

# Legal Update: Bargaining in a Pandemic

ICCCFO

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Labor Relations  
in the Time of  
COVID



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# The Latest News from the Front

## Trends over the Last 9 months

- Significant mid-term bargaining due to COVID-19 Operations
  - Remote instruction and hybrid work schedules
  - Suspension of evaluation process
  - Safety and health issues
  - Enhanced leave rights
  - Testing and vaccinations

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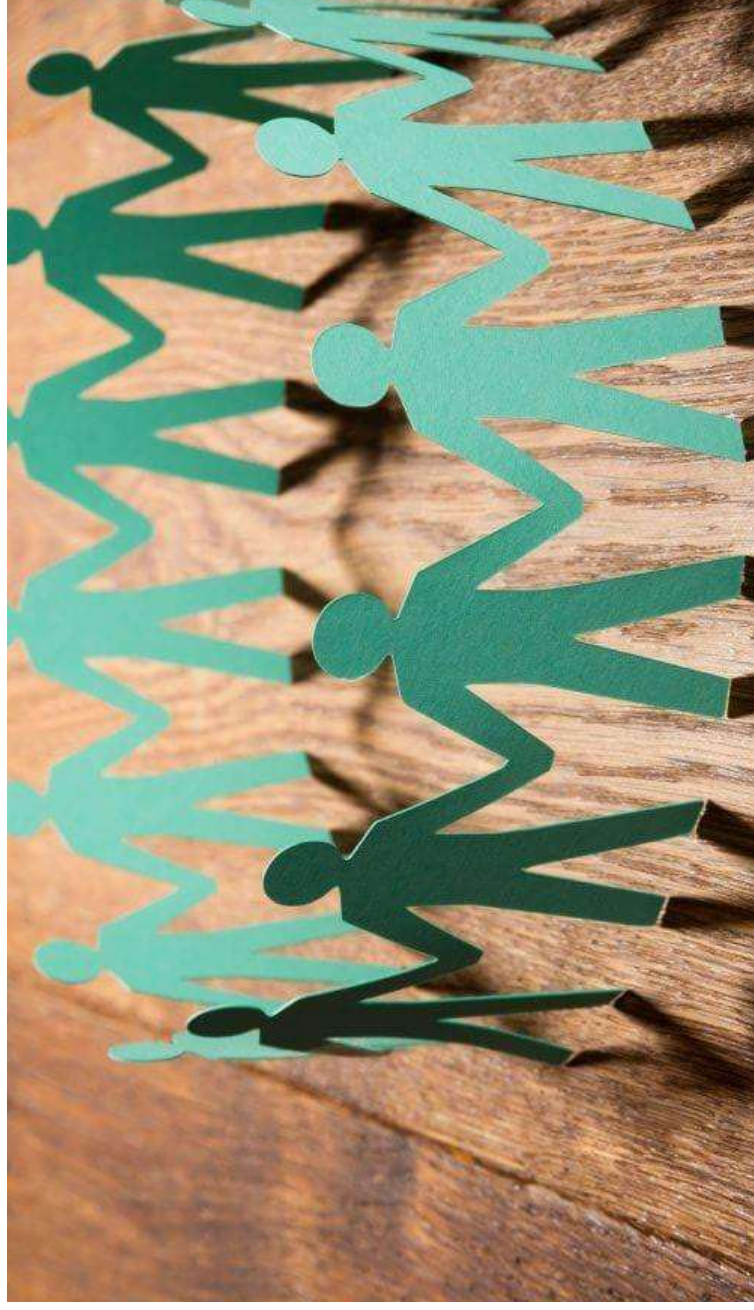
# The Latest News from the Front

## Trends over the Last 9 months

- The Impact of COVID on successor bargaining
  - Uncertain economics- state funding and EAV is uncertain
  - Increased desire for contract roll-over and short contracts
  - Unions wanting use of pandemic federal aid for compensation increases
  - Renewed pension push down concerns
  - Need for reopener language
  - Reexamining retirement incentive language

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# Mid-Term Bargaining



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## Mid-Term Bargaining

### More Mid-Term Bargaining?

- Continued need to adjust operations in summer and 2021
- Many colleges entered into short-term MOUs which expiring with end of FY 2021.
- Continued safety concerns
- Requiring vaccines
- Continued use of remote learning platforms for so classes

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# Mid-Term Bargaining

## The Eternal Question in Mid-Term Bargaining

- Q: We have a CBA with a management's rights Why do we need to negotiate?
- A: Section 10 of the Illinois Education Labor Relations Act (IELRA) sets forth the scope of an educational employer's and union's obligation to bargain, to
  - Sec. 10. Duty to bargain. (a) An educational employer and its exclusive representative have the authority and the duty to bargain . . . with respect to wages, hours and other terms and conditions of employment, . . .
  - (c) The collective bargaining agreement negotiated between representatives of the educational employer and the educational employer shall contain . . . appropriate language prohibiting strikes for the duration of the agreement.

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# Mid-Term Bargaining in the Time of COVID

- Q: Okay, but we have a CBA with a no-strike clause. Why do we need to negotiate?
- A: The Illinois Educational Labor Relations Board (IELRB) has held that an employer has a duty to mid-term bargain issues which are not fully bargained or covered by the parties' bargaining agreement.
  - [W]e hold that mid-term bargaining is required for mandatory subjects of collective bargaining when the subject of a dispute is not the subject of an existing collective bargaining agreement. In view, this formulation will serve to preserve the rights under the Act without subjecting the bargaining process to continual reopening after completion.

Rock Falls Elementary School District No. 13, PEF (IELRB 1986).

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# Mid-Term Bargaining in the Time of COVID

- For good measure, the IELRB has limited employer's right to contend that a mid-term bargaining issue is already covered in the collective bargaining agreement and need be renegotiated:
- The fact that a collective bargaining agreement deals with some aspects of a topic does eliminate the mid-term bargaining obligation for other aspects of that topic. State Community College, 6 PERI 1109 (IELRB Opinion and Order, July 24, 1990).



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# Mid-Term Bargaining in the Time of COVID

- Q: Not every change at the college must be bargained, correct? We change class time course content, room assignments, etc. each semester. No CBA could cover all these changes and there aren't enough hours in the day to bargain over this kind of stuff.
- A: The IELRA answers this question...well, so Section 4 of the Act says:
  - Sec. 4. Employer rights. Employers shall not be required to bargain over matters of inherent managerial policy, which include such areas of discretion or policy as the function of an employer, standards of service, its overall budget, the organizational structure and selection of new employees, the direction of employees. Employers, however, shall be required to bargain collectively with regard to policy matters directly affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by employees' representatives . . .

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## Mid-Term Bargaining in the Time of COVID

The IELRB and Illinois courts will apply a “balancing test” to determine if any given subject is a mandatory subject of bargaining or not. The question is whether the burdens of collective bargaining outweigh the benefits.

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# Mid-Term Bargaining in the Time of COVID

- Q: What about changes involving health and safety of employees? What about vaccination status requirements, or disclosure? Are there mandatory subjects of bargaining?
- A: There are no IELRB decisions or Illinois cases directly on point. The answer is that some subjects are mandatory subjects of bargaining and others are not.  
For instance:
  - The decision to open the campus and offer courses is a core management decision and need not be bargained.
  - The way the campus reopens and the safety measures to protect staff are mandatory subjects. This is referred to as “impact bargaining.”

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# Mid-Term Bargaining in the Time of COVID



- Q: So we meet and negotiate with the union issues like vaccines, PPE and symptom screening. What if we can't agree? Are we stuck?
- A: No. You are not stuck.
  - An employer may change terms and conditions of employment so long as the changes do not violate express terms of a collective bargaining agreement.
  - If, however, the employer is changing an established practice relating to working conditions, it must bargain with the union in good faith over the impact of the changes.
  - If the parties are unable to reach an agreement a reasonable period of time, the employer may impose its last best offer.

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# Labor Relations in the Time of COVID

- Q: What if we can't agree and the unions do like the terms the college is implementing they strike even though the CBA contains "strike" clause?
- A: The short answer is that a union cannot strike during the term of the agreement. However, the two major educational employee unions (IEA and the IFT) did assert during the height of the Pandemic, that they could strike over safety concerns.

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# Labor Relations in the Time of COVID

- The problem with the union position is that unlike other federal and state labor statutes like the National Labor Relations Act (NLRA) and the Illinois Public Labor Relations Act (IPLRA), the IELRA does not specifically address health and safety strikes.

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# Preparing for Mid-Term Bargaining

- Union demands to bargain.
- Review the current CBA to ensure compliance with existing contractual obligations related to health and safety
- Notice to union if change in working conditions
- Duty to mid-term bargain with union, if requested
  - Formalize the plan – consider involving union in discussions over safety measures *before* you demand to bargain
  - Understand current guidance and responsibilities and be prepared to discuss them
  - Be flexible

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## Operational Issues

- Safety and health topics potential subject to impact bargaining
  - Vaccinations and testing
  - Continued use of masks and social distancing
  - Employer-Provided Leave
  - Enhanced accommodation rights

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## Operational Issues

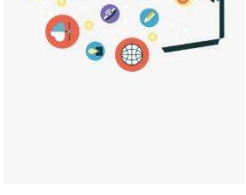
- Continued Hybrid and Virtual Work Considerations
  - Premium pay for on-line teaching
  - Differentials for certain hourly work
  - Meetings
  - Office Hours
  - Exceptions to Virtual Attendance

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# Benefit and Operational Issues

- Access to and Use of Technology
- Increasing Demand for Technology
  - Laptops, dual monitors, headsets, hot spots, white boards
  - Look at CBA – existing funds to allocate dollars
  - Reimbursement or Stipends for Use of Personal Internet/Devices for Work
  - Illinois Wage Payment and Collection Act Considerations
  - Not generally covered in CBA prior to CO check Board policy

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# Successor Bargaining During the Pandemic



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# Operational Issues

- Assignment
- Evaluation
- Tenure
  - By operation of statute
  - Opportunity to extend by one year
- Other Probationary Periods

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# Preparing for Successor Bargaining

## What have we learned about our CBAs as a result of the COVID Crisis?

- The importance of the management right to work clause
- Rigid workday clauses prevent flexibility
- Rigid job descriptions prevent flexibility
- The need for mid-term bargaining rights

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# Successor Bargaining

- Economic forecasting is more important than ever
- Strategize to tie your economic proposals to projected as opposed to fund balances and short-term federal aid
- Use of economic presentations at the bargaining table
- The limitations of COVID 19 relief aid.
- Use your health insurance consultant
- Consider removal of retirement incentives and/or post-retirement benefits ; focus on the compensation package
- Now is the time to tackle all those hidden cost items

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# Impasse



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# Impasse

- "Impasse" is a stalemate in the negotiations process which may prevent the parties from reaching a contractual agreement

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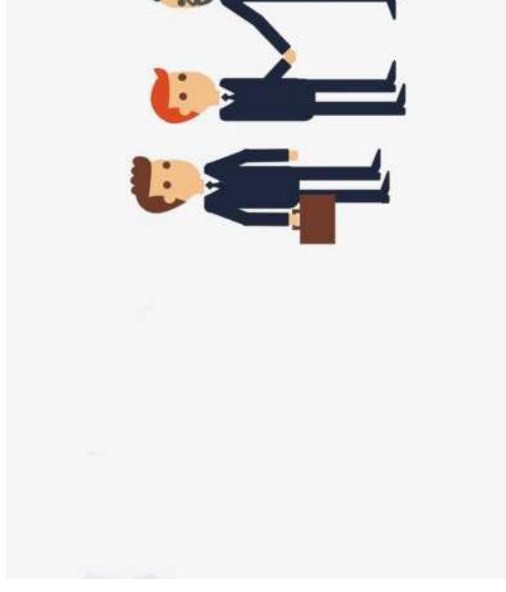
# Impasse

- Once impasse is reached:
  - The prohibition on employers making unilateral changes in the employees' *quo* is suspended
  - Employers are free to alter employee existing wages, hours and terms and conditions of employment by imposing terms of their final offer

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# Impasse

- The IELRB will review each negotiation before it on a case-by-case basis to determine whether impasse exists



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# Impasse

- The IELRB considers the following factors
  - The parties' bargaining history
  - The good faith of the parties in negotiating
  - The length of the negotiations
  - The importance of the unresolved issues
  - The contemporaneous understanding of the parties as to the status of the negotiations

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## Plan and Prepare

- Economic and Enrollment Uncertainties
  - Be familiar with RIF timeline and process
  - Alternatives

**BRACE YOURSELF**



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Questions?

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