

## CHAPTER 7

# THE COLLECTIVE AGREEMENT

### Preface

In this chapter students will explore collective agreements. In particular, when a union is certified to represent a group of employees in a workplace, the nature of the employment relationship is transformed from an individual employee-to-employer contract to that of a union (representing all members of the bargaining unit)-to-employer legal relationship. Further, this chapter reviews the structure, common terms, concepts and phrasing found in a collective agreement. Employer and union preferences for content and phrasing the agreement are also reviewed in important content areas. The impact of collective agreements on the human resources management function will also be discussed.

### Learning Objectives

- 7.1 Summarize the importance of collective agreements.
- 7.2 Describe the legal nature of a collective agreement between the “actors” in the labour relations system.
- 7.3 Identify the mandatory collective agreement terms required by legislation.
- 7.4 Outline the voluntary terms commonly included in a collective agreement.
- 7.5 Understand language prohibited in collective agreements.

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#### **I. The Collective Agreement**

One of the first tasks of a newly certified union bargaining unit is to engage in negotiating a **collective agreement** with the employer. Thereafter, a collective agreement is negotiated from time to time between the union and employer. Language in this document changes based on external circumstances, internal business changes and the shifting perspectives of both groups. Government sets rules related to mandatory language and prohibited content in these agreements. Government is also a key player in helping to resolve disagreements between union and management in the interpretation, application and administration of the collective agreement.

**Collective agreement** is a formal agreement between an employer and the union representing a group of employees regarding terms and conditions of employment.

The collective agreement is critically important to the employer, the union, employees, and the public. The employer's control over the workplace and profitability will be affected by its contents. Wage and benefit provisions affect the employer's total compensation costs. Seniority provisions may impose constraints on layoffs and promotions. The grievance and arbitration process could lead to the review and reversal of management decisions such as the termination of an employee. The union's rights to continue to represent employees and its influence are affected by the contents of the agreement. The union is protected from a raid by another union or a decertification application by employees for most of the term of a collective agreement. Union security provisions in the contract, which may require membership in the bargaining unit and the payment of dues by employees, are vital. In addition, provisions that might limit contracting out or technological change can affect the employees' job security. A collective agreement might also impact residents by affecting the cost and availability of public services. For example, collective agreements in education might contain restrictions on student–teacher ratios, affecting the quality of education.

Collective agreements are not confidential documents: most jurisdictions require a copy to be filed with the government ministry responsible for labour issues. Many government ministries and unions make collective agreements available on their websites. Employment and Social Development Canada provides collective agreements in an e-database called Negotech.

### **Legal Requirements for Collective Agreements**

Collective agreements must comply with employment standards, human rights and labour relations legislation in the employer's jurisdiction(s). Some agreements repeat content from such legislation, but if not, it is still assumed that a collective agreement cannot contract out of statutory guarantees. For example, a wage schedule in the collective agreement cannot set a wage rate for a union job class at a level less than the minimum wage rate prescribed in employment standards law in the jurisdiction(s).

Legal frameworks for labour relations in Canada are divided between federal, including Northwest Territories, Nunavut, and Yukon, and provincial jurisdictions with 10 percent of employers being regulated by federal labour laws and 90 percent of employers covered by provincial legislation. Provincially regulated employers, operating in more than one province, must understand and comply with the provincial labour laws in each separate jurisdiction where an organization's operations are located.

Union and management rights and obligations are established throughout the collective agreement. When representatives of either group view the actions of the other party as being contrary to terms set out in the agreement, they are required to pursue a described grievance and arbitration process to resolve the disagreement. If the disagreement is between an individual union member and their supervisor, the dispute is addressed by the union representing the employee. In the majority of cases, the ownership, or the decision to proceed with a grievance, is decided by the union.<sup>1</sup>

The structure of a collective agreement is generally left to negotiating teams for union and management. If you looked at five different collective agreements between unions and

employers, for example, in the manufacturing sector, the issue of seniority may be located in different page locations of each agreement. This is dependent on the negotiating history between the parties and their preferences. A topic such as seniority or wages is described in an **article** which sets out clauses on that subject in the collective agreement. Articles may be as short as two or three sentences or involve several paragraphs, even pages, in the agreement depending on the complexity of the topic area. The content of a collective agreement may be considered in terms of mandatory, voluntary and prohibited articles.

**Mandatory Terms** are provisions that must be included in the collective agreement because they are required by law. Labour relations legislation requires the contract to include the following mandatory terms.

### Union Recognition

The union recognition article, which may be referred to as the *scope clause*, is usually found at the beginning of the collective agreement. It states that the employer recognizes the union as the sole bargaining agent for a specified group of employees that make up the bargaining unit. The recognition article will usually describe or limit the bargaining unit in terms of location and jobs. This is important because it will identify the jobs which are in the bargaining unit and covered by the collective agreement, and by implication will indicate which employees are not in the bargaining unit.

When the union is certified, the labour relations board issues a certificate that confirms the jobs included in the bargaining unit. The recognition clause might simply refer to the certificate like, The employer recognizes the union as the exclusive bargaining agent for employees in the bargaining unit described in the Certificate of the Manitoba Labour Relations Board dated January 14, 2018.

Alternately, the bargaining unit may describe the entire municipality as, the organization recognizes the union as the exclusive bargaining agent for all employees working in the municipality of Anytown, save and except foremen, persons above the rank of foreman and office employees. This recognition article that sets out the parameters of the bargaining unit, illustrates a bargaining unit that includes part-time employees.

Further, if the employer moved or established another plant within the municipality, it would be covered by the collective agreement, such as, the organization recognizes the union as the exclusive bargaining agent for all employees in its nursing homes in the province of British Columbia, save and except registered nurses, physiotherapists, forepersons, persons above the rank of foreperson, office staff, persons employed for not more than 24 hours per week and students employed during the school vacation period. In this example, the bargaining unit includes employees located anywhere in the province; however, there are a number of exceptions, including nurses. The employees in the jobs excepted might be included in a separate bargaining unit, represented by the same or a different union, or might not be unionized.

In the third example above, part-time employees are not included. Generally, employers would prefer to have part-time employees and students excluded so that individual contracts of

employment can be established with them. Unions would prefer to have part-time employees included in the bargaining unit or organized in a separate bargaining unit because they are concerned that work might be shifted to these non-union employees. If part-time employees are not unionized, the union would like to see the agreement contain restrictions on work being done by those employees. The employer might also prefer to have each location in a separate bargaining unit so that negotiation for each location could be conducted separately.

When the management and union bargaining teams negotiate their first agreement after the union is certified, they might ask whether the recognition clause can be varied from the bargaining unit set out in the certificate issued by the labour relations board, and whether the parties can agree to change the bargaining unit or amend the recognition clause when they negotiate a renewal of the collective agreement. The short answer to both of these questions is yes. The employer might wish to amend the recognition article so that it excludes a new job classification, or the union might wish to expand the bargaining unit to include employees presently excluded, such as part-time workers. However, there is a restriction on the negotiation of changes to the recognition clause. Neither side can press this issue to an impasse that would cause a strike or lockout. The parties can discuss the recognition clause and agree to a change; however, insisting on a change and taking the issue to a strike or lockout would be a breach of the duty to bargain in good faith.

## II. Grievance and Arbitration Process

**GRIEVANCE DEFINED** At one time a grievance simply referred to a claim that the collective agreement had been violated. Some arbitrators held that because their jurisdiction flowed from the agreement, they did not have jurisdiction in a dispute that involved legislation unless the agreement provided a connection to the legislation. However, the Supreme Court of Canada has held that all employment and human rights statutes are incorporated into collective agreements. Accordingly, a grievance can be filed whenever it is claimed that such legislation has been violated. In view of this development, a grievance should be defined as an allegation that the collective agreement or an employment statute, including human rights legislation, has been violated, together with the remedy that is claimed to rectify the situation.

**GRIEVANCE PROCEDURE** The grievance procedure includes a series of steps, usually three or four, in which union and employer representatives at progressively higher levels meet to try to resolve the dispute. The collective agreement will set out the number of steps in the process and time limits for each. An example of a grievance procedure is provided in Figure 7-3. The procedure article will refer to union stewards and other union officials who represent the union. A steward is an elected local union official who assists employees with issues, including grievances, that arise in the course of administration of the collective agreement. Their duties include explaining collective agreement terms to employees, preparing grievances, attending grievance meetings and attempting to settle grievances. Labour relations legislation requires collective agreements to contain a term providing that any disputes regarding the administration of the agreement that the parties cannot resolve be referred to arbitration.

**TYPES OF GRIEVANCES** A grievance might be filed by an individual employee, a group of employees, the union or the employer. There is no requirement that the grievance specify the

articles of the collective agreement that have been violated unless the collective agreement says they must be provided. An employer might prefer that the grievance identify the articles, but unions generally prefer to avoid this. As is noted below, there might be rules in the collective agreement that affect who can file a grievance in a given situation.

**Individual grievance**—an allegation by an employee that the employer has violated the collective agreement or statute and that includes a statement of the remedy sought by the employee. For example, if an employee was unsuccessful in a bid for a job vacancy, he or she might think the employer did not properly take seniority into account. An individual grievance might be filed that alleged the employer had violated the seniority provisions of the agreement and state that the remedy sought is the placement of the grievor in the job.

**The Grievance Procedure** The grievance procedure article will set out the process to be followed for any grievances. Employers would prefer that the procedure provide for an employee to first make a complaint before filing a grievance as in Article 9 in Figure 7-3. At each step in the process, the grievance could be settled, withdrawn, or denied by the employer. If the employer denies the grievance the union will have to decide whether to withdraw it or proceed to the next step. If the grievance is not resolved, it might be referred to arbitration.

The collective agreement usually provides that some types of grievances are started at a higher step in the process or have different time limits. For example, the agreement may provide that a policy grievance start at Step 2 and a discharge grievance start at Step 3. Unless the collective agreement prevents it, the union may file a grievance even if an individual employee does not.

**TIME LIMITS** It is necessary to assure that disagreements between management and the union over the interpretation, application or administration of the collective agreement are settled in a reasonably prompt manner. To do this there are time limits negotiated in collective bargaining for each step in the grievance process.

The time limits in the grievance process may be either mandatory or directory. A **mandatory time limit** is one that must be met, and the grievance might be dismissed if a grievance step is not taken within the time allowed. If the time limits are mandatory and the step is not taken within the time specified, the grievance cannot proceed to arbitration unless there is an extension granted by the arbitrator, as explained below. **Directory time limits** are viewed as a guide, and the grievance may be allowed to proceed even if the limit is not met. If the agreement provides that a step may be taken within a specified number of days, it is directory only and failure to meet it does not prevent the grievance from going to arbitration. The grievance is still arbitrable.

Many arbitrators suggest that the word “shall in a time limit is not enough to make the time limit mandatory. They have held that unless the agreement also provides specific consequences for failing to meet the time limit, such as “the grievance shall be deemed to have been abandoned,” the time limit is not mandatory. Employers usually prefer to have mandatory time limits and may seek language in the agreement that will meet this objective. Unions usually prefer that time limits be directory.

The issue of time limits is further complicated by labour relations legislation in six jurisdictions—Canada including Northwest Territories, Nunavut, and Yukon, British Columbia, Manitoba, New Brunswick, Ontario and Saskatchewan—that gives an arbitrator authority to extend a time limit in the grievance process. This means that even if the time limits are mandatory, an arbitrator could allow a grievance to go to arbitration. Employers may wish to attempt to have the collective agreement provide that the arbitrator does not have the authority to extend time limits, but the union would likely resist this.

When a party, usually the employer, fails to reply within the time specified it does not mean that the grievance is decided in the other party's favour. But it permits the other party to proceed to the next step in the process, thus avoiding a stalling tactic to resolve the disputed issue on the part of management.

## ARBITRATION

Unresolved grievances are referred to **arbitration**—a dispute resolution method in which management and union representatives present evidence and arguments to a third party who makes a final, binding decision. This process is also referred to in such cases as **rights arbitration**.

**PROBLEMS WITH ARBITRATION** One of the criticisms of the arbitration process is that it is too slow; delays of a year or more from the filing of a grievance to the completion of the arbitration are possible. To deal with this problem, the agreement can provide for an **expedited arbitration** process, which might include a single arbitrator, and shorter time limits for their appointment, the hearing and a decision. The agreement may provide that the expedited procedure is available only for certain issues or requires the consent of both parties.

Another concern, particularly for small or not-for-profit employers is the cost of arbitration proceedings. Each of the parties will be responsible for their own legal and other expenses associated with arbitration. If a sole arbitrator is used, the parties would split her professional daily fee plus fees for their organization's legal counsel. In cases of an arbitration board, the parties would each bear the cost of their own nominee to the board and split the costs of the board chairperson in addition for legal counsel fees. Meeting room and material costs are other possible expenses shared by both parties. A few agreements have provided that the losing side will pay these expenses, but a union would likely oppose such a term. A few unions have been able to negotiate a justice and dignity provision in the process that provides that, subject to some restrictions, an employee who has been suspended or discharged will be allowed to retain their job while the process is going on. An employer would likely oppose such a term.

## Strikes and Lockouts

A third required article in a collective agreement deals with strikes and lockouts. A **strike** is the refusal to work or a restriction of output by bargaining unit members. A **lockout** refers to an employer's refusal to allow employees to work, in order to force the union to agree to terms of employment proposed by the employer. A lockout should be viewed as the employer's economic weapon equivalent to the union's strike threat. One of the basic principles of Canadian labour

relations is that strikes or lockouts are prohibited during the term of the collective agreement, and most collective agreements include an article to this effect.

### Duration or Term of the Agreement

In all jurisdictions, the collective agreement must have a term of at least one year. If the term is not specified, or is stated to be less than a year, it will be deemed to be one year. Many collective agreements have a longer term. Employers have usually sought longer terms, to avoid having to renegotiate too frequently and to have certainty for planning purposes. Unions have generally sought shorter terms, because a collective agreement with a longer term delays the opportunity to improve the terms of the agreement and exposes employees to the risk of future inflation or other undesirable circumstances. The trend is for collective agreements to be longer.

There are open periods in the term of a collective agreement during which employees can apply to decertify the union or another union can apply for certification. If a union is decertified, the collective agreement is terminated. Accordingly, it is possible that a collective agreement will not continue to operate for the term specified.

**CHECK-OFF OF UNION DUES** Unions are external organizations whose line of business is to represent the interest of employees who believe that their collective needs are best served by seeking a bargaining agent to serve as a spokesperson and advocate for bargaining unit members with the employer. Like any business, unions rely heavily on certain income streams to provide revenue for its operations. One key form of revenue is the collection of union dues—a service fee paid to the union by members of the bargaining unit. This fee is set by the union as a percentage of the worker's earnings and is not a subject for contract negotiations with the employer. However, the deduction of union dues by the employer, if the union requests it, is a required clause in collective agreements in a majority of Canadian jurisdictions. A dues check-off clause can be included in a collective agreement, requiring the employer to make a payroll deduction from each bargaining unit member for the dues and to submit the monies to the parent union office.

### Voluntary Terms

If a collective agreement only listed the required articles set out by Canadian legislation, it would likely be only four or five pages in length. However, collective agreements can be documents of 50 pages or more. The balance of content in the typical agreement is comprised of **voluntary terms**—those terms and conditions of work, not required by legislation, which union and management bargaining teams agree to include in a collective agreement.

### Management Rights

Most of the provisions of a collective agreement, such as the seniority and job posting articles, restrict management's rights and flexibility. The **management rights** article may be the only term protecting or benefiting the employer. Most arbitrators apply the **reserved or residual rights** theory that provides that the employer has all rights to manage the organization except as expressly restricted by the collective agreement. For example, if the collective agreement did not

refer to the issue of uniforms, management would have the right to introduce a uniforms policy. The management rights article expressly sets out that management retains the authority to manage the organization, except as otherwise provided in the collective agreement. This article has been relied on to make numerous management decisions such as changing the method of payment to workers, workplace security measures and establishing a rule to search toolboxes. The two types of management rights clause are a general (short) form and a detailed (long) form. Figure 7-5 provides an illustration of both.

The short form, which is preferred by unions, is a simple statement confirming that the employer has the right to manage the organization. The long form, which is preferred by employers, is a general statement regarding the employer retaining the right to manage, to which are added specific provisions such as the right to change methods of operation. Although the employer may not have to refer to a specific item in a long form to justify a management decision, the long form makes it more likely that management will be able to refer an arbitrator to a specific right provided in the agreement. Accordingly, the long form may increase the likelihood of an arbitrator making a decision favourable to the employer.

The law relating to the obligation of management to be fair and reasonable in the administration of the agreement is unclear. One argument holds that management has a duty to act reasonably only in connection with matters specifically set out in the agreement. According to this approach, if the agreement provides for the assignment of overtime, management would have to do so fairly and reasonably. Another interpretation holds that there is an overriding duty to act fairly and reasonably with regard to any issue, whether or not it is specifically set out in the agreement. In Manitoba, this issue has been clarified by legislation that requires management to act reasonably in the administration of the collective agreement.

### **Bargaining Unit Work**

The phrase **bargaining unit work** refers to the work normally done by employees in the bargaining unit. If there is no provision in the collective agreement preventing the employer from assigning work to employees who are not in the bargaining unit, the employer is free to do so. Arbitrators have held that if an individual not in the bargaining unit does a certain level of bargaining unit work, he or she will be included in the unit. However, arbitration decisions vary on how much work must be done to make someone part of the bargaining unit. Unions would prefer an article that prevents non-bargaining unit employees from doing the work of employees in the bargaining unit, and employers would prefer to avoid this type of restriction.

### **Union Security**

**Union security** may be understood as measures taken by the union in collective bargaining to help “secure” the ongoing presence and influence of the bargaining agent in a unionized work setting.

A **dues check-off** article refers to the deduction of union dues from employees’ pay by the employer and the remittance of these funds to the union. A **Rand formula**, or **agency shop**, is a provision in a collective agreement that does not require employees to become union members



but requires the employer to deduct union dues from the pay of all employees in the bargaining unit. This union security arrangement came out of a famous arbitration case by Justice Ivan Rand to settle a 1945 strike by the United Auto Workers' against the Ford Motor Company in Windsor, Ontario. It required all employees performing bargaining unit work to pay dues even though they could freely elect to not take out a union membership.

In most jurisdictions, legislation provides for the compulsory check-off of union dues upon the request of the union. This could be viewed as legislative imposition of the Rand formula. In a few jurisdictions, the deduction of union dues is not mandatory. In 2009 the Alberta Labour Relations Board, held that the failure to require the deduction of union dues from the pay of all employees in the bargaining unit was a substantial interference with collective bargaining and a violation of the *Charter*. The Board ordered an employer to agree to the union's proposal requiring the deduction of union dues and allowed the government 12 months to amend the Alberta *Labour Relations Code*. This decision is not binding in the other jurisdictions that do not require the deduction of union dues; however, if the same argument succeeds elsewhere, it will mean that the mandatory deduction of union dues will be required in all jurisdictions. This development illustrates the significance of the *Charter* and the Supreme Court of Canada decision in the *Health Services* case. Most collective agreements that contain a dues check-off clause provide that the dues will be remitted on a monthly basis by the employer to the union.

**UNION MEMBERSHIP** A stipulation for union membership to be included in a collective agreement depends on the parties agreeing to such a requirement. As seen in the 1945 UAW–Ford Motor strike, this could be an important issue in the negotiation of a first contract. Unions want union membership to be mandatory; employers prefer to avoid this requirement. Whether or not they become union members, all employees in the bargaining unit are covered by the terms of the agreement. It is important to note that the union security provisions do not affect the union's obligations to fairly represent all employees in the bargaining unit.

Variations of the union membership requirements that may be contained in a collective agreement are listed in Figure 7-6. The **closed shop** is generally limited to the construction industry.

**Closed shop** is a place of work in which an individual must be a union member before being hired; new employees are hired through the union.

In most industries, the union will want the agreement to provide for a **union shop**. If employees must be union members to retain their job, it will be easier for the union to maintain solidarity in the event of a strike. Employees who do not honour the strike face the possibility of losing their union membership, and as a result losing their job. However, in five jurisdictions—Canada including Northwest Territories, Nunavut, and Yukon, Alberta, Manitoba, Nova Scotia and Saskatchewan—legislation provides that the union cannot terminate an employee's membership for any reason other than the failure to pay union dues. In those jurisdictions, the union will have less control over its membership. Employers would generally prefer that employees not be required to become union members.

The **modified union shop**, in which union membership is required only for employees hired after the agreement is in force, is a possible compromise. In certain situations, a form of union security known as **maintenance of membership** does not require an employee to join a union as a condition of employment, but those who voluntarily join the union must maintain their membership for the duration of the collective agreement. An **open shop** does not require the employee to be a union member at time of hire or as a condition of continued employment.

When the collective agreement is negotiated, the union and the employer will have to define the union security.

**UNION REPRESENTATIVE ROLES** Union security is aided by allowing organizational employees to adopt internal representative roles to conduct bargaining unit business through leadership roles within the union local such as the president, treasurer, chief steward, negotiating collective agreements and filing and processing grievances. Having individuals who are inside the organization assists the union in these monitoring and advocacy functions.

**UNION ACCESS TO ORGANIZATIONAL PREMISES** At certain stages of union–management interactions, external experts from the parent union are needed to access the employer's premises to participate in various types of meetings. Without such access to this form of expertise, the employer may have the advantage in such interactions. Access to the organization's premises by internal and external union representatives affords the union a more secured position in supporting members of the bargaining unit in their interactions with various levels of management in an organization.

**PROBATIONARY EMPLOYEES** Employment standards legislation in both federal, provincial, and territorial jurisdictions allow for the termination of an employee without any notice or any pay such as a severance package. These are referred to as statutory probation periods and vary from as little as 30 days in Manitoba to 6 months in New Brunswick and Prince Edward Island. The federal government and remaining provinces have set a three-month (90-day) probationary period.<sup>ii</sup>

Collective agreements may contain a provision that employees are on probation for a specified length of time. There is no probationary period unless the collective agreement provides for one. If there is no probationary period, employees are entitled to all rights provided in the collective agreement from the time they start their job. A distinction is made between probationary periods that provide that an employee is on probation for a certain period of employment such as three months, and periods that refer to a specified number of working days. Employers would prefer the reference to be to working days so that the employee must actually have worked a day for it to count.

Employers may wish to know if the agreement can prevent probationary employees from grieving a dismissal. A collective agreement should not directly prohibit the probationary employee from filing a grievance. However, with the proper wording, the agreement could provide that the employer has the sole discretion to hire and will be able to avoid grievances relating to the dismissal of probationary employees. In cases where a grievance is filed, it is not uncommon for the union and management to agree to an extension of the probationary period

and identify specific performance concerns and what, if any, employer actions will be taken to resolve the performance gaps.

## Seniority

**Seniority** is an employee's length of service with the employer. Unions prefer seniority to apply to more workplace issues and for seniority to be given more emphasis, because this provides increased job security for longer-term employees and avoids favoritism by management. Most collective agreements contain seniority provisions that give a job preference or benefits to employees based on this objective measure. If the agreement provides that seniority is a factor in determining layoffs and promotions, it will not be a factor regarding other issues such as shift assignments.

Seniority provisions and their application can be quite complex. A distinction should be made between two different uses of seniority: (1) *competitive* status issues or job rights, in which seniority is being used as a factor in determining promotion, layoff or recall and (2) *benefit* status, in which seniority determines an entitlement such as the amount of vacation. In the case of competitive status, seniority is being used as a factor to determine which of two competing employees will be assigned to or allowed to keep a job. In the case of benefit status, there is no competition between employees; a gain by one employee does not come at the expense of another.

**CALCULATION AND APPLICATION OF SENIORITY** A collective agreement may provide for different ways to calculate seniority for different applications. For benefit status issues such as vacation, seniority may be defined as the entire period of employment or service in the bargaining unit. For competitive status issues such as promotions, seniority may be defined as the time spent in a department or job classification. The agreement may include a provision to deal with the possibility that two employees have the same seniority. The parties might specify a tie-breaking formula such as the alphabetical order of the employees' names or a random draw.

Employers generally prefer seniority to apply to fewer workplace issues and to have less emphasis so that they have more flexibility and are able to make job decisions on the basis of the KSAs of the employees. The collective agreement will usually provide that the employer will periodically prepare and post a seniority list and provide a copy to the union. The agreement may also provide for **super-seniority** for specified union positions such as a union local president which means that the employees who hold the union office referred to will be the last to be laid off. The purpose of super-seniority is to ensure union representation for employees when layoffs occur. The application of such a provision will mean that bargaining unit members who have more seniority than union officers will be laid off before the union officers.

**TERMINATION OF SENIORITY** The agreement should specify what happens to an employee's seniority if the employee leaves the bargaining unit. The general rule is that employees who are transferred or promoted out of the bargaining unit no longer have any rights under the collective agreement. They lose their seniority and do not have the right to return to the unit unless the agreement provides otherwise. The agreement might specify that time outside of the bargaining unit is included in seniority and put a time limit on a return to the unit. The

agreement might also put conditions on an employee returning, such as prohibiting a return if that would result in the displacement of another employee.

The collective agreement should specify what causes seniority rights to be lost. Seniority might be lost in the event that the employee resigns or retires, is discharged and is not reinstated through the grievance and arbitration process, is laid off for a specified length of time or for other reasons. The period of time that employees can be on layoff without losing their seniority rights, the **recall period**, can be an important issue for the parties. It determines how long an employee has the right to be recalled. The union will seek a longer recall period. The employer may prefer the recall period to be shorter.

Loss of seniority is a separate issue from the termination of employment; termination does not happen unless the agreement provides that is the case. Many collective agreements combine the loss of seniority with the loss of employment; that is, they provide that the same factors that cause loss of seniority also cause termination. A **deemed termination** provision states that if an employee is absent for a specified length of time, they are automatically dismissed. Human rights legislation may mean that this type of provision cannot be applied to an employee who is absent because of a condition that is within the definition of a disability.

Human rights tribunals and commissions in Canada have clearly stated the obligations of unions and management to sustain and protect seniority accumulation during periods of disability. Employees who are absent due to disability or maternity or other *Code* grounds, such as family status, would continue to earn seniority as other employees.<sup>iii</sup> The Canadian Human Rights Commission notes that the duty to accommodate prevails over private arrangements such as collective agreements. When it comes to collective agreements, unions should follow the same process of identifying and eliminating barriers to full participation in the workplace as does the employer. However, if doing so substantially changes the operation of the collective agreement, then the accommodation may amount to undue interference and may thus be undue hardship.

**LAYOFFS** The definition of a layoff in the collective agreement is important, because if a layoff occurs a number of collective agreement rights and obligations might be triggered. In addition to determining who should be laid off after considering seniority, KSAs, the employer may also be required to provide early retirement or severance options to employees who have been laid off. Some collective agreements have defined a layoff in a manner that means more than the displacement from work will be addressed. In one hospital collective agreement, a layoff was defined as: “a reduction in a nurse’s hours of work and cancellation of all or part of the nurse’s scheduled shift . . . a partial or single shift reassignment of a nurse from her or his area of assignment will not be considered a layoff.” When the hospital reassigned nurses from one unit to another, the union contended that there had been a layoff as defined in the collective agreement. An arbitrator upheld the grievance noting that by stating that a partial or single shift reassignment would not be considered a layoff, the implication was that the alternative, a longer reassignment, did constitute a layoff. Accordingly, all of the agreement’s provisions relating to layoffs, including notice, early retirement and severance offers were engaged. It is beneficial to the employer if a layoff is defined in a manner that would exempt short interruptions. If a layoff is defined as a period of at least five working days, the layoff provisions including notice are not an issue for a shorter period.

**Bumping or bumping rights** refers to an employee who would otherwise be laid off displacing another employee with less seniority. Bumping articles in a collective agreement can appear in three different forms depending upon the relative importance of seniority versus KSAs.<sup>iv</sup>

- Seniority is the *only* factor to be considered. As long as the affected employees have more seniority, they can bump a more junior employee.
- Seniority is a factor allowing affected employees with more seniority to bump more junior employees *if* they also have the minimum job requirements for the position.
- Seniority is a factor allowing the most senior employee to bump a more junior *if* they have equal or better skills than the junior employee.

Employers would prefer to have restrictions on bumping in order to avoid having employees move or bump into positions they are not qualified for, and to reduce the number of bumps. The contract might provide that employees can only move into certain job classifications and must have the required ability to do the work. It might also provide that the employee exercising bumping rights must move into the job held by the lowest seniority employee in the bargaining unit. If there is no requirement that an employee must bump the lowest-seniority employee, there might be a series of bumps (referred to as chain bumping when an employee with five years' seniority bumps one with four years' seniority, who in turn bumps one with one year's service. Unions would prefer that there be fewer restrictions on bumping, possibly combined with training periods for employees who wish to move to another position.

**JOB VACANCIES** The collective agreement may define job vacancies and require the employer to post them within the workplace prior to any internal non-union or external notice. When the employer is filling short-term openings, it would be beneficial if vacancies were defined to exclude shorter-term jobs. For example, if the agreement defined a vacancy as a job that was going to last more than 90 days, it would be possible to avoid posting and seniority requirements for shorter assignments. The agreement might place restrictions on bidding or applications for a job. The employer might wish to avoid having someone successfully bid for and move into one job and then bid for and move to another—referred to as job-hopping. To avoid such a situation, the employee might be required to remain in a position for a certain length of time perhaps six months before bidding on another job vacancy.

**Recall notice** is an agreement will usually provide that employees who have been laid off will be recalled to work in order of seniority.

Most collective agreements do not provide that seniority is the only factor referred to when a decision is made regarding which employee is entitled to a particular job. The parties can agree that KSAs will also be a factor, and the agreement can specify how much weight will be given to skill and ability as opposed to seniority. There are two primary ways that KSAs can be combined with seniority: a sufficient ability clause or a relative ability clause. A **sufficient ability clause**, also known as a *threshold ability clause*, provides that the employee with the most seniority is awarded the job if they have enough ability, even if another employee has more advanced KSAs.

A **relative or competitive ability clause**, on the other hand, provides that seniority will only be referred to if the skills and abilities of two employees competing for a job are relatively equal. The employee with the most seniority will be awarded the job only if they have the KSAs equal to or greater than that of other employees. Because the sufficient ability type of provision gives more weight to seniority, unions favour it. Employers favour the relative ability provision, because it gives more weight to KSAs. Alternatively, the parties could agree on a **hybrid seniority** provision that falls between a sufficient ability and a relative ability term. In this approach, seniority is included along with skill and ability when the determination is made. Arbitrators have held that the employer must demonstrate that the decision was made by considering the factors listed, including seniority, in a reasonable manner giving each the appropriate weight.

It has been established that unless the collective agreement provides for a training period related to a job posting, employees are not entitled to one. An employee must have the KSAs required to perform the job at the time they apply for it. The agreement might provide for a training period of a specified number of days. The union would prefer that the agreement provide for a longer training period and allow the employee to return to a previous job if they are not successful in the new one. The employer would likely prefer to avoid a required training period, so that an employee who has the ability to do the job without any additional training can immediately move into the job.

The exact wording of the agreement regarding KSAs might be significant. The phrase capable of performing particular job tasks is not the same as having the required KSAs. A reference to capability is less demanding than a requirement that the employee have the required KSAs. It has been held that when the contract refers to capability, an employee is entitled to a period of familiarization with the job for example 30 days even though the agreement did not specifically allow for one. Accordingly, employers would prefer the contract to require that employees have the skill and ability required.

## Discipline and Discharge

Most collective agreements provide in the management rights article or elsewhere that the employer has the authority to discipline or discharge employees for misconduct that amounts to just cause. A few jurisdictions have provided that the collective agreement must contain a just cause article. Even if the agreement does not contain such an article, most arbitrators will require that the employer establish just cause to discipline or discharge.

There may be articles in the collective agreement that lay down procedures that must be followed when the employer imposes discipline or impose limitations on the employer's right to discipline or discharge. Unions generally prefer to have contract language related to employee discipline or discharge that addresses union representation, notice and reasons, time limits and what is referred to as a **sunset clause**. Such language may cause disciplinary records in an employee's file to be removed after a continuous, discipline-free period for example 24 months.

## Hours of Work and Scheduling

Employment standards legislation provides for maximum hours of work, minimum lunch or break periods and minimum rest or time away from work. The rules relating to maximum hours should not be confused with the separate requirements regarding overtime. The terms relating to hours, which are referred to here, focus on the issue of when and how many hours the employee works. The overtime provisions, referred to in the next subsection, deal with the separate issue of how much additional pay employees are entitled to if they exceed a specified number of hours.

Unless the collective agreement provides otherwise, the employer has the authority to establish schedules, start times and shift changes. The agreement may provide for a guaranteed number of hours. This would be a provision the union would want and the employer would prefer to avoid. The agreement might specify the work days, hours of work and details regarding shifts. If the agreement specifically sets out such items, the employer would have to get the consent of the union to make any changes. The employer would prefer to avoid having work days, hours of work and details regarding shifts in the contract. Instead, it might be provided that notice will be given for shift and other scheduling changes. The union would prefer longer notice and a provision that there will be compensation provided if the required notice is not given. Conversely, the employer would prefer to maintain as much flexibility as possible, have notice periods be shorter and avoid any compensation if adequate notice is not given. The agreement might also provide that a premium be paid for certain shifts, such as nights.

## Overtime

Employment standards legislation provides for minimum rules regarding overtime, which vary between jurisdictions. Such legislation requires the employer to pay a premium of 1.5 times the regular hourly wage rate for hours worked in excess of a set number of weekly hours for example Ontario = 44; Alberta = 8 hours a day and 44; Newfoundland and Labrador = 40). Typically, unions will seek to improve upon the legislated minimums in collective agreements. Overtime legislation and collective agreement terms should be kept separate from hours of work terms and legislation. Overtime deals with the issue of when an employee is entitled to additional pay for working extra hours and the amount of the additional compensation. The employer can impose overtime unless the agreement provides otherwise. It could require employees to work overtime as long as the employment standards legislation and collective agreement provisions relating to the hours of work are complied with. Overtime laws may also allow the employer and a union to enter into an overtime averaging agreement. For example, In Ontario, an agreement could see an employee on duty for the following weekly totals (48, 40, 56 and 32) and not receive any overtime payment in that period as the average weekly worked hours does not exceed 44.

Hours-of-work provisions in employment standards legislation usually provide an exception for emergencies. Unions will seek to have agreement terms that require notice to employees or their consent for overtime. Employees do not have a right to overtime unless the agreement provides for it. Unions may push for terms that require an equal distribution of overtime or alternatively give priority to employees with more seniority. Some arbitrators may award cash to an employee who has not been correctly allotted overtime, instead of ordering the employee be

given the next opportunity to work overtime. Employers would prefer that the agreement clarify that the remedy is the next opportunity to work.

## Public Holidays

Statutory holidays such as New Year's Day and Thanksgiving are paid days off, and should not be confused with vacations, which are discussed below. The collective agreement must provide for at least the minimum holidays required by employment standards legislation in the jurisdiction. The union may seek to have the agreement provide for additional public holidays. The parties should clarify the issue of when a public holiday falls on a day that is **not** ordinarily a working day for an employee, or during the employee's vacation; the employee is typically entitled to either a substitute holiday off with public holiday pay or public holiday pay for the public holiday—if the employee agrees to this in writing (in this case, the employee is not given a substitute day off).

## Vacation

Employment standards legislation provides for a minimum amount of vacation time and pay for employees. The vacation entitlement in the legislation is not very generous, and it is common for the collective agreement to provide for greater vacation time than the legislation requires. Figure X lists issues relating to vacations.

## Leave of Absences

Employment standards legislation continues to expand the type of leaves of absence in keeping with changing social norms. The collective agreement might provide employees with numerous types of leave, some of which have legislated minimums. The employer and the union will have to negotiate what leaves are to be provided and the extent to which any leaves will exceed the minimum the law provides.

**JURY DUTY** Legislation provides that the employer must grant leave for jury duty and protect the job, seniority and benefits of employees. However, the compensation paid to individuals by the court system for jury duty is minimal. Unions may seek to have articles added to the agreement to provide that the employer will pay any difference between the allowance paid to jurors and the employee's pay.

**BEREAVEMENT LEAVE** Employees are entitled to bereavement leave as provided in the employment standards legislation governing their workplace. The legislation usually provides for leave in the event of the death of specified relatives, most commonly the employee's spouse, child, parent or guardian, sibling, grandchild or grandparent. The length of the leave varies across jurisdictions from one to five days, and it may depend on the nature of the relationship. Most bereavement leave provided in legislation is unpaid; however, there are exceptions. Federally regulated employees who have been employed for at least three months are entitled to leave on any normal working day that falls within the three-day period immediately following the day the death occurred.<sup>v</sup>



**MATERNITY LEAVE** Employment standards legislation provides for unpaid maternity leave that ranges from 15 to 18 weeks depending on the jurisdiction. Employees entitled to maternity leave may also be entitled to additional unpaid parental leave. The unpaid leave should not be confused with the monetary benefits provided by the federal *Employment Insurance Act*. In December 2017, the Government of Canada changed rules related to maternity and parental leaves whereby new parents may opt for *either 12 months or 18 months* of combined maternity and parental leave. In some jurisdictions, employees are entitled to maternity leave as soon as they start employment. In other jurisdictions the employee must have been employed for a minimum period of time. The legislation also contains rules regarding notice to commence the leave and to return to work, restrictions on when the leave can commence and provisions regarding extension of the leave. Any collective agreement terms regarding maternity leave must at least meet the standards provided for in the relevant federal, provincial, or territorial legislation. The union representing bargaining unit members may seek leave provisions greater than the legislated minimums.

**PARENTAL LEAVE** Employment standards legislation at federal, provincial, and territorial levels provides for parental leave associated with the birth or adoption of a child. In some jurisdictions, the leave must be split between the parents; in others, including Ontario, both parents are entitled to the leave. There are rules regarding eligibility that vary across jurisdictions. The legislation sets out requirements regarding notice to commence the leave and notice to return to work, and restrictions on when the leave can commence. Under changes to the *Canada Labour Code* in late 2017, if both parents work for a federally regulated employer, the two parents are entitled to a *combined* parental leave of up to 63 weeks. Parents have the option of taking their parental leave at the same time, or one after the other, as long as the total combined parental leave does not exceed 63 weeks. However, for mothers, the total duration of the maternity and the parental leaves must not exceed 78 weeks. Any collective agreement terms regarding parental leave will have to at least meet the standards provided for in the relevant legislation and should address the issues referred to in Figure X Leave of Absence Issues.

**SICK LEAVE** Under the *Canada Labour Code*, federally regulated employees are entitled to unpaid sick leave protection of up to 17 weeks if they have worked for the same employer for at least three consecutive months. Sick leave pay may be claimed through Employment Insurance benefits. Sick leave is dealt with in varying ways across Canadian jurisdictions, increasingly through emergency or personal leave coverages in employment standards legislation. Prince Edward Island is unique in Canada in that it does impose a mandatory single paid sick day, provided the employee has been with the employer for at least five years. Manitoba and Nova Scotia both provide for three days of unpaid family leave, which includes personal illness and family responsibilities. Alberta allows for five days of unpaid leave per year for personal emergencies and caregiving responsibilities related to education of a child. Newfoundland and Labrador lumps together similar family responsibility leave with personal sick days, providing seven unpaid days in total. Ontario requires employers to offer personal emergency leave to 10 days per year for all employees, with at least two paid days per year for employees who have been employed for at least a week. Quebec provides for leave due to obligations relating to the health, custody or education of a child or the child of a spouse, as well as the health of a close relative. The leave amounts to 10 unpaid days. British Columbia has recently introduced paid

sick leave. However, Saskatchewan do not require employers to pay employees away from work due to sickness.

Unions will seek in collective bargaining to provide increased entitlement and payment for legislated sick leave. The collective agreement might provide for a system of sick leave credits in which employees will accumulate a certain number of sick days for each week or month worked, and the days can later be used if the employee cannot work. The employee will be entitled only to the sick credits accumulated. Employers may prefer to avoid this type of system so that they do not have to pay out unused sick credits on termination. Instead of a credit system, the agreement might provide for leave with pay, specifying the length of the leave and the amount of the pay. It might provide that the length of the leave increases with seniority and the pay diminishes with a longer leave. For example, the pay provided might be 100 percent of regular pay for the first week and 75 percent of pay for an additional 10 weeks.

**UNION LEAVE** Collective agreements commonly provide for unpaid leave for union officers such as a union local chief steward to attend to union matters. This type of leave can be either short term—to allow for attendance at union conventions and other meetings—or long term—to allow for taking on a union executive position or serving the union in some other manner such as a business agent.

**PERSONAL LEAVE** In addition to the various specified leaves already referred to in this section, some Canadian jurisdictions have expanded the circumstances under which a leave of absence may be taken by an employee without risk to their employment status. Some examples to the types of circumstances include:

- Compassionate care leave (Federal)
- Leave related to the death or disappearance of a child under 18 years (Federal)
- Reservist leave (Federal)
- Domestic or sexual violence leave (Ontario)
- Personal and family responsibility leave (Alberta)

For personal leaves of absence not covered in legislation, collective agreements often refer to such absences as being at the employer's discretion—that is, the employer may grant the leave but does not have to. An employer might be surprised to find out that some arbitrators have required employers to act reasonably when they consider whether to grant such leave. This means that even though an agreement states that the employer may or may not grant the leave, it will have to show a valid reason to deny it. Unions would prefer that the agreement confirm that the employer may not unreasonably deny a leave. Employers would prefer that the agreement provide that the employer has sole discretion to grant or refuse leave, and the decision cannot be grieved, provided that it is made in good faith.

## Wages

The collective agreement will set out the wages that are to be paid to various job classifications, including any compensation increases that will be made over the term of the agreement. The pay rate and procedure stated in the agreement will have to comply with employment standards and human rights legislation. Employment standards legislation establishes rules including a minimum wage and the form of payment most often direct deposit or (cash or cheque

Unless the agreement provides otherwise, management can change the job classifications referred to in the agreement, provided the change is prompted by a valid business reason. Consequently, the union may seek to have the agreement provide that job classifications will not be changed for the term of the agreement, or that the union will be consulted if there are any such changes. The union would prefer that if the parties cannot agree on a classification the matter be referred to arbitration. In addition to the wages, the agreement might provide for numerous additional allowances and payments including shift premiums, mileage allowances, pay for meals, additional pay for hazardous work and clothing allowances. Employment standards legislation provides a minimum amount that employees who report for, or are called in to, work must be paid. The union may seek to have the agreement provide for call-in pay that is greater than the minimum set out in the legislation.

Inflation is once again a serious concern for employers and unions. Inflation on goods and services purchased by Canadians was approximately 5% in 2022. The cause of this inflation is likely due to supply chains concerns and COVID-19 demand for goods and services rising faster than supply. Unions continue to seek **cost-of-living allowances (COLA)** in collective agreements to protect against the risk of inflation and to sustain the purchasing power of its members. COLA provisions may require that an increase in pay will be provided to employees on the basis of a formula linked to the rate of inflation.

## Benefits

In addition to the legally required benefits such as the Canada Pension Plan (CPP) and Employment Insurance (EI) to which employers must contribute, there are many additional voluntary benefits that collective agreements may provide, including dental care, drug expenses, eye care, life insurance, semi-private hospital care, disability protection and pension plans.

## Health and Safety

All jurisdictions in Canada have health and safety legislation that sets out rights and obligations for employers and employees. Pursuant to the legislation, employers have a duty to establish and maintain a safe workplace. Employees must follow safe work practices and use protective equipment. Joint health and safety committees or representatives must be appointed, and employees have the right to refuse unsafe work. The legislation is enforced by inspections and provides for the prosecution of employers and employees who do not comply. A reference to health and safety legislation across Canadian jurisdictions is found at the Canadian Centre for Occupational Health and Safety (CCOHS).

## Technological Change

Labour relations legislation in some jurisdictions regulates the introduction of technological change into the workplace. The legislative provisions range from requiring the parties to submit any disputes relating to technological change to arbitration such as in New Brunswick to requiring notice from the employer and mid-term bargaining in four jurisdictions including Canada, Manitoba, Saskatchewan and British Columbia. In other jurisdictions, including Ontario, the legislation does not deal with the issue. In jurisdictions without technological change legislation, the employer will be able to introduce technological change relying on the management rights article, unless the collective agreement imposes limitations. Unions will likely seek collective agreement terms to protect against technological change causing job losses. Employers would prefer to avoid such provisions to be able to maintain flexibility and reduce costs.

In any article dealing with technological change, a critical issue will be its definition. It might be defined narrowly to include only new equipment that causes job loss, or more broadly to include additional matters such as changes in methods of operations and techniques to complete the work. The definition can be extremely important as it will determine whether the notice and other protective measures referred to below are available. In one case, the agreement defined technological change as involving equipment of a different kind or purpose, and it was held that a change made to an existing computer system did not fall within the definition.

There is a broad range of protection that might be provided for employees if there is a technological change. The agreement might simply require the employer to give a specified period of notice to the union. The agreement may require the parties to negotiate the implementation and effects of the change and to refer disputes on issues to arbitration. The most restrictive type of provision might provide job guarantees for employees. Articles might provide for income protection in the event that an employee's job is reclassified due to the change or if the employee is transferred to a lower-paying job. Another possibility is a provision for retraining and preference in future job openings. If the employee's job cannot be saved, the agreement might provide for a severance payment.

## Contracting Out

**Contracting out** refers to an employer arranging for another organization to do work that is, or could be, done by the employer's own employees. Employers will want to maintain the capability to contract out to provide flexibility and reduce costs. For example, if a hospital had its own laundry staffed by hospital employees, it could contract out this work to a laundry service provider. This will mean that the employees who formerly did the work will not be needed and layoffs could result. Unions will seek to have language in the agreement that prevents or restricts contracting out to protect existing jobs in the bargaining unit. Their motivation is to protect the size and influence of the bargaining unit in the work setting. A reduction of jobs also means a loss of revenue by the union caused by fewer union dues being collected. Arbitrators have held that if there is no collective agreement term preventing contracting out, an employer is free to contract out provided it is done in good faith and for a sound business reason. It should be noted that contracting out in this context is not the same usage referred to earlier in this text regarding

setting terms in the collective agreement that are not in keeping with minimum guarantees under employment standards, health and safety or other legislation and are separate from any restrictions relating to previously referred to restrictions on bargaining unit work.

### **Prohibited Terms**

So far collective agreement language has been grouped into required and voluntary categories. It is important to know that there are prohibitions placed on unions and management regarding the inclusion of **prohibited terms** in collective agreement terms that reflect unfair labour practices or run contrary to human rights laws.

### **Union Business**

1. Will the agreement require that union information be provided to new employees?
2. Will the agreement require the employer to provide bulletin boards, provide office space or allow union meetings on the employer's premises?
3. Are union officials allowed to conduct union business during work time?

### **III. Review Questions**

#### **1. Identify the required terms that must be included in a collective agreement.**

The following mandatory terms:

- recognition of the union
- a prohibition against strikes and lockouts during the term of the agreement
- a provision for the arbitration of disputes relating to the administration of the agreement
- a minimum term of one year

#### **2. Discuss a situation in which an employer may assign work normally done by bargaining unit employees to employees outside of the unit, including supervisors.**

Yes. Unless there is a restriction in the collective agreement the employer can assign bargaining unit work to other employees. Accordingly the union may seek collective agreement provisions to prevent other employees from doing bargaining unit work. Employers would prefer to avoid this type of restriction entirely or ensure that collective agreement provisions do not prevent employees outside the bargaining unit from doing work in emergency or training situations.

#### **3. Explain the meaning of the phrase contract out, of bargaining unit work and provide reasons why unions seek restrictions on contracting out.**

Contracting out refers to the employer arranging for an independent contractor or another firm to do the work that would normally be done by bargaining unit employees. Contracting out threatens the job security of employees in the bargaining unit. Unions seek restrictions on contracting out because the employer is allowed to contract out if there is no collective agreement term preventing it.

**4. Why would an employer seek to have a specific penalty for misconduct included in the collective agreement?**

Generally an arbitrator has the authority to reduce the discipline imposed by the employer. If an employee has been discharged, an arbitrator could order that a suspension is the proper discipline and direct that the employee be reinstated. If the employer has suspended an employee an arbitrator could reduce the length of a suspension. However, when the collective agreement provides for specific penalty for misconduct the arbitrator cannot reduce the penalty imposed. Therefore employers may seek specific penalties for misconduct to avoid having an arbitrator reduce the penalty that has been imposed.

**5. Explain why a union would seek to have provisions regarding technological change included in the collective agreement.**

Technological change threatens the job security of employees. Although some jurisdictions have legislation regulating the introduction of technological change, this legislation does not provide employees with extensive protection. The majority of jurisdictions do not provide technological change provisions in labour relations legislation. Although this question does not ask about the protection that could be provided to employees, collective agreements could provide employees protection such as increased notice of change, job guarantees, retraining, and increased severance payments.

**6. Describe the preferences of the union and the employer regarding any personal leave provisions in the collective agreement.**

Union Preferences:	Employer Preferences:
Broad definition of matters allowing employees to take leave	Narrow definition of matters entitling employees to take leave
No maximum, or longer maximum leave	Shorter maximum leave
Employees entitled to leave as a right	Provision requiring employees to apply for leave and allow employer to deny leave

**IV. Discussion Questions****1. How can an employer ensure that the time limits provided in the grievance processes will be enforceable?**

Time limits in the grievance process could be directory or mandatory. Employers should seek mandatory time limits in the collective agreement. To clearly establish that the time limits are mandatory it may be necessary to have the contract specifically provide that the grievance is deemed to be abandoned or cannot proceed if a time limit is not met. Employers in some jurisdictions have an additional problem even if the time limits are mandatory. Labour relations legislation in some jurisdictions allows an arbitrator to extend a time limit, even if it is

mandatory, if the other side is not prejudiced and the agreement does not prohibit the extension. Accordingly, the employer may wish to go further and have the collective agreement specifically provide that the arbitrator does not have the authority to extend a time limit in the grievance process.

**2. The grievance procedure in a collective agreement provides that a union grievance “shall not include any matter upon which an individual employee would be personally entitled to grieve. ...” Why would a union want to negotiate the removal of this provision from the collective agreement?**

This provision would prevent a union from filing a policy or union grievance in any situation where an individual employee could have filed an individual grievance. A union may be concerned that individual employees may not file grievances for a number of reasons:

- employees may be intimidated by management
- employees may not wish to be perceived as troublemakers
- employees may perceive that filing a grievance will harm their future job prospects
- employees may not think an issue is important enough to pursue a grievance.

**3. A unionized employer is hiring students to work in its office and production departments for the months of May through August, on both a full-time and a part-time basis. How would the employer determine whether union dues should be deducted from the students' pay?**

To answer this question the employer would have to determine 1) if the students are included in the bargaining unit, and 2) if students are included in the bargaining unit is their consent required to deduct union dues? To determine if students are included in the bargaining unit the employer will refer to the recognition article in the relevant collective agreement. If the bargaining unit only includes production employees and excludes office employees, students working in the office are not included in the bargaining unit and union dues do not have to be deducted. If the bargaining unit only includes full-time employees, part-time students would not be in the bargaining unit and dues would not have to be deducted. Even if students are included in the bargaining unit there are some jurisdictions in which the consent of the employee is required before dues can be deducted.

**4. Explain the importance to the union of union security provisions in a collective agreement and the implications of these provisions to the employer.**

Union security provisions relate to the deduction of union dues from employees' pay and the possible requirement that employees be union members. Without the dues deduction provision the union would be forced to pursue employees for dues. The dues deduction is important for the union because it provides a financial base. A membership requirement could increase the solidarity of the bargaining unit by avoiding a split between union and non-union employees. The deduction and remittance of union dues will impose one more administrative task on the employer. There is a possibility that union security provisions could affect the recruiting and selection of employees. There may be some individuals who would not work at an organization

where union membership and the payment of union dues are required. Mandatory union membership may provide the union with more control over bargaining unit employees and accordingly may be something that the employer wishes to avoid. If there is a strike, an employee who refuses to strike and continues to work could be disciplined by the union. This discipline could include expulsion of the employee from the union in some jurisdictions. Where the collective agreement provides that union membership is required for employment, the end result could be that an employee who continued to work during a strike could be discharged. Accordingly, the requirement of union membership for employment, together with the possibility that union membership can be withdrawn by the union for refusing to strike, provides the union with a stronger position when dealing with the employer.

**5. Why do unions want specific provisions relating to issues such as discrimination and health and safety included in collective agreements even though there is legislation covering these issues?**

Unions could seek collective agreement provisions in these areas for several reasons:

- 1) to emphasize and educate. By having contract provisions relating to discrimination and health and safety union and employer representatives are reminded of the importance of these issues.
- 2) to obtain additional protection. Collective agreement provisions could provide for higher standards than the legislation. For example, the agreement could provide for a larger health and safety committee than the legislation requires.
- 3) changes in legislation. The union may be concerned that if the legislation is relied upon it could be amended.

**6. An employer and a union have been discussing what will happen if two employees are hired on the same day. The concern is how to determine who has the most seniority. The employer has proposed that the tie be broken on the basis of the employees' birthdays—the employee with the earliest birth date would be deemed to have the most seniority. Explain any problems that could arise if this tie-breaking formula is adopted.**

The tie-breaking formula based on birth dates could lead to problems relating to discrimination. It has been held that a tie-breaking formula based on age or birth date is discriminatory because age is a prohibited ground of discrimination.

**7. Why would an employer want restrictions on bumping in the collective agreement?**

Employers want to ensure that employees are qualified for jobs. Accordingly, employers would want any bumping to be subject to a restriction that employees have the skill and ability required. Employers may also wish to avoid a series of bumps that disrupt the workplace. For example, if employee A bumps employee B who bumps employee C etc. there could be significant disruption. This could be avoided by having contract language that restricts the number of



bumps. One such restriction would require employees to bump the lowest seniority employee possible.

**8. An employer is negotiating a first contract with a union. It has found two alternative provisions regarding job vacancies that could be included in the agreement:**

**(a)** One provides that seniority will be the determining factor if the KSAs of two contending employees are equal.

**(b)** One provides that the employee with the most seniority will be awarded the job provided that they have sufficient ability to do the job.

Decide which of the two provisions the employer should seek to have included in the collective agreement and explain why:

Provision (a) is a relative or competitive ability clause. It provides that seniority will only be a factor in the decision if two employees have equal ability. If an applicant for a job vacancy has more skill and ability the employer will be able to choose him or her even though they may have less seniority than other applicants. For example, if employee A has ten years seniority and employee B (who has more ability) has only five years seniority, the employer will be able to select B even though B has less seniority. Provision (a) is the term that the employer should try to have included in the collective agreement because it places more emphasis on skill and ability and less emphasis on seniority. Provision

(b) is a sufficient ability clause. It provides that the employee with the most seniority only has to have enough ability to do the work. With provision (b) an employee with the most seniority and enough ability must be given the job even though another employee has more skill and ability. The employer should avoid provision (b) because it places more emphasis on seniority and gives skill and ability less weight.

**9. You are part of a management team that is preparing to negotiate a renewal of a collective agreement. The agreement contains the following article: "All job vacancies shall be posted for three days. If there is more than one applicant for a job positing plant seniority shall prevail." Explain how the present wording of the agreement may be unfavourable to management and how the provision should be changed from management's perspective.**

The present wording does not define a job vacancy. Management would prefer a provision that defined a vacancy as being an opening that will be for more than a minimal number of days. There is no reference to skill and ability. Management would prefer a competitive ability provision that only refers to seniority if employees are equal in ability.

**10. Describe the preferences of the union and the employer regarding any overtime provisions in the collective agreement.**

Possible Union Preferences:	Possible Employer Preferences:
Voluntary overtime	Mandatory overtime
Equal distribution of overtime	No restrictions on distribution
Distribution of overtime on the basis of seniority	No restrictions on distribution
Cash remedy if overtime is incorrectly distributed	Opportunity to work if overtime is incorrectly distributed
Longer advance notice of overtime work	Shorter advance notice of overtime work
Overtime defined to provide for a lower threshold	Overtime defined to provide for a higher threshold
Overtime rate higher than legislated minimum	Overtime rate at legislated minimum
Restrictions on use or maximum amount of overtime allowed	No restrictions on use of overtime
Additional payments such as meal or transportation allowance	No additional payments

**11. A collective agreement provided for the following definition of technological change:**  
*“Technological change ... shall include automation, mechanization, and process change, and means the introduction of equipment or material of a different nature or kind than that previously utilized. ...”*

The employer had an existing IT system in its two locations, to a cloud. Changes were made to the IT system that resulted in layoffs. The union claimed that there had been a technological change, and accordingly certain protection in the collective agreement was available to employees. What could the employer's response be?

The employer's response could be that there has not been a technological change as defined in the collective agreement. The collective agreement refers to the introduction of new equipment or material of a different nature than previously used. In this situation the employer is only making changes to existing equipment. In the case that this question was based upon, *Re Ellehammer*, 48 LAC (4<sup>th</sup>) 26, the grievance was dismissed. This question illustrates the importance of the definition of technological change provided in the collective agreement. Employers would prefer a narrow definition, while unions would prefer a broader definition.

**12. A collective agreement provided that an employee would be entitled to five days' leave with pay upon the death of a parent. Yie worked Monday through Friday. Her stepfather died on a Saturday. If you represented the union, what leave would you claim Yie is entitled to? If you were the employer's HRM department, and you wanted to reduce the leave as much as possible, what would your position be? If you were an arbitrator what leave would you order be provided to Gwen:**

The union would claim that Yie had lost a parent and they are entitled to five working days of leave - Monday through Friday. The employer could take the position that the collective agreement provided for leave on the death of a parent and this does not include a stepfather. Alternatively, the employer could contend that the leave provided for in the agreement began on Saturday and accordingly Yie was only entitled to Monday through Wednesday as leave. Although it may be hard to believe, this question is based on an actual case, *Re Essex*, 65 LAC (4<sup>th</sup>) 85, where the employer made the arguments referred to here. The arbitrator in the case held that a stepfather was a parent and that the employee was entitled to five working days of leave. The arbitrator ordered the employee to be given two additional days of leave with pay. This question illustrates that terms such as parent and days should be clarified in the collective agreement.

**13. One of the union's concerns is job security. Which articles in the collective agreement will directly or indirectly affect job security?**

The following articles could directly or indirectly affect job security:

Recognition article. If the bargaining unit is broadly defined, for example it includes part-time employees, employees will still be protected by the provisions of the collective agreement if they move to a job which might otherwise not be included in the bargaining unit.

Bargaining unit work. Restrictions on individuals outside of the bargaining unit from doing bargaining unit work could increase job security.

Contracting out. Restrictions on contracting out will increase job security. A complete ban on contracting out, although unusual, would provide the most job security.

Discipline and discharge. If an arbitrator is able to review the discipline imposed by the employer an employee who has been discharged could be reinstated. An arbitrator cannot reinstate an employee if the specific penalty of discharge for certain misconduct is provided for in the collective agreement. Accordingly, a collective agreement that does not provide for the specific penalty of discharge provides greater job security.

Seniority. If the seniority provisions in a collective agreement require an employee to have sufficient ability to do a particular job, as opposed to a relative ability provision, an individual employee's job security may be increased if they have more seniority. If employees must establish that they have ability equal to other employees their job security may be reduced because seniority has less weight in job decisions.

**Super-seniority.** A super-seniority provision in the collective agreement could provide increased job security to union officials.

**Technological change.** Technological change provisions that place restrictions on change and require employers to engage in retraining efforts increase job security.

**Grievance and arbitration procedure.** Although this may be stretching the point, the nature of the grievance and arbitration procedure could have indirect implications for job security. If the time limits in the grievance procedure are directory, it is possible that in the event of a discharge where there has been a

failure to meet a time limit, the grievance will still be arbitrable and the employee could be reinstated. Contrast this to a situation where the time limits are mandatory and the arbitrator's authority to extend a time limit has been eliminated. In the later case, if a time limit were missed a grievance relating to a discharge would not be arbitrable.

## **V. Web Research**

1. Examples of required and voluntary clauses should be consistent with these provisions identified in the text. Depending on how the language is constructed, the language identified can favour the union or management.
2. Canadian jurisdictions should be similar in nature with respect to dues check off, union membership requirements, and religious exemptions.
3. It is important to note that different jurisdictions may have different requirements for paying for public holidays.
4. There have been several employment standards revisions in most jurisdictions in Canada. This most notable impact has been in Ontario with several regulations being amended in 2017 only to be repealed in 2018 by a different government.

## **VI. Vignette**

### **So, What Is the Value of a Collective Agreement?**

A collective agreement outlines the terms of the employment relationship between employees and their employer for unionized employees. Many collective agreements includes terms outlining employees' important rights, working conditions, and total compensation. This became abundantly clear during the COVID-19 pandemic when unions strived to ensure safe working conditions for their members.

A collective agreement also affords marginalized employees protection by working to reduce racial and gender wage differences. The Canadian Union of Public Employees or CUPE, advocates for collective agreements that support marginalized employees – women, persons with disabilities and racialized, LGBTTI and Indigenous employees. Human rights are a centre piece of CUPE collective agreements. Collective agreements also add value to employees with terms pertaining to childcare, anti-harassment, violence prevention including domestic violence, work-life balance, and family leave.

A collective agreement could also add value to employees' lives with the inclusion of terms pertaining to employees' mental health. Specifically, a collective agreement could define increased medical and paramedical benefits for mental health practitioners' improved access to counselling services and improved employee assistance programs.

Collective agreements also add tremendous value to both the organization and its members with defined terms pertaining to the cradle to grave HRM practices. These include employee recruitment and selection, training, compensation and benefits, and promotion.

## VII. Case Incident: Grant Office Ltd.

The purpose of this incident is to illustrate the critical point that if there is no explicit restriction on contracting out work, the employer can do so. For a case illustrating this point refer to *CAW v. Bristol Aerospace Limited*

<http://www.canlii.org/en/mb/mbca/doc/2008/2008mbca62/2008mbca62.html>

### 1 a) What is does *bargaining unit work* mean?

#### b) In Article 1, how would this term apply?

Bargaining unit work is the work normally done by employees in the bargaining unit. In this case, the Company agrees that work normally performed by employees within the bargaining unit shall continue to be performed by bargain unit employees.

### 2. a) What is meant by seniority and who do unions prefer it to be included in a collective agreement? b)What is the significance of seniority in this case?

Seniority is an employee's length of service with the employer. Unions prefer seniority to apply to more workplace issues and for seniority to be given more emphasis, because this provides increased job security for longer-term employees and avoids favoritism by management. In this case, seniority with the Company shall continue to accrue the benefits during an employee's period of layoff, as long as the employee remains eligible for recall. However, an employee on layoff shall not be entitled to any benefit conferred by this Agreement on regular employees, except as specifically provided for in this Agreement.

### 3. What is the value of paragraphs one and two in the letter of understanding to both the union and the employer in this case?

The value of paragraphs one and two in the letter of understanding to both the union and the employer in this case is that both the parties have finally agreed to a point of collective agreement that is partially benefited to both the parties. It provides a framework of continuing the company's operation and both union and the management have agreed to work accordingly. The agreement explains the meaning of the term "temporary work" and, a temporary work list will be created on a classification-by-classification basis.

**4. Do you think management representatives could successfully use Article 1 in the agreement to defend their decision to contract with General Management Company? Why:**

The employer's response will be that the contract contains a provision which protects bargaining unit work; however, it does not prohibit contracting out with an external company and these are entirely separate issues. A term protecting bargaining unit work does not prohibit contracting out. However the term will not be used in such a way as to cause the layoff to the existing employees.

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<sup>i</sup> Laurence Olivo and Peter McKeracher, *Labour Relations: The Unionized Workplace* (Toronto, ON: Emond Montgomery Publications Ltd., 2005), pp. 149–50.

<sup>ii</sup> Singh Lamarche LLP, “Probation Periods in Canada: what are they and what do they mean?” (2018), <http://singhlamarche.com/probation-periods-canada-mean/>, accessed April 26, 2018.

<sup>iii</sup> Ontario Human Rights Commission, *Human Rights at Work 2008—Third Edition*, <http://www.ohrc.on.ca/en/iv-human-rights-issues-all-stages-employment/7-pay-benefits-dress-codes-and-other-issues>, accessed April 27, 2018.

<sup>iv</sup> Krista G. Stringer and Travor C. Brown, “A Special Kind of Downsizing: An Assessment of Union Member Reaction to Bumping,” *Relations Industrielles*, vol. 63 (2008), 648.

<sup>v</sup> Government of Canada, Federal Labour Standards. Leave (October 10, 2017), <https://www.canada.ca/en/employment-social-development/programs/employment-standards/federal-standards/leave.html>, accessed April 28, 2018.