HOW ZIPPER CLAUSES WORK  
AND WHY THEY ARE IMPORTANT  
By: Lilybell Nakamura

Introduction

Federal labor law requires employer and employee representatives to engage in negotiations or collective bargaining over "wages, hours, and other terms and conditions of employment." These are called mandatory subjects of bargaining. Under the Meyers-Milias-Brown Act (MMBA), public employers in California have a duty to bargain or negotiate in good faith. MMBA provides a broader scope of representation than any of the other labor relations statutes, in that it includes the phrase "including but not limited to" before the words of "wages, hours, and terms of conditions."

Collective bargaining is a process of negotiations between employers and the representatives of a unit of employees with a goal of reaching agreements that regulate working conditions. These collective bargaining agreements, also referred to as Memorandum of Understanding (MOU), are written, signed, legally enforceable contracts for a specified term, between the employer and its employees represented by labor organizations. The Memorandum of Understanding usually covers wages, hours, and working conditions including but not limited to overtime and grievance procedures, rights and responsibilities and term of agreement.

The Memorandum of Understanding may include technical provisions and special clauses such as a zipper clause. This paper describes the two types of zipper clauses, provides examples of zipper clauses and describes why these special contract clauses are important.

What is a Zipper Clause?

A zipper clause in the collective bargaining contract means that both parties waive the right to bargain during the term of the contract. Zipper clauses should be "clear and unmistakable." Depending on the type of zipper clause included in the agreement, the employer and employee may or may not negotiate during the life of the contract.

There are 2 types of zipper clause. One is a comprehensive or complete agreement clause. This type of zipper states that the parties waive the right to demand bargaining on not only over matters dealt with in the contract, regardless of whether that matter was contemplated when the contract was negotiated or signed but also over any other matters within the scope of representation. Neither employers nor the union could
reopen negotiations during the life of the contract with this clause. The employer would have the right to implement changes to otherwise bargainable terms and conditions of employment during the time such a compressive clause was in effect as the union would have waived its right to bargain over such changes. A comprehensive zipper clause is not common because most unions will not agree to one.

The more common zipper clause is one that closes off bargaining over matters included in the labor agreement and those withdrawn during negotiations. These zipper clauses do not waive the right to negotiate over matters not covered in the contract. In other words, the employer and the union would be required to negotiate over changes to mandatory subjects of bargaining not included in the current contract.

Examples of Language

An example of a complete agreement or comprehensive zipper clause is: Both parties acknowledge that they had full opportunity during negotiations to make any demands and proposals. There is no obligation on either party during the life of the agreement to bargain collectively with respect to any matter, whether included or not included in this agreement, except as provided in this agreement.\[1]\]

Another example of a comprehensive clause is: During negotiations that resulted in this agreement, the Union had the unlimited right and opportunity to make demands and proposals with respect to all subjects within the scope of representation. Therefore, for the term of this agreement, the Union agrees that the (agency) shall not be obligated to negotiate with respect to any subject or matter specifically referred to or covered in this agreement or those matters discussed during the negotiations, but not included in this agreement (and to those mandatory subjects that are not covered by this agreement).\[2]\]

The following is an example of a typical zipper clause from US Legal: All matters within the scope of bargaining have been negotiated and agreed upon. The terms and conditions set forth in this Agreement represent the full and complete understanding and commitment between the District and the Association.\[3]\]

Alameda County’s zipper clause is a common or typical one. Alameda County’s Memorandum of Understanding with SEIU’s Local 1021 language reads: Except as otherwise specifically provided herein, this Memorandum of Understanding fully and completely incorporates the understanding of the parties hereto regarding the provisions contained in this MOU. Neither party shall, during the term of this Memorandum of Understanding, demand any change herein, provided that nothing herein shall prohibit the parties from changing the terms of the Memorandum of Understanding by mutual agreement.\[4]\]
As demonstrated by these examples, language may vary. In an unfair labor practice dispute, the Public Employee Relations Board (PERB) will interpret the language in the contracts and look for a waiver that is understandable and not ambiguous. PERB will also look for evidence of both parties’ intent and agreement to the waiver. That means that the negotiations history should demonstrate that the labor organization and employer waived the right to bargain over mandatory subjects of bargaining.

**Why is a Zipper Clause Important?**

A zipper clause is important because it can protect the rights of employers by relieving management from the duty to bargain during the contract. It also protects the rights of the employees in that it can prevent management from imposing changes in terms and conditions of employment that weren’t covered in the contract.

Here’s an example of why this typical clause is needed. Management wants to change the structure of pay for performance bonuses to employees. There is no mention in the contract for pay for performance bonuses nor was it discussed during prior negotiations. Without a zipper clause, management could demand the labor organization to negotiate pay for performance bonuses. With a strong zipper clause, the labor organization can respond to management that there is no duty to negotiate. In addition, even if the labor organization agrees to meet and negotiate, management would not be able to impose or unilaterally adopt any changes if mutual agreement is not reached.

**Alameda County Concession Bargaining**

However, in spite of the inclusion of zipper clauses in their Memorandums of Understanding, the employer *may request* to reopen negotiations during the term of the agreement as it may not be practical to wait until the contract is open. Employers cannot demand or impose. They must exercise good judgment when requesting reopeners that would otherwise be barred by a zipper clause. For example, due to the downturn of the economy, Alameda County prepared for concession bargaining.

As previously stated, Alameda County’s waiver is a typical one. In 2009, management requested to reopen six of their Memorandums of Understanding during the terms of the contracts. Although the labor organizations were not required to meet, all six agreed to meet and discuss wages with management.

The reopeners of the six contracts resulted in four labor organizations conceding or giving up previously agreed upon cost of living raises. In addition, these labor organizations agreed to extend contracts with no wage increases as demonstrated below.


**International Association of Firefighters Local 55A and 55B:** Agreed to extend their MOU until June 2015 with concessions on medical and three years of zero.

**Alameda County Welfare Fraud Investigations Association:** Settled for three years of zero and 10% of the medical premiums and have extended their contract until June 2014.

Unfortunately for Alameda County, concession bargaining for two of the reopeners was unsuccessful.

**Union of American Physicians and Dentists:** Polled their membership and was not interested in continuing discussions.

**Professional Association of County Employees IFPTE Local 21 Units S-06 and S-25:** Negotiations were unsuccessful.

**Village of Tarrytown v. Tarrytown Police Association**

In the PERB case of Village of Tarrytown vs. Tarrytown Police Association, Assistant Director of Public Employment Practices and Representation Kenneth J. Toomey was tasked with determining whether a zipper clause precluded negotiations for paid time off for police officers called to jury duty after the contract agreement was ratified. [5]

An amendment to the law in 1996 eliminated the statutory exemption of police officers from jury duty. This subject of paid time off for jury duty for police officers had not been discussed during negotiations of their 1995-1997 contract agreement so it was not included in the agreement. The parties agreed to negotiate the change but were unable to reach mutual agreement. The Village of Tarrytown suggested discussing this in the next negotiation for a new contract rather than going through mediation and interest arbitration. However, on November 21, 1996, the Village of Tarrytown rescinded its jury duty policy and required the officers called to jury duty to use accrued time or leave without pay.

The Village of Tarrytown’s zipper clause stated that the parties “agree that to the extent agreement is possible on negotiable items it has been reached in [the] agreement.” The
Village of Tarrytown argued that because of the existence of the zipper clause, this issue could not be arbitrated. Toomey did not accept the argument because at the time the contract agreement was being negotiated, the issue of jury duty did not exist as the police officers were not subject to serve on juries. Therefore, the issue of jury duty could not have been sensibly expected to be a topic of discussion or negotiation.

Toomey found that a zipper clause “does not preclude the reopening of negotiations concerning a subject which has become negotiable as the result of a statute enacted during the term of the agreement; and compulsory interest arbitration is available in the event of an impasse in negotiations arising in the course of the reopening of negotiations during the term of a collective bargaining agreement.”

**Case of County of Los Alamos v. John Paul Martinez and Michael Dickman**

In the case of County of Los Alamos v. Martinez, the New Mexico Court of Appeals upheld the decision rendered by the First Judicial District Court. The district court determined that paramedic training contracts are subjects of mandatory bargaining and that the County may not unilaterally enter into such contracts with Union members without including the Union in its negotiations. [6]

The County of Los Alamos offered firefighters a voluntary paramedic training program which pays for the salaries including overtime, the tuition, per diem, travel and other expenses while they attended the program. The advanced training provided advanced skills for their paramedic staff as well as allowing them opportunities for higher salaries since the training enable them to earn the highest EMS rated license in New Mexico. In return, the County asked that the firefighters remain employed with Los Alamos for at least two years after completing the training.

The County brought suit against two employees, John Paul Martinez and Michael Dickman. These two employees entered contracts agreeing to the provisions of the program including complying with the request to remain employed for at least two years following the completion of the training. Failure to abide by the terms of the contract could lead to disciplinary action up to and including termination. In addition, Defendants agreed that if they failed to complete the training or maintain the employment agreement following the completion of training as stated in the contract, they would reimburse the County for all expenses incurred by the County related with the training program.

Both Defendants completed the training program. Martinez remained with the County for seven months after completing the program prior to voluntarily leaving the County. Dickman remained employed for six months after completing the program prior to
voluntarily leaving the County. Neither Martinez nor Dickman made payments to reimburse the County.

Both Martinez and Dickman were members of the Union. The County and Union were parties to a collective bargaining agreement that covered the Defendants’ bargaining unit effective January 1, 2004 through December 31, 2005. The agreement included provisions relating to wages, hours, and terms of conditions of employment but did not cover the paramedic training contracts.

The collective bargaining agreement included a management-rights clause that gave management certain specific operational and policy rights as well as “all rights not specifically limited by” the collective bargaining agreement. It also included the following clauses:

The parties agree that this is the complete and only agreement between the parties. Each party has negotiated on all issues identified for negotiations and such negotiations have led to this agreement. No additional negotiations will be conducted on any item, whether contained herein or not, except by mutual agreement of the parties. This agreement replaces any and all previous agreements between the parties.

The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective bargaining and that all such subjects have been discussed and negotiated upon and the agreements contained in this Agreement were arrived at after the free exercise of such rights and opportunities; therefore, the [County] and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Both the County and the Union filed motions for summary judgment and a hearing was held. After the hearing, the district court granted the Union’s motion for summary judgment on the basis that the paramedic training contracts containing terms and conditions of employment are subjects of mandatory bargaining. The district court found that direct communication or dealing with the union-represented employees violated the Public Employee Bargaining Act (PEBA). Additionally, the district court denied the County’s motion for summary judgment based on the Union’s waiver of bargaining rights set forth in the zipper clause of the collective bargaining agreement. The district court held that the management-rights and zipper clauses could not override the County’s obligation to engage in negotiating on the subject of paramedic training contracts.
How Zipper Clause Work and Why They’re Important

The Union argued that the “clear and unmistakable” language standard be applied in this case while the County asked the court to follow decisions in federal circuit cases found that the broad waiver clauses be sufficient clear and unmistakable language. The County appealed but to no avail. The Court of Appeals agreed with the district court that the Union did not waive its right to bargain based on the zipper clause.

Conclusion

While there does not appear to be any good reason *not* to have a zipper clause, contracts without one are common. Your collective bargaining agreements may or may not contain zipper clauses. However, zipper clauses have been proven to be valuable and are worth understanding and including in your agreements. Without them, the law requires that the employer and employee be willing to negotiate even in mid-contract.

Notes

[3] USLegal.com

Lilybell Nakamura
Departmental Personnel Officer, County of Alameda
1401 Lakeside Drive, Suite 500
Oakland, CA  94612
(510) 208-9853
September 30, 2011