



SCHOOL NEGOTIATIONS WORKSHOP

Virtual Training
January 21, 2021

“Negotiating Issues for 2021”

Presented by
Brian J. DeSantis, Esq.

I. Introduction

II. Increased Union Militancy

A. Where and how Union militancy is being seen.

1. Increase in strikes and threatened strikes.

a. Two teacher strikes in the fall of 2020.

b. Several 10-day strike notices were issued in the fall of 2020.

2. Increased filing of Unfair Labor Practices.

3. Regressive bargaining.

a. Regressive bargaining is the practice of a party making a less acceptable or more financially expensive bargaining proposal than that party’s prior bargaining proposal.

b. Regressive bargaining “is unlawful if it is for the purpose of frustrating the possibility of agreement.” U.S. Ecology Corp., 331 NLRB 223, 225 (2000), citing McAllister Bros., 312 NLRB 1121 (1993).

- c. Negotiation implications.
 - (1) Regressive bargaining, intended or otherwise, may frustrate the side receiving the proposal and can greatly harm or slow down the chances of reaching settlement.
 - (2) It is always best to determine whether the regressive bargaining was intended by the union or merely a mistake.
 - (3) If engaged by the Board, such actions constitute bad-faith bargaining, and if the Board engages in bad-faith bargaining, then it is not permitted to unilaterally implement.

4. Militarized rhetoric.

- a. Military rhetoric is often used to normalize actions that would not be permitted otherwise as what happens in war is typically not permitted in daily life. Militarized rhetoric develops an “us” vs. “them” mentality.
- b. Example: After a recent strike ended, an Ohio teacher published a summary of what had happened on a public labor website:

“[o]n our health care, though, [the Board] seemed to be out for blood.” [...]

“As the sun rose on our ‘d-day,’ our members came out in massive numbers in the bitter cold and snow.”

On the end of the strike: “[w]alking off the picket lines one fellow strike captain, a music teacher, told me that we need to maintain what we built. We need to develop a union culture where we have one another’s backs and band together to protect ourselves in the workplace—even in between contract negotiations.”

5. Cyberbullying of Board members, the bargaining team, and administrators.

B. Reasons for militancy.

- 1. Reflection of societal polarization.
- 2. Effects of the Janus decision.
- 3. COVID-19 becomes a new wedge issue.

III. Virtual Learning in 2021 and Beyond

A. Remote Learning as an education model.

1. “Remote Learning” is defined in H.B. 164
2. Remote Learning is exclusive to the 2020-2021 School Year: “for the 2020-2021 school year only, a school district that implements a plan in accordance with this section shall be considered to have complied with both of the following: (1) The minimum number of hours required under section 3313.48 of the Revised and (2) Any requirements to receive state funds prescribed under Chapter 3317. of the Revised Code.”
3. It is unknown what will be required for 2021-2022 and beyond.
 - a. Remote vs. Virtual vs. Blended Learning.
 - a. Synchronous learning vs. asynchronous learning.
 - b. Attendance and participation requirements.
 - c. Ratio of students to teacher.

B. Early language being requested or demanded by unions.

1. The amount of “live” virtual instruction each day.
2. Issues regarding videos associated with virtual instruction.
 - a. Who has control over the live video feed?
 - b. The camera position of the live video feed in classrooms.
 - c. Can videos be recorded?
 - d. Who is liable for what “appears” in the teacher’s video?
3. Parameters on answering emails and text messages from students and parents:
 - a. Minimum amounts of time.
 - b. Maximum amounts of time.

4. Where virtual instruction may be initiated.
5. Require that remote education opportunities that are being provided only to a limited number of teachers be posted and filled by seniority.

C. Calamity Days and Virtual Learning.

1. What will calamity look like in the future?
2. How should calamity be defined in your contract?

IV. Employee Leave in the COVID-19 Era

A. Temporary FFCRA Leaves.

1. Emergency Paid Sick Leave (EPSL).

a. Amount of leave: up to 10 work days.

b. Bases for EPSL:

- (1) The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- (2) The employee is advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (4) The employee is caring for an individual who is either on a governmental quarantine or isolation order related to COVID-19 or is advised by a health care provider to self-quarantine due COVID-19 concerns;
- (5) The employee is caring for their child if the child's school or place of care is closed, or the childcare provider is unavailable, due to COVID-19 precautions.
- (6) The employee is experiencing any other substantially similar condition.

2. Expanded FMLA (“EFMLA”).
 - a. Amount of leave: 12 weeks.
 - b. Leave basis:

The employee is caring for their child if the child’s school or place of care is closed, or the childcare provider is unavailable, due to COVID-19 precautions.

B. The specter of Federal FFCRA Leaves.

1. Both EPSL and EFMLA expired on December 31, 2020.
2. Although Congress extended certain provisions of the FFCRA, FFCRA Leaves were not extended. Private employers can still receive tax credits if they allow these leaves.

C. Unions have attempted to frame FFCRA Leaves.

FFCRA Leaves reflect a new reality that members and their families must quarantine for an extended period of time.

D. Boards need to contextualize FFCRA Leaves.

1. FFCRA Leaves—including the bases for leave and the amount of leave—were developed when little was known about COVID-19 and the pandemic.
2. FFCRA Leaves were not available if an employee could work remotely.
3. FFCRA Leaves related to childcare did not provide full pay; they provided partial pay (2/3 pay).
4. Many employees “banked” sick leave during the 2019-2020 school year.
5. Many employees received attendance bonuses when school districts shifted to remote learning during the 2019-2020 school year.
6. For most employees, FFCRA Leaves were not utilized until the beginning of the 2020-2021 school year.

7. Most of the bases for FFCRA Leaves can also be used for sick leave or personal leave.
 8. If the Federal Government believes additional leave is required, it will provide additional leave.
- E. Concerns about including FFCRA Leaves in your next contract.
1. If FFCRA Leaves are added to a negotiated agreement, they become a permanent part of the negotiated agreement.
 2. It is extremely difficult to attempt to predict COVID-19's future.
 3. Many school districts did not see a significant use of FFCRA Leaves during the first half of the school year.
 4. EFMLA's generous 12 weeks leave (at reduced pay) was tied to FMLA. Now that it is no longer tied to FMLA, it becomes an additional basis for leave.
- F. Analyze your use of District's EPSL and EFMLA.
1. Review data regarding year-over-year trends relating to use of sick leave, personal leave, EPSL, and EFMLA.
 2. Was EPSL and EFMLA abused in the fall?
- G. Alternatives to negotiating FFCRA Leaves.
1. MOU to address leave for the remainder of the 2020-2021 school year.
 2. Intelligent, one-time addition of a limited amount of sick leave.
- H. Should COVID-19 leaves be part of a larger discussion regarding sick leave?
1. Redefining immediate family.
 2. Revisiting documentation requirements to obtain sick leave.
 3. Gaining control of the sick leave bank.
 4. Limiting use of personal leave.
 5. Reconsidering perfect attendance awards.

V. OTES 2.0

- A. If a school district has included provisions in the CBA governing OTES 1.0, then the conversion to OTES 2.0 will need to be negotiated.
- B. Similar to OTES 1.0, OTES 2.0 restricts a district's ability to negotiate contrary to many of OTES 2.0 requirements.
- C. Providing for a robust, collaborative evaluation review committee can reduce the burden of the necessity to negotiate.

VI. Negotiating in a Zoom World

- A. The studies have shown that there are benefits to beginning a Zoom meeting with "small talk."
- B. Zoom negotiations are both intimate and distant.
- C. Use different hardware or programs for chatting.
- D. Building in time for caucuses.

VII. Contract Rollovers

VIII. Conclusion