MEMORANDUM

TO: Steve Burton
FROM: Jessica Marsh
DATE: June 4, 2014
RE: Duty to Provide Information
    Our File No.: 1064.000

The Duty To Provide Information

I. Legal Overview – Scope of Information

Generally, under the Act, a Union is entitled to relevant information that will help it perform its duties as the employees’ exclusive bargaining representative, which includes information related to (1) policing the collective-bargaining agreement; (2) grievance processing; and (3) collective bargaining. It is important to remember that the Union also has a parallel obligation under the Act to provide the Employer with relevant requested information. Either party’s failure to provide relevant information is an unfair labor practice.

Either party’s unjustified delay in providing relevant information is also an unfair labor practice.

II. Information Relating to Contract Negotiations

A. 9(a) Relationships -

In a 9(a) relationship, both parties have an enforceable obligation to provide, upon request, information relevant to the bargaining process. See 8(a)(5) (Employer’s
obligation), 8(b)(3) (Union’s obligation). This obligation derives from the Act’s requirement that parties to a 9(a) Relationship bargain “in good faith.”

B. 8(f) Relationships -

In an 8(f) context, during the term, and for a time thereafter, the Employer may be obligated to provide information to prove it is complying with the terms of the parties’ agreement. However, the Employer probably does not have an obligation to provide information relevant to negotiating a new agreement, as neither the employer, nor the union, have any obligation to bargain in good faith for a new agreement.

III. Analytical Framework

Although it is clear that parties are obligated to provide “relevant” information, at times it can be difficult to determine whether or not the requested information meets this standard.

A. What Is “Relevant” Information?

The principles discussed above relate to the duty to provide relevant information. The NLRB is the final judge of relevancy, and generally divides information into two categories:

1. **Presumptively Relevant.** Information regarding wages, benefits, and working conditions of bargaining unit employees is presumptively relevant. This means that the Union does not need to establish relevance. The Employer must provide this information, upon demand.

2. **Other Types Of Information.** In order to be entitled to other types of information, the requesting party must first establish the relevance of the information. This means that the requested information must be related to either (a) the bargaining process (b) policing the contract and/or (c) to a pending or potential grievance.

In determining whether the requested information is relevant, the Board uses a very broad standard. The inclination is to find it relevant, as the measurement is a “liberal discovery-type standard”, and the Union only needs to demonstrate the “potential or probable” relevance of the sought-after information. This means that even if the
information is not presumptively relevant, the union may have little difficulty establishing its relevancy.

Nonetheless, when confronted with such a request, it is still appropriate to request that the Union explain the relevance of requested information before providing it, while assuring the union that if it can demonstrate its relevance, the Employer will provide it. This is also the time to raise any potential issues related to the burdensome nature of the request, potential cost sharing, and confidentiality concerns (discussed in more detail infra). If the information simply does not exist, the union should also be promptly advised of that fact.

B. What Are Consequences Of Revising To Provide Relevant Information?

If the Board finds that failure to provide information was unlawful, it may order disclosure of the information. This remedy might not seem particularly significant, standing alone. However, there are other potential consequences that Employers need to be aware of, as the effect of an unlawful refusal may be wide ranging.

- In a 9(a) Relationship, the Board can find that by not providing the information, the employer has not met its overall obligation to bargain in good faith.

- In a 9(a) Relationship, if the employer has implemented a final offer on the basis of “impasse” the Board may conclude:
  1. That the Employer did not bargain in good faith.
  2. Therefore, it never reached a lawful impasse.
  3. Therefore, it could not implement.

- Depending on the circumstances, an unlawful failure to provide information could convert an economic strike into an unfair-labor-practice strike, (most likely limited to parties in a 9(a) Relationship).

- An unlawful failure to provide information can also taint an otherwise lawful lockout, which could have catastrophic consequences.

IV. Specific Issue: “Pleas of Poverty”

A. Legal Framework
Financial information is not presumptively relevant, although there are several circumstances in which an Employer may be required to provide financial information to the Union.

Dating back to 1956, the Supreme Court held if an Employer states that it cannot afford a proposed increase, then, upon the Union’s demand, the Employer may be required to afford the Union access to financial information to establish the truth of such a claim. NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). In Truitt, the Supreme Court held that the Employer had not bargained in good faith when it claimed during negotiations that it “could not afford” to pay a proposed wage increase, but refused the Union’s request to provide information substantiating its claim. The Supreme Court stated: “Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy…. We agree with the Board that a refusal to attempt to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith.”

However, the Supreme Court did not go so far as to hold “that in every case in which economic inability is raised as an argument against increased wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts.” (Emphasis added).

B. What Constitutes An Inability To Pay Claim?

Almost sixty years later, this area of the law is still evolving. The Board cases generally fall into one of two categories: (1) cases which focus on whether or not a particular statement constitutes a poverty plea, so as to obligate the Employer to turn over relevant financial records and (2) cases involving more specific requests for financial information, which were made in response to a particular bargaining proposal. There are few bright-line rules here.

In 2011, the NLRB’s Acting General Counsel (Lafe E. Solomon), issued a Guideline Memorandum and noted “there has been no clear delineation as to what exactly constitutes a statement of an inability to pay. Indeed, the Board appears to have often come to differing conclusions on facts that are difficult to distinguish.” Guideline
Memorandum Concerning Parties’ Obligation to Provide Information Related to Assertions Made in Collective Bargaining, Memorandum GC 11-13 (May 17, 2011).

There are no “magic words,” but as the law stands now, it is clear that these statements do constitute a poverty plea:

- We can’t afford it
- We would go broke
- We would be out of business
- We can’t afford what we are presently paying
- We can’t afford more than the current rates

These statements are not enough to constitute a poverty plea (under current law):

- We won’t pay it
- We will not match the plumbers/fitters
- We will not agree, it is unreasonable
- We won’t pay it, it is way above the cost of living

In 1991, the Board held that under Truitt, the obligation to provide financial information does not apply if an Employer stated that agreeing to the Union’s demands would put it at a “competitive disadvantage.” Nielsen Lithographing Co., 305 NLRB 697 (1991). But the Board also refused to make this a bright-line-rule: “We do not say that claims of economic hardship or business losses or the prospect of layoffs can never amount to a claim of inability to pay.” (Emphasis added).

And, as recognized by the General Counsel, and as illustrated below, the Board’s holdings appear inconsistent in different cases:

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<th>Board Held Not Poverty Plea</th>
<th>Board Held Was Poverty Plea</th>
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<td>Employer’s statement it would “not be able to survive” if it increased wages or benefits.</td>
<td>Employer’s statement that its financial situation was “a matter of survival.”</td>
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<td>Employer’s statement it was “fighting to keep the business alive.”</td>
<td>Employer’s statement that if Union accepted its offer it would enable employees to “retain your jobs and get back in the black in the short term,” and that the “future of [the business] depends</td>
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The NLRB’s General Counsel wishes to reassess prior case law. However, he apparently would continue to follow previous authority that general references to competitiveness are insufficient. He would like an opportunity to reassess precedent on other points, and that will be done through the issuance of complaints against employers, so that certain issues may again be addressed by the Board.

**It is important to understand that even under prior law,** if an Employer stated it would not agree to a proposal because of an adverse impact on competitiveness, the Employer may have to provide information to back up that claim.

- **Example:** The NLRB’s Division of Advice recently concluded that an Employer violated Section 8(a)(5) when it refused to provide information concerning its ability to compete for business. The Employer stated in bargaining that it was having problems getting and keeping customers, given the significance of labor costs in pricing and bidding. Because the Employer directly linked labor costs to its competitiveness, it was required to give the Union information on that topic.
- In a 2006 Board case, the Employer said it needed concessions from the Union to be more competitive in the industry. The Union requested competitor data. The Employer was held to have violated the Act by refusing to provide this information.
- In a 2011 Board case, the Employer stated (to justify its bargaining proposals) that it was not competitive with other companies, because wages and benefits were too high, and said it lost job bids because of this. The Union requested specific information regarding job bidding, and the Employer refused to provide it. The Board held this violated the Act.
- In another 2011 Board case, the Employer sought concessions from the Union. The Employer explained that they were “necessary to make its facility more competitive,” particularly in the light of increased competition from Asia. The Union requested specific information including a list of current customers, 5 years of job quotes, a list of all customers who ceased doing business with the Employer in the last 5 years, a complete list of prices for the Employer’s products, and market studies and/or marketing plans. The Employer refused to provide this information, and the Board held that this was unlawful.

**C. What Happens If Your Statement Crossed The Line?**
This is a significant issue. Unions know this, and are pushing the envelope. Be aware that Unions will be attentive to anything that sounds like an “inability to pay” claim. You do not wish to have to open up financial information for all members of the multi-employer unit.

If confronted with such a request for financial information and you did claim inability to pay, keep in mind that you still may confine disclosure to relevant information, and you may bargain with the union to establish conditions under which the information will be provided.

- For example, it does not automatically mean that you need to open your books up to the business manager. You may bargain over acceptable alternatives
- You can bargain over the process of compiling and using the information, and may:
  - Propose a cost-sharing arrangement on compiling the information
  - Propose that a CPA for each party review the relevant financials, and prepare a summary report on the ability to pay the proposed increase.
  - Propose that the parties sign a non-disclosure agreement.
- If you cannot reach agreement, and the Union files an ULFP charge, the NLRB will resolve the competing interests and positions of the parties.

The same holds true if the Union requests specific financial information based on particular proposals or statements made by the Employer during bargaining. You can bargain over similar issues in the process without violating your obligations under the Act.

V. The Union’s Parallel Obligation

Remember that the Board has consistently held the Union has a parallel obligation to provide relevant information to Employers. Because the union has a parallel obligation, the contractors may have the right to request the following information, (at least in a 9(a) Relationship.)

You may consider requesting:

- Copies of the Union’s CBAs with other employers, particularly if there is a Most Favorite Nations clause.
Recent Example: The NLRB Division of Advice found that a Union unlawfully refused to provide certain provisions of its other CBAs to the Employer. The requested provisions were relevant because the Union asserted in bargaining that its proposal was reasonable because other employers had agreed to the same provisions. Thus, the Employer justifiably requested information to prove or disprove the Union’s claim.

- Data to substantiate any specific claims the Union makes during bargaining, such as market share, the effectiveness of current market recovery programs, and the like.