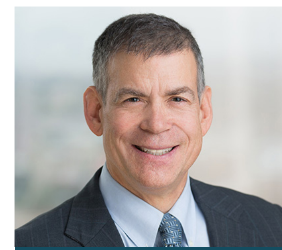
# ALL ABOARD THE HR EXPRESS:
## OREGON EMPLOYMENT RELATIONS BOARD RECENT CASES



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### Interference Claims under (1)(a) and Union Domination under (1)(b)

***Clackamas Cty. Empl. Ass'n. v. Clackamas Cty.*, UP-030-20 (June 6, 2022)**

The County violated ORS 243.672(1)(a) and (b) when it suspended the union president's access to his email account when placed on administrative leave. The Employment Relations Board (ERB) agreed with the union that the suspension was contrary to the established practice and contract terms that permitted the union president to use the County email system (including his account) to conduct union business. One notable finding was that various County managers and executives continued to try to engage in labor relations related work with the union president during the period of suspension.

**KEY TAKEAWAY**

ERB looks dubiously on any employer action that suspends access or use of emails.

### Unilateral Changes

***Salem Keizer Ed. Ass'n. v. Salem-Keizer Sch. Dist.*, UP-006-21 (June 8, 2022)**

Adopting an ALJ proposed order, ERB concluded that the District committed an unlawful unilateral change when it altered how it calculated full time equivalency. The ALJ rejected the employer's argument that the calculation was controlled by the terms of the parties' collective bargaining and instead found a consistent past practice that the District had modified in calculating FTE for the 2021 school year.

**KEY TAKEAWAY**

Tinkering with how time and workload is calculated will likely lead to disputes and potential for adverse findings that can be very costly.

## Duty to Bargain

***In the Matter of the Petition for Declaratory Ruling filed by United Food and Commercial Workers Union, Local 555, DR-002-22 (September 15, 2022)***

ERB addressed two questions in this declaratory ruling case:

(1) Can a party insist, over the other party's objection, that some of its bargaining committee members will participate in bargaining sessions virtually or via telephonic means, if the other party requests that bargaining should occur only via face-to-face, in-person meetings?

ERB declined to adopt a *per se* approach and ruled that a party can propose in-person, virtual, or a hybrid approach so long it as reasonable under a totality of the circumstances. ERB rejected outdated National Labor Relations Board (NLRB) rulings that bargaining must be in-person in light of advances in virtual technology, its broad accessibility, and that meeting virtually to bargain may at times be more effective than in-person bargaining. ERB did not consider this issue to be a dispute over ground rules (a permissive subject), but rather over meeting the fundamental obligation of meeting with the other party. ERB found support for its ruling in AFSCME v. Housing Authority of Yamhill County, UP-120-89, 12 PECBR 372 (1990) (involving differences over time of day to bargain).

ERB "conclude[d] that the proposed format is unreasonable only if it would restrict the other party's choice of negotiators or would, considering the totality of the circumstances, otherwise tend to interfere with the bargaining process." Op. at 14.

(2) Can an employer insist, over the union's objection, that bargaining unit employees, who are not part of either party's chosen bargaining team, must be allowed to attend negotiation sessions as observers?

ERB answered this question somewhat obliquely stating: "an employer violates its duty to bargain in good faith when it insists, over the labor organization's objection, that represented employees not on the bargaining team attend bargaining sessions. We consider the presence of observers at bargaining sessions as a ground rule subject, and, under PECBA, ground rules are a permissive subject. Therefore, a public employer that insists on that subject as a precondition to bargaining over mandatory subjects violates ORS 243.672(1)(e)." Op. at 17-18 (internal citations omitted).

ERB did not say that a union insisting on the same would likewise violate the PECBA, but most of its rationale would support that position and ERB did cite a General Counsel Memorandum that concludes so. Op. at 15 n.14.

### KEY TAKEAWAY

A party can propose and insist on bargaining in-person, virtually, or a hybrid approach so long as its insistence does not interfere with the right to select choice of representatives or otherwise interfere with the bargaining process. And, attendance at bargaining by persons outside the bargaining team is a ground rule that is permissive for bargaining.

***Portland Fire Fighters' Ass'n. v. City of Portland*, 321 Or. App. 569 (September 8, 2022)**

The court affirmed an ERB decision issued on remand that the union had waived its rights to bargain through its actions—by participating in negotiations with the fire chief and a representative from the mayor's office, agreeing with the city's budget, and promising not to contest operational changes. Although the union had challenged ERB's finding that an agreement had been reached, the court concluded that finding was supported by substantial evidence. The court also rejected the union's reliance on a contract provision requiring that side agreements be done in writing because that provision only applied to modifications of contract terms. Finally, the court concluded the union's actions were sufficient to support a clear and unmistakable waiver, which required "clear, unequivocal, and decisive act" by the union, as supported by substantial evidence.

## KEY TAKEAWAY

Informal or oral agreements over operational changes and budgets can lead to waiver of bargaining. I suspect, however, that ERB will be reluctant to extend this holding.

***Multnomah Cty. Corr. Deputy Ass'n. v. Multnomah Cty.*, 317 Or App 89 (January 20, 2022), affirming UP-003-19 (May 29, 2020)**

The court affirmed a 2-1 ERB order that an employer had a duty to engage in bargaining during the term of a contract over mandatory subjects of bargaining that are not specifically covered by a collective bargaining agreement. In this case, the union demanded to bargain safety issues, which were mandatory for bargaining and not "specifically covered by the parties' agreement." The court agreed with ERB that the employer had a duty to bargain mid-term where the employer had neither proposed nor made a unilateral change concerning or affecting a mandatory subject. In doing so, the court rejected the dissent's assertion that during the term of a collective bargaining agreement an employer's bargaining duty is limited to changes proposed by an employer consistent with ORS 243.698.

Key to the court's analysis was its determination that ERB was interpreting "delegative" terms of The Public Employee Collective Bargaining Act (PECBA); that is, terms the meaning of which the legislature had delegated to ERB to ascertain. ERB's interpretation of such delegated terms are due deference from the courts. Here, the delegative term was the definition of collective bargaining and the attendant duties imposed by that definition.

## KEY TAKEAWAY

Court defers to ERB construction of the bargaining obligation and determination that ORS 243.698 is not the only basis for requiring bargaining during the term of a collective bargaining agreement.

## Pandemic Bargaining

***SEIU Local 503 v. Marion Cty.*, UP-037-21 (October 29, 2021), and ruling adhered to on recons. (December 16, 2021)**

ERB concluded the County engaged in an unlawful unilateral change in July 2021 when directing strike-permitted employees to return to the workplace and ending its COVID-19 work-from-home policies, following the Governor's recession of Executive Orders related to the COVID-19 pandemic.

ERB first concluded that the County's temporary telecommuting policy adopted in March 2020 had become the status quo for County employment. ERB noted that a working condition can become the status quo by terms of an express agreement, past practice, work rule, or policy. And, in this case, ERB found that the policy set the status quo. ERB rejected the County's argument that status quo was the practice in effect before the COVID-19 pandemic and the work-from-home policy was adopted. ERB rejected this argument, in part, because the COVID-19 pandemic was continuing and, in fact, there was a surge in COVID infections the summer of 2021 as the County was rescinding the policy. As ERB succinctly concluded, "the County did not have a practice of 'no teleworking' during a pandemic caused by the global spread of a dangerous virus." Order at 13.

ERB also rejected the County's argument that the policy on its face was temporary and expressly stated that it could be revoked at any time. Although ERB recognized that there is no "bright line on when a temporary emergency-related change becomes the status quo," 15 months was sufficient time to create a new status quo. Order at 13-14.

ERB next concluded that the subject of the policy change was safety because it dealt with how employees could be protected from the risks of COVID-19 and that it fell within the definition of a mandatory subject of bargaining because it "had a direct and substantial effect on the on-the-job safety of public employees." Order at 15, citing ORS 243.650(7)(h).

Finally, ERB rejected the County's waiver defense. ERB found that the facts did not support the contention that the union had "consciously yielded" its right to bargain over the cessation of the temporary telecommuting policy. ERB explained that a party waives bargaining over a proposal by "negotiating over it without reaching agreement, only when the party has 'consciously yielded' its position and the issue has been 'fully discussed' and 'consciously explored.'" Order at 18. ERB emphasized that during bargaining for a successor agreement, the County had refused to bargain over COVID-19 proposals and rejected a union proposed letter of agreement over COVID-19. Thus, the topic had neither been fully discussed nor consciously explored. The successor agreement was bargained between December 2019 and April 2020 and became effective July 1, 2020.

ERB also rejected the argument that the union waived the right to bargain over the terms of the policy because it never demanded to bargain it. ERB emphasized that the policy was presented as a fait accompli and in such circumstances a union need not demand to bargain to avoid a waiver because the employer has already made a unilateral change. Order at 18.

On reconsideration, ERB distinguished its prior decision in *Coos Bay Police Off. Ass'n. v. City of Coos Bay*, UP-61-92, 14 PECBR 229 (1993). In *City of Coos Bay*, ERB held there was no unlawful unilateral change because the city's policy expressly permitted the city to change its promotional practices. First, ERB noted that Coos Bay is based on an out-

moded analysis, based on specifically relevant language in a bargaining agreement, that was supplanted by the Supreme Court in Assn. of Oregon Corr. Emp. v. State of Oregon, 353 Or 170, 177 (2013), requiring an express waiver of the right to bargain over mandatory subjects of bargaining. And even if Coos Bay remained valid, there was no evidence that the union had agreed to such terms as provided in the policy, which had been presented to the union as a fait accompli without prior notice.

## KEY TAKEAWAY

A "temporary" change in employment practices, even when implemented in response to an emergency, can create a new status quo. An employer does not reserve the right to change back to a prior practice simply by specifying in the policy that it is temporary or subject to rescission without bargaining (or providing the opportunity to bargain) over such terms.

***Airport Fire Fighters' Association, IAFF Local 43 v. Port of Portland*, UP-046-21 (April 14, 2022), recons. den. as untimely (May 18, 2022) appeal pending**

ERB dismissed the complaint containing various challenges to the Port's vaccine exception process, concluding:

(1) The Port did not violate ORS 243.672(1)(a) by refusing to allow employees to have union representation during meetings over the vaccine exception process.

The union was seeking to invoke *Weingarten* rights at these meetings. But as ERB noted, *Weingarten* rights do not apply to all meetings between an employer and a union-represented employee. Rather, an employee has a right to union representation only at "investigatory interviews." In this case, the employer was involved in a process to determine whether to grant such employees' exemption request and provide an accommodation to such requests. The meetings thus were not investigatory interviews triggering *Weingarten* representation rights. Notably, a Port manager expressly wrote to each employee that the meetings were not investigatory or disciplinary.

(2) The Port did not violate the parties' Memorandum of Understanding (MOU) and ORS 243.672(1)(g) by refusing to provide an accommodation to employees with an accepted religious or medical exemption that would allow them to continue working.

ERB rejected the Union's assertion that the MOU required the Port to accommodate employees who met the religious exemption requirement by permitting them to continue to work, finding the Port's interpretation that the MOU imposed no such obligation was both plausible and supported by extrinsic evidence. Among the extrinsic evidence was the interpretation by the Oregon Health Authority of its regulation (OAR 333-019-1010) to permit an employer to deny accommodations if they pose a direct threat or an undue hardship.

(3) The Port did not violate ORS 243.672(1)(e) by making a unilateral change to a mandatory subject of bargaining regarding changes to minimum staffing.

ERB found that the Port had a minimum staffing practice of at least 12 employees per shift and that occasionally its staffing fell below that minimum. And because of a staff shortage, the Port fell below that minimum staffing level between October 18 and November 30. This shortage was temporary and at no time did the Port indicate that it intended to change its practice to drop the 12-person minimum.

(4) The Port did not violate ORS 243.672(1)(f) by failing to provide the Union with written notice of anticipated changes to a mandatory subject of bargaining under ORS 243.698. As noted above, the Port did not intend to change its minimum staffing and did not do so. Therefore, it had no obligation to give notice.

### KEY TAKEAWAY

The Port was not obligated to allow union representation at meetings to discuss vaccine exemptions or to accommodate exemptions by allowing firefighters to continue to work. The Port did not change its practice as to minimum staffing when dealing with staff shortages arising from vaccine requirements that led to several shifts falling below the minimum. Compare with Marion County above.

## SB 1049 Bargaining

***Hillsboro Professional Firefighters, IAFF Local 2210 v. City of Hillsboro*, UP-046-20 (May 4, 2022)**

ERB held that the City did not violate ORS 243.672(1)(e) by refusing to bargain, by engaging in surface bargaining, or by engaging in bad faith bargaining with the Union over the impact of Senate Bill (SB) 1049 on employees holding the rank of Battalion Chief during the term of the contract.

ERB distinguished this case from *Multnomah County*, UP-003-19 (2020) *aff'd*, 317 Or App 89 (2022). ERB noted that it held that "a public employer violates ORS 243.672(1)(e) when it refuses to bargain, during the term of a contract, over a mandatory subject of bargaining that is not specifically covered by the parties' existing agreement (and the union did not waive its statutory right to bargain). See Multnomah County, recons, at 3." (Order at 13.) By contrast, in this case, "the subject of retirement benefits is specifically covered by the parties' contract, meaning that Multnomah County simply does not apply here." (Order at 13.)

ERB elaborated that under *Multnomah County*, "the obligation to bargain over mandatory subjects of bargaining during the term of the contract does not include an obligation to reopen or bargain over subjects expressly covered by the contract. Therefore, Multnomah County does not provide a basis for finding that the City violated ORS 243.672(1)(e) in this case."

ERB further concluded: (1) there was no duty to bargain over invalidated provisions under ORS 243.702 because nothing was invalidated by SB 1049, (2) the City did not make a unilateral change, (3) the parties' agreement to defer bargaining over SB 1049 entered while its validity was being challenged in the Supreme Court did not create or recognize any specific bargaining obligation, and (4) surface bargaining allegation rejected because there was no obligation to bargain.

### KEY TAKEAWAY

Union demand to bargain over SB 1049 diversion of funds from employee contributions did not trigger bargaining duty under *Multnomah County* case because the subject was "expressly covered" by terms of collective bargaining agreement.

**_Oregon Sch. Empl. Ass'n. v. Silver Falls Sch. Dist. 4J_, UP-010-21 (August 4, 2022) appeal pending**

ERB held that employer failed to bargain in good faith even through there was no statutory duty to bargain.

Employer agreed to interim bargain with union over effects of SB 1049, but was found to have engaged in surface bargaining. Before commencing bargaining, the District's assistant superintendent sent an email to the superintendent and business manager that he intended not to offer retirement compensation. Based on that email, the majority concluded that the District "had no real intention of reaching an agreement with OSEA." Op. at 16. Other facts were also noted, including the cancellation of two bargaining sessions when the business manager's house was being threatened by a wildfire and delayed and incomplete responses to information requests. The two-member majority ruled that employer, once it agreed to bargain, was obligated to bargain in good faith regardless of whether there was a statutory duty to bargain. The two-member majority therefore declined to determine if there was a statutory duty to bargain.

## KEY TAKEAWAY

When agreeing to bargain (or even discuss) permissive matters where there is no bargaining duty, take it seriously and act in good faith. And stop emailing abut sensitive and arguably unlawful plans. Think before your hit send.