

Subjects of Bargaining

Legal Definitions

In *National Labor Relations Board (NLRB) v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), the Supreme Court concluded that "[t]he duty [to bargain] is limited to those subjects, and within that area neither party is legally obligated to yield ... As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree."

Further, in *Allied Chem. & Alkali Workers Local 1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 178 (1971), the Supreme Court clarified that "Section 8(d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. ... But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees."

These Supreme Court precedents distinguish between mandatory subjects of bargaining, which fall within the National Labor Relations Act (NLRA) itself, and permissive (e.g., non-mandatory or voluntary) subjects of bargaining, which fall outside the statutory language.

Finally, by definition, a third category must include illegal subjects of bargaining about which both parties are legally prohibited from bargaining.

Therefore, per related case law, the NLRA establishes three categories of subjects of bargaining:

1. ***Mandatory***;
2. ***Permissive or Voluntary***; and
3. ***Illegal***



Mandatory Subjects

Mandatory subjects are those that directly affect – wages, hours or working conditions (or terms and conditions of employment). Both parties must bargain these subjects if either party submits a proposal that addresses these subjects. *This requirement does not mean that the parties have to reach agreement on such proposals, but rather that they have to engage in the process of bargaining in good faith over the subject.* Mandatory subjects may be bargained to impasse. In the private sector, it is also legal to strike (or to lock out) to obtain a mandatory subject of bargaining. The Florida Constitution prohibits public employees to strike. However, either party may issue a demand to bargain letter.

The *National Labor Relations Act (NLRA)* states:

Section 8. [§158.]

(a) [Unfair labor practices by employer] *It shall be an unfair labor practice for a labor organization or its agents -- ...*

(5) to refuse to bargain collectively with the representatives of his employees ...

(d) [Obligation to bargain collectively] *For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to **wages, hours, and other terms and conditions of employment**, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession ...*

The National Labor Relations Board's *Basic Guide to the National Labor Relations Act* states:

Section 8(a)(5)—Refusal to Bargain in Good Faith. *Section 8(a)(5) makes it illegal for an employer to refuse to bargain in good faith about wages, hours, and other conditions of employment with the representative selected by a majority of the employees in a unit appropriate for collective bargaining. ...*

Required subjects of bargaining. *The duty to bargain covers all matters concerning rates of pay, wages, hours of employment, or other conditions of employment. These are called “mandatory” subjects of bargaining about which the employer, as well as the employees’ representative, must bargain in good faith, although the law does not require “either party to agree to a proposal or require the making of a concession.” In addition to wages and hours of work, these mandatory subjects of bargaining include but are not limited to such matters as pensions for present employees, bonuses, group insurance, grievance procedures, safety practices, seniority, procedures for discharge, layoff, recall, or discipline, and union security. Certain managerial decisions such as subcontracting, relocation, and other operational changes may not be mandatory subjects of bargaining, even though they affect employees’ job security and working conditions. **The issue of whether these decisions are mandatory subjects of bargaining depends on the employer’s reasons for taking action. Even if the employer is not required to bargain about the decision itself, it must bargain about the decision’s effects on unit employees.** On “nonmandatory” subjects, that is, matters that are lawful but not related to “wages, hours, and other conditions of employment,” the parties are free to bargain and to agree, but neither party may insist on bargaining on such subjects over the objection of the other party. ...*

What constitutes a violation of Section 8(a)(5). An employer, therefore, will be found to have violated Section 8(a)(5) if its conduct in bargaining, viewed in its entirety, indicates that the employer did not negotiate with a good faith intention to reach agreement. **However, the employer's good faith is not at issue when its conduct constitutes an out-and-out refusal to bargain on a mandatory subject. For example, it is a violation for an employer, regardless of good faith, to refuse to bargain about a subject that it believes is not a mandatory subject of bargaining, when in fact it is.**

In addition, [Section 447.309 Collective bargaining; approval or rejection, Florida Statutes](#), states:

(1) After an employee organization has been certified pursuant to the provisions of this part, the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the **wages, hours, and terms and conditions of employment** of the public employees within the bargaining unit.

Examples of [mandatory subjects](#) include, but are not limited to:

- Wages
- Shift premiums
- Overtime
- Premium pay
- Longevity
- Pay for training
- Holidays
- Sick days
- Hours of work
- Work schedules
- Grievance procedure
- Workloads
- Vacancies
- Promotions
- Transfers
- Layoff and recall
- Discipline and discharge
- Waiver/ zipper clause
- Mandatory meetings
- In-service trainings
- Parking
- Bonuses
- Incentive pay
- Equity pay adjustments
- Legal services
- Bulletin boards
- Jury duty pay
- Bereavement pay
- On-call pay
- Severance pay
- Pensions
- Health insurance
- Leave of absence
- Tuition reimbursement
- Seniority
- Job duties
- Probationary period
- Testing of employees
- Rest and lunch periods
- Bargaining unit work
- Subcontracting
- No strike clause
- Non-discrimination
- Dues check off
- Mileage and stipends
- Evaluation procedures
- Health and safety
- Clothing and tool allowance
- Management rights clauses
- Dental and vision plans
- Work rules
- Meals provided by the employer

Permissive or Voluntary Subjects

Permissive, voluntary, or non-mandatory subjects of bargaining are subjects not directly related to the work. That is, these subjects fall outside of wages, hours, and working conditions and generally are matters that relate to the nature and direction of the business/industry or relate to the internal union affairs. The list can be infinitely long. The parties may agree to bargain over these but are not required to by law and can refuse to discuss them without fear of an unfair labor practice charge. They also cannot be bargained to impasse. Furthermore, it would also be a violation to strike over a permissive subject. Subjects that have a minimal impact on the employment relationship most likely are permissive, but it is not always clear. There could be considerable grey areas in determining whether a proposal is mandatory or permissive and these might have to be litigated for resolution.

Examples of *permissive or voluntary subjects* include, but are not limited to:

- Negotiation ground rules
- Supervisor's conditions of employment
- Interest arbitration
- Settlement of an unfair labor practice (ULP) charge
- Pensions for retired members
- Use of the union label/ flag
- Internal union matters (e.g., how union stewards and officers are elected, union dues, officer structure, union by-laws, etc.)
- Recognition clause defining the bargaining unit
- Either party's bargaining team make-up
- Make-up of the employer's board of directors or trustees
- Demanding that a union settle arbitrable grievances filed under the previous contract

Illegal Subjects

Illegal subjects include any subjects that would violate an existing active law. Neither party can legally bargain these subjects. Even if both parties agree to do so, such subjects cannot be entered into legally within a collective bargaining agreement.

Examples of *illegal subjects* include, but are not limited to:

- Closed shop provisions (contract language in which the employer agrees to hire union members only)
 - Discrimination against a group of employees on the basis of race, color, religion, gender, age, marital status, disability, political or religious beliefs, national or ethnic origin, genetic information, sexual orientation, gender identity, or pregnancy
 - Hot cargo clauses (contract language that prohibits an employer from dealing with any other employer, usually involved in a labor dispute)
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Sources

- *Allied Chem. & Alkali Workers Local 1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157, 178 (1971) (<https://www.law.cornell.edu/supremecourt/text/404/157>)
- *National Labor Relations Act* (<https://www.nlr.gov/guidance/key-reference-materials/national-labor-relations-act>)
- *National Labor Relations Board (NLRB) v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (<https://www.law.cornell.edu/supremecourt/text/356/342>)
- *National Labor Relations Board's Basic Guide to the National Labor Relations Act* (<https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf>)