

Subcontracting

With costs going up and revenue going down, it's essential to look for the most cost-effective way of providing services. Subcontracting is one way to cut costs while maintaining current services.

If you are considering using a private vendor to provide services that are new to the district, you may make those decisions unilaterally. If the services are currently being provided by district employees or if they impact current employees, you need to bargain before bringing in an outside firm.

According to the Employment Relations Board (ERB), if you seek other individuals or an outside contractor to perform work currently performed by bargaining unit members, you have a duty to bargain with the union representing those employees. Called subcontracting, the transfer of duties from current employees to another employer is a mandatory subject of bargaining.

For example, if you have a private bus company transport students to and from school and school activities or a private janitorial firm perform custodial services, and these duties are currently performed by district staff, you must bargain.

Under ORS 243.716, using volunteers to provide services is not considered subcontracting.

Exclusive Bargaining Unit Work

We need to be clear about one point, however. The duties at issue must be exclusively bargaining unit work in order to have the duty to bargain. Review your district's history: Do the duties traditionally or contractually belong to bargaining unit members, meaning no one outside the unit previously or currently performs the work?

For example, if library clerks (classified employees) and a certified librarian historically have worked side by side performing the same tasks, hiring a librarian and subsequently laying off a library clerk is not subcontracting. Library clerk duties assumed by the librarian are not exclusively classified bargaining unit work.

Before actually subcontracting particular duties, you must bargain over the decision to subcontract and the impact on current employees as a result of subcontracting services. There are two ways you can avoid bargaining: 1) If the union has waived its bargaining rights by specific contract language, or 2) If the union takes no action after being notified that you plan to subcontract services.

Contract Language: Waivers and Bars

Collective bargaining agreements, particularly classified contracts, sometimes contain language that addresses the issue of subcontracting. Contract language waiving union bargaining rights must be very specific, however. If a contract reads that an employer "has the right to subcontract," that does not waive the union's bargaining rights.

A contract must state that the union specifically waives its rights to bargain over the decision and impact of subcontracting. Or it must establish some other procedure, such as an expedited bargaining process, to alter, reduce or negate the union's bargaining rights. Total bargaining waivers through contract language are rare.

On the other hand, contract language may specifically prevent a district from subcontracting services. These total bars of subcontracting are equally rare. Sometimes a contract specifies procedures to be followed when subcontracting is under consideration.

You should look carefully at current contract language before pursuing subcontracting.

The Duty to Bargain

To fulfill the obligation to bargain, the ERB says you must initiate action and determine a proper dispute resolution forum under the statute. There are two ways bargaining can occur.

- If you have a contract in place and you decide to pursue subcontracting, you should use the interim bargaining process outlined in ORS 243.698.

- If you are already engaged in bargaining,

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you should use the successor or regular bargaining process under ORS 243.712.

Interim Bargaining Process

While a contract is in place, the union may waive its right to bargain by taking no action after it has been notified of your plans to subcontract. The notice must be specific, such as a letter handed to the union president. Announcing your plan to subcontract during an open board meeting with union members present is not sufficient notice.

If the union does not respond within fourteen days after it has been notified of your plans to subcontract, it may have waived the right to bargain. The Employment Relations Board reviews each case separately, however, to assess the type of notice provided and the length of time during which the union made no demand to bargain.

Once notice is sent to the union, you must engage in an expedited bargaining process for 90 calendar days. If no agreement is reached, you may implement your plans with no further bargaining. At any time during the 90 days, the parties may mutually agree to mediation, but that does not extend the 90-day period.

Regular Bargaining

When a contract is about to expire, the parties usually begin bargaining prior to the actual expiration date. According to ORS 243.712, this process begins at the first meeting after initial proposals are submitted. You are required to negotiate for a period of 150 calendar days. After this period ends, either party may unilaterally request mediation. A joint request for mediation may be made before the end of the 150 days.

ERB mediation is required for 15 days. This period begins at the first mediation session. At the end of the 15 days, either party may declare an impasse, at which time both parties must submit their final offers with cost summaries to the ERB. The ERB then publishes the offers, starting

a 30 day cooling-off period during which mediation typically continues. At the end of the cooling-off period, the union may give a ten-day notice of strike, the employer may give a five-day notice of implementation of its final offer, or the parties may continue to negotiate or mediate.

This regular bargaining process can take nine or ten months to complete.

What are we Bargaining?

Bargaining over a decision to subcontract involves discussing your reasons for subcontracting, which may include saving money or reducing the administrative load. The union may want to do a study of current duties to find ways to save money while keeping current employees.

When you bargain over subcontracting, you must discuss the impacts on current employees. You may propose that district employees be hired by the subcontractor or that wages be kept at or near current levels. You may offer to cash out unused vacation, provide severance pay, or continue district-paid health insurance for a time.

Request for Proposals

According to the ERB you may prepare a Request for Proposals (RFP) and solicit bids before bargaining is completed. The union should be notified of these actions early enough to allow meaningful bargaining to take place. You should accompany this notice with a statement reiterating that you are willing to continue the bargaining process. You may not come to an agreement with a private vendor until bargaining is complete.

If you are considering subcontracting, proceed with care. Review contract language to determine if the union has waived its rights or you are prohibited from subcontracting. You may solicit information from vendors without triggering bargaining, but once you decide that subcontracting is a viable alternative, you should notify the union. Take no formal action with vendors until required bargaining is completed.

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