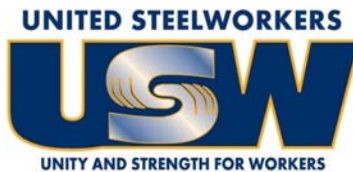


# Labor Law for Union Workers



July 2007

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This manual is intended to train International Staff Representatives and Local Union leaders and provide substantive information that will facilitate understanding of Labor Laws and its impact on workplaces and unions. The information provided is general information and does not constitute legal advice or opinion, nor does it address specific individual problems. Individuals should seek professional legal advice before making any decision affecting individual legal rights based on this specific topic.

# The Statutory Environment

## National Labor Relations Act (NLRA) of 1935

This Act guarantees workers the right to organize, join Unions and engage in collective bargaining without fear of management retaliation; established employer unfair labor practices (ULPs).

It is important to clearly understand the purpose of the act, as Union officers, to define and protect the rights of employees and employers -- to encourage collective bargaining, and to eliminate certain practices on the part of labor [and management] that are harmful to the general welfare.

## Labor Management Relations Act (LMRA) of 1947

Amendments to the NLRA which "balanced" the rights of labor and management by establishing unfair labor practices on the part of labor Unions.

### Important Sections:

- |              |  |     |  |     |   |     |  |
|--------------|--|-----|--|-----|---|-----|--|
| Section 7    | Protects Unions and collective or concerted activity. Protects workers who take part in organizing, grievances, protects on the job picketing and strikes.   |     |  |     |   |     |  |
| Section 8(a) | <b>Employer</b> unfair labor practices (NLRA) <ol style="list-style-type: none"><li>1. Interference, restraint or coercion directed against Union or collective activity</li><li>2. Domination of Unions</li><li>3. Discrimination against those who take part in Union activities</li><li>4. Retaliation for filing unfair labor practice charges or working with the NLRB</li><li>5. Refusal to bargain in good faith with Union representative</li></ol>  |     |  |     |   |     |  |
| Section 8(b) | <b>Union</b> unfair labor practices (LMRA) <ol style="list-style-type: none"><li>1. Failure to provide fair representation to all members of the bargaining unit (DFR)</li><li>2. Union security violation -- prohibits Union from causing employer to violate 8(a)(3)</li><li>3. Bad faith bargaining</li><li>4. Secondary boycott prohibited</li><li>5. Excessive fines and fees</li><li>6. Featherbedding – exacting money for work not performed</li><li>7. Picketing for recognition without seeking election</li></ol> |     |  |     |   |     |  |
| Section 8    | <table border="0"><tr><td>(c)</td><td>Free Speech Rights – permits employers to express opinion about Union representation</td></tr><tr><td>(d)</td><td>Defines good faith bargaining and establishes notice requirements before a contract can be terminated or modified</td></tr><tr><td>(e)</td><td>"Hot-cargo" clauses prohibiting one employer from dealing with other employers who are non-Union or who are on strike.</td></tr></table>  | (c) | Free Speech Rights – permits employers to express opinion about Union representation | (d) | Defines good faith bargaining and establishes notice requirements before a contract can be terminated or modified | (e) | "Hot-cargo" clauses prohibiting one employer from dealing with other employers who are non-Union or who are on strike. |
| (c)          | Free Speech Rights – permits employers to express opinion about Union representation   |     |  |     |   |     |  |
| (d)          | Defines good faith bargaining and establishes notice requirements before a contract can be terminated or modified  |     |  |     |   |     |  |
| (e)          | "Hot-cargo" clauses prohibiting one employer from dealing with other employers who are non-Union or who are on strike.   |     |  |     |   |     |  |
| Section 9    | (a) Covers Union election procedures, resulting in the certified or recognized Union as the exclusive representative of bargaining unit members  |     |  |     |   |     |  |

- (b) How the appropriate bargaining unit is determined
  - (c) Election procedures
- Section 10 Enforcement of Unfair Labor Practices (ULP)
  - (a) NLRB has the authority to enforce ULP (provisions of Section 8(a) and 8(b))
  - (b) ULP statute of limitations – must be filed (and served) within six (6) months
  - (c)-(f) Trial procedures and appeals from Board to Courts
- Section 11 Investigative powers of the Board
- Section 13 Right to Strike Protected
- Section 14 Supervisors defined: A supervisor is defined by the Act as any individual who has the authority, acting in the interest of an employer, to cause another employee to be hired, transferred, suspended, laid off, recalled, promoted, discharged, assigned, rewarded, or disciplined, either by taking such action or by recommending it to a superior; or who has the authority responsibly to direct other employees or adjust their grievances; provided, in all cases, that the exercise of authority is not of a merely routine or clerical nature, but requires the exercise of independent judgment.
  - Are permitted to be members of labor organization but employer not required to bargain about working conditions or recognize supervisor's Union
  - States can pass Right-to-Work laws
- Section 19 Religious objectors not required to join or financially support Union

The Act states that the term "employee" shall include any employee *except* the following:

- Agricultural laborers.
- Domestic servants.
- Any individual employed by his parent or spouse.
- Independent contractors.
- Supervisors.
- Individuals employed by an employer subject to the Railway Labor Act.
- Government employees, including those employed by the U .S. Government, any Government corporation or Federal Reserve Bank, or any State or political subdivision such as a city, town, or school district.

# National Labor Relations Board (NLRB) and its Regional Offices

The NLRB is the administrative agency of federal government which enforces the NLRA. It is comprised of five (5) board members appointed by the President. The Board is specialized in labor law and has developed and applied its expertise in this area. The General Counsel, also appointed by the President, serves a 4-year term; the GC is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB field offices in processing cases. Each Regional Office is headed by a Regional Director who is responsible for making the initial determination in cases arising within the geographical area served by the region. There are 34 regional offices.

Cases are referred to by a letter, which reflects the type of case, it is. See Appendix 1, (NLRB & You—Representation Case or petition).

*Site: [www.nlr.gov](http://www.nlr.gov)*

## Unfair Labor Practice Procedures

A Union, employee or employer may file a charge with NLRB in person or by mail or fax, but it must be done within six (6) months of the violation.

NLRB appoints a field examiner or field attorney to investigate (by interviews and affidavits). Within approximately forty-five (45) days, the examiner/attorney reports to the Regional Director with recommendation to dismiss, defer, or issue formal complaint.

If NLRB defers a decision on the ULP, the Union can file a contract grievance against the employer if arbitration is available under the contract. If the issue is arbitrated, the director reviews the arbitration decision to see if it should be honored or if a complaint should still be issued.

*See Appendix 2.*



# Labor Management Reporting And Disclosure Act (LMRDA) of 1959

Also known as the Landrum-Griffin Act, this Act regulates internal Union matters and established the "Bill of Rights" for Union members; internal Union election procedures; and reporting and disclosure requirements for Unions, Union officers and employers.

The Act also amended the NLRA by adding Section 8(e) regarding "hot cargo" clauses prohibiting one employer from dealing with other employers who are nonunion or who are on strike. Section 8(e) makes it an unfair labor practice for an employer or a labor organization to enter into a hot cargo agreement. This section applies equally to Unions and to employers.

## Special Status of Union Representatives

Under the NLRA and cases decided by the NLRB, Union representatives have a special legal status when they engage in Union business. They should be considered equals with management, with no fear of reprisal for their actions only when a Union representative is acting in an official capacity.

Official capacity is defined as:

- Investigating a grievance
- Requesting Information
- Presenting a Grievance
- Acting as representative of employees

This is compared to individual capacity which means: discussing your own work assignment and/or performance.

There is not a 100% equality guarantee.

Employers can still discipline Union representatives for "outrageous" or "indefensible" behavior. This includes extreme, unprovoked profanity, social epithets, physical threats, or striking a supervisor. They can also be disciplined for disobeying reasonable directions, work rules, encouraging slowdowns, or taking part in illegal strikes.

## Retaliation Against Union Representatives or Stewards

It is illegal for an employer to retaliate against a Union representative because of their position by:

- ordering him/her to perform greater or more difficult work
- denying pay opportunities
- separating a Union representative from other employees
- denying overtime opportunities
- enforcing plant rules more strictly
- "over kill" in supervising
- holding stewards to a higher standard in work quality/quantity

## Collective Bargaining

The following materials will attempt to speak to most of the legal issues associated with collective bargaining, in a general sense. Bargaining committees need to understand the law of private sector collective bargaining under the National Labor Relations Act. The following example highlights the importance of each issue, keeping in mind that there are six subjects which are at the heart of collective bargaining law:

1. Notices
2. The duty to bargain in good faith
3. Is the particular subject of bargaining mandatory or permissive
4. Information that employers have to give to the Union
5. What "impasse" means to the continuing obligation to bargain; and
6. Strikes.

*If a Company violates its duty to bargain, it cannot lawfully reach impasse, and cannot implement changes. If the Union fails to give the proper notice at the termination of the contract, the Union violates its duty to bargain and any strike would be illegal. If the Company refuses to bargain over a mandatory subject, any strike would be an unfair labor practice strike and the strikers cannot be permanently replaced.*





## Notices

Where a contract is in effect, the duty to bargain requires the Union to give at least 60 days notice (to the Company) prior to the contract expiration date of your intent to terminate or modify the contract. This is called the “reopener” notice. Notice must also be provided to the Federal Mediation and Conciliation Service (FMCS) or other state agency, within 30 days of sending the Company’s notice.

Special rules apply to notice if the employer is a health care institution. Section 8(g) of the Act prohibits a labor organization from engaging in a strike, picketing, or other concerted refusal to work at any health care institution without first giving at least 10 days’ notice in writing to the institution and the Federal Mediation and Conciliation Service.

## The Duty to Bargain

It is an unfair labor practice if the employer or the Union fails to bargain in good faith. To determine whether this requirement is met, the NLRB will normally look at the entire course of bargaining. “Surface bargaining” is usually defined in conjunction with an 8(a)(5) violation, refusal to meet and negotiate. An employer may simply go through the motions with no intention of reaching an agreement. Factors to be considered in deciding whether surface bargaining has taken place include:

1. Refusing to meet at reasonable times and places;
2. Refusing to give basic information to the Union that is necessary for meaningful bargaining;
3. Refusing to discuss certain issues with the Union;
4. Agreeing on minor bargaining issues, but then refusing to give in on any major point (such as agreeing to general contract language, but maintaining a fixed position on all major economic issues).
5. Refusing to agree to provisions found in most collective bargaining agreements (such as “just cause” or “seniority” provisions);
6. Proposing wages and benefits that are no better than before the Union was certified, are extremely regressive, or that would allow the Company to act unilaterally on most working conditions as if the employees were not represented by a Union;
7. Rejecting Union proposals without making any counterproposals or indicating why the Union’s proposals are unacceptable;
8. Introducing new proposals late in bargaining, reneging on agreements reached, or reintroducing proposals that have been withdrawn previously in order to avoid reaching an agreement.

## Unilateral Change—Work Rules

Whether the employer can make changes to working conditions during the term of the collective bargaining agreement depends on whether the matter is part of the CBA. If a proposed change is a “mandatory” subject of bargaining, the NLRB requires employees and Unions to follow several steps before an employer’s changes can be implemented. This is particularly important with regard to work rules.

1. The employer must give the Union adequate notice of the proposed change; that is, enough time for the Union to have an opportunity to bargain about the change.
2. After learning of the coming changes (through employer’s notice or otherwise), the Union must promptly request to bargaining. The Union loses its bargaining rights if they fail to make the request.
3. After a request is made, the employer cannot make changes during negotiations and must continue – bargaining in good faith, meeting, providing information, and considering any counterproposals.
4. Bargaining must continue until impasse or agreement. The employer can only implement changes without Union agreement when a “dead-lock” or impasse is reached.

## Subjects of Bargaining

The NLRA divides bargaining issues into three categories: mandatory, permissive and illegal. Mandatory subjects include any issue that touches on wages, hours, terms or conditions of employment. You can bargain to impasse over these subjects and then engage in a strike or be locked out. The employer cannot make unilateral changes in these subjects unless it gives notice to the Union of the proposed changes and bargains in good faith to impasse. These requirements apply also to the Union. (See Unilateral Change Rules below)

**Mandatory subjects:** Note this list is not all inclusive and may be added to or subtracted from depending on decisions from the NLRB (and of course, the make up of the Board members).

Absence/attendance/tardiness rules  
Arbitration Procedure and Recording  
Automation decision  
Bathroom procedures  
Bonus  
Check-off  
Clean-up rules  
Disciplinary procedures or penalties  
Dress codes  
Drug/alcohol testing (except for pre-employment which is permissive)  
Effects of closing or partial closing  
Elimination of positions  
Employee privileges (radios, personal telephone calls, smoking, and use of computers)

Evaluation systems  
Food prices  
Grievance procedures  
Grooming standards  
Hiring halls  
Holiday pay  
Insurance plans (for regular employees, permissive as to retirees; not carrier)  
Job assignments  
Length of contract  
Meal or coffee break rules  
New hours or shifts  
Pay rates –wages  
Pensions (non-retiree)  
Physical examinations (not pre-hire)  
Production quotas or standards

Profit-Sharing Plans  
Promotions  
Removal of bargaining unit work  
Retirement Eligibility  
Safety rules  
Seniority  
Stock Purchase Plans  
Subcontracting, partial closure, or relocation decisions based on labor costs  
Superseniority  
Surveillance cameras  
Transfers  
Union access to employer premises  
Union privileges (paid leaves, time off)  
Vacations  
Vending machine prices  
Work loads and assignments

Union security clause (except in right-to-work states where it is illegal)  
Union stewards and leaves of absence

**Permissive subjects**, one party may ask to discuss; the other party may refuse. These subjects are discussed voluntarily; once the discussion about a permissive subject starts, it can be stopped at any time by either party. These include:

- creation of new supervisory positions
- decisions not related to labor costs, to close plants or to eliminate departments
- general business practices
- gifts for holidays
- production methods
- ratification procedure
- recording of grievance proceedings
- selection of supervisors
- subcontracting, partial closure, or relocation decisions based upon changes in the nature or direction of business

**Illegal.** The parties are forbidden to bargain about these subjects. They include:

- closed-shop provisions
- hiring hall provisions that give preference to union members
- hot cargo clauses (8(e))
- clauses that speak to DFR issues
- discriminatory clauses

## Information

The duty to furnish information applies not only during bargaining but also during your role in policing the contract (grievance and arbitration). If an argument is important enough to present in bargaining, it is important enough to require the party making that argument to furnish proof of accuracy.

What information has to be furnished? Information that is relevant and necessary to the Union's function as a representative, depending on the issue you and your negotiating committee develop. The NLRB has ruled that certain information is presumptively relevant – list of bargaining unit employees, dates of hire, job classifications, rates of pay, plant assignments, shift/hours, health insurance, pension benefits, holidays, vacations, seniority, leave of absence and discipline policies. Other items relevant to the bargaining process include disciplinary notices, current job descriptions, company wage and salary plans<sup>1</sup>.

Information about sales or transaction agreements are relevant for purpose of effects bargaining. If the Company "pleads poverty" the Union should have access to the financial records of the Company. Certain statements by the Company can trigger the right to financial information. Listen for "insufficiency of earnings" or "don't have the money" or "the proposal is too steep for us." When the Company uses the phrase "need to remain competitive" it is not pleading poverty.

The following rules apply to information request for both bargaining and grievance/arbitration:

1. To trigger the duty to produce information, the Union must ask for it.
2. Information must be provided promptly and in a usable form—maybe not the exact format the Union asked for.
3. You may need to make numerous requests, especially as new issues arise and proposals evolve.
4. Customize your information requests to your situation.
5. Some records may be confidential, i.e. medical or other personnel records, and a confidentiality agreement needs to be signed.
6. The duty goes both ways – the Union may be required to furnish information requested by the Company.

## Management Rights Clauses

Generally, every collective bargaining agreement contains a "management rights" clause which identifies the rights of management, i.e. hire, fire, lay off, discipline, discharge, assignment of work, etc. As a practical matter, any other provisions of the contract restrict this right – establish limitations to the management rights clause. Carefully drafted management rights clauses will define the subjects reserved to management to limit unilateral changes. The management rights clause does not survive the expiration of the collective bargaining agreement.

<sup>1</sup> Additional information may be relevant to an actual pending grievance or to the investigative process. See listing under grievance procedure at page 15.

## Zipper Clause

The Union may waive its right to bargain over unilateral change by agreeing to a clause that “zips up” the contract. Typical zipper clause states “parties have had the right and opportunity to bargain over all mandatory subjects” and they waive the right to bargain over any matters during the terms of the collective bargaining agreement. Sometimes the word “sole agreement” is used with the same effect. Generally, zipper clauses should be avoided and not agreed to.

## Superseniority Clause

Under present law, superseniority (a preventative measure or language in your CBA that affords Union officials the opportunity to keep their job, and protects them from bumping, termination or layoff) is provided only to Union representatives who take part in day-to-day grievance processing or who have regular on-the-job contract administration responsibilities (shop steward, grievance committee). The role of the Union officer, not their title, determines if they can take advantage of superseniority clauses.

It is necessary, in arguing for the enforcement of the contract provision, to show how the position furthers the effective administration of the bargaining agreement on the plant level. This can be done by showing the continued need of the steward/officer on the job, when employees are working, including overtime period, and alternative shifts.



## The Grievance Process

Almost all collective bargaining agreements contain a grievance procedure to resolve employee complaints and contract violations. In most instances, stewards investigate, file and present grievances. Most contracts outline several “steps” in the grievance procedure with the last being arbitration.

Employers violate the NLRA when they refuse to discuss grievances or have unreasonable delays in scheduling grievance meetings.

In filing grievances, remember that grievants may not be retaliated against in any way by threat or harassment because of exercising their rights to file a grievance—Unions can be charged under the NLRA for retaliating against a member’s right to grieve just as employers can be charged. Watch for:

- use of harsh language to intimidate
- threats for filing a grievance
- increased penalties
- layoffs for pursuing grievances
- threats for testifying at grievance meeting or arbitration hearing

## Soliciting the Grievance

The NLRB has ruled that “solicitation of grievances is a protected activity for stewards as well as other employees.” Union representatives can honestly encourage or discourage members to file grievances. Unions can file “class” grievances when a violation affects numerous employees or the bargaining unit as a whole.

## Investigating the Grievance

The NLRB does not require employers to allow Union business during working time. Stewards are permitted to investigate grievances or administrate the contract during breaks and other non-work time. In the absence of a published rule prohibiting, the assumption is that the employer tolerates Union activity unless it interferes with production or attains disruptive levels.

Many contracts allow stewards a **reasonable** amount of time during work to conduct Union business. Some have this right by virtue of past practice. If this is the case, any effort by the Company to unilaterally change these rules is an unfair labor practice. The Company must notify the Union and discuss the matter before the change.

# Right to Information

As a Union representative, information requests are allowed:

- When investigating a grievance
- When preparing for a grievance meeting
- When deciding to drop or carry a grievance to the next step
- When deciding whether to arbitrate
- When preparing for arbitration

## **What you can request:**

Accident Records	Material Records
Attendance Records	Notes to File
Bargaining Notes	Payroll Records
Company Memos	Performance Reviews
Contracts	Personnel Files
Correspondence	Photographs
Disciplinary Records	Reports and Studies
Equipment Specifications	Salary and Bonus Records
Evaluations	Security Guard Records
Inspection Records	Seniority Information/Rosters
Insurance Policies/Plan Documents	Supervisor Notes
Interview Notes	Time Study Records
Job Assignment Records	Training Records
Job Descriptions	Video Tapes

These requests should be made in writing and should be as specific as possible in identifying the data required and when you expect the information to be provided to the Union.

Employers must answer pertinent factual questions. They must also assemble relevant data and statistics. Employers are not excused from complying with the request for information because of the size of the Union's request. You cannot request information for the purpose of harassment. Material sought must be relevant to the issue under investigation and timely relevant.

The NLRB has approved the right of Unions to make general requests. For example: "Please supply all documents or records which pertain to the denial of this grievance."

## Disciplinary Grievance

When a grievance deals with disciplinary action (warning, suspension or discharge) a complete copy of the grievant's personnel file should be requested as well as personnel files of other workers disciplined for the same or similar offense in previous years. Also ask for names of workers who committed the same offense and were not disciplined, names of witnesses, and notes made by supervisors concerning each incident.

## Contract Interpretation Cases

The guiding principle of contract interpretation cases is that clear and unambiguous language must be enforced—even though the result may be harsh or not what the parties expected. If there is no ambiguity in the language of the contract, the intent is obvious and must be enforced.

Another clearly adopted guideline: Contract language that is ambiguous should be interpreted against the draftsman. This requires the proponent of language to either explain what is contemplated or to use language that does not leave the matter in doubt.

Contract provisions must be read as a whole. If alternative results are possible, one of which would give meaning and effect to another provision of the contract, while the other would render the other provision meaningless, the arbitrator will use the interpretation that would give effect to all provisions. All words in the contract must have effect.

There are numerous other guidelines that apply to ambiguous language. Arbitrators will interpret language to avoid harsh or absurd results. Dictionaries can be used to give instruction to the meaning of words. General language can be restricted by more specific language on the topic. Negotiations can give light to the intent and meaning of language.

## Past Practice Cases

The standard for establishing "past practice" that has been followed by numerous arbitrators and has become an accepted governing principle is as follows:

1. The practice must be unequivocal;
2. The practice must be clearly enunciated and acted upon; and
3. The practice must be readily ascertainable over a reasonable period of time as fixed and established practice accepted by both parties.



## Health and Safety Grievance

If the grievance involves an unsafe condition, such as chemicals or equipment, request a list of employees impacted by the unsafe condition, the material safety data sheet (MSDS) supplied by the manufacturer, copies of any OSHA citations, and all studies on the effects of the chemical, including medical exams of affected employees. You could also ask permission to bring in an industrial hygienist for the Union to conduct an inspection of the workplace.

Employers try to resist responding to information requests. These are some excuses that the NLRB has denied.

- "Employees already have the information."
- "The request is too large."
- "That information was posted on the Company bulletin board."
- "That grievance is not arbitrable."
- "You can subpoena that information to the arbitration hearing."
- "We won't be discussing that issue at arbitration."
- "Witness statements do not have to be produced."

Employers are sometimes successful with the defense of confidentiality. To use this defense, an employer must have an established personal privacy policy that prohibits disclosure of confidential information and must have consistently abided by this policy. This includes not allowing supervisors/management personnel to see this data. Normally only medical records and aptitude tests have been designated as particularly sensitive/confidential information.

The Union can get around this defense by obtaining written authorization from the employee(s) to release the information in their files to the Union or you can offer to bargain over the confidentiality and to not disclose it to anyone except those necessary to decision process.

## Deadlines for Response to Information Requests

The NLRB does not have established deadlines for answering an information request. Employers are expected to act promptly, but time periods depend on the amount of information requested. For simple requests, such as personnel files, one-two weeks are a reasonable length of time to wait for the information; or an adequate reason for their delay must be provided. If no response is made, you can file an NLRB charge.

# Weingarten Rights

Employees (Union and non-Union) have the right to Union representation during investigatory interviews; that is when the employee is questioned about a matter that could lead to disciplinary action. This has become known as Weingarten rights based on the U.S. Supreme Court decision in 1975. The presence of the Union steward can help the employee in many ways, and Unions should encourage workers to assert this right. Stewards can take an active role in the meeting:

- Help a fearful/inarticulate worker explain the circumstances
- Raise extenuating factors
- Advise a worker against denying everything, giving the appearance of dishonesty and guilt
- Prevent a worker from making incriminating admissions
- Stop an employee from losing his/her temper and possibly being fired for insubordination.
- Serve as a witness to prevent management from giving a biased account of the conversation.

*Remember that this right only applies to investigatory interviews; if the investigation is focused on the employee and the employee reasonably believes that he or she may face disciplinary action. If the employee is just one of many interviewed as the employer investigates a matter, the right to a steward/representative may not apply.*

Investigations of certain matters are red flags for steward representation:

- Absenteeism
- Accidents
- Attitude/work performance
- Damages to Company property
- Drinking/drug use
- Falsification of records
- Fighting
- Insubordination
- Sabotage
- Tardiness
- Theft
- Violation of work rules

## WEINGARTEN RIGHTS

If this discussion could any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my union representative, officer, or steward be present at the meeting. Without representation, I choose not to answer any questions.

## USW

**United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union**

**MY UNION REPRESENTATIVE IS:**

NAME

PHONE NUMBER

# Weingarten Rules

As the result of the Supreme Court decision, the following rules apply during an investigatory interview:

**RULE ONE**      The employee must make a clear request for Union representation before or during the meeting. He/she cannot be punished for this request

**RULE TWO**      The employer has three options after such a request is made:

1. Grant the request and delay the meeting until the Union representative arrives and has a chance to meet privately with the worker;
2. Deny the request and end the meeting immediately;
3. Give the employee the choice of (a) continuing the meeting without representation or (b) ending the meeting.

## Rights of Stewards in the Investigatory Interview

Employers assert that the role of stewards/grievance committee during an investigatory interview is to observe and be a silent witness. The Supreme Court has ruled that the steward may **assist and counsel** workers during the interview. Here are some practical tips:

1. When the steward arrives, management should inform the steward of the nature of the interview (i.e. theft, lateness, drugs, etc.).
2. The steward should be allowed to take the employee aside for a private meeting before the interview begins.
3. The steward is allowed to speak during the interview, but he does not have the right to bargain over the purpose of the meeting.
4. The steward may ask for clarification of questions asked.
5. The steward may give advice on how to answer a question.
6. After the interview, the steward can provide additional information to management.

If the Weingarten rules are complied with, stewards do not have the right to tell employees to give false answers or to not answer at all. Employees can be disciplined if they refuse to answer.

## Duty of Fair Representation

Union representatives are obligated by law to represent all employees in the bargaining unit equally, despite Union membership. An employee who does not receive fair representation can file ULP charges against the Union. Employees can also file a lawsuit against the Union in federal or state court. This duty applies to contract administration as well as collective bargaining negotiations.

Most DFR violations occur during the grievance process, because of superficial handling and can include:

- Failing to file the grievance
- Failing to investigate the grievance
- Withdrawing a grievance
- Settling a grievance
- Failure to take a grievance to arbitration
- Failure to prepare for arbitration

Generally, an employee who is not satisfied with the local Union's conduct must prove more than poor performance or mistakes, not whether the decision was right or wrong. Even slight evidence of racial or sexual discrimination is likely to be recognized and reprimanded by the NLRB. The Union cannot act arbitrarily, discriminatorily or in bad faith. Additional examples of conduct that violates the DFR are:

- Failure, without good reason, to file a grievance for an employee
- Refusal to process a grievance because the employee is not a dues-paying member of the Union
- Refusal to seek arbitration because the discharged employee is a Union dissident
- Failure to arbitrate legitimate grievances of female employees alleging sexual harassment

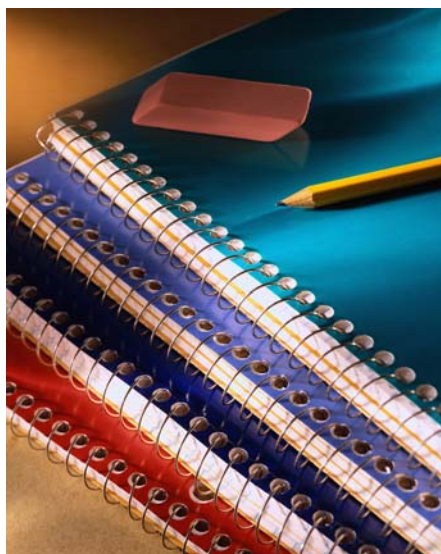
Negligence on the part of the Union does not equal a violation of the duty of fair representation nor is poor judgment or ineptitude.

## Union Liability

Few DFR charges against Unions are successful; those that are can be costly to the Union. For example, the Union can be held responsible for attorney fees and sometimes part of the back pay, if a court determines that an arbitrator would have reinstated the employee, and the Union had performed its duty properly. The employer would only be responsible for the period from the discharge to the arbitration date.

# Avoiding DFR Charges

- When a complaint is made by an employee, conduct a full investigation. Interview the grievant and all witnesses. Ask for files, documents and other relevant information. Simply accepting Company information without an investigation can open the Union to liability.
- Keep detailed records.
- Do not refuse to file a grievance because of an employee's sex, race, nationality, age, religion, politics, personality or membership status. Even if you consider the grievant to be a destructive force in the Union, s/he must be represented.
- Keep the employee informed about the progress of the grievance and step meetings. If the Union (or servicing representative) decides not to take the grievance to arbitration, explain the reasons to the grievant and record notes of this conversation. Follow any procedures set forth in your local by-laws with regard to arbitration, voting, etc.
- Prepare thoroughly for all arbitration and grievance step meetings. Meet in advance and discuss this preparation and what can be expected at the step meetings. Prepare for testimony of the grievant and witnesses for the arbitration hearing <sup>2</sup>.



<sup>2</sup> The International Union offers a more intensive arbitration class for local unions. A specific course for local Union stewards and grievance committee members is also available. Contact your staff representative regarding such training.

## Other Laws<sup>3</sup>

### Bankruptcy

A bankruptcy case is started by the Company filing a “petition.” There are several types of cases. The Union is generally concerned with Chapter 7 – Liquidation, and Chapter 11, Reorganization.

In Chapter 7 cases, the assets of the Company (debtor) are sold or liquidated, and the proceeds are distributed to the creditors. A trustee named by the Court performs the liquidation. Chapter 11 cases are designed to give the Company (debtor) certain relief from its creditors and an opportunity in the future to restructure the business in an attempt to become profitable through a plan of reorganization.

In a Chapter 7 case, the collective bargaining agreement will be rejected thirty days after the petition is filed unless a motion (to assume) is filed. Typically, because of the nature of the Chapter 7 **liquidation**, there is no assumption of the agreement. In Chapter 11 **reorganization** cases, the bankruptcy law also requires that the Company bargain over changes in the collective bargaining agreement before it can ask the bankruptcy court to reject or modify the agreement. There is a specific provision in the code that sets out the procedure for this rejection/modification and it must be necessary to the reorganization of the Company. The Bankruptcy Court can reject the collective bargaining agreement only for cause. Bankruptcy procedures can also affect pension and other health and welfare plans.

The procedures in bankruptcy affecting the rights of employees and the Union are very complicated. In any case where a bankruptcy is filed, and you receive notice of employer's petition for bankruptcy, you should immediately contact your international staff representative. There are deadlines, investigation and documents which will probably need to be handled through the International's legal department.

### Family and Medical Leave Act (FMLA) (see Flowchart, Appendix 3)

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year – with continued group health insurance coverage – for specified family and medical reasons. Employees are eligible for these FMLA protections only if they work for a covered employer, and: (1) have worked for their employer for at least 12 months, (2) have worked at least 1,250 hours during the 12 months immediately preceding the start of leave, and (3) work at a worksite where the employer employs at least 50 employees at the site or within 75 miles of the site.

FMLA leave may be taken all at once or may be taken intermittently or on a reduced leave schedule when medically necessary for the employee's own serious health condition, or when the employee is needed to care for a spouse, child, or parent with a serious health condition. It does not take away from any rights or benefits already negotiated in your collective bargaining agreement. There are posting requirements under the FMLA, notice with regard to the employer's responsibilities and the employee's rights and responsibilities.

<sup>3</sup> The International, Education and Membership Development Department and Legal Department, offer specific courses in FMLA, ADA, Sexual Harassment and other Civil Rights Laws.

Collective bargaining agreements often offer greater benefits to employees than the basic protections provided by labor laws, such as the FMLA. Enforcement can be through the grievance/arbitration procedure, the Department of Labor, or by suit in court. Binding arbitration featured in collective bargaining agreements often can resolve employment problems more quickly and informally than investigating and litigating a FMLA complaint. If arbitration fails to resolve sufficiently a valid FMLA complaint, then the Division may accept the complaint for investigation. In August 2002, the Department of Labor issued a memorandum outlining its position that Department and the Wage and Hour Division should defer to arbitration agreements based upon certain guiding principles. Some of the factors considered in deciding whether to defer to arbitration include: whether the arbitration agreement covers the same statutory claims; whether the complaint involves an individual claim for relief; and, whether a complaint can be efficiently and expeditiously arbitrated.

## Americans with Disabilities Act (ADA) (see Flowchart, Appendix 4)

The ADA prohibits private employers, state and local governments, employment agencies and labor Unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations.

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without **reasonable accommodation**, can perform the essential functions of the job in question.

Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee as long as it does not impose an "undue hardship" on the operation of the employer's business. "Undue hardship" is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

An employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids. The requirements of the ADA cannot override a seniority system. No additional language is required in your CBA to cover this – the employer is bound by the law. Do not allow your employers to circumvent your CBA with any proposed language.

The intent of the ADA is to protect disabled individuals by requiring that employers and Unions (as employers) make reasonable accommodations that allow disabled individuals to remain in, return to, or join the workforce. It is not an affirmative action law and does not provide superseniority of any kind. An employer may not violate your CBA in order to place a disabled person into a position. All parties should do everything reasonable and possible to see that our disabled Union brothers and sisters remain a working and viable part of our community.

## **Worker Adjustment and Retaining Notification Act (WARN) (see Fact Sheet, Appendix 5)**

Passed in 1988, this Act provides protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. According to the statute, advance notice provides workers and their families time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow the workers to successfully compete in the job market. WARN also provides for notice to State dislocated worker units so that dislocated worker assistance can be promptly provided.

Employers must have 100 or more employees (including salaried, clerical and other non-bargaining unit). It is enforced through lawsuits for damages on behalf of affected workers and local governments. Workers in most states now have a year or more to file for back pay when their Company fails to give the required 60-day notice of plant closing or mass layoff.

The Department of Labor has developed regulations that interpret the legal requirements of the law. The regulations require that notice be given to the representative of employees if they belong to a Union. Specifically, written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local Union(s) representing affected employees, it is recommended that a copy also given to the local Union official(s).

The act sets forth three conditions under which the notification period may be reduced to less than 60 days. The employer bears the burden of proof that conditions for the exceptions have been met. If one of the exceptions is applicable, the employer must give as much notice as is practicable to the Union, non-represented employees, the State dislocated worker unit, and the unit of local government. The exceptions to 60-day notice are:

- (1) **Faltering Company.** This exception, to be narrowly construed, covers situations where a Company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to



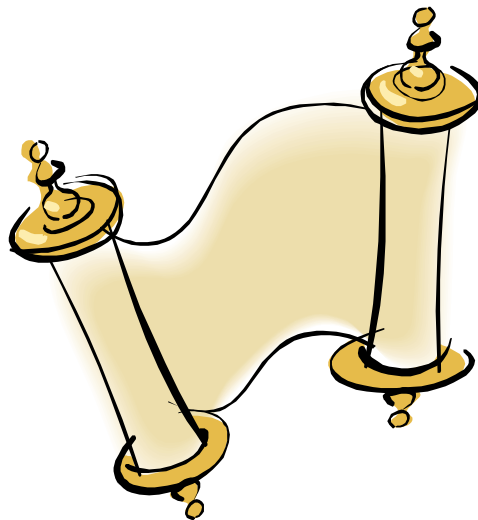
Since the notice goes directly to the Union, when received, you should immediately contact your staff representative. In turn, notice must also be given by the Union to all members of the bargaining unit. Effects bargaining should be requested immediately. Workers, or their representatives, and units of local government may bring individual or class action suits. United States District Courts enforce WARN requirements. The Court may allow reasonable attorney's fees as part of any final judgment.

A detailed workers' guide is available online at the Department of Labor's website, <http://www.doleta.gov/layoff/warn.cfm>.

## Uniformed Services Employment and Reemployment Rights Act (USERRA)

This Act, passed in 1994, protects service members' reemployment rights when returning from a period of service in the uniformed services, including those called up from the reserves or National Guard. The Act further prohibits employer discrimination based on military service or obligation. The U.S. Department of Labor's (DOL) Veterans' Employment and Training Service (VETS) administers USERRA.

An employee making a discrimination claim under USERRA must show that the employee's military service was 'a substantial or motivating factor' in the adverse employment action.



## Additional Resources

The Department of Labor has developed regulations that interpret the legal requirements of the law. The regulations require that notice be given to the representative of employees if they belong to a Union. Specifically, written notice is to be served upon the chief elected officer of the exclusive representative(s) or bargaining agent(s) of affected employees at the time of the notice. If this person is not the same as the officer of the local Union(s) representing affected employees, it is recommended that a copy also be given to the local Union official(s).



# Appendix 1

# The National Labor Relations Board and YOU

Representation Cases



*This pamphlet contains a general explanation of what the National Labor Relations Board (NLRB) is and what it does concerning the processing of representation petitions. For future information, contact the nearest NLRB office and ask to speak with the Information Officer.*

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## **What is the National Labor Relations Board?**

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We are an independent Federal agency established to enforce the National Labor Relations Act (NLRA). As an independent agency, we are not part of any other government agency—such as the Department of Labor.

Congress has empowered the NLRB to conduct secret-ballot elections so employees may exercise a free choice whether a union should represent them for bargaining purposes. A secret-ballot election will be conducted only when a petition requesting an election is filed. Such a petition should be filed with the Regional Office in the area where the unit of employees is located. All Regional Offices have petition forms that are available on request and without cost.

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## **Types of Petitions**

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### ***1) Certification of Representative (RC)***

This petition, which is normally filed by a union, seeks an election to determine whether employees wish to be represented by a union. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit being sought. These signatures may be on paper. Generally, this designation or “showing of

interest" contains a statement that the employees want to be represented for collective-bargaining purposes by a specific labor organization. The showing of interest must be signed by each employee and each employee's signature must be dated.

2) *Decertification (RD)*

This petition, which can be filed by an individual, seeks an election to determine whether the authority of a union to act as a bargaining representative of employees should continue. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit represented by the union. These signatures may be on separate cards or on a single piece of paper. Generally, this showing of interest contains a statement that the employees do not wish to be represented for collective-bargaining purposes by the existing labor organization. The showing of interest must be signed by each employee and each employee's signature must be dated.

3) *Withdrawal of Union-Security Authority (UD)*

This petition, which can also be filed by an individual, seeks an election to determine whether to continue the union's contractual authority to require that employees make certain lawful payments to the union in order to retain their jobs. It must be supported by the signatures of 30 percent or more of the employees in the bargaining unit covered by the union security agreement. These signatures may be on separate cards or on a single piece of paper. Generally, this showing of interest states that the employees no longer want their collective-bargaining agreement to contain a union-security provision. The showing of interest must be signed by each employee and each employee's signature must be dated.

4) *Employer Petition (RM)*

This petition is filed by an employer for an election when one or more unions claim to represent the employer's employees or when the employer has reasonable grounds for believing that the union, which is the current collective bargaining representative,

no longer represents a majority of employees. In the latter case, the petition must be supported by the evidence or "objective considerations" relied on by the employer for believing that the union no longer represents a majority of its employees.

*5) Unit Clarification (UC)*

This petition seeks to clarify the scope of an existing bargaining unit by, for example, determining whether a new classification is properly a part of that unit. The petition may be filed by either the employer or the union.

*6) Amendment of Certification (AC)*

This petition seeks the amendment of an outstanding certification of a union to reflect changed circumstances, such as changes in the name or affiliation of the union. This petition may be filed by a union or an employer.

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## **What is a Bargaining Unit?**

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A bargaining unit is a group of two or more employees who share a "community of interest" and may reasonably be grouped together for collective-bargaining purposes. The NLRB is responsible for ensuring that any election in a representation case is conducted in an appropriate unit. A unit is usually described by the type of work done or job classification of employees—for example, production and maintenance employees or truckdrivers. In some cases, the number of facilities to be included in a bargaining unit is at issue, and a unit may be described by the number of locations to be involved. For example, in the retail industry, the NLRB may need to determine whether employees at a single or whether a bargaining unit consisting of several stores is appropriate. Generally, the appropriateness of a bargaining unit is determined on the basis of the community of interest of the employees involved. The NLRB may also consider factors such as any history of collective bargaining and the desires of the affected employees.

If you file a decertification petition (RD) or petition for the withdrawal of union-security authority (UD), the bargaining unit in which any election is conducted will be the same as the unit that is certified or recognized. You should check your contract for a description of the existing bargaining unit in these cases.

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### **Workers Excluded from NLRA Coverage**

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The NLRA does not include coverage for all workers. The Act specifically excludes from its coverage individuals who are:

- employed as agricultural laborers
- employed in the domestic service of any person or family in a home
- employed by a parent or spouse
- employed as an independent contractor
- employed as a supervisor
- employed by an employer subject to the Railway Labor Act, such as railroads and airlines
- employed by Federal, state, or local government
- employed by any other person who is not an employer as defined in the NLRA

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### **NLRB's Jurisdiction**

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In addition, the NLRB has established standards for determining whether it will exercise its juris-



diction over an employer. These jurisdictional standards are based on the volume and nature of business done by an employer, and vary by industry.

For example, the NLRB asserts jurisdiction over employers in the retail business, which have an annual volume of business of at least \$500,000 and which receive or send merchandise across state lines.

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### **When Can A Petition Be Filed?**

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The NLRB has established certain rules relating to the filing of petitions affecting employees who are covered by an existing contract. Generally, under these "contract-bar" rules, a valid contract for a fixed period of 3 years or less will bar an election for the period covered by the contract. However, in such situations, a petition filed more than 60 days but not more than 90 days before the end of the contract will be accepted and may bring about an election. These time periods for filing petitions involving health care institutions are more than 90 days but not more than 120 days before the end of the contract.

In addition, the NLRB will not hold a representation election in any collective-bargaining unit in which a valid election has been held during the preceding 12 months. This rule does not apply, however, to a withdrawal of union-security (UD) election conducted within 12 months of a representation election (RC, RM, RD), or to a representation election conducted within 12 months of a withdrawal of union security election.

If an election is held and a union is certified by the NLRB, that certification is normally binding for 1 year and a petition for another election in the same unit will be dismissed if filed during the 1-year period after the NLRB's certification.

## **What Can You Expect, If You File a Petition?**

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The Information Officer in the NLRB Regional Office nearest you can answer your questions regarding representation petitions and can assist you in completing the petition forms.

If you file a petition, you should be prepared to tell us the name and address of the employer and any labor organization(s) involved. In addition, you must describe the bargaining unit that is the subject of the petition, and the approximate number of employees in the unit. You also will need to tell us whether there is a labor organization that represents you, any other interested labor organization, or any collective-bargaining agreements in effect. If available, you should provide a copy of any current contract between the employer and the union.

You will need to state your current address on the petition form as well as sign it. A copy of the petition will be served on all parties involved.

The showing of interest in support of an RC, RD, or UD petition or the objective considerations in support of an RM petition (whichever is applicable) must be filed with the petition, or within 48 hours after its filing and, when RC and RD petitions are involved, no later than the last day on which the petition might timely be filed. If such proof is not timely submitted, or if the NLRB considers the showing of interest or objective considerations to be insufficient, the petition is subject to dismissal.

After the petition is filed, the case will be assigned to an NLRB agent for processing. If the Region determines that the petition should be processed further, the agent will attempt to secure agreement of the parties regarding the appropriate unit and the eligibility of voters as well as the date, time, and place of the election.

If all parties reach an agreement that is approved by a Regional Director, an election will be

conducted. If agreement cannot be reached, a representation hearing will be conducted before an NLRB Hearing Officer. All parties will have the opportunity to appear and present evidence about the issues in dispute. After the hearing closes, a Regional Director's or Board decision will issue in which an election will be ordered or the petition will be dismissed. Exceptions to a Regional Director's decision can be filed by any party with the NLRB in Washington, D.C.

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### **NLRB Offices**

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Our office addresses are located in the telephone directory under the United States Government-National Labor Relations Board.

The address and phone number of the office closest to you is:

1. Section 8 Unfair Labor Practices (C Cases)						
Charge Against Employer	Charge Against Labor Organizations					Charge Against Labor Organization And Employer
CA Case	CB Cases	CP Case	CC Case	CD Case	CG Case	CE Cases
8(a)(1) Interfere with, restrain, or coerce employees in exercise of their rights under Sec. 7 (to join or assist a labor organization or to refrain).	8(b)(1)(A) Restrain or coerce employees in exercise of their rights under Section 7 (to join or assist a labor organization or to refrain).	8(b)(7) To picket, cause, or threaten the picketing of any employer where an object is to force or require an employer to recognize or bargain with a labor organization as the representative of his employees, or to force or require the employees of an employer to select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:	8(b)(4)(i) To engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods or to perform any services; or (ii) to threaten, coerce or strain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:		8(g) To fail to provide any health care institution and the Federal Mediation and Conciliation Service with at least ten days' written notice before engaging in any strike, picketing, or other concerted refusal to work at the health care institution. Special notice requirements apply in cases where the parties are negotiating their initial agreement following certification for recognition.	8(e) To enter into any contract or agreement (any labor organization and any employer) whereby such employer ceases or refrains or agrees to cease from handling or dealing in any produce of any other employer, or to cease doing business with any other person.
8(a)(2) Dominate or interfere with the formation or administration of a labor organization or contribute financial or other support to it.	8(b)(1)(B) Restrain or coerce an employer in the selection of its representatives for collective bargaining or adjustment of grievances.	(A) where the employer has lawfully recognized any other labor organization and a question concerning representation may not appropriately be raised under Section 9 (c ).	(A) To force or require any employer or self-employed person to join any labor or employer organization or to enter into any agreement prohibited by Sec. 8(e).	(C ) To force or require any employer to recognize or bargain with a particular labor organization as the representative of its employees if another labor organization has been certified as the representative.		
8(a)(3) Encourage or discourage membership in a labor organization (discrimination in regard to hire or tenure).	8(b)(2) Cause or attempt to cause an employer to discriminate against an employee.	(B) where within the preceding 12 months a valid election under 9 (c ) has been conducted or C ) where picketing has been conducted without a petition under 9(c ) being filed within a reasonable period of time not to exceed 30 days from the commencement of such picketing.	(B) To force or require any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or cease doing business with any other person, or force or require any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been so certified	(D) To force or require any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another trade, craft, or class, unless such employer is failing to conform to an appropriate Board order or certification.		
8(a)(4) Discourage or otherwise discriminate against an employee because he has given testimony under this Act.	8(b)(3) Refuse to bargain collectively.					
8(a)(5) Refuse to bargain collectively with representatives of its employees	8(b)(5) Require of employees the payment of excessive or discriminatory fees for membership.  8(b)(6) Cause or attempt to cause an employer to pay or agree to pay money or other thing of value for services which are not performed or not to be performed.					

# Appendix 2

# The National Labor Relations Board and YOU

Unfair Labor Practices



*This pamphlet contains a general explanation of what the National Labor Relations Board is and what it does with respect to the processing of unfair labor practice charges. Although the pamphlet cannot provide answers to all questions, it does contain useful information which will be helpful to you.*

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### **What is the National Labor Relations Board?**

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We are an independent federal agency established to enforce the National Labor Relations Act (NLRA).

As an independent agency, we are not part of any other government Agency—such as the Department of Labor.

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### **What Are Your Rights As An Employee Under the NLRA?**

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Examples of Your Rights As An Employee Under the NLRA Are:

Forming, or attempting to form, a union among the employees of your employer.

Joining a union whether the union is recognized by your employer or not.

Assisting a union in organizing your fellow employees.

Engaging in protected concerted activities. Generally, "protected concerted activity" is group activity which seeks to modify wages or working conditions.

Refusing to do any or all of these things. However, the union and employer, in a State where such agreements are permitted, may enter into a lawful union-security clause requiring employees to join the union.

The NLRA forbids employers from interfering with, restraining, or coercing employees in the exercise of rights relating to organizing, forming, joining or assisting a labor organization for collective bargaining purposes, or engaging in concerted activities, or refraining from any such activity. Similarly, labor organizations may not restrain or coerce employees in the exercise of these rights.

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### **Examples of Employer Conduct Which Violate the NLRA Are:**

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Threatening employees with loss of jobs or benefits if they join or vote for a union or engage in protected concerted activity.

Threatening to close the plant if employees select a union to represent them.

Questioning employees about their union sympathies or activities in circumstances that tend to interfere with, restrain or coerce employees in the exercise of their rights under the Act.

Promising benefits to employees to discourage their union support.

Transferring, laying off, terminating or assigning employees more difficult work tasks because they engaged in union or protected concerted activity.



### **Examples of Union Conduct Which Violate the NLRA Are:**

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Threats to employees that they will lose their jobs unless they support the union's activities.

Refusing to process a grievance because an employee has criticized union officers.

Fining employees who have validly resigned from the union for engaging in protected activity following their resignation.

Seeking the discharge of an employee for not complying with a union shop agreement, when the employee has paid or offered to pay a lawful initiation fee and periodic dues.

Refusing referral or giving preference in a hiring hall on the basis of race or union activities.



## **What We Do Not Do . . .**

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We do not enforce—

Various federal laws within the jurisdiction of the Department of Labor. For example:

- Fair Labor Standards Act
- Wage Garnishment Provisions of Various Statutes
- Public Contracts Act
- Service Contract Act
- Davis-Bacon and Related Acts
- Contract Work Hours and Safety Standards Act.

Various state laws relating to employment. For example:

- Unemployment Compensation Statutes
- Workman's Compensation Statutes
- Equal Employment Statutes.

Various statutes within the jurisdiction of the Equal Employment Opportunity Commission.

IF YOU HAVE ANY QUESTION ABOUT THE RELATIONSHIP OF THESE LAWS TO OUR AGENCY OR THE APPLICATION OF OUR LAW TO YOUR SITUATION, PLEASE SEE THE INFORMATION OFFICER.

## **Are You Excluded From the NLRA's Coverage?**

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The NLRA specifically excludes from its coverage individuals who are:

employed as agricultural laborers.

employed in the domestic service of any person or family in a home.

employed by a parent or spouse.

employed as an independent contractor.

employed as a supervisor.

employed by an employer subject to the Railway Labor Act.

employed by a Federal, State or local government.

employed by any other person who is not an employer as defined in the NLRA.

IF YOU HAVE ANY QUESTION ABOUT WHETHER YOU ARE EXCLUDED FROM THE NLRA's COVERAGE, PLEASE SEE THE INFORMATION OFFICER.

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## **When Do We Take Action?**

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If you have any question regarding your work situation that you would like to discuss with this Agency, our Information Officer will be happy to speak with you. The Information Officer is a professional who is experienced in the investigation of unfair labor practice charges. The Information Officer can be contacted by phone, mail or in person to discuss the question which you wish to

present to the Agency. The Information Officer can provide you with information which will assist you in deciding whether or not to file an unfair labor practice charge.

If you wish to file a charge, we can provide you with the appropriate forms and assistance in completing these forms.

You should be aware that the Act provides that allegations of unfair labor practice violations must be filed and served within 6 months of the occurrence of the conduct alleged as violative.

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### **What Can You Expect, If You File a Charge?**

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If you file a charge, you should be prepared to tell us the name and address of the employer or union against whom you are filing the charge. In addition, you must tell us the nature of your complaint. You will be required to state your current address on the charge form as well as sign the charge.

A copy of the charge will be served upon the employer or union against whom you are complaining.

After the charge is filed, we will receive your evidence in support of the charge. Receipt of your evidence, including sworn statements, may occur at the time you file the charge. If this does not happen, an NLRB agent will contact you shortly after the charge is filed for the purpose of receiving your evidence in support of the charge.

If sufficient evidence is revealed to warrant the continuation of the investigation, the Board agent assigned to your case will contact other witnesses who possess relevant information and the charged union or employer.

Following the investigation of this matter, a review of the evidence will be made. If it appears that no violation of the NLRA has taken place, the Board agent will ask you to withdraw the charge. If you decide not to withdraw, the Regional Office will dismiss your charge. You will then have the opportunity, if you desire, to appeal the Region's dismissal to the Office of Appeals in Washington, D.C.

If after reviewing the evidence it appears that a violation has occurred, the charged employer or union will be asked to remedy the violation. If the charged party refuses to voluntarily remedy the matter, a formal complaint will issue against the charged party and the case will be set for a hearing before an Administrative Law Judge. During the hearing evidence will be presented concerning the allegations of the complaint. The hearing before the Administrative Law Judge and its possible review by the Board or U.S. Courts will determine what, if any, remedy you may receive as a result of your charge.

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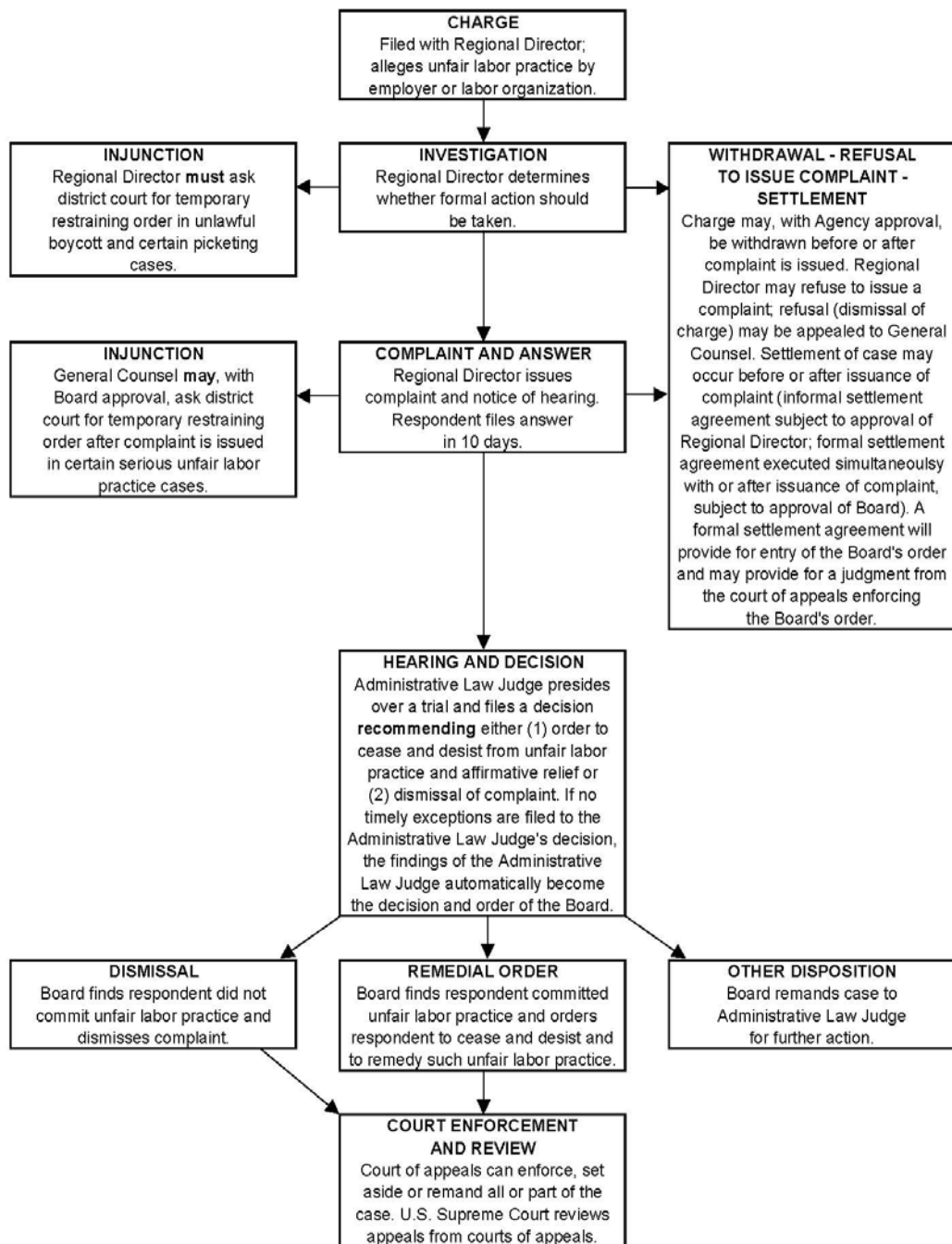
### **NLRB Offices:**

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Our office addresses are located in the telephone directory under the United States Government, National Labor Relations Board.

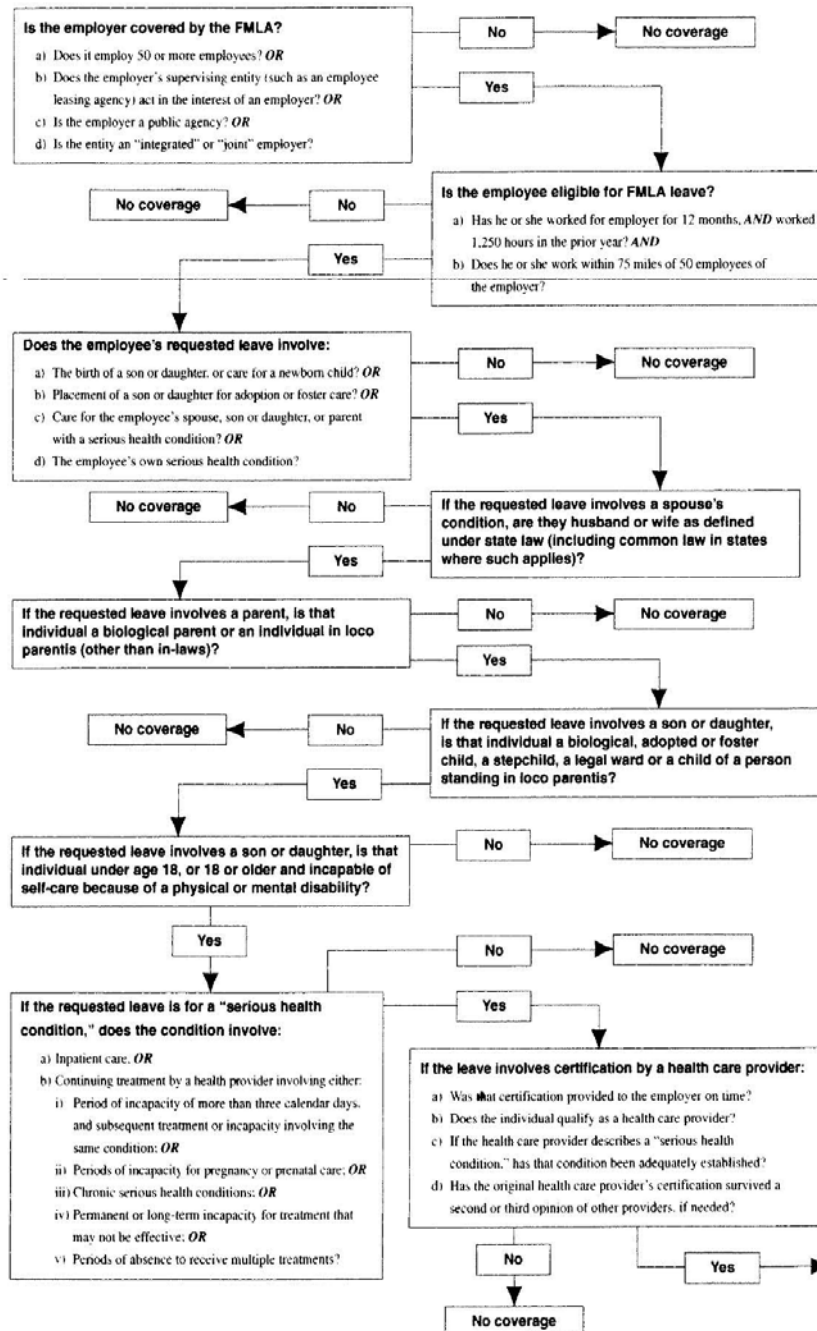
The address and phone number of the office closest to you is:

NATIONAL LABOR RELATIONS BOARD EXHIBIT B  
BASIC PROCEDURES IN CASES INVOLVING CHARGES OF UNFAIR LABOR PRACTICES

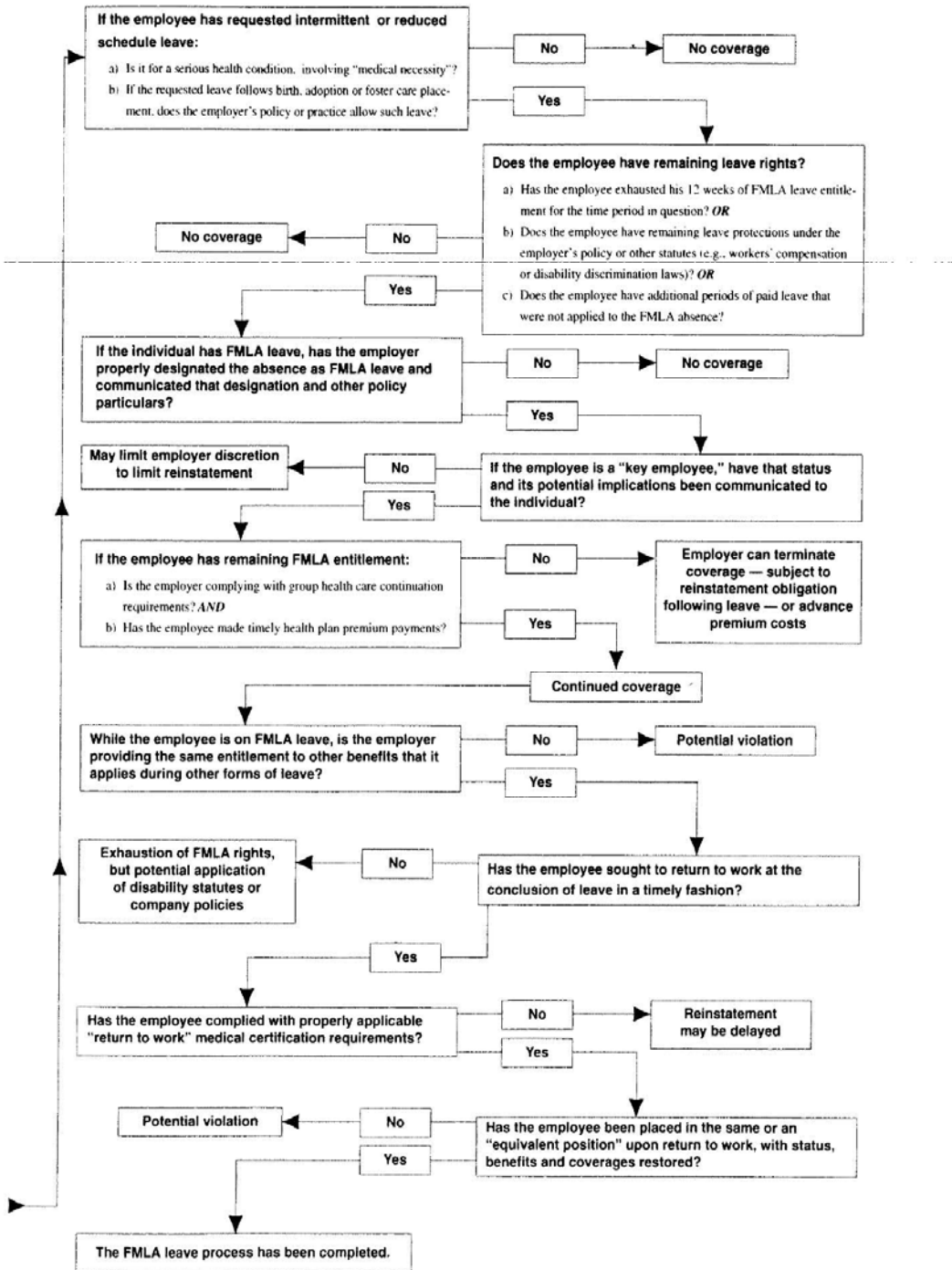


# Appendix 3

Fig. 105-A  
Decision-Making Flowchart



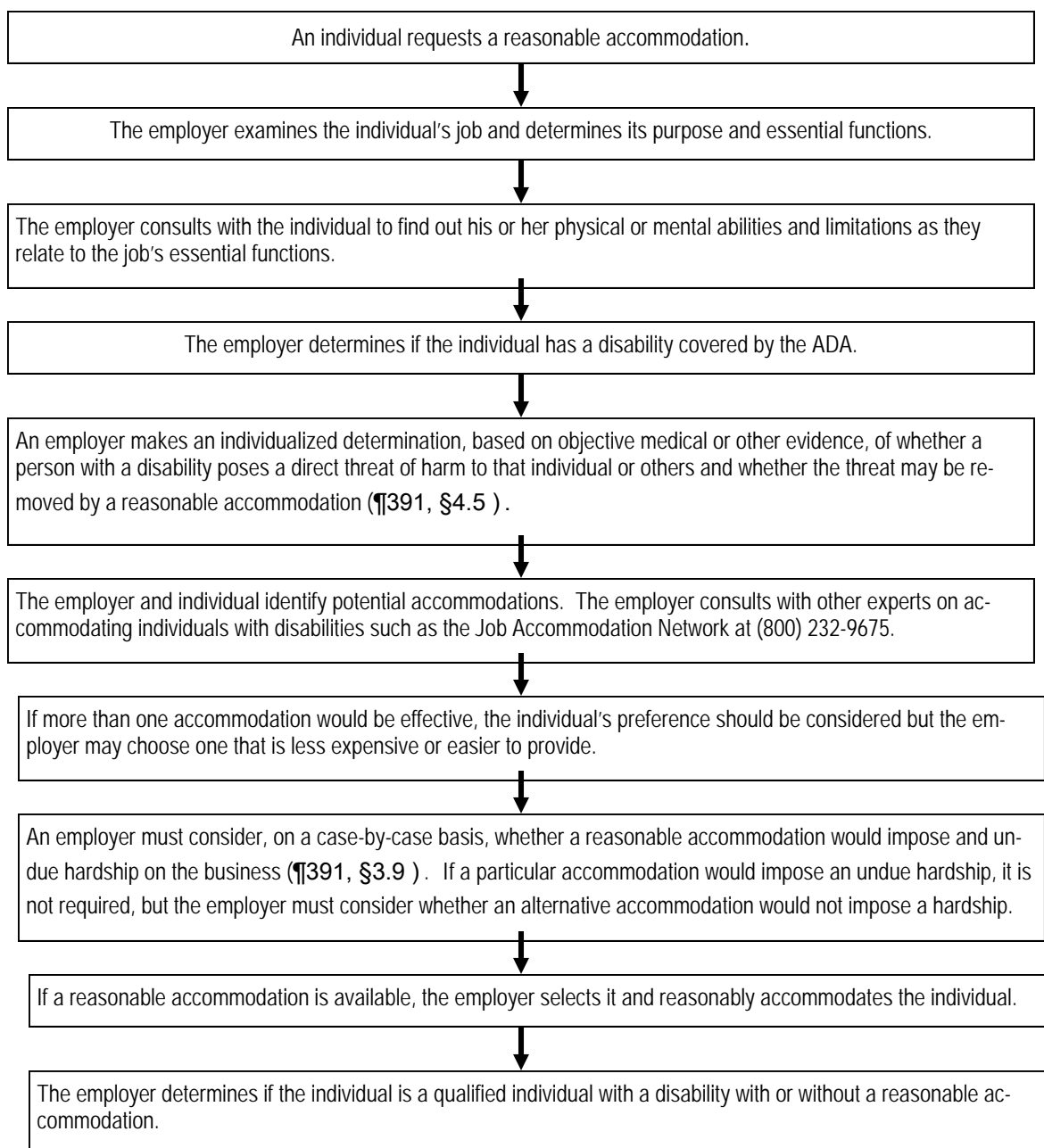




# Appendix 4

## FLOW CHART OF REASONABLE ACCOMMODATION PROCESS

This flow chart outlines the reasonable accommodation process, which as defined by the EEOC in ¶391, §3.8 consists of (1) determining a job's essential functions; (2) consulting with the individual with a disability to determine his or her abilities and limitations; (3) identifying possible accommodations in consultation with the individual; and (4) selecting the best accommodation. This chart includes points made in the EEOC's discussion of the process and provides additional points to consider when trying to identify a reasonable accommodation.



# Americans with Disabilities Act Quiz

## True or False

1. Employers with ten (10) or more employees are covered under the ADA. **True or False**
2. The ADA only prohibits discrimination firing and advancement. It does not apply to job application and hiring procedures. **True or False**
3. An employer does not have to give preference to a qualified applicant with a disability over other applicants. **True or False**
4. An employer may require a job applicant to take a medical examination before making a job offer. **True or False**
5. An employer may be required to lower quality or quantity standards as a reasonable accommodation. **True or False**
6. If an individual with a disability does not request an accommodation, then the employer is not obligated to provide one. **True or False**
7. An employer must immediately modify existing facilities to make them accessible. **True or False**
8. An employee tells his/her supervisor that he/she would like a new chair because his/her present one is uncomfortable. This is insufficient to put the employer on notice that he/she is requesting a reasonable accommodation. **True or False**
9. Requests for reasonable accommodation must be in writing? **True or False**
10. An employer is required to provide reasonable accommodation that the individual wants. **True or False**
11. An employer must notify an employee with a disability about all vacant positions? **True or False**
12. An employer is seeking a reassignment for an employee with a disability. There are no vacant positions today, but the employer has just learned that an employee in an equivalent position plans to retire in six months. Although the employer knows that the employee with a disability is qualified for this position, the employer does not have to offer this position to him/her because six months is beyond a "reasonable amount of time." **True or False**
13. An employer is not required to withhold discipline or termination of an employee who, because of a disability, violated a conduct rule that is job-related for the position in question and consistent with necessity. **True or False**

14. An employer is relieved of its obligation to provide reasonable accommodation for an employee with a disability who fails to take medication, to obtain medical treatment, or to use an assistive device (such as a hearing aid). **True or False**
15. An employer must provide a reasonable accommodation that is needed because of the side effects of medication or treatment related to the disability, or because of symptoms or other medical conditions resulting from the underlying disability. **True or False**
16. An employer may tell employees that an individual is receiving a reasonable accommodation when employees ask questions about a coworker with a disability. **True or False**
17. An employer must modify the work hours of an employee with a disability as a reasonable accommodation, even if doing so would prevent other employees from performing their jobs. **True or False**
18. A cost-benefit analysis is used to determine whether a reasonable accommodation will cause an undue hardship. **True or False**
19. An employer may not claim that a reasonable accommodation imposes an undue hardship simply because it violates a collective bargaining agreement. **True or False**
20. Reassignment means that the employee is permitted to compete for the vacant position. **True or False**



# Case Scenarios and Possible Reasonable Accommodations

1. An employee with a psychiatric disability informs the Employer of this condition. The employee has frequently shown up to work late or been groggy on the job due to the medication he is taking. The employee controls heavy machinery. The employee, a union member, asks you, a shop steward, to represent him in determining what reasonable accommodations should be provided. What reasonable accommodations would you suggest to the Employer?
2. Assume the same scenario as above, but now the employee asks to be moved to a different shift that requires more seniority under the collective bargaining agreement?
3. A 56-year old production bottling line employee suffered a disabling back injury while working as a canister washer, which resulted in limited pushing and pulling capacity and inability to repetitively twist and bend. As a canister washer, the employee needs to constantly bend and twist and lift used canisters into the wash as well as remove the clean canisters and place them on a pallet. What reasonable accommodations would you suggest to the Employer to allow this individual to keep his job as a canister washer?
4. A 31-year old maintenance mechanic sustained an injury to his back requiring surgery. The injury limited his push/pull (torquing) capacity to 100 pounds. As a maintenance mechanic, the worker services Hysters and front loaders at a log and pile treating yard. The job requires pulling or torquing on wrenches with force exceeding 100 pounds. What reasonable accommodations would you suggest to the Employer to allow this individual to keep his job?
5. A 31-year old cemetery worker sustained an injury to his lower back. The injury resulted in lifting and carrying restrictions of 50 pounds and an inability to tolerate significant equipment vibrations. The Employer has a backhoe, which this employee has often operated. This employee spends approximately 1/3 of his day opening grave sites using a 90 pound jackhammer, and the rest of his work day operating the backhoe. What reasonable accommodations would you suggest to the employer to allow the employee to keep his job?
6. A 32-year old truck driver/plant mechanic sustained an injury to his back resulting from an on-the-job automobile accident. The injury limited his lifting and carrying ability to 100 pounds. In the past he has driven tank trucks to a distribution center and manually offloaded 55-gallon drums of petroleum products, stacked two high, that weigh in excess of 500 pounds. What reasonable accommodations would you suggest to the Employer to allow him/her to keep his job?
7. A 44-year old warehouseman sustained a lower back injury resulting in an inability to perform repetitive bending. His job involves unloading of cartons from a 27 inch high conveyor system to a pallet at floor level. What reasonable accommodations would you suggest to the Employer to allow him to keep his job?

## Does this person have a disability under ADA?

1. A 55-year old supermarket employee with a sixth grade education injured his back on the job twice. He was diagnosed with a herniated vertebral disc. When he returned to work after each injury, his doctor restricted him from lifting objects weighing more than 50 pounds and from carrying objects weighing more than 25 pounds. He had worked as a meatcutter for 35 years for the Employer. The job requires the occasional lifting of meat weighing more than 50 pounds.
2. An applicant for a truck driving position with monocular vision obtained a waiver of applicable Department of Transportation (DOT) vision standards by demonstrating a good recent driving record, stable vision, and vision in one eye correctable to 20/40. Vision in the other eye 20/200 and not correctable. He has adapted to having vision in one eye.
3. A truck mechanic with high blood pressure was discharged after the nurse reviewed his file and noted that his blood pressure was 186/124. The position of truck mechanic required the issuance of a DOT health card because some driving was required. His doctor testified that he functions normally in everyday activities when he takes his medication.
4. A power plant worker suffered breathing problems after chemical exposure. She was hospitalized and diagnosed with "chemical bronchitis." She then experienced numerous allergic reactions from exposure to cleaning chemicals, diesel fumes, paint fumes, and smoke. The employee's allergist said that she should consider working at home. She was discharged because the company doctor said there was no position at the company that would accommodate her.
5. A worker was fired while undergoing chemotherapy treatments for a cancerous growth on his shoulder. His doctor said he was able to continue with his normal activities and that the treatments were performed on an out-patient basis.
6. A warehouse worker with carpal tunnel syndrome had a 10 pound lifting limit. She lived in an area where physically demanding jobs "are an economic mainstay."
7. An assembly worker had a spastic colon and needed numerous daily bathroom breaks. She was discharged.
8. An expeditor at a welding and steel fabrication plant had a bad heart, requiring a pacemaker. He was medically restricted from working near welding equipment or power lines.
9. A forklift driver has a history of illegal drug use problems, but he has been in an EAP and has not used illegal drugs for 2 years. On September 18, 2000, he smokes a joint in the presence of his Employer's undercover investigator, who promptly reports this incident to the Employer.
10. An employee with a long history of absenteeism suffers an appendicitis attack on the job, and an ambulance has to take him to the hospital for an emergency appendectomy. Under his Employer's "no-fault" absenteeism policy, this absence puts him "over the limit," and he is terminated.

# Appendix 5



# The WARN Act

Requires an employer to give a 60-day notice of plant closing or mass layoff by written notice.

The notice must go to each representative of affected employees, or if no representative, to each employee.

## Analyzing the case—Questions to Ask:

1. Is the Company large enough to meet the definition of “employer”?

Any business enterprise that employs: 100+employees, excluding part-time or 100+ employees, who in the aggregate, work at least 4,000 hours per week (excluding over-time).

Part-time is defined as an employee who is employed for an average of less than 20 hours per week or who has been employed for fewer than 6 of the past 12 months. They are not considered in counting employees for either the definition of “employer” or when the minimum number of employees have been laid off. They are “affected” and therefore require notice.

*Note: Employees who are already on “temporary layoff” with a reasonable expectation of recall are considered in determining “employer”.*

2. Does the action meet the definition of “mass layoff”?

Layoff must not be the result of a plant closing, and must result in employment loss at the single site during any 30-day period for at least 33% of the employees, excluding part-time employees, and total at least 50 employees, or at least 500 employees.

“Single site” refers to either a single location or a group of contiguous locations—those who share the same staff or operational purpose.

May look back or ahead 90 days from the date(s) of layoff to see if other layoffs maybe suggested.

3. Does the action meet the definition of “plant closing”?

Requires 50 or more employees must be laid off from a single site during any thirty (30) day period, excluding part-time employees. Any permanent or temporary shut down of a single site which results in such loss of employment.

4. Is the notice proper?

Must be in writing and delivered to employees or representatives

If less than sixty (60) days given, the employee must give as much notice as possible and a brief statement of the basis for reducing the notification period. Statement must address the "unforeseen business circumstance" or assert that the company was actively seeking capital which would have prevented or delayed the shut-down.

Notice must state exact date of layoff or set at 74 days from the date of notice.

Courts have held that notice which lacks specificity is defective and ineffective for purposes of statute.

5. What happens if no notice is given or is given in less than 60 days?

Employees are entitled to damages equal to 60 days or portion of 60 days, less wages earned.

6. Can the Company assert any defense under the exceptions to notice rule?

Employer excused if the closing or layoff is caused by business circumstances that were not foreseeable at the time notice was required. Examples: principal customer's sudden and unexpected termination of contract, a strike or sudden unexpected change in business conditions. Circumstances must have caused the layoff.

Employer excused if at the time that notice was required, the employer was actively seeking capital or business, which if obtained, would have enabled the employer to avoid or postpone the shut down and the employer believed that giving the notice would have precluded the employer from obtaining the capital or business. This applies to plant closings only. This is a narrow exception (and statute interpreted in favor of employees). Sales or mergers do not constitute "actively seeking capital".

7. How can I counter the employer's defenses?

Documents. Union/Employees entitled to all documents which relate to the decision to close the plant from the Employer.

8. Was a government agency involved in closing?

If closing ordered by government, this may be an unforeseen business circumstance. Government would not be considered "employer".

9. Can the employer raise “good faith” defense?

Trial courts can reduce the employer’s liability if it finds that the employer acted in good faith and had reasonable grounds for believing that the act (or omission) was not a violation of WARN. The employer has the burden of proof. The employer must investigate potential liability under WARN, ignorance is not a defense.

10. How is WARN enforced?

There is no statute of limitations in WARN. SOL will be determined by reference to SOL in analogous state statute. Statute well suited for class action. The union can sue on behalf of bargaining unit members and all other “similarly situated employees.” The Secretary of Labor has no enforcement powers—can only issue the regulations.

11. What are the remedies or damages?

WARN remedies are in addition to (not in lieu of) other contractual or statutory remedy. Employees entitled to prejudgment interest, an amount equal to their daily wages for each day of violation. Paid for each calendar day that the notice is lacking—not for actual number of days the employee would have worked. Severance payments are not a set-off. Vacation pay paid under state law (such as Wage Payment Act) at the time employment ceases is not a set-off. Only interim earnings and voluntary payments are set-off.

May also receive fringe benefits or medical claims which would have been paid or covered if the employees had received full notice.

WARN payments are a “priority” claim in bankruptcy.

Attorney fees may be awarded.

Generally, you cannot not obtain an injunction against the closing or layoff. May obtain injunction to prevent closure if no other remedy available or attachment of assets pending outcome of litigation.

Since rights under the CBA are retained, Union may obtain an injunction under Section 301 pending arbitration.

# **U.S. Department of Labor Employment and Training Administration Fact Sheet**

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## ***The Worker Adjustment and Retraining Notification Act (WARN)***

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### ***A Guide to Advance Notice of Closings and Layoffs***

The Worker Adjustment and Retraining Notification Act (**WARN**) was enacted on August 4, 1988 and became effective on February 4, 1989.

### **General Provisions**

**WARN** offers protection to workers, their families and communities by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs. This notice must be provided to either affected workers or their representatives (e.g., a labor union); to the State dislocated worker unit; and to the appropriate unit of local government.

### **Employer Coverage**

In general, employers are covered by **WARN** if they have 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week. Private, for-profit employers and private, nonprofit employers are covered, as are public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. Regular Federal, State, and local government entities which provide public services are not covered.

### **Employee Coverage**

Employees entitled to notice under **WARN** include hourly and salaried workers, as well as managerial and supervisory employees. Business partners are not entitled to notice.

### **What Triggers Notice**

**Plant Closing:** A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss (as defined later) for 50 or more employees during any 30-day period. This does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice (discussed later).

**Mass Layoff:** A covered employer must give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce. Again, this does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer.

These latter groups, however, are entitled to notice (discussed later).

An employer also must give notice if the number of employment losses which occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Job losses within any 90-day period will count together toward **WARN** threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

### **Sale of Businesses**

In a situation involving the sale of part or all of a business, the following requirements apply. (1) In each situation, there is always an employer responsible for giving notice. (2) If the sale by a covered employer results in a covered plant closing or mass layoff, the required parties (discussed later) must receive at least 60 days notice. (3) The seller is responsible for providing notice of any covered plant closing or mass layoff which occurs up to and including the date/time of the sale. (4) The buyer is responsible for providing notice of any covered plant closing or mass layoff which occurs after the date/time of the sale. (5) No notice is required if the sale does not result in a covered plant closing or mass layoff. (6) Employees of the seller (other than employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week) on the date/time of the sale become, for purposes of **WARN**, employees of the buyer immediately following the sale. This provision preserves the notice rights of the employees of a business that has been sold.

### **Employment Loss**

The term "employment loss" means:

- (1) An employment termination, other than a discharge for cause, voluntary departure, or retirement;
- (2) a layoff exceeding 6 months; or
- (3) a reduction in an employee's hours of work of more than 50% in each month of any 6-month period.

Exceptions: An employee who refuses a transfer to a different employment site within reasonable commuting distance does not experience an employment loss. An employee who accepts a transfer outside this distance within 30 days after it is offered or within 30 days after the plant closing or mass layoff, whichever is later, does not experience an employment loss. In both cases, the transfer offer must be made before the closing or layoff, there must be no more than a 6 month break in employment, and the new job must not be deemed a constructive discharge. These transfer exceptions from the "employment loss" definition apply only if the closing or layoff results from the relocation or consolidation of part or all of the employer's business.

## Exemptions

An employer does not need to give notice if a plant closing is the closing of a temporary facility, or if the closing or mass layoff is the result of the completion of a particular project or undertaking. This exemption applies only if the workers were hired with the understanding that their employment was limited to the duration of the facility, project or undertaking. An employer cannot label an ongoing project "temporary" in order to evade its obligations under **WARN**.

An employer does not need to provide notice to strikers or to workers who are part of the bargaining unit(s) which are involved in the labor negotiations that led to a lockout when the strike or lockout is equivalent to a plant closing or mass layoff. Non-striking employees who experience an employment loss as a direct or indirect result of a strike and workers who are not part of the bargaining unit(s) which are involved in the labor negotiations that led to a lockout are still entitled to notice.

An employer does not need to give notice when permanently replacing a person who is an "economic striker" as defined under the National Labor Relations Act.

## Who Must Receive Notice

The employer must give written notice to the chief elected officer of the exclusive representative(s) or bargaining agency(s) of affected employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss. This includes employees who may lose their employment due to "bumping," or displacement by other workers, to the extent that the employer can identify those employees when notice is given. If an employer cannot identify employees who may lose their jobs through bumping procedures, the employer must provide notice to the incumbents in the jobs which are being eliminated. Employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week are due notice, even though they are not counted when determining the trigger levels.

The employer must also provide notice to the State dislocated worker unit and to the chief elected official of the unit of local government in which the employment site is located.

## **Notification Period**

With three exceptions, notice must be timed to reach the required parties at least 60 days before a closing or layoff. When the individual employment separations for a closing or layoff occur on more than one day, the notices are due to the representative(s), State dislocated worker unit and local government at least 60 days before each separation. If the workers are not represented, each worker's notice is due at least 60 days before that worker's separation.

The exceptions to 60-day notice are:

(1) **Faltering company.** This exception, to be narrowly construed, covers situations where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings;

(2) **unforeseeable business circumstances.** This exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required; and

(3) **Natural disaster.** This applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

If an employer provides less than 60 days advance notice of a closing or layoff and relies on one of these three exceptions, the employer bears the burden of proof that the conditions for the exception have been met. The employer also must give as much notice as is practicable. When the notices are given, they must include a brief statement of the reason for reducing the notice period in addition to the items required in notices.

## **Form and Content of Notice**

No particular form of notice is required. However, all notices must be in writing. Any reasonable method of delivery designed to ensure receipt 60 days before a closing or layoff is acceptable.

Notice must be specific. Notice may be given conditionally upon the occurrence or non-occurrence of an event only when the event is definite and its occurrence or nonoccurrence will result in a covered employment action less than 60 days after the event.

The content of the notices to the required parties is listed in section 639.7 of the **WARN** final regulations. Additional notice is required when the date(s) or 14-day period(s) for a planned plant closing or mass lay-off are extended beyond the date(s) or 14-day period(s) announced in the original notice.

## Record

No particular form of record is required. The information employers will use to determine whether, to whom, and when they must give notice is information that employers usually keep in ordinary business practices and in complying with other laws and regulations.

## Penalties

An employer who violates the **WARN** provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days. The employer's liability may be reduced by such items as wages paid by the employer to the employee during the period of the violation and voluntary and unconditional payments made by the employer to the employee.

An employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed \$500 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within 3 weeks after the closing or layoff is ordered by the employer.

## Enforcement

Enforcement of **WARN** requirements is through the United States district courts. Workers, representatives of employees and units of local government may bring individual or class action suits. In any suit, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

## Information

Specific requirements of the Worker Adjustment and Retraining Notification Act may be found in the Act itself, Public Law 100-379 (29 U.S.C. 2101, et seq.) The Department of Labor published final regulations on April 20, 1989 in the Federal Register (Vol. 54, No. 75). The regulations appear at 20 CFR Part 639. General questions on the regulations may be addressed to:

U.S. Department of Labor  
Employment and Training Administration  
Office of Work-Based Learning  
Room N-5426  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210  
(202) 219-5577

The Department of Labor, since it has no administrative or enforcement responsibility under **WARN**, cannot provide specific advice or guidance with respect to individual situations.

*This is one of a series of fact sheets highlighting U.S. Department of Labor programs. It is intended as a general description only and does not carry the force of legal opinion.*



# Appendix 6

# The Union's Response to Claims of Sexual Harassment

The number of claims against unions for failing to fulfill their duties to members has increased. Complainants use statutory remedies under Title VII (EEOC) to address complaints, but also can use DFR (Duty of Fair Representation), which prohibits discrimination.

Why don't claimants seek assistance from their union?

1. General reluctance to complain
2. Fear of retaliation
3. Perception that the union will side with the Company
4. Lack of knowledge of sexual harassment policy or how the union can help with this issue

The Union's dilemma: Competing claims between the complainant and the accused.

It is sometimes hard to determine what is sexual harassment.

Men sometimes just don't get it—don't believe that the woman's version or that she was harmed. The accused will deny, and defend—discharge arbitrations require clear and convincing proof.

**DFR ISSUES:** Union breaches this duty when conduct is arbitrary, discriminatory or in bad-faith.

- The grievance is the union's grievance, and the union may exercise discretion as to taking sexual harassment grievance to arbitration, but such a decision should not be arbitrary. This duty is also owed to the accused and same discretion applies to discharge/discipline grievance.
- The duty is implicated in situations where seniority vs. merit is considered in bidding cases, credibility may be a real issue and can only be determined after a full investigation. The Union may have to neutrally pursue the grievance of each.

What to do:

1. Respond to the complaint—what is the employer's sexual harassment complaint procedure, use this first—also file a grievance within the time limits. If the employer's procedure doesn't resolve the complaint, the union should investigate the grievance to answer the following questions:
  - A. Did the objectionable conduct occur?
  - B. Did it interfere with working conditions?
  - C. Did management correct the problem?
2. Interview the witnesses. Maintain confidentiality, but talk to the accused.
3. Evaluate the evidence and decide whether to pursue the grievance.