

ATLANTIC LEGAL'S GUIDE TO  
LEVELING THE PLAYING FIELD

What Massachusetts Charter School Leaders  
Need To Know About Union Organizing

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Jackson Lewis LLP

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# LEVELING THE PLAYING FIELD

What Massachusetts Charter School Leaders  
Need To Know About Union Organizing

## Preface

Now that charter schools have become widely accepted quality options to the conventional public schools across the nation, labor leaders continue to try to interfere. They are focused on bringing charter school teachers and other charter employees to their collective bargaining table. By doing so, they threaten the freedom that many charters were formed to enjoy.

While the decision to join a union is solely that of the charter school employee, it is important to recognize that teachers' unions at the local, state and national levels have been staunchly vocal in their opposition to charter school laws and policy. Given this political history, many charter advocates have found that organized labor's agenda is not consistent with the vision of the charter school movement that guarantees accountability in exchange for flexibility.

Charter leaders—especially board members and administrators—need to be aware of the strategies that unions may use to organize employees. They also need to know what

they are legally permitted to do—and what they cannot do—to ensure that charter school teachers and other employees have the knowledge to make a fully informed choice, should a union attempt to organize their school.

*Leveling the Playing Field* is a comprehensive examination of this important area and a practical guide to what Massachusetts charter schools need to know about their rights and responsibilities regarding union issues. We are pleased to endorse this discussion and encourage your close review.

***Jeanne Allen***

President

The Center for Education Reform

Washington, D.C.

# Foreword

The Atlantic Legal Foundation, a public interest law firm now in its 28th year of operation, has been proud to represent charter school advocates contending that charters should be given freedom to permit innovative programs leading to academic success. We welcome this opportunity to serve the charter community.

Efforts to organize charter school teachers and other employees, altogether lawful, are likely to have a significant impact on the flexibility the school needs to meet its charter responsibilities, and charter administrators need to know how to react when the union seeks to represent employees.

This thorough guide—an important component of Atlantic Legal’s Charter School Advocacy Program—offers advice that is not always available from corporate or not-for-profit attorneys who often are not skilled in labor law matters. Labor law is highly specialized. Charter boards and administrators are well advised to seek counsel from firms that practice regularly in this area.

In preparing this guide Atlantic Legal has enlisted the services of Jackson Lewis LLP, a prominent national law firm whose practice is limited to representing employers in a wide variety of labor and employment law matters. This guide is one in a series, the first of which was prepared by New York Jackson Lewis partners Thomas V. Walsh, Esq. and Roger S. Kaplan, Esq. We are grateful to Howard M. Bloom, Esq. and Matthew D. Freeman, Esq. who prepared the Massachusetts edition. Messrs. Walsh and Kaplan continue to serve as Series Editors. The guidance of the Jackson Lewis firm in this contentious area is greatly appreciated.

Careful consideration of this discussion of union organizing efforts will ensure that charter leaders comply with the law while making their views about the merits of dealing with a union known to staff members.

***William H. Slattery***

President  
Atlantic Legal Foundation  
New York, N.Y.

# I

## The Landscape

When it enacted the Charter School Law, considered by many to be the most significant part of the Education Reform Act of 1993, the Massachusetts legislature made it possible for many charter schools (subject to certain exceptions) to be relieved of the collective bargaining obligations which encumber the traditional public school districts. However, the law does not prevent a charter school from being unionized. The Charter School Law states that such schools shall be subject to Chapter 150E, the Massachusetts public employees labor law, which grants public employees the right to “form, join, or assist” a labor organization and provides procedures for labor organizations that seek to represent them.

Teachers’ unions have taken a strong stance against the establishment of charter schools in the United States. The most hotly debated issue for the teachers’ unions in Massachusetts was, and is, charter school funding. The unions take the position that charter schools drain money from the regular public school systems, and thus from the regular public school teachers the unions represent. The Massachusetts Federation of Teachers (MFT) and the Massachusetts Teachers Association (MTA), the largest teachers’ unions in

the state, fought charter schools legislatively leading up to the passage of the Education Reform Act in 1993, and have continued to do so ever since.

However, the MFT recently changed its approach. On June 14, 2005, the MFT sent letters to all 2,000 charter school teachers in the state urging them to join as associate members. Associate members of the MFT get limited benefits, such as liability insurance, in exchange for the payment of reduced dues. According to *The Boston Globe* in an article dated August 10, 2005, forty-eight of those charter school teachers, from a dozen different schools, had joined the MFT as associate members. That means at least twelve of the forty-nine Commonwealth charter schools in Massachusetts currently may have MFT members on staff. The MFT expects the membership of charter school teachers to continue to increase.

## What is a "Union?"

MEMBERS

MEMBERS

AFT

State Federations  
(MFT, for example)

Locals  
(Each organized public system  
constitutes a "local")

Unions are organizations made up of several layers. At the top is the "home office," usually called the "International." In the case of the American Federation of Teachers (AFT), the main office is

in Washington, D.C. The MFT is actually a “state affiliate” of the parent organization, the AFT. There are many state federations. Below the regional level are the “branch offices,” commonly called “Locals.” Some locals are very big, like Local 66 in Boston—better known as the Boston Teachers Union (BTU). Many teachers are surprised to learn that the BTU and MFT are all part of the same organization, the AFT.

At the bottom are the members. Every member is a member of his or her local, state federation, and international. Thus, every BTU member helps fund the MFT statewide, and the AFT nationally.

This is no small matter, since all the funding for the union comes from dues and other fees paid by members. Members pay their locals. The locals keep some money, then send the rest upstairs, to the state federation and to the international. These payments are called “per capita taxes,” because they are “taxes” that the subordinates must pay “per head.”

The AFT is not the only union active among teachers. The National Education Association (NEA) is also a high profile union. It is similarly designed. There is a national headquarters, intermediate bodies (councils and state affiliates) and locals. The Massachusetts affiliate of the NEA is the MTA.

The drive to organize charter schools is not limited to Massachusetts and the Massachusetts Federation of Teachers. In New York, the New York State United Teachers, the New York regional office of the AFT, has signed up hundreds of charter school teachers. The NEA, the international parent of the MTA, has recently committed \$1.75 million to organizing efforts at charter schools.

Charter schools are growing because parents, teachers and charter school leaders have found that traditional school administration often had not achieved educational progress, resulting in failing schools. Traditional schools' collective bargaining agreements stifled efforts to improve educational performance. Many charter school leaders believe the unions' goal is not academic achievement, but to look out for the interests of their members ahead of those of the students.

Under the Massachusetts public employees' labor law, employees have not only the right to join a union, but also the right to refrain from doing so. Although the law grants employees freedom of choice in this regard, the law also grants certain advantages to unions. For example, a 2000 amendment to the Charter School Law, explained in detail in Chapter IV, makes it possible for unions to organize charter school employees, and thus obligate their charter school to a bargaining relationship, simply by getting a certain number of them to sign "authorization cards."

## **Which Law Applies?**

The federal labor law, the National Labor Relations Act, is administered by the National Labor Relations Board, which largely decides for itself which employers are subject to its authority. Federal law is supreme and the National Labor Relations Act would trump Chapter 150E, a state law, if the NLRB asserted jurisdiction over Massachusetts charter schools.

However, the NLRB has never exercised its authority over a

Massachusetts charter school (and rarely has asserted jurisdiction over a charter school anywhere else). Further, since the clearly expressed intent of the Massachusetts Legislature is that charter school employees are to be considered “public employees” subject to Chapter 150E, it is doubtful that Massachusetts charter schools will be deemed subject to the federal law. Therefore, we assume that charter schools will continue to be covered by Chapter 150E.

Further exploration of this issue is not foreclosed. Charter School administrators requiring closer examination of this question should consult with labor law counsel.

The most important aspect of “leveling the playing field,” for all charter schools, is fostering a workplace in which unions would be considered unnecessary by employees. The next two chapters of this guide address factors that may lead employees to come to want union representation and outline steps charter school administrators can take to develop positive employee relations that make a union unnecessary in the minds of employees.

## **Why Many Charter School Leaders Do Not Want to Have a Union**

While a charter school leader may have an opinion as to whether a union is desirable, the choice belongs to the *employees*.

Having said that, there are many reasons why school leaders may see a union as an obstacle to the mission of the charter.

Schools may see unions as obstacles to progressive change, based on their experiences in the traditional public school system. All evidence suggests that charters challenge the union agenda.

Besides these charter school-specific reasons, administrators may well be concerned that a union would interfere with the successful and harmonious operation of the enterprise. For example:

- Union contracts often reduce flexibility;
- Union contracts can restrict direct communications with employees;
- An “us versus them” atmosphere can develop;
- Union relationships require much time, energy, and extra costs, all better spent on educating children;
- An over-emphasis on seniority may hurt a merit-based system and limit the ability to motivate;
- Risk of labor strife may increase, and with it a loss of community confidence.

# III

## Why Employees Might Want to Support a Union

Unions represent only a small minority of employees in the workforce. Not all of those employees support their unions wholeheartedly, for the great majority had little choice whether to be represented. Indeed, most unionized employees are “union” because they *have to be*. They have gone to work for an enterprise whose employees already were subject to a collective bargaining agreement.

In a growing number of cases, employees are governed by an agreement (or law) that calls for unionization simply by card count. Often, there is only a minimal effort to educate employees as to the disadvantages of union representation. A continually shrinking number of employees actually have an opportunity to vote in a secret ballot election.

Surveys show that many Americans favor the notion of unions, but relatively few favor having one where *they* work.

When one is asked why employees would support unionization, there is a temptation to say “money,” or “benefits,” or in the case of charter schools, “tenure.” If these truly were the reasons, we might all be unionized—after all, everyone wants more money, benefits and job security. In fact, these enticements generally matter little, because there is no guar-

antee that a union can deliver them.

Employees actually are motivated to support a union when they feel ignored or hurt by their employer. If they believe their employer has no interest in them, will not listen to them, or has treated them unfairly or abusively, they will look to unions for help. (They also may seek out government agencies or private attorneys willing to make claims on their behalf.) A word commonly used in organizing campaigns is “respect.”

While it is true that employees who are educated about unions are less likely to support organizing than those who are not, where employees believe they are treated unfairly by their employer they often are willing to take a chance on unions.

Who is the employer? In a technical sense, it is the employing organization—here, the charter school. In a real sense, however, it is every supervisor, every manager, and of course, every administrator. Naturally, the upper management of any enterprise should be committed to the welfare of its employees, but the lower levels of management have more interaction with employees. To an employee, his or her immediate supervisor is management. No matter how progressive an employer tries to be, it will be viewed negatively by employees if its first line supervisors are seen as uncaring or unfair.

Do not underestimate the extent to which supervisors and managers can affect employees' morale and their view of the school. Employees spend more of their waking hours

with management than they do with anyone else. Employees take the directions, comments, praise, and criticism from their supervisors very seriously. Even a manager's off-hand remark, seen by that manager as inconsequential, may weigh upon the employee for days.

Naturally, employees vividly recall their exchanges with their managers and supervisors. Employees want the support and approval of those above them. They gauge their relationships with supervision (and thus with the school itself) by the feedback they get, both spoken and unspoken, and by their observations of how other employees relate with management. This is perfectly normal and, in a well-functioning workplace, it is beneficial.

Conduct by managers at any level which is inappropriate can produce undesirable results. Even a perfectly pleasant individual can accidentally create a problem. Minor incidents in sufficient number can become a major headache. When an employee's personal catalogue of slights and hurts reaches a critical point (which will differ for every person), that employee will sour on the enterprise. Employees who reach this point have low morale and poor performance. Worse, their unhappiness spreads to other employees, demoralizing the organization.

Small indignities eventually can poison the working atmosphere. If a manager or supervisor:

- Is too busy to deal with employees;
- Is rude, abrupt, or discourteous;
- Fails to address employee issues;

- Appears to “play favorites”;
- Enforces standards that seem inconsistent;
- Does not want to hear employee suggestions;

then, employees may decide that the school really has no interest in their concerns. In such cases, employees will be more willing to look outward for help. They may seek out a union.

The good news is that the workplace need not be this way. These slights may be avoided or at least corrected promptly. Even better, the same management skills which make for highly productive and successful workplaces also can create positive employee relationships. When such relationships exist, unions cease being attractive.

# III

## **Skilled Administration Makes a Union Unnecessary**

Union avoidance has two key elements: (1) creating a management environment in which employees feel no need to seek outside representation, and (2) educating employees to the realities of unionization. The second element will be described in Chapter V.

The first element can be summarized in an eleven-point program for ensuring a healthy working environment.

### **Eleven Point Program to Enhance Team Morale and Performance**

Any enterprise which follows these eleven points will enjoy improved morale and performance. It will recognize and deal with employee issues before they become conflicts. Schools employing this program will better serve their students. Workplaces operating in this environment will experience less conflict and find the notion of a labor union to be irrelevant to employees.

#### **1. Develop and Maintain Clear and Lawful Workplace Policies**

The first step in successful management is to ensure that the employees have a clear understanding of the

employer's policies and rules. That means the employer must have policies which are not only functional, but also lawful and clearly expressed. They should cover every aspect of work, and address fully the relationship between the school and its employees. These policies should be collected into one master file or manual, and updated as laws or your school's needs change.

The charter school will have a well-worded *mission statement*. It will give your employees a sense of common purpose. Your mission as a charter school should be plain: to create an alternative educational resource which has the flexibility to succeed where the traditional schools have not. Do not underestimate the value of your school's mission to motivate employees. Together, you are embarked on an exploration of education, always looking to enhance your students' educational experiences.

There are resources which can assist you in preparing employment policies. However, off-the-shelf policies will not fully satisfy your school's needs. "Generic" policies should be reviewed and modified to meet your circumstances. The school's employment law counsel should be asked to review the materials. Proper policies are the first line of defense in union organizing and litigation.

## **2. Create and Distribute an Employee Handbook**

Once you have prepared sound policies for your school, you must *communicate* them to your employees. An employee handbook is an excellent vehicle.

A well-prepared handbook allows all employees to fully understand the policies that apply to them. It also offers the school an opportunity to publicize its mission and provides employees with a resource to understand the school's benefits for them and expectations from them.

As with employment policies, there are resources which can provide suggestions for employee handbooks. You must put your own stamp on any handbook. Because these handbooks are important and will raise expectations by employees that the policies will be followed, they too should be reviewed by counsel.

## **What's in a Handbook?**

Here are some topics that typically are found in an employee handbook:

Our Mission	Continuing Education
Our Philosophy	Workers' Compensation
Anti-Harassment Policies	Leaves (and Procedures)
About Your Job	Bereavement Leave
Your Supervisor	Jury Duty
Employee Classifications	Military Leave
Problem Solving	Solicitation & Distribution
Attendance & Time Records	Access & Trespass
Work Hours	Confidentiality
Your Paycheck	Monitoring of Electronic
Your Personnel Record	Communications
Performance Evaluations	Standards & Discipline
Salary Increases	Substance Abuse Policy
Benefits	Personal Appearance
Retirement Plan	Inclement Weather Closings
Vacation (Eligibility & Usage)	Safety
Paid Holidays	Bulletin Boards
Sick Pay	Smoking
Disability (Short & Long Term)	

### **3. Educate Employees About Your Mission**

If you are a school administrator, you are committed to the great experiment of charter school education. If you are a founder of a charter school, the enterprise is the product of your vision. Your school could not have been created and maintained without your enthusiasm and hard work. Chances are many of your employees share that enthusiasm. You should encourage them to spread the enthusiasm. You are doing important work—make sure they know it! Share your vision with every person who works for you.

- Don't be afraid to tell employees you cannot succeed without them.
- Explain that you *exist* to be different.
- Explain your finances. Employees should understand funding issues and the problems you may face.
- Take pride in the flexibility you have. You can change when you need to, while traditional schools are bound by union contracts under which it may take years to solve problems, if ever.
- Make employees part of the process. Grow employees' enthusiasm by soliciting their ideas.
- Meet with employees regularly to discuss the "state of the school."

## **Sample Pro-Employee Mission Statement**

Our school strives to maintain an environment which provides excellent working conditions and non-confrontational working relationships. Every employee is essential to the success of our mission. Each employee deserves to be treated with respect.

We believe in meeting our challenges together through individual consideration and direct collegial relationships. In our view, these principles provide the best environment for staff development and the education of our students. We seek to create a climate that enhances the teamwork necessary for us to attain our mutual goals. We want our school to be free from the artificially created tensions and interruptions that often arise when a third party such as a union and the collective bargaining process stand between the school and its staff.

We enthusiastically accept our responsibility to provide our employees with good working conditions, competitive wages and benefits, fair treatment, and the personal and professional respect you deserve. We do so because of our continuing interest in our employees, our students, and the community we serve.

We firmly believe that collegiality and teamwork will enable us to succeed in our mission of providing the best possible educational opportunities to our students. Your participation in our school community by expressing your problems, suggestions, and comments in a constructive atmosphere allows us to understand each other better.

#### **4. Supervisors Are Not Born—They Are Trained**

American business culture sometimes mistakenly believes that because an individual has ambition or drive, or because an employee has a good performance history, that employee will be a good supervisor or manager. This is not necessarily true. The qualities which will make someone successful as a worker are not always the ones needed for success in management.

All individuals in a managerial or supervisory capacity should receive training on fundamental supervisory principles. Subjects may include:

- The employment policies of the school;
- Effective supervision and delegation of duties;
- Constructive (not confrontational) correction.

All levels of school management could benefit from instruction on these subjects.

#### **5. Clearly State Performance Expectations: Accountability and Corrective Action Are Essential**

All employees in the school must fully understand the performance expectations held by administration. This is essential to their doing a good job and to any evaluation of their work. Where an employee fails to meet goals because he or she did not fully understand them, management has only itself to blame. Do not assume that the staff will “know what to do.”

Having stated your expectations, all employees must be held accountable for their performance. This

is not intended to be harsh. It is intended to be fair; fair to all employees (they are treated equally), fair to the students (so they are not shortchanged), and fair to the school (that it is better able to succeed).

Holding employees accountable is more difficult than it may appear. Many educators are reluctant to discipline or correct subordinates for fear that the collegial atmosphere of the school will be disrupted. This is not wise. Avoiding critical discussion prolongs the problem and makes the correction more difficult later. Constructive criticism can correct a problem before it becomes deeply rooted.

Likewise, a laid-back, “let live” approach, which “lets the small things pass” is not conducive to a good working environment, and is likely to prove troublesome as time passes. Looking the other way creates an environment in which standards slip. Moreover, it creates an expectation that infractions are permitted. When corrective action finally is taken, there may well be resentment (“Why is it a problem when I do that, but not someone else?”). Experience proves that the best way to maintain a fair workplace is to hold all employees to the same standards all the time.

## **6. Provide Meaningful Performance Evaluations**

Develop a program of formal performance evaluations which provide a true measure of strengths and weaknesses. Employees should have at least one meeting with management every year in which their

written evaluation will be discussed. Avoid last-minute fill-in-the-blank or circle-the-number formats for evaluations. Use the interview as an opportunity to help the employee grow. Where improvement is desired, be sure the school is providing the tools to the best of its ability. However, don't forget to mention the individual's successful qualities and accomplishments, as well.

In addition to these formal evaluations, employees deserve ongoing feedback and support. An employee should never learn at her annual evaluation that she has not been meeting expectations for many months. If performance is substandard, interim correction should be provided. The school will never go wrong by having too much constructive communication.

## **7. Meet Frequently with All Employees**

It should be clear from these recommendations that *communication* is the key to a successful school, and to remaining union free. Part of the school's program of communication should be regular meetings—preferably weekly—which all employees attend. Management can use these meetings to discuss its goals, as well as the school's performance, and any other issues. It can also use this time to provide in-service training on various subjects.

Unionization should be included among these topics. Regular reminders about Chapter 150E and the simplicity with which a union may come in with-

out a vote, as well as suggestions that employees not sign anything unless they know all the details, may be included. Where the school promotes its mission and vision, instills pride in its employees, gives them the tools to succeed, and reminds them that union promises may not be fulfilled, employees are unlikely to succumb to the siren calls of union organizers.

## **8. Listen to Your Employees**

Too often, management engages in one-sided communication. Use your meetings with employees as an opportunity to *listen*. Be sure to reserve time at every meeting for employees to express issues important to them. Build an inviting environment in which employees are encouraged to bring up their concerns. It is far better to hear the issues early than to allow them to fester unresolved.

Move beyond your “open-door” policy. Your door may be open, but you are not always there, and when you are, you’re probably on the phone. Understand that employees may be reluctant to bother you.

Actively solicit employee input on problems or challenges facing the school. There is nothing which makes an employee feel more like part of the team than being asked for help in facing a common issue.

After all, teachers usually choose charter schools because they truly can be part of the team and can

play an active role in school governance; something they could not do in the traditional public schools, in large part because of union contracts. Many of these teachers have innovative ideas that can benefit their schools. It is important to maintain channels for teacher input and to respond to their ideas.

### **9. Document, Investigate, and Resolve**

Now that you've listened, be sure to act on the employee's request or suggestion. You must "close the loop." If management does not respond to employees promptly, it would have been better off not having listened to them in the first place. When you have received an employee question, concern or suggestion, *write it down immediately*. Give the employee a time frame in which you will respond. Follow up on it. Get back to the employee with a reasoned response.

A grunting "NO" translates into "I'm the boss, you're the horse." However, telling an employee that you have discussed his or her idea with the trustees is empowering to that employee. It makes the staff member understand that his or her opinion is valued. It sends the message that management is not arbitrary, and is willing to consider change.

Also, be open to the likelihood that your employees have good ideas that you may want to implement. This will reflect well upon you, and the school, as well as the

employee. After all, you're a charter school—you are able to do things differently.

### **10. Consider a Problem-Solving Procedure**

Despite your state-of-the-art policies, your employee handbook, and your constant communication with employees, there will be a time when you will have a conflict with an employee. One of the greatest attractions a union can offer is the possibility of a grievance and arbitration procedure to remedy perceived unfair actions by management. Consider developing a process by which an employee may have a management decision reviewed.

There are many procedures available, from “peer review” to “alternative dispute resolution.” Not all of these procedures will be right for your school. However, where an employer has a meaningful outlet to assure employees they are receiving fair treatment, the chances for serious conflict are reduced.

### **11. Competitive Wages and Benefits**

Lastly, be sure your school is reasonably competitive with market rates for wages and benefits. Although there may be certain benefit plans under school district union contracts in which charter school employees cannot participate, your employees should be provided with an appropriate compensation package.

## **Use Your Charter School Association as a Resource**

Operating a charter school can sometimes seem like a lonely task. There are powerful groups out there that feel threatened by charters. Perhaps you have a less-than-cordial relationship with the school district. Perhaps there are funding delays. You are not alone. There are many other charter schools in Massachusetts, and many around the country, which are experiencing the same challenges.

Your charter school association can offer a wealth of resources to assist you with many of the items discussed in this guide.

Creating an environment where employees do not feel the need to seek outside assistance is the first step toward “leveling the playing field.” However, these measures will not necessarily prevent unions from seeking to organize charter schools. Charter school administrators need to understand how unions recruit members in order to better educate their employees on the realities of unionization.

# IV

## How a Union Organizes Employees

The process of unionization is referred to as “union organizing,” because it “organizes” the employees for the purposes of collective action into appropriate bargaining units represented by a union.

### **How Do Unions Go About Organizing?**

Chapter 150E establishes employees’ rights to support or refrain from supporting unionization. To organize employees under the law, a union must gain written expressions of support from employees. Typically, “union authorization cards” are the means used for such expression. Employees state that they designate a specific labor union to be their representative for collective bargaining purposes and sign their names to the cards. Obtaining these signed cards is essential to the union’s efforts. The union’s success in obtaining formal recognition as the employees’ bargaining representative depends on the number of signed employee cards it can obtain (relative to the total number of employees in the bargaining unit).

## **Significance of Authorization Cards**

- An authorization card is a binding legal document.
- It is similar to a power of attorney.
- For some charter schools a signed card can result in unionization without an election.

Before reviewing the legal process further, let us consider the methods used by unions to obtain signatures.

### **How the Union obtains Authorization Cards**

Union authorization cards often are solicited by unions and signed by employees before an employer is aware of what is taking place. The law does not require that a union announce its intention to organize the employees of any particular employer. In fact, unions are most successful when they secure employee signatures without management's knowledge.

Let us pause here to talk about some assumptions upon which labor laws are based. It may help explain the law's curious procedures.

American labor laws, both state and federal, are based on a workplace model that is now almost 100 years old. Back then, that workplace was subject to virtually no safety laws or anti-discrimination laws, and offered employees few meaningful outlets for their frustrations. Unions back then were of questionable legality. Employers often responded ruthlessly to efforts to unionize their workers, retaliating against employee "troublemakers" without legal limitation. Conflict—often violent—was inherent in this employment relationship. The

nation's labor laws were written while this model was still widely accepted. Employment relations have changed greatly, but the labor laws—even the more recent ones dealing with public employment—have not kept pace.

The laws, therefore, were written not only to establish the employees' right to engage in concerted activities, but also to expressly forbid employers from punishing employees for exercising their right. The laws, however, go even further. They forbid employers and their agents from questioning employees as to their union activities, or those of their co-workers. Merely *asking* an employee if he supports a union may be deemed coercive and intimidating. We will discuss these restrictions on employers in more detail below.

Given the historical context of the law, it is understandable that a union need not announce its intention to seek employee signatures.

Unions often are well-structured, well-funded, and skilled in recruiting new members. The AFL-CIO, as well as many of its member unions, has long taught organizers that the most successful tool of organizing is *stealth*. Unions are most successful when they can obtain a large number of employee signatures *without attracting the employer's attention*. They will appeal to employees so as to make unionization appear highly attractive, at little or no cost to the employees, without providing any negative information, in an effort to get signatures swiftly.

Why this secrecy? Unions know full well that when the employer is aware of union organizing, the employer *lawfully*

will begin educating employees as to the less attractive realities of unionization.

In short, unions want to obtain employee signatures before the employer can provide employees with “the other side of the story.”

## **Honest Information Is Not “Union Busting”**

Unions do not want employers to discuss their views of unionization with employees. Unions do not want employers to provide employees with information about the costs of a union, the risks of collective bargaining, the rules imposed by unions on their members, and other subjects.

Charter school employers must understand the law does *not* prevent them from educating their employees about union representation. Further, schools are not forbidden from expressing their opinions about unionization.

Unions often rail against employers who oppose their interests by branding them “union busters.” Unions hope this label will scare the employer into silence, thereby giving the unions an advantage in securing signatures. Silence, however, does not help the school or its staff.

By providing your employees with honest factual information, you serve your charter school and your employees. The law gives employees the right to decide. You have the right, and arguably the moral obligation, to provide employees with information they would not otherwise hear.

Indeed, experience shows that unions frequently attempt to secure signatures from many employees at the same time by using several organizers, and even by

visiting employees at their homes. Unions refer to this approach as a “blitz”. They seek to gain as many signed cards as they can in the shortest possible time, before the employer can respond.

Some employees are more than willing to support a union. They may feel this way because of their political beliefs, because their employer is treating them badly, or because they do not understand the shortcomings of union representation.

In a perfect world, unions would provide employees with a balanced view of unionization. They would offer employees copies of the labor organization’s financial reports, by-laws, and collective bargaining agreements, so employees could learn about the organization in detail. Unions would inform employees that they cannot guarantee any results, that it is possible employees could end up with less in wages and benefits than they had before bargaining, and that unions have other objectives for which they might be willing to trade these terms of employment.

However, union officials are not required, and certainly cannot be expected, to offer employees a fair or complete explanation of the consequences of signing a representation card. Moreover, unions also rely on pro-union employees to convince their co-workers to sign with the union.

## **Signs of Organizing Activity**

There are many examples of employee conduct that may signal union organizing:

- new employee cliques form;
- new employee “leaders” emerge;
- heated discussions erupt among employees;
- the employee “rumor mill” becomes very active—and unusually negative in tone;
- employees start meeting after work;
- employees stop speaking freely to administration;
- adversarial challenges are made towards administration; and
- new vocabulary: “grievances,” “tenure,” “seniority,” etc.

Charter school administrators should educate staff before any “tell-tale signs” emerge—remember, acting early is important because under the Charter School Law, signed cards may take the place of an election.

## **Organizing Procedure Under Chapter 150E**

Generally, unions in Massachusetts have two avenues to secure lawful establishment as the collective bargaining representative of public employees: voluntary recognition by the employer or certification through the procedures of the Massachusetts Labor Relations Commission (MLRC), the Massachusetts administrative agency empowered with the authority to oversee public employee matters. For charter schools whose charters were issued after August 10, 2000, the Charter School Law establishes a third avenue for unions to organize employees. The following general description of

these processes assumes there is no union already in place.

The process always begins with employee signatures. Typically, if the union secures signatures from a majority of the employees in an “appropriate bargaining unit,” it may request voluntary representation by the public employer (see box on page 30 for discussion of an appropriate bargaining unit). The employer is permitted to recognize the union—but only if the union has been authorized by a majority of employees. Assuming the employer has declined, the union may file a petition with the MLRC requesting a “certification” of union representation through an election where employees decide whether or not they want union representation.

When the union files its petition, it also must file a “showing of interest” indicating that at least 30 percent of the unit employees have provided supporting signatures. This showing of interest can be in the form of union cards or a petition sheet. The signatures must be dated within six months of the date the petition is filed. In the private sector, unions typically will not file a certification petition unless they have obtained signatures from at least 70% of the employees in an appropriate unit because they need a majority (or 50% plus one) of the employees who vote in the election to vote for the union in order to win.

The MLRC will conduct a preliminary investigation to determine if the petition is supported by a sufficient showing of interest and raises a question of representation in the appropriate bargaining unit. If the MLRC determines that the petition raises a question of representation, it will schedule

an investigatory hearing to determine whether an election should be held to allow the employees to vote on whether or not they want to be represented by the union, as well as whether the group of employees the union seeks to represent constitutes an “appropriate unit.”

## **What’s an “Appropriate Unit?”**

Under the law, to obtain bargaining rights a union needs signatures from a certain percentage of employees in an “appropriate unit” for bargaining. In essence, an appropriate unit is that group of employees whose job titles share workplace interests to the extent that it would be practical to negotiate one collective bargaining agreement to cover all of them. This is referred to as the “community of interests” test. There need only be a community and not an identity of interests among employees in an appropriate unit. The unit is ultimately determined by the MLRC, which will examine each workplace on a case-by-case basis.

As of this writing no charter school units have been certified, but the MLRC has determined the appropriateness of bargaining units among other public employees, including public school employees. While no one factor is determinative, the MLRC examines the similarity of skills and functions, similarity of pay and working conditions, common supervision, work contact and the similarity of training and experience among employees. The unit need not be the “perfect” unit, just an “appropriate” one and the MLRC traditionally favors broad comprehensive units over small fragmented ones. There are clear exclusions from an appropriate unit, however. The law excludes certain managerial and confidential employees from its definition of “employees.” They are excluded from representation entirely.

One example of an appropriate unit in a public school in Massachusetts is: “all classroom teachers, school adjustment counselors, guidance counselors, speech and hearing teachers, remedial reading teachers, homebound teachers, educational testers, Title I teachers...excluding all other employees....”

If the MLRC determines that an election will be held, it will schedule either an on-site secret-ballot election or a mail-ballot election. Recently, due to limited resources at the MLRC, mail-ballot elections have become the standard practice. In both types of elections employees fill out ballots on which they vote for or against union representation. If a majority (50% plus one) of the employees who vote in the election vote in favor of being represented by the union, the union will become the exclusive bargaining representative of all the employees in the unit deemed appropriate by the MLRC.

The major difference between on-site elections and mail-ballot elections concerns the ability of unions to access employees during the voting. Union members are not allowed access to employees while they vote in on-site elections. In mail-ballot elections the employees receive ballots from the MLRC and have at least two and one-half weeks to fill them out and return them. Although the ballots are tabulated anonymously, union access to employees during the voting process is not closely monitored, as with on-site elections.

## **The Third Avenue: Charter Schools Whose Charters Were Issued After August 10, 2000**

As mentioned earlier, for certain charter schools in Massachusetts there is a third avenue unions can use to secure lawful establishment as the collective bargaining representative of employees. The 2000 amendment to the Charter School Law applies to any charter school whose charter was issued after August 10, 2000, and states:

*A charter school shall recognize an employee organization designated by the authorization cards of 60 per cent [sic] of its employees in the appropriate bargaining unit as the exclusive bargaining representative of all the employees in such unit for the purpose of collective bargaining.*

Although no charter schools to date have been unionized pursuant to this procedure, taken at face value this means that if a union can secure authorization cards from 60% of employees in an appropriate unit the charter school is required to “voluntarily” recognize the union as the exclusive bargaining representative of the employees. **There will be no election** and the union will represent the employees.

While the statutory language quoted above specifically refers to “authorization cards,” this provision of the statute also might apply if a union were to get signatures from 60% of the employees on a petition sheet, similar to the process for establishing a showing of interest under Chapter 150E, discussed above. Either way, in these charter schools a union is

best served by obtaining signatures quickly and quietly from 60% of the employees in an appropriate bargaining unit. If it does, it generally will avoid the risk of losing an election. This presents a real challenge to the charter school administrator, for very practical reasons. In essence, the law permits a labor union to become the legally recognized bargaining representative of the charter school's employees simply by getting signatures from 60% of the employees in an appropriate bargaining unit, without any discussion of the disadvantages, costs, risks, or requirements of union membership.

Whether a charter school's charter was issued after August 10, 2000 or not, the process always begins with employee signatures. To obtain employee signatures, unions must first gain access to employees. Sometimes union organizers attempt to gain such access at the employer's facility. In Massachusetts, public employers, including charter schools, can deny union organizers access to their facilities, but only if they do so in a non-discriminatory way. In other words, to the extent that access is granted to any non-employees (with the exception of students, and parents on school business) it cannot be denied to non-employee union representatives. The flip side to this is that union organizers do not have to be given any *more* access than other non-employees. Fortunately, while there may be cases where charter school administrators cannot deny access to union organizers, if a union seeks such access, it loses the advantage of surprise, and the administration then has the opportunity to educate its staff.





# What the Charter School Employer Can Do

As noted, the Charter School Law gives employees the absolute right to act independently in choosing whether to support a union. Naturally, the union will emphasize that collective bargaining is permitted for charter school employees and extol its benefits. The union would prefer that employees hear only its argument for representation.

As a practical matter, the party best suited to provide employees with the necessary information is the employer: a representative of the school administration, armed with a clear understanding of “the rules of the road”— what can be said and what cannot and must be avoided — can be a powerful voice in promoting an informed workforce.

## **Are Charter School Employers Permitted to Educate Employees About Unions?**

The answer is “YES.” While the law does not state that as an employer you have the right to provide information to employees, it also does not *prohibit* you from discussing unions with your employees. Chapter 150E does provide some limitations, however. These are called “Prohibited Practices” and are discussed in the text.

A charter school can communicate with its employees about unions. While we strongly recommend that you get advice from an experienced attorney before undertaking a program of communication, there are some general guidelines on what you can share with employees.

In communicating with your employees about unions, there are several key concepts you want to be sure employees understand.

- Our mission is to provide children with a quality education.
- Unions have strongly opposed charter schools.
- Unions have begun a campaign to represent charter schools, while continuing to fight their existence.
- Employees have the right to decide for themselves whether they want union representation.
- Unions make bold promises that sound wonderful ...
- But, there is a lot more to the story that they *don't* tell you.
- If anyone ever asks you to sign a union card or paper—wait until you first get all the information you need to make an informed decision.
- Signing a card may well be your only chance to “vote”— so you need to get the facts first before you sign anything.

Seventy years of experience under federal labor law have produced several core principles of lawful employer communication. While these are not specifically made part of Chapter 150E, the MLRC frequently looks to federal labor law for guidance, and these principles are equally pertinent to

the public employment arena. Your communications should be limited to these subjects: **Facts, Opinions and Examples.**

### **Facts: There Is No Defense Like the Truth**

Facts are the best means of persuading employees that unions are not always wholly frank.

Employers may inform employees of any facts regarding unions, collective bargaining, the operation of Chapter 150E and the relevant provisions of the Charter School Law, and the procedures of the MLRC. Lawful communications may include facts which are uncomplimentary to unions, such as the costs of unionization, stories of union corruption, or failures of collective bargaining. Because a *fact* is *unpleasant* does not render it *unlawful*.

What facts may you share?

There is an enormous amount of information available regarding unions. It may be shared lawfully. You will want to familiarize yourself with current information relevant to your community. Although this guide is not intended as a script for charter school employers, and you should obtain legal counsel in the event you are faced with union organizing, employees are likely to find the following facts of particular interest.

Facts about employee rights, and the limitations on their rights, under the law:

- They have the right to decide for themselves, free from coercion, whether they want—or don't want—to be represented by a union;

- The law does not guarantee all charter school employees the right to a secret ballot election;
- The law does not require “full disclosure” by union organizers of all the facts needed to have a balanced view;
- Signing a card now could deprive them of an opportunity to make a choice later;
- Decertifying (getting rid of) a union is possible, but very difficult.

Institutional facts about the international unions and locals, such as:

- The size and scope both of the international union and the local union, as well as their payrolls, expenditures, and political contributions;
- The initiation fee charged by the local;
- The monthly (or possibly weekly) dues charged by the local;
- The possibility of extra *assessments* members are required to pay;
- The rules which members must follow, which are found in both the international’s constitution and in the local’s by-laws (all unions must have such documents);
- Union rules generally include the right to discipline members for violations (typically through *finés*).

Newsworthy information about relevant local unions, including:

- The union’s successes and failures in organizing;
- Collective bargaining agreement information;
- The union’s views about and opposition to charter

schools and the charter school movement;

- Other political views and position statements made by the union which may be contrary to the goals and principles of the charter school movement and contrary to the employees' personal beliefs;
- The union's role in opposing charter schools and charter school expansion through legislative and other means.

The truth about "collective bargaining":

- The union, not the teachers, decides what to propose in negotiations;
- The union bargains with the school;
- The school may make its own proposals at the bargaining table;
- The law requires good faith bargaining, but does not require either side to agree to terms it does not want;
- The parties must negotiate in good faith, but there is no time limit on how long it may take to reach agreement, and no requirement that an agreement actually be reached;
- Negotiations may result in employees receiving higher pay and benefits than they have now, the same as they have now, or less than they have now;
- The union may have made many promises (for instance, tenure), but it cannot guarantee any of them will come true;
- If and when a union contract goes into effect, all employees in the bargaining unit are covered, whether or not they signed a card or voted for the union (no "opting out").

## Is There a “Downside” to Unionization?

Yes, although you will never hear a union talk about it. To make an informed judgment about unions—and about whether they want to become members—employees must have information about the potential negative impacts of a union.

It is not the purpose of this guide to provide an exhaustive list, but some of the most important concerns include:

### **Negative Impact on the Educational Mission**

Despite their public relations campaigns, maximizing educational achievement is not the union's primary goal. Unions—by definition—are institutionally motivated to maximize the number of employees, minimize work, eliminate accountability, and to promote the lowest common denominator. Many teachers chafe under union-imposed limitations on performance.

Additionally, collective bargaining agreements can stifle the innovation and flexibility in curriculum and school governance that attract students, and teachers, to charter schools in the first place.

### **Risks of Negotiations**

There is no guarantee a union will obtain higher pay or better benefits. In fact, the union cannot guarantee negotiations will not result in a *reduction* of wages or benefits. While unions have had success in negotiations with many public entities, charter schools are well-positioned to resist union proposals they deem adverse to their mission.

### **Union Control of Members**

Unions require members to obey their rules—under pain of trial and potential fines. A union will expect all its members to act and speak with one voice; dissent and individuality are strongly discouraged. This also can extend to political activities

beyond the workplace. In recent years, unions have increasingly pressured members to contribute and campaign for the union's preferred political and social agenda.

**Financial**

Unions require members to fund the union through:

- Initiation fees;
- Dues;
- Assessments.

Unions often pressure members to contribute to their political action funds as well.

## **Opinions: A Highly Persuasive Tool**

The law allows employers to express their opinions regarding unionization. For charter school operators, these might include the following:

- That union values and aims are contrary to the charter school's core mission;
- That it does not make sense to have an organization that opposes charter schools representing charter school teachers;
- That union contracts have hurt the traditional schools' ability to meet student needs;
- That the teachers' unions will seek to impose work rules that will reduce flexibility.

Opinions are powerful. It is for this reason that the line drawn by the MLRC between lawful opinions and unlawful

threats can be fuzzy. Threats, and the distinctions between threats and opinions, are discussed in more detail in chapter VI. For now, suffice it to say that expressing opinions and making predictions about unions can be a tricky, though not impossible, business.

### **Examples: The Power of the Press**

Facts are driven home by real-world examples. The law permits you to share with employees any relevant newspaper articles, position papers, or other media pieces on subjects such as:

- Union leaders' statements in opposition to charter school approvals and legislative initiatives;
- Articles about restrictive union contract rules preventing meaningful change in the public schools.

\* \* \*

Adding a union and collective bargaining to your charter school's operation is a big step—one that should not be taken without a careful evaluation of how unionization will impact your school's mission. Your staff deserves to decide if a union is needed or desirable based on all facts, not just the union's promises.

# Limitations on Employer Communications with Employees

While nothing in the law prohibits a charter school employer from discussing unionization with its employees, Chapter 150E provides a general outline of activities employers must avoid. These activities are called “prohibited practices.” Here is the statute, along with some explanatory comments:

*c. 150E § 10. Prohibited practices. It shall be a prohibited practice for a public employer or its designated representative to:*

*(1) Interfere, [sic] restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;*

The MLRC has interpreted section (1) to prohibit supervisors and managers from *engaging in conduct* which interferes with employees’ rights “to form, join, or assist any employee organization” as well as employees’ “right to refrain from any or all of such activities” under Section Two. It does not matter whether managers or supervisors intend their conduct to interfere with employees’ rights or whether they engage in the conduct in good faith. What matters is the effect the conduct has on employee rights, from the employees’ perspective.

*(2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;*

Section (2) prohibits employers from developing or maintaining a “captive union” which is controlled by the employer. It also prohibits unions from becoming too reliant on the employer for money or other support, which can undermine its independence in representing employees.

*(3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;*

Section (3) forbids discrimination against employees based on their union sentiments or activity. This includes taking disciplinary action against an employee, denying promotion, or taking any other adverse action because of the employee’s union sentiments or activities. Because these actions often result in interference with employee rights, violations of section (3) frequently overlap with violations of section (1).

*(4) Discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he has informed, joined, or chosen not be represented by an employee organization;*

Akin to section (3), section (4) prohibits employers from retaliating against employees for exercising rights granted under Chapter 150E.

*(5) Refuse to bargain collectively in good faith with the exclusive representative as required in section six;*

The employer *must* negotiate in good faith with a union that is the exclusive bargaining representative of its employees. Section Six defines in more detail what it means to bargain collectively in good faith, as discussed in the next chapter. Basically, it means the employer must make a sincere effort to reach common ground and negotiate a collective bargaining contract. It does not mean the union gets whatever it seeks.

*(6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in sections eight and nine;*

Typically, collective bargaining agreements provide procedures, including binding arbitration, for the resolution of disputes or grievances arising under the agreement. Section Eight regulates these grievance procedures and provides for binding arbitration to resolve disputes in the absence of such procedures.

Section Six requires only that the employer and the union bargain in good faith, not that they reach agreement. Section Nine provides for procedures, such as mediation, to address situations where the parties cannot agree and are at impasse.

These prohibitions seem intimidating, but what are the penalties?

The prohibited practices are the bases for charges which a complainant—usually an employee or union—may file with the MLRC. The MLRC determines whether or not the charges

have merit. The remedy for a violation is for the employer to restore the situation that existed before the improper practice was committed. If an employee has lost pay due to the violation, the employee receives backpay; if an employee has been terminated, he receives an offer of reinstatement. The employer must commit to act lawfully in the future. Charges are filed against the *employer*, not the individual supervisor or manager. There is no “fine” for a violation and improper employer practices are not “crimes.”

Additionally, the MLRC has indicated that it has the authority, as an extraordinary remedy for engaging in prohibited practices, to issue a bargaining order to force an employer to recognize a union without conducting an election. The union must first obtain authorization cards from a majority of the employees in an appropriate bargaining unit. If the union has done so and the employer engages in prohibited practices so egregious that the MLRC finds it would be impossible to conduct a fair election, the MLRC may issue such a bargaining order.

Finally, the Code of Massachusetts Regulations provides a significant sanction as well:

*1.13: Charter Revocation, Probation, Suspension, and Non-Renewal*

*(1) The Board of Education may suspend or revoke...a charter for cause, including but not limited to:*

\* \* \*

*(b) failure to comply substantially with the terms of the charter, with any of the applicable provisions of M.G.L. c.71, or*

*with any other applicable law or regulation;*

Chapter 150E is an “applicable law” because the Charter School Law makes it applicable to charter schools. This regulation suggests that a school’s charter could be revoked if it is proven that the school failed to comply substantially with Chapter 150E. While this regulation has not been tested in the context of prohibited practices, it would certainly seem that a finding that a charter school engaged in a prohibited practice could result in this penalty.

## **What You Should Avoid: The Unlawful and The Counter-Productive**

You have expansive rights to engage employees in discussion of the facts they need to know.

So what do you have to steer clear of? Although the law does limit what you can say and do, for the most part what it prohibits you probably would never say or do anyway. In a nutshell, the law prohibits you from engaging in the following conduct: **threats, retaliation, interrogation, bribes and promises of bribes, and surveillance.**

Having described earlier which acts are unlawful, we can add the good news: they are easy to avoid.

### **Threats: No Way to Treat an Employee**

The law does not allow employers to make threats to

employees in connection with their support for, or activities for, the union. Some examples are obvious:

- If I find out you signed a card, you'll be sorry!
- If you bring in a union, you can forget about that extra prep time!
- If we get a union here, I'll have to find some new teachers.

However, the ban also includes indirect threats, and the line between lawful opinions and predictions on the one hand and unlawful indirect threats on the other can be fuzzy. For example, technically, the following statement is an opinion: "I think that bringing in a union would be one of the worst things that could happen to a charter school, and bringing a union in here could be construed as a disservice to this school." However, this statement could be considered a prohibited practice under Chapter 150E. Why? Because the MLRC looks at such employer statements from the employees' perspective and determines whether, based on all the circumstances, the statements can reasonably be said to have resulted in interference with employee rights. If so, they are considered prohibited practices. Assume in this case the statement was made by a charter school headmaster to a teacher who was organizing a union, and was delivered in a stern manner. The question is whether it would be reasonable to say that the statement, in those circumstances, would have tended to curb the teacher's organizing activities. While technically not a threat, this statement would likely be considered a prohibited practice.

## **Retaliation: Vengeance Is No Virtue**

Retaliation is likewise prohibited. This includes all forms of discrimination against employees based on their union activity or sentiments. Employees have the right to make their own decision; if they decide to support a union, they still must be treated as if that were not the case. All promotion, assignment, discipline, and compensation decisions are to be made without regard to the employee's union likes or dislikes (if any). This does not mean a pro-union employee should be given preferential treatment. Indeed, to do so also would violate the law. The safe path is to conduct business as usual. Any decisions regarding an employee must be made on the merits, without consideration of union activity, one way or the other.

### **Wait! I don't see "threats," "retaliation," and similar misconduct mentioned in Chapter 150E.**

That's right. You won't. These rules are not part of the statute. Furthermore, it is very rare for a Massachusetts public employer to mount an informational campaign among its employees to educate them about unionization.

As a result there are a limited number of MLRC cases addressing employer communications. Many of the examples cited in the text come from the decisions of the National Labor Relations Board, which has long experience in deciding these issues in the private sector, and to whom the MLRC commonly looks for guidance in interpreting Chapter 150E.

## **Interrogation: Don't Ask**

Employees have the right to make their decisions on unionization without being coerced. While employers may share *facts*, *opinions*, and *examples* about unions, they should avoid *asking* employees questions about their possible union support or activity. Examples of improper questions include:

- Has the union been asking employees to sign cards?
- Have you signed a card?
- You wouldn't sign a card, would you?
- Did Jane go to the union meeting?
- What is the union promising?
- Do you support our union-free principles?

The reason supervisors and managers may not make these inquiries is that the law generally views such questions as “inherently coercive.” Don't ask them.

Of course, there is nothing wrong with an employee expressing union sentiment, or providing information about union activities voluntarily, possibly in response to a manager's provision of *facts*, *opinions*, or *examples*. However, you should be careful not to get drawn into asking these prohibited questions.

## **Bribes: You Cannot Buy Your Way Out**

Unions are permitted to make promises to employees, even if they cannot guarantee to deliver. However, employers are forbidden from making promises to employees, or from improving wages, benefits, or working conditions, in response to union organizing activity and in order to dis-

courage employees from supporting the union.

There are two main reasons for this difference in treatment. The law promotes collective bargaining. If an employer could “buy its way out” of an obligation to bargain, unions might never prevail. Also, an employer’s promise may give it an unfair advantage. After all, a union’s promises are merely “campaign rhetoric” because the union can’t deliver unless the employer agrees to concede those items in collective bargaining. The employer’s promises, however, stand on a different footing, because it can fulfill them without any third party’s agreement. (At least, that’s the thinking. By the same logic, a union can make promises because, as the legal logic goes, they are worthless.)

### **Surveillance: No Big Brother**

The law also prohibits the employer from “surveilling,” or spying on, union activities. A classic example of surveillance is where a manager stations himself outside a union meeting to see who is attending. The simple rule is, *don’t spy*.

Supervisors and managers may not attend union meetings, and any attempt to monitor attendance is a violation. (It also may be unlawful to give employees the impression that the employer is spying on them, such as by saying, “I understand you went to the union meeting yesterday.”)

Of course, this rule does not apply to discussions be-

tween employees on school premises which happen to be overheard by school officials. If a school administrator happens to walk in on a union discussion in the staff room, where he has a right to go, it is not “spying.”

As a charter school leader, you already are committed to observing the law. You would not abuse the public’s trust by denying employees their rights. You would not discriminate against employees on any unlawful basis. Complying with the law, and avoiding the consequences of violations, is your standard operating procedure. Therefore, carefully counseled, you should not be deterred by this aspect of the law from speaking to your employees about unions.

## **Do Unions Have to Follow Any Rules?**

Absolutely. The law, Chapter 150E, §10, specifies a list of “prohibited practices” for employee organizations as well, although it is a little shorter than the employer’s list. Under the law, unions may not:

- Interfere with, restrain or coerce any employer or employee in the exercise of any right guaranteed under this chapter;
- Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required by section six;
- Refuse to participate in good faith in the mediation, fact finding and arbitration procedures set forth in sections eight and nine.

# VIII

## Collective Bargaining

Collective bargaining is defined by Chapter 150E. Many find the definition to be surprising. Here it is:

*The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process and shall negotiate in good faith with respect to wages, hours, standards or [sic] productivity and performance, and any other terms and conditions of employment, including without limitation, in the case of teaching personnel employed by a school committee, class size and workload, but such obligation shall not compel either party to agree to a proposal or make a concession...*

In essence, collective bargaining is the obligation of the union and the employer to meet and confer in good faith concerning employees' terms and conditions of employment. Thus, a good faith effort must be made by both parties to seek agreement. However, an agreement is not required or guaranteed, since neither side is forced to accept any terms it does not want.

## What Actually Happens During Bargaining?

Collective bargaining involves actual meetings between the union and the administration. The union may, or may not, have some employees present at the table. However, they will have an experienced negotiator participate. Experience is important. Collective bargaining is not like an ordinary negotiation over an individual or commercial contract. While administration officials surely will be involved in bargaining, it is highly recommended they obtain the assistance of experienced counsel at the negotiating table. Successful bargaining requires preparation and, yes, strategy.

There is no time limit on negotiations. The parties trade proposals back and forth agreeing to some, rejecting others, asking questions, suggesting changes... all these are elements of bargaining.

This may sound like a recipe for failure, since parties rarely are in full agreement. How does one side persuade the other to reach agreement?

In the private sector, unions have leverage to push employers toward compromise and agreement through the “economic weapon” of the strike. The possibility or actuality of a strike drives the parties toward agreement. The employer does not want to be shut down and employees do not want to lose paychecks. The incentive to settle is strong.

Under the Chapter 150E, however, *the union cannot go on strike*. What leverage, then, does the union have?

Actually, with ordinary public employers, a union has considerable leverage.

For one thing, public employee unions may not have to struggle as hard as their private sector counterparts. It is generally accepted that public sector employers who are not concerned with profits usually come to terms at the table more readily than private sector employers. For another, unions possess political power through their ability to raise cash for candidates for elected public office, to provide campaign volunteers, and to influence legislation. Put plainly, the public employer does not want a labor dispute with a powerful political adversary.

However, there are times when public sector negotiations become deadlocked. What does the law say? For police and firefighters, a different law provides that the parties may be ordered to allow an arbitrator to determine the terms of a contract. The procedure is called interest arbitration. That law does not apply to charter schools.

Contract dispute resolution in the case of most public employers (including charter schools) is handled as follows. A party may petition the Board of Conciliation and Arbitration (BCA), a Massachusetts independent state agency empowered to aid in the resolution of labor relations disputes. If the BCA finds impasse, that is, negotiations are deadlocked, it will appoint a mediator to help the parties reach agreement, but the mediator cannot *impose* any terms on either party.

If mediation fails, the BCA may assign a fact-finder. The fact-finder inquires into the causes and circumstances of the impasse, along with the positions of the parties. The fact-finder is empowered to make public recommendations for

resolving the impasse—but he, too, cannot impose a settlement. Either party is free to accept or reject the fact-finder's report and recommendations. The purpose of the public recommendations is to put pressure on the parties to reach agreement. The fact-finder is also empowered to provide additional mediation. *In no event will there be any imposition of contract terms on the parties by any outside agency.*

What does this mean to the charter school operator? Just this: the school must bargain in good faith—which means it must make an honest and earnest effort to reach agreement. Failure to bargain in good faith may result in an MLRC prohibited practice charge. However, the good faith refusal of an employer to agree to terms (tenure, for instance) will not be unlawful. Although there are various vehicles to help reach agreement, the law has no way to compel the charter school to agree to terms it does not want.

Put plainly, a charter school may not be as susceptible to the political pressures which often impact a public employer. Although the issue is obviously fact sensitive, charter schools—which are not subject to governmental election campaigns—may be better suited to maintain their values and principles at the bargaining table.

Of course, if charter school leaders can successfully foster positive employee relations, understand the legal landscape, and effectively communicate the realities of unionization to their employees, it is unlikely they will find themselves at the bargaining table in the first place.

*Note: This guide is intended to provide charter school administrators with a general understanding about Massachusetts' labor relations law applicable to charter schools. It offers a broad description of the law and the rights and responsibilities of employees, charter schools and unions under the law—a subject that in large measure has escaped notice until now. It is not intended to be an exhaustive explanation of the law. It is not a substitute for professional legal advice. If your school faces any of the issues raised in this guide, you are urged to seek specific legal advice from an attorney who is knowledgeable in this specialized area of the law.*



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## Jackson Lewis LLP

Jackson Lewis LLP is a labor relations and employment law firm consisting of approximately 380 attorneys representing management exclusively. The firm's offices are located in major commercial centers across the country. Jackson Lewis attorneys have handled labor relations matters, administrative hearings and litigation in virtually every jurisdiction in the United States.

Jackson Lewis has been, in many respects, a pioneer. It is probably the first firm actively to practice preventive labor and employment law. From its beginnings over 40 years ago, Jackson Lewis has advocated the education of management as the key to avoiding legal problems. For example, it was the first labor law firm, and possibly the first firm of any kind, to conduct annual client symposiums and publish monthly client bulletins. The firm has authored *Avoiding Unionization Through Preventive Employee Relations Programs*, published by CCH Incorporated, among other titles. This preventive approach continues to be the foundation of the firm's practice.

The firm's expertise in assisting clients in remaining union-free is recognized nationally. It has counseled employers in thousands of union organizing and election situations. But perhaps its proudest accomplishment is the number of clients who have relied upon the firm's expertise in developing issue-free environments, thereby making the intervention of a union unnecessary. The firm's practical "hands on" approach consists of training supervisors, developing policies and procedures including employee handbooks and supervisory manuals, and conducting employee relations audits.

This aggressively proactive, preventive approach is particularly warranted in an age when the growth of employee rights and the surge in employment-related litigation have seriously eroded employment-at-will.

For clients with unionized workforces, Jackson Lewis provides the full range of labor law services: negotiation of collective bargaining agreements, representation at all stages of the grievance and arbitration process, representation in deauthorization/decertification proceedings, and handling administrative and court litigation relating to these activities.

The firm also has been particularly active in litigating novel and challenging wrongful discharge and EEO cases. It is proud of its record of victories for management in cases at the trial stage, but is equally conscious that efficient pretrial resolution of such matters is frequently of paramount interest. The firm believes its reputation as aggressive litigators has enabled it to secure very favorable extra-judicial settlements of many matters, at minimum expense and exposure to clients. Indeed, it frequently provides counsel and conducts training seminars on implementing preventive employment practices and “avoiding the courthouse”.

Additional information about Jackson Lewis LLP may be found on the firm's website, [www.jacksonlewis.com](http://www.jacksonlewis.com), or by contacting an attorney at the firm's offices shown on the next page.

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