Communicating with Employees During Negotiations:  
A Bad Idea or Good Practice?  

by  
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Purpose  
This paper debunks the misconception that employers cannot communicate with represented employees during negotiations. It outlines steps employers can follow to communicate their message and avoid unfair labor practice charges.

Communication is critical to understanding each other’s perspectives, the reasoning behind those perspectives and identifying options for working through differences. Communication also plays an important role in the success of any organization and greatly influences organizational culture, employee morale, public perception, customer satisfaction, and labor relations. It is important, then, to understand what restrictions bargaining laws place on employer-employee communication. During negotiations, is an employer required to rely solely on the union to provide information to employees? Or can the employer communicate directly to its employees?

Overview of Relevant Laws  
California statutes outline the requirements of bargaining—both the scope of bargaining and the duty to bargain in good faith. I work for a city so this paper will focus on the Meyers-Millas-Brown Act (MMBA) which established bargaining laws for cities, counties, and special districts. However, statutes that apply to other public agencies should also be noted:

- The Education Employment Relations Act (EERA), which covers employees of public K-12 schools and community colleges
- The Higher Education Employment Relations Act (HEERA), which covers public employees of colleges and universities
- The State Employer-Employee Relations Act (SEERA), also known as the Ralph C. Dills Act, which covers government employees
- The Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA), which covers supervisory employees of the transit agency
- The Trial Court Act (TCA), which covers trial court employees, and
- The Court Interpreter Employment and Labor Relations Act, which covers court employees who serve as spoken language interpreters of trial court proceedings

Each of these statutes is derived from the National Labor Relations Act and grants certain rights and obligations to employers and unions. The Public Employment Relations Board (PERB) is the state agency that has jurisdiction to enforce and administer these bargaining laws by hearing and deciding charges of alleged violations. These include bad faith, discrimination and representation disputes. PERB helps ensure consistent implementation and application of these statutes. Five members, drawn from California’s public and private sectors, are appointed to PERB by the Governor to serve five-year terms.
Meyers-Milias-Brown Act

The purpose and intent of the MMBA, Section 3500, is to:

“promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations” and to “promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies.”

This means employees have the right to select and join a union. The employer must work with that organization in order to discuss matters that affect the employment relationship such as wages, work hours, and working conditions. In addition, the MMBA requires employers to meet and confer with union representatives. Section 3505 of the MMBA defines the duty to bargain in good faith as:

“...a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.”

Both parties have the obligation to come to negotiations with an open mind, follow procedures that will enhance the prospects of settlement, be willing to meet as often as necessary, provide information needed to bargain meaningfully, discuss the demands of employees freely, justify negative responses to these demands and consider compromise proposals.1 If either party violates this duty to bargain, it has failed to negotiate in good faith.

Conduct that Violates the Duty to Bargain in Good Faith

Two tests were established to determine whether a party has bargained in good faith: “the totality of circumstances test” and “per se test.”

The “totality of circumstances test” is a test that requires courts to consider all relevant facts in a case to determine if a party acted with a genuine intent to reach agreement. While a specific behavior viewed alone might not support a bad faith bargaining charge, the court will look at the circumstances surrounding the alleged violation and the party’s overall conduct.

during negotiations to determine if the duty to bargain in good faith was violated. When considering the totality of the circumstances, courts usually consider whether a party:

- Engaged in surface bargaining;
- Used conditional bargaining;
- Used regressive bargaining;
- Refused to exchange proposals or make concessions;
- Used dilatory tactics;
- Provided negotiators who lacked adequate authority; and
- Bypassed the exclusive representative ("direct dealing").

To reach the conclusion that a party did not bargain in good faith, more than one of the above indicia have to have occurred. Both courts and public sector agencies generally accept the totality test.²

The second test involves “per se” violations. Unlike the totality test, just one violation is enough to prove bad faith bargaining. Per se violations include:

- Failing to provide information that has been requested and which is related to bargaining;
- An absolute refusal to meet;
- Failing to execute the contract after reaching agreement;
- Reaching impasse on non-mandatory subjects;
- Conditioning proposals on waiver of rights; and
- Making unilateral changes without providing notice and the opportunity to bargain.

**Direct Dealing**

When employees select a union to represent them, the employer is required to work through the union to discuss matters that fall within the scope of bargaining. When an employer bypasses the exclusive representative and goes directly to employees to discuss and take action on items that are bargainable, this is considered “direct dealing” and could result in a bad faith bargaining charge.

The generally held belief is that employers are prohibited from communicating with represented employees during negotiations seems counterintuitive because it reduces the ability of the larger group to understand the issues and reasoning behind proposals made. Lack of communication and understanding contribute to employees coming up with their own explanations as to what might be happening in negotiations. Worse yet, there is a potential that when an employer relies solely on the union to communicate with employees about proposal made during negotiations, the chance of the information being miscommunicated is high. Like the age-old game of “operator,” messages rarely end up the same as when they began as information is passed from one person to another.

Although employers cannot deal directly with employees on bargainable matters, the MMBA does not prevent employers from passing on information shared in bargaining sessions after the session.

**Employee Communication During Negotiations**

When contracts are being negotiated the workplace may be tense and employees anxious given the uncertainty of potential contract changes that may affect them. If contracts are being negotiated with more than one unit, employees may be concerned members of another unit will get a better contract. Supervisors and managers of represented employees may be equally unsure of the impact a new contract will have on the workplace. In addition, unions often communicate with their members using an “us versus them” or “win or lose” perspective. While these approaches support the union’s reason for existing, they can create fear amongst employees and promote mistrust toward the employer. By contrast, it is in the employer’s best interest for employees to understand the proposals it is making so they will be encouraged to work together to resolve issues.

Employers are often dissuaded from communicating with represented employees as a result of confusion about “direct dealing.” Bargaining laws do permit employers to communicate with employees about negotiations; however, the communication must:

- Be factual;
- Have already been discussed with the union;
- Not attack the union; or
- Not attempt to coerce or make promises to employees.

The key issue to keep in mind is whether the employer is meeting with and working through the union to confer about bargainable subjects or bypassing the union and bargaining directly with employees. The former is acceptable while the latter is not as it undermines the duty to bargain. **Caveat:** To be able to communicate with employees, the employer should not agree to a confidentiality ground rule at the negotiating table.

Ground rules often discussed during the initial negotiation session include matters such as the fact that tentative agreement on an issue is subject to agreement on all issues, confidentiality, media statements, the order of items bargained (e.g., non-economic versus economic items), deadlines for proposals, the need for proposals and/or tentative agreements to be in writing, and employee release time from work. Ground rules help guide negotiations in a productive and mutually understood manner, but they may not be imposed on one party by the other.

**Benefits of Communication**

Lack of information generates rumors. By communicating factual information during negotiations, an employer can:

- Reduce rumors by increasing employee understanding of items on the table by stating the reason(s) for the employer’s proposals;
• Increase transparency of the process with employees (and potentially with the public) as those not present at the bargaining table will have access to both union and management proposals.

The employer’s ability to share the proposals can highlight the number of items the union has brought forward which is often much greater than the employer’s list, and enable others to draw conclusions about the reasonableness, expense, and possible impact of those proposals.

Use of Newsletters or Facts Sheets
Bargaining laws limit but do not prohibit communication entirely. One approach some employers use with success is to create fact sheets or use existing newsletters to communicate about negotiations with employees.

Learning from Tulare County’s Experience
Tulare County’s newsletter, the Grapevine, is an example of an effective employee communication tool. The Grapevine, described as “news for employees of the County of Tulare,” is a monthly publication produced by the Human Resources and Development Department. Prior to negotiations, benign articles on labor relations issues are introduced including the fact that negotiations are coming. The County continues to use the Grapevine, by distributing special editions of the newsletter containing timely information about negotiations. This publication is nicely formatted, easy to read, and accessible to all employees and the public via the department’s web site. Special editions of the Grapevine contain the following information:

• The date of the negotiation session or meeting on which the newsletter is reporting;
• The names of each bargaining team member and the name of the union and local;
• A brief description of the primary purpose for the meeting;
• A summary of the proposals discussed;
• A summary of counter proposals made, if any;
• A list of any documents, data, or information shared between the parties and who generated the information; and
• The date, time, and location of the next scheduled meeting.

Pre-Negotiations Planning
Part of the employer’s pre-negotiations planning should be to determine if it wants to communicate with employees, and, if so, how best to do it. The employer should develop a communication plan and decide whether an existing newsletter should be used or whether another communication tool should be developed. The plan also should identify:

• Who will be responsible for writing, editing and designing the fact sheet or newsletter;
• What information should be included—perhaps following Tulare County’s format (see References at end of this paper);
• What information cannot be included, such as new proposals which have not yet been discussed with the union;
• How it will introduce the publication or subject of negotiations to employees if the publication is new;
• How the publication will be distributed (hard copy, electronically, post on bulletin boards) and to whom;
• Who will review and approve the document before it is distributed;
• What the timing of an issue will be—something that should be given special consideration if the employer is also in negotiations with other bargaining units;
• Who will handle questions from employees or the public that may be generated as a result of the newsletter; and
• What response to provide the union should the union be interested in making the newsletter a joint publication.

The employer also must understand that in order use a newsletter or fact sheet to communicate with employees about negotiations, the employer cannot agree to a confidentiality ground rule.

Guidelines for Communicating with Employees
These guidelines are offered to assist employers in understanding what their communication may include and what should be avoided.

• Do communicate in a factual manner;
• Do develop a communication plan and follow that plan each time a new contract is negotiated. Make it your practice.
• With more sensitive or complex items, do consider sharing the same background information, reasoning, or justification that was presented to the union during negotiations;
• Do not criticize or in any way derogate the union;
• Do not threaten or attempt to persuade employees;
• Do not make promises;
• Do not communicate any position or information that was not previously discussed during negotiations; and
• Do not make any proposals directly to employees that were not shared during negotiations.

Summary
Employers may choose to make a practice of communicating with employees during negotiations. By following the recommendations outlined in this paper employers will be able to share their story and distribute important information with employees without violating bargaining laws. Communication plans should be established prior to the start of negotiations and information shared should be factual and mirror that which was exchanged at the bargaining table. The benefits of using newsletters or fact sheets to communicate with employees may increase understanding of the proposals being discussed, decrease rumors and false information, potentially increase trust in the negotiation process and provide greater transparency.
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References


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