

**HOW EMPLOYMENT AND UNION ADVOCATES  
CAN OBTAIN INFORMATION FROM COMPANIES  
TO EVALUATE CLAIMS**

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**DUTY TO FURNISH INFORMATION UNDER  
THE NATIONAL LABOR RELATIONS ACT:  
A GENERAL OVERVIEW**

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**I. INTRODUCTION**

The National Labor Relations Act (the “Act”), 29 U.S.C. §§ 151-163, does not contain an express requirement that unions or employers provide each other with information to facilitate collective bargaining. Rather the obligation to provide information to a union arises from the Act’s “collective bargaining” obligation. 29 U.S.C. §158(d).

Since its inception, the National Labor Relations Board has construed the Act as requiring the parties to disseminate information that is relevant to the collective bargaining process. In Allen, S.L., & Co., Inc., 1 NLRB 714,728 (1936), the Board held that the “Interchange of ideas, communication of facts peculiarly within the knowledge of either party is the essence of the bargaining process.” The duty to furnish relevant information also exists for employer information requests from the union.

**II. THE DUTY TO PROVIDE INFORMATION**

Generally, the duty to provide information to a union arises from a request made by the union for specific information. Generally there is not a duty to supply information absent a request. However, there are exceptions where an employer needs to consider disclosing certain types of information to a union. For example, when an employer decides to sell a business it may have an obligation to notify the union of the sale so that the parties can bargain about the “effects” of the sale. See First National Maintenance Corp. vs. NLRB, 452 U.S. 666 (1981) and Willamette Tug and Barge Co., 300 NLRB 282 (1982) (finding that a union is “entitled to as much notice of the closing and termination of employees as was needed for meaningful bargaining at a meaningful time.”)

**III. FAILURE TO PROVIDE INFORMATION**

An employer’s refusal to provide relevant information to a union is considered a failure to bargain with the union and an unfair labor practice. 29 U.S.C. §158(a)(5). One of the most common Section 8(a)(5) unfair labor practice charges involves the allegation that an employer has failed or refused to furnish information. Increasingly, unions are making extensive information requests in connection with collective bargaining, grievance administration and contract administration.

#### IV. THE ANATOMY OF A VALID REQUEST

- A. Basic elements A union's demand for information can be either verbal or in writing. Additionally, a request for information must be specific and ask for necessary and relevant information. An employer is under an obligation to clarify an ambiguous or confusing request with the union shortly after a demand has been made. See Hughes Tool Co., 100 NLRB 208, 210 (1952). If only part of the request is ambiguous or confusing, the employer must comply with the parts of the request that are not ambiguous or confusing. See Keauhou Beach Hotel, 298 NLRB 702 (1990).
- B. Timing A union may request information during contract negotiations and during the life of a collective bargaining agreement. For example, in NLRB v. Acme Industrial Co., 385 U.S. 432, 436 (1967) the United States Supreme court upheld a union's request for information regarding a grievance filed by the union by noting that a union's right to information "...applies to labor-management relations during the term of an agreement."

Employers cannot unreasonably delay producing requested information. Whether a delay is unreasonable will be determined based on the particular facts of the request and circumstances existing between the parties. A number of cases hold that an employer's two-month delay is unlawful. See, e.g., Zukiewicz, Inc., 314 NLRB 114 (1994). However, delays of a shorter duration have been found violative of Section 8(a)(5) when the circumstances suggest the employer delayed production of the information in bad faith. See Hollywood Film Co., 213 NLRB 584 (1974) (delay of 3 weeks unlawful where the circumstances suggested bad faith).

- C. Relevancy A union is only entitled to relevant information from an employer. Relevant information is information that is linked to the union's role as the employees' exclusive representative relating to bargaining needs, contract administration, or grievance responsibility. Where it is unclear if the information requested is relevant, employers may seek to determine the relevancy. However, the general standard for relevance is low. The information need only appear "reasonably necessary" to the union's function as the employees' exclusive representative. The standard for relevance is a "discovery-type standard." Acme Industrial Co., *supra* at 437.

Certain information is considered presumptively relevant. Presumptively relevant information is information pertaining to employees in the bargaining unit. The NLRB has repeatedly held that wage and related information is presumptively relevant and that such information must be provided by employers "without regard" to any relationship the information may have to either negotiations or administration of the agreement. Dyncorp/Dynair Servs., 322 NLRB 602 (1996). An employer may attempt to rebut the presumption of relevance; however, efforts to do so are rarely successful. Information that has been found presumptively relevant include: employee personnel files, work rules, names, addresses and

telephone numbers of bargaining unit employees. See Fleming Companies, Inc., 332 NLRB 1086 (2000) and Bryant & Stratton Bus. Inst., 323 NLRB 410 (1997) (“it is well settled that information concerning names, addresses, telephone numbers, as well as wages, hours worked, and other terms and conditions of employment of unit employees is presumptively relevant...”). Information about how an employer has set its wages has also been found presumptively relevant. For example, in General Electric Co. vs. NLRB, 466 F.2d 1177 (6th Cir. 1972), the Board, as enforced by the court, required the employer to reveal wage surveys used in developing the employer’s wage structure. Similarly, time study data used to determine wages has also been found presumptively relevant. See J. I. Case Co. vs. NLRB, 253 F.2d 149 (7th Cir. 1958). Insurance, health and welfare benefits, and pension benefit information also has been required for disclosure. Such information can include an employer’s insurance plan costing information and where such information is not broken down on an individual employee basis, the Board and the courts have required an employer to break the information down in this manner. See Borden, Inc., 235 NLRB 982 (1978), enforced in part 600 F.2d 313 (1st Cir. 1979).

Examples of other information that employers have been required to disclose include the following:

- profit sharing plans;
- job classifications information;
- information on job assignments for bargaining unit employees;
- seniority lists;
- attendance records;
- worker’s compensation policies;
- attendance records;
- information on the use of temporary employees;
- the employer’s transfer of operations between plants;
- information on equipment and specifications; and
- information used to determine lay-offs.

The Board has also required the disclosure of information on wages paid to employees at other plants maintained by an employer. See, e.g., Mohenis Servs. 308 NLRB 326 (1992). A closely related line of cases has required employers to disclose information concerning the employer’s relationship with another company. For example, the NLRB required the production of such information where the union asserted two companies were operating as “alter egos” of each other. See Contract Flooring Sys., 344 NLRB No. 117 (2005).

Not all information requested by a union is presumptively relevant. However, the distinction between presumptive relevance and general relevancy is often murky. For example, information concerning workers outside the bargaining generally is not presumptively relevant. However, this generalization is not iron clad. See Brown Newspaper Publishing Co., 238 NLRB No. 187 (Sept. 29, 1978) (workers’

wage rates who were outside the bargaining unit were presumptively relevant because they performed the same work as unit members). On the other hand, in a very recent decision of the NLRB, Disneyland Park, 350 NLRB No. 88, 2007 WL 2708012, the Board reiterated its position that information concerning subcontracting agreements, even those relating to bargaining unit employees' terms and conditions of employment, is not presumptively relevant. Id. citing Richmond Health Care, 332 NLRB 1304, 1305 n. 5 (2000).

When information is not presumptively relevant, a union must demonstrate relevance by showing "a reasonable belief, supported by objective evidence, that the requested information is relevant." Disneyland Park, 350 NLRB No. 88, 2007 WL 2708012. Relevance under this standard requires evidence either "(1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the [employer] under the circumstances." Id.

- D. The Form of Production An employer is not required to provide information in the precise form requested by the union. However, information must be provided in a manner not so burdensome or time consuming as to impede the process of bargaining. Employers are at their peril if they provide information that is incomplete or is inaccurate. See, e.g., Airport Aviation Services, 292 NLRB 823 (1989).

It is the employer's burden to show that a production would be unduly burdensome. See, e.g., Tower Books, 273 NLRB 671 (1984). When an employer has an objection to the form in which the union has requested information, the employer is required to advise the union of its objection. Failing to do so will undermine the defense that the request is somehow burdensome. It is the employers obligation to "offer to cooperate with the union in reaching a mutually acceptable accommodation." See, e.g., Mission Foods, 345 NLRB No. 49 (2005). One such accommodation may be allowing the union to review the information in the employer's possession and cooperating in answering questions raised by the review.

- E. Limits on the Duty to Disclose A union may not use the information request process to substitute for discovery in a Board proceeding. This employer defense usually is based upon the timing of the union's request being in close proximity to an unfair labor practice complaint and other evidence supporting the fact that the union is using the request to prepare in its prosecution. Unbelievable, Inc. d/b/a Frontier Hotel & Casino, 318 NLRB 857 (1995). An employer also does not have to comply with a request made in bad faith or designed to harass the employer. NLRB v. Wachter Construction, 23 F.3d 1378 (8<sup>th</sup> Cir. 1994), reversing 311 NLRB 215 (1993). Even where the employer does not have relevant information in its direct control, an employer may need to satisfy its obligations under the Act by making a good faith effort to obtain the information. See, e.g., Pittson Cole Group, Inc., 334 NLRB 690 (2001). While an employer may have to make a diligent effort to obtain information, this does not include a requirement that the

employer gather/create information that is not already in its possession. Information that does not exist does not have to be disclosed. In such cases employers generally must be able to explain the reasons to the union why the information is not available.

Some employers have raised the issue of the cost of furnishing data as a defense. The cases suggest the parties must bargain over this issue. An employer may require the union to pay a reasonable cost to duplicate information that has been requested. Food Employer Council, 197 NLRB 651 (1972). When cost is the employer's objection it should be reviewed whether the type of information requested has voluntarily been provided at the employer's expense in the past. See, e.g., Beverly Hills, 346 NLRB No. 111 (2006).

Employers also sometimes cite confidentiality concerns as a reason for nondisclosure. Like other objections to production such an objection must be timely and specific. Where an employer has a legitimate interest in confidentiality, it must bargain with the union to see if an accommodation can be reached. If the information request is refused on the grounds of confidentiality, the refusal will be analyzed under the balancing of interest approach articulated by the Supreme Court in Detroit Edison Co. vs. NLRB, 440 U.S. 301 (1979). Under this approach, claims of confidentiality are examined on a case-by-case basis. The balancing required by Detroit Edison and the Board decisions uses a two-part test. First, the company must demonstrate a "legitimate and substantial interest in refusing to supply the information; second, the employer must reasonably and in good faith attempt to provide information in an alternate form." To prevail, an employer must demonstrate that the need to keep the information confidential is substantial and that it offered a reasonable alternative to disclosure. An employer may request a union to give assurances that confidential information will not disseminated more widely than is required by the union's need for the information.

## **V. A SPECIAL CASE: EMPLOYER FINANCIAL INFORMATION**

A substantial number of unfair labor practice charges and litigation has occurred regarding the disclosure of employer financial information. An employer's financial information may be relevant, even though the information about a company's sales and profits is usually considered confidential. Whether an employer's financial information is relevant will turn on the employer's words and conduct.

The seminal case discussing the disclosure of an employer's financial information is NLRB vs. Truitt Manufacturing Co., 351 U.S. 149 (1956). In Truitt, the Supreme Court required the disclosure of the employer's financial information to substantiate the employer's claim concerning its ability to pay increased wages and benefits. The Supreme Court held:

“good faith bargaining necessarily requires that claims made by either bargainer be honest claims. This is true about an asserted

inability to pay an increase in wages. If such an argument is important enough to present in the give-and-take of bargaining, it is important enough to require some proof of its accuracy.”

Id. at 152-53. In AMF Trucking and Warehouse, Inc., 342 NLRB No. 116 (2004), the Board discussed the assertion of inability to pay: “inability to pay means that the company presently has insufficient assets to pay or that it would have insufficient assets to pay during the life of the contract that is being negotiated.”

An employer’s expressed unwillingness to agree to a union wage demand will not require an employer to make disclosure. Only when an employer’s words or conduct link a bargaining position to economic hardship will the rule in Truitt be implicated. For example, in Nielsen Lithografing Co., 305 NLRB 697 (1991), enforced sub nom. Graphic Communications Local 508 O-K-I vs. NLRB, 977 F.2d 1168 (7th Cir. 1992), the Board distinguished an employer’s assertion of competitive disadvantage from an assertion or claim of inability to pay. The Board held: “[A]n employer’s obligation...to provide a Union with information by which it may fulfill its representative function bargain does not extend to information concerning the employer’s projections of its future ability to compete. We consider that obligation to arise only when the employer has signified that it is at present unable to pay proposed wages and benefits. We do not equate “inability to compete,” whether or not linked to job loss, with a present “inability to pay.” Id. The Board has also held that an employer has the ability to retract a claim of inability to pay by an explicit withdraw of such a claim. See e.g., Fairhaven Properties, 314 NLRB 763 (1994).