

# MEMORANDUM

DATE: April 5, 2011  
TO: Local Presidents  
FROM: Mark S. Toledo  
SUBJECT: Employer Communications; Hostile Work Environment

---

At the last release time presidents' meeting you requested additional legal information and analysis about two subjects: 1. Employer communications with bargaining unit members about subjects normally handled in the bargaining process; and 2. What constitutes an "unlawful" hostile work environment.

## Employer Communications with Employees

Several presidents raised questions about whether school district management can unilaterally survey bargaining unit members about their priorities with respect to wage freezes versus furlough days versus layoffs etc.; and, talk directly to bargaining unit members about these issues. This is a great subject for a law journal article, but I will focus on a brief history, the statutory prohibitions against "direct dealing" or "end run" violations and a couple of ERB cases that provide guidance.

**History** - Until 1995 and the passage of SB 750, the Public Employees Collective Bargaining Act (PECBA) expressly prohibited employer "direct communications" about employment relations (mandatory subjects of bargaining) with bargaining unit members during periods of bargaining. Eliminating this provision allows for public sector employers to have "some" direct communications with bargaining unit members during periods of bargaining, but there are still limits on such direct employer communications.

**Statutory Provisions** - Direct employer communications are still governed and limited by the statutory duties to: 1. "Bargain in good faith;" (ORS 243.672 (1)(e)) 2. Interact with bargaining unit members in ways that do not intimidate or coerce them (ORS 243.672 (1)(a)); and 3. Interact with bargaining unit members in ways that do not interfere with the administration of the union (ORS 243.672 (1)(b)).

**ERB Cases** - To help determine whether a public employer is violating one of these statutory provisions, the Employment Relations Board (ERB) will analyze whether the employer is attempting to bypass the union and negotiate directly with its employees by the conduct in question. In *LUBC v. McKenzie School District*, the ERB held that the district violated its duty to "bargain in good faith" when it made a contract proposal directly to bargaining unit members without first submitting the proposal to the union. (8 PECBR 8160 (1985)) In this case, the facts lead the ERB to conclude that the employer was dealing "with the union through the employees, rather than the employees through the Union" designated as the exclusive representative.

In a more recent case, the ERB found that Blue Mountain Community College (BMCC) violated both its duty to bargain in good faith and its duty not to interfere with the administration of the union because of direct dealing with employees. The "bad faith" bargaining violation occurred because a BMCC board member, who also was on the BMCC bargaining team, sent out an intranet posting to college faculty with a new sabbatical leave proposal that had not been presented to the union first.

In addition, ERB held that a “direct dealing” violation occurred when the interim college president announced “town hall” meetings and invited bargaining unit members and others to attend. The interim president then emailed a summary of the meetings to faculty suggesting that faculty take an unpaid leave as a way to save positions. In the email, he said “because this is a union issue, please discuss this among yourselves.” He also stated he needed to know if this was being considered by the union. The ERB held that this conduct violated the prohibitions against employer interference with the existence or administration of a union.

In its opinion the ERB wrote: “When a labor organization is chosen by the employees as their exclusive representative, it has the statutory right to represent those employees in dealing with the employer. By bypassing the exclusive representative and dealing directly with the employees on contractual matter, a public employer undermines the exclusive representative’s status and impairs the representative’s ability to discharge its statutory obligations. Bargaining unit members who see the employer dealing directly with other unit members about contractual issues will inevitably lose confidence in the exclusive representative’s capability to represent their interests in dealing with the employer.”

In summary, it is clear that an employer commits a bad faith bargaining violation when it presents a new proposal directly to employees without first presenting it to the designated bargaining representative. Other cases of direct communications with employees require an analysis as to whether the conduct in question is an act of bypassing the designated bargaining representative. When these cases arise it is critical to keep an accurate record of the communications in question and seek assistance from your UniServ consultant.

### Hostile Work Environment

OEA leaders and staff who advocate for members are frequently faced with member requests to do something about their “hostile work environment.” There is no doubt that these cases often involve employer behavior that is offensive, rude, intimidating and unprofessional. Most of the time, however, such behavior is not unlawful. There is no separate state or federal “hostile work environment” law.

“Unlawful” hostile work environment cases most commonly arise in the context of sex discrimination and sex harassment cases, and may also occur in the context of race, religion, age, national origin cases, etc. Under state and federal sex discrimination laws, a hostile work environment exists when: 1. A work environment is contaminated with speech and/or conduct of a sexual nature that is intentional, severe, recurring, or pervasive; and 2. The conduct interferes with the ability of an employee to do his or her job. This same analysis also applies to situations involving race, age, national origin, etc.

In “unlawful” hostile work environment cases, the employer faces substantial liability for damages and other remedies by way of EEOC/BOLI complaints and lawsuits. In the rude supervisor type of “hostile work environment” cases, employers have limited liability if any. The conduct, if bad enough, may involve ethical violations and discipline of an individual’s teaching or administrative license through TSPC procedures. This remedy is limited because of the time it takes and the severity of conduct required for TSPC to act. Such conduct also could result in a “Workers’ Compensation” stress claim. This remedy is also limited because of the severity of the conduct required and the medical evidence necessary to prove such a claim.