This handout discusses the similarities and differences between “decision” and “effects” bargaining, including how to demand bargaining and when to file an unfair practice charge. Novices may want to consult the summary on page 13 first to get the basic ideas.

I. The Basics of Bargaining in General

CSU must “meet and confer”—i.e., bargain—with APC about “wages, hours of employment, and other terms and conditions of employment” that are “within the scope of representation.” In bargaining, CSU merely has to “endeavor to reach agreement” but does not have to “agree to any proposal.” If bargaining results in “impasse,” APC can strike and CSU can impose its “last, best, and final offer” once the parties have exhausted the statutory impasse procedure.

A. CSU has to bargain or “meet and confer” with APC on “all matters within the scope of representation.”

“Higher education employers, or such representatives as they may designate, shall engage in meeting and conferring with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation.”

Gov’t Code § 3570

B. The “scope of representation” includes “wages, hours of employment, and other terms and conditions of employment” but excludes, e.g., the “necessity or organization of any service.”

“For purposes of the California State University only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include: (A) Consideration of the merits, necessity, or organization of any service, activity, or program established by statute or regulations adopted by the trustees, except for the terms and conditions of employment of employees who may be affected thereby. (B) The amount of any student fees that are not a term or condition of employment. (C) Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and conduct of courses, curricula, and research programs. . . .”

Gov’t Code § 3562(r)(1)
C. The obligation to meet and confer requires CSU to “endeavor to reach agreement,” but it does not “compel [it] to agree to any proposal.”

“"Meet and confer" means the performance of the mutual obligation of the higher education employer and the exclusive representative of its employees to meet at reasonable times and to confer in good faith with respect to matters within the scope of representation and to endeavor to reach agreement on matters within the scope of representation. The process shall include adequate time for the resolution of impasses. If agreement is reached between representatives of the higher education employer and the exclusive representative, they shall jointly prepare a written memorandum of the understanding, which shall be presented to the higher education employer for concurrence. However, these obligations shall not compel either party to agree to any proposal or require the making of a concession.”

Gov’t Code 3562(m)

D. If bargaining results in “impasse,” then APC can strike and CSU can impose its “last, best, and final offer” once the parties have exhausted the statutory impasse procedure.

“Once the parties have exhausted the statutory impasse procedures, a union may lawfully engage in an economic strike and the employer may lawfully implement terms and conditions of employment reasonably comprehended within its last, best and final offer.”

Regents of the Univ. of Cal., PERB No. 2094-H (2010)

II. The Details of “Decision” Bargaining

If CSU desires to make a change that directly involves a matter that is within the scope of representation by APC, CSU has to give APC “notice and an opportunity to meet and confer” about the decision to make the change. Failure to do so is an” unfair practice.”

A. Which matters are “within the scope of representation”?

1. “Wages,”

2. “Hours or employment,” and

3. “Other terms and conditions of employment”

a. The test for “non-enumerated” subjects

“A subject is within the scope of representation if: (1) it involves the employment relationship; (2) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission.”

b. Application of the test to “parking location”


   “Parking at [CSU campuses] is not a condition of employment. Employees are not required to drive to work. However, in the event they choose to drive, the employees are not limited to the permitted spaces. They may, like students and members of the public, park in "daily use" spaces rather than permitted spaces or, alternatively, park off campus. Ultimately, the evidence is insufficient to establish a relationship between CSU's parking policy and any condition of employment. Accordingly, we believe parking location does not involve the "employment relationship." As such, parking location does not fall within scope under "other terms and conditions of employment."” (Emphasis supplied.)


   “The question here is . . . whether the terms and conditions on which an employer chooses to provide parking to its employees (like the terms and conditions on which it chooses to provide food) “involve the employment relationship.” [¶] The answer to that question is obvious. Just as the terms and conditions on which an employer makes food available for its employees are germane to the working environment, so are the terms and conditions on which an employer makes parking available. Indeed, the availability of parking may have a significant impact on whether an employee can get to work in the first place. . . . [¶] For the foregoing reasons, we find the board’s conclusion that “parking location does not involve the ‘employment relationship’” clearly erroneous.” (Emphasis supplied.)


   “[T]he Charging Parties' collective bargaining agreements with CSU have never addressed parking access, location, or allocation. Moreover, with the exception of the instant dispute, these parking changes have not been grieved or otherwise challenged in the form of an unfair practice charge. Thus, based on our review of the record, we find that these changes have not typically resulted in conflict between the Charging Parties and CSU at either CSUS or CSUN. Accordingly, we find the Charging Parties failed to demonstrate that the subject is of such concern to management and employees that conflict is likely to occur.” (Emphasis supplied.)

   “[A]ny resolution of a dispute regarding the location/availability of parking spaces must take into consideration the interests of both the [employees] and the students. However, collective negotiations between the Charging Parties and CSU can only focus on the needs of the [employees], thereby depriving the students of the opportunity to assert and defend their parking interests. Accordingly, even if parking location is a subject of such concern that conflict is likely to occur, we find collective negotiations is not the appropriate means of resolving the conflict between the interested parties.” (Emphasis supplied.)
“Here, the decision to restrict parking was aimed at the broader objective to provide adequate parking for the students, [employees], and the general public. The record demonstrates CSU’s need for flexibility in parking access in order to accommodate changes in the student population, construction and new challenges facing each campus. Thus, . . . imposing an obligation to negotiate such decisions would carry the bargaining process beyond the bargaining unit and into CSU’s overall mission and its relationships with third parties. Accordingly, it would significantly abridge CSU’s freedom to exercise those managerial prerogatives essential to the efficient operation of its campuses and, thus, the achievement of its mission.”

(Emphasis supplied.)

Exercise 1: According to the European comic book series *Asterix*, collective bargaining changed the way in which Roman soldiers were called to the mess hall. Compare the panel on the left, from *Asterix at the Olympic Games*, with the panels below, from *Asterix and the Mansions of the Gods*. Given the reasoning of PERB and the Court of Appeal in the case discussed above, was this a subject that was “within the scope of representation,” *i.e.*, did the officers have to bargain with the men about the “cookhouse call”?

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c. Application of the test to layoffs, reductions in hours, contracting out, and transfer of bargaining unit work

i. Layoffs are *not* within scope.

“[A] public employer’s decision to implement layoffs is not within the scope of representation, rather, only the effects of a layoff are within scope.”

ii. Reductions in hours are within scope.

“[T]he decision to reduce hours of employment [is] negotiable and . . . management may not unilaterally reduce hours without affording the exclusive representative notice and an opportunity to negotiate.  


iii. Contracting out may be within scope.

“Contracting out is negotiable in either of two circumstances: (1) where the employer simply replaces its employees with those of a contractor to perform the *same services* under *similar circumstances*; or (2) where the decision was motivated substantially by potential savings in labor costs.”  

*State of Cal. (Dept. of Veteran Affairs)*, PERB Dec. No. 2110-S (2010) (emphasis supplied)

iv. Transfers of bargaining unit work may be within scope.

“[I]n order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that [1] unit employees ceased to perform work which they had previously performed or that [2] nonunit employees began to perform duties previously performed *exclusively* by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by *increasing* the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.”  


B. When does the employer have to give the union “notice and an opportunity to bargain” over a negotiable decision?

“Notice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate.”  


C. To whom in the union does the employer have to give notice?

1. A union official with “authority to act”

“[N]otice of a proposed change must be given to an official of the union who has the *authority to act* on behalf of the organization. . . . The knowledge of one or even several members of the bargaining unit, who lack authority to act in an official capacity, will not be imputed to the organization.”  

*Regents of the Univ. of Cal. (Davis)*, PERB Dec. No. 2101-H (2010) (emphasis supplied)
2. *Not a campus steward*

“Garduque was not a proper official to receive notice. He was a steward at the Fresno campus, he was not a statewide officer, he was not on the negotiating team, and he had no authority to accept notice on proposed changes in negotiable matters. His authority extended only to representation in grievances and related matters. Moreover, Goetzel testified without rebuttal that a longstanding practice existed under which APC required CSU and its campuses to give official notice in writing to APC at its Oakland office. He said further that APC received no notice of the Fresno policy at its Oakland office. Under these circumstances, CSU’s argument that APC had legal notice of the Fresno telephone and e-mail policies is rejected.”

*Trustees of the Cal. State Univ.,* PERB Case No. LA-CE-584-H (ALJ prop. dec. 2001)

D. What happens if the union has been given notice by the employer of a proposed change but fails to request or refuses to bargain about it?

1. Normally, the union will be deemed to have *waived* its right to bargain and the employer can implement the change.

2. However, if the proposed change is covered by a “zipper clause,” the union can fail to request or even refuse to bargain about a proposed change, and the employer then still cannot implement the change.

a. The “zipper clause” in the APC-CSU Contract

“The parties acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to offer proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. *Except as provided for in this Agreement, the Employer and the Union, for the life of this Agreement, voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement,* even though such subjects or matters may not have been within the knowledge of or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.”

Article 3.2 (emphasis supplied)

b. The effect of the “zipper clause”

“[A] zipper clause may not be construed as a waiver of bargaining rights . . . , and . . . while a union may use it as a shield to resist the employer's efforts to change the status quo, the employer may not use it as a sword to make unilateral changes over a union's refusal to bargain.”

E. What are the elements of an unlawful “unilateral change”? 

“Unilateral changes are considered “per se” violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation.”  

County of Sonoma, PERB Dec. No. 2242-M (2012)

F. When does a charge alleging a unilateral change have to be filed?  

1. Within six months . . . 

“[T]he Board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.”  

Gov’t Code § 3563.2(a)

2. . . . of when the union knew or should have known of the employers intent to implement the change . . . 

“In a unilateral change case, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent’s intent to implement a change in policy . . . . [A] charging party that rests on its rights until actual implementation of the change bears the risk of running afoul of the statute of limitations.”  


3. . . . and not a single day later!

“On or about January 13, 2010, Respondent sent an e-mail message to employees represented by Charging Party [that constituted the basis for the unfair practice charge]. . . . It is undisputed that the Union knew or should have known about the e-mail message in question on January 13, 2010. Accordingly, the statute of limitations in this case began on Thursday, January 14, 2010 and ran until and including Tuesday, July 13, 2010. It is undisputed that the Union did not file the instant unfair practice charge with PERB until Wednesday, July 14, 2010. Therefore, the unfair practice charge was filed outside of the statute of limitations and is untimely . . . .”  

Housing Authority of the City of Los Angeles, PERB Case No. LA-CE-621-M (2011)
III. The Details of “Effects” or “Impact” Bargaining

If CSU desires to make a change that does not directly involve a matter within the scope of representation by APC, CSU still has to bargain with APC about any “reasonably foreseeable” effects on matters within the scope of representation by APC, but not the decision to make the change itself. Failure to do so is again an unfair practice.

A. The Details

1. Which matters are subject to effects bargaining?
   a. The effects of non-negotiable decisions on “wages”
   b. The effects of non-negotiable decisions on “hours of employment”
   c. The effects of non-negotiable decisions on “other terms and conditions of employment”
      i. See II.A.3.a above for the test of “non-enumerated” subjects.
      ii. See II.A.3.b above for an application of this test.

Note 1: “Whether or not such effects actually materialize is not the issue. So long as [the union] identified a reasonably foreseeable impact on [any matter within the scope of representation such as] workload, [the employer] was obligated to meet and negotiate in good faith those potential impacts prior to implementation.”

   Trustees of the California State University, PERB Dec. No. 2287-H (2012)

Note 2: While a layoff decision is not subject to decision bargaining, the effects of that decision on the “wages, hours of employment and other terms and conditions of employment” of the remaining employees are subject to effects bargaining. See II.A.3.c.i above for a PERB decision so holding.

B. When does the employer have to give the union “notice and an opportunity to bargain” over the effects of a non-negotiable decision?

1. Before it implements the non-negotiable decision . . .

“The employer has a duty to provide reasonable notice and an opportunity to bargain before it implements a decision within its managerial prerogative that has foreseeable effects on negotiable terms and conditions of employment.”

   County of Santa Clara, PERB Dec. No. 2321-M (2013)
2. . . but under certain circumstances, implementation before completion of the bargaining process is then permissible.

“Under certain circumstances, an employer may implement a nonnegotiable management decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of that decision. . . . [I]mplementation before the completion of the bargaining process is permissible where:

1. the implementation date is not an arbitrary one, but is based upon either an immutable deadline. . . or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer’s right to make the nonnegotiable decision;

2. notice of the decision and implementation date is given sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation; and

3. the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.”

State of California (Dept. of Corrections), PERB Dec. No. 2115-S (2010)

C. To whom in the union does the employer have to give notice?

See section II.C above.

D. What happens if the union has been given notice by the employer of a proposed non-negotiable decision but fails to request or refuses to bargain over the negotiable effects of that decision?

1. The union will be deemed to have waived its right to bargain and the employer can implement the decision.

2. “Zipper clauses” are inapplicable in effects bargaining.

“CFA argues the contractual zipper clause prohibits CSU from implementing the new policy. However, because there is no duty to bargain the decision to implement the policy, the zipper clause is inapplicable. Additionally, the zipper clause in the CBA does not preclude CSU from implementing the policy if CFA declines to negotiate the effects of the [the policy]. A contrary conclusion would lead to absurd results. For example, a union could delay the implementation of a non-negotiable layoff until after the expiration of the contract simply in reliance upon the zipper clause. Thus, we hold that exclusive representatives cannot properly refuse to bargain effects in reliance on a zipper clause when the decision to implement the policy is itself a managerial prerogative or else risk waiving the right to bargain the effects.”

3. What are the elements of a violation of the duty to bargain in good faith over the effects of a non-negotiable decision?

In *County of Santa Clara*, PERB Dec. No. 2321-M (2013), the Board overruled its prior test in *State Of California (Dept. Of Corrections)*, PERB Dec. No. 2196-S (2011) without clearly formulating a new test. However, based on the *Santa Clara* decision and *Trustees of the California State University*, PERB Dec. No. 2287-H (2012), the new test appears to be this: (1) the employer implemented a non-negotiable decision that had reasonably foreseeable effects on terms and conditions of employment; and (2) (a) such decision was implemented without giving the union notice or an opportunity to bargain over the effects, or (b) such notice was given, but the union requested to bargain over identified reasonably foreseeable effects of the decision on terms and conditions of employment and the employer failed or refused to do so prior to implementation, subject to III.B.2.

**Exercise 2:** The campus administration has announced that it will lay off half of the Student Services Professionals (SSPs) in Student Affairs. Write a bargaining request.

4. When does a charge alleging a violation of the duty to bargain over the effects of a non-negotiable decision have to be filed?

   a. Within six months . . .

   See II.F.1 above.

   b. . . . of when the union knows or should have known of the employers intent to implement the decision . . .

   “Whether the intended change is subject to decision and/or effects bargaining, it is the charging party's knowledge of the respondent's intent to unilaterally implement the change that starts the six-month statute of limitations period.”


   c. . . . and not a day later!

   See II.F.3 above.

IV. After Collective Bargaining: What Comes Next?

   A. When the Parties Agree: Funding the Collective Bargaining Agreement.

   1. CSU Has to Ask the Legislature to Provide Funding for the CBA . . .

   “No written memoranda reached pursuant to this chapter that require budgetary or curative action by the Legislature or other funding agencies, including the Federal
Maritime Administration, shall be effective unless and until that action has been taken. Following execution of written memoranda of understanding, an appropriate request for financing or budgetary funding for all state-funded employees or for necessary legislation will be forwarded promptly to the Legislature and the Governor or other funding agencies.”

Gov’t Code § 35721(b)

2. . . . But if the Legislature Does Not Provide the Funding, the Parties Are Back at the Table.

“When memoranda require legislative action pursuant to this section, if the Legislature or the Governor fails fully to fund the memoranda or to take the requisite curative action, the entire memoranda shall be referred back to the parties for further meeting and conferring; provided, however, that the parties may agree that provisions of the memoranda that are nonbudgetary and do not require funding shall take effect whether or not the funding requests submitted to the Legislature are approved.”

Gov’t Code § 35721(b)

B. When the Parties Cannot Agree: Exhausting the Statutory Impasse Procedure.

<table>
<thead>
<tr>
<th>Event</th>
<th>Timeframe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party Declares Impasse</td>
<td>↓ 5 Working Days</td>
</tr>
<tr>
<td>PERB Appoints Mediator</td>
<td>↓ 15 Days</td>
</tr>
<tr>
<td>Mediator Is Unable to Effect Settlement</td>
<td>↓ 5 Days</td>
</tr>
<tr>
<td>Each Party Selects Fact-Finding Panel Member</td>
<td>↓ 5 Days</td>
</tr>
<tr>
<td>PERB Selects Panel Chairperson</td>
<td>↓ 30 Days</td>
</tr>
<tr>
<td>Panel Makes Findings of Fact and Recommends Terms of Settlement</td>
<td>↓ 10 Days</td>
</tr>
<tr>
<td>Parties Consider Fact-Finding Report</td>
<td>↓ 70 Days</td>
</tr>
</tbody>
</table>

Employer Can Impose Last, Best, and Final Offer;
Union Can Strike

Gov’t Code §§ 3590-3593
V. Summary: Decision Bargaining vs. Effects Bargaining

<table>
<thead>
<tr>
<th>What does the employer have to bargain about?</th>
<th>Decision Bargaining</th>
<th>Effects Bargaining</th>
</tr>
</thead>
<tbody>
<tr>
<td>The decision to implement a change regarding a subject that is within the scope of representation</td>
<td>The reasonably foreseeable effects of a non-negotiable decision to implement a decision on terms and conditions of employment</td>
<td></td>
</tr>
</tbody>
</table>

| When does the employer have to give the union notice and opportunity to bargain? | | |
|---------------------------------------------------------------|---------------------------------------------------------------|
| Sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate. | Sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation. |
| Decision cannot be implemented before impasse procedure has been exhausted. | Decision can be implemented before impasse procedure has been exhausted under the circumstances. |

| To whom in the union does the employer have to give notice of the change? | | |
|-------------------------------------------------------------------------------|-------------------------------------------------------------------------------|
| An official of the union who has the authority to act on behalf of the organization. | An official of the union who has the authority to act on behalf of the organization. |
| In APC’s case, the statewide union office. | In APC’s case, the statewide union office. |

| What happens if the union has notice of but fails to demand to bargain? | | |
|--------------------------------------------------------------------------|--------------------------------------------------------------------------|
| If formal notice prior to decision, failure to demand bargaining results in waiver, unless decision is covered by “zipper clause.” | If formal notice prior to implementation, failure to demand bargaining results in waiver, even if effects are covered by “zipper clause.” |
| Formal notice after decision or actual notice does not result in waiver. | Formal notice after implementation or actual notice does not result in waiver. |

| What are the elements of an unfair practice charge for violation of the duty in question? | | |
|---------------------------------------------------------------------------------|---------------------------------------------------------------------------------|
| 1. The employer breached or altered the parties' written agreement or its own established past practice; | 1. The employer implemented a non-negotiable decision that had reasonably foreseeable effects on terms and conditions of employment; and |
| 2. Such action was taken without giving the union notice or an opportunity to bargain over the change; | 2. (a) Such decision was implemented without giving the union notice or an opportunity to bargain over the effects, or (b) such notice was given and the union requested to bargain over identified reasonably foreseeable effects, but the employer failed or refused to do so prior to implementation, subject to III.B.2 above. |
| 3. The change . . . has a generalized effect or continuing impact upon bargaining unit members’ terms and conditions of employment); and | |
| 4. The change in policy concerns a matter within the scope of representation. | |

| When does an unfair practice charge have to be filed? | | |
|-------------------------------------------------------|-------------------------------------------------------|
| Within six months of the union’s actual or constructive knowledge of the decision. | Within six months of the union’s actual or constructive knowledge of the decision. |
VI. Answers to Exercises

A. Answer to Exercise 1: “No.”

The second prong of the test in II.A.3.a is probably not met under these circumstances:

i. The question how soldiers are called to the mess hall “involves the employment relationship,” given that “the terms and conditions on which an employer makes food available for its employees are germane to the working environment.” See II.A.3.b.i above.

ii. However, this question will likely be deemed not to be “of such concern to management and employees that conflict is likely to occur,” even if “the mediatory influence of collective negotiations is the appropriate means of resolving [any] conflict” that does occur about it. See II.A.3.b.ii above.

iii. “[T]he employer's obligation to negotiate” about whether soldiers should be called to the mess hall by horn or by lyre might also “significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission,” See II.A.3.b.ii above.

B. Exercise 3: A Sample Request (With Necessary Elements in Boldface)

“APC has learned that the campus administration has decided to lay off half of the Student Services Professionals (SSPs) in Student Affairs. APC hereby requests to meet and confer over the reasonably foreseeable negotiable effects of this decision, including, but not limited to, the following: (1) effects on the workload of the remaining SSPs, (2) . . . .”
VII. Links

A. APC Homepage

http://www.apc1002.org/

B. APC Labor Relations Page

http://lrc.apc1002.net/index.php

C. California Public Employment Relations Board (PERB)

http://www.perb.ca.gov/

D. Higher Education Employer-Employee Relations Act (HEERA)

http://www.perb.ca.gov/laws/HEERA.aspx

E. PERB Regulations

http://www.perb.ca.gov/Regulations.aspx

F. PERB Decisions


Note: Clicking on “Decision Search” in the lower left-hand of that page and then on “Browse By Topic Index” in the lower left-hand of the next page leads to a “Topic Index Search” that contains summaries of major PERB decisions, organized by topics, which are very helpful in providing an overview of the law.

G. CSU Labor Relations Homepage

http://www.calstate.edu/LaborRel/