



## OUTSIDE COUNSEL

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### *Labor Law: Expiration of a Collective Bargaining Agreement*

A client's collective bargaining agreement is about to expire, and the client asks you if he can change some of the terms and conditions of employment contained in the agreement after it expires. Thinking the question is one of simple contract law, you think back to Farnsworth on Contracts and advise your client that once the contract expires he is no longer bound by the agreement so he can do as he pleases. If the client follows your advice he will likely violate the National Labor Relations Act (NLRA).

#### **Employment Terms, Conditions**

It is true that an expired collective bargaining agreement (CBA) no longer has any force or effect. The NLRA, however, prohibits employers from unilaterally changing the terms and conditions of employment after contract expiration:

[A]n expired contract has, by its own terms, released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied. Although after expiration most terms and conditions of employment are not subject to unilateral change, in order to protect the statutory right to bargain, those terms and conditions no longer have force by virtue of the contract.

[T]hey are no longer agreed-upon terms; they are terms imposed by law, at least so far as there is no unilateral right to change them.

*Litton Financial Printing Div. v. NLRB*, 501 US 190, 206 (1991) (citation and quotations omitted). See also *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 25-27 (2d Cir.



*Nearly every provision of a collective bargaining agreement remains legally effective unless the parties agree on a new agreement or good-faith bargaining results in an impasse.*

1988) ("[T]he CBA must be considered defunct upon its expiration for all purposes except definition of the status quo....").

Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract. Thus, an employer's failure to honor the terms and conditions of an expired collective-bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of §§8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act. *Laborers Trust Fund v. Advanced Lightweight Conc.*, 484 US 539, 545 n.6 (quoting *NLRB v.*

*Katz*, 369 US 736, 743 (1962)).

Virtually every provision of the collective bargaining agreement remains effective by force of law unless and until: 1) the parties agree on a new collective bargaining agreement or 2) good-faith bargaining results in an impasse.<sup>1</sup> This includes provisions governing wages, medical and pension contributions, seniority and most fringe benefits. See, e.g., *Laborers Trust Fund*, 484 US 539 (fringe benefit fund contributions); *White Oak Coal Co.*, 295 NLRB No. 64, 131 LRRM 1802 (1985) (holiday pay, birthday pay, pension benefits); *Struthers Wells Corp.*, 262 NLRB 1080, 111 LRRM 1018 (1982) (cost of living wage increase). But see *American Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976 (2d Cir. 1997) (retiree medical benefits not a term and condition of employment, so employer could modify them after contract expiration so long as contract itself did not create a vested benefit).

Accordingly, for all intents and purposes, your client must continue to follow the expired collective bargaining agreement.

**No Strike, Arbitration, Dues Check-Off and Union Security.** Certain key provisions do not survive contract expiration. These include the no strike, arbitration, dues check-off and union security clauses:

"[I]n recognition of the statutory right to strike," the no-strike clause in an expired CBA no longer prevents a union from striking. *Litton*, 501 US at 199.

#### **Arbitration**

An arbitration provision does not survive expiration of a collective bargaining agreement. Nevertheless, employers must arbitrate post-expiration grievances that "arise under the contract." A grievance "arises under" an expired contract if: (1) the grievance involves facts and occurrences that arose before expiration, (2) an action taken

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after expiration infringes a right that accrued or vested under the agreement, or (3) under normal principles of contract interpretation the disputed contract right survives expiration of the agreement. *Litton*, 501 U.S. at 206.

The U.S. Court of Appeals for the Sixth Circuit has held that:

[A] dispute 'arises under the contract' when a majority of the material facts and occurrences arose before the expiration of the collective bargaining agreement. [M]aterial facts and occurrences that may be considered in making this determination include, but are not limited to, the factual predicate underlying the grievance, whether any grievance was filed or pursued, and the timing of discipline or discharge of the employee. *South Cent. Power Co. v. I.B.E.W., Local Union 2359*, 186 F3d 733, 740 (6th Cir. 1999).

In *Butchers, Food Handlers and Allied Workers Local 174 v. Hebrew Nat'l Kosher Foods Inc.*, 818 F2d 283 (2d Cir. 1987), the court held that a grievance over the employer's decision to relocate the plant — which it announced as a possibility five days after contract expiration, and as a final decision less than two months later — arose under the contract.

In *Halsey Drug Co. v. Drug, Chem., Cosmetic, Plastics and Affiliated Indus. Warehouse Employees Local 815*, 192 FSupp2d 192 (SDNY 2002), the court found that an alleged violation of the successors and assigns clause was arbitrable because it related to a plant closing that was announced before expiration, even though it was effectuated after expiration. Alternatively, the court found that the successor clause created rights that vested under the CBA. See also *Local Union No. 38, Sheet Metal Workers' Int'l Ass'n v. A & M Heating, Air Conditioning, Ventilation & Sheet Metal, Inc.*, 314 FSupp2d 332 (SDNY 2004) (alter-ego employer may be bound to arbitration clause in predecessor's expired CBA if grievance arose under the contract).

In contrast, the *Litton* court found that layoffs that occurred 10 months after the CBA expired did not involve rights that vested or accrued under the collective bargaining agreement. In *United Auto., Aerospace and Agric. Implement Workers, Local 33 v. R.E. Dietz Co.*, 996 F2d 592 (2d Cir. 1993), the court held that a claim for vacation pay accruing after contract expiration did not arise under the CBA. See also *Williamsbridge Manor Nursing Home v. Local 144 Division of 1199*, 107 FSupp2d 222 (SDNY 2000) (dismissal that occurred 14 months after expiration not arbitrable); *HCMF Corp. v. District 28, UMWA*, 1997 U.S. App. LEXIS 17322 (4th Cir. July 9, 1997) (discharge that occurred nine months after expiration did not arise

under the CBA).<sup>2</sup>

Despite the fact that arbitration provisions do not survive expiration of a CBA, an employer's blanket refusal to arbitrate any grievance filed after the contract expires is an unfair labor practice. Accordingly, you must evaluate each grievance as it arises.

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### Dues Check-Off, Security

Dues check-off and union security provisions do not survive expiration of a contract. *Litton*, 501 US at 199; *Hacienda Hotel Inc.*, 331 NLRB No. 89, 164 LRRM 1273 (2000); *Tampa Sheet Metal Co.*, 288 NLRB 322, 129 LRRM 1188 (1988). A union and an employer can, however, agree to extend the dues check-off and/or union security provisions while negotiating the rest of the contract terms, in which case the employer must continue to check-off and submit dues during the negotiation period (provided the employees have not revoked their dues check-off authorizations) and maintain a closed shop. See *Sun Harbor Caribe*, 237 NLRB 444, 99 LRRM 1011 (1978).<sup>1</sup>

In fact, in the absence of an agreement to continue the collective bargaining agreement the NLRA actually prohibits employers from deducting dues and/or initiation fees after contract expiration because the act prohibits payments by an employer to a union except for payments made pursuant to a valid CBA. 29 USC §158(a)(3). Moreover, an employer who deducts dues after the collective bargaining agreement expires may be required to repay the wrongfully deducted amounts to the employees even if the employer already remitted the funds to the union. See *Stainless Steel Prods.*, 157 NLRB 232, 61 LRRM 1346 (1966).

Accordingly, employers must exercise caution before deducting union dues after the collective bargaining agreement expires.

### Continuation Clauses

A union and an employer may provide that some or all contract terms will survive contract expiration. Courts and the NLRB will enforce such a provision, and any disputes about the effect of the clause will likely be

arbitrable. For example, in *Abram Landau Real Estate v. Bevana*, 123 F3d 69, 71 (2d Cir. 1997), the court examined the effect of an "evergreen clause," which provided that "upon the expiration ... this agreement shall thereafter continue in full force and effect for an extended period until a successor agreement shall have been executed. During the extended period, all terms and conditions hereof shall be in effect. ..." The court ruled that the arbitrator would decide if the evergreen clause also extended the arbitration provision.

Where the agreement contains a sweeping arbitration clause covering all disputes involving the meaning of terms and provisions of the agreement and where the arbitration clause does not expressly exclude disputes over the termination provision or the "evergreen" clause, disputes over these matters should be submitted to arbitration. *Id.* at 73.

Similarly, in *Costco Wholesale Corp. v. Int'l Bhd. of Teamsters, Local 210*, 2001 USDistLEXIS 1980 (SDNY Feb. 28, 2001), the contract provided that "[S]ixty days prior to expiration, either party may notify the other party in writing of its desire to cancel the existing Agreement or to negotiate a new Agreement." *Id.* at \*4. The union gave written notice of its desire to negotiate a successor agreement, but the notice did not say the union desired to terminate the agreement. The union took the position that the contract, and therefore the arbitration provision, continued in effect. The employer disagreed. Relying on *Abram Landau Real Estate*, the court ruled that the arbitrator would decide the question.

Accordingly, employers must be wary of contract continuation clauses and pay close attention to the language of a union notice requesting negotiation of a successor collective bargaining agreement.

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1. For a discussion of "impassé" see my earlier article, entitled "Impasse: The 'Obscurity' of Labor Law," *The New York Law Journal*, March 5, 2003 page A.4.

2. For post-expiration grievances that do not arise under the CBA the union must file an unfair labor practice charge with the National Labor Relations Board, alleging that the employer unilaterally changed a condition of employment.

3. An employer's threat to stop dues check-off during negotiations can often give the union that little additional push needed to reach an agreement. On the other hand, it could backfire and have the opposite result, so proceed carefully.