COMPARATIVE LABOR LAW DOSSIER
MODIFICATION OF WORKING CONDITIONS IN THE UNITED STATES OF AMERICA

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1. Is it possible in the United States for the employer to unilaterally modify the worker's functions? If the answer is yes or if it is only allowed in cases of agreement with workers' representatives, public authority or a third party (for example, Labor Administration or arbitrator), what are the causes that allow this modification? What are the formal or procedural limits that must be followed?

The answer to this question depends upon whether the employees at issue are represented for the purposes of collective bargaining by a union, and if so, the specific language of the applicable collective bargaining agreement.

In the United States, the default rule is that unless otherwise agreed by the parties, employment will be presumed to be on an at-will basis. The fiction behind the at-will rule is that the parties are in a constant state of "offer and acceptance" of terms. The terms of the offer can be changed at any time, and likewise, acceptance of them similarly can be declined.

Unlike nearly every other employment law regime, most employees in the United States are not employed on the basis of a fixed contract with stated terms, but on an at-will basis. Thus, employers in the United States typically remain free to change the terms of work unilaterally and "at will". If those changed terms are unacceptable to the employee, they typically are free to quit their employment, again "at will". Employment is regarded as resting on a contractual basis, and hence regarded primarily as a function of private ordering. There is no state involvement in an employer's modification of employment terms where employment is on an at-will basis.

Naturally, if an employee has a contract of employment with his or her employer, and that contract sets forth the functions to be fulfilled, no unilateral change may occur. That would constitute a contractual breach. Changing terms in this case would require a "novation", a re-negotiation of terms with their positive acceptance by the employee, to be effectuated.

Only a small portion of employees in the United States presently have the terms of their employment set through the provisions of a collective bargaining agreement. For the most part, the practice of collective bargaining in the United States in the private sector is governed by the terms of the National Labor Relations Act.

For those covered by a collective bargaining agreement, any change in functions specified by the agreement would require the consent of their collective bargaining representative. Typically, any asserted breach of a collective agreement that is not settled through the agreement's "grievance procedure" will be subject to binding arbitration. Arbitration in the United States is a "creature of the contract". Hence, the collective agreement will state the procedures for selecting an arbitrator and specify the scope of the duty to arbitrate. Arbitral awards are subject only to very limited review by the courts.

2. Is it possible for the employer to unilaterally modify the employee's workplace? If applicable, what are the causes that allow this modification? What are the formal or procedural limits that must be followed?

Because of the at-will nature of the employment relationship in the United States, American employers typically can unilaterally modify the employee's workplace. (See the response to Q1, above.) Thus, unless a contract between the employer and the employee specifically states the place of work and limits the ability of the employer unilaterally to change that location, the employer remains free to modify, at will, the place of an employee's work, or any other terms and conditions. If those changes are unacceptable to the employee, the employee has the legal right to terminate his or her employment.

For employees covered by the terms of a collective agreement, the answer is a bit more complicated. Some collective bargaining agreements will specify limits on an employer's right to transfer employees. More typically, however, agreements may attempt to place limits on the employer's ability to transfer the work done at a facility covered by the terms of a collective agreement. The "law" by which the terms of collective agreements are interpreted is the "common law" developed by arbitrators. In fact, the United States Supreme Court has indicated that when the parties agree to arbitration, they also agree to accept the "common law of arbitration" developed by arbitrators over the decades.

Broadly speaking, arbitrators and the courts have required rather specific "work preservation" language to bind an employer not to transfer work to another facility. The more general the "work preservation language" is, the less the chance that it will be read

by an arbitrator as an effective restriction on an employer's actions. Arbitrators may also examine the parties course of conduct over the years, concerning the subcontracting and outsourcing of work, to determine the parties understandings as embodied in the language of their collective agreement (See the discussion on "past practice" in Q5, *infra.*)

Arbitrators also typically will prohibit the transfer of work where it is clear that the employer's motive is to undermine the unit and thereby to avoid the terms of the agreement. Cases involving transfer typically involve the transfer of work. Some collective agreements require employers, in cases of the transfer of work, to provide transfer opportunities to current employees, i.e., permitting them "to follow the work."

In certain circumstances, where an employer employs 100 or more employees and engages in the permanent or temporary shutdown of a single facility that result in a loss of employment for 50 or more employees during any 30 day period, or in the layoff of 50 employees in any 30 day period, the employer may be bound to give 60 days notice to the union, if the employees are represented, or to the individual employees, pursuant to the "Worker Adjustment and Retraining Notification Act" of 1988. Studies show that the Act has had little effect in helping employees, and it has proved very difficult to enforce.

3. Is it possible for the employer to unilaterally decide a permanent or temporary transnational geographic mobility? In that case, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

Because employment typically is on an at-will basis, such unilateral transfer is possible. Unless otherwise limited by contract, United States employers are free to make such decisions.

4. Is it possible for the employer to unilaterally modify the regulation established in collective bargaining agreements regarding working conditions (working hours, salary, holidays…)? If applicable, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

In a word, no. In the United States, a collective bargaining agreement is a contract, and like any contract, no unilateral modification of the terms "contained in" the collective agreement can be made by one of the parties without the express consent of the other. Section 8(d) of the National Labor Relations Act specifically provides that once a collective agreement has been concluded, the duty to bargain "*shall not be construed as*

requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract…"

An employer may request to bargain about such modification, and unions, sensitive to the possibility of work transfer, eventual job losses, etc., may agree to modifications. As the statute makes clear, however, neither party is required to bargain over any terms "contained in" an agreement, and an employer may make no unilateral change in any term "contained in" an agreement. Breach by the employer could result in an injunction requiring the employer to cease any change prior to arbitral determination as to whether that change violated an express term of the agreement, or in a charge to the National Labor Relations Board, alleging a violation of Sections 8(a) (5 and (1) of the statute—breach of the duty to bargain through unilateral change.

5. Is it possible for the employer to unilaterally modify the regulation of working conditions (working hours, salary, holidays…) not established in collective bargaining agreements? If applicable, what are the causes that allow this modification? And what are the formal or procedural limits that must be followed?

This is a somewhat complicated question. If a so-called "past practice", i.e., a long-standing practice, custom or usage in the workplace, the National Labor Relations Board, or more usually, arbitrators, often will see that practice as having become part of the implied terms of the collective agreement. By their actions, the parties are seen as having accepted the practice and agreed to it by ratification of the course of conduct. As one arbitrator explains it, "[a] *union-management contract is far more than words on paper. It is also all the oral understandings, interpretations and mutually acceptable habits of action which have group up around it over the course of time*." This is a well-established view.

Whether a disputed manner of behaving has achieved the status of a past practice is a matter typically resolved through arbitration. In the United States, nearly all collective bargaining agreements provide for arbitration of disputes. The agreement will provide a method for selecting the arbitrator. Since it is the employer who acts, the union will be the party who will allege that the employer's action violates a term of the agreement. The union will "grieve" the disputed action. If the dispute is not resolved through the grievance process (usually a 3 to 5 step process involving resolution efforts by increasingly higher levels of union and management officials), the dispute will be subject to arbitration.

As mentioned previously, agreements typically provide a simple process for selecting an arbitrator. Agreements often provide that if the parties cannot agree on an arbitrator, a neutral body such as the American Arbitration Association or the Federal Mediation and Conciliation Service, will provide the parties with a list of three names. If the parties cannot agree on one of the names, each strikes one name, and the one remaining acts as the arbitrator.

There is a substantial common law of arbitration concerning the conditions under which a particular practice can be said to constitute a binding "past practice". Past practice claims are a frequent source of arbitral disputes. There is a substantial corpus of published arbitral decisions regarding the matter of past practice. It should be pointed out that a union may be found to have waived any ability successfully to protest an employer's acts through its own "past practice" of tolerating them, i.e., accepting those practices without objection over time.

An employee representative may also allege that an established practice, unilaterally changed by the employer, constitutes an unlawful refusal to bargain over a mandatory term or condition of employment. There is also a substantial body of NLRB developed law as to whether a unilateral change in an established practice constitutes an unfair labor practice.

The procedure concerning the forum for resolution is somewhat complicated and confusing. Where a matter can be said to constitute both a potential violation of the collective bargaining agreement as well as an unfair labor practice as a change in a mandatory term or condition of employment, the NLRB can, on its own motion or upon motion of one of the parties, withhold its jurisdiction and defer the matter to arbitration. A full discussion of this process well-exceeds the bounds of the question posed.

6. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there a different treatment depending on the size of the company? If applicable, what is the different regulation?

Broadly speaking, the answer to the question is no. However, that answer requires some qualification.

Firstly, as previously explained, unless there is a specific contract governing the employment relationship, in American law it will be regarded as an at-will relationship, and hence modifiable at any time. However, if the affected employees are covered by

the terms of a collective agreement, the duties of the employer with regard to contractual modification have been described above.

As to the issue of the "size of the company". It is true that the terms of the National Labor Relations Act do not cover all employers in the private sector. There are exceptions based on matters such as the gross volume of the employer's business, among other things (but not on numbers of employees). Section 2 (2) of the National Labor Relations Act also excludes from its coverage federal and state employees, agricultural employees, employees subject to the Railway Labor Act, etc. Those employers excluded from coverage under the NLRA may have coverage under state labor relations acts, that are patterned after the NLRA and that typically follow the doctrine established under the NLRA. Many federal employees are covered by the terms of the Federal Employee Relations Act, which largely follows the terms of the NLRA.

7. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there a different treatment in the event of business transfers (when the modification of working conditions is needed to cause the transfer)?

Again, the answer in the American case depends upon whether employees are organized and covered by the terms of collective agreement. For those employed on an at-will basis, modification of conditions, as described in the responses above, can occur at will.

To explain a bit further, for non-collectively bargained for workers, there are few legal requirements that an employer must respect concerning the sort of working conditions raised in the query. Those that apply generally arise under the terms of the Fair Labor Standards Act (FLSA) that may require certain employees to have compensated meal or rest periods. The FLSA itself states no maximum hour regulations (save for employees under the age of 18), but simply requires covered employees to be paid at a time and one-half rate for hours worked in excess of forty (40) hours during a working week. American law does not require employers to grant vacations, etc.

It might be noted that employers not infrequently voluntarily offer severance packages to employees being terminated as part of a transfer. Typically, the severance package requires a waiver of any and all potential actions against the employer. Such waivers for employees over the age of 40 require the waivers to comply with the Older Workers Benefits Protection Act of 1990 (OWBPA) to make effective the waiver of any age discrimination claims. Section 201 of the OWBPA sets forth what is in effect a check list of requirements with which an employer must comply, including advising the

affected employees to consult with counsel, in order to make effective any waiver of their rights to pursue actions under the Age Discrimination in Employment Act.

While it does not affect or restrict changes in working conditions, the transfer of a business that results in job losses or layoffs as defined in the above-mentioned "Worker Adjustment and Retraining Notification Act" of 1988 may require 60 days notice to be given to the affected workers prior to the transfer. However, the Act provides that an employer "*may order the shutdown of a single site of employment before the conclusion of the 60 day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice would have precluded the employer from obtaining the needed capital or business*."

The sale of a business in the presence of a collective bargaining agreement can provide some special problems. A general outline of issues and doctrine follows:

- Under a line of United States Supreme Court cases interpreting the terms of the National Labor Relations Act, the purchasing ("successor") employer is not required to:

    - Hire the employees of the transferee business (the "predecessor"). As long as the successor's refusal is not founded on anti-union animus, it is free to hire whomever it pleases. The predecessor's employees have no legal priority.

    - The case law actually encourages such a result. If the successor employer hires as a majority of its workforce at the effected facility the employees of the predecessor, it is required to recognize the union that represented these employees. This will not be the case, however, if the successor's "operational structure and practices" differ substantially from those of the predecessor.

    - Even where the successor must recognize the union selected by the predecessor's employees, the successor employer is not necessarily required to adopt the terms of the collective bargaining agreement between the predecessor employer and the union. The successor is free to state the initial terms on which it will hire employees, and to offer them to all applicants. It only gains the duty to recognize the predecessor employees' collective bargaining representative at the time that they constitute a majority of the successor's employees at the affected unit or facility.

- This rule does not apply in those situations in which it is "*perfectly clear that the new employer plans to retain all of the employees in the unit*" in which case "*it will be appropriate to have* [the successor employer] *initially consult with the employees' bargaining representative before* [it] *fixes the terms*." *–NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972).

- Some collective bargaining agreements have "successors and assigns" language in them that purport to require the (predecessor) employer to impose the terms of the collective agreement on any successor business. The enforcement of such language typically occurs through arbitration. Any extended discussion is out of place here. Broadly speaking, arbitrators have required very specific language in the agreement before they will find that is effective. The remedy is against the employer with whom the agreement was made, and not the successor, who was a stranger to the agreement.

8. With regard to modification of working conditions (functions, geographic mobility, working time, salary, holidays…), is there any specialty when the modification of working conditions is intended in an insolvent/bankrupt company?

A collective bargaining agreement in a bankruptcy proceeding may be rejected (modified) only under the conditions stated in Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §1113 (added to the Code in 1984). Briefly summarized, this provision of the law permits the rejection or modification of the terms of a collective bargaining agreement in a bankruptcy proceeding where:

- The trustee or the debtor makes "*a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably*;"

And—

- The debtor has provided "*the representative of the employees with such relevant information as is necessary to evaluate the proposal*."

The terms of the collective agreement then only can be modified or rejected when:

- The debtor has made a proposal that fulfills the foregoing requirements

- The collective bargaining representative has refused to accept such proposal without just cause, and,

- The balance of the equities clearly favors the rejection of the agreement.

9. The worker affected by a modification of his or her working conditions (functions, geographic mobility, working hours, salary, holidays…), does he or she have the right to terminate the employment relationship with right to compensation?

See the above discussion concerning the predominately at-will basis of American employment. Unless the parties have provided otherwise, an employee may terminate the employment relationship at any time for any reason whatever, so long as it does not constitute an attempt to injure the employer maliciously (a rare situation with few cases speaking to the matter). If the employee has a contractually guaranteed right to certain conditions, and the employer violates the contract, the employee will have an action in contract to recover damages for its breach.

If the employee is covered by the terms of a collective bargaining agreement, the employee's union representative typically will file a grievance and go to arbitration over the matter should no settlement be made.

10. Is there a special judicial procedure to substantiate claims regarding modification of working conditions?

No. For further explication, see the responses provided above.