LABOR EDUCATION AND RESEARCH CENTER

Working Papers in Oregon Public Sector Labor Relations

The Duty to Provide Information: An ERB Evolution

By Kathryn Logan

Negotiating Technological Change in Oregon's Public Sector Workplace

By Jason Weyand, Kyle Abraham and Nicole Elgin

Edited by Marcus Widenor

Prepared for the 30th Public Employment Relations Conference, May 30, 2018
Labor Education and Research Center
University of Oregon

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EDITOR'S INTRODUCTION

These **WORKING PAPERS** represent the continuation of a long series of studies prepared by the Labor Education and Research Center for Oregon's community of public sector labor relations professionals—union representatives, management representatives, and neutrals. Beginning with the ***LERC Monograph Series*** in 1982, (the first edition was Carlton Snow's "Statutory Decisions by Arbitrators") we have provided a forum for participants in the public sector labor relations community to exchange information and opinions, and develop greater skills in the resolution of disputes.

The ***LERC Monograph Series*** now numbers 18 editions, most often published in conjunction with the bi-annual Public Employment Relations Conference (PERC). This year's PERC is the 30th that LERC has presented, in conjunction with its partners, Oregon LERA and ORPELRA. It remains a unique opportunity for labor relations professionals to meet with the members of the Employment Relations Board and discuss how decisions are made in Oregon's collective bargaining system. I would like to thank all the current and past members of the Employment Relations Board who have been so cooperative in helping LERC put on the PERC and publish the ***Monograph Series*** over the years.

The two ***Working Papers*** we offer here deal with questions at the core of the collective bargaining process—information sharing and information technology.

First, we examine labor and management's responsibilities to one another in exchanging the information necessary to negotiate and administer the collective bargaining agreement. Former ERB member Kathryn Logan gives us a concise and authoritative account of exactly how the duty to provide information has evolved under the PECBA, and where it stands today.

Our second paper examines the responsibilities of labor and management when negotiating over the introduction of new workplace technologies. This paper is authored by labor representative (and former ERB member) Jason Weyand from Tedesco Law group and management representatives Kyle Abraham and Nicole Elgin of Barran Liebman LLP. As the authors point out, we are now a long way from the legal question of whether or not a labor organization may negotiate over access to an employer's bulletin board. The avalanche of new technologies since the advent of personal computer systems, the creation of the worldwide web, and the growth of social media has revolutionized the way we share information in our personal lives as well as in our workplaces. This raises important questions about how labor and management negotiate the decision to introduce new technology and its impacts.

My thanks to all of the authors for their excellent work here.

LERC Public Information Assistant Leigh Roberts deserves special recognition for doing the layout work for the ***Working Papers*** and making it accessible to practitioners.

Marcus Widenor
Associate Professor Emeritus
UO Labor Education and Research Center

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BIOGRAPHIES

Editor

Marcus Widenor is an associate professor emeritus at the University of Oregon Labor Education and Research Center. He received his B.A. in history from Antioch College and a master's degree in history from the University of Massachusetts. He has worked as an organizer for the International Ladies' Garment Workers' Union in Alabama and a labor educator at the University of Minnesota. Widenor has served as editor of the LERC Monograph Series since 1996. mrwide@uoregon.edu

Authors

Kathryn Logan, *Esquire*

Kathryn earned her BA at Johnston College and her JD at Willamette University College of Law. She has been a labor arbitrator and worked as an Administrative Law Judge for several state agencies, including the Employment Relations Board. As a management advocate, Kathryn worked for both the City of Salem and the State of Oregon as a Labor Relations Manager. She was also a Senior Assistant Attorney General with the Oregon Department of Justice, advising and representing management on labor and employment matters. She finished her career as the Board Chair for the Employment Relations Board. Since October 1, 2016, she has been happily retired.

Jason M. Weyand, *Partner with Tedesco Law Group*

Jason earned his BA from Oregon State University and his JD from the University of Oregon School of Law. After law school, Jason served as an ERISA/Bankruptcy attorney in the Office of the General Counsel of the Pension Benefit Guaranty Corporation in Washington, D.C. In 2004, Jason returned to Oregon, accepting a position as Legal Counsel for Oregon AFSCME. In 2012, Jason was appointed to serve as the labor representative on the Employment Relations Board by Governor John Kitzhaber. Jason served as a member of the ERB until 2017, when he joined the Tedesco Law Group. Jason represents public and private sector unions in all aspects of labor relations. jason@miketlaw.com

Kyle Abraham, *Barran Liebman LLP*

Kyle represents employers in both traditional labor and employment law matters. Kyle's labor practice includes negotiating collective bargaining agreements, advising employers on labor matters, and representing employers before labor arbitrators, the National Labor Relations Board, and the Oregon Employment Relations Board. Kyle works closely with employers to develop effective workplace policies, and he provides proactive advice and counsel. Kyle is an experienced litigator who has successfully represented clients before U.S. circuit and district courts, Oregon and Washington state courts, the Equal Employment Opportunity Commission, Oregon's Bureau of Labor and Industries, and other state and federal agencies. kabraham@barran.com

Nicole Elgin, *Barran Liebman LLP*

Nicole represents employers in traditional labor and employment law matters. Nicole's labor practice ranges from negotiating collective bargaining agreements to representing employers in hearings before arbitrators, the Oregon Employment Relations Board, and the National Labor Relations Board. Nicole's employment law practice includes working with employers to adapt workplace policies to the latest legislative changes at the state and national levels. Prior to joining Barran Liebman LLP, Nicole was a judicial extern for the Honorable Michael H. Simon at the United States District Court for the District of Oregon. nelgin@barran.com

The Duty to Provide Information: An ERB Evolution

By Kathryn Logan

During the course of contract negotiations and contract administration, employers and labor organizations routinely request information from each other. Oregon's Employment Relations Board (Board) has addressed the issues that arise from such requests, such as the type of information requested, and how and when it must be provided. The intent of this article is to provide an overview of the Board's case law regarding the duty to provide information under the Public Employee Collective Bargaining Act (PECBA), and highlight the evolution of the duty over the past 40-plus years.

Requirement to Provide Information

The first major case arose in 1976, when the Oregon State Employes[1] Association asked the Children's Services Division for information to determine whether a contract violation had occurred. The information was not provided. After a grievance was filed, the Association again asked for information. Again, the public employer did not provide it. The Association then filed an unfair labor practice with the Board.

In its order, the Board determined that the duty to provide information arises from the statutory requirement to bargain in good faith.[2] The Board held that the employer's duty to bargain in good faith "includes the duty to furnish information necessary to allow a labor organization to intelligently evaluate and pursue a pending grievance." [3] In reaching this conclusion, the Board adopted the construction of the National Labor Relations Board when it interpreted Sections 8(a)(5) and 8(d) of the National Labor Relations Act. [4]

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[1] This is correctly spelled. At the time, the story is that the Governor required "employe" to be spelled with one "e" to save keystrokes. While I have always believed this story to be true, I am unable to attest to its veracity. This edict was later rescinded.

[2] ORS 243.672(1)(e) requires the employer to bargain in good faith with the exclusive representative. There is a similar requirement for labor organizations found in ORS 243.672(2)(b).

[3] *Oregon State Employes Association v. Children's Services Division, Department of Human Resources, State of Oregon,* Case No. C-32-76, 2 PECBR 900, 906 (1976).

[4] *NLRB v Truitt Mfg. Co.,* 351 US 149 (1956).

In a later case, the Board determined that the duty to bargain in good faith also requires that a labor organization provide information to a public employer. [5]

Extent of the Duty (Threshold Standards)

In *Children's Services Division,*[6] the Board established a standard for the type of information that must be disclosed in a contract administration situation. According to the Board, there must be a "probability that the desired information may be relevant and would be of use to the union in carrying out its statutory duties and responsibilities."[7]

However, in *Washington County,*[8] the Board made a distinction between contract administration and contract negotiation situations.

> "We agree that a discovery-type standard is appropriate in right-to-information cases * * * where the inquiring party is attempting to enforce or otherwise police a contract. We are not persuaded, however, that so liberal a prescription will necessarily be appropriate in the negotiations setting."[9]

In other words, to require a party to disclose all "potentially relevant" data in contract negotiations goes too far. The inquiring entity must "demonstrate some reasonable need" for the information, and "show that its ability to meaningfully negotiate will be substantially impaired" without the information.[10]

Applying Standards for Information Requests

Once one of the threshold standards has been met, must an entity immediately and automatically produce all of the information requested? The Board addressed this issue in *Oregon School Employees Association, Chapter 68 v. Colton School District 53 (Colton).*[11] In this case the Board applied a "totality of circumstances"

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[5] *Washington County School District No. 48 v. Beaverton Education Association & Nelson*, Case No. C-169-79, 5 PECBR 4398 (1981).

[6] Citation at fn 3.

[7] *Id.* at 906, citing *NLRB v. ACME Industrial,* 385 US 432 (1967).

[8] Citation at fn 5.

[9] *Id.* at 4403.

[10] *Id.* at 4403.

[11] Case No. C-124-81, 6 PECBR 5027 (1982).

approach, explaining that many factors must be considered in determining whether an entity has failed to provide legally required information. The Board then discussed four factors to be considered regarding both the extent of information to be provided and the timeliness of providing the requested information.[12]

1. Reason given for the request

The relevance of any requested information generally can be discerned from the request itself. There will be occasions where the requesting entity must explicitly state the need for the information so that the responding entity can determine the relevance of a request. Information requests about a pending grievance should yield a faster response than information requests involving general contract administration.

2. The ease or difficulty in producing and providing the information

Information that is already compiled and printed should be produced quickly. Where the information must be gathered or translated into a usable format, the responding party has a reasonable time in which to provide the information. A responding entity may request reimbursement of reasonable costs incurred in providing the information, as long as the requesting entity has been informed of that intent. In that situation, the requesting entity may decline, or may request access to the information so as to compile the information itself.[13]

3. The kind of information requested

An entity is not required to provide confidential information or purely subjective information.

4. The history of the entities' labor-management relations

The Board stated that the reasonable time for providing the information may be longer, or in extreme cases may be excused altogether, where a pattern of fishing

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[12] The listed factors do not exclude consideration of other relevant factors by the Board. These four factors, however, are the ones most used by parties and the Board. Although the Board labeled these four factors as a "four-part test" in later cases (*see*, *e.g.*, *Lincoln City Police Employees' Association v. City of Lincoln*, Case No. UP-32-98, 18 PECBR 203, 210 (1999)), the Board has consistently applied these four items as factors to consider rather than a test.

[13] See *American Federation of State, County and Municipal Employees Council 75, Local 189 v. City of Portland,* Case No. UP-046-08, 24 PECBR 1008 (2012), *recons* 25 PECBR 85 (2012), *rev* 276 Or App 174 (2016), *order on remand* 26 PECBR 785 (2016), *recons* 26 PECBR 796 (2016) regarding reimbursement of costs. This case will be discussed later in the article.

for information exists or when a party makes numerous requests. However, where a pattern of unreasonable delay in responding to legitimate requests exists, the amount of time to provide the information may be shortened.

The Threshold Standards (Evolution)

Over the years the threshold standard for contract administration cases has expanded. The Board now starts with a premise of full disclosure.[14] Information that has probable or potential relevance is subject to disclosure.[15] This may include information that is not relevant in and of itself, but may have the potential to lead to relevant information.[16] Other cases involving the contract administration threshold use a potential value standard. In *Oregon State Police Officers' Association v. State of Oregon,* the Board stated:

> "All the union needs to establish is that the subject of the request has *potential value* in aiding it in the performance of its statutory duties of representation of bargaining unit members." (Emphasis added). [17]

An example of how the potential value standard is used is found in *Oregon AFSCME Local 3581 v. State of Oregon, Real Estate Agency*.[18] The document at issue was a copy of the notes taken by an assigned note taker during a meeting between the agency and the industry representatives regulated by the agency. The purpose of the meeting was to discuss the industry representatives' complaints about the agency and to explain the agency's procedures. The meeting attendees agreed to ground rules that all remarks made at the meeting would be confidential and that no complaints would be made about individual agency investigators.

The investigators were concerned, however, that the agency was soliciting complaints. Consequently, the union requested copies of all correspondence regarding this meeting, stating that it wanted to evaluate the merits of a potential grievance. The agency supplied everything but the meeting notes. The agency's position was that the notes were not relevant, were confidential, that the relevance of the notes had not

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[14] *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections*, Case No. UP-7-98, 18 PECBR 64, 70 (1999).

[15] *Olney Education Association v. Olney School District 11,* Case No. UP-37-95, 16 PECBR 415, 418 (1996), *aff'd* 145 Or App 578.

[16] *Benton County Deputy Sheriff's Association v. Benton County,* Case No. UP-24-06, 21 PECBR 822, 833 (2007).

[17] Case No. UP-24-88, 11 PECBR 718, 727 (1989).

[18] Case No. UP-42-03, 21 PECBR 129 (2005).

been explained to the agency, and that the union received the information it needed from all the other correspondence.

The Board ordered the disclosure of notes, stating that they had potential value to the union, that the agency waived its relevance argument by providing the other documents, that the notes were not confidential, and that the agency had not met its duty to accommodate the union's request. There is no discussion by the Board as to what the actual potential value was of the information, other than a statement that the union wanted the notes to document what occurred at the meeting. Needless to say, it takes very little explanation to fulfill the threshold requirement of relevance in contract administration cases.

The threshold standard for contract negotiation cases, however, has stayed the same. If there is not a need for the information, the Board has not ordered disclosure.

For example, there is no requirement to provide information when a duty to bargain does not exist. In *Service Employees International Union, Local 49 v. Pacific Communities Hospital,* [19] the union requested information about the hospital's rule changes for bargaining purposes. The hospital did not provide the requested information. The Board held that the hospital had not unlawfully refused to provide information because the union had waived bargaining over this matter. Therefore, the union had no right to the information. In *AFSCME Council 75, Local 132 v. Oregon Employment Department, Child Care Division,*[20] the union wanted information so it could bargain about changes in the complaint and grievance procedures for child care providers. The changes were mandated by statute, and as such, were prohibited subjects for bargaining. Because the employer did not have a duty to bargain, it was not required to provide the information.

Colton Factors

The four factors outlined in *Colton* are used in virtually every case involving information requests. A review of these cases provides the breadth and limits of the duty to provide information, and reflects how the Board has adapted to changing circumstances over the years. While I address each factor separately, there is clearly overlap among the factors.

[19] Case No. UP-92-91, 13 PECBR 753 (1992).

[20] Case No. UP-017-11, 25 PECBR 216 (2012).

REASON GIVEN FOR THE REQUEST

This factor is intertwined with the threshold standards because the entity receiving the request must be able to determine whether the request is relevant. In making its request, the requesting entity need not allege a specific contract article allegedly violated, nor need it explain the relevance of the information it seeks. If asked, however, the requesting entity must respond and explain the relevance of the information.[21]

In *Oregon School Employees Association, Chapter* 151 *v. Linn-Benton Community College,*[22] the union requested certain information to determine if the college had subcontracted bargaining unit work. The college responded by informing the association that the two nonbargaining unit employees at issue were no longer working for the college.[23] Because the college did not expect to be having any more nonbargaining unit employees provided to them, it did not see a need to gather and provide the requested information. The association responded by filing an unfair labor practice complaint. The Board determined that the college was lacking information to understand the relevance of the request, noting that the association should have responded with an explanation of why the information was still needed. Consequently, the college did not unlawfully fail to provide the requested information.

Similarly, the entity receiving the request may not review the request and simply determine that the requesting entity has the information. A response must be given, even if it states that all the information sought has been previously provided.[24] Finally, the responding entity is required to provide only the relevant requested information. "An employer is not required to *assume* the union *also* is seeking supporting documentation if the request does not specifically state such."[25]

Finally, there is no obligation to provide information that is not relevant. Pre-discipline information in a contract administration matter is generally not relevant, because until some action is taken by the public employer, a contract violation likely

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[21] *Oregon Education Association and Moberg v. Salem-Keizer School District,* Case No. UP-55-96, 17 PECBR 188 (1997), *recons* 17 PECBR 223 (1997).

[22] Case No. C-20-82, 6 PECBR 5317 (1982).

[23] These employees had been provided by, and removed by, a federally-funded CETA Consortium.

[24] *Association of Oregon Corrections Employees v. Oregon Corrections Department,* Case No. UP-39-03, 20 PECBR 664, 674 (2004).

[25] *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections,* UP-7-98, 18 PECBR 64, 74 (1999) (emphasis in original).

has not occurred.[26] However, where the disciplinary action to be taken has been determined but has not yet been imposed, pre-discipline information may need to be disclosed. In *Eugene Police Employees Association v. City of Eugene,*[27] the employer told the labor organization that a police officer would be dismissed based on a psychological report. The labor organization then requested the report. Because disciplinary action had not been imposed, the employer declined to produce it. The Board held that the report had to be disclosed before discipline was actually imposed because the employer already had made its disciplinary decision. According to the Board, "the handwriting was on the wall."[28] In *Union-Baker ESD Association v. Union-Baker Education Service District,* [29] the employer was required to disclose relevant copies of Board minutes, notes and tape recordings because it had announced its intention to negotiate the resignation of an employee.

EASE OR DIFFICULTY IN PROVIDING INFORMATION

Cases involving this factor assess the amount of time it takes an entity, usually the public employer, to provide the information. The Board looks to all the circumstances involved to determine the timeliness of a response. Again, as stated in *Colton,* the Board expects a quicker response in contract administration matters than in contract negotiation situations. And while it may be tempting to try and fact-match a current request with an earlier case, there is no definitive period of time that is too long or too short. For example, to delay providing information for four months when it took the responding entity only six hours to compile the information was too long.[30] In other cases, several months may not be too long. In *Deschutes County 911 Employees Association v. Deschutes County* 911 *Service District,*[31] the Board listed circumstances that may be involved in responding to a request such as accessibility of the data, clerical time required, workload priorities, amount of data requested and the parties' experience in responding to information requests. All of these may be reviewed in determining whether the amount of time to respond was reasonable.

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[26] *Jackson County Sheriff Employees Association v. Jackson County and Jackson County Sheriff's Office* Case No. UP-66-92, 14 PECBR 270 (1992).

[27] Case No. UP-43-97, 17 PECBR 634 (1998), *AWOP* 159 Or App 426 (1999).

[28] *Id.*at 639.

[29] Case No. UP-2-05, 21 PECBR 286 (2006).

[30] *Oregon School Employees Association v. Reedsport School District No. 105,* Case No. C-71-81, 6 PECBR 5120 (1982).

[31] Case No. UP-32-04, 21 PECBR 416 (2006).

Since *Colton,* technology has greatly changed both the amount of information available and the ease with which it can be gathered. Depending on the systems available to public employers and labor organizations, databases can now be searched via query rather than pulling paper files and performing manual searches. The "totality of circumstances" test is flexible enough to incorporate these technological changes.

Another circumstance that has changed over time that is that the requested information may need to be reviewed prior to its release. For example, legal counsel may need to review the information because of related litigation or potential litigation. Additionally, human resource staff may need to review to verify compliance with privacy laws, such as non-disclosure of Social Security numbers or health information. Again, these are circumstances that may need to be considered in applicable cases.

KIND OF INFORMATION REQUESTED

Colton provides that neither confidential information nor subjective information must be disclosed. But there is a process to follow if making these assertions for nondisclosure. First, an entity asserting confidentiality needs to inform a requesting entity of the confidential nature of the requested information. Then, the providing entity needs to attempt to reach an accommodation with the requesting entity that addresses both the need for the information and the need for confidentiality.[32] This might include redaction of certain information, providing a partial document, or providing the information in some other manner. The entity asserting confidentiality has the burden of proof to establish that the information is not subject to disclosure. Finally, the Board, when addressing claims of confidentiality, balances the need for the information against any legitimate and substantial confidentiality interests. [33]

In practice, the Board may determine whether the alleged confidentiality claim has merit, and only then engage in a balancing test. In other situations, the Board may determine that the providing entity has not attempted to accommodate, and make no decision about the confidentiality of the information. [34]

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[32] *Lincoln City Police Employees' Association v. City of Lincoln City,* Case No. UP-32-98, 18 PECBR 203, 213 (1999), citing *Pennsylvania Power & Light Co.,* 301 NLRB 138 (1991).

[33] *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections,* Case No. UP-7-98, 18 PECBR 64, 71 (1999).

[34] *See, e.g., Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon,* Case No. UP-009-15, 26 PECBR 724 (2016), *aff'd* 291 Or App (2018), where the Board assumed without deciding that the information was confidential. This case is discussed later in this article.

Confidentiality claims have included attorney-client privilege,[35] student records,[36] and patient records.[37] There have also been claims that the information should be conditionally exempt from disclosure for a period of time.[38]

In *Ashland Police Association v. City of Ashland,*[39] the Board addressed several claims of confidentiality, one of which was attorney-client privilege.[40] The union requested a report of an investigation that was conducted by the City Attorney. The case before the Board, submitted on stipulated facts, did not establish that the investigation was made for the purpose of facilitating the rendering of professional legal services, or that the facts were gathered in anticipation of litigation. The Board determined that the city's legal office was not providing legal services, but rather acting as a scrivener for the client. Because legal services were not being provided, the document was not protected by attorney-client privilege and therefore needed to be disclosed.

In *Lincoln County Employees Association (LCEA) v. Lincoln County,*[41] the union asked for information as to the "location, contents and meta-data" of an electronic file about an employee's work plan, including "the file creation date, last modified date and any interim versions that exist." The union clarified that it only wanted the meta-data as to the dates of creation and modification. While the employer provided the date that the work plan was created, it claimed that the rest of the meta-data need not be disclosed, in part, because of attorney-client privilege. The Board adopted the ALJ's recommended order as written, which determined that although drafts of the work plan were prepared in consultation with the legal counsel, the meta-data is a collection of facts regarding dates of creation and modification. There was no evidence that the meta-data included confidential communications

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[35] *Ashland Police Association v. City of Ashland,* Case No. UP-50-05, 21 PECBR 512 (2006).

[36] *East County Bargaining Council v. David Douglas School District,* Case No. UP-043-07, 23 PECBR 333 (2009).

[37] *OLPNA v. Department of Justice and Oregon State Hospital, Mental Health Division, Department of Human Resources*, Case No. UP-46-86, 9 PECBR 9063 (1986).

[38] *Association of Oregon Corrections Employees v. State of Oregon, Department of Corrections,* Case No. UP-7-98, 18 PECBR 64 (1999).

[39] Citation at fn 33.

[40] The attorney-client privilege standards are set forth in ORS 40.225.

[41] Case No. UP-039-16, 27 PECBR 100, 105 (2017).

between the county counsel and the client. The employer was ordered to provide the meta-data to the Association.[42]

In *Beaverton Police Association v. City of Beaverton,*[43] the employer asserted that witness statements made during the course of a harassment investigation were confidential as attorney work-product in preparation for litigation. There was nothing in the record, however, to support that this investigation was anything other than a standard investigation to determine whether the city policy's had been violated. The city's purpose in obtaining witness statements was to gather facts in order to ascertain whether policy violations had occurred, not to prepare for litigation. The Board determined that the statements were not exempt from disclosure.

The disclosure of harassment investigation reports arose again in *Portland State University Chapter of the American Association of University Professors v. Portland State University.*[44] The university claimed, in part, that an affirmative action report need not be disclosed because it is exempt under EEOC Guidance. The Board quotes the EEOC Guidance, which clearly states that an employer should tell employees that confidentiality will be protected "to the extent possible," which is a standard less than complete nondisclosure.

The university also claimed that the affirmative action report was exempt under the Oregon Public Records Law (PRL).[45] The Board has addressed PRL issues in the past, holding that PRL requests, by themselves, are not enforceable through an unfair labor practice complaint. The request must be made under the PECBA.[46] The duty to provide information under the PECBA, however, is different than under PRL. Where the PRL provides an exemption from disclosure, but not a prohibition, the PECBA requirements for disclosure prevail.[47] The Board found that there was no legal prohibition to releasing the information.

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[42] When the Board adopts a recommended order as a final order, the final order is precedential unless the Board determines to make all or part of the order non-precedential.

[43] Case No. UP-60-03, 20 PECBR 924 (2005).

[44] Case No. UP-36-05, 22 PECBR 302, 319, (2008), *recons* 22 PECBR 503 (2008). The appellate history has been omitted from the citation because the appeals did not involve the Board's decision regarding the duty to provide information.

[45] ORS 192.410 through ORS 192.505.

[46] *Morrow County Education Association v. Morrow County School District,* Case Nos. UP-68/69-89, 11 PECBR 695 (1989).

[47] *Oregon State Police Officers Association v. State of Oregon*, UP-24-88, 11 PECBR 718 (1989).

Confidentiality claims have also arisen regarding student records. After an incident between a teacher and a student, a vice-principal conducted interviews of the student and teacher involved, five other students who were present at the time of the incident, and other staff. During preparation for grievance arbitration, the union asked for the names, addresses and phone numbers of students who were interviewed. The employer declined to provide the information, citing the Family Education Rights and Privacy Act (FERPA), a federal law regarding disclosure of student information, and a state law that paralleled FERPA. The Board held that this information was not an education record, as that term is defined by FERPA, and that it must be disclosed.[48]

Another case involving student records was resolved not on the issue of confidentiality, but rather whether the university made a good faith effort to accommodate the union's request. The Board explained that the university requested assistance from the federal Family Policy Compliance Office (FPCO) in determining FERPA compliance, which might have supported the university's claim of confidentiality. But the university's letter only stated its position on the situation, and did not included the union's facts and position. In order to show good faith, a joint request or a letter outlining the university's and union's factual statements would have more easily demonstrated a good faith accommodation by the university. The Board also suggested other avenues that the university could have taken in accommodating the union's request. Because the university had not made such efforts, the Board held that university had violated its duty to provide information. [49]

Olney Education Association v. Olney School District 11[50] involved the disclosure of executive session[51] tapes of a school board. The union requested copies of tapes to support its conclusion that the District had violated the collective bargaining agreement. While determining the District had an obligation to supply the requested information, the Board held that the union would not receive the entire tape, but only those portions that were of probable or potential relevance to the pending grievance. The employer was ordered to provide the tapes to the Board for

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[48] *East County Bargaining Council v. David Douglas School District,* Case No. UP-043-07, 23 PECBR 333 (2009).

[49] *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon,* Case No. UP-009-15, 26 PECBR 724 (2016), *aff'd* 291 Or App 109 (2018).

[50] Case No. UP-37-95, 16 PECBR 415 (1996), *aff'd* 145 Or App 578 (1997).

[51] In 1995, ORS 192.660(1)(b) allowed school boards, among other public entities, to "consider the dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, unless such public officer, employee, staff member or individual agent requests an open hearing."

an *in camera* review by an administrative law judge, who would then provide copies of the portions of the tapes that contained probable or potential relevance.

Patient records was the subject for confidentiality in *Oregon Licensed Practical Nurses Association v. Department of Justice and Oregon State Hospital, Mental Health Division, Department of Human Resources*.[52] An employee of the hospital was dismissed for alleged patient abuse. In preparing for arbitration, the union asked for the medical records of the allegedly abused patient. The hospital refused to disclose the records, citing a state statute (former ORS 179.505). The Board held that while the information is relevant, the statute set forth specific exceptions under which the information may be disclosed. According to the Board, "[c]ompliance with ORS 243.672(1)(e) is not among those exceptions."[53] The information was not disclosed.

In a case involving contract negotiations, the union asked for specific information about the medical, dental and vision costs for each employee in order to prepare for bargaining. The county was unwilling to provide a breakdown by employee for the county's self-insurance plan, but was willing to provide information in another form that would verify the county's claim figures. The county was concerned that employee's health care privacy rights were at issue, because employees with higher claims amounts may have been battling serious medical issues. This was not acceptable to the union, which filed a complaint. The Board concluded that the union did not show that it needed the information "in the precise form" it had requested, and held that the county had not violated its duty to provide information.[54]

Cases raising the issue of disclosing subjective, rather than objective, information are rare. The Board's analysis generally follows the same process as in other cases where an entity declines to provide information. The only major distinction is that a balancing test is not applied in the Board's decision process. In *AFSCME v. Oregon Health Sciences University,*[55] the union requested information about an employee's work errors, her difficulty in communicating with her supervisors and the employer's rationale for a mandated fitness-for-duty examination. One of the reasons that the employer declined to provide the information was because it claimed that the union was asking for subjective information. The Board agreed that information describing a party's reasoning is subjective, not objective, information and is not disclosable. In this case, however,

[52] Case No. UP-46-86, 9 PECBR 9063 (1986).

[53] *Id.* at 9069. This case occurred long before the Health Insurance Portability and Accountability Act (HIPPA) was enacted in 1996.

[54] *AFSCME Local 88 v. Multnomah County,* Case No. UP-34-92, 13 PECBR 702, 709, *recons* 13 PECBR 748 (1992).

[55] Case No. UP-47-99, 18 PECBR 804 (2000).

the union was not asking the employer for its subjective reasoning for selecting the mandated exam, but rather was asking for objective facts about the employee's conduct with supervisors and her specific work errors that led it to request the exam. The Board ordered the information to be disclosed.

History of the Parties' Labor-Management Relations

In *Association of Correction Employees v. State of Oregon, Department of Corrections,*[56] the union argued that the collective bargaining agreement contained an "automatic discovery" requirement, obligating the employer to provide two documents that it failed to provide until grievance arbitration. The Board reviewed the contract language solely to ascertain whether it constituted an information request under the PECBA, and held it did not. Further, the union asserted that the union president routinely requests such documents. The Board held that although that might be practice, this practice was not sufficient to establish proof of a valid information request in this matter. The case was dismissed.

Other matters involving the duty to provide information

A failure-to-provide-information claim is not rendered moot by the responding entity eventually providing the information. Nor is an unfair labor practice claim moot if the entities resolve the underlying matter.[57]

In *OPEU v. Oregon Administrative Services Department and Oregon Transportation Department,*[58] the union lawfully refused to provide the employer with written communications created among the union, the grievant and counsel regarding the rejection of a settlement agreement because it was not relevant to a contractual matter. The employer wanted the information to determine whether the grievant's rejection was based on a disagreement with a particular clause or was caused by union counsel. The Board determined that the grievant's reason for rejecting the settlement was not information that could assist the employer in determining whether to arbitrate the grievance because the State had already decided not to arbitrate.

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[56] Case No. UP-45-98, 18 PECBR 377 (1999).

[57] *Service Employees International Union Local 503, Oregon Public Employees Union v. University of Oregon,* Case No. UP-009-15, 26 PECBR 724 (2016).

[58] Case Nos. UP-23/44-97, 17 PECBR 593 (1998).

ARBITRATOR'S JURISDICTION

Where the underlying dispute to which the information relates is already under the jurisdiction of an arbitrator, consideration by the Board of a PECBA information request constitutes an unwarranted interference with the arbitrator's authority and responsibility. Therefore, a party's responsibility to produce evidence under the PECBA expires when an arbitrator assumes jurisdiction. [59]

REIMBURSEMENT OF COSTS

In *Colton,* the Board described two situations where requested information need not be provided: 1) where non-payment of reasonable costs exists or 2) where extreme "fishing" for information for grievances exists. I was unable to locate a situation where a requesting entity was denied information due to "fishing." The issue of cost reimbursement, however, has been raised to the Board.

The charging of costs was referenced tangentially in *Service Employees International Union, Local 503, Oregon Public Employees Union v. State of Oregon, Department of Forestry.*[60] One of the union's claims was that the employer was untimely in providing the information. The Board noted that much of the time between the union's request and the employer's response involved whether the union needed to provide prepayment of costs before the employer would begin its document search. There were no objections to the prepayment of costs, and the Board determined that the amount of time from when payment was made to the production of records was not unreasonable.

The issue came before the Board recently in *American Federation of State, County and Municipal Employees Council 75, Local 189 v. City of Portland.*[61] On remand,[62] the Board outlined principles established by the NLRB in analyzing the cost issue as part of the "totality of circumstances" test, and stated that these principles provide a "commonsense framework for analyzing similar disputes under the PECBA." [63]

These are:

- The cost of complying does not justify an initial, categorical refusal to disclose.

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[59] *Multnomah County Sheriff's Office v. Multnomah County Corrections Officers Association,* Case No. UP-5-94, 15 PECBR 448, 470 (1994). This was a grievance arbitration case. I am unaware of a similar case involving interest arbitration.

[60] Case No. UP-19-05, 22 PECBR 33 (2007).

[61] The complete citation for this case is located at fn 6.

[62] This is the Board order that is relevant to this article.

[63] *Id.* at 791.

- The entity receiving the request bears the burden of establishing that the request is unduly financially burdensome. This includes justifying its claim of financially burdensome impact if the requesting entity claims that the cost of compliance would be *de minimus*.
- An unconditional demand that the requesting party bear all cost is not consistent with the duty to bargain in good faith.
- If the parties dispute whether the costs are unduly burdensome, they should bargain in good faith as to how the costs should be paid.

The Board, in the future, will apply these principles to situations involving either the failure to provide, or the untimely provision of, information that involve a similar issue of costs.

OBTAINING INFORMATION FROM OTHERS (NON-PARTIES)

Both the public employer and the labor organization must make a reasonable, good faith effort to attempt to obtain and provide information held by a third party. For the labor organization, this usually is information possessed by the grievant.[64]

Conclusion

The major change over time is that the distinction between the threshold issue of relevance, and the application of *Colton's* first factor – the reason given for the request – essentially ceases to exist. Further, more information is now found to be relevant, as a minimal facial claim of "probable or potential relevance" or "potential value" clears both the relevance threshold and the reason for the request, as outlined in *Colton*. This is particularly true if the Board continues on the path of disclosing information that may *lead* to other relevant information.

The Board has steadfastly maintained its test of the "totality-of-the-circumstances" review, which is as effective today as it was when *Colton* was issued. Particularly in light of the minimal relevance threshold, parties should expect to clearly explain the "circumstances" that supports their decision for not disclosing information.

Finally, the massive volume of information that is likely available in each situation should cause practitioners to reach common-sense solutions with their labor-management counterpart. This is what the Board asked parties to do in *Colton*. That common-sense approach still carries forward today.

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[64] *Multnomah County Sheriff's Office v. Multnomah County Corrections Officers Assn,* Case No. UP-5-94, 15 PECBR 448 (1994).

Negotiating Technological Change in Oregon's Public Sector Workplace

By
Jason Weyand, Kyle Abraham, and Nicole Elgin

Introduction and Overview

Those who have studied or made a career in labor relations are well aware that divergent viewpoints on the appropriate role of technology in the workplace have been the source of many disputes between employers and unions. Although the nature of the disputes has changed with time and technology, they have existed in one form or another since the development of the employer-employee relationship itself. Left unresolved, these disputes can pose a threat to labor peace. But the slow pace of the legislative process has often lagged behind the rate of technological innovation, and labor and employment laws in particular have struggled to keep up with those changes. Fortunately, when properly conducted, the collective bargaining process itself is inherently flexible and capable of adapting to the changing nature of work and society more quickly. This empowers unions and employers to address these issues on the ground level. This flexibility is (sometimes) aided by the decision to delegate certain policy making and adjudicatory authority under the applicable labor law statutes to administrative agencies such as the Oregon Employment Relations Board ("ERB") and the National Labor Relations Board ("NLRB"). Often, these agencies are able to issue decisions interpreting and applying the existing laws to new technologies more quickly than courts or legislative bodies.

This article will discuss some of the recent changes in technology that have had significant impacts on public sector workplaces, as well as some of the corresponding changes in the law. It will focus on two main types of electronic technology—communication systems used by employees, employers, and labor organizations (e.g., email and social media), and technology that can be used to track and monitor employees or the equipment that employees use for work (e.g., GPS devices and video and audio surveillance equipment).[1] The primary emphasis will be on the use of technology in the Oregon public sector. However, the article will also discuss developments in the private sector to the extent that those decisions may be

[1] This is not intended to suggest that these two broad categories of workplace technology are remotely inclusive of the types of technology being used in the workplace. To the contrary, a seemingly endless variety of technologies are being used and developed to aid or even replace employees in the performance of work. This has long been a source of disagreements and legal battles between employers and their employees and will continue to be for the foreseeable future. A discussion of the role of technology and the legal framework that applies to that particular issue could fill the pages of a single Monograph issue by itself.

predictive of how similar questions that have yet to be decided in the public sector might be resolved. The article will also briefly discuss some of the state and federal laws that have been enacted in response to technological changes and regulate how employers can and cannot use certain technologies. We will discuss several recent ERB decisions regarding the obligation to bargain over technology-related issues, as well as decisions concerning the legality of employer efforts to limit or regulate the use of workplace technology to discuss union-related subjects. Finally, the article will conclude with some suggestions on strategies for both employers and unions in dealing with the ever-changing technologies.

Emerging Trends in Workplace Technology

When the Public Employee Collective Bargaining Act ("PECBA") was enacted in 1973, extending comprehensive bargaining rights to public employees in Oregon, electronic workplace technology was in its infancy.[2] To say that workplace technology has changed dramatically in the four plus decades since the PECBA's enactment would be a gross understatement. The scope of these changes can be illustrated by comparing two ERB decisions on the scope of bargaining related to employer technology—one case from 1980, and one case from 2013.

In the 1980 case, ERB was asked to determine, among other things, whether the following union proposal was mandatory for bargaining:

"B. Bulletin Boards: The Association may post association materials on bulletin boards located in faculty rooms and work rooms.

"C. Inter-school mail and mail boxes: The Association may use inter-school mail service and teacher mail boxes for communications.

"***

"E. Use of Employer Equipment: The Association shall have the right to use school facilities and equipment, including typewriters, mimeographing machines, other

[2] ORS 243.650 through 243.782. Originally enacted by 1973 Or Laws ch 536.

duplicating equipment, calculating machines, and all types of audio-visual equipment at reasonable times, when such equipment is not otherwise in use. The Association shall pay for the reasonable costs for all materials and supplies incidental to such use, and any repairs necessitated as a result thereof."[3]

Because they have been obsolete for decades, many readers have likely never used a mimeograph or calculating machine in the workplace, let alone attempted to bargain over their use in negotiations for a collective bargaining agreement.[4] To get a sense of just how much things have changed, one need only contrast these antiquated technologies with the more familiar types of technology at issue in ERB's 2013 decision in *Association of Engineering Employees of Oregon v. State of Oregon, Department of Administrative Services* ("*AEE*").[5] In *AEE,* ERB was confronted with several issues related to the use of email in the unionized workplace, including whether the employer's decision to disallow the use of its email system for union-related communications involved a mandatory or permissive subject of bargaining. In concluding that the employer's change involved a mandatory subject, ERB discussed the changing nature of workplace technology, observing that "Email has become an essential part of today's workplace, surpassing yesterday's bulletin board, water cooler, and mail room. Employers and employees rely on this means of communication more and more to conduct business and communicate about a wide variety of matters…." [6]

The employer-provided email systems addressed in *AEE* are one of the most common types of workplace technology used today, but email is just one of the many mediums for communication that have been developed and adopted by employers. Across the country, there are innumerable other examples of disputes involving different technologies and different substantive disagreements. It could be said that the only thing that is consistent about workplace technology is that it is constantly changing. Among the most important of these changes has been the exponentially decreasing amount of time that it take for a new type of technology to get developed and seemingly become out-of-date in the blink of an eye. Indeed, it is almost certain that much of the technology discussed in the cases cited in this article will become antiquated shortly after this article's publication. Nonetheless, we will attempt to

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[3] *Springfield Education Association v. Springfield School District No. 19,* Case No. C-280, 1 PECBR 347, 355 (1975), *aff'd after remand on other grounds,* 290 Or 217, 621 P2d 547 (1980).

[4] Indeed, the authors found it necessary to do some research of their own into these antiquated technologies. For the curious, information on the history and development of "calculating machines" can be found on the website for the Smithsonian's National Museum of American History. *See* http://americanhistory.si.edu/collections/object-groups/calculating-machines. For some basic background on mimeograph machines, you can find some information in Wikipedia under the category of "obsolete technologies" at https://en.wikipedia.org/wiki/Mimeograph.

[5] Case No. UP-043-11, 25 PECBR 525, *order on reconsideration*, 25 PECBR 764 (2013).

[6] *Id.* At 542.

summarize and describe some of the important types of technology that are in use in the workplace today.

To begin with the obvious, the proliferation of smart phones and portable electronic devices has resulted in an increase in the use of text, email or other instant messaging systems to communicate with coworkers, clients, or constituents. Various social media platforms such as Facebook, Instagram, Twitter, Reddit, and Snapchat have also expanded beyond personal use, and are often used by employers and employees to communicate on workplace issues. Of course, many employers also communicate with employees via internal or external websites, and employees are required in many jobs to use internet resources to do their job on a daily basis. Employers can utilize a wide variety of computer programs to monitor and limit employees' internet and email usage, blocking certain types of content and giving the employer the ability to review employee communications and the websites visited by employees.

In addition to technology used for communication, employers are also increasingly relying on technology to monitor employee's production on the job, to monitor and track employer equipment, and to keep an eye on the workplace itself. The most common tools include audio and video surveillance, which can include stationary recording devices in the work space, mobile recording devices carried or worn by employees themselves (such as law enforcement body cameras), or recording devices installed on vehicles operated by employees (dash cameras, cameras on buses, etc.). In addition, many employers have installed global positioning system ("GPS") devices to track the location of their fleet of vehicles. While most GPS devices are used to track vehicles, employer-issued cell phones and computers can also be used to track employees through the use of similar technology. Some of these systems are capable of monitoring more than location, but can also track details such as speed, whether an employee or vehicles leaves a certain area (by using "geo-fences"), and the time employees spend driving or travelling (and by extension assessing whether employees are complying without any applicable hour restrictions or reporting time worked accurately). GPS technology can also be used to monitor employee driving habits to determine whether they are minimizing fuel usage and maximizing efficiency.

Employers also regularly utilize electronic key cards, "fobs," or other devices that employees can use to sign in and out of work, or to obtain access to certain work areas. These can be used to track employees when they come and go and monitor their activities and locations during the workday. If an employee is required to check a certain location or perform a specific function during their work day, a variety of electronic devices can be used by the employer to monitor whether the employee is fulfilling this duty. For example, a parking/code enforcement officer may be required to "check in" at different locations around their assigned area of responsibility. Some employers have also begun utilizing biometric devices to monitor employees,

requiring employees to sign in and out of work by scanning their finger prints. These systems can be used to track hours worked, but also to notify employers if an employee is late to work or is working overtime.[7]

Properly used, technology can serve a number of important functions in the public-sector workplace. For example, email, chat, and other electronic communication technologies allow for efficient, real time communications within governmental bodies, allowing employees and supervisors to communicate quickly and to exchange large quantities of information in a way that can be easily archived and reproduced later. This is all accomplished largely without the need for paper or large storage areas to hold hard copies of data which can now be stored in cyberspace. These changes result in direct savings to the public, allowing public resources to be spent on more valuable priorities. New communication technologies also allow many employees to work remotely at times, reducing the need for brick and mortar office space while also reducing commuting costs, both financial and environmental. Workplace monitoring technology can promote the safety of the public and public employees in a variety of ways. These systems can also ensure that all of the time employees work is counted and compensated accordingly and that allegations of employee misconduct are addressed fairly. Properly utilized, these types of technology can provide a great value to public employees, public employers, and the public itself.

However, it is important to understand that the interests of employees and employers are sometimes at odds when it comes to the use of technology, and that it can be difficult to strike the appropriate balance between those competing interests while still being mindful of the best interest of the public. When it comes to technology to monitor employees, some reasonable protections for privacy must be afforded to employees. Likely because of these tensions, it is difficult to create a legal framework or negotiate an agreement that strikes the ideal balance between these competing interests, particularly when technology changes so rapidly. Moreover, the law rarely changes as quickly as technology, and thus, unions and employers should not count on legislatures or courts to take the lead in providing guidance on how technology can and should be utilized in connection with their specific workplaces. Instead, unions and employers should proactively use the collective bargaining process to address these issues, as this system is inherently flexible to allow parties to adapt to the new technologies in ways that make sense for them.

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[7] See *City of Elizabeth v. Elizabeth Superior Officers Ass'n/City of Elizabeth v. PBA Local 4,* P.E.R.C. No. 2016-83 (New Jersey Public Employment Relations Commission 2016), *aff'd*, 2017 WL 4228070, at *2 (N.J. Super. Ct. App. Div. Sept. 25, 2017) (per curiam).

Key Laws Regulating Technology in the Union Workplace

Primary State and Federal Law Limitations on Employers' Use of Technology in the Workplace and Regulation of Employee Communications.

CONSTITUTIONAL CONSIDERATIONS

Public employer decisions to adopt new technologies or implement new limitations on their use are complicated because not only do they have to comply with the PECBA and other state and federal statutes that affect the use and regulation of technology, but they also have to be mindful of constitutional limitations on the ability of a governmental agency to surveil employees or limit employee speech. Potentially, public employer actions can implicate the rights established by both the Fourth and the First Amendments to the United States Constitution, as well as Oregon's parallel provisions in the state constitution.

The Fourth Amendment of United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Individuals do not forfeit this constitutional right merely by accepting public employment. Further, the Fourth Amendment's protection extends beyond the sphere of criminal investigations.[8] To the contrary, it is well established that the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government," without regard to whether the government actor is investigating crime or performing another function.[9] The Fourth Amendment specifically applies when a governmental body acts in its capacity as an employer.[10]

These protections extend to public employers' use of technology in the workplace, at least in areas where the employee has a reasonable expectation of privacy. One of the most commonly cited case involving the application of the Fourth Amendment in the public employment context is *City of Ontario, California v. Quon*.[11] In *Quon,* the City issued police officers pagers to send and receive text messages. The

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[8] *Camara v. Municipal Court of City and County of San Francisco*, 387 U. S. 523, 530 (1967).
[9] *Skinner v. Railway Labor Executives' Assn.*, 489 U. S. 602, 613–614 (1989).
[10] *Treasury Employees v. Von Raab*, 489 U. S. 656, 665 (1989).
[11] 130 S.Ct. 2619 (2010).

City maintained a policy reserving the right to monitor all network activity and advising employees that users should have no expectation of privacy or confidentiality. During the first two months, several officers exceeded the usage limit, which resulted in an overage fee assed to the City. Jeff Quon was one of the City police officers who exceeded the test limits. The City reviewed Officer Quon's use of the pager to determine the source of the data overage. The City determined that many of his texts were not work related. In one month only 8% of his messages were work-related texts, and some were sexually explicit. Quon was later disciplined. Quon filed suit, alleging that the City's review of his text messages violated his Fourth Amendment right to be free from unreasonable searches and seizures.

The Supreme Court rejected Quon's claim of privacy in the text messages, focusing on facts that demonstrated that he did not have a reasonable belief that his messages were private. To the contrary, the Court clearly felt Quon should have expected his messages to be reviewed.

"Even if he could assume some level of privacy would inhere in his messages, it would not have been reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises – and given that Quon had received no assurances of privacy – Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations." [12]

In deciding the case, the majority acknowledged the difficulties in adapting the law to the constant changes in technology, espousing what might be best labeled as a conservative "wait and see" approach:

"Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. As one amici brief notes, many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. Another amicus points out that the law is beginning to respond to these developments, as some States have recently passed statutes requiring employers to notify employees when

[12] *Quon,* 560 U.S. at 762.

monitoring their electronic communications. At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

"Even if the Court were certain that the [approach taken by the Supreme Court's plurality opinion in *O'Connor v. Ortega*, 480 U.S. 709, 711, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), was] the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."[13]

This case demonstrates that it is difficult for a public employee to assert that they have a reasonable right to privacy when it comes to their employer-issued technology, including devices such as computers, smart phones, and pagers. However, the ability of a public employer to use technology to monitor employees is much more limited if it involves using employee-owned equipment. For example, in a 2013 New York case, *Cunningham v. New York State Dept. of Labor*, the court found that a state employer's installation of a GPS device on the private vehicle used by an employee to investigate concerns about falsification of time constituted an unreasonable search and seizure.[14] Likewise, in a recent decision out of California, a court concluded that a police officer had a reasonable expectation of privacy in his personal cell phone, and that the public employer engaged in an unlawful search by searching the officer's personal cell phone without a warrant and probable cause.[15]

In addition to Fourth Amendment issues, public employers must also be mindful that policies restricting employees' utilization of technology do not run afoul of employees' rights under the First Amendment. This question most often arises when employers attempt to limit what employees can say in social media forums, or discipline employees because of statements made by employees in those forums. This subject alone could be the basis for a stand-alone article, but parties should be aware of the issue, and that certain types of speech are protected while others are not.

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[13] *Quon*, 560 at 759-60. (Internal citations omitted).
[14] 21 N.Y.3d 515 (NY Ct. App., 2013).
[15] *Larios v. Lunardi*, 2016 WL 6679874 (E.D. Cal. 2016).

Important State and Federal Statutes—Excluding Collective Bargaining Laws

There is a myriad of state and federal statutes that employers and unions must be mindful of when addressing technology related issues. The list is growing daily and includes limitations and regulations from unexpected sources. Below, we will discuss only a handful of these laws to provide the reader some insight into some of the more frequent issues that arise, and hopefully some insight into the type of questions that parties should be asking.

To begin with, Oregon law provides some specific limitations on where and how parties can lawfully make video or audio recordings of others, including in the workplace. ORS 163.700, which deals with the protection of personal privacy, makes it unlawful to make video recordings of people without their consent under certain circumstances. Specifically, it prohibits people from knowingly making or recording "a photograph, motion picture, videotape or other visual recording of another person's intimate area without the consent of the other person" when the "person being recorded has a reasonable expectation of privacy concerning the intimate area."[16] Thus, employers cannot use security cameras in areas like restrooms, locker rooms, or other areas where an employee could be in a state of undress and has a reasonable expectation of privacy.

Additionally, ORS 165.540, which addresses obtaining the contents of communications, provides several limitations on when and how phone or in-person conversations may be lawfully recorded. Relevant here are subsections (1)(a) and (1)(c), which makes it unlawful to:

"(a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio communication to which the person is not a participant, by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at least one participant.

"***

"(c) Obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or

[16] ORS 163.700(1)(b).

otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained."[16]

In sum, phone conversations may only be recorded if at least one participant consents. In person conversations can only be audio recorded if all participants are informed that the conversation is being recorded. Violation of these prohibitions constitutes a Class A misdemeanor.[17] Employers and union representatives should be mindful of these prohibitions and avoid recording common workplace conversations such as grievance meetings, investigatory interviews, and labor-management meetings, in any manner that would run afoul of these statutes.

Of course, no statute is complete without exceptions, and there are several exceptions to these limitations that are applicable in particular to public safety employees in Oregon. For example, ORS 165.540(2) authorizes certain types of audio or video recordings in jails and prisons, and ORS 165.540(5) authorizes recordings of and by police officers in certain instances, with specific allowance for the use of body and dash cameras. Additionally, ORS 165.540(6) incorporates exceptions allowing some recording of governmental proceedings and educational classes.

Oregon has also enacted limitations on when an employer, public or private, can request or require access to an employee's social media accounts. Specifically, the 2015 Employee Social Media Account Privacy Act makes it an unlawful employment practice for an employer to "require or request" that an employee or applicant for employment provide access to the person's social media accounts or disclose the employee or applicant's user name and password. Moreover, it is also unlawful to require employees or applicants to add the employer to its list of contacts on social media (e.g., they cannot require employees or applicants to "friend" the boss or the employer on Facebook).[18]

The 1986 Stored Communications Act ("SCA")[19] is one of the federal statutes that may apply in the public sector when dealing with technology concerns. Broadly speaking the SCA limits employer intrusions into employees' personal stored communications. SCA has a "provider" exception for employers who provide electronic communication service. However, the SCA's exception is broader because it does not require that the employer access the information in the ordinary course of business. Under the SCA, an employer may access stored emails on services it provides. Although the SCA affords broad protection to employers monitoring their own email systems, the SCA does not provide similar protection for systems hosted by third-parties, e.g., web-based e-mail accounts stored on third party servers. As such, an

[16] ORS 165.650(1).
[17] ORS 165.540(8).
[18] ORS 659A.330(1).
[19] 18 U.S.C. §§ 2701–2712.

employer will be unable to establish a provider exception.[20] For this reason, employers should be wary of accessing information not contained on their internal networks without the user's authorization.

The Impact of the PECBA and NLRA on Employer Regulation of the Use of Technology to Communicate About Union or Other Workplace Issues

In addition to the statutory and constitutional protections discussed above, traditional labor laws also limit the type of actions an employer may lawfully take to regulate employee access to, or use of, employer technology to discuss workplace or union issues. Most importantly, the PECBA and the NLRA both guarantee employees that fall under the jurisdiction of the statutes the right to choose whether to form or join a union, and the right to engage in a variety of actions to address workplaces issues (usually referred to as "concerted" or "protected" activity). In the Oregon public sector, ORS 243.662 grants public employees the right "to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." Similarly, Section 7 of the NLRA grants arguably more expansive rights to private sector employees, providing that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities."

Both the PECBA and the NLRA make it an unfair labor practice for an employer to interfere with employees' exercise of these protected activities. Of primary importance to this article, in the Oregon public sector, ORS 243.672(1)(a) makes it an unfair labor practice for a public employer to interfere with, restrain, or coerce employees in or because of the exercise of the rights guaranteed in ORS 243.662.[21] Under Section 8(a)(1) of the NLRA, it is unlawful for a private sector

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[20] See *Rene*, 817 F.Supp.2d at 1096-1097 and *Fischer*, 207 F. Supp. 2d at 925-26 (holding a triable issue of fact existed as to whether the defendant church violated the SCA by accessing an employee's Hotmail account).

[21] Similarly, ORS 243.672(1)(c) makes it an unfair labor practice for a public employer to "[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization." ERB's analysis of a violation of subsection (1)(c) is similar to its analysis under the 'because of' prong of subsection (1)(a). A complainant proves a violation of subsection (1)(c) by showing protected activity, employer action, and a causal connection between the two. *International Longshore and Warehouse Union, Local 28 v. Port of Portland*, Case No. UP-35-10, 25 PECBR 285, 298-299 (2012). Practically speaking, most complaints allege both a (1)(a) and (1)(c) claim, but ERB will generally only address the (1)(a) claim, treating its resolution of that claim as disposing of the (1)(c) claim as well. As a result, this article will focus its discussion on the (1)(a) analysis.

employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[22]

There are some notable differences between the public and private sector statutes, as well as the legal standards applied by ERB and the NLRB. However, there is also a great deal of overlap between the two, and because the NLRA served as the model for the legislature in drafting the PECBA, ERB often looks to cases decided under the federal law to assist it in interpreting the PECBA. Cases decided before the PECBA was enacted in 1973 are considered particularly persuasive.[23] As a result, we will briefly discuss some recent private sector decisions in addition to relevant ERB cases.

Protected Concerted Activity Under ORS 243.672(1)(a)

To understand the recent decisions discussed below it is helpful to understand the analytical framework that ERB applies in reviewing claims under subsection (1)(a). As a preliminary matter, ERB has long recognized that the statute encompasses two distinct types of (1)(a) violations. First, an employer can violate the statute if it takes actions that interfere with, restrain or coerce employees "because of" their exercise of PECBA-protected rights. Second, an employer can violate subsection (1)(a) if it takes actions that interfere with, restrain or coerce employees "in the exercise" of their protected rights.[24] The focus of ERB's inquiry is different under each of the two "prongs" of ORS 243.672(1)(a). In a "because of" claim, ERB analyzes the reasons for the employer's conduct. An employer commits a violation if it takes an action because of an employee's exercise of rights protected by PECBA. ERB does not require that the complainant prove that the employer acted with actual anti-union animus or a subjective intent to restrain or interfere with protected rights. Instead, a complainant must show "a direct causal nexus between the protected activity and the employer's action."[25] If the Board finds that an employer's motivations were based in part on lawful reasons and in part in response to protected activities, it applies a "mixed motive" analysis. Under that analysis, the Board determines whether the "unlawful motivation—as one of two or more coinciding reasons for the employment action—was a sufficient factor to attribute the decision

[22] 29 U.S.C. 158(a)(1).

[23] *See Elvin v. OPEU*, 313 Or 165, 177, 832 P2d 36 (1992); *Portland Association of Teachers v. Multnomah School District No. 1*, 171 Or App 616, 631 n 6, 16 P3d 1189 (2000).

[24] *Portland Assn. of Teachers v. Mult. Sch Dist. No. 1*, 171 Or App 616, 623, 16 P3d 1189 (2000).

[25] *Id.*

to it."[26] Alternately stated, the Board will determine "whether the employer would not have taken the disputed action but for the unlawful motive."[27]

For claims brought under the "in the exercise" prong of (1)(a), the Board's focus is on the likely consequences of the employer's actions. If the natural and probable effect of the employer action is to deter employees from exercising a protected right, then the action unlawfully interferes with, restrains or coerces employees in the exercise of protected rights. This type of violation may occur in two different ways. First, when an employer violates the "because of" prong of the statute, the Board will also find a derivative "in the exercise" violation because the natural and probable consequence of an employer taking unlawful action because of an employee's PECBA protected rights will be to chill that employee's willingness to engage in future protected activities.[28]

Second, an employer may commit an independent, or stand-alone, "in the exercise" violation under subsection (1)(a). When deciding whether an employer committed a stand-alone (1)(a) violation, ERB determines whether the natural and probable effect of the employer's conduct, viewed under the totality of the circumstances, would be to interfere with employees' exercise of protected rights.[29] Neither the subjective impression of employees nor the employer's motive is relevant. Rather, ERB is concerned solely with the probable consequences of the employer's actions.[30] Independent "in the exercise" violations often occur when an employer makes threatening or coercive statements regarding union activity. Violations can, however, also occur in the absence of direct threats or coercion and may be based on an employer's implied coercion or threat of reprisal.[31] An employer can violate the "in the exercise" prong of subsection (1)(a) by presenting an entirely lawful act in a way that leads other employees to believe the act was unlawfully based on protected activity.[32]

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[26] *Portland Assn. Teachers*, 171 Or App at 639.

[27] *Oregon School Employees Association v. Cove School District #15*, Case No. UP-39-06, 22 PECBR 212, 221 (2007).

[28] *State Teachers Education Association/OEA/NEA et al and Hurlbert et at. v. Willamette Education Service District et al.*, Case No. UP-14-99, 19 PECBR 228, 249 (2001), *AWOP*, 188 Or App 112, 70 P3d 903 (2003).

[29] *Polk County Deputy Sheriffs Association v. Polk County*, Case No. UP-107-94, 16 PECBR 64, 77 (1995).

[30] *Spray Education Association and Short v. Spray School District No. 1,* Case No. UP-91-87, 11 PECBR 201, 219-20 (1989).

[31] *Hood River Education Association v. Hood River County School District*, Case No. UP-38-93, 14 PECBR 495, 499 (1993).

[32] *Eugene Charter School Professionals, AFT, AFL-CIO v. Ridgeline Montessori Public Charter School,* Case No. UP-34-08, 23 PECBR 316, 331 n 13 (2009).

Significant Oregon ERB Cases on The Use of Workplace E-Mail

Unlike recent case trends in the private sector, restrictions on social media use have been the subject of less dispute in the Oregon public sector, at least in terms of cases being brought to ERB. Certainly, many practitioners have dealt with disciplinary grievances involving challenges to employer disciplinary actions over social media postings, but ERB has yet to issue a decision involving an employer's restrictions on social media. Rather, the majority of disputes submitted to ERB have arisen in the context of union challenges to the legality of employer efforts to limit the use of employer-provided communications technology to discuss union or workplace concerns. These disputes have primarily arisen in one of two different contexts: situations where an employer attempted to enforce or establish a policy limiting the use of its communication system and equipment during a union organizing drive involving unrepresented employees; and situations where there was an incumbent union and the employer attempted to restrict or limit employees' ability to use its communications systems and equipment to communicate about union issues.

In 2005, ERB decided two early cases involving the use of employer email for union related communications in the context of a union organizing drive, both involving the Oregon Judicial Department ("OJD") and the Service Employees International Union ("SEIU"). In the first case, *SEIU Local 503, OPEU v. State of Oregon, Judicial Department ("OJD I"),* SEIU alleged that OJD had violated ORS 243.672(1)(a) when it prohibited employees that supported the union from using the "reply all" function on the employer's email system to respond to communications that supporters viewed as negative towards the union.[33] The Board cited to private sector precedent in finding that employees do not have a statutory right to use the employer's email system, while noting that if the employer had a rule regulating email usage, it could not be applied in a manner that discriminated against union activities specifically. Based on the facts of that specific case, ERB concluded that OJD had not applied its rule in a discriminatory manner.[34]

In a related case between the same parties, *SEIU Local 503 v. State of Oregon, Oregon Judicial Department ("OJD II"),* ERB again reviewed the legality of OJD's efforts to limit the use of its email system during SEIU's organizing drive.[35] In *OJD II,* ERB found that the OJD had not unlawfully prohibited employees from using the employer's email system to communicate about union matters, because OJD's actions were consistent with a facially neutral anti-solicitation policy. ERB rejected SEIU's

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[33] Case No. UP-11-04, 21 PECBR 37, 46 (2005).

[34] *Id.*

[35] Case Nos. UP-52/62-03, 21 PECBR 98, 113-14 (2005), aff'd, 209 Or App 497, 149 P 3d 235 (2006).

argument that, because OJD had allowed some minimal personal, or non-work use of its email system, it could not lawfully prohibit union-related communications. On appeal, the Oregon Court of Appeals affirmed ERB's decision. However, the scope and applicability of the *OJD* cases has been clarified by ERB's 2013 decision in *AEE,* where it engaged in a detailed discussion regarding the interplay between an employer's right to manage and control its communication technology and employees' rights to engage in union activities.[36]

In the months leading up to the filing of the complaint, AEE and the State were engaged in negotiations for a successor agreement. Unfortunately, successor bargaining was not completed until after the parties collective bargaining agreement expired. Under the expired contract, the union and bargaining unit employees were allowed to utilize the State's email system to communicate about union matters, subject to a list of agreed-upon limitations. After the contract expired, the State sent out a directive prohibiting AEE representatives and bargaining unit members from using the State's email system to communicate about union matters. The State did not prohibit or otherwise limit the use of its email system for discussions about any other non-work topics, it only limited the use for union-related communications.

AEE filed an unfair labor practice complaint with ERB, alleging that the State violated both the "because of" and "in the exercise of" prongs of ORS 243.672(1)(a). In response, the State claimed that it only issued the directive because it believed it was no longer obligated to continue allowing the use of its email system due to the expiration of the CBA. The State claimed that there was no legal right for employees to use its email system to communicate about union matters outside of the CBA, citing to the *OJD* cases.

After a detailed discussion, ERB concluded that the State violated both the "in the exercise of" and "because of" prongs of ORS 243.672(1)(a). In reaching this decision, ERB distinguished the current case from the *OJD* case, noting that the State's directive regarding the use of its email system prohibited *only* Association-related communications over its e-mail system, while specifically allowing other personal use of the e-mail system. When an employer has a rule regulating e-mail usage, it cannot be applied in a discriminatory fashion. If the court accepted the State's assertion that it was at least partially motivated by a mistaken belief that it was allowed to change the *status quo*, it would perform a mixed motive analysis that looked at whether the employer's unlawful motive "was a sufficient factor to attribute

[36] Arguably, ERB's decision in *AEE* could reflect a significant departure from the OJD cases. At a minimum, the *AEE* decision certainly limits or calls into question the validity of certain portions of the analysis in the OJD cases. In addition, the primary case cited by ERB and the Court of Appeals in support of its position has been overturned by the NLRB, further calling into question the precedential value of the OJD cases. Employers and unions should review the most recent ERB decisions for guidance.

the decision to it."[37] Even under a mixed motive analysis, ERB found the State would not have discontinued the use of its email system for Association related communications "but for" its unlawful motive, in violation of subsection (1)(a).

In 2015, ERB was again confronted with a dispute involving an employer's decision to limit employees' access to its electronic systems, including email, in response to protected union activity, this time in response to a potential strike by employees. In *Portland State University Chapter, American Association of University Professors v. Portland State University*,[38] PSU and the University were engaged in successor contract negotiations, but the negotiations had stalled, and the parties were far apart. After mediation failed to produce a contract, the union announced that it would be holding a strike vote on a certain date. Two days before the strike vote the employer sent out an email to the union and all employees in the bargaining unit with the subject heading of "PSU strike guidelines and FAQs." The email directed recipients to a PSU website that contained a four-page "FREQUENTLY ASKED STRIKE-RELATED QUESTIONS" section (the "FAQs"). The FAQs included the following question and answer:

> "Would a striking AAUP-represented employee have access to email, their office or lab during a strike?
>
> "No. Striking employees will not be permitted to engage in any activities related to their employment. The electronic log-in credentials for striking employees will be disabled during a strike, preventing access to email, Banner, D2L, VPN and other electronic systems. Similarly, striking employees will not be permitted to enter non-public areas of campus, such as offices or laboratories."[39]

The union filed a complaint alleging, among other things, that this statement violated ORS 243.672(1)(a), because it constituted a threat to employees if they participated in the strike. In analyzing this claim, ERB acknowledged well-established precedent that going on strike is protected activity under the PECBA. Further, it was clear that the employer's stated intent to prohibit employees from accessing these electronic resources was only applicable to employees participating in the strike. Thus, there was no dispute as to whether the employer's threatened action was in response to protected activity. The real question was whether the employer's action was a legitimate and lawful response to a potential strike, or an unlawful threat against employees should they engage in protected activities. Employers have the right to take certain actions in response to a strike. For instance, they can hire replacement employees, assuming they stay within the established

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[37] *Portland Assn. Teachers v. Mult. Sch. Dist. No. 1,* 171 Or App 616, 639, 16 P3d 1189 (2000).
[38] Case No. UP-013-14, 26 PECBR 438 (2015).
[39] *Id.*, 26 PECBR at 448.

parameters. However, an employer cannot threaten to hire replacement workers in a way that constitutes a threat against employees for engaging in protected activities.[40]

The ERB took note that the email and other electronic systems provided to faculty by the university were of great importance to the faculty, for both professional and personal reasons. ERB noted that PSU uses a single sign-on computer system, and gives a log-in ID to faculty, staff, and students. Through this system, faculty and other users have access to nearly 100 electronic systems, accounts, or programs, including PSU's email system, student recordkeeping system, degree audit reporting system (which tracks a student's degree progress), and library resources. Faculty can access PSU's electronic resources when off campus through this login system and were allowed to use their work email accounts for personal communications. The faculty and the union also used the employer's email system for communicating about union-related business.

Faculty also used PSU's electronic systems for hybrid personal-professional purposes. For example, faculty were encouraged and expected to engage in service outside of PSU, including activities such as "pro bono scholarly and philanthropic activities outside their campus which may not provide the faculty member with anything other than reimbursement of direct expenses." Additionally, faculty were expected "to accept invitations to serve on advisory bodies or public commissions related to their academic work, as well as to travel to other institutions or conferences for the purpose of presenting lectures, leading seminars or workshops, or visiting the laboratories of colleagues." Faculty regularly used their work email accounts to communicate with respect to such activities. Faculty also used other resources accessed through the electronic log-in system to aid them in presentations, lectures, and to seek and obtain grants from external sources for research related to their areas of academic interests.

After receiving the FAQ email, approximately 50 faculty members contacted union leadership and expressed reservations about striking. The potential loss of access to the university's electronic systems was one of the primary topics of discussion within the bargaining unit in the days leading up to the strike vote. Despite these concerns, the union membership voted to go on strike.

ERB looked at the circumstances surrounding PSU's announcement and determined that the natural and probable consequence of PSU's actions would be to chill these employees in their exercise of statutorily-guaranteed rights, including the right to participate in the strike-authorization vote. In particular, ERB highlighted PSU's announcement, two days before the strike vote, that it would disable access to its electronic systems for any employee who exercised the right to strike. The evidence established that Association-represented employees are highly dependent on being

[40] See *American Baptist Homes of the West*, 364 NLRB No. 13. (2016))

able to access PSU's electronic systems for personal and professional reasons, as well as for those hybrid "personal-professional" reasons described above. For some employees, the PSU e-mail account is their sole account. Moreover, Association-represented employees rely on access to PSU's electronic systems to conduct research and perform other tasks necessary to meet their work and outside professional obligations. Given these unique facts, ERB found that PSU's FAQ e-mail "had the quality of a reprisal" against employees should they exercise their right to engage in activities protected by the PECBA. Therefore, ERB concluded that PSU's announcement interfered with, restrained, or coerced Association-represented employees in the exercise of their PECBA-protected rights. Consequently, the University violated the "in the exercise" prong of ORS 243.672(1)(a).

NLRB Cases Related to Employer Limitations on the Use of Employer Equipment for Union-Related Communications

In the private sector, a significant body of case law has developed regarding the legality of employer efforts to limit what employees can say about workplace issues. Recent cases have often focused on efforts by employers to limit what employees can say about the company on the internet or via social media platforms. As it often does, the NLRB has gone back and forth on the issue of whether employees have a statutory right to use employer emails systems for union communications. In the *Register-Guard* case, which was cited approvingly by ERB and the Oregon Court of Appeals in *OJD II*, the NLRB held that an employer may completely prohibit employees from using the employer's email system for Section 7 purposes, even if they are otherwise permitted access to the system, so long as the employer's ban is not applied discriminatorily. This decision was premised on the belief that no statutory right to use the employer's email system for union communications existed.[41] However, in 2014, the NLRB reversed course. In *Purple Communications, Inc.*, stating that:

> "At issue in this case is the right of employees under Section 7 of the National Labor Relations Act to effectively communicate with one another at work regarding self-organization and other terms and conditions of employment. The workplace is "uniquely appropriate" and "the natural gathering place" for such communications, and the use of email as a common form of workplace communication has expanded dramatically in recent years. Consistent with the purposes and policies of the Act and our obligation to accommodate the

[41] 351 NLRB 1110 (2007*), enfd. in relevant part sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). A good example of how a private sector case, at a small employer in our own backyard (Eugene), ended up setting the stage for a discussion of union rights that affects workers and employers throughout the nation.

> competing rights of employers and employees, we decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems. We therefore overrule the Board's divided 2007 decision in *Register Guard* to the extent it holds that employees can have no statutory right to use their employer's email systems for Section 7 purposes." [43]

In reaching its conclusion, the NLRB majority noted that email as a communication tool was different than other historic technologies that had been discussed in earlier cases and discussed in detail the growing importance of email in the workplace. Ultimately, the NLRB established a presumption that, if an employer provides employees with access to a work email system, the employees can use that system to communicate about union or other Section 7 protected topics. An employer could only lawfully rebut that presumption by demonstrating that special circumstances existed to support the prohibition.

The NLRB has long held that employer policies, including policies that limit employees' ability to communicate on social media, violate Section 8(a)(1) of the NLRA if they "would reasonably tend to chill employees in the exercise of their Section 7 rights."[42] The NLRB uses a two-step inquiry to determine if a work rule would have such an effect. First, the NLRB will find that a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[43]

Applying this rule, the NLRB, relying on a now overruled decision, previously found a violation of Section 8(a)(1) in a case where an employer fired employees for discussing workplace concerns over Facebook,[44] and in another case where an employer had a rule prohibiting employees from electronically posting statements that "damaged the company, defamed any individual, or damaged any person's reputation."[45] However, in 2017, the NLRB issued a decision in *Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001* (*Boeing*)**,** that significantly modified how it evaluates employer policies under Section 7.[46] In *Boeing,* the Board, expressly disavowed the analytical framework for facially

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[43]361 NLRB No. 126 (2014).

[42] *See generally Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999).

[43] *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

[44] *Hispanics United of Buffalo,* 359 NLRB 368, 369 (2012).

[45]*Costco Wholesale Corp.*, 358 NLRB 1100 (2012).

[46] 365 NLRB No. 154 (2017).

neutral policies that it had adopted in *Lutheran Heritage Village-Livonia.*[47] In place of the *Lutheran Heritage* standard, the NLRB announced that, when evaluating the legality of what it considers a facially neutral policy, rule or handbook provision, that it would evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. The NLRB then announced that, prospectively, three categories of rules will be recognized, including.

• Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

• Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

• Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would be a rule that prohibits employees from discussing wages or benefits with one another.

The NLRB noted that, while the maintenance of particular rules may be lawful, the application of such rules to employees who have engaged in NLRA-protected conduct may still violate the NLRA depending on the particular circumstances presented in a given case.

Although the full impact of the *Boeing* case has yet to be determined, the decision is intended to provide greater leeway for employers to enact rules and policies regulating employee conduct so long as those policies don't expressly single out protected activities. This decision calls into question the ongoing precedential value of any recent NLRB decisions to the extent that they relied on the *Lutheran Heritage* framework.

The Obligation to Bargain Over Workplace Technology

Assuming that no law prohibits a particular use or limitation on the use of technology, employers and unions may also be obligated to bargain over workplace technology issues. Before discussing the obligation to bargain specifically over

[47] 343 NLRB 646, 647 (2004).

technology issues, it is important to understand the general legal obligation to bargain under the PECBA. As an initial matter, most labor relations practitioners are well aware that ERB has long held that under the PECBA, there are three general categories of subjects for bargaining—mandatory subjects, permissive subjects, and prohibited subjects.[48] Under ORS 243.672(1)(e), which applies to employers, and ORS 243.672(2)(b), which applies to unions, a public employer and union must bargain in good faith over "employment relations."[49] Subjects included in the definition of employment relations are mandatory for bargaining. Employers and unions may voluntarily bargain over permissive subjects but are not required by law to do so. A prohibited subject is one that requires either party to perform an illegal act or perform an act that is contrary to any statutory or constitutional provision.[50]

ORS 243.650(7)(a) enumerates several specific subjects that constitute "employment relations," and are therefore mandatory for bargaining. These subjects include "matters concerning direct or indirect monetary benefits, hours, vacations, sick leave, grievance procedures and other conditions of employment." Other portions of ORS 243.650(7) designate additional specific subjects as mandatory or permissive, sometimes depending on the type of public employer and employees at issue.[51] This statute also acknowledges ERB's role in determining the bargaining status for subjects not specifically designated by the legislature as mandatory or permissive. For example, ORS 243.650(7)(b) clarifies that any subject found to be permissive by ERB before June 6, 1995, remains permissive. Subsection (7)(c) requires ERB to conduct a balancing test to determine whether a subject not specifically addressed in the statute is mandatory or permissive. If ERB determines that the subject will "have a greater impact on management's prerogative than on employee wages, hours, or other terms and conditions of employment," then the subject will be permissive.

ERB case law also distinguishes between "decision" and "impact" bargaining. An employer must bargain over its decision to change a mandatory subject of bargaining before making the decision. An employer is not required to bargain over a decision to change a permissive subjective of bargaining, but it is required to

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[48] *Springfield Education Ass'n v. Springfield School Dist. No. 19*, 1 PECBR 347, 350 (1975), aff'd, 290 Or 217 (1980).

[49] "Collective bargaining" is defined in ORS 243.650(4) as "the performance of the mutual obligation of a public employer and the representative of its employees to meet at reasonable times and confer in good faith with respect to *employment relations* for the purpose of negotiations concerning mandatory subjects of bargaining, to meet and confer in good faith in accordance with law with respect to any dispute concerning the interpretation or application of a collective bargaining agreement, and to execute written contracts incorporating agreements that have been reached on behalf of the public employer and the employees in the bargaining unit covered by such negotiations." (Emphasis added)

[50] *Greater Sweet Home Area Education Ass'n v. Sweet Home School Dist.,* 6 PECBR 4832, 4837 (1981).

[51] For example, ORS 243.650(7)(e) excludes certain subjects from the definition of employment relations for school district employees, including class size and the school calendar. Likewise, ORS 243.650(7)(f) and (g) provide greater rights to bargain over staffing levels for public safety employees such as firefighters, police officers, and correctional employees.

bargain over the impacts of the decision on mandatory subjects of bargaining before implementing the change.[52] Thus, there are often situations where an employer may make a decision to change a permissive subject of bargaining that it does not need to bargain over, but it must still bargain any impacts to mandatory subjects of bargaining related to the permissive change. It is critical that unions and employers understand this distinction, which is often more complicated than it might sound.

Bargaining over technology may occur either in negotiations for an initial or successor collective bargaining agreement, or, when appropriate, during the life of a collective bargaining agreement (this is referred to as "interim" or "midterm" bargaining). During contract negotiations, either party may pursue proposals regarding technology unless limited by bargaining ground rules or by the obligation to bargain in good faith itself, because the parties are past the stage where it is lawful to add new issues into the negotiations. If an employer is considering making changes during the life of the collective bargaining agreement, then negotiations must generally take place under the requirements of the expedited bargaining provisions of ORS 243.698. Under this process, the employer is required to provide the union written notice of any possible changes to mandatory subjects of bargaining. If the employer gives the required notice, then the union has 14 days to demand to bargain over this change. An employer cannot implement changes without complying with its obligation to bargain, or it commits an unfair labor practice under ORS 243.672(1)(e).

Recent Employment Relations Board Decisions Involving the Obligation to Bargain Technology Related Issues.

USE OF EMPLOYER EMAIL SYSTEMS FOR UNION COMMUNICATIONS

With this framework in mind, we return to the *AEE* case discussed above. As noted earlier, AEE and the State were engaged in negotiations for a successor agreement. Because the current collective bargaining agreement was about to expire, and the parties had not reached a deal for a new agreement, the State sent out a list of subjects that it believed to be permissive and therefore could be changed after the expiration of the contract.[53] This list included a provision of the CBA allowing employees and the union to use the State email system for union related

[52] *Three Rivers Ed. Assn. v. Three Rivers Sch. Dist.*, 254 Or App 570, 575, 294 P3d 574 (2013).

[53] While not germane to the specific topic of this article, practitioners should be aware that, as part of its decision in this case, ERB rejected the State's broad view of the employer's right to unilaterally discontinue what had been previously referred to as "purely contractual rights" after a contract expires. This decision clarified that this exception was limited to purely permissive subjects and a few limited mandatory subjects specifically recognized by ERB in previous decisions, such as arbitration provisions in an expired contract. *AEE,* 25 PECBR at 545.

communications. After the contract expired, the State sent out a directive prohibiting union related communications over its email system. In addition to the charges discussed above under ORS 243.672(1)(a), AEE also alleged that the State violated ORS 243.672(e) by making a unilateral change during the hiatus period.

There was no dispute that the State had changed its practices involving the use of its email system, or that it did not bargain over the issue before making that change. The primary dispute between the parties was whether the subject involved was mandatory or permissive for bargaining. After a detailed analysis, ERB held that union access to an employer's existing email system for communications about union business is a mandatory subject for bargaining. In doing so, ERB acknowledged that the subject was not included in one of the mandatory or permissive subjects enumerated in the statute and had not been resolved by previous case law.[54] As a result, ERB utilized its balancing test under ORS 243.650(7)(c).

In balancing the competing interests of management and the employees, ERB acknowledged that providing access to an employer's email system for union-related communications has a significant impact on management's prerogatives. However, ERB concluded that this interest did not outweigh the impact on employee wages, hours, and other terms and conditions of employment. ERB noted that email is an essential and unique feature in today's workplace, and access to that system to communicate about workplace issues has a greater impact on employee terms and conditions of employment than access to other communication systems provided by employers, such as bulletin boards and inter-office mail, that ERB had previously found to be mandatory for bargaining.

Further, ERB found that union access to employer's communication systems also assists the union in its duty of fair representation, and that a labor organization cannot operate effectively without communicating with its membership. Beyond the duty of fair representation, ERB found a long list of reasons why e-mail access provides an efficient and reliable method for the unions to communicate with its represented employees, such as: (1) to communicate with employees for contract negotiations, (2) discuss potential bargaining proposals, (3) to plan concerted activities, or (4) discuss potential grievances.

In sum, ERB concluded the subject was mandatory for bargaining because Association-related communications has a greater impact on employee wages, hours, and other terms and conditions of employment than it does on management's

[54] In reaching this conclusion, ERB rejected the State's argument that the subject was permissive under ORS 243.650(7)(b). The State asserted that *Oregon State Police Officers Association v. State of Oregon Department of State Police* applied, but ERB found this case was not dispositive because in that case, the employer equipment concerned the use of off-duty vehicles, which is distinct from the use of email. *Oregon State Police Officers Association v. State of Oregon Department of State Police*, Case No. UP-109-85, 9 PECBR 8794 (1986).

prerogatives. As a result, ERB found that the State violated ORS 243.672(1)(e) when it unilaterally prohibited the use of the State e-mail system for Association-related communications.

The Use of Technology to Monitor or Surveil Employees

In *District Council of Trade Unions, et al v. City of Portland,* ERB was presented with its first opportunity to determine whether the installation of GPS devices in employee-operated vehicles involved a mandatory subject of bargaining. However, because the union only demanded to bargain over the *impacts* of the decision to install the GPS devices, and not the *decision,* ERB only considered whether there were impacts on mandatory subjects of bargaining.[55] The City had been using GPS devices to track some of the vehicles used by specific departments within the City for several years. It continued to slowly expand its use of GPS devices across some of its other bureaus. Sometime in 2012 or 2013, the City decided that it wished to contract with a single GPS equipment provider to expand its use of GPS devices in City vehicles. The City issued a request for proposals for these services and signed a price agreement with their chosen manufacturer.

Shortly after signing the price agreement, the City sent an email to the representatives from each of the DCTU constituent unions stating that it intended to install GPS devices on City vehicles to better manage and track its fleet. The City also stated that installation of GPS devices on vehicles was a permissive subject of bargaining. At this time, the parties were still in negotiations for a successor contact. In response, DCTU demanded to bargain over the mandatory *impacts* of the installation of the GPS devices on the City's vehicles. The City refused to bargain over the installation of the GPS devices, and the Union filed an unfair labor practice complaint.[56]

As an initial matter, the majority found that the Union had alleged both a unilateral change claim and a "flat refusal" claim under ORS 243.672(1)(e), both of which constitute *per se* violations. The majority first analyzed the case as a "flat refusal" by the City to bargain over the impact of installing GPS devices on City vehicles during the course of successor negotiations. Because there was no dispute that the Union had demanded to bargain over the impact of the City's use of GPS devices, or that the City had refused to do so, the only issue remaining was whether the installation of GPS devices had any impact on mandatory subjects of bargaining. The majority concluded that, at a minimum, the installation of the GPS devices impacted the mandatory subject of discipline. There were multiple examples of

[55] Case No. UP-023-14, 26 PECBR 525 (2015).
[56] *DCTU,* 26 PECBR at 528-535.

situations where GPS devices had been utilized in employee investigations and disciplinary actions had been taken by the City in part because of the information provided through those devices. Under well-established ERB case law, disciplinary standards and procedures are mandatory subjects of bargaining.[57]

The majority also concluded that the installation of GPS devices affects the mandatory subject of safety (under ORS 243.650(7)(g), safety is mandatory subject for bargaining if it has a "direct and substantial effect on the on-the-job safety of public employees."). The City itself cited employee safety as a core justification for its decision to utilize GPS technology, both in its brief before ERB and in the bid process for the GPS devices. Thus, ERB found that installing GPS devices had a sufficient effect on safety to render the impacts mandatory for bargaining.

ERB has also determined that the decision to install electronic monitoring devices to surveil an employees' workplace is a mandatory subject of bargaining in *Amalgamated Transit Union, Division 757 v. Tri-County Metropolitan Transportation District of Oregon,* ("*ATU v. TriMet*").[57] In that case, TriMet maintained a large fleet of buses driven by ATU-represented operators. In the past, different models of buses have had varying numbers of video cameras that recorded certain areas in and around the buses. The number of cameras increased over the years, but none of the cameras were directed at the bus operator, leaving a blind spot if a driver were to be assaulted by a rider or if a driver assaulted a rider. Although some of the cameras on the older buses had the ability to make audio recordings, that function was never enabled. TriMet ordered a new series of buses that were equipped with an additional camera that would increase the total number of cameras in and outside of the bus to eight, with one camera aimed directly at the driver of the bus. This internal camera would constantly operate while the bus was in service, including all or part of the driver's break times, which for logistical reasons drivers frequently spent on their buses. The cameras on the new series of buses would also make audio recordings.

ATU demanded to bargain over the installation and usage of the cameras in the new series of buses. TriMet refused to bargain over the decision to change its surveillance practices but did agree to negotiate the impacts of the decision. ATU filed an unfair labor practice complaint, alleging that TriMet violated ORS 243.672(1)(e).

The primary issue in dispute was whether the subject of electronic surveillance of bus operators involved a mandatory or permissive subject of bargaining.[58] Because this subject was not one of those specifically designated by the legislature as mandatory

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[57] *DCTU,* 26 PECBR at 538-541.

[57] Case No. UP-009-13, 26 PECBR 225 (2014).

[58] The facts of the case also raised the issue of how much an updated camera system constituted a "change" in TriMet's practice.

or permissive under ORS 243.650(7), and ERB had never previously determined the status of this particular subject, ERB applied the ORS 243.650(7)(c) balancing test. TriMet contended that the electronic recording of bus operators concerns "public safety," which it characterized as "the quintessential management prerogative."[59] ERB agreed that TriMet had a significant operational interest in its buses safely conveying passengers and discussed the importance of management's ability to monitor its equipment and employee performance. ERB noted that the impact on those management prerogatives was particularly significant while employees were on duty. Ultimately, however, ERB found that the impact on TriMet's management prerogatives was less than the impact on employee conditions of employment. ERB noted that the electronic recording of bus operators could be used as a tool to investigate employee misconduct and impose discipline, including termination, stating that:

"The impact on TriMet's management prerogatives, however, is less than that on employee conditions of employment. Specifically, the electronic recording of bus operators can be used as a tool to investigate employee misconduct and impose discipline, including termination. Indeed, this appears to be one of the reasons that motivated TriMet's decision to expand the use of surveillance devices. This Board has previously concluded that similar investigatory tools are mandatory for bargaining, as are other subjects that involve discipline and job security."[60]

ERB analogized this subject to those at issue in earlier decisions where it had concluded that similar investigatory tools involved mandatory subjects bargaining, as those subjects also involved discipline and job security. Additionally, ERB concluded that the constant electronic surveillance of the bus operators proposed by TriMet would clearly impact employee privacy interests, particularly because the surveillance would continue during employee break periods. ERB stated that there was "undoubtedly a significant impact on employee conditions of employment when every workplace movement, gesture, and utterance is recorded, even those that take place on an employee's break time, a time in which there is little (if any) impact on management's prerogatives." For these reasons, ERB concluded that the subject of continuous electronic recording of bus operators was mandatory for bargaining, and that TriMet violated ORS 243.672(1)(e) when it made a unilateral change regarding that subject.

These cases demonstrate that, in general, the use of workplace technology to communicate about workplace or union issues, or to monitor employees, is likely to

[59] TriMet further argued that, as a common carrier under Oregon law, it "owes its passengers the highest degree of care and skill practicable for it to exercise," citing to *Simpson v. The Gray Line Co.*, 226 Or 71, 76, 358 P2d 516 (1961).

[60] 26 PECBR at 247.

involve mandatory subjects of bargaining. Both employers and unions should be prepared to bargain over these issues.

Private Sector Decisions Related to Bargaining Over Technology

Under the NLRA, the installation and use of surveillance equipment involves a mandatory subject of bargaining. In a 1997 case, *Colgate-Palmolive*, the NLRB held for the first time that the installation and use of hidden cameras in the workplace involved a mandatory subject of bargaining, and that the employer violated Section 8(a)(5) of the NLRA when it installed the cameras without first notifying and bargaining with the union.[61] In 2004, the NLRB reached the same conclusion in *Anheuser-Busch, Inc.*[62] These cases left open the possibility that the fact that the surveillance cameras were hidden may have been significant in assessing whether the subject was mandatory for bargaining. However, in a 2008 advice memorandum, the NLRB confirmed that the installation of cameras to surveil employees in the workplace was mandatory for bargaining regardless of whether the cameras were hidden.[63] In a 2015 advice memorandum, the NLRB also confirmed that the use of GPS devices to track employees for potential misconduct is also mandatory for bargaining.[64]

Strategies for Unions and Employers in Dealing with Technology Issues

Strategies for Unions

The nature of the labor relations process sometimes leads unions to operate in a reactive or defensive manner—the employer acts, the union reacts. This can result in a cycle of moving from one problem to another, leaving insufficient time to focus on long term strategic planning. But to successfully adapt to the constant changes in technology, unions need to be proactive and develop a comprehensive strategy to take advantage of the benefits technology can provide while simultaneously avoiding the

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[61] 323 NLRB 515 (1997).

[62] 342 NLRB 560 (2004). The United States Court of Appeal for the District of Columbia reversed and remanded a portion of the NLRB's remedy in this case, but otherwise affirmed the decision. *See Brewers and Maltsters, Local Union No. 6 v. National Labor Relations Board,* 414 F.3d 36, 367 U.S. App. D.C. 145 (D.C. Cir. 2005).

[63] *See Muscle Shoals Minerals, Inc.*, Case No. 10-CA-37423 (August 15, 2008) ("Although the instant case involves installation of openly mounted surveillance cameras, not concealed cameras as in *Colgate-Palmolive*, the same rationale and policy underpinnings discussed in that case are applicable to openly mounted surveillance cameras.")

[64] *See Shore Point Distribution Company, Inc.*, Case 22-CA-151053 (October 15, 2015) (noting that "under well-settled Board precedent, the Employer's installation and use of a GPS device to track an employee suspected of stealing time was a mandatory subject of bargaining.")

pitfalls that come with those same developments. This strategy should not focus solely on the use of technology in the workplace; it must also focus on the many ways that technology from outside of the workplace can be used by unions and employees to achieve gains in the workplace.

To effectively respond to technology-related issues, unions must try and understand the full scope of interests that employers have relating to technology. It should not be assumed that an employer's motives for seeking to change how technology is used are somehow adverse to the interests of employees. Rather, unions should acknowledge that employers may be seeking to utilize technology in ways that they believe are beneficial to employees and the public. Properly utilized, technology can have positive impacts for employees, including the potential to improve employee safety and provide reliable evidence to defend against unfounded charges of misconduct. Technology can also alleviate excessive employee workloads by streamlining inefficient processes. Understanding the interests of the employer can inform bargaining strategies and allow for more productive conversations and negotiations around these issues.

To be successful, a union's strategy should include at least the following four general components: (1) a recurring training program on technology and related legal issues, (2) a plan to monitor how technology is used in workplaces and to keep abreast of changes to those practices, (3) a long-term bargaining plan related to technology, and (4) a plan to maximize the use of technology in support of internal and external communications and organizing efforts. This section of the article will not address the topic of creating an effective plan for utilizing technology for communication and organizing as described in the fourth component. What constitutes an effective strategy in that context will vary greatly depending on the needs of the particular union and the composition of the relevant employee group. A discussion of those strategic choices is beyond the scope of this paper.

Training on Technology and Related Legal Issues

Developing an effective strategy to deal with workplace technological change begins with internal union education. Leaders and members must be trained on what types of technology are being used in the modern workplace and what kind of technologies are being developed that can be used for internal and external communication and organizing. They must also receive training on the legal issues surrounding technology that will allow them to spot and respond to potential problems or opportunities. This training should, at a minimum, include segments discussing the legal limitations on the use and regulation of technology in the workplace, the obligation to bargain as it pertains to technology, and best practices for using workplace technology. Ideally, these trainings would be worksite specific

and would include content tailored to address the particular technology used by the employer and employees.

Similarly, unions need to develop training programs on appropriate and effective utilization of (both employer and non-employer) technology and social media platforms to communicate. Social media platforms and similar technologies can provide a fast, low cost method of communicating with members that can be incredibly useful, particularly for unions with members spread across multiple worksites. They can also provide great tools to communicate with community allies and to get a union's message disseminated widely and quickly to exert pressure in support of bargaining campaigns. Social media can also be an effective way to reach potential members as part of an organizing campaign.

Of course, utilizing social media platforms and similar technologies is not without its share of risks. Some of these risks are legal in nature, such as the risk of being sued if communications can be considered defamatory or otherwise unlawful. But perhaps more importantly, electronically distributed communications have a habit of being shared with unintended recipients and they never truly disappear regardless of how many times one hits delete. Thus, unions should not distribute anything that they would not want an employer to see, or that could be readily used against the union or employees.[65]

To minimize these risks unions should offer leaders and individual members regular training on the many pitfalls associated with social media and technology in the digital era. As Benjamin Franklin famously stated, "an ounce of prevention is worth a pound of cure." As applied in the context of the use of workplace technology and social media, the goal should be to avoid having to fight unnecessary legal battles to defend employees or the union itself because of questionable uses of technology. Thus, when it comes to training union members and leaders it is wise to focus not only what employees *can* do, but also on what they *should* do.

If employees and union leaders follow a few common-sense rules relating to social media and technology use, they can avoid many of the most common problems. Admittedly, these rules reflect an overabundance of caution, and if strictly adhered to, might require employees and union leaders to voluntarily refrain from some conduct they are legally allowed to engage in. The underlying premise for these rules is that it is better to prevent the need of a potentially costly legal fight that might be

[65]See Facebook Organizing: Legal Do's and Don'ts. By Julian Gonzalez. *Labor Notes*, July 9, 2014. http://labornotes.org/2014/07/facebook-organizing-legal-do%E2%80%99s-and-don%E2%80%99ts

easily avoided by exercising a reasonable level of restraint. It is with that cautious approach that the rules are suggested.[66]

The first rule is that employees and union leaders should assume that every communication that they send on any work email system or other employer-provided communication device will be read by their boss, coworkers, and family members, and may even be published by the *Oregonian*. As mentioned above, electronic communications are often shared beyond their intended audience and they never truly go away. Further, as public employees in Oregon, there is a very real chance that communications on employer systems will be considered a public record and can be subject to disclosure under the Oregon Public Records Law. Employees should draft their communications accordingly and should not put anything into writing that they would not want to be broadly read. Union members and leaders should not communicate about important union matters over employer communication systems and should absolutely not communicate with their lawyers over work communication systems. Employers have taken the position that such communications lose their customary privilege by virtue of being sent over a publicly owned communication systems. There are solid arguments to the contrary that can be raised, but those arguments can be easily avoided by using external communications systems for any important communications.

Second, employees must also understand that employer-issued computers, smart phones, and other technology that they use for work are public property and should not be used for any purpose that violates lawful employer policies. Likewise, employees should assume that any websites they visit, or documents they create or download on employer computers, can be viewed by their employer and that the employer has some sort of software program to monitor such use for improprieties. In disciplinary arbitrations, employees are often surprised by the extensive and detailed information that the employer can produce about their electronic activities. If employees understand the scope of information available to the employer, then they are likely to be more circumspect in their choices.

Third, if employees choose to use social media on their own time and utilizing their own technology, they should still assume that their posts will be read by their boss, coworkers, and family. This is true even if they think their posts are private and were wise enough not to "friend" their boss or otherwise grant their employer access

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[66] Some sources on union use of social media include: Social Media for Unions. By Alex White, 2010. http://www.back2ourfuture.org/wp-content/uploads/2014/06/Social_Media_For_Unions.pdf
The Internet vs. The Labor Movement: Why Unions Are Late-Comers to Digital Organizing. By Kati Sipp. *New Labor Forum*, April, 2016. http://newlaborforum.cuny.edu/2016/04/30/internet-versus-the-labor-movement/

to their social media posts. Repeated experience tells us that nothing on the internet is ever truly private.

Fourth, employees and union leaders must understand what types of social media communications and uses of technology are protected by statute. Further, if employees or union leaders are engaging in protected activity by posting on social media, they should do so in a manner that makes it clear that the statements are made in their capacity as union leaders or members. Using official union social media identities or accounts is advised when possible. To be clear, whether a posting or communication is protected under PECBA or the NLRA is not dependent on whether the person making the comment uses a union social media account or identifies themselves as a union officer. Rather, it depends on the content and context of the posting itself. However, if an employee posts comments through a union social media account or uses their union title, it will be easier to establish that the communications are protected under ORS 243.662 and 243.672(1)(a). It follows that, if an employer takes an adverse or retaliatory action against the employee, it will also be easier to challenge those actions through an unfair labor practice or grievance.

Monitoring the Use of Technology in the Workplace

Unions need to proactively investigate how technology is being used in the workplace and what limitations the employer has put in place regarding technology. Some of the uses will be obvious and require little effort to discover, but there may be a variety of uses of technology that are not obvious. Also, employer policies are not always well known to union leaders and employees.[67] To determine whether any new or unknown current policies exist, or whether technology is being used in a way that the union is not aware of, unions should submit a written request for information to the employer asking for details related to the use of technology. Under the PECBA, the duty to bargain in good faith with the union includes the duty to provide information that may be relevant to bargaining or a potential grievance. Information on technology may be relevant to both, so an employer should provide that information on request. If the employer refuses, it may be an unfair labor practice under ORS 243.672(1)(e), so long as the information sought meets the relevance standard.

[67] There can be a variety of reasons employees and union leaders might not be well acquainted with employer policies. Often, despite good intentions, policies are not distributed or posted in a manner that is likely to result in employees actually reading them. This is particularly true in smaller organizations without the resources to have a robust human resources or labor relations staff. Ironically, some large employers have the opposite problem—they have such voluminous and detailed policies, and make such frequent revisions to those policies, that employees and union leaders can get "policy fatigue," and eventually stop paying attention to the changes.

After initially discerning how the employer is using and regulating technology, unions need to continue to carefully monitor the use of technology by the employer. Having frequent and effective communications with members is of course the first step to monitoring any changes, as employees will often become aware of changes long before union leadership. But it is also advisable to submit follow up requests for information to the employer at some regular interval, or to establish a standing agreement for the employer to provide notice and details concerning any planned changes in its technology. Unions should also carefully monitor changes in employer policies on technology use. Many collective bargaining agreements include requirements that employers provide unions with copies of new policies, or even draft copies of proposed new policies or proposed policy changes. Even absent contractual required notices, some public employers distribute notice of pending or recently adopted policy changes to employees or labor organizations by email, or by posting on an intranet or internet site. Unions should carefully monitor these sources for potential changes. Also, when public employers are considering purchasing new technology, they may go through some form of public contracting process that can provide information on potential changes. For example, under certain circumstances, the contracting process involves the employer issuing a "request for proposals" (RFP) soliciting bids from contractors to provide the equipment or services. The RFP documents may detail the type of technology being sought and the purpose for the technology, along with other important information that a union may wish to have.[68]

Developing a Long-Term Bargaining Strategy on Technology Issues

A successful bargaining strategy must be predicated on a solid understanding of the different ways that the obligation to bargain can be triggered, as well as an understanding of the consequences of action or inaction. If a union is being proactive on technology issues proposals relating to the use of technology should be a part of negotiations over the collective bargaining agreement, and subject to the full PECBA bargaining process. However, in practice, the obligation to bargain over technology-related issues most often arises when, during the life of an existing collective bargaining agreement, an employer decides to change the type of technology that it uses or how its existing technology can be used. These changes are generally subject to the expedited bargaining procedure under ORS 243.698.[69]

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[68] See e.g., *DCTU*, 26 PECBR 525.

[69] The use of the term "generally" reflects the fact that parties are not always obligated to bargain over midterm changes under the expedited process in ORS 243.698. For example, if the parties are already in successor negotiations, they would not utilize the expedited process, they would address the potential change through the

If the obligation to bargain over technology issues arise under ORS 243.698, employers are required to provide written notice of any such changes. Unfortunately, employers frequently make changes without providing that notice.[70] This is often because employers are unaware that the desired change might require bargaining, because it can be difficult to discern with certainty when a change to the status quo occurs and whether a change impacts or involves a mandatory subject of bargaining. However, the failure to provide notice can also be a result of a strategic decision to try and implement a change without triggering a demand to bargain from the union.

If the union does receive written notice of a change, it must demand to bargain over the change within 14 days of the notice. If no demand to bargain is submitted, the union will likely be deemed to have waived its right to bargain over the change and the employer may implement. The failure of the employer to provide the written notice required under ORS 243.698 may excuse a union from filing a demand to bargain, but if the union becomes aware of a change through other means—such as verbal notice from the employer or through information received from bargaining unit members—it may still be best to submit a demand to bargain. In some cases, the union has been found to have waived its ability to bargain by lengthy inaction even in the absence of official written notice of a change. Of course, if the union learns of the change after the employer has already implemented the change unilaterally, the union may file an unfair labor practice complaint under ORS 243.672(1)(e). The union need not demand to bargain in such circumstances.[71]

When demanding to bargain over technology issues, it is important to consider whether the obligation to bargain extends to the decision to make the change, or just the impacts. If it is not entirely certain, the demand to bargain should cover both the impacts and the decision. There is no real risk in demanding to bargain over both,

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successor negotiations process. Additionally, if the collective bargaining agreement contains a provision waiving the right of the union to bargain over midterm changes, the employer may not be obligated to bargain. Employers often argue that management rights clauses constitute waivers of the right to bargain, and unions should be wary of including "zipper clauses" into contracts. As a result, unions should carefully review management rights clauses and other proposals to include language in a collective bargaining agreement that could be construed as a waiver of the right to bargain over any midterm technology changes. If an employer insists on putting language into an agreement that could even arguably waive the right to bargain, the union should insist that language also be included that these clauses are not intended to waive the right of the union to bargain under PECBA.

[70] See ORS 243.698(3). Although employers are required under ORS 243.698 to notify unions of changes to mandatory subjects of bargaining, employers and unions frequently disagree about what exactly constitutes "written notice." Does written notice simply require that employers give some written document that suggests that the employer is going to make some changes, but does not specify what those changes are, and that they are willing to bargain over any mandatory subjects of bargaining? Or does written notice require that the employer set out the specific changes being contemplated, and that it stands ready to bargain over any mandatory subjects of bargaining? And who does the employer need to provide this notice to? Is an email to the entire bargaining unit alluding to the changes sufficient, or does the employer need to provide a notice to the appropriate union representative who generally negotiates collective bargaining agreements?

[71] ERB has recognized that there is no need to demand to bargain when doing so would merely constitute a *fait accompli.*

even if the employer is likely to claim that one aspect is permissive. Conversely, if the union only demands to bargain over the impacts of a change, it may limit its ability to bargain over the decision or limit the scope of potential claims if an unfair labor practice complaint is filed over a corresponding refusal to bargain from the employer.

It is important to remember that, even if the union does not make a timely demand to bargain over the initial employer-made changes in technology use or has agreed with the use of technology in the past, nothing prevents a union from bargaining over changes to those practices in future contract negotiations. For example, if a union did not demand to bargain over the installation of cameras in the workplace for any reason, and the cameras were used for several years without protest, the union could still make proposals in future negotiations over the use of those cameras.

Once the parties are in negotiations over technology related issues, the possible scope of bargaining proposals is quite broad, limited only by the parties' creativity and, of course, legal restrictions on what can and cannot be bargained under the PECBA. It would be difficult to list all of the different subjects that parties could negotiate over in this context, but some of the more common types of proposals that a union might want to pursue include:

Proposals limiting or establishing the use of audio or video recording devices in all or part of the workplace. For example, the union could propose that the video cameras only be used to record certain dangerous work areas, and that no recording take place in break areas where employees have more of an interest in privacy.

Proposals that the employer allow employees and union representatives to use its email system to communicate about union matters. Agreements regarding the use of employer email often include reasonable limitations or parameters for the use of the email system including provisions relating to the confidentiality of the messages, limits on file size, limits on the number or type of information that can be sent, and restrictions on political campaigning via public employer emails.

Proposals to create procedures for ensuring that electronic data is accurate and accessible to employees and the union, and not just the employer. For example, if an employer uses a GPS tracking system, the union can require that it has access to the data and that procedures are in place to test whether the equipment is functioning properly.

Proposals limiting who can access electronic data and when they can access that data. Some common proposals include requirements that the employer only access video recordings if a complaint is filed, or if an investigation is

initiated due to information derived from other sources. The crux of these proposals is to keep employers from randomly surveilling employees with no reason, and to avoid the proverbial fishing expedition looking for misconduct.

For employees who wear body cameras or have in-vehicle recording devices, contracts frequently include language delineating when the employee can view or listen to the recordings in connection with an investigation.

Proposals on what type of documents or data should be considered exempt from Public Records Laws, or at a minimum, that employees or the union have the ability to receive advanced warning before any documents or data are provided to a party under the Public Records Law. It is important to ensure that any such proposals are consistent with the applicable laws.

Proposals on how and when employees may be disciplined for technology related issues.

Proposals requiring notice of any changes in technology use or policies related to technology.

Proposals regarding training for employees on the proper or acceptable uses of technology, particularly where that technology has impacts on safety.

Strategies for Public Employers

The utilization of technology by a public employer is generally not driven by the labor relations or human resource professional. Instead, the above cases teach a lesson that new technology will be driven by operational divisions within a public employer. As such, a labor relations or human resource professional's first goal should be to educate management and procurement officials on the necessity to bargain over certain technological changes *before* committed public funds to a new or significantly upgraded technological systems. This proactive involvement requires involvement in the employer's operations beyond the traditional level of involvement.

Assuming the employer is able to identify the potential bargaining obligation of the new technology, the labor relations or human resource professional must next assess the new capabilities of the technology, and the impact on employee monitoring. It is vital for the employer representative to have a credible and competent understanding of the new technology. On one hand, if the employer representative is able to understand the new capabilities, she or he will be able to explain the benefits of the technology and how it will allow the employee to do their job in a more effective and safe manner. The employer's justification should also include the problem identified and how the employer's proposal (the use of new technology) provides a solution to the problem.

On the other hand, the employer representative should think critically about how a union representative will see the capability of the new technology to record employee conduct. If the employer representative is able to consider how the technology could be exploited to expose employee misconduct, the employer representative will have an insight into the concerns of the union representative with the implementation of the new technology. With such an understanding the employer representative may be in a position to limit the technological capabilities of the system to mitigate union concerns of how the technology could be used, or, at least, be prepared to propose some limitations on the technology.

Once the employer representative has assessed the technology, the best approach is to involve the union early. The union will very likely be skeptical of the employer's implementation of new technology, but early involvement and a "palms-up" approach has the effect of disarming a union's skeptical opposition to new things.

As listed above, both the union and the employer should think critically about bargaining language related to technology. Employers would be well served to reserve the right to utilize recordings of employee conduct as part of an investigation based on evidence unrelated to the recording. Often times, unions are concerned that supervisors will actively monitor employee conduct; however, no Oregon public employer has sufficient staffing such that supervisors will actively serve as "big brother" during the work day. However, if an employee complains of harassment by another employee, the employer should protect in bargaining the right to review any evidence needed to substantiate such a complaint.

In the end, the employer's approach to technology is focused on the implementation of new technology and addressing the union's concerns of how the technology could be used to monitor employee behavior. Management's best approach to technological change issues is to engage labor early in the process and attempt to see the changes through the employee/labor relations lens. This will articulate how new technology can enhance the efficiency and effectiveness of the workplace while continuing to protect the privacy of individual employees.