

# The Oregon Employment Relations Board

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## 2023 Oregon Labor Law Conference

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Adam Rhynard, Chair  
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# Overview of the Oregon Employment Relations Board

- What is the Employment Relations Board?
  - fondly referred to as “ERB” (pronounced like herb) or “the EE-ARE-BEE”
- Composition?
- Jurisdiction?
- Duties?

# Structure and Composition of ERB

- Three Board Members, appointed by the Governor with the approval of the State Senate
  - Representatives of labor, management, and the public
- Administrative Law Judges who hear unfair labor practice complaints and representational issues
- The State Conciliator and additional Mediators
- Staff

# Mediation and Conciliation Services

- Mediation of Collective Bargaining Disputes
- Grievance and ULP Mediation
- Interest-based Bargaining Training and Facilitation
- Labor-Management Committee Training
- Arbitrator List

# Jurisdiction of ERB

- Oregon public sector
  - Public Employee Collective Bargaining Act - (PECBA) (ORS 243.650 through 243.806), which governs collective bargaining in state and local government.
  - State Personnel Relations Law - (SPRL) (ORS Chapter 240), which creates appeal rights for certain unrepresented state employees regarding some disciplinary and workplace actions.
- The Private Employee Collective Bargaining Act (ORS 662.405 through 662.455, and 663.005 through 663.295), which governs collective bargaining for certain private-sector employees who are not subject to the jurisdiction of the National Labor Relations Board.

# Primary Duties of ERB

- To determine appropriate bargaining units and conduct card-checks or elections regarding collective bargaining for employees
- To resolve disputes over union representation and collective bargaining negotiations, including providing mediation and conciliation services
- To issue declaratory rulings and orders in contested cases, including:
  - Unfair labor practice cases
  - Claims by union members against unions (duty of fair representation claims)
  - Appeals from state personnel actions

# What types of conduct constitute a ULP?

- The Public Employee Collective Bargaining Act (PECBA) defines certain conduct as an unfair labor practice.
- Public Employer ULPs
  - ORS 243.672(1)
- Labor organization ULPs
  - ORS 243.672(2)

# ORS 243.672 (1)(a): The “in” and “because of” prohibitions.

- ORS 243.672(1)(a) prohibits a public employer from taking actions that “interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed [under the PECBA].”
- What is protected activity?
  - Striking, strike planning, union organizing, displaying union insignia, filing a grievance, etc.

## ORS 243.672 (1)(b): Employer domination of, interference with, or assistance to the union

- It is an unfair labor practice for an employer to “[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization.”
- To violate subsection (1)(b), an employer’s action must amount to actual domination, interference, or assistance.
- “A complaining union must prove that the employer’s actions impeded or impaired the labor organization in performing its duties as exclusive representative.”

# ORS 243.672 (1)(c): Encouraging or discouraging union membership

- It is an unfair labor practice for a public employer or its designated representative to “[d]iscriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization.”
- ERB examines the reasons for the employer’s conduct. A violation will be found “only if the employer acted with a discriminatory motive, intending to undermine employees’ exercise of [rights protected by the Public Employee Collective Bargaining Act].”

## ORS 243.672 (1)(d) – (k)

- It is also a ULP for a public employer to:
  - (d) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony in an ERB proceeding.
  - (e) Refuse to bargain collectively in good faith with the exclusive representative.
  - (f) Refuse or fail to comply with any provision of the PECBA.
  - (g) Violate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them.
  - (h) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
  - (i) Violate ORS 243.670(2) (which prohibits the use of public funds to oppose or support a union organizing campaign, or to take certain actions against employees who participate in hearings under this section).
  - (j) Attempt to influence an employee to resign from or decline to obtain membership in a labor organization.
  - (k) Encourage an employee to revoke an authorization for the deductions described under ORS 243.806.

# ORS 243.672(2) Labor Organization ULPs

- **A labor organization may not:**
  - interfere with, restrain, or coerce any employees in the exercise of any statutory right.
  - refuse to collectively bargain in good faith.
  - refuse or fail to comply with any PECBA provision.
  - violate the provision of any written contract with respect to employment relations.
  - refuse to reduce to writing and sign a collectively-bargained agreement.
  - engage in unconventional strike activity.
  - picket at the residence or business premises of any member of the governing body of a public employer.

# Processing of ULPs

- Complaint filed with the Board.
- ALJ investigates the complaint to determine if there should be a hearing.
- The ALJ sets a hearing date, conducts a hearing, and issues a Recommended Order.
- If any party disagrees with the Recommended Order, they can file “objections” with the Board.
- Board issues a Final Order that can be appealed to appellate courts.

# Mediation of ULPs

- The parties may participate in voluntary mediation with the State Conciliation Service.
- If both parties agree to participate in mediation, the ALJ will notify the State Conciliator, who will assign a mediator and schedule the matter for mediation.
- Benefits of settlement:
  - The parties negotiate their own resolution tailored to the needs of all involved: employer, union, employees, and the public;
  - The parties avoid the cost of hearing, post-hearing objections, and possible appeal to the Oregon Court of Appeals;
  - The parties avoid further uncertainty, workplace disruption, and inconvenience to witnesses and participants.

# Representation Petitions

- Petitions for Representation
  - New units typically certified by card check verifying majority support
  - Unless at least 30% of employees petition for election in lieu of card check
- Petition to add Unrepresented Employees to an Existing Bargaining Unit
- Other Petitions for Unit Change/Clarification
  - E.g., disputes over supervisory status, or to move employees from one unit to another
- Decertification Petitions

# HB 2016: Oregon Worker Protection Act

- Effective January 2020, PECBA was amended to comply with the *Janus* decision, and also codify best practices in the unionized workplace
- Key updates include:
  - Unions have reasonable access to public employees the organization represents;
  - Public employees designated union representatives have "reasonable time" during their regular work schedules to: investigate and process grievances, attend investigatory interviews, attend labor-management committee meetings and bargaining, etc.;
  - Public employers and unions may negotiate release time for public employees to serve as officers or other union positions;
  - ULP for a public employer to: encourage an employee to resign or decline to obtain membership in a labor organization, or encourage an employee to revoke authorization for the payroll deduction of dues and fees to a labor organization.

# Takeaways from Recent Board Decisions

- *United Academics of Oregon State University v. Oregon State University*, 315 Or App 348, 502 P3d 254 (October 27, 2021)
  - o Court of Appeals affirmed the Board's interpretation of PECBA's provisions in ORS 243.670(2)(a) and ORS 243.672(1)(i) restricting the use of public funds as "prohibiting any act or instance of a public employer making an effort to affect or alter (including by indirect or intangible means) the decision of any or all of its employees regarding whether to support or oppose a labor organization that seeks to represent those employees."
  - o The court affirmed the Board's determination that the University attempted to influence faculty members' decisions regarding whether to support union representation by its conduct related to the publication of an "FAQ" webpage regarding faculty unionization.
  - o The court also affirmed the Board's conclusion that the University's conduct did not fall within the exception in ORS 243.670(3), which provides, "If an employee requests the opinion of the employee's employer or supervisor about union organizing, nothing in this section prohibits the employer or supervisor from responding to the request of the employee."

# Takeaways from Recent Board Decisions

*In the Matter of the Petition for Declaratory Ruling filed by United Food and Commercial Workers Union, Local 555 (UFCW), Case No. DR-002-22 (September 15, 2022)*

- The Board ruled that a party's insistence, over the other party's objection, that some of its bargaining members participate in bargaining sessions virtually or via a hybrid format is not a per se violation of ORS 243.672(1)(e) or (2)(b). Rather than use a per se bright line approach, the Board ruled that a party violates its duty to bargain in good faith under ORS 243.672(1)(e) or (2)(b) if it insists on bargaining in a meeting format that is not reasonable under the totality of circumstances of a case. The proposed format is unreasonable only if it would restrict the other party's choice of negotiators or would, considering the totality of the circumstances, otherwise tend to interfere with the bargaining process.
- The Board also ruled that an employer violates ORS 243.672(1)(e) when it insists, over the labor organization's objection, that bargaining unit employees who are not part of the union's bargaining team attend bargaining sessions.

# Takeaways from Recent Board Decisions

*American Federation of State, County, and Municipal Employees, Council 75, AFL CIO v. Clackamas County, Case No. UP-025-22 (October 5, 2022)*

- The Board concluded that the employer violated ORS 243.672(1)(e) and (1)(g) when it failed to present and recommend ratification of tentative agreements.
- The Board further held that the County violated ORS 243.672(1)(e) and (1)(g) when the Board of Commissioners communicated to County negotiators after a tentative agreement had been reached, that they had no authority to negotiate on any terms or make any concessions without the Board of Commissioners' pre-authorization.
- The Board ordered the County to pay a civil penalty to the Union, finding that the unfair labor practice conduct was egregious because it tended to undermine the very nature of the collective bargaining process.

# Resources

- ERB Website
  - <http://www.oregon.gov/erb/pages/index.aspx>
- ERB's PECBA Unfair Labor Practice Q&A:
  - [https://www.oregon.gov/erb/Documents/Q-A\\_ULPGuide.pdf](https://www.oregon.gov/erb/Documents/Q-A_ULPGuide.pdf)
- Oregon State Bar Treatise: *Labor and Employment Law: Public Sector*
- University of Oregon's Labor Education and Research Center's Monograph Series
  - <http://lerc.uoregon.edu/research/monograph-series/>
- PECBA Digest
  - ERB's library in Salem is open to the public, and it includes the PECBA Digest and other labor law resources.
- ERB Orders are public records; request form is available here:
  - <https://www.oregon.gov/erb/Pages/PublicRecord.aspx>