

Tips for Handling Union and Employee Objections to COVID-19 Policies and Procedures

**VIRTUAL SCHOOL ADMINISTRATORS'
CONFERENCE**

September 23, 2021

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Tips for Handling Union and Employee Objections to COVID-19 Policies and Procedures

Presented by: Dennis L. Weedman and Thomas C. Garretson
Annual Legal Update for School Administrators Conference
September 23, 2021

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The Latest from the Bargaining Tables

Trending

- Mid-term bargaining demands continue as a result of ever evolving COVID-19 Rules and Guidance
 - The Governor's Vaccine/Testing Mandate
 - Enforcing the Mask Mandate
 - Applying Employee Discipline
 - COVID-19 Leave Issues

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The Latest from Employees

Trending

- Religious and Medical Exemption Requests
- Vaccinations
- Testing
- Health Care Right of Conscience Act

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Mid-Term Bargaining



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Mid-Term Bargaining



More Mid-Term Bargaining?

- Continued need to adjust operations
- Many school districts entered into short-term MOUs which expired at the end of last year
- Implementing the Vaccine/Testing Mandate
- Continued safety concerns
- Continued use of remote instruction

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Mid-Term Bargaining

- Union demands to bargain
 - Review the current CBA to ensure compliance with existing contractual obligations related to health and safety
 - Notice to union if change in working conditions
 - Duty to mid-term bargain with union, if requested
 - Formalize the plan – consider involving the union in discussions over safety measures *before* you get a demand to bargain
 - Understand current guidance and responsibilities, and be prepared to discuss them
 - Be flexible

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Mid-Term Bargaining



The Eternal Question in Mid-Term Bargaining

- Q: We have a CBA with a management's rights clause. Why do we need to negotiate?
- A: Section 10 of the IELRA sets forth the scope of an educational employer's and union's obligation to bargain:
 - Sec. 10. Duty to bargain. (a) An educational employer and the exclusive representative have the authority and the duty to bargain . . . with respect to wages, hours and other terms and conditions of employment, . . .
 - (c) The collective bargaining agreement negotiated between representatives of the educational employees and the educational employer shall contain . . . appropriate language prohibiting strikes for the duration of the agreement.

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Mid-Term Bargaining

- Q: Okay, but we have a CBA with a no-strike clause. Why do we need to negotiate?
- A: The IELRB has held that an employer has a duty to mid-term bargain issues which are not fully bargained or covered by the parties' bargaining agreement.
 - "[W]e hold that mid-term bargaining is required over mandatory subjects of collective bargaining which are neither fully negotiated nor the subject of a clause in an existing collective bargaining agreement. In our view, this formulation will serve to preserve the parties' rights under the Act without subject the bargaining process to continual reopening after completion . . ."
 - Rock Falls Elementary School District No. 13, PERI 1150 (IELRB 1986).

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Mid-Term Bargaining



- For good measure, the IELRB has limited an employer's right to contend that a mid-term bargaining issue is already covered in the collective bargaining agreement and need not be renegotiated:
 - The fact that a collective bargaining agreement deals with some aspects of a topic does not eliminate the mid-term bargaining obligation for other aspects of that topic.
 - State Community College, 6 PERI 1109 (IELRB Opinion and Order, July 24, 1990).

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Mid-Term Bargaining

- Q: Not every change within the district must be bargained, correct? We change course content, room assignments, etc. every school year. No CBA could cover all these changes and there aren't enough hours in the day to bargain over this kind of stuff.
- A: The IELRA answers this question...well, sort of. Section 4 of the Act says:
 - Sec. 4. Employer rights. Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of service, its overall budget, the organizational structure and selection of new employees and direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employee representatives . . .

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Mid-Term Bargaining

- The IELRB and Illinois courts will apply a “balancing test” to determine if any given subject is a mandatory subject of bargaining or not. The question is whether the burdens of collective bargaining outweigh the benefits.



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Mid-Term Bargaining

- Q: What about changes involving health and safety of employees? What about vaccine status requirements, or disclosure? Are these mandatory subjects of bargaining?
- A: There are no IELRB decisions or Illinois cases directly on point. The answer is that some subjects are mandatory subjects of bargaining, and others are not.

For instance:

- The decision to open the school and offer in person instruction is a core management decision and need not be bargained.
- The way the school reopens and the safety measures in place to protect staff are mandatory subjects. This is referred to as “impact bargaining.”

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Mid-Term Bargaining



- Q: So we meet and negotiate with the unions over issues like vaccines, testing and masking. What if we can't agree? Are we just stuck?
- A: No. You are not stuck.
 - An employer may change terms and conditions of employment so long as the changes do not violate the express terms of a collective bargaining agreement.
 - If, however, the employer is changing an established practice relating to working conditions, it must bargain with the union in good faith over the impact of those changes.
 - If the parties are unable to reach an agreement after a reasonable period of time, the employer may implement its last best offer over impasse.

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Impasse

- "Impasse" is a stalemate in the negotiations process which may prevent the parties from reaching a contractual agreement



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Impasse

- Once impasse is reached:
 - The prohibition on employers making unilateral changes in the employees' status quo is suspended
 - Employers are free to alter employees' existing wages, hours and terms and conditions of employment by imposing the terms of their final offer

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Impasse

- The IELRB will review each negotiation before it on a case-by-case basis to determine whether impasse exists

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Impasse

- The IELRB considers the following factors:
 - The parties' bargaining history
 - The good faith of the parties in negotiation
 - The length of the negotiations
 - The importance of the unresolved issue or issues
 - The contemporaneous understanding of the parties as to the status of the negotiations



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Labor Relations in the Time of COVID

- Q: What if we can't agree and the unions do not like the terms the district is implementing? Can they strike even though the CBA contains a "no strike" clause?
- A: The short answer is that a union cannot strike during the term of the agreement. However, the two major educational employee unions (IEA and the IFT) have asserted that they could strike over safety concerns even with the existence of a "no strike" CBA clause.

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Operational Issues



- Safety and health topics potentially subject to impact bargaining
 - The vaccination/testing mandate
 - Continued use of masks and social distancing
 - Employer-provided leave
 - Enhanced accommodation rights

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Bargaining the EO Mandating Vaccine and Testing

- The Governor's Executive Orders Mandating Vaccine/Testing
 - By September 19, 2021, school districts must implement the Vaccine/Testing Mandate.
 - Districts have the option to apply a more stringent enforcement of the Mandate to require that all employees be vaccinated (with testing only permissible for those in the process of becoming fully vaccinated and for those who are exempt for religious or medical reasons) or districts can decide to follow a less strict approach and require weekly testing in lieu of vaccinations generally - even for persons who do not fall into one of the two exemptions.

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Bargaining the EO Mandating Vaccine and Testing



- This is Impact Bargaining, Right?
 - Unions appear to acknowledge that the bargaining duty is on the impact, not the decision, to apply the mandate. Impact issues would include the key question as to what to do with the employee who refuses to vaccinate or test.
 - However, if a district decides to apply a more stringent approach permissible under the EO, could a union argue that decisional bargaining is needed?

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Bargaining the EO Mandating Vaccine and Testing



- Potential Impact Bargaining Issues include:
 - What to do with the employee who refuses to vaccinate or test?
 - Use of leave time for obtaining vaccinations and/or testing?
 - Use of leave time for required quarantining?
 - Granting additional leave time for COVID purposes?

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Operational Issues

Vaccination Scenario

The Bestatit School District decides to apply the Governor's Executive Order on Vaccine/Testing strictly to require that all employees receive the COVID 19 vaccine by the beginning of the Fall 2021 semester. The parameters of the program include: Employees who ae not vaccinated must arrange to be fully vaccinated by October 30, 2021.

- Testing will only be accepted as an alternative to being fully vaccinated until October 30th - unless an employee qualifies from a valid medical or religious exemption.
- Employees who are not vaccinated or who do not fall into an exemption will be prohibited from the premises and will move into an unpaid status pending resolution of their employment status.

What is the bargaining duty?

What are the strategic considerations?

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Employee Objections

- Employee Requests for Exemption to COVID-19 Vaccination
 - Medical – ADA and IHRA
 - Religious – Title VII and IHRA
 - District's obligations?



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Employee Objections

- Employee Requests for Exemption to Weekly COVID-19 Testing
 - Medical?
 - Religious?
 - District's obligations?
 - Who pays for the testing?
 - When is the testing conducted?

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Employee Objections

- IL Health Care Right of Conscience Act (745 ILCS 70/1 *et al.*)
 - Common employee objection to testing requirements
 - Applicable to the school and employment setting?
 - Recommended response to objection?

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Successor Bargaining During the Pandemic



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Successor Bargaining

The Union's Approach:

- Unions are continuing to seek substantial economic increases
- The pressure caused by prior roll-overs
- Unions seeking to address issues arising out of last year's remote or hybrid teaching.
- Pressure to permanently expand E-learning programming



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Preparing for Successor Bargaining

What have we learned about our CBAs as a result of the COVID-19 Crisis?

- The importance of the management rights clause
- Rigid workday clauses prevent flexibility
- Rigid job descriptions prevent flexibility
- The need for mid-term bargaining rights
- The need for reopener clauses.

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Successor Bargaining

- Economic forecasting is more important than ever
- Strategize to tie your economic proposals to projected revenues as opposed to fund balances and short-term federal aid

Use of economic presentations at the bargaining table

The limitations of COVID 19 relief aid

Use your health insurance consultant

- Consider removal of retirement incentives and/or post-retirement benefits ; focus on the compensation packages
- Now is the time to tackle all those hidden cost items

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Successor Bargaining

Bargaining Proposal Scenario

Strong School District is at the bargaining table to negotiate a successor agreement with its Teacher's Union. In addition to the multiple economic items that remain unresolved, the Union is insisting that the District agrees to the following proposal:

- *"In the event of an emergency closure directed by the District or the State of Illinois, the District will continue paying bargaining unit employees regardless of whether the employees are able to perform their duties in person or remotely."*
- Agree or Disagree?

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Questions?



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thank you!

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Dennis Weedman represents school districts, community colleges, county boards and other units of local government in labor negotiations and employment related matters, including complaints and charges of discrimination, wrongful termination litigation, claims of sexual harassment, civil rights violations and unfair labor practice charges. Dennis also advises clients on the handling of grievances, as well as represents public entities in labor arbitration hearings. He has represented employers in more than 200 arbitration hearings and has handled more than a hundred union organizational cases before the various public sector labor relations boards. Following certification of the bargaining unit, Dennis also serves as a negotiator and advisor for collective bargaining agreements, having negotiated several hundred labor contracts for public employers.

Dennis's area of practice extends well beyond just labor and employment matters. He counsels clients in all areas of personnel management, including employee leave rights, overtime obligations, and employee disciplinary matters, as well as in the areas of board governance, general education law and student rights and responsibilities. Dennis has served on the Illinois State Bar Association's Labor and Employment Section and is a frequent presenter for the Illinois Association of School Boards and at statewide conferences, including the Chicago-Kent School of Law Public Sector Labor Relations Conference.

Dennis has over twenty-eight years of experience representing public entities in labor and employment disputes. Prior to joining Robbins Schwartz, Dennis served as an Administrative Law Judge with the Illinois Labor Relations Board and was Labor Relations Counsel for Governor James Edgar through the Illinois Department of Central Management Services.

Dennis is approved by the Illinois State Board of Education to provide school board member training.

AWARDS

Illinois Leading Lawyer, Employment Law: Management, Labor Law: Management, School Law and Governmental, Municipal, Lobbying & Administrative Law, 2015

RECENT PRESENTATIONS

Collective Bargaining Workshop, Regional IASBO Conference (April 2021)

Legislative and Decisional Law Update, Illinois Community College Presidents' Council (March 2021)



PRACTICE AREAS

Education Law
Labor & Employment
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Student Discipline

EDUCATION

J.D., Southern Illinois
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U.S. District Court for the
Central District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

Illinois Council of School
Attorneys

Illinois Local Government
Lawyers Association

Illinois State Bar
Association

Collective Bargaining Update, Large Unit District Association (February 2021)

Legal Ethics: Ethical Considerations during the Pandemic, Illinois Kent School of Law 36th Annual Public Sector Labor Relations Conference (December 2020)

Pre-K to Grade 12 Return to School, Southwest Leadership Council (September 2020)

Collective Bargaining Workshop, Regional IASBO Conference (March 2020)

Nuts and Bolts of Grievance Handling and Pre-Arbitrations Strategies, 35th Annual Kent School of Law Public Sector Labor Relations Conference (November 2019)

New College Board of Trustee Member Training, Illinois Community College Board (September 2019)

Managing Creditable Earnings under TRS New 3% Limitation Threshold, Annual and Regional IASBO Conferences (April 2019)

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Prior to joining Robbins Schwartz, Tom worked in Labor Relations for the Cook County Health System. During law school, Tom interned with the U.S. Equal Employment Opportunity Commission's Enforcement Unit.

RECENT PUBLICATIONS

"Get off my Property: SCOTUS Limits Union Access to Employer Premises," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Recent Department of Labor Opinion Letters: Pay for Training and Travel," *Employment and Labor Law Flashpoints*, IICLE (2021)

"Seventh Circuit: Jury, Not Judges, Must Decide Coach's Sex Discrimination Claim," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Unions Strike Back Through Amendments to Illinois Public Labor Acts," *Employment and Labor Law Flashpoints*, IICLE (2020)

"Heading Into the New Year with New Employment Laws," *Employment and Labor Law Flashpoints*, IICLE (January 2019)

RECENT PRESENTATIONS

Employee Misconduct Investigations and Discipline During a Pandemic, IASPA Annual Conference (January 2021)

Is it ADA, FMLA, or Other Leave? Navigating the Murky Waters of Employee Leave Benefits, IAPD/IPRA Soaring to New Heights Conference (January 2020)

Updates from the DOL: New Developments for FMLA, FLSA, and IWPCA, IAPD/IPRA Soaring to New Heights Conference (January 2020)

A Step-by-Step Guide to the ADA Interactive Process, IAPD/IPRA Soaring to New Heights Conference (January 2019)



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U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

ORGANIZATIONS

Chicago Bar Association

Conducting Employee Misconduct Investigations: Best Practices to Minimize Employer Liability, IAPD/IPRA Soaring to New Heights Conference (January 2019)