FTR Now

Responding to Disclosure Demands at the Bargaining Table: Employer Rights and Obligations

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Many Social Services organizations will be negotiating for the renewal of their collective agreements in 2011. Some of our clients have advised us that they have received broad disclosure requests from unions well in advance of actual bargaining. These requests are very similar to requests a number of Social Services organizations received in early 2009. At that time, we sent out an *FTR Now* to advise our clients of their obligations and the limits of those obligations. We are taking this opportunity to remind employers receiving such requests that in Ontario, there is no legal obligation to automatically disclose all information requested by a union before the parties have commenced bargaining.

Disclosure obligations are part of the statutory duty to bargain in good faith and to “make every reasonable effort” to conclude a collective agreement. In dealing with the duty to disclose information specifically, the Ontario Labour Relations Board has identified two obligations within that duty. First, on its own initiative, an employer must reveal to a trade union any actual (including *de facto*) decision which is likely to have a significant impact on the bargaining unit. A *de facto* decision is one which has effectively been made, even if some formalities of the decision-making process have not yet been complied with, or if the details are not finalized. It is important to remember that a *de facto* decision in any given case will depend on all the facts and circumstances.

The second aspect of the duty to disclose is that, when asked by the union in bargaining whether it is seriously contemplating initiatives which are likely to have a significant impact on the bargaining unit, an employer must answer “honestly”. As before, what constitutes an “honest” answer will depend on a variety of circumstances: when was the question asked? What is the actual question? At what stage are the employer’s plans? However, what is clear in the case law is that the answer should be one that does not mislead the union as to the actual state of affairs.

In addition, unions may request information related to a proposal or position placed on the table by either party. Disclosure obligations are more limited here. The Board has stated that there is an obligation to disclose enough information so that a party can understand the position being taken by the other party, as well as the rationale for that position. There is no obligation to automatically disclose every piece of information in all cases.

Recently, unions have adopted a pre-bargaining strategy of initiating broad requests for information from Social Services employers. Requests received to date have requested such things as:

- full financial disclosure with respect to the employer’s entire operations (presumably including operations outside the bargaining unit);
- identification of all initiatives currently undertaken or to be undertaken that will negatively impact bargaining unit members;
- benefits information, including master contracts of insurance and underwriting agreements;
- a complete organization chart listing all positions, including those outside the bargaining unit; and
- census and financial information relating to benefits for all eligible members.

In order to respond to some of the requests, employers would need to prepare or locate additional documentation that is not readily accessible and that may not be relevant to the issues on the bargaining table.

A union’s right to receive information from employers is not absolute. It will depend upon the particular circumstances of the request, including such factors as the content of the bargaining proposals, the stage of negotiations, collective agreement

obligations and the relationship between the parties. Employers are entitled to refuse inappropriate requests in certain cases. Your Hicks Morley lawyer would be pleased to review any disclosure requests that your organization receives to assist you in developing a pro-active strategy.

If you have any questions about this article, please contact Daniel B. Fogel at 416.864.7349 or your regular Hicks Morley lawyer.

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