Managing in a Unionized Environment

September 12, 2018

If you can see this screen, you're logged into the webinar.
If you can hear our voices, you're ready to go**!**

This webinar will be set to "listen only" mode, which means you will be able to hear and see the presenter over your computer. You may want to have headphones or speakers attached. Attendees will be able to participate through the text chat box.

Using “Chat”

- If you are experiencing technical difficulties, use CHAT
- If you have a question or comment, use CHAT

About the Recording

Today's webinar will be recorded and the archived webinar will be posted for on-demand viewing.

Clinic ED's and Managers (Use your LAO log in information)can access the webinar at https://www.legalclinicresources.ca/xwiki/bin/view/LearningLibrary/Library

Board Members (use your On-Board log in Information) can access the recorded webinar at

http://onboardlegalclinics.org/

CPD Hours

Depending on your practice, today's LIVE session may be eligible for up to two Substantive Hours.

We encourage you to visit the Law Society site directly to learn more about what you can claim.

http://www.lsuc.on.ca/CPD-Requirement/

Slide presentation

Clinic ED's and Managers (Use your LAO log in information)can access the presentation materials at https://www.legalclinicresources.ca/xwiki/bin/view/LearningLibrary/Library

Board Members (use your On-Board log in Information) can access the recorded webinar at

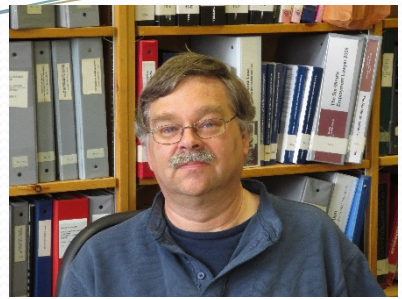
http://onboardlegalclinics.org/

Or email Sosan Nasar at nasars@lao.on.ca.

Frances Gallop, Lawyer - Rae, Christen, Jeffries

Frances Gallop was called to the Ontario Bar in 1985. Since her call to the bar in 1985, she has focused on advising and representing employers in labour and employment law matters. Frances' law practice includes advising and representing employers in matters relating to union organizing, certification, collective bargaining, collective agreement administration, grievance arbitration and other processes under the Labour Relations Act. Although Frances has been in private practice for much of her career, her first job after her call to the bar was at a large aircraft manufacturer dealing with labour relations matters. From her perch above a noisy wing assembly area, Frances gained an appreciation for the opportunities and challenges an employer has in a unionized environment. Frances is certified by the Law Society of Ontario as a Specialist in Labour Law. She has a distinguished rating from Martindale Hubbell and in 2017 was a recipient of a Lexpert award for her contributions to the advancement of women in the legal profession.

In July of 2018 Frances joined the newly formed labour law boutique firm of Rae Christen and Jeffries and continues her practice with her colleagues at that firm.

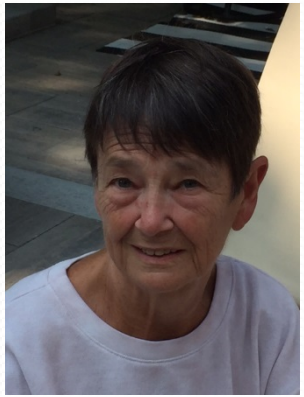


Terry Copes, Executive Director at Sudbury Community Legal Services

Terry Copes has a BA in History from Simon Fraser University and an LLB from the University of Toronto. He was called to the bar in 1984 and spent the first two years of his career at the Kenora Community Legal Clinic before joining the Sudbury Community Legal Clinic as a staff lawyer and as Executive Director since 2011. Over the years he has handled social assistance, housing, and WCB cases as well as developing a particular expertise in CPP matters. Currently he is a member of the Provincial Clinics' Workers' Compensation Network and is the past Chair of the Canada Pension Plan Advocacy Group Ontario (CPAGO) which no longer is active. He is presently the Chair of the Northern Clinics WCB/CPP study group. He is also a member of the CPPD Client and Stakeholder Roundtable.

He has represented clients at Administrative Tribunals and in the courts, including Divisional Court, the Ontario Court of Appeal and the Supreme Court of Canada.

Fawn Currey, Consultant



Fawn has more than 30 years experience as a labour relations consultant and human resource manager for a variety of not-for-profit groups, and professional associations in the greater public sector. She worked for the Ontario government's Data Research Unit as a senior researcher with a focus on Employment Equity and Workforce Planning. She was also responsible for collective bargaining and grievance arbitration for The York Faculty Association.

Unionization at Legal Clinics

Association of Community Legal Clinics of Ontario

Frances R. Gallop

September 12, 2018

Rae Christen Jeffries LLP
MANAGEMENT LABOUR & EMPLOYMENT LAW

TRENDS/THEMES/CHALLENGES

- Interest in unionization in legal clinic sector
- Delivering quality services to clients with limited resources and respecting employee interests and aspirations

Agenda

1. Process towards unionization under the Labour Relations Act
2. Key decisions a clinic will need to make in responding to application for certification
3. Voluntary recognition agreements: key points to consider regarding lawyers and paralegals
4. After clinic is unionized what are the rules and what you can expect in relation to bargaining

Basic Process Under Labour Relations Act:

- **Certification:**
  1. Employee interest in being unionized
  2. Employees sign membership cards
  3. Possible application to OLRB for production of employee list
  4. Application for certification
  5. Vote
  6. Majority of votes determine outcome. If majority vote for union, OLRB issues a certificate

- **Voluntary Recognition:**
  - Employer may voluntarily agree to recognize union on certain agreed terms and conditions

Voluntary Recognition Agreement – Lawyers and Paralegals

- Key points to consider

Some Key Decisions:

- Bargaining union description – who’s in/out
- Can/should lawyers and paralegals be included?
- Communications to employees

Life After Certification or Voluntary Recognition

What changes?

- Statutory freeze is in effect
- “Just cause” protection in force

Life After Certification or Voluntary Recognition

- As of January 1, 2018, Bill 148 extended “just cause protection” to unionized employees from the date a union is certified as bargaining agent until a first collective agreement is entered into

- Fetters an employer’s ability to discipline and fire: discipline and discharge must meet “just cause” standard

Preparing for Bargaining

- Roles of management and Board
- Select bargaining team and determine roles
- Gather information:
  - FOR EXAMPLE:
    - Consult with managers on their needs and challenges
    - Obtain and review other collective agreements in sector
    - Obtain and review other settlements for comparable employers or unions in geographic area

continued…

Preparing for Bargaining, *Continued*

- Consider what are issues of concern and demands likely to be?
- Identify current compensation for employees and its cost

Roles of Management and Board During Bargaining

1. Management:
   - Represented at table by a bargaining committee
   - Bargains in good faith making every reasonable effort to reach a collective agreement
   - Makes decisions about proposals to make, how to respond to union proposals with bargaining mandate
   - Updates Board on the bargaining process
   - Communicates with employees on bargaining as needed, subject to review of communications with legal counsel

Roles of Management and Board During Bargaining

2. Board:
   - Establishes bargaining mandate
   - Supports management in its effort to negotiate collective agreement while ensuring delivery of services in line with mission statement

Negotiating a Collective Agreement

- Notice to bargain
- Union or employer can request “educational support” on labour relations and bargaining from the Ministry of Labour (first contract)
- Union usually requests extensive information
- Bargaining typically involves a number of meetings and extends over a number of months

Key Responsibilities While Agreement Negotiated

- Statutory freeze continues
- Union and employer have a duty to bargain in good faith and make every reasonable effort to enter into a collective agreement

Resolving an Impasse During Negotiations

Can’t reach an agreement?

- Either party can request that a conciliation officer be appointed at anytime in the collective bargaining process
- A conciliation officer will generally act as a neutral third party and assist the union and the employer in attempt to resolve issues
- During conciliation, either party can request a “no board” report
- No board report starts clock ticking to strike/lock-out deadline – but special rules apply for first contract

Resolving an Impasse During Negotiations

Strikes and Lock-Outs

- Where the collective agreement has expired, a strike or lock-out may occur on the 17th day after “no board” report is mailed (*e.g.* – No board issued May 1; strike can occur on May 18)
- Union strike secret ballot vote must have been held with more than 50% in favour of strike
- Special Provisions Apply for First Contract Negotiations

Resolving an Impasse During Negotiations

Strikes and Lock-Outs

- Duty to bargain in good faith continues
- Expanded “just cause” protection also applies to employees who are in a lawful strike or lock-out position until the date on which a renewal collective agreement is entered into

Resolving an Impasse During Negotiations

First Agreement Mediation

- Under Bill 148, either party can seek to have a mediator appointed anytime after issuance of the conciliator's report or a no board report.
- Mediator meets with the parties to facilitate negotiation of agreement.
- For 45 days after the mediator is appointed, no strike/lock-out can take place.
- At anytime on or after 45th day after mediator appointed, either party can apply for First Collective Agreement mediation-arbitration

Resolving an Impasse During Negotiations

First Agreement Mediation-Arbitration

Within 30 days of receiving an application for mediation-arbitration, the Labour Board has to decide to:

a) Order further mediation;

b) Dismiss the application;

c) Direct settlement of First Agreement by mediation-arbitration.

Resolving an Impasse During Negotiations

First Agreement Mediation-Arbitration

- Fees and costs of mediator shared between employer/union
- Strikes and lock-outs are prohibited for the duration of first collective agreement mediation-arbitration
- If a strike or lock-out was ongoing at the time of the application for mediation-arbitration, the parties must end the strike or lock-out once the Board directs the parties to proceed to mediation-arbitration.
- The terms and conditions of employment for employees cannot be altered during the first collective mediation-arbitration process

Roles of Management and Board in Relation to Strikes and Lock-Outs

Management:

- Informs Board of date parties will be in legal strike/lock-out position (once known)
- Consults with Board if lock-out contemplated
- Prepares and implements strike preparation plan to address client service if labour disruption occurs

Board:

- If strike or lock-out is contemplated Board would be apprised of situation and consult with management

Key Responsibilities When a Deal is Reached

Management:

- Signs Memorandum of Settlement with union outlining tentative agreement terms
- Agrees in Memorandum to recommend ratification to its principal

Board:

- Ratifies tentative collective agreement

Managing with a Collective Agreement

- Management will retain broad **management rights**, except as bargained away or limited by legislation

- “Work now, grieve later”

Using Legal Counsel Effectively

When should you call legal counsel?

- During statutory freeze:
  - Before making significant changes in the workplace, and;
  - Before disciplining/discharging employees.
- Reviewing collective agreement language – especially in first contract
- Before agreeing to significant amendments during bargaining
- Before issuing severe discipline (i.e. termination or a lengthy suspension)
- Before unilaterally imposing a significant workplace policy
- Before communicating with employees about bargaining
- If you are encountering difficulties in the bargaining process

Questions?

Contact

Frances R. Gallop
frances@rcjlaw.ca
416.430.0031

70 University Avenue,
Suite 320, Toronto, ON
M5J 2M4 Canada
416-630-4737 **T**
416-595-7321 **F**
www.rcjlaw.ca

Steps in Collective Bargaining

1. Steps to Unionization - 1st contract – 2 ways (to fight or accept), but both controlled by OLRB

A) Union Drive with Cards

- Workers contact the union and meet with a union organizer.
- Workers sign cards applying for membership in the union, and authorizing the union to represent them in negotiations.
- If at least 40 per cent of the workers sign membership cards, the Ontario Labour Relations Board will hold a vote to see if workers want a union.
- The OLRB holds a secret ballot vote. Anyone who is in the bargaining unit the union applied to represent can vote. If the majority (50%+1) of workers who cast ballots vote to unionize, the union is certified.
- The union will serve notice to the employer to begin bargaining a first contract.

B) Voluntary Recognition - Employer agrees that a trade union may represent its employees without requiring the trade union to become certified. A Typical AGREEMENT for VOLUNTARY RECOGNITION under the auspices of the ONTARIO LABOUR RELATIONS ACT would include:

- The EMPLOYER agrees to **recognize** the UNION as the Exclusive Bargaining Agent of its Employees in the Bargaining Unit(s) described as follows:
- Describes who's in and who's out and
- Outlines exceptions (usually managers)

Such an agreement under the OLRB requires the parties to bargain collectively - a mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. So, under the law, the employer must bargain with the Union — **and processing grievances is a form of bargaining — when unresolved issues regarding wages, hours and conditions of employment arise.**

2. Both Parties Meet with their Principals

a) **To choose bargaining teams**
On the labor Union side, the negotiations team generally comprises an OPSEU staff rep plus and employees elected from the bargaining unit. The role of the staff rep is to ensure the union is participating in negotiations and agreeing to terms to which OPSEU can agree, while the role of elected employees is to represent the interests of all BU members.
On the Employer side, the negotiations team may include a Bd. Member, ED, Lawyer, labour relations person.

b) **To get a mandate.** OPSEU reps will typically allow union members to set priorities whether through voting or through an open meeting.

c) **To prepare positions**: Review the existing CA and any grievances to determine which parts of it are working and where there is room for improvement
d) **Costing**
e) **Comparisons** with like units

3. Information Exchange Prior to First Meeting

- Emails to determine time, place, & date of 1st meeting
- **Disclosure** = audited statements, names addresses of employees plus seniority dates and wage scales
- Identify those on each side who will be at the table

4. Issues to be bargained - You won't necessarily bargain over every term of the employment contract in each session, unless you are bargaining a 1st agreement.

Central issues for the Union typically include:

- Improving wages, hours, layoff procedures, and key benefits such as health insurance. If there is already a collective bargaining agreement in place, there may be other issues on the table that arose as a result of the implementation of that agreement and need to be adjusted.
- Because bargaining for wage increases is limited to LAO funding, usually great attention to time off – stat days, vacations, sick days, leaves, birthdays, especially since many clinic workers are rather senior they value time off work, and more of a desire to balance work and private life.
- **Seniority** – defined and used for layoffs, bumping, holidays, promotions
- More **autonomy** as they are highly educated folks so they look to include job descriptions, policies and procedures, E & E committees and board committees
- Desire to include statutes and laws in CA which Employer must follow but when they are in the CA they become grievable – e.g. (H & S, HR Code, Accommodation etc.)

Central issues for the Employer typically include:

- **Maintain Mgt. Rights and Board Prerogatives around policies and procedures**
- Deliver quality client service - ***shared** by employees also
- Fiscal responsibility
- Employer must conform with laws/statutes, funders, culture and type of business or mission statement
- To recruit, hire, and maintain qualified staff

5. 1st Meeting

- Introductions
- Ground rules – respectful language, start & end times, who talks
- Union goes 1st providing rationale for positions & Mgt. listens, asks questions of clarification
- **With or without prejudice**
- Confidentiality at least until there is a tenetative agreement as **both have mandates from their principals**
- Caucus
- Mgt. may be ready with some positions or may respond at next meeting
- Summarize where things stand at the end of the meeting
- Next meeting
- Notetakers on each side to compare notes

6. Successive Rounds of Bargaining

- **Do your research** as the party with more information usually has more leverage.
- Don't begin negotiations with your bottom line – make sure each offer you make leaves you room to continue to negotiate if it is refused by the other side.
- Start the negotiations with quick agreements to set the stage for more agreements.
- Compare options and proposed alternatives. Depending on the issue at hand, each side likely has several scenarios it would find acceptable. Search for common ground and weed out issues upon which there is basic agreement first. That way you have more time (and energy) to devote to issues that might be more contentious.
- **Prioritize** since some positions are more important than others. When you negotiate, you need to know what your top priorities and how other priorities rank below that.
- Bargain with an eye toward **compromise** since the legal framework requires the union and the employer to meet at reasonable times and bargain in good faith, which means the parties must fairly assess each others' proposals and attempt to work towards a compromise.
- Evaluate how the proposals can be implemented in a way that is most mutually beneficial.
- Separate the people from the issues (that is, remove the emotion from the equation), look beyond the negotiating parties to see who or what is the real interest or influence affecting each party, generate options to create a problem-solving environment, and neutralize conflict by sticking to objective and easy-to-justify principles of fairness.
- Use facts, not feelings.
- **Question rather than demand**. If the other party is taking a hard line on certain issues, ask why. Questions open up the discussion; arguments often close communication down.

- Watch the **behavior and body language** of the other side's representatives.
- Keep in mind that the parties area not legally required to make unappealing concessions, or to agree to something that would be disastrous to implement. If an agreement, an impasse can be declared and the situation turned over to a **Conciliation Officer** at the Ministry of Labour for help. The parties must use, the government's conciliation services before they can get into a position to engage in a strike or lock-out.
- If the parties have not reached a settlement in the conciliation stage, the ministry continues to offer the services of a mediator who will confer with the parties and endeavour to affect a collective agreement. This is referred to as the **mediation stage**, a process by which a third-party attempt to help a trade union and an employer in reaching a collective agreement. Since mediation is discretionary, the service is only used if both parties agree to it.

Reaching the Final Agreement

- **Create a tentative/draft agreement.** The draft agreement reflects the outcome of prior rounds of bargaining sessions and is not legally binding. However, it is best to agree that both parties will unanimously agree to recommend the draft too their principals for approval.
- **Circulate the draft agreement to principals** who will have the opportunity either to accept or reject it.
- **Draft the final agreement**. The final agreement should encompass all the compromises that have been reached and as outlined in the tentative agreement and in clausal language.
- **Final agreement to be circulated** among employees
- **Final agreement to be ratified** by a majority of the union members and the Board of Directors before it becomes official.
- **Final agreement to be signed** by representatives of both sides

Items Worth Knowing

1. **Statutory Freeze -** The period of time, from the filing of an application for certification and until the right to lock out or to strike is exercised or an arbitration award is handed down, during which the employer cannot change the conditions of employment of employees without the written consent of each union seeking certification or, where such is the case, the certified union. The statutory freeze also generally operates during the period after the expiration of the collective agreement until the right to lock out or to strike is exercised or until an arbitration award is handed down.

2. **Bargaining with Prejudice or without prejudice**
   a) **With Prejudice** - A bargaining process where the parties sign-off, or sign agreement, on the proposal, including draft language, at the time that the individual proposal is being considered. Neither side can then go back or renege on the agreed-upon proposals.
   b) **Bargaining Without Prejudice** - A bargaining process where nothing is formally agreed to, or signed off, until all proposals have been considered and either agreed to as a package, or withdrawn, even though the parties may agree in principle to proposals as the negotiation proceeds. Nothing is signed off until the end of the negotiations.

3. **Mandatory Clauses**
   - Every collective agreement shall be deemed to provide that the trade union that is a party thereto is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein.
   - Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.
   - Every collective agreement shall be deemed to provide that there will be no strikes or lock-outs so long as the agreement continues to operate.
   - Deduction and remittance of union dues

4. **Duty of Reasonableness -** Few questions have been subjected to more attention than the extent of management's duty to act fairly or reasonably. Although the authority of arbitrators in this area remains largely unsettled, **some common** themes run through most recent decisions:
   - if a provision of a collective agreement specifically requires reasonableness, any decision made under that provision must be reasonable. However, there is not a generally implied duty to act reasonably.
   - Arbitrators are entitled to review management's decisions to ensure they were based on **bona fide business reasons** and only on bona fide business reasons. Management must therefore act honestly and in good faith and avoid arbitrariness and caprice.
   - A consensus seems to be forming around the proposition that **when a decision conflicts with another right under the collective agreement, the employer has a duty of**

reasonableness. For example, if a collective agreement requires that overtime be spread evenly around all members of the bargaining unit capable of doing the work, management must be reasonable in judging the ability of employees to do the work.

- The duty of reasonableness is clearer when **disciplinary matters are involved**. In such cases, arbitrators are more likely to find a duty of reasonableness implied in the collective agreement.

Note: Generally, there is no real distinction made between reasonable and fair in the arbitration context, but there is a difference between the terms in everyday usage. **Reasonable** is generally defined in most dictionaries as 'having sound judgment, not absurd, not greatly less or more than might be expected.' So, reasonableness, seems to involve questions of judgment and, therefore, decision making and the quality of decisions. **Fair**, on the other hand, is often defined as 'just, unbiased, or equitable'. So, fairness seems to have more to do with treating one employee as other employees are treated—in other words, without discrimination.

5. Duty to Disclose Information – Because employers have access to more information they are required to disclose:

- **Financial data** (audited statements). When the Employer claims that financial problems prohibit it from granting a requested wage increase, the union has the right to request and review documents that support the company's claims.
- to supply the union with current employee **salary and benefit data** so the union can base its demands on accurate information.
- Names and addresses of employees, and seniority with start dates

Recently, unions have adopted a pre-bargaining strategy of initiating broad requests for information from social services employers. Requests received to date have related to such things as:

- full financial disclosure with respect to the employer's entire operations (presumably including operations outside the bargaining unit), including Ministerial letters;
- identification of all initiatives currently undertaken or to be undertaken, including ones which may not impact bargaining unit members at all or may not have a "significant" impact on them;
- specific disclosure of provincial government initiatives and all related documentation, correspondence and submissions to Ministries, whether such initiatives are being "seriously contemplated" or not;
- a **complete organization chart listing all positions**, including those outside the bargaining unit; and
- census and financial information relating to benefits for all eligible members.

Requests have further included demands which would require some employers to prepare additional documentation that is not readily accessible and which may not be relevant to issues on the bargaining table. **A union's right to receive information from employers is not absolute**. It will depend upon the particular circumstances of the request, including such factors as the content of the bargaining proposals, the stage of negotiations, collective agreement obligations, and the relationship between the parties.

Where Does Power Come From?

There are two clauses in contracts that are **basically general in nature**. One is the "Management Rights" clause, which states some of the general rights that management has. The other is the “Recognition" clause, which states the rights of the Union and the obligation of management to deal with the Union.

1. MANAGEMENT RIGHTS – SAMPLE CLAUSE

Except as expressly abridged by this agreement, the Board shall continue to have the right to take any action it deems appropriate in the management of the Clinic and the direction of its employees. Without limiting the generality of the above, these rights include, but are not limited, to the right to hire, direct, promote, demote, transfer, layoff or re-call, discharge, reprimand, suspend or otherwise discipline employees for just cause: to determine the requirements of a job and the standards of the work to be performed: to expand, reduce, alter, combine, transfer or cease any job activity in the office: to determine the size and composition of the work force: to make or change any rules, policies or practices with respect to employment: to maintain order and efficiency and otherwise generally manage the Clinic, direct the work force and establish terms and conditions of employment.

2. THE RECOGNITION CLAUSE

The OLRA grants union power in the form of the “Recognition” clause, which states the **rights of the Union and the obligation of management to deal with the Union**, meaning that the employer recognizes the Union as **the sole and exclusive** bargaining agent, for the purpose of establishing wages, hours and conditions of employment. Most often the Recognition clause is at the beginning of the contract and reads something like this: The employer recognizes the Union as the sole and exclusive bargaining agent, for the purpose of establishing wages, hours and conditions of employment. The reason this kind of language is so common is that the Recognition clause is just repeating what the OLRA says. For the purposes of the Act, to bargain collectively is the performance of the **mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment**. So even if management has a specific right given to them in the Management Rights clause, they still may have to bargain over how using that right affects workers.

Note: There is no union contract written that covers every possible situation that can occur during the life of a CA, and complaints often arise from employees that the employer has made a unilateral change to the original terms and conditions of employment, specifically in this example, in the form of a sudden decision to alter starting times to better serve their clients while relying on their **Management Rights clause** which highlights their right to direct the work force and establish terms and conditions of employment. In response, the shop steward replies with a threat to file a grievance **under the union recognition clause**, believing that the processing of Grievances is a Form of Bargaining and that the employer must bargain with the Union when unresolved issues regarding wages, hours and conditions of employment arise.

Evaluation

We would appreciate your feedback!
A very brief survey will pop up on your screen.