

BY REBECCA A. SHAFER

COLLECTIVE BARGAINING OBLIGATIONS, LABOR CONTRACT REQUIREMENTS AND UNCOOPERATIVE UNIONS CAN BE HINDRANCES FOR A UNIONIZED COMPANY THAT IS TRYING TO DEVELOP A RETURN-TO-WORK PROGRAM TO MANAGE WORKERS COMPENSATION COSTS.

Unions often oppose a return-to-work program until they can be convinced that it offers them something. Sometimes, employers facing this situation drop the idea completely, believing the obstacles are too great. The employer who gives up too easily, however, may be losing an opportunity to experience significant savings—and even improve union relations.

The National Labor Relations Act (NLRA) bargaining obligations are among the largest obstacles to developing a program in the unionized environment. One fundamental principle is that the union is the exclusive representative of employees, meaning that the employer is obligated to bargain collectively and in “good faith” over “wages, hours and other terms and conditions of employment.” A refusal or failure to bargain in good faith with the union over mandatory items may result in an unfair labor practice charge under Section 8 of the NLRA.

Precisely where a return-to-work program falls within the context of these bargaining obligations is not always clear. For the most part, the union will argue that such a program is a mandatory subject of bargaining because it involves job assignments and hence is a “term or condition of employment.” The contrary argument is that a decision to implement a return-to-work program lies at the core of the company’s



CAL

DEVELOPING RETURN-TO-WORK PROGRAMS IN UNIONIZED COMPANIES

right to manage its business and is not a subject of bargaining.

That said, the union and the employer do not have to agree. The “good faith” bargaining obligation imposed by the NLRA requires only that the union and the employer “bargain in good faith.” If the parties reach an impasse, the employer can normally implement a proposal, provided it is not a violation of the collective bargaining agreement. The problem for most employers is whether such an impasse has been reached because the concept of bargaining in good faith is subjective. If the employer is found to have fallen short of this, an unfair labor practice judgment may follow and the employer action can then be reversed by the National Labor Relations Board.

In addition to the requirements under the NLRA, the collective bargaining agreement between the union and the employer may significantly limit employer action. Specific references to return-to-work programs are rare because they are still fairly recent phenomena. On the other hand, the collective bargaining agreement may contain significant restrictions on the employer’s freedom to transfer employees, to create new job assignments or to modify seniority provisions. These restrictions make it difficult to implement a return-to-work program while such contract provisions are in effect.

“Past practices” may also be asserted by the union to disallow a return-to-work program. If the contractual provisions are not restrictive enough to disallow a return-to-work program, unions may assert the doctrine of “past practices.” If the union can successfully demonstrate a past practice allowing employees to remain out of work, management may lose in arbitration if a return-to-work program is implemented without union cooperation.

After considering the obstacles employers face in implementing a return-to-work program in a unionized company, many wonder what solutions are available. Some employers give up, assuming there is nothing they can do to change such restrictions. But

THE COLLECTIVE BARGAINING AGREEMENT MAY SIGNIFICANTLY LIMIT EMPLOYER ACTION. SPECIFIC REFERENCES TO RETURN-TO-WORK PROGRAMS ARE RARE BECAUSE THEY ARE STILL FAIRLY RECENT PHENOMENA.

in today’s competitive business environment, employers must be creative and determined in order to find a way around union restrictions.

1. Check for Management Rights

Review the collective bargaining agreement itself and determine the employer’s “management rights.” Every company has the right to manage the affairs of the business. Unless negotiated away, management normally has the right to determine products, services, methods and schedules of operations, including establishing company rules, maintaining discipline and promulgating reasonable workplace practices. Management rights clauses can include the right to promote, demote or transfer employees, and to lay off employees because of lack of work. Some collective bargaining agreements contain broader “management rights” clauses, permitting management greater latitude in regulating the work environment and the workforce. These might permit a return-to-work program.

2. Review Contractual Provisions

Other contractual provisions—including seniority and job transfer clauses—must be analyzed. Provisions such as “minimum manning provisions,” stipulating a minimum number of employees (even if unproductive) working in each classification, may interfere with the implementation of a return-to-work program. Other similarly restrictive procedures may involve limitations on the temporary transfer of employees outside of classifications or absolute prohibition on any work out of classifications. Such restrictive work practices impair the employer’s flexibility to utilize a return-to-work program and should be negotiated out of the contract. In short, look

at what the union contract precludes or provides for before proceeding.

3. Analyze Past Practices

Certain past practices, including arbitration decisions over the years, may impair management’s freedom to operate. Management should thoroughly review these past practices, such as past arbitration awards, to understand how far the employer may go in implementing a return-to-work program.

Sometimes, perceived past practices are a result of a misunderstanding on the part of the employer. After analyzing how those practices developed, management often finds that the original premise was incorrectly based on the misinterpretation of an arbitration award or resulted from an employer’s inattention to detail. Asking why such a practice exists is vital. It may not preclude the union from raising a claim, but it will give the employer a stronger defense.

4. Gain Senior Support

A company cannot implement a successful return-to-work program unless senior management supports it. Management must be willing to allocate the resources to improve safety and reduce workers compensation costs.

Unions are very astute at sensing a lack of management commitment. When union leadership senses that management is actually willing to dispute grievances and ready to face National Labor Relations Board activity—or even workplace disruption—the union may decide that opposition to a program is not worth the effort.

5. Communicate with the Union

Union leaders and members need to be aware that staying out of work for

extended periods rarely helps an injured employee heal; in fact, the employee's health often deteriorates because mental health can be compromised by depression once the employee loses his or her daily routine and social network.

Ask for support from the union. Graphically show members how much workers compensation costs the company each day and translate the financial realities to the business agent, asking him or her to relay the information to the membership. Including the business agent while you are crafting the transitional duty guidelines helps keep rumors from developing. "No surprises" is the best strategy for success.

Understand the union's "hot buttons." Focus on the economic consequences and interests of the membership. For example, are the union health funds being depleted by employees who are out of work on false workers compensation claims? Are union dues being stopped unnecessarily when members

pay. Senior management must be made aware of these disincentives so that it can push to get such practices changed immediately.

In other cases, seniority actually accrues faster for employees receiving workers compensation and not working than it does for those actively working. Employees may be able to stack months of accumulated sick time, carried over the years, to extend time off. Consider buying out accumulated sick time.

In some states, an employer can offset long-term disability payments if an employee is receiving workers compensation. Sometimes an employee can receive workers compensation payments equal to two-thirds of his or her average weekly wage tax-free while also receiving long-term disability payments. This means the employee may receive more than 100% of wages while not working. If the employee returns to work—or even to transitional duty—long-term disability stops, and the employee's income returns to its original level. For

excessive time off and reduce the number of injuries.

Investigate all workers compensation claims immediately upon notification to ensure that they are work-related. If they are not, refer employees to the group health plan (which may have a deductible) and disability programs for wage reimbursement.

Ask for a "withdrawal card" when an employee requests a lump-sum settlement, so the employee cannot reapply for the same job after receiving a permanency award. Get a signed waiver covering all actions to ensure that no other claims, such as Americans with Disabilities Act (ADA) claims, will follow.

One more step a company can take is to attend all workers compensation hearings. If an employer representative is at every workers compensation hearing before a commissioner, this also sends a clear message.

Despite possible union objections to a return-to-work program, the employer must consider its own legal

"NO SURPRISES" IS THE BEST STRATEGY FOR SUCCESS.

are out of work? Explain the impact of workers compensation on the profit-sharing program and financial survival of the company.

In labor/management relations, appealing to the union's interest in safety and worker recovery—along with the goal of reducing operating costs—is a sound basis for a joint effort to implement a return-to-work program. Utilizing an existing committee, such as a joint union/management safety committee, is a good place to start.

6. Eliminate Loopholes and Disincentives

Often, there are loopholes and inconsistencies in the design of an employee benefits program that allow employees to receive double payment legitimately and destroy any incentive to return to a modified-duty job. Some unions supplement workers compensation benefits, for example, allowing employees on workers compensation to collect full

these employees, there is no reason to return to work. Review all benefit programs and state laws to ensure that all allowable offsets are defined in the benefit plans. Even when combined, benefits should never equal more than 100% of normal pay.

Companies may want to eliminate voluntary contributions to benefit plans and other perks if an employee refuses work in a suitable transitional-duty position or refuses to follow company procedures. One national airline, for example, eliminated employee's travel passes if the employee failed to abide by the return-to-work policy.

7. Monitor Claims Closely

The employer who takes a vigorous stance on workers compensation defense sends a message to the union and employees who seek to abuse the system. When the employees feel management is scrutinizing every claim, a strong incentive develops to reduce

obligations under the ADA. Under this act, the employer must make reasonable accommodations to the job if doing so enables the employee to perform "essential functions of the job." A modified job or shortened work week is sometimes considered reasonable accommodation. While this obligation focuses on permanent impairments, and a return-to-work program focuses on temporary ones, the obligations may well overlap and a future ADA claim may be precluded.

In some situations, the union contract is inflexible, the relationship with the union is bad and the risk of unfair labor practices is great. But even in these cases, there are many subtle actions the employer can take to start chipping away at the workers compensation problem and begin implementing a return-to-work program in a unionized company. A sound program is not just in the employer's interest; it is in the union's interest as well. ■