Employer's Duty to Provide Information under the National Labor Relations Act Checklist

A Lexis Practice Advisor® Practice Note by
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This checklist highlights the best practices for helping unionized private employers effectively and lawfully respond to a request for information made by the labor organization representing the employees.

The National Labor Relations Act (NLRA) generally requires employers to furnish to unions information relevant to the administration or negotiation of a collective bargaining agreement upon request. See Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979). Specifically, the Supreme Court provides that "[t]he duty to bargain collectively, imposed upon an employer by § 8(a)(5) of the National Labor Relations Act, includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." Id. Consider the following guidance when preparing to respond to a union's information request.

For more information on the employer's duty to provide information under the National Labor Relations Act, see Complying with the Duty to Share Information and National Labor Relations Act: Law & Practice § 12.07.

DESIGNATE AN AUTHORIZED AGENT TO RECEIVE REQUESTS FOR INFORMATION

Before receiving an information request, the employer should designate in writing to the union the person(s) at the company who are authorized to receive and respond to information requests. This assists with the processing of information requests by:

- Ensuring the employer is aware of the information request and has an opportunity to respond. Often, lower level supervisors may not be aware of the legal obligations associated with information requests.
- Centralizing the process. There may be multiple information requests, so it is a good idea to have them all in one place.
- Prohibiting the union from playing "gotcha" by making information requests to multiple persons at an employer and then claiming it did not receive the requested information.

LOG THE REQUEST AND SET A DEADLINE TO RESPOND

Upon receipt of a labor union's information request, immediately log it and set a deadline for response. Information requests trigger a legal obligation to respond and therefore it is important the employer keep a record of the request, including:

- The date the request was received (often, the stated date on the actual request is inaccurate and the employer should note it)

- The manner in which the request was received (e-mail, regular mail, certified mail, etc.)
- The deadline set by the union in the request

To avoid inadvertently neglecting the request, it is a good idea for the employer to set a deadline to respond. Try to respond by the date the union requests, even if the response is simply to tell the union that you need more time. A delay in responding can constitute a violation of the law, so it is best to stay engaged with the union. See, e.g., Beverly Health and Rehabilitation Servs., Inc., 322 N.L.R.B. 968, 974 (1997) (finding that the employer violated the NLRA by unreasonably delaying between two and eight months before providing the union with requested information).

CONSIDER ALL TYPES OF DATA

All forms of data can be subject to the obligation to provide information. These can include:

- Paper (e.g., copies of files, lists, and disciplinary records)
- Electronic data (e.g., emails, pdf's, and spreadsheets)
    - Generally speaking, the native format of the data is required (i.e., the format used by the software or application that created the data)

If the data does not exist in a format that can be copied (such as information responding to a request for all "past practices" in the workplace, which can encompass several unwritten understandings), then the employer usually does not have an obligation to create a document to respond to an information request.

CLASSIFY THE REQUESTS

Once the employer receives an information request, it should evaluate and classify the individual requests with respect to relevance and confidentiality. The employer should separate the requests into three categories. Category 1 information is presumptively relevant and must be turned over to the union, Category 2 information is not presumptively relevant and requires further evaluation, and Category 3 information is confidential and may be withheld.

- Category 1: This category should include information that concerns the terms and conditions of employment of the employees working in the bargaining unit. This information is "presumptively relevant" and the employer must turn it over in most cases. Generally, this information is maintained and accessible to the employer. Such information includes:
    - Information about bargaining unit members, such as:
        - Names, addresses, and telephone numbers
        - Dates of hire and seniority dates
        - Shifts and schedules
        - Hours worked, including overtime
        - Compensation, wages, and bonuses
        - Classifications and job titles
        - Performance reviews
        - Attendance records

        - Disciplinary documents, including written and verbal warnings
        - Other documents contained in their personnel files
    - All written policies that apply to represented employees, including handbooks, work rules, and other employer-created workplace regulations
    - All benefit information, including:
        - Insurance information (e.g., health, life, and AD&D insurance), including copies and/or identification of selected plans, employer costs, and co-pay information
        - Profit sharing, bonus, and other incentive program information
        - Safety and health information (e.g., OSHA logs, incident reports, and information about substances used in production process)
    - Information related to grievances and investigations, including internal investigation reports and certain witness statements (see National Labor Relations Act: Law & Practice § 12.07[3][b][i][B].)
- Category 2: This category should include information that does not pertain to wages, hours, or other terms and conditions of employment of bargaining unit employees. This information is not "presumptively relevant" and need not automatically be turned over. Such information includes:
    - Information about customers, vendors, and contractors
    - Information about non-bargaining unit employees, including:
        - Wages and benefits
        - Disciplinary matters
    - Information about other corporate entities such as parent, sister, and affiliate companies
- Category 3: This category should include information that is confidential. It may include information that also falls into Category 1 or 2. Examples of confidential information include:
    - Social security numbers of employees
    - Information about employee health conditions (to the extent known)
    - Trade secrets or other proprietary information
    - Documents that are covered by an established privilege (e.g., attorney-client or work product)

EVALUATE THE EMPLOYER'S BURDEN

Once the employer categorizes the requested information, it should evaluate the burden to provide any presumptively relevant information. These questions will help guide the employer's response.

- *Question 1*: Is the information currently maintained and accessible by the employer?
    - If yes, then go to Question 2 and evaluate the format of the information
    - If no, is it something that the employer can obtain with relative ease?
        - If yes, then go to Question 2 and evaluate the format of the information.
        - If no, inform the union in the response that the employer does not have access to the information and it is not easily obtainable. Consider requesting more time or asking the union to narrow the scope

of the request or share in the costs of producing. (See "Prepare a Written Response to the Union," below.)

- *Question 2:* Is the information in a format requested by the union?
  - If yes, go to Question 3 and evaluate the difficulty of assembling the information.
  - If no, will it be unduly burdensome to put it into a format specifically requested by the union?
    - If no, go to Question 3 and evaluate the difficulty of assembling the information.
    - If yes, inform the union in the response that the employer does not have the information in the format requested and it would be unduly burdensome to convert the information into that format. Consider seeking an accommodation from the union to produce the information in its current format. (See "Prepare a Written Response to the Union," below.)
- *Question 3*: How difficult would it be to assemble the information?
  - **Easy**. This includes employee lists and other electronically stored information.
  - **Moderate**. This includes information that is maintained in a paper form (e.g., personnel file information) and must be retrieved by hand. Assess the timeline and resources the employer would need to assemble the information.
  - **Difficult**. This includes information that is highly burdensome to assemble. Reasons information can be highly burdensome to gather include that it consists of a huge amount of data, it is located in a variety of different places (geographically or on systems), and/or it spans a lengthy period of time. Assess the timeline and resources the employer would need to assemble the information.
    - It is important that the employer be honest in its assessment. Today, employers can access significant amounts of information electronically with relative ease. If a claim of burdensomeness is deemed disingenuous, the employer could face an unfair labor practice violation.
  - **Impossible**. This is information that the employer does not possess and cannot access.

PREPARE A WRITTEN RESPONSE TO THE UNION

Once the employer has categorized the information and evaluated the burden of responding, the employer should prepare an appropriate response.

Presumptively relevant / easy to gather information. The employer should send this information with a brief cover letter stating the information request to which the letter is responding and listing the information enclosed.

Presumptively relevant / moderate or difficult to gather information. The employer's response regarding this information can vary depending on the resources and time needed to gather it.

- If more time is needed, the employer should respond that gathering the information requested will take additional time and state the date it anticipates providing it.
- If the request is truly burdensome, the employer has a few options for its response:
  - It can contact the union and ask to narrow the request. Many times a discussion about the scope of the request can resolve burdensome requests.
  - If the conversation does not result in a narrowing of the scope of the request, the employer can offer to bargain with the union over the costs associated with gathering the information.

- If the employer has or can readily obtain the requested information but not in the union's requested format, negotiate with the union to permit the employer to provide the information in its current format.
- It is important that the employer not outright reject an information request, which could result in a legal violation, and instead seek an accommodation such as those discussed above.

Presumptively relevant / impossible to gather information. The employer should describe any information that is presumptively relevant but impossible to obtain and discuss with the union alternative options that would provide the union with the requested information.

Presumptively relevant / confidential information. If the request seeks information related to the bargaining unit that is confidential, the employer should do as follows:

- As with claims of burdensomeness, the employer should honestly evaluate whether the information sought is confidential. Note that some data that is generally considered private (e.g., home addresses and other contact information) is not confidential for purposes of information requests and cannot be withheld from the union.
- For legitimately confidential information, contact the union and see if an accommodation can be reached. Some examples include:
  - Redacting confidential information from otherwise relevant non-confidential information
  - Redacting certain information so that it no longer discloses the entire item, such as the first six digits of a social security number
  - Seeking limitations on the use of information through a confidentiality agreement

Not presumptively relevant information. In the event the information sought is not presumptively relevant, here are the questions to go through to evaluate the situation.

- *Question 1*: Has the union articulated the reason it needs the information?
  - If yes, go to Question 2 and evaluate the purpose of the request.
  - If no, then the employer should respond stating that the information is not relevant, so it needs to understand the union's purpose for requesting the information. Once the employer does so, does the union respond explaining its purpose?
    - If yes, go to Question 2 and evaluate whether the purpose is relevant to the union's role as representative of the employees.
    - If no, the employer should send a response stating that the union has refused to tell the employer what the purpose of the information is and that under the circumstances it will not provide the information.
- *Question 2*: Is the union's purpose for obtaining the information valid?
  - If yes, the employer should provide the relevant, non-confidential information. Here are some valid purposes:
    - To administer a collective bargaining agreement
    - To evaluate whether the collective bargaining agreement has been breached

    Example: If the union makes a claim of illegal subcontracting, the union would be entitled to information about the work third party contractors perform that may violate a subcontracting clause.

- To verify claims asserted by employer

  Example: If the employer asserts it has zero tolerance policy for certain conduct, the union is entitled to information that would allow it to evaluate whether the employer has applied the policy outside of the bargaining unit.

  Example: If the employer asserts an inability to pay for something, the union must be allowed to review all of the employer's financial books. See National Labor Relations Act: Law & Practice § 12.07[3][b][ii].

- If no, the employer should respond to the union that the information does not appear to be relevant and that under the circumstances it will not provide the information.

RESPOND TO THE INFORMATION REQUEST IN WRITING

The employer should always respond to the union's request for information in writing. An oral response is insufficient. By responding in writing, you can more carefully craft what you want to say and how you want to say it. It is also easier to prove both the content of the response and when it occurred when it is in writing.

Even if the employer is not legally obligated to provide the requested information (such as where all of the information requested is confidential), there is no situation where an employer should not provide a documented response.

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Mark Theodore is a partner in Proskauer's Labor & Employment Law Department. He has devoted his practice almost exclusively to representing management in all aspects of traditional labor law matters throughout the United States. Mark has extensive experience representing employers in all matters before the NLRB, including representation petitions, jurisdictional disputes and the handling of unfair labor practice charges from the date they are filed through trial and appeal. Mark has acted as lead negotiator for dozens of major companies in nearly all industries, including multi-unit, multi-location, multi-employer and multi-union bargaining. In addition, Mark has handled hundreds of arbitrations involving virtually every area of dispute, including contract interest arbitration, contract interpretation, just cause termination/discipline, benefits, pay rates, and hours of work. Mark's work has been consistently recognized by *Chambers USA, Best Lawyers in America,* and *The Legal 500 U.S.,*among others.