between employees . . . and employers”
- Covers virtually all private sector employers (other than rail and air carriers)
- Ensures employees can engage in “concerted activity,” mainly through representation by unions
- Regulates the processes by which employers and unions negotiate a collective bargaining agreement (“CBA”)
- Enforced by the National Labor Relations Board (“NLRB”)

# Section 7 of the NLRA

- Applies to almost all workforces -- whether represented by a union or not
- Employee activities **protected** by the NLRA include:
  - Organizing, forming, joining or assisting labor organizations
  - Collectively bargaining for changes in wages and working conditions
  - Engaging in protected concerted activities (e.g., **picketing, striking, hand-billing, bannering, and talking to each other about terms and conditions of employment**)
  - Refraining from any of these activities

# Section 8 of the NLRA

- An employer cannot **interfere with, restrain or coerce** employees in the exercise of their “Section 7 rights”
- An employer cannot **dominate or interfere** with the formation or administration of any labor organization or contribute financial or other support
- An employer cannot **discharge or otherwise discriminate** against an employee engaging in activities protected under the NLRA, including:
  - Filing charges with the NLRB
  - Giving affidavits to NLRB investigators
  - Testifying at NLRB hearings

# Section 8 of the NLRA Cont.

- An employer cannot discriminate in hiring, tenure, or any other term or condition of employment for the purpose of encouraging or discouraging union membership
- Requirement to bargain in good faith
- Labor Management Relations Act made bargaining for **“Closed Shops”** a ULP
  - **“Union Shops”** and **“Agency Shops”** still allowed
  - Authorizes states to pass **“Right-to-Work”** laws to prohibit **“Union Shops”** and **“Agency Shops”**



# What Does this Mean for You?

- Do not ask about union involvement or activity or views
- Do not issue policies that interfere with Section 7 rights (confidentiality, social media, photography, etc.)
- Employees may talk about their terms and conditions of employment with fellow employees and third parties
- Cannot generally prohibit union logos (exceptions for health, safety, or legitimate business purpose)
- Work time activities
- Tide changes by administration

# Consequences

- Employee or their bargaining representative may file an Unfair Labor Practice (ULP)
- The NLRB investigator has the right to investigate the Charge
- May try to settle it
- In case of violation a company may be required to post a notice, hire or re-hire, compensate, remove discipline, revoke policy, etc.

# Applying NLRA to Service Contracts

- **The Davis Bacon Act** – Contractors performing on federal contracts for construction, alteration or repair must pay employees no less than the locally prevailing wages and fringe benefits.
- **The Service Contract Act** : Contractors performing on service contracts must pay employees no less than locally prevailing wage rates and fringe benefits, OR the rates in a predecessor contractor's CBA.
- Purpose of these laws is to remove wages as a bidding factor in the competition for Federal service and construction contracts.

# SCA Wage Determinations

- **Prevailing Wage WDs:** Issued by DOL for specific geographic localities by occupational groups.
- **WDs based on CBAs:** Successor contractors must pay wages and fringe benefits at least equal to those contained in a CBA entered into under the predecessor's covered SCA contract.
  - The WD applicable to the successor contract period will reflect the CBA between the predecessor contractor and the collective bargaining representative of the employees.
  - Each year is a successor unto itself.

# Bidding a CBA Wage Determination

- You bid on a contract that includes a CBA wage determination. What wages and benefits must you consider when pricing your bid?
  - Wages, shift differentials
  - Health and welfare
  - Funeral leave, jury leave, military leave
  - Retirement, Pension plans
  - Vacation pay, Holiday pay, Sick leave, etc. (consider FAR 48 CFR 52.222-62)
- Remember: No need to provide specific fringe benefits, just the equivalent value.
- New contracts: Monetary provisions control for first year

# Knowledge Check

- You know based on your research that there is a union workforce on site. But when the RFP drops there is not a CBA, only the regular WD. What should you do?  
  
(A) Ask the question  
(B) File a pre-award protest  
(C) All of the above, if necessary

# Knowledge Check

You receive a solicitation with a CBA attached. You bid the contract based on the wages in the CBA. You are awarded the contract! Once you begin work, the union contacts you and advises you that you need to pay into the pension fund. You tell the union that there was no rate for the pension in the CBA and therefore you are not paying it. The Union claims that the pension was referenced in the CBA. You look back and there is reference to another document that was not included in the solicitation that may have the rates. You offer to negotiate it next year.

- Are you correct?

(A) Yes

(B) No

- If you submit a claim to the CO, what are your chances that you will receive a price adjustment?

(A) Yes, the government left the attachment off

(B) No way

# Onboarding and Transition Considerations

- **Successor Obligations to Bargain with Employees' Union:** An employer is considered a “successor” if: (1) there is substantial continuity in the predecessor’s and successor’s business operations, and (2) the predecessor’s employees constitute a majority of the new employer’s work force in a separate and appropriate bargaining unit.
- **Avoid Being A Perfectly Clear Successor:** A “new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment,” or when the employer “has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment.”
  - In these circumstances, contractor will be bound to the predecessor’s CBA.
- **Generally, No** obligation to recognize seniority rights, job security, grievance procedures, work rules, etc.



# What Does that Mean?

- Avoid promises that the Company will abide by the terms of the prior CBA
- Avoid any statement that infers that you will not negotiate with the Union or that you are not a “union” shop
- Understand when you can push back on the Union’s assertions that you “must” sign on to the prior CBA
- Provide offer letters just as you would for any other workforce and tell the Union that you will work with them once the obligation to bargain has been established
- Respond to the union and schedule negotiations if you hired the majority of bargaining unit members (remember don’t discriminate!)
- Carefully consider whether to sign an MOU signing on to a predecessor CBA
- You do not have to hire everyone as long as you do not discriminate

# Subcontractor Considerations

- Provisions in CBA limiting subcontracting
- Impact of CBA on Subcontractor
- How will you divide the work?
- Negotiating separately
- Flow down and price adjustment
- Experience with CBAs?

# Knowledge Check

- ABC Co. is awarded a contract. A CBA was included as a WD. There are 7 employees in the former unit. You hire 4 of them and 2 applicants from the general pool of applicants. You tell everyone in their interviews that while you will abide by the terms of the CBA, you are a non-union employer.

Which have you violated?

- A. The NLRA
- B. The SCA

Will you be deemed a perfectly clear successor?

- A. Yes
- B. No

# Important Practices for Negotiating a CBA

- Employers required to meet at reasonable times to confer in good faith with employees' designated bargaining representative on mandatory subjects of bargaining
- Duty to bargain includes duty to:
  - Deal with **whomever** is designated by the employees to conduct negotiations
  - On request, **supply information** relevant to wages, hours, and other conditions of employment
  - Refrain from **unilateral changes** in terms and conditions of employment without consulting with the employees' representative

# Important Practices for Negotiating a CBA, cont'd

- Timeliness (signed, ratified, delivered)
  - Not effective if received after award and performance starts within 30 days
  - If performance starts more than 30 days after award, CBA effective if received 10 days prior to start of performance
  - Time limitations only apply if the CO has given both the contractor and the Union written notification at least 30 days in advance of all applicable estimated procurement dates
  - Must get notice of intent to exercise option from CO
- Arms-Length
  - Precludes arrangements by parties to a CBA who, either separately or together, act with an intent to take advantage of the wage determination scheme.

# Important Practices for Negotiating a CBA, cont'd

- Substantial Variance
  - Does not apply if the Secretary finds that wages and fringe benefits under the predecessor contract are substantially at variance with wages and fringe benefits prevailing in the same locality for services of a similar character
- Effective Dates
  - CBAs must be effective prior to expiration of the predecessor contract
  - But, for price adjustment purposes wage rates should not become effective until option year
- Contingency Clauses
  - Wage and fringe benefit provisions based on contingencies, such as agency acceptance of the CBA's terms, will be rejected by the DOL

# Consequences

- CBA is self-executing as the WD once the rules are followed
- Failure to satisfy these SCA requirements may result in the government's rejection of the CBA and refusal to provide contractors with a price adjustment
- However, does not cancel a contractor's obligation to comply with the CBA terms
- The contract with the union is distinguishable from the contract with the government

# Knowledge Check

You have been negotiating a CBA with a union on site for almost a year. Option Year 1 begins September 1. You finalize the CBA on August 28. You have not received a modification or other documentation officially exercising the option so you do not turn in the CBA. You begin performance on September 1 and the same day receive a modification. You then turn in the CBA. The CO rejects it as untimely and says that the SCA rate will apply for the next year.

- Does the CO have a basis to reject the CBA?



# Negotiating A Contract: The Obligation to Bargain

- Employees hold a Board-Certified election and vote to certify the union as their bargaining representative
- Employer voluntarily recognizes the union
- Collective bargaining agreement expires (exception for certain construction contracts subject to pre-hire agreements)
- Company performs as a successor in interest

# Negotiating a Contract: Topics Employers Must Bargain

- Mandatory Subjects of Bargaining: Directly impact terms and conditions of employment
- Examples:

Wages	Health Insurance
Working Conditions	Rest and Meal Breaks
Holidays	Dues Check Off
Sick Days/ Vacation	Non-Discrimination
Pension/Retirement	Etc.

# Negotiating a Contract: Topics Employers May Bargain

- Permissive Subjects of Bargaining: Not directly related to terms and conditions of employment but parties can mutually agree to bargain over. You can refuse to bargain over these subjects.

Examples: Terms of negotiations, adding supervisors to a bargaining unit, settling ULPs

- Distinguished from illegal subjects of bargaining such as closed-shop provisions, hiring-hall provisions granting preference for union members, and provisions inconsistent with a union's duty of fair representation

# Negotiating a Contract: Typical CBA Provisions

- Union Recognition
- Union Security and Membership (review state law)
- Discipline and Grievance/ Arbitration (timelines and power of arbitrator)
- Employee Benefits (wages, health and welfare, sick leave, retirement)
  - Sick leave: must be compliant with FAR 52.222-62
  - Pension: review withdrawal liability risk and mitigation
  - Vacation: Accrual or vesting/payout
- Union Access to Site
- No Strike/ No Lockout
- Management Rights
- Zipper Clause
- Government Requirements, Withdrawal Liability

# Getting to Impasse

- Obligated to bargain in good faith until either reach a stand-off or “impasse”
- When impasse is reached, the duty to bargain is suspended
- Unlawful to reach impasse on permissive (or illegal) subject of bargaining
- When impasse is reached, company is permitted to make changes in working conditions, as long as the changes are consistent with the last offer presented
- The challenge of impasse for government contractor

# When Does the Client Get Involved

- Threats of strike
- Requirement for a strike plan
- Government client neutrality
- Role of the labor advisor

# Negotiating Tips

- Talk with the union about the rules of the road before negotiating
- Handle non-economics first
- Walk away with purpose
- Make sure the timing lines up (effective date before turn CBA in with current rates and rate increases that align with the option years)
- Listen and be creative
- Understand what costs are recoverable without breaching arms-length obligation
- Be responsive

# Add'l Considerations During Bargaining

- The Information Request
- Take good notes (in fact make someone the secretary)
- Bargaining representatives must have adequate authority to negotiate
- Be careful what you say (opening the door)
- It is unlawful to:
  - Implement unilateral changes
  - Bargain directly with employees
  - Withdraw from an agreed upon provision (use of TAs and reservation of rights)
  - Modify the terms of a CBA without union's prior consent
  - Engage in regressive bargaining
  - Discriminate or retaliate



# Requesting a Price Adjustment

- It is the contractor's responsibility to request a price adjustment!
- Submit your request within **30 days** of a new wage determination being incorporated into the contract
  - Remember that CBAs are incorporated upon effective date
- Submit calculations and documents to support amounts requested in adjustment
  - All payroll data showing the previous amounts paid to employees and the amounts paid as of the date the new WD applied to the contract.
  - Documentation of contract work hours
  - Documents supporting accompanying costs (i.e. payroll taxes and workers comp)
  - Fringe benefit cost support
- The more detail you provide, the easier (and faster) it will be for the agency to approve your request).

# What is not paid?

- Overtime
- Double time or half time on holidays
- Training fees or other misc. fees
- Grievance or arbitration costs
- Review FAR 52.222-43

# Notes During Performance

- Employees are not at-will
- Be consistent and provide progressive discipline that adheres to a just cause standard or the CBA
- Weingarten Rights (investigatory interview that may lead to discipline: employee may ask for representation)
- Union right to access worksite

# Questions?



Sarah Nash  
Partner  
PilieroMazza PLLC  
Labor & Employment  
202.857.1000  
snash@pilieromazza.com

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