



## Collective Agreement Negotiation

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### **Maintained**

This practice note discusses the negotiation of collective agreements. In particular, it provides an overview of collective bargaining, reviews key collective agreement terms, negotiation strategies and the key parties, and discusses legal compliance as it relates to the negotiation process. Collective bargaining is a process that involves negotiation between an employer and a group of employees, who are represented by a labour union, to determine the terms and conditions of employment. It is a crucial element in labour relations and plays a significant role in shaping the working conditions, wages, and benefits applicable to a workforce. This practice note also provides practical tips for achieving successful negotiations.

For more information regarding union certification and collective bargaining, see the practice note: *Bargaining Rights and Employer Obligations in the Bargaining Process*. For an overview of the collective bargaining process between the employer and trade union, see the *Collective Bargaining Preparation Flowchart*. For an overview of the process for certifying a union as the exclusive bargaining agent of employees, see the *Union Certification Process Flowchart*. See the *Union Organizing: Employer Do's and Don'ts Checklist* for a list of what an employer can and cannot do during a union organizing campaign. Also see the *Collective Bargaining Preparation Checklist* for a list of key items for an employer to consider when preparing for the collective bargaining process. For more information on managing a unionized workforce, see the practice note: *Managing and Operating in a Unionized Environment*. To learn more about the laws governing collective bargaining in each Canadian jurisdiction, see the practice note: *Labour Relations Legislation*. For information on labour relations in Canada, see the *Labour Relations Resource Kit*.

### **Overview**

Collective bargaining is a crucial mechanism for establishing terms and conditions of employment in unionized workplaces. Through collective bargaining, an employer and a trade union will come together to negotiate employment terms such as wages, working hours, benefits, and disciplinary procedures.

More importantly, the collective bargaining process fosters open dialogue, allowing both parties to have the opportunity to express their concerns, share perspectives, and work toward common ground. This collaborative approach can help to continually build a positive relationship between employees and management.

However, it is essential to recognize that the collective bargaining process is not without challenges. Disagreements may arise over various issues, leading to impasses in negotiations. Strikes and other forms of industrial action can occur when parties fail to reach an agreement, which can lead to significant consequences for the employees in the workplace and the overall functioning of the employer's business. For more information on strikes and lock-outs, see the practice note: *Managing and Operating in a Unionized Environment*.

### **Key Collective Agreement Terms**

The goal of collective bargaining is the establishment of a collective agreement, the terms of which will govern the relationship between the employer, the union, and the employees in the relevant bargaining unit. Canadian labour legislation requires the collective agreement to be in writing and entered into between an employer and a bargaining agent. (See e.g.: *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 3(1) ("CLC"); *Labour Relations Act*, 1995,

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S.O. 1995, c. 1, Sched. A, s. 1(1) ("ON LRA"); and *Labour Relations Code*, R.S.B.C. 1996, c. 244, s. 1(1) ("BC LRC").

Monetary terms are a central focus of collective bargaining, as the resulting wage entitlements most directly impact the economic well-being of bargaining unit employees. The negotiation of monetary terms typically involves discussions on base pay, overtime rates, bonuses, shift premiums, and other monetary benefits, taking into account factors such as inflation, cost of living, and industry standards.

Beyond terms addressing monetary compensation, collective bargaining often addresses issues related to employee benefits. This can include health insurance, retirement benefits, vacation time, sick days and work-related leaves, and other non-monetary perks.

Working conditions are also key elements of collective bargaining. In general, the parties will negotiate clear standards for issues like hours of work, overtime policies, break times, rights in respect of lay-off and recall, and workplace safety.

Relatedly, when negotiating a collective agreement, employers and unions will usually establish clear rules in respect of employee discipline. These terms may include the time frame in which the employer can issue discipline, the right for employees to have union representation during disciplinary meetings, and the length of time that a disciplinary notation will remain on an employee's record.

Moreover, employers and unions will negotiate procedures by which the parties can resolve disagreements relating to the interpretation, enforcement, and application of their collective agreement. Two main types of such procedures appear in collective agreements: (a) the grievance procedure, which sets out how a party may raise allegations of a collective agreement breach; and (b) the arbitration procedure, which establishes the process by which grievances are formally adjudicated and resolved. The grievance and arbitration provisions of a collective agreement will typically include requirements regarding timeframes for filing grievances and holding grievance meetings, procedures for appointing labour arbitrators, and more.

### **Negotiation Strategies**

Two general approaches to collective bargaining have been identified in Canadian labour law: distributive bargaining and integrative bargaining (see: e.g., D. Corry, *Collective Bargaining and Agreement* (Toronto: Thomson Reuters, 2016) at 6:4000; W.B. Rayner *et al.*, *Canadian Collective Bargaining Law: Principles and Practice*, 3rd ed. (Toronto: LexisNexis Canada, 2017) at Chapter 26).

Distributive bargaining (also known as "positional bargaining") is a style of negotiation where the parties aim to divide a fixed resource and claim the maximum amount of benefit for themselves. This bargaining style is inherently competitive in nature, with each issue in dispute being "won" or "lost" by a party.

Integrative bargaining aims is a strategy that aims to find mutually beneficial results for the negotiating parties. The parties are encouraged to identify common interests and collaboratively create "win-win" solutions.

There is no "one size fits all" method to collective bargaining and, indeed, distributive and integrative tactics should be used in combination when negotiating a collective agreement. For instance, it may be appropriate for the employer and union to co-operate when discussing provisions in respect of job accommodation but engage in positional bargaining when negotiating wage rates. See Negotiation Strategies for a list of factors to consider when choosing the right negotiation strategy.

### **Key Parties**

As alluded to above, the main parties to the collective bargaining process are the employer and the union representing that employer's workforce. Each party will be represented by its own bargaining committee, who is responsible for voicing the interests of management (in the case of the employer) and the employees in the bargaining unit (in the case of the union).

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The selection of each party's bargaining committee members is an important stage in the collective bargaining process and should be done carefully. A bargaining committee is more likely to be successful if its members:

- are knowledgeable about the existing collective agreement (if any) and the collective bargaining process;
- understand the key needs and issues of the business and workplace;
- are credible, trusted advocates who do not have animus toward the opposing party;
- understand their individual roles within the committee (e.g., lead spokesperson, note-taker, *etc.*) and internal decision-making processes; and
- are strong communicators who can effectively present proposals at the bargaining table and provide bargaining updates to the stakeholders who they represent.

In some cases, a conciliator or arbitrator may participate in collective bargaining as a neutral third party. The conciliator or arbitrator's role in these circumstances is to assist in resolving disputes and facilitating productive negotiations between the employer and the union.

### Legal Compliance

The negotiation process is governed by various legal principles that aim to strike a balance between the interests of both parties, protecting the rights of workers while acknowledging the economic constraints faced by employers. Each Canadian jurisdiction has specific laws and regulations that outline the rights and responsibilities of employers, unions, and employees during negotiations (for more information, see the practice note: Labour Relations Legislation). These laws aim to ensure a fair and transparent bargaining process while also providing mechanisms for dispute resolution.

One important legal obligation arising from these laws is the duty for parties to *bargain in good faith* and to *make every reasonable effort to enter into a collective agreement* (see e.g.: CLC, s. 50(a); ON LRA, s. 17; and BC LRC, s. 11(1)). This duty is discussed in detail by the Supreme Court of Canada in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] S.C.J. No. 14 at para. 42. As explained by the Court, the "good faith" component of this duty is measured on a subjective standard — adjudicators will evaluate whether a party is making an honest attempt to reach a collective agreement. However, the "every reasonable effort" component is assessed on an objective standard, whereby the party's behaviour is compared to the industry norm and any significant deviations from that norm are scrutinized.

Over the years, courts and labour boards across Canada have shed light on how the aforementioned duty may look in practice. Some of these interpretive principles are set out below:

- Parties are prohibited from "surface bargaining" — *i.e.*, going through the motions of collective bargaining without the intent of concluding a collective agreement (see: *Daily Times*, [1978] OLRB Rep. July 604 at para. 15). Examples of surface bargaining include the adoption of inflexible positions on central issues to the negotiations or the refusal to accept terms that are industry standard.
- Unions must act fairly, genuinely, and competently toward the employees that they represent and diligently pursue the interests of those employees (see: *Canadian Merchant Service Guild v. Gagnon*, [1984] S.C.J. No. 24 at 527).
- Employers must bargain with the union, and not with employees directly. This requires an employer to be circumspect when communicating with bargaining unit members and ensure that any such communications do not undermine the union's representation rights (see: *AN Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393 at paras. 17–18).
- The employer is required to share with the union any information which is of value to the union's role as bargaining agent, such as names and contact information of the employees in the bargaining unit (see: *Hotel & Restaurant Employee CAW Local 448 National Automobile, Aerospace, Transportation and*

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*General Workers' Union of Canada (CAW-Canada v. The Millcroft Inn Ltd.*, 2000 CanLII 12207 at paras. 30-31).

- A party must be honest during collective bargaining discussions and respond truthfully to any questions that it is asked (see: *Inglis Ltd.*, [1977] OLRB Rep. March 128 at para. 16).
- Similarly, an employer is obligated to disclose to the union any decisions that have already been made which may have a major impact on the bargaining unit (see: *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577 at para. 39).

Furthermore, given that the collective agreement will establish terms and conditions of employment, the parties must ensure that the results of their negotiations are legally compliant. For instance, negotiated wages and shift schedules must comply with minimum wage and hours of work requirements under employment standards legislation.

### **Practical Tips**

The nature and tone of collective bargaining will differ from case to case, depending on the workplace, the parties and their representatives, and the wider economic context in which the negotiations are occurring. There are, however, some common strategies for achieving successful negotiations:

- Before commencing negotiations, ensure that you understand your mandate and objectives. If you understand your client's top priorities and fallback positions, you can approach the negotiation process in a more targeted and productive manner.
- Review the existing collective agreement and the grievances that were filed during the term of that collective agreement. This will help you understand the key issues currently affecting the workplace and which the parties may want to address at the bargaining table.
- Research economic conditions, industry trends, and labour market dynamics applicable to the employer's business and the union's bargaining unit. These external factors often influence bargaining positions and can help you anticipate the other side's demands during negotiations.
- Try to simplify the negotiations by focusing on essential issues. Avoid overloading your bargaining proposals with issues that not a high priority for your client, as lengthier negotiations can stoke frustrations between the parties and undermine productive bargaining.
- Address and resolve non-contentious issues first, so that you can shrink the bargaining table as you work toward more contentious issues.
- Communicate clearly. As part of the duty to bargain in good faith, both the employer and the union should be open about their respective positions and be willing to share any data (e.g., financial performance, workforce statistics, market trends, etc.) that may be relevant to the negotiations.
- Be prepared to compromise. Successful negotiations often require each party to give and take. If you approach collective bargaining with a flexible mindset, you may find it easier to develop effective solutions that foster the parties' long-term relationship.

*Current as of: 10/20/2024*