KEEP HR SIZZLING

FRESH INGREDIENTS FOR A NEW ECONOMY
Legal Landscape Impacts

• Mutual obligation between employer and union to bargain in good faith pursuant to National Labor Relations Act (NLRA) Section 8

• Employer must use strategies that conform with law, contract, culture and type of business

• Laws implemented mid-contract present challenges for employers who already bargained economics
Mid-Term CBA Changes

• Mid-term CBA changes but only after bargaining:
  – Specific CBA provisions that call for opening of contract triggered by specified event and/or mutual agreement. May be limited or full re-opener.
  – Mid-term changes required by new circumstances not contemplated in existing CBA.
    • Could be changes in law
    • Generally cannot change economic terms
    • Zipper Clause may allow union to refuse to bargain
Summary

- Affordable Care Act
- Pension Crisis
- Wage and Hour $15 Now!
- Marijuana
- Miscellaneous
ACA and Your Contract
Health and Welfare

- Health benefits are a mandatory subject of bargaining
- Employers have limited options to make changes to terms and conditions mid-contract and may lose leverage to bargain changes during negotiations
- NLRA 8(a)(5) prohibits employers from making unilateral changes in terms and conditions of employment without union agreement
ACA vs. CBA

- Employers must bargain over ACA mandatory or discretionary requirements
- Penalties are solely on employer
- Likely to create bargaining leverage against employer
- Union may withhold agreement
- Union may refuse to bargain mid-term (e.g., Zipper Clause)
- ACA “trumps” CBA
Bargaining Considerations

• Are the union employees covered by a multi employer plan or a single employer plan?
• Employer Mandate – Pay or play decision
  – Eligibility periods, coverage Levels, plan design and part time employees
• Cadillac Tax
• Presidential Election 2016
Pay or Play/Plan Design

• Providing health insurance benefits to unionized employees has been a fundamental term of most labor contracts for decades

• ACA forces employers to reconsider and readjust their arrangements if they want to avoid penalties and account for new costs imposed under the law
Eligibility

• Benefits eligibility waiting period = no more than 90 days after employment including weekend and holidays
  – “First of the month after 90 days” does not comply
  – “First of the month after 60 days” does comply
Eligibility

• **CAUTION:** the ACA exceptions to 90 day rule are for plan/trust and not available to employers:
  – Orientation periods satisfying a reasonable and bona fide employment-based orientation period
  – Cumulative Hours of Service Requirements that condition health coverage eligibility on an employee’s completion of a “cumulative hours of service” not to exceed 1,200 hours
  – Multiemployer Plans may use eligibility criteria to tack on to the 90-day requirement if such criteria is based on the participating employer’s industry or unique operating structure
  – Condition eligibility on licensure or attaining job classification
Eligibility

• Employers are on the hook for penalty if employee goes to exchange even if Trust/Plan language provides coverage long after 90 days
  – i.e., Cumulative hours of service of 1200 hours could require employee to wait up to six months
Full-Time Employee

• “Full time employee” now defined under ACA as an employee who works 30 hours per week on average during the month

• Retain discretion in CBA to adjust the length of the measurement periods and stability periods that are used for determining whether an employee is full-time for purposes of the play or pay penalty

• i.e., Whether variable-hour employees or seasonal employees are treated as full-time employees
Sample

Part time employees work less than thirty (30) hours a week. The Employer shall in its sole discretion determine full time employment status under The Affordable Care Act, using available statutory methods for determining full time status for purposes of eligibility for health care.
Full-Time Employee

- Employer could offer all employees a Bronze plan and charge 9.5% of pay
- Employees may decline and stay on current plan
- Avoids complicated process of “Look Back” and “Stability” Periods
Full-Time Employee

- Preserve the flexibility to modify the definition of who is considered full-time under the ACA, in case there is a legislative change
- Bipartisan legislation has been introduced that would raise the full-time standard for purposes of the play or pay penalty from 30 hours per week to 40 hours per week
- Presidential election in 2016
Sample

In the event that the definition of full time employee under the ACA is modified during the term of this Agreement, the Employer shall implement the revised law without the consent of the Union.
Sample

The management of the Employer and direction of the working forces are vested exclusively in the Employer and the Employer shall have all rights customarily reserved to management, including the right to determine or revise job classifications and qualifications, to hire, assign, promote, suspend, transfer, discipline or discharge for just cause; the right to relieve employees from duty because of lack of work; the right to contract or subcontract for services; the right to set or schedule work hours, assign work, require overtime work; the right to determine whether to make or buy; the right to determine whether to determine the location of worksites and the continuance of any departments; and the right to establish production standards in order to maintain the efficiency of the employees.
Plan Design

• Consider the cost of providing (or not providing) coverage to spouses

• ACA does not require employers to provide coverage for spouses and does not penalize employers for excluding spouses from coverage

• Evaluate potential savings from excluding spouses from eligibility for health coverage
Sample

Employees wishing to insure a spouse who has the option of other health and welfare coverage through an employer and does not opt out of coverage under this Agreement, will pay 50% of the share of benefits herein and the company will pay 50%.
Cadillac Tax

- Effective 2018 and imposes 40% nondeductible excise tax on the aggregate cost of applicable employer sponsored coverage
- March and July 2015 IRS Guidance released
  - Self only coverage for employee medical only limit is $10,200 a year ($850 a month)
  - Other than self only for medical only limit is $27,500 ($2,291 a month)
  - Coverage under multi employer plan (changed from “land” to “plan) is limited to other than self $27,500 a year
  - Applicable coverage includes medical, HSA, Archer MSA
  - Possibly insured/self insured vision and dental excluded
Who Pays the Tax?

- Insured plan – the issuer (carrier) is the coverage provider and must pay the tax
- H.S.A. and Archer MSA – the employer who contributes to the account must pay the tax
- Other applicable coverage (self-insured plans) – “the person that administers the plan benefits” must pay the tax – will usually be the employer
- Tax likely calculated on calendar year regardless of plan year
Cadillac Tax

• For single employer health plans:
  – Assess now whether they are likely to trigger the excise tax, based on the current costs of benefit plans as well as the projected rate of increase for the cost of those plans through 2018 and beyond
  – Review cost of medical insurance employee only ($850 a year) or employee + coverage ($2,291 a month)
  – Retain flexibility to change benefits to avoid the Cadillac Tax and/or provide language that caps the cost at $850 and then employee pays the remainder
If premium cost increases cause either:

- Employee cost to exceed 9.5% during CBA term, or
- Total cost of health care premiums to exceed “Cadillac Plan” limits

Then:

- Reduce employee premium share to cap at 9.5% and offset with wage reduction or other benefit reduction
- Switch to cheaper plan identified in CBA
- Opener for health care and wages (not without risks)
Multiemployer Plans

- IRS will apply $27,500 cost of coverage for employee and employee + coverage
- Cost of employee medical cannot exceed $2,291 a month
- Teamster Plan A currently $1,300, Machinist Plan 15 currently $545 employee and $1,700 family
- Excise tax will be paid by the plan so trustees will make changes necessary to avoid 40% excise tax
Fees

• Self-insured employers will owe a "transitional reinsurance fee" in 2015, 2016, and 2017; for the first year, the fee is at the rate of $63 per covered life. For the second year, the fee is at the rate of $44 per covered life.

• In addition, for a single-employer plan, the employer must pay a "patient-centered outcomes research institute fee," which is $2 per covered life payable in the years 2014-2020.

• For multiemployer plans, fees are paid by the plans and passed on through premiums.
Sample

The Company may reopen the contract to bargain the selection of the plan and allocation of costs provided for in this Article to avoid a tax or penalty pursuant to the Affordable Healthcare Act. Employer will provide written notice to the union of not less than 20 days prior to expiration of the current benefit plan of the year in which the employer desires to make a change.
ARTICLE XI – HEALTH AND WELFARE AND DENTAL

11.01 Regular full time employees shall be covered under the Company health and welfare plan and shall receive the same benefits and shall pay the same employee-share of the contribution rate as all other employees covered under that plan. The Employer may, at its sole discretion, change the benefits levels and/or employee-share of the contribution rate, so long as employees in this bargaining unit are in the same position as other employees covered under the Company plan.
Sample

The parties acknowledge the need to arrive at modifications to the current system for providing health care benefits to employees. Therefore, the parties agree that during the term of this Agreement, they will meet in Joint Labor Management Committee to explore cost saving measures for providing health care for employees, and to meet the requirements of the Affordable Care Act. The objectives of the Committee will be to identify and recommend to the parties for adoption, no later than one year from the ratification of this contract amendment, a health benefits plan that is affordable, cost effective and sustainable.
The Employer will pay the full cost of the ABC Plan 1 for all eligible employees as described above, until the Employer implements an “Affordable Plan” in compliance with the Employer Mandate of the Affordable Care Act (ACA). The Employer and the Union agree that either party may reopen this Article no earlier than forty-five (45) days prior to the implementation of the Employer Mandate of ACA for the sole purpose of negotiating wage rates and the implementation of the Health and Welfare Plan pursuant to the ACA.
Openers

• If you opt for a reopener, avoid the pitfalls of single-issue bargaining

• Risks of reopeners:
  – May not obtain agreement: risk of impasse and possibly strike and labor instability – check no strike clause to determine if it survives an opener
  – May be forced to settle for higher cost than if alternative coverage options identified now
  – Impacts on employee morale

• Expedited arbitration procedure to resolve disputes over non-compliant plans
Pensions
History

• Multiemployer plans – Taft Hartley Plans – were established to provide benefits to employees represented by unions (1945 to 1965)
• Employers could withdraw without penalty
• Funding according to CBA and trust approval
• Defined benefit versus defined contribution
• Hallmark of union employment
• “The reason employees join a union”
Pension Crisis

- 1980 Multiemployer Pension Plan Amendments Act
- Withdrawal liability created: employer who ceases participation in plan must pay its proportionate share of the Plan’s unfunded vested liabilities, even if employer paid all required contributions under CBA
Pension Crisis

• **Direct Impact:**
  – Pension rehabilitation plans and Funding Improvement Plans supplemental contributions going out 10 to 20 years
  – Withdrawal liability
  – CBA may not alter base contributions when plan enters critical status
Pension Crisis

• **Indirect impact:**
  – Damage to competitive wages of union shops
  – Disincentive to hire union employees
  – Disincentive to make capital improvements
  – Unpredictable future surcharges, supplemental contributions
  – Banking, credit issues
Withdrawal

• ERISA mandates withdrawal liability upon occurrence of:
  1. Complete withdrawal
  2. Partial withdrawal

• Employer who ceases participation in plan must pay its proportionate share of the Plan’s unfunded vested liabilities, even if employer paid all required contributions under CBA

• A withdrawing employer is liable to the pension plan for their share of unfunded benefits based on actuarial assumptions
Withdrawal

1. Employees decertify union
2. Employer’s CBA expires and employer’s obligation to stay in the pension is not renewed in the new contract
   - Withdrawal of employer from plan is a mandatory subject of bargaining
3. Pension fund terminates employer’s participation for breach of trust fund agreement
4. Layoff, plant closure, shut down, liquidation
Bargaining Strategies

Long before CBA expires employer should make a plan that includes:

• How to pay withdrawal liability
• Offer alternate retirement plan to employees/union – research and educate
  – Convince employees they are responsible for their own retirement
• Talk to union early and often
• Prepare for strike
• Get union to agree or cram it down
• Bargain to impasse – tricky road based on Obama board
Bargaining Strategies

• Difficult to get union on board
• “Plan is improving, why do you want to leave now?”
• “If we let you leave, everyone else will leave and plan will fail”
• “Members want defined contribution plan, they want guaranteed retirement, your 401K does not do that”
• “You don’t pay administrative costs with our pension, you pay that for annuities, 401ks”
• “The PGBC protects our members if the plan fails”
Bargaining Strategies

Educate and persuade in bargaining:

• Get withdrawal liability estimate to share
• Calculate cost of rehab/FIP plan and share
• Explain impact direct and indirect pension crisis has on employer economically without pleading poverty
• No new money in plan
• Pension opener
• Will union indemnify employer for withdrawal liability?
• Is the “cure worse than the disease”?
Sample

In the event that during the term of this Agreement, the Employer, in its sole discretion, determines it desires to withdraw from the Pension Fund, the contributions to the pension plan shall cease, and the full one dollar and ninety-five cents ($1.95) per compensable hour shall go into a defined contribution plan to benefit the employee who has completed three (3) months of continuous service with the Employer.
Sample

In the event that during the term of this Agreement, the Employer is either no longer subject to unfunded withdrawal liability, or in the Employer’s sole discretion, determines it desires to withdraw from the plan, the contributions to the pension plan shall cease, and the full $_____ shall be contributed to a 401K plan for the benefit of the employee who has completed 90 days of continuous service.
Sample

Employee pays surcharges:

Effective upon adoption of the Rehabilitation Plan, Employees shall pay 100% of supplemental contributions via a pre tax wage diversion from Appendix A. If the Trustees require adjusted contributions/remittances or a surcharge in a specific amount not expressly provided for by the written agreement of the parties, the wage rates of such employees will be diverted from Appendix A in an equal amount.
Surcharges

• Company may be in the ironic position of begging the union to stay if rehabilitation plans become too onerous on employees

• Consider splitting supplemental contributions to lessen impact on employees or employers

• Consider reopener if plan comes out of critical status during term of the contract
Multiemployer Pension Reform Act

- Law enacted in December 2014 to improve financial conditions of “red” and “yellow” zone funds
- Gives troubled funds ability to reduce pension benefits of plan participants, including some who are already receiving benefits
- Inquire from pension trustees whether the pension will seek any of the changes under the MPRA
Marijuana
Pot & Legal Off-Duty Conduct

- Will the employer still be able to point to use of pot as off-duty misconduct?
  - Federal law still prohibits the consumption of marijuana
- Pot is becoming more and more acceptable in today's society and legalized in some states
- Arbitrators are responding to this development
- The bar for proving off duty legal conduct nexus to job is higher
“Just Cause”

• Collective Bargaining Agreement with just cause provisions may limit Employer’s right to discipline for *lawful* marijuana use.

• When an employee is legally authorized to use marijuana and there is no evidence of impairment at work; at least one local labor arbitrator ruled no “just cause” to discipline for failed drug test because Employer failed to prove the “nexus” between off duty conduct and employee work performance.
County of Solano (2011)

• Grievant was a deputy probation officer who enforced court orders and facilitated rehab for offenders. Her supervisor saw her buy marijuana at store which prompted an internal investigation after which she admitted to smoking it for the past two years, every two or three months.

• No just cause because illegal drug use involved “off duty conduct”.

• “Even if off duty misconduct involves drugs, it is necessary to establish an effect on the employer’s business”. Discipline converted to reinstatement with mandatory chemical dependence referral.
Seafreeze Cold Storage (2012)

- Grievant failed random test for marijuana, presented medical marijuana card
- No evidence of impairment at work
- Evidence that grievant only used marijuana on weekends to control gout pain
- Drug Testing Policy implemented outside of CBA
- Union objected to random testing
- Arbitrator ruled no just cause to discipline grievant since he was using marijuana legally off duty and no evidence he was impaired at work
Strategy

• Ensure drug testing policy is bargained and accepted by Union and that employees violate policy if they have “detectable levels” of marijuana

• Bargain language that allows for discipline after failed test even without nexus to legal off duty conduct, i.e., employer does not have to show impairment only failed test

• Be prepared for union pushback in states where marijuana is legalized for recreation
Strategy

• Call out marijuana in policy:

Although Washington and/or Oregon State, has legalized marijuana for medicinal or recreational purposes, the Company is not required to allow the medicinal or recreational use of marijuana in the workplace. Using, possessing, or being under the influence of marijuana is strictly prohibited on Company property and while conducting Company business. A positive test for marijuana under the Company policy is considered a failed test and will subject you to discipline.
Minimum Wage and Paid Leave
Local and State Laws

• Address at contract expiration or mid-contract
• Changes required by law the employer must bargain over effects
• If “effects” of legal changes are positive for union/employees, union will not object
  – i.e., Seatac Minimum wage increases, Seattle Paid Safe and Sick Leave Ordinance
• Employer forced to change its economic position without benefit of bargaining
$15 Minimum Wage Ordinance

- Sea Tac Minimum Wage Ordinance 2013
- City of Seattle Minimum Wage Ordinance 2014
- City of Tacoma on ballot November 3, 2015
- City of Portland, Oregon ballot November 2016
Minimum Wage

• Wage compression issues – see Archbright keynote
• Union waivers contained in some ordinances like SeaTac:
  – “All of the provisions of this chapter, or any part thereof, including the employee work environment reporting requirement set forth herein, may be waived in a bona fide collective bargaining agreement”
Paid Leave Laws

• Seattle and Tacoma Paid Leave Ordinance – may be waived by Memo of Understanding

• “The provisions of this chapter shall not apply to any employees covered by a bona fide collective bargaining agreement to the extent that the requirements of this ordinance are expressly waived in the collective bargaining agreement in clear and unambiguous terms”
Sample

The parties understand that the Seattle City Council has passed a bill that would add a new chapter to 14.16 of the Seattle Municipal Code requiring employers with employees in the City of Seattle to provide paid sick time/days and paid safe time/days to their employees. The parties hereby agree that any requirement to provide any leave required by said bill, either in its current or amended form, or by a substitute bill is hereby waived. The waiver is made knowingly by the undersigned Union and the Employer.
Paid Leave Laws

• Oregon – no waiver but allows employer to comply as long as current PTO, vacation or sick meet minimum accrual and eligibility requirements of ordinance

• California – waiver if:
  1. Union – represented employees covered by a valid collective bargaining agreement if the agreement expressly provides for paid sick leave, provides for final and binding arbitration of disputes concerning the application of paid sick day provisions, and meets other requirements
  2. Employees in the construction industry covered by a valid collective bargaining agreement that meets certain requirements
Paid Leave Laws

- Withdraw Paid Leave from CBA and propose employer follow the law
- Propose language allowing employees to use paid time off in CBA for any reason qualifying under Ordinance
- Propose amendment to CBA converting Vacation to Paid Time Off
- Pay for waiver with other economic give
- Seek repayment of benefit when contact opens if Union refuses to waive
Sample Language

Language that addresses future ordinance:

Should future government mandate(s) allow the payment of any wages or benefits less than those called for by the Employer in this agreement, no wages or benefits shall be reduced so that the total amount of wages and benefits required by this Agreement remains the same. Should future government mandate(s) require the payment of any wages or benefits in excess of those called for in this agreement, the excess may be the amount of a reduction by the Employer to other non-mandated wages or benefits so that the total amount of wages and benefits required by this Agreement remains the same.
Miscellaneous
Double Jeopardy

• Union files grievance under arbitration procedure in CBA and an Unfair Labor Practice (ULP) from the NLRB over the same factual circumstances
  – i.e., Shop steward is disciplined and employee argues the conduct resulting in discipline was his union duties
  – Babcock & Wilcox, 361 NLRB 132 (December 2014) revised NLRB “deferral” standards
  – Standard more difficult to prove NLRB should defer the ULP to the arbitration process
Double Jeopardy

If all of these are met then NLRB may defer the ULP to arbitration and no double jeopardy:

1. Arbitrator was explicitly authorized to decide the ULP issue

2. The arbitrator was presented with and considered the statutory issue, or was prevented from doing so by party opposing deferral

3. NLRB reasonably permits the award
Double Jeopardy

Grievance Settlement must include:

1. Evidence the charging parties intended to be bound;
2. Evidence that settlement is reasonable in light of nature of violations
3. Whether there has been any fraud, coercion or duress by any of the parties in settlement
4. Whether employee has history of unlawful conduct or breach previous settlement agreements
Sample

An arbitrator shall have no power to add or subtract from or to disregard, modify, or otherwise alter any term of this or any other agreement(s), between the Union or the Company or to negotiate new agreements. The arbitrator’s powers are limited to interpretations concerning specific applications of the terms of this Agreement or to decide unfair labor practices if any. Decisions of the arbitrator shall be subject to and in accordance with the provisions of existing laws, including court and NLRB decisions, and executive or administrative orders and/or regulations.
Shipyard Laborers, Riggers and Fasteners of the Pacific
Local 36-A

Tacoma, Washington April 2, 1919.

The Central Labor Council
City

Greeting:-

At the regular meeting of the above Local
The enclosed Resolution was unanimously concurred in and a
Copy was ordered sent to the Central Body and one spread upon the
Minutes of this Local Union.

The employment of women and girls at manual labor in the different
industries, is growing, and before long will become a menace to the
health and full development of future generations of American working
men and women.

Therefore we urge the Central Council, and the movement in
general to get busy and nip this pernicious growth in the bud.

Fraternally,

SHIPYARD LABORERS & FASTENERS
36-A I.L.A.

[Signature]

Secretary.
Thank You!

Contact Information:

• Kellis M. Borek – kborek@archbright.com
• Archbright – 206.664.7278
• Website – http://www.archbright.com