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**THE BASICS OF AND RECENT  
DEVELOPMENTS IN PRIVATE SECTOR  
BARGAINING LAW**

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# THE BASICS OF AND RECENT DEVELOPMENTS IN PRIVATE SECTOR BARGAINING LAW

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## I. THE BARGAINING OBLIGATION

### A. THE STATUTORY LANGUAGE

1. Pursuant to Section 8(a)(5) of the Act, it is an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees . . . .” 29 U.S.C. § 158(a)(5).

Section 8(d) of the Act defines the obligation to bargain collectively as “the performance of the mutual obligation of the employer and the representative of the employees *to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That* where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract . . . .” (Emphasis added).

### B. THE DUTY TO MEET AND CONFER

1. The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times. *Calex Corp.*, 322 NLRB 977, 978 (1997), *enforced*, 144 F.3d 904 (6<sup>th</sup> Cir. 1998) (examining respondent’s “overall conduct”). Its inquiry is not limited to an examination of the number of bargaining sessions held. Thus, where the employer had met approximately every three weeks totaling 20 times in 11 months, it nonetheless bargained in bad faith by refusing the union’s repeated requests for more frequent sessions without explaining its reason(s). *Garden Ridge Mgmt. Inc.*, 347 NLRB 131 (2006).

### C. THE PARTIES MUST NEGOTIATE IN GOOD FAITH

1. Good-faith bargaining “presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract.” *NLRB v.*

*Insurance Agents' Union*, 361 U.S. 477, 485 (1960).

2. Both the employer and the union have a duty to negotiate with a “sincere purpose to find a basis of agreement.” However, a party cannot be forced to make a concession on any specific issue or to adopt any particular position. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).
3. An insistence on bargaining over non-mandatory subjects is unlawful, as it effectively is a refusal to bargain over mandatory subjects. Thus, an employer’s insistence on the union’s agreeing to bargaining ground rules that were non-mandatory as a pre-condition for bargaining was unlawful. *Mercy, Inc.*, 346 NLRB 1004 (2006).

#### D. SUBJECTS OF BARGAINING

1. The bargaining obligation exists with respect to “wages, hours, and other terms and conditions of employment,” which are the so-called “mandatory subjects” of bargaining.
2. Mandatory subjects are those that “vitally affect” the terms and conditions of bargaining unit employees. *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Put another way, if the subject of bargaining “regulates the relation” between the employer and employee, that matter is a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

#### E. IMPASSE

1. During bargaining for a first-ever or successor contract, an employer must refrain from implementing changes to mandatory subjects, absent overall impasse on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373 (1991).
2. An impasse exists when the collective-bargaining process has been exhausted, *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), and “despite the parties’ best efforts to reach an agreement neither party is willing to move from its position.” *Excavation-Construction*, 248 NLRB 649, 650 (1980).
3. The Board has defined bargaining impasse as the “situation where good-faith negotiations have exhausted the prospects of concluding an agreement.” *Royal Motor Sales*, 329 NLRB 760, 761 (1999), *enforced sub nom. Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir. 2001). It is the point in time of negotiations when the parties are warranted in assuming that further bargaining would be

futile. The Board has often said: “Both parties must believe that they are at the end of their rope.” *AMF Bowling Co.*, 314 NLRB 969, 978 (1994), *enf. denied* 63 F.3d 1293 (4<sup>th</sup> Cir. 1995).

4. The relevant factors to be considered in determining whether a bargaining impasse exists were set forth by the Board in *Taft Broadcasting Co.*, 163 NLRB 475, 476 (1967):

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all factors to be considered in deciding whether an impasse existed.

5. Where a union has made significant concessions, the employer cannot declare impasse “simply because the union’s concessions were not more comprehensive or sufficiently generous.” *Larsdale, Inc.*, 310 NLRB 1317, 1319 (1993). “[F]utility rather than mere frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse.” *Grinnell Fire Protection Systems v. NLRB*, 236 F.3d 187, 199 (4<sup>th</sup> Cir. 2000), *enforcing* 328 NLRB 585 (1999). And where there is a distinct possibility of further movement on important issues, there is no impasse, even if there is still a “wide gap” between the parties’ negotiating positions. *Newcor Bay City*, 345 NLRB 1229 (2005).
6. Under these standards, an employer’s claim of impasse has been found invalid where, for example, the evidence showed that the employer was determined to implement unilateral reductions immediately upon the expiration of the agreement regardless of the state of negotiations. *CBC Industries*, 311 NLRB 123 (1993).
7. The burden of establishing the existence of an impasse is on the party asserting it as the basis for its unilateral actions. *Tom Ryan Distributors*, 314 NLRB 600, 604 (1994); *Airo Die Casting, Inc.*, 354 NLRB No. 8 (2009) (party asserting impasse bears burden), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed)<sup>1</sup>.

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<sup>1</sup> Between January 2008 and March 2010, the National Labor Relations Board operated with two of its five seats filled, issuing decisions in cases only where the two members agreed on the result. As discussed in the Supreme Court update, in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), the Supreme Court ruled that the two-member Board lacked authority to issue these decisions. Most of the cases decided by the two-member panel have either been closed under the Board’s processes or are in some stage of compliance

8. As a general rule, where parties are engaged in negotiations for a collective-bargaining agreement, the employer must maintain the status quo of all mandatory bargaining subjects absent overall impasse. However, there is an exception to this general rule: if a term or condition of employment concerns a discrete recurring event, such as an annually scheduled wage review, and that event is scheduled to occur during negotiations for an initial contract, the employer may lawfully implement a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice. *TXU Electric Co.*, 343 NLRB 1404 (2004).

Thus, an employer lawfully withheld a scheduled COLA increase after notifying the union it would pay a 2.2% increase if the union agreed to close negotiations on the COLA issue for that year. *The Neighborhood House Ass'n*, 347 NLRB 553 (2006).

9. A finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties. *Caldwell Manufacturing Co.*, 346 NLRB 1159 (2006); *Monmouth Care Center*, 354 NLRB No. 2 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 356 NLRB No. 29 (2010). However, an unfilled information request with no relation to core issues in the negotiations does not preclude a genuine impasse. *Sierra Ballets, LLC*, 340 NLRB 242, 243-244 (2003).

A request for information that is purely tactical and designed to delay implementation of the employer's proposals does not preclude the parties reaching a genuine impasse. *ACF Industries*, 347 NLRB 1040 (2006).

An employer's unlawful refusal to provide the union with requested financial statements after claiming an inability to pay prevented creation of a valid impasse in contract negotiations, where the requested financial statement was related to core economic policies separating parties. *Stella D'Oro Biscuit Co.*, 355 NLRB No. 158 (2010).

10. When a union engaged in tactics designed to delay bargaining or when economic exigencies compel prompt action, an employer may be entitled to implement such unilateral changes. However, even when "economic exigencies compelling prompt action" justify

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proceedings. The Board is currently reconsidering all cases in which compliance with the original order has not been achieved. The closed and in process cases are indicated as such with parentheticals following the *New Process Steel* citation. The reconsidered cases, with their citation, are also indicated.

unilateral changes, the employer must provide the union adequate notice and an opportunity to bargain. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995).

11. Although impasse over a single issue does not always create an overall bargaining impasse that privileges unilateral action, it may do so when the single issue is “of such overriding importance” to the parties that the impasse on that issue frustrates the progress of further negotiations. *Calmat Co.*, 331 NLRB 1084, 1097 (2000).

Thus, where -- due to a most-favored nations clause in its multi-employer contract -- the union would not agree to wages lower than it had with other contractors, and the employer was unwilling to agree to the wage negotiated by the multi-employer association, a genuine impasse existed, notwithstanding that the parties were not deadlocked on other issues. *Richmond Electrical Services*, 348 NLRB 1001 (2006). However, the Board reached a different result in *Wayneview Care Center (Victoria House)*, 352 NLRB 1089 (2008), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 356 NLRB No. 30 (2010), finding no impasse where a union retreated from its initial position that a most-favored nations clause prohibited it from agreeing to lower health care benefits.

12. An impasse determination is a factual determination that relies on a variety of factors. Thus, a genuine impasse was not reached where: (1) the parties had exchanged letters at the last bargaining session before the employer implemented its final offer demonstrating that both parties anticipated continued negotiations; (2) the union made various concessions throughout bargaining process and there was no indication it would be unwilling to make further concessions; (3) the employer refused to provide or delayed in providing union with requested information related to mandatory bargaining subjects such as health insurance and its use of workers from temporary staffing agencies; and (4) the employer's final offer introduced new proposals. *Castle Hill Health Center*, 355 NLRB No. 196 (2010).

## F. SURFACE BARGAINING

1. In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), *enforced*, 318 F.3d 1173 (10<sup>th</sup> Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), *enforced*, 938 F.2d 815 (7<sup>th</sup> Cir. 1991); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Under this standard, the Board must decide whether a party is engaging in hard,

but lawful, bargaining to achieve an agreement that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *Id.* In making this determination, the Board examines not only the conduct of the employer but also the conduct of the union. *Aztec Bus Lines*, 289 NLRB 1021, 1042 (1988).

Allegations of failing to meet and surface bargaining are separate unfair labor practices. The failure to meet in itself “does not establish the separate allegation of surface bargaining” or “establish an intention not to reach an agreement.” *Garden Ridge Management, Inc.*, 349 NLRB 1108 (2007).

2. Although no particular concession is required, the employer is, nonetheless, “obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all.” *Atlanta Hilton*, 271 NLRB at 1603 (emphasis in original). Therefore, “mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.” *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001).
3. In a divided opinion, the Board found that the employer’s conduct at the bargaining table did not constitute unlawful surface bargaining and that its misconduct away from the table was insufficient to establish bad faith or taint the negotiations. Following the employer’s receipt of an ALJ decision in another pending unfair labor practice case concerning its failure to bargain over the transfer of unit work, the employer made a proposal that would permit it to transfer unit work to non-union employees upon the departure of unit employees. The Board found this did not indicate bad faith because the employer was seeking to fulfill its bargaining obligation.

The Board also found that oral statements by the employer during a mediation session and another meeting were, in part, made in connection with efforts to settle pending unfair labor practice charges (in addition to negotiating a labor contract), and therefore were inadmissible under the rules of evidence. The employer had offered to convert 23 agency employees to regular employees (contingent on an election) stated that a starting wage of \$8 per hour was “too rich,” and commented that the union’s filing of new unfair labor practice charges would add two years to the proceedings. The Board added that even if such statements were admissible, they did not establish bad faith.



The Board majority also found that the employer's misconduct away from the table was insufficient to show overall bad faith or taint its conduct at the table. Thus, the actions of various high and mid-level managers in assisting with a decertification petition was not evidence of overall bad-faith bargaining because these actions did not show an intent to frustrate reaching an agreement. In addition, the employer's implementation of a new health insurance plan during negotiations was not material and substantial.

Member Walsh dissented, finding that the totality of the employer's conduct demonstrated its intent to frustrate the reaching of an agreement with the union. Member Walsh found the evidence of bad faith outweighed the factors that suggested a sincere desire to reach agreement, citing the employer's insistence on another union election as a *quid pro quo* for this first-ever contract, and the employer's rescission of its \$8 per hour wage offer immediately after the union agreed to it. *St. George Warehouse, Inc.*, 349 NLRB 870 (2007), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 355 NLRB No. 81 (2010).

4. An employer did not engage in surface bargaining where the union was complicit in the slow progress of negotiations. The ALJ stated that the employer had shown a "less than enthusiastic approach to bargaining". However, according to the ALJ, the union did not take enough steps to keep the process on track. The employer representative had failed to show up for a May 8<sup>th</sup> session. The union, though, did not contact the employer to reschedule until June 8<sup>th</sup>. Neither party showed up for the next session on June 26<sup>th</sup>. The union then waited until August 30<sup>th</sup> to follow up. Here, there was no surface bargaining as both sides appeared to treat negotiations as a low priority. *Benjamin Franklin Plumbing*, 352 NLRB 525 (2008), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (in process).
5. Despite union protests, an employer did not engage in surface bargaining when its proposals and conduct were consistent with the requirements of the Act. *Brinks U.S.A.*, 354 NLRB No. 41 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).

The parties had been bargaining over a first contract. The General Counsel took the position that the employer's actions evidenced intent to avoid an agreement. The ALJ, affirmed by the Board, disagreed.

-----The General Counsel argued that the employer made harsh proposals that sought regressive give backs and bargaining waivers

on subjects including discipline, work rules, protective vests, assignment of working non-unit personnel, and vacation. Further, according to the General Counsel, the employer made a regressive wage proposal without providing proof of its rationale.

The ALJ determined that “adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith.” Moreover, the facts did not support a showing that the employer altered any of its initial proposals so as to make them less favorable to the employees. Regardless, it was found that “even a regressive proposal advanced during the course of negotiations is not unlawful if the circumstances explain it.” Finally, in looking at the totality of the employer’s conduct, the ALJ found no evidence of unilateral changes or attempts to bypass the union.

The union’s own behavior at the negotiating table was also factored into the ALJ’s decision. By their own admission, the union negotiators were inexperienced in bargaining. The union representatives wrongly believed that any unresolved issues would be submitted to mandatory interest arbitration. Consistent with this belief, union negotiators repeatedly taunted the employer’s representatives with the prospect that an arbitrator would give the union certain contract provisions that the company would not agree to in negotiations. The same negotiators would frequently declare impasse on various issues based on this misperception that these issues would be submitted to arbitration. The ALJ also cited the union’s own unwillingness to budge on its wage proposal in finding no bad faith bargaining by the employer.

#### G. EFFECTS BARGAINING

1. An employer has an obligation to provide the union with notice and an opportunity to bargain about the effects of a managerial decision on unit employees, even if it has no obligation to bargain about the decision itself. *Kiro, Inc.*, 317 NLRB 1325, 1327 (1995) (citing *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981)).
2. Effects bargaining can include such topics as layoffs, severance pay, health insurance coverage and conversion rights, preferential hiring at other of the employer’s operations, and reference letters for jobs with other employers.
3. An employer’s refusal to bargain over the effects of its decision to lay off three unit employees was unlawful, even though it had negotiated a contractual layoff provision, where union requested effects bargaining, employer unilaterally altered contractual layoff

provision by reducing advance notice from six weeks to three weeks, and other effects of the layoff—including changes to the workload of remaining unit employees—were not addressed by the contractual layoff provision. *KGTV*, 355 NLRB No. 213 (2010).

## II. VIOLATIONS OF THE BARGAINING OBLIGATION

### A. UNILATERAL CHANGES

1. An employer violates the duty to bargain in good faith when it unilaterally changes the terms and conditions of employment of its employees without discussions with their representative. *NLRB v. Katz*, 369 U.S. 736 (1962). When it is alleged that an employer has unilaterally changed terms and conditions that constitute a past practice, the General Counsel must establish the existence of the past practice. *Exxon Shipping Co.*, 291 NLRB 489, 492-93 (1988). In order to prove the existence of a past practice, the Board has required:

[T]he change complained of must be of an activity which has been “satisfactorily established” by practice or custom; an “established practice”; an “established condition of employment.”

2. The prohibition against making unilateral changes during collective-bargaining negotiations applies only to mandatory subjects of bargaining. A unilateral change with regard to a mandatory subject of bargaining violates Section 8(a)(5) only if the change is a “material, substantial, and significant” one. *Crittendon Hospital*, 342 NLRB 686 (2004). So, where the employer changed the location of employee parking (to deal with congestion, accidents and other safety concerns), the Board found the change insufficient to constitute a mandatory subject, notwithstanding that employees walk time changed from 1 minute to 3-5 minutes (where no greater security concerns were implicated). *Berkshire Nursing Home*, 345 NLRB 220 (2005).
3. Before implementing a unilateral change involving a mandatory bargaining subject, an employer is required to give timely notice to the union and a meaningful opportunity to bargain. Once notice is received, the union must act with “due diligence” to request bargaining. Even where decision has already been made but not yet implemented, an opportunity for bargaining still exists. An employer is not required to bargain before making its decision, but it is required to delay implementation to allow for good-faith collective bargaining once the decision has been made. *KGTV*, *supra*, 355 NLRB No. 213 (2010).

## B. RECENT CASES

1. An employer violated the Act by unilaterally making the following changes in an employee's terms and conditions of employment: implementing a new work rule deeming leave from work an unexcused absence if taken with less than one week's prior notice; changing the work shift and working hours of the unit inventory clerk; implementing a plan to hire temporary employees directly rather than through temporary employment agencies and paying temporary employees at a different rate for performing bargaining unit work; and changing the shift times for the first shift processing department employees during the Memorial Day holiday.

However, the Board found that the employer did not violate the Act by unilaterally reducing the number of non-working holidays. In this case, the employer, Alan Ritchey, Inc., contracted with the United States Postal Service for the inspection and repair of non-motorized mail handling equipment. The contract between the employer and the U.S.P.S. gave the U.S.P.S. the right to change any contract term at its discretion. Pursuant to that provision, the U.S.P.S. modified its contract with the employer to change Memorial Day and Labor Day from non-working to working holidays. As a result, the employer eliminated Memorial Day and Labor Day as non-working holidays without affording the union notice and an opportunity to bargain over either the decision or its effects. The Board found that the respondent breached a duty to bargain with the union over the effects of the holiday reduction. However, as to the decision itself, there was no violation because, according to the Board, the employer's hands were tied by the U.S.P.S.'s contract modification; thus, the employer was not obligated to bargain over the decision to reduce the number of non-working holidays. *Alan Ritchey, Inc.*, 354 NLRB No. 79 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (in process).

2. By transferring unit work to owner-operators without bargaining in good faith with the union, the employer violated § 8(a)(5). The union was certified to bargain on behalf of a unit comprised of full-time and regular part-time drivers. The employer had a practice of using temporary agency drivers on an as-needed basis to handle extra work that its unit drivers could not perform. Without bargaining, the employer started hiring owner-operators as independent contractors and using them interchangeably with bargaining unit members to perform delivery work.

The employer argued that it was simply substituting the owner-operators for the temporary agency drivers it had previously employed for fill-in work. However, the owner-operators were assigned to the same full-time schedules as unit drivers and not simply for overflow work. To make matters worse, immediately prior to hiring the owner-operators, the employer had been working on a plan to actually increase the unit and decrease the use of temporary drivers.

The Board stated that “by hiring the owner-operators and deploying them in this manner, rather than expanding the unit as it had planned, the Respondent created a new, full-time group of drivers competing with bargaining unit drivers for the same work, which obviously constrained the work opportunities available to the bargaining unit.”

The Board rejected the employer’s argument that its subcontracting was a core managerial decision not subject to mandatory bargaining. The employer asserted that it hired the owner-operators in anticipation of securing long-distance runs which required layovers. According to the employer its deliveries were mostly local and it did not possess sleeper cabs for layovers. As a result, it subcontracted this work to the owner-operators with sleeper cabs. The facts, however, did not support the employer’s argument. The owner-operators were assigned loads just like regular unit drivers. The Board also found that as a matter of law, the employer’s position fared no better - - it is “most settled that a subcontracting decision motivated by labor costs is generally amenable to collective bargaining.” *Quickway Transportation, Inc.*, 354 NLRB No. 80 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).

3. An employer’s unilateral change of health insurance carrier was lawful where the parties’ agreement allowed for such changes. The crux of the dispute involved whether the contract expired, negating the employer’s right to make the unilateral changes.

In this case, the Board initially found in 2005 that the contract did not automatically renew, despite the absence of the contractually required notice to terminate, because the parties had entered into negotiations for a successor collective bargaining agreement. Accordingly, the employer could not make the change.

However, on appeal, the Second Circuit remanded the case back to the Board, finding that there was no precedent supporting the position that notice was unnecessary once the parties entered into negotiations. On remand, the Board did not ultimately decide the

legal issue of whether bargaining should be sufficient to constitute a waiver of the contractual requirement of notice because the union did not set forth any argument on the issue. Thus, the original contract was found to remain valid despite negotiations and the employer was privileged to make the change. *Long Island Head Start Child Development Services*, 354 NLRB No. 82 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).

4. A violation of the Act was found where the employer eliminated a program used to discipline or rehabilitate drivers who had problems with excessive absenteeism. This unilateral change resulted in the termination of drivers and also ended the benign treatment of drivers with excessive absenteeism. It was found that “it is well established that an employer’s disciplinary system constitutes a term of employment that is a mandatory subject of bargaining.” *Cook DuPage Transportation Company*, 354 NLRB No. 31 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (in process).
5. By unilaterally transferring bargaining unit work, an employer violated the Act. The employer admitted that it had never before diverted bargaining unit work but argued that the contract permitted such a change. The ALJ found that the contract’s generally worded management rights clause did not constitute waiver by the union of its right to bargain. *American Benefit Corp.*, 354 NLRB No. 129 (2010), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).
6. The layoff of bargaining unit employees during an employer’s slow season was found to be an unlawful unilateral change. The employer had a past practice of reducing employees’ hours when business was down. However, layoffs were unprecedented and “constituted a change in employees’ terms and conditions of employment.” *Seafood Wholesalers, Ltd.*, 354 NLRB No. 53 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).
7. A change in the status quo must take place for a finding of an unlawful unilateral change. A continuation of a past practice is not a change in the status quo, and does not violate the Act, where the practice occurs with such regularity and frequency that employees could reasonably expect the “practice” to continue or reoccur on a regular and consistent basis. However, a union’s acquiescence to previous unilateral changes does not operate to waive a party’s right to bargain over future changes.

An employer's change in prescription drug benefits to "generic first" dispensing and requiring employees pay full retail price for brand name prescriptions if a direct generic was available was found to be an unlawful unilateral change requiring bargaining. Absent evidence of comparable changes during the life of the contract, no past practice was established and the change was a substantial and material change. The Board reversed the ALJ's finding that the change was a continuation of a past practice and merely an "administrative" change, as the employer failed to establish that prior changes to prescription plan occurred with regularity and frequency, there was no similarity among employer's prior changes, and the change that eliminated employee discretion in choosing brand name drugs was "material, substantial, and significant." *Caterpillar, Inc.*, 355 NLRB No. 91 (2010).

8. Following an employer's unlawful unilateral change, the union has the option to request that the employer rescind the changes and restore the status quo. Where an employer was properly ordered to rescind its unilaterally implemented health insurance plan and restore the prior plan, the Board found that the employer is afforded the opportunity to litigate whether compliance would be impossible or if it is unduly or unfairly burdensome to restore the prior plan. If restoration is impossible, the union is entitled to make-whole relief. If, however, the union does not request that the changes be rescinded and chooses continuation of the unilaterally implemented health insurance policy, then make-whole relief for that unilateral change is inapplicable. *Laurel Baye Healthcare of Lake Lanier LLC*, 352 NLRB 179, 179 n.3 (2008), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 355 NLRB No. 118 (2010).
9. An employer's unilateral ceasing of contributions to the employees' welfare and pension funds following the expiration of the contract, without providing notice and an opportunity to bargain, violated the Act. The employer was ordered to make the unit employees whole by contributing all delinquent funds on behalf of the employees and to reimburse unit employees for any expenses that resulted from its failure to make the required contributions. *Buggy Whip*, 356 NLRB No. 80 (2010).
10. A party has the option of claiming that its unilateral actions were lawful when consistent with the parties' past practice. The party claiming this affirmative defense has the burden of proof and must show that the specific practice applied. In the *Courier-Journal* cases, 342 NLRB 1093 (2004), and 342 NLRB 1148 (2004), where the employer had established a past practice of making unilateral changes both while the contract was in effect and during hiatus

periods, the employer has the right to make unilateral changes both before and after the contract expires.

However, where a past practice exists only while the contract was effective, no past practice is established for the hiatus period. In *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176 (2010), the employer unilaterally changed the terms of the employees' benefit plan during bargaining, prior to impasse. While the management rights clause allowed for changes to be made to the benefit plan during the term of the contract, the clause does not survive the contract's expiration absent the parties' intent to the contrary. Thus, the employer's right to make unilateral changes was limited to the period when the contract was in effect. Upon expiration, the terms and conditions in place became fixed and subject to the statutory duty to bargain, and the status quo at the time of expiration must remain until impasse.

### **III. SELECTED DEFENSES TO ALLEGED VIOLATIONS OF THE BARGAINING OBLIGATION – WAIVER AND EXIGENT CIRCUMSTANCES**

#### **A. THE CLEAR AND UNMISTAKABLE WAIVER DOCTRINE**

1. To be given effect, both the U.S. Supreme Court and the Board require the purported waiver to have been “clear and unmistakable.” *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). In order for a waiver of bargaining rights to exist under this standard, “[e]ither the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter.” *Amoco Chem. Co.*, 328 NLRB 1220 (1999), *enf. denied*, 217 F.3d 869 (D.C. Cir. 2000).

#### **B. TYPES OF WAIVER**

1. Waiver by Written Agreement

A union can waive its statutory right to bargain over a particular subject by operation of the collective bargaining agreement. Because the waiver must be clear and unmistakable, and not “lightly inferred,” the contract language must be specific. Examples:

A recognition clause that relieved the successor employer from adopting contractual obligations does not constitute a clear and unmistakable waiver of the union's statutory right



to recognition. *TransMontaigne, Inc.*, 337 NLRB 262 (2001).

A union did not clearly and unmistakably waive its right to bargain a new attendance policy where it agreed that the employer had “the exclusive right to manage the plant and its business and to exercise customary functions of management in all respects and to make fair and reasonable rules for the purpose of maintaining order, safety, and effective operation.” *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999), *enforced in relevant part*, 223 F.3d 831 (4<sup>th</sup> Cir. 2000).

A contractual provision preserving the employer’s right “to decide the number of employees to any shift or job . . . or to determine appropriate staffing levels” demonstrated a clear and unmistakable waiver of the union’s right to bargain over summer staffing level changes. *Good Samaritan Hosp.*, 335 NLRB 901 (2001).

A union waived its right to bargain over a decision to subcontract work based upon specific provisions in the collective bargaining agreement, including language in the management rights clause pertaining to subcontracting. *Ingham Regional Medical Center*, 342 NLRB 1259 (2004).

Waiver provisions generally do not survive contract expiration. However, when contracting parties orally agree to extend their agreement, the management rights clause remains in effect. *Quebecor World Mt. Morris, II*, 353 NLRB No. 1 (2008), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (petition for review dismissed, closed).

The Board rejected the employer’s claim that its unilaterally imposed contract provision acted as a waiver of the union’s right to bargain over mileage reimbursement rates. The contract, implemented after impasse, established the mileage reimbursement rate at “twenty-nine cents per mile, or the rate generally offered to non-bargaining unit employees if that rate is higher than twenty-nine cents.” After increasing the rate for non-bargaining unit employees, the employer claimed that it could not increase the members’ rate because the contract provision had given it unlawful discretion to do so in violation of *McClatchy Newspapers*, 321 NLRB 1386 (1996), *enforced*, 131 F.3d 1026 (D.C. Cir. 1997). *McClatchy* prohibits an employer from implementing contract provisions after impasse that give it discretionary

authority over terms and conditions of employment. The employer argued that it had discretion over the reimbursement rate because it could increase or decrease the rate at its whim, so long as it did not fall below twenty-nine cents, thus violating *McClatchy*. The Board rejected this rationale because the union had notified the employer that it did not contest the validity of the provision. Therefore, because the union recognized the validity of the contract provision, the provision did not constitute a waiver under *McClatchy*. The Board found that the employer violated Section 8(a)(1) and (5) of the Act by not increasing the members' rates. *Cox Ohio Publishing*, 354 NLRB No. 32 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).

2. Waiver by Bargaining History.

Although a matter is not addressed in the labor contract itself, a waiver of the right to bargain over a mandatory subject may be found where the matter has been discussed in contract negotiations and the union has "consciously yielded" its position. Examples:

There was no waiver of the union's right to recognition at a relocated grocery store where the parties never discussed an address-specific recognition clause in the context of waiving future statutory rights as distinct from merely describing bargaining unit. *King Soopers, Inc. v. NLRB*, 254 F.3d 738 (8<sup>th</sup> Cir. 2001).

The parties' bargaining history indisputably showed the union negotiated a security clause in exchange for limiting recognition to only one city, thereby waiving its rights with respect to the employer's subsequent establishment of a facility in another city. *Waymouth Farms*, 324 NLRB 960 (1997).

3. Waiver by Inaction.

A union can waive its statutory right to bargain through inaction. The Board requires a union to act with "due diligence" when given notice of an employer's intent to change a mandatory subject of bargaining (i.e. not covered by the contract).

On the other hand, "acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes

arguably are similar to those in which the union may have acquiesced in the past.” *Exxon Research & Engineering Company*, 317 NLRB 675 (1995).

Refusing to meet with the employer and instead filing an unfair labor practice charge does not constitute or renew a request for bargaining. *AT&T Corp.*, 337 NLRB 689 (2002); *Boeing Company*, 337 NLRB 758 (2002) (union, which affirmatively refused to meet and bargain with employer over terms of new compensation and benefit plan and instead filed an unfair labor practice charge, waived its statutory bargaining rights).

A waiver, though, does not occur where the union declines to respond to an employer’s letter advising the union of a possible change to the contract sometime in the future. *Coastal Cargo Co.*, 353 NLRB No. 86 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (ALJ decision accepted).

The Board does not require a labor organization to demand negotiations every time an employer mentions a potential, future change in order to avoid the risk of waiving its right to bargain under the *Katz* doctrine. More than general statements about changes that might be necessary are required, as “[t]he prior notice must afford the union with a reasonable opportunity to evaluate the proposals and present counter proposals before implementing [the] change.” An inchoate and imprecise announcement is insufficient to trigger an obligation to bargain. *San Juan Teachers Ass’n*, 355 NLRB No. 28 (2010).

Similarly, a waiver does not occur where the employer does not give notice and an opportunity to bargain, but instead presents the union with a *fait accompli* or insufficient advance notice. *UAW-Daimler Chrysler National Training Center*, 341 NLRB 431 (2004).

For example, the Board upheld an ALJ’s decision finding that the union had not waived its right to bargain over job descriptions approximately eight years after the company unilaterally implemented new job descriptions without notifying the union of the change. The issue arose in 2007 when the union grieved the suspension of an employee who refused to perform work because it was beyond the scope of his duties. Alleging the work was part of the employee’s job description, the employer provided a revised job description

from 1999. This description, however, differed from the union's job description, which was created and approved in 1995. The ALJ, after weighing the credibility of the witnesses, determined that the employer had not sent the union the 1999 job descriptions. Hence, the union was never notified of the change and could not waive its right to bargain over the job descriptions. The employer, therefore, violated Section 8(a)(1) and (5) of the Act. *ABB, Inc.*, 355 NLRB No. 2 (2010), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).

C. RECENT CASES (DEBATE OVER THE "CONTRACT COVERAGE" TEST)

1. In the last 15 years, a few courts and some NLRB members have championed an employer-friendly alternative to the clear and unmistakable waiver test. The contract coverage theory holds that once a matter is "covered by" the labor agreement, "the union has exercised its bargaining right and the question of waiver is irrelevant." Proponents of the contract coverage approach argue that applying the Board's traditional waiver analysis is an assault on the principle of freedom of contract and robs the parties (usually the employer) of the benefit of their bargain by requiring rebargaining of matters already addressed in the agreement.
2. In several cases, the contract coverage test has been rejected by a majority of the Board over the dissent or disagreement of individual Board members. *Elliott Turbomachinery*, 320 NLRB 141 (1995) (Member Cohen, dissenting); *Stevens International Inc.*, 337 NLRB 143 (2001) (Chairman Hurtgen, concurring and dissenting in part); *Cincinnati Paperboard*, 339 NLRB 1079 (2003) (Members Schaumber and Acosta, finding dismissal of the complaint warranted under either standard). The contract coverage test has never commanded a majority holding in a standard unilateral charge case.
3. However, in *Bath Iron Works Corp.*, 345 NLRB 499 (2005), the Board applied the contract coverage test in a § 8(d) unilateral modification case. The Board ruled that the clear and unmistakable waiver test does not apply to contract modification changes where the charge alleges that the employer has unilaterally modified a term of the contract.

An appellate court has now upheld the Board's ruling, albeit on a somewhat different rationale. *Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1<sup>st</sup> Cir. 2007). The First Circuit held the underlying case was, in fact, a unilateral change/failure to bargain

case. The Court went on to find, however, that the Board should apply the contract-coverage test to such cases.

4. In another divided opinion, *Provena St. Joseph's Medical Center*, 350 NLRB 808 (2007), the majority found that the waiver doctrine was supported by Supreme Court precedent and rested on a sound theoretical basis. Switching to a contract-coverage analysis would, in the majority's view, unnecessarily complicate the bargaining process and increase the likelihood of disputes.
5. Regardless, the Board continues to use the "clear and unmistakable" standard in analyzing waiver. As recently as this year, the Board upheld an ALJ's decision that analyzed whether the union had waived its right to bargain over the employer's transfer of work under the "clear and unmistakable" standard. Here, the employer had a backlog of work that needed to be completed within thirty days. After the union members agreed to work overtime to resolve the backlog, the employer nevertheless transferred some of the work to non-bargaining unit employees at off-site locations.

The employer justified its action by claiming that the union had waived its right to bargain over the transfer of work because a provision of the contract allowed it to use temporary employees when the workload could not be completed during normal business hours. However, the ALJ determined that there was no clear and unmistakable waiver because of a subsequent memorandum of understanding prohibiting the transfer of work to off-site, non-bargaining unit employees. Thus, the employer's transfer of work violated Section 8(a)(1) and (5) of the Act. *American Benefit Corporation*, 354 NLRB No. 129 (2010), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).

#### D. EXIGENT CIRCUMSTANCES

1. The Board has held that an employer may lawfully make a unilateral change "when economic exigencies compel prompt action." *Bottom Line Enterprises*, 302 NLRB 373 (1991), *enforced mem. sub nom. Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9<sup>th</sup> Cir. 1994). This exception is limited to "extraordinary events which are an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *RBE Enterprise of S.D., Inc.*, 320 NLRB 80 (1995) (internal quotations and citation omitted). The employer must bear the burden to prove that it "experienced such dire and unforeseen circumstances, and that burden is heavy." *Harmon Auto Glass*, 352 NLRB 152 (2008) (internal quotations and citation omitted), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 355

NLRB No. 66 (2010).

2. For instance, the Board upheld an ALJ's decision that an employer's unsupported claim of increased health insurance costs and a decline in sales of more than \$800,000 in a year was not defensible as an exigent circumstance. During negotiations, the employer alleged it was experiencing financial stress and needed concessions. The union requested information to investigate the employer's claim, but the request was ignored. In defending its implementation of its final offer, the employer claimed that exigent circumstances (increased health insurance costs and sales' decline) justified its action. Regardless, the ALJ rejected the employer's arguments because neither increased health care costs nor a "decline in sales revenue over many months is . . . the kind of unforeseen exigency that would excuse unilateral action." *Harmon Auto Glass, supra*, 355 NLRB No. 66 (2008).
3. The Board upheld an ALJ's decision that a looming budget cut was not defensible as an exigent circumstance. The Board found that the employer had ample warning of the coming budgetary restrictions, giving it sufficient time to bargain the effects of moving bargaining unit employees from a 12-month schedule to a 10-month schedule. Moreover, the employer only changed bargaining unit employees' schedules, even though non-bargaining unit employees could have been moved to the 10-month schedule, as well. *Hartford Head Start Agency, Inc.*, 354 NLRB No. 15 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).

#### IV. THE DUTY TO PROVIDE INFORMATION

##### A. INFORMATION REQUESTS

###### 1. Obligation

The bargaining parties must provide, on request, relevant information needed for the proper performance of the duties as collective bargaining agent, including collective bargaining negotiations and representation activities under a collective bargaining agreement. *See NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967); *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149, 155 (1956).

###### 2. Procedure.

Request. A request need not be in writing, but the requestor must take reasonable steps to assist the disclosing party if required for compliance with the request. *See Bundy Corp.*,

292 NLRB 671, 672 (1989). As a practical matter, written requests with specific disclosure terms are easier to enforce.

Timing. The timeliness of an information request is factually specific in light of the parties' bargaining history. An information request made 15 months prior to the commencement of negotiations has been found timely based on the parties' bargaining history. *Kraft Foods*, 355 NLRB No. 156 (2010).

Response. If a request is ambiguous, the other party must request clarification or comply with the request by furnishing appropriate information based on a reasonable interpretation of the request. *See Azuba USA Co.*, 298 NLRB 702, 703 (1990). It is unlawful to ignore the request or fail to make a reasonable attempt to comply.

Counter-Request: The union's obligation to provide information is parallel to that of the employer, with both employers and unions having an obligation to provide relevant information related to bargaining and grievance administration. *SEIU Local 715*, 355 NLRB No. 65 (2010). *See also California Nurses Assoc.*, 326 NLRB 1362, 1366 (1998); *Fireman and Oilers Local 288*, 302 NLRB 1008, 1009 (1991). As a result, information requests and counter-requests have become part of the parties' negotiation and grievance handling strategies.

### 3. Relevance and Necessity.

- a. Presumptions. If one party refuses to provide the information, the requestor must demonstrate that the requested information is necessary and relevant. *See Curtis Wright Corp. v. NLRB*, 347 F.2d 61, 67-68 (3d Cir. 1965). Information requests are presumptively relevant if they pertain to workers in the bargaining unit or go to the core of the employee-employer relationship. Otherwise, the requestor bears the burden of proving that the information is relevant and necessary for "non-unit" information. *See Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enforced*, 531 F.2d 1381 (6<sup>th</sup> Cir. 1976). Furthermore, one party is not required to accept the other party's representations about the relevance or sufficiency of information; the requestor is entitled "to see for itself" or verify the details of the information requested. *See Southern Ohio Coal Co.*, 315 NLRB 836, 845 (1994).

b. Factual Basis. Where information is not presumptively relevant, the requestor bears the burden to prove the relevance and necessity. However, the requestor need not show that its support for the request was accurate or reliable, so long as the requestor has more than a mere suspicion as a basis for the request. *See Genovese & DiDonno, Inc.*, 322 NLRB 598, 600 (1996) (citing *Brisco Sheet Metal*, 307 NLRB 361 (1992)); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). *But see Bohemia Inc.*, 272 NLRB 1128, 1129 (1984) (no duty to furnish information without objective factual basis). For example, an information request can be based on hearsay.

c. Examples:

- (1) Severance Package Information: A union is entitled to information about non-bargaining unit members to negotiate a severance package for employees. *See Sea Jet Trucking*, 327 NLRB 540, 546-47 (1999); *United States Testing Co.*, 324 NLRB 854, 859 (1997).
- (2) Sales Agreement Information. A union is entitled to information about a potential sale of the employer if it relates directly to terms and conditions of employment. *See Super Value, Inc.*, 326 NLRB 1069, 1071 (1998), *enforced*, 184 F.3d 949 (8<sup>th</sup> Cir. 1999); *Super Value Stores, Inc.*, 279 NLRB 22, 25 (1986).
- (3) Alter-Ego Information. A union may obtain information concerning matters outside the bargaining unit related to a potential alter ego claim, if it has a “reasonable belief that enough facts exist to give rise to a reasonable belief that the two companies are in legal contemplation a single employer.” *See Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988).

An employer is also entitled to information about a third party union, where the employer has an objective basis for believing that the information would be relevant in relation to the employer’s bargaining obligation. Where an employer was confused over the bargaining representative of the unit, an alter-ego type standard was applied in reviewing whether the union was required to respond



to the information request concerning the third party union. Since the information was necessary for determining the unit's bargaining representative, the information was relevant. *SEIU Local 715, supra*, 355 NLRB No. 65 (2010).

- (4) Recall Information. A union may obtain information about non-bargaining unit employees and their work because the information related to members' prospects for recall. *See Galicks, Inc.*, 354 NLRB No. 39 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 355 NLRB No. 68 (2010).

4. Defenses.

- a. Relevance: Ability vs. Willingness. An employer is generally not required to provide *financial* information to a union during collective bargaining negotiations unless the employer has rejected the union's wage or other demands on the grounds that the employer is financially unable to support the labor costs associated with the union's demands. *See Nielson Lithographic Co.*, 305 NLRB 697, 699 (1991), *enforced*, 977 F.2d 1169 (7<sup>th</sup> Cir. 1992).

The phrase "inability to pay" means more than the assertion that it would be difficult to pay, or that it would cause economic problems or distress to pay. "Inability to pay" means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to non-survival in business. *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004).

Even where the employer has not explicitly stated an inability to pay, the company's failure to deny an inability to pay and statements made evidencing an inability to pay at least during the life of the contract being negotiated were sufficient to require the employer to provide information substantiating its claim. *Stella D'Oro Biscuit Co.*, 355 NLRB No. 158 (2010).

- b. Unduly Burdensome. Information requests may not be so burdensome or time consuming as to impede reasonable operations. *See NLRB v. Tex Tan, Inc.*, 318 F.2d 472, 478 (5<sup>th</sup> Cir. 1963) (discussing obligation to provide information where the materials are "intricate, complex, and

voluminous”).

- c. Confidentiality. Parties need not disclose information if they can prove a legitimate justification in maintaining the secrecy of the information. *See Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318-20 (1979).
- d. Waiver. An employer need not provide information if the union has “clearly and unmistakably” waived its right to the information.” *See Hearst Corp.*, 113 NLRB 1067, 1071 (1955).
- e. Burden of Proof. The party resisting disclosure bears the burden of proving the justification, and the party must still bargain with the other party about the reasonable accommodations to satisfy the privacy interest. *See Oil, Chemical & Atomic Workers Local 6-418 v. NLRB (Minnesota Mining)*, 711 F.2d 348, 364 (D.C. 1983). Moreover, a request is presumed in good faith until the contrary is shown, even if the request covers confidential or sensitive information; the possibility that information might have other uses does not establish bad faith. *See GTE Southwest, Inc.*, 329 NLRB 563, 564 (1999) (employer must disclose information about testing procedures for new employees); *Beverly Health & Rehabilitation Services Inc.*, 328 NLRB 959, 963 (1999) (employer must disclose information about staffing and work load at facility).

## B. RECENT CASES

1. The Board upheld an ALJ’s decision that the employer failed to respond to the union’s information request in a timely fashion when it delivered the requested information incrementally over the course of five months and after contract negotiations had begun. The union had requested the information to prepare for those negotiations. Having not received all of the requested information after three months, the union and employer nevertheless held an initial bargaining session. The union was unable to submit its economic proposal, including wages and benefits, without the requested information. Paradoxically, the employer refused to submit a counter-proposal until the union submitted its economic proposal, which the union could not do until it received the requested information from the employer. The ALJ found that the employer’s “actions in ignoring and then delaying the Union’s requests for information virtually ensured that the . . . bargaining session would be a meaningless exercise.” Thus, the ALJ found that the employer had unreasonably delayed providing the information in violation of

Sections 8(a)(1) and (5) of the Act. *See Essex Valley Visiting Nurses Association*, 353 NLRB No. 109 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).

2. The Board upheld an ALJ's ruling that an employer was obligated to provide a union with information requested concerning non-bargaining unit members because the information was relevant to a pending grievance. The union requested information for the grievance after discovering that bargaining unit work was being completed by nurse practitioners who were not members of the union. In response, the hospital claimed that those individuals were not employees of the hospital, but rather employees of a university affiliated with the hospital. Similarly, the affiliated university refused to disclose the information on the grounds that it was not a signatory to a collective bargaining agreement with the union. The ALJ, in rejecting both contentions, found that the information requested was relevant because "these people are doing the same type of function, in the same place, for the same people, under the same supervision, under the same State laws and pursuant to the same type of privileges as the nurse practitioners who are directly employed by the Respondent." The ALJ, furthermore, found that the hospital could have obtained the information from the university. Therefore, the employer violated Section 8(a)(1) and (5) of the Act when it failed to disclose the information as requested. *See The New York Presbyterian Hospital*, 354 NLRB No. 5 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 355 NLRB No. 126 (2010).
3. The Board upheld an ALJ's ruling that an employer was obligated to honor the union's information request concerning the identity and work of all of the employees, even though the four employees in the bargaining unit had been laid-off and the employer withdrew recognition from the union as exclusive bargaining representative. The Board agreed with the ALJ when it found that "the information was relevant to the Union's representative role in the current bargaining relationship because . . . it related to whether Respondent would have work for journeymen and clearly impacted their prospects for recall." Therefore, the employer's failure to provide the requested information violated Section 8(a)(5) of the Act. *See Galicks, Inc.*, 354 NLRB No. 39 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), and *aff'd on reh'g*, 355 NLRB No. 68 (2010).
4. The Board reversed an ALJ's finding when it held that an employer's nearly one month delay in providing information requested by a union was not unreasonable under the "totality of the circumstances." Under such a review, the factors considered

include: “the complexity and extent of the information sought, its availability and the difficulty in retrieving the information.”

Because the employer: (1) informed the union that it would take additional time to obtain the records from its outsourced contractor; (2) needed time to review the information once it was received; (3) delivered the information within a month; and (4) created no adverse effect to the union, the Board found the delay was not unreasonable. *Spurlino Materials, LLC*, 353 NLRB No. 125 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), *aff’d on reh’g*, 355 NLRB No. 77 (2010).

5. The Board reviewed an ALJ’s decision in three consolidated cases concerning information requests. In reversing one decision and upholding the remaining two, the Board analyzed each case under the “totality of the circumstances.” Under such a review, the factors considered include: “the complexity and extent of the information sought, its availability and the difficulty in retrieving the information.” For instance, in the first case, the Board reversed the ALJ’s decision that a forty-two day delay in fulfilling the union’s information request was unreasonable. The Board found that the majority of the information requested was delivered to the union within nine days, with the last document requiring additional time to locate because it had been misfiled in an unmarked filing cabinet. In the second case, the Board agreed with the ALJ’s conclusion that twenty-eight days was an unreasonable delay in providing one page of information. This was especially true because the delay impeded the union’s ability to pursue the pending grievance. Finally, in the third case, the Board upheld the ALJ’s decision that a thirty day delay in providing fifty-one pages of information requested by the union was unreasonable. The record reflected that it took the employer only three hours and fifteen minutes to locate the documents. *United States Postal Service*, 354 NLRB No. 58 (2009), *vacated by New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (closed).
6. The Board found that merely allowing a union to view, but not retain possession of, the employer’s financial statement did not satisfy its obligation to furnish requested information. The employer’s legitimate confidentiality concerns were deemed insufficient by the Board in light of the union’s agreement to sign a confidentiality agreement and the employer previously providing the union with a one page summary of the financial statement’s contents. Moreover, the complexity of the document itself and the relevance of the financial statement by virtue of the employer’s claimed inability to pay, required that a personal copy, rather than a mere in camera inspection of the document, be provided. *Stella D’Oro Biscuit Co.*, 355 NLRB No. 158 (2010).

7. The Board's liberal standard for showing relevance was satisfied by the union through its bargaining history with the employer. Where: (1) the information sought was a mandatory topic of bargaining; (2) the employer had routinely stated that the unit's members were "the most highly paid, highly benefited people" at the company; and (3) that the employer sought to standardize benefits across its plants, information requested by the union regarding the benefits at the other plants is relevant. *Kraft Foods*, 355 NLRB No. 156 (2010).