

## Bargaining to Promote Safety and Health

Many trade unionists are not aware that they can negotiate with management over safety and health issues and reach collective bargaining agreements that require management to maintain specific safety and health conditions and policies.

If used skillfully, bargaining for safety and health can produce important contract language and furnish the union with substantial leverage over day-to-day working conditions. In addition, the union can use safety and health issues to require that management provide the union with information that is not otherwise accessible while a contract is in force.

### Why do unions need to bargain for safety and health?

Safety and health conditions are like wages – the law requires employers to pay their workers at least the minimum wage, but minimum wages won't pay the rent, so unions negotiate for better pay.

Unions can treat safety and health conditions the same way, because official safety and health standards are *minimum* standards that employers must meet. The minimum legal protection is seldom the best protection; frequently, the minimum is completely inadequate.

The union might decide that wages or job security take precedence over safety and health issues, but the union should at least consider the option of negotiating for better safety and health conditions.

- Many safety and health laws and regulations are inadequate because they are based on research that is 30 years (or more) old – new information shows that the hazard is worse than

had been known, but the standard hasn't been updated.

- Other legal minimums don't provide adequate protection because they are based on cost-benefit analysis or political compromise, not science.
- Many hazards, such as diesel fumes, are not covered by any OSHA standard, even though diesel fumes are considered to be a "likely human carcinogen."

For most unionized workers, safety and health is a "mandatory subject of bargaining." Their unions have the right to bargain for higher safety and health standards and for anything else that contributes to better safety and health conditions. And safety and health covers a lot of territory – it includes stress, and all the things that cause it, such as staffing levels, line speed and mandatory overtime.

Collective bargaining for safety and health is important for all workers, but it is especially important for employees of state and local government agencies in 25 states and the District of Columbia. That is because public-sector workers in those places are not covered by OSHA regulations (see page 5 of this factsheet for a list of states where public-sector workers are not covered by OSHA).

In those states, the safety and health regulations for government employees are completely up to the state or local government. Some of those states have a legal framework of safety and health protection for public-sector workers, but many of them have "protections" that are completely inadequate or nonexistent.

In New York State, OSHA regulations apply to public-sector workers. They are enforced by the Public Employee Safety and Health Bureau (PESH) of the New York State Labor Department.

### What strategies can a union use to successfully bargain for safety and health?

It is important to remember that negotiating for a contract is only one part of collective bargaining. When a contract is in force, an employer does not have the right to make a unilateral change in any of the "conditions of employment" of unionized workers. If an employer attempts to make any change that has an impact on any condition of employment (including safety and health conditions), the union can demand that the employer bargain the change first.

Such bargaining, which is mandatory if the union requests it, is referred to as "impact bargaining." Employers cannot legally refuse to participate in impact bargaining; if the union and the employer do not come to an agreement about a change that has an impact on conditions of employment, it is an illegal "unfair labor practice" for the employer to put the change into effect.

In addition to using its authority to demand an employer engage in impact bargaining, unions can practice a broader form of "continuous bargaining." Unlike impact bargaining, continuous bargaining is not based on a specific legal authority. Rather, continuous bargaining is a strategy that unions can use on behalf of safety and health and any other aspect of relations with management.

For a union to engage in continuous bargaining, it needs to view every labor-management interaction as an opportunity to reinforce the union's collective bargaining role.

For example, a union can treat a labor-management safety and health committee meeting as being an extension of contract

negotiations; the difference is that during contract negotiations the bargaining is over the text of the contract, and during a safety and health committee meeting the bargaining is over how the contract will be enforced.

No union would go into contract negotiations without first collecting information, agreeing on goals and strategies, and preparing a plan of action for the meeting. Similarly, a union that is conducting continuous bargaining will prepare for any meeting with management in a similar way, by gathering information and deciding on a plan of action to reach a designated goal.

For a union to engage in continuous bargaining, its leaders and members need to devote time and energy to prepare for all discussions with management. Before going into contract negotiations, a union needs to decide how it will gather the needed information, formulate its demands and draw up a plan to reach its goals.

On a much smaller scale, a union that practices continuous bargaining will need to devote resources to prepare for any labor-management meeting. Many unions negotiate release time for their officers and members

who are engaged in contract negotiations and preparation for contract negotiations; similarly a union can, and probably should, negotiate release time to prepare for other labor-management meetings.

### **How can union members benefit from bargaining for safety and health?**

A tremendous range of working conditions can have an impact on safety and health, so safety and health-related bargaining and contract provisions can involve almost any aspect of employment.

In the following list and throughout this fact sheet, remember that anything affecting terms and conditions of employment can be simultaneously a subject of contract negotiations, impact bargaining, and continuous, day-to-day bargaining.

- A contract can be used to control hazards that are not regulated, or to control hazards that are covered by regulations that are inadequate. Some OSHA regulations don't cover all industries – for example, OSHA's forklift standard doesn't apply to the construction industry. Even when the regulations are adequate, OSHA lacks the resources to enforce them effectively.
- A contract can require an employer to pay for safety and health activities of the union.
- A contract can require an employer to release employees, with pay, to do safety and health work.
- A contract can give the union the authority to enforce safety and health contract language on the spot, without waiting for an inspector to respond to a complaint. OSHA can take weeks to respond to a complaint and OSHA inspectors can only act on hazards they can observe.

If a hazard is intermittent

(or if it is corrected for as long as an inspector's visit lasts) union members can use their contract to correct it. This power is also important because an employer that is cited by OSHA can, if it contests (challenges) the citation, leave the violation uncorrected until the contest is settled, a process that can take years.

- A contract can set up a procedure for immediate negotiations over any change by management that could affect safety and health.
- A contract can set up a strong labor-management safety and health committee, through which union members can continuously monitor and, if necessary, bargain over conditions that have an effect on safety and health.
- A contract can require management to recognize and work with union-designated safety stewards – union members who monitor safety and health conditions. The contract can authorize the union to designate safety stewards under a “union rights” clause – which requires the employer to provide paid release time for stewards while they are performing their union duties.
- A contract can set up a worksite safety program that gives the union a voice in preventing, identifying and eliminating or reducing hazards.
- A contract can set up procedures to be followed when a safety and health problem arises.
- A contract can establish a schedule for the employer to give the union reports of accidents, illnesses, near misses and hazardous exposures.
- A contract can establish expedited grievance procedures and choice of arbitrators concerning safety and health.
- A contract can provide workers with the right to refuse dangerous work.
- For public-sector workers who are not covered by OSHA, a contract can establish safety and health protections where none exists.

For a useful overview of safety and health provisions in existing contracts, see: “Joint Local Labor-Management Safety and Health Committee Provisions in Private Sector Collective Bargaining Agreements” in the Winter 2000 issue of the U.S. Department of Labor's quarterly magazine *Compensation and Working Conditions*. The magazine is also available in most large libraries.

### **How can safety and health be bargained?**

Most workers in the U.S. are covered by federal labor laws, which give them the right to bargain collectively with their employer about “conditions of employment.” Safety and health issues are “conditions of employment,” which make them a “mandatory subject of bargaining.”

As a mandatory subject of bargaining, safety and health issues are subject to a wide range of union activities. Anything that could have an effect on safety and health, including line speed and staffing levels, is a mandatory subject of bargaining.

- During contract negotiations, the union can make safety and health-related demands. The employer cannot refuse to bargain about them.
- The union can request information from the employer that is relevant to any subject that could be bargained over. The employer cannot refuse to give the union information relevant to anything that could affect safety and health.
- In addition to obtaining information directly from the employer, the union has the right to take whatever steps are necessary to gather information about any mandatory subject of bargaining. For example, the union can call in a consultant or other outside expert to conduct a safety and health inspection of the workplace.
- At any time when a contract is in force, the employer cannot make unilateral changes in working conditions that have an impact on safety and health. If the employer attempts to make such a change, the union may demand that the employer bargain about the change and the employer can't refuse to do so.
- Whenever a mandatory subject of bargaining is involved, the employer must give the union all relevant information on the subject that is requested by the union.
- The union can utilize continuous bargaining techniques in preparation for and during any meeting between representatives of the union and management.

Federal labor laws don't apply to public-sector workers, agricultural workers and domestic workers who work in their employer's home. For them the right to bargain for safety and health is determined by state law. In some states the law gives public-sector workers and agricultural workers the same bargaining rights as those in federal labor law. Other states give those rights to some, but not all, public-sector workers.

In New York State, safety and health is a mandatory subject of bargaining for all workers, including public-sector workers, agricultural workers and domestic workers.

Even those workers who do not have safety and health as a mandatory subject of bargaining can make safety and health demands in contract negotiations, but they cannot take legal action against if their employer refuses to discuss them.

Workers who want to raise safety and health demands even though safety and health is not a mandatory subject of bargaining for them should consider contacting the central labor council or other multi-union coalition in their area, a local committee for occupational safety and health (COSH group), or a national union for information.

If safety and health is a mandatory subject of bargaining in your workplace, the union should make full use of its authority. It should closely examine any new policy or program that could affect safety and health, directly or indirectly. If the new policy could affect safety and health, the union has the option of bargaining over it or requesting information about the change from the employer.

Unions need to be particularly alert to employer safety and health incentive programs, many of which have the effect of discouraging the reporting of accidents and injuries. A program that rewards employees who report few accidents or injuries, or penalizes workers because they report accidents or injuries, will probably do nothing to enhance safety, and will almost certainly have the opposite effect.

### **Places where public-sector workers are not covered by OSHA standards**

Alabama, Arkansas, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia and Wisconsin\*

\* Public-sector workers in Wisconsin are covered by state regulations that are very similar to OSHA regulations, but Wisconsin is not under a legal obligation to adopt OSHA regulations.

## Adding a “general duty clause” to your contract

No document can enumerate or anticipate every possible situation, so it is a good idea to include a general statement that will cover anything that is not dealt with specifically. That is why the Occupational Safety and Health Act of 1970 contains the so-called “general duty clause”:

*Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.*

A contract can also include a general duty clause, like:

*The Company shall make every effort to ensure the safety and health of its employees. It is the responsibility of the Company to comply with all safety and health laws and regulations and to provide all employees with work that is free from hazards that cause or are likely to cause death or serious physical harm.*

Although some employers like to emphasize “shared responsibility” for safety and health (it is one of the only areas for which employers are willing to “share” responsibility), the legal responsibility for safety and health belongs to the employer. Unions should never agree to language that makes the union or its members responsible for safety and health conditions.

## Reporting unsafe or unhealthful conditions

It is useful for a contract to specify how workers should notify management about unsafe or unhealthful conditions. Many contracts set up a multi-step complaint system, while specifying that it is not the exclusive method of filing complaints.

In one such system, complaints are initially filed in writing with the appropriate supervisor by the union or an employee. Management is required to acknowledge receipt of a complaint immediately and follow up with a written response within one working day.

If management rejects a complaint or responds in a way that the union does not accept, the union or employee can appeal to a high-level manager, who must acknowledge the complaint immediately and respond within one working day.

If the union does not agree with the manager’s response, the union may file a grievance. The union should have the right to grieve a safety and health issue or file a complaint with a government agency without first going through the written complaint process.

Written complaints and responses to them will be useful if the hazardous condition is unresolved. It is always wise for a worker and the union to keep copies of any written communications with management.

## Your right to refuse unsafe or unhealthful work

A clause about refusing unsafe work with no loss of pay is important, because the law does very little to protect workers from firing or discipline for refusing to do a dangerous job.

For example:

*No employee shall be required to perform work that he/she reasonably believes involves a substantial probability that serious physical harm may occur. Employees who exercise this right of refusal shall be assigned to other work. The employee shall accept such assignment either at the rate of the job from which he/she was relieved or the rate of the job to which he/she is assigned, whichever is higher. If an employee exercises the right of refusal, the employer shall not assign another employee to the task without first informing the employee to be assigned and the union that the work has been refused under the terms of the contract.*

*The employer shall not discipline or otherwise discriminate against any employee because the employee has exercised any right established by this contract.*

A contract that protects an employee who refuses to perform a task because of a “reasonable belief” that the task may cause serious bodily harm gives more protection than existing laws and regulations.

## Preparing for bargaining

Winning safety and health demands is no different than the fight for higher wages. The most important part of any bargaining does not take place at the bargaining table. Successful bargaining depends on involving the whole membership in establishing priorities and showing strong support for them. Without the support of the membership, it’s very hard to win anything at the table.

When preparing for bargaining, examine the safety and health provisions, if any, in the current contract. Has it worked well? Do parts of it need to be strengthened? If your contract does not include any safety and health language, what are the most pressing safety and health issues you face?

You can also review safety and health language in a model contract or in other unions’ contracts.

An excellent resource for safety and health contract language is *Collective Bargaining for Health and Safety: A Handbook for Unions* by the Labor Occupational Health Program, Center for Occupational and Environmental Health, University of California, Berkeley. Single copies are available for \$20 from LOHP, 2223 Fulton St., Berkeley, CA 94720. For more information contact LOHP at that address or telephone 510-642-5507; e-mail: [info@lohp.org](mailto:info@lohp.org); website: [www.lohp.org](http://www.lohp.org)

Two additional sources of safety and health contract language:

- “Joint Local Labor-management Safety and Health Committee Provisions in Private Sector Collective Bargaining Agreements” in the Winter 2000 issue of the U.S. Department of Labor’s quarterly *Compensation and Working Conditions*
- Model Health and Safety Contract Language, Canadian Auto Workers

Identify safety and health concerns, with specific examples. Management is required to give the union information it needs to prepare for bargaining, including information on the following subjects:

- complaints to supervision or management
- grievances related to safety and health (both successful and unsuccessful)
- surveys of workers regarding safety and health concerns
- records of injuries and illnesses (Workers who are covered by OSHA have a right to copies of the employer’s OSHA-300 log of injuries and illnesses or, in states where the OSHA law is enforced by a state agency, the state’s equivalent form. In New York State, it is a DOSH-900 log for public-sector workplaces.)
- records of workers’ compensation cases
- records of disciplinary action taken against workers for raising safety and health issues
  
- records of any reasonable accommodation resulting from an Americans with Disabilities Act or state disability claim and records of any light-duty assignment and the disability that prompted the assignment
- Government agencies also have information relevant to your employer’s safety and health record, most of which must be disclosed on request.
  
- workers’ compensation board case records
- OSHA and state safety and health agencies (copies of complaints and inspection reports)
- other state and local agencies, such as the health department and the fire department (copies of complaints and inspection reports)

Discuss your safety and health experience. Examine the union’s records, including records of complaints and grievances. Identify specific examples of problems with the existing

Discuss your safety and health experience. Examine the union's records, including records of complaints and grievances. Identify specific examples of problems with the existing contract. Determine which of these problems could be corrected by means of improved contract language.

### **Union access to safety and health information**

Asking for information is a useful way to force management to respond to members' concerns about safety and health issues. By law, unions are entitled to safety and health information such as the following:

- Information necessary for negotiating and servicing labor contracts, through the National Labor Relations Act or state law.
- Information specified by the OSHA regulations and other laws and regulations.
- Any information that OSHA has about the employer, including inspection narratives, settlement agreements and citations. To obtain all relevant OSHA records, make three separate Freedom of Information Act requests: one to OSHA headquarters in Washington, one to the Regional OSHA office with jurisdiction over your location, and one to your local (Area) OSHA office.

If you are in a State Plan state, make the request to the Area office under your state's freedom of information law. Specify in each request that you are making similar requests to the other two affected offices, so each request is only for records in the office that receives it.

A summary of OSHA inspection information is available on the OSHA website, but the records that can be obtained under the Freedom of Information Act include much more information.

- For public-sector unions (and the public at large), copies of any of the employer's records that are covered by a Freedom of Information law
- Copies of safety and health studies, or safety-related engineering studies that are conducted by management and that affect bargaining unit members.

In addition to information that is covered by existing laws, contract language can provide additional, significant rights to obtain other safety and health information, such as the right

to immediate notification about accidents or conditions that may affect the safety and health of employees and the right to investigate injuries, near-misses and illness.

A contract can require management to provide the union with information about the safety and health effects of any new process before it is instituted. It can require management to give the union an opportunity to inspect any new machinery before it is installed.

### **Contractual joint labor-management safety and health committees**

A contract can require the creation of a joint labor-management safety and health committee, which brings together the people affected by safety and health conditions and their union representatives with the people who have the responsibility for insuring safe and healthful working conditions. Labor-management safety and health committees create an opportunity for the union to bargain continuously over safety and health issues and for frontline managers and workers to resolve safety and health issues at the level where they arise.

A union needs its own safety committee to set its safety and health agenda and strategy. A joint committee is not a substitute for a union safety committee, because the union and management will have sharp disagreements over some safety issues. When there is a basis for discussion, it's fine to work with management, but it is vital for union members to have a forum for addressing safety and health issues that management will not consider. If you decide to establish a joint labor management safety and health committee, it is important to get contract language that provides time for the union members of the committee to caucus.

The union and management can benefit from the work of a joint labor-management safety and health committee, because such a committee has the potential to both protect union members by reducing the number of workplace injuries and illnesses and reduce the expenses that the employer incurs when a worker is hurt or sick.

A contract that sets up a joint labor-management safety and health committee should specify:

- The number of committee members, half of them from the union and elected by the union members.
- The duties and responsibilities of the committee and the equality of the union and management in the leadership of the committee, which should have co-chairs from union and management or a chair that rotates between union and management. The committee's minutes should require the approval of both the union and management.
- The pay status of committee members when they are performing committee business. Union members of the committee should be paid for the time they spend on committee business, including both time in committee meetings, time to prepare for meetings, including time to caucus with the union members of the committee, and time to perform other duties of committee members.
- The information that members of the committee will have access to, including injury and illness data.
- The amount and subjects of training that committee members will receive, and management's responsibility to pay for it.
- Unrestricted access to the plant to investigate reports of accidents, injuries, illnesses, near misses and hazardous conditions.

Labor-management committee members should be able to devote time to committee work outside of committee meetings.

Management representatives on the committee will spend time investigating and analyzing safety and health issues for management before and after committee meetings; union representatives on the committee must have the right to devote paid time to such activities on behalf of the union.

This provides the union members of the committee with a full opportunity to discuss safety and health issues and to set their own priorities for resolving them, prior to their discussions with management.

Management is likely to attempt to restrict all safety and health issues to the labor-management committee process. With a contract clause stating that the joint labor-management committee is not the union's "exclusive forum" for dealing with safety and health issues, the union will keep the option of using the forum of its choice, including the grievance mechanism and OSHA complaints.

### **What about safety & health problems that can't be settled cooperatively?**

Workers and management don't always agree on how to resolve a safety and health problem. A contractual method of resolving disputes is needed, such as the grievance and arbitration procedure, which has the advantage of familiarity and the potential for speedy resolution, but can have some disadvantages.

- Grievances can take a long time to resolve. Safety and health issues can be matters of life and death. They should take priority over other grievances.
- "Labor relations" staff – who are more familiar with disciplinary matters and contract interpretation than with occupational safety and health – may not be competent for dealing with these issues.
- Arbitrators may also lack any safety and health expertise.

Unions may want to establish an expedited grievance procedure with strict deadlines for safety and health issues. The contract can also provide that safety and health matters will be arbitrated by members of a special panel, consisting of safety and health experts.

If a contract establishes the right to grieve a safety and health issue, it should not restrict the union from using other ways of resolving differences, such as complaining to OSHA, making use of safety stewards or labor-management safety and health committees. No contract can waive members' legal rights, such as the right to file an OSHA complaint.

### **Hazardous-duty pay**

If a job is inherently hazardous, it is preferable to compensate workers in those jobs by means of their overall pay scale, than it is to pay them more for working under unusually unsafe conditions. Unions can use the process of negotiating over hazardous duty to eliminate or control the hazards, rather than obtaining premium pay for members who are put



unsafe conditions. Unions can use the process of negotiating over hazardous duty to eliminate or control the hazards, rather than obtaining premium pay for members who are put at undue risk.

Some contracts require premium pay for workers when they perform certain hazardous or unpleasant tasks. A hazardous-duty pay clause can be abused by an employer who chooses to pay a small premium rather than to spend enough to eliminate hazardous conditions and make the job safe.

Hazardous-duty pay should be paid only under specific, agreed-upon conditions. A contract can require the employer to take specific steps to correct any condition that results in hazardous-duty pay and limit it to work that is unavoidable.

### **Summary: safety and health contract language**

- Safety and health contract language can be used to obtain greater protection than the regulations of OSHA or other government agencies.
- For some public-sector workers, contract language may be their only protection regarding occupational safety and health.
- Contract language can establish a stronger “right to refuse” unsafe work and stronger protection from discrimination for exercising a safety and health right than OSHA or state law.
- In some circumstances, it is easier and quicker to directly enforce safety and health contract language than rely on OSHA or another agency.
- A contract can establish a procedure for reporting – and documenting – safety and health complaints and their disposition.
- Contract language can cover safety and health hazards that are not regulated by OSHA.
- A contract can mandate safety stewards or a joint labor-management safety and health committee.
- Use great care crafting contract language so it will be effective and not subject to misinterpretation.



(212) 227 6440 | [www.nycosh.org](http://www.nycosh.org)