


# Change Orders Needed?: 2020 Oregon Public Sector Update

**2020 Employment Law Seminar**  
Day 4: 2020 Labor Law Update



## Speaker Introduction



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## Fair Share Fees: The Sequel

### *Janus v. AFSCME* (S. Ct. 2018)

- Sup. Ct.: Declares mandatory fair share fees by public employees as unconstitutional
- 9<sup>th</sup> Cir.: *Janus* does not require union to disregard union membership agreements
- 1<sup>st</sup> Cir: *Janus* does not require union to disgorge fair share fees collected before the decision

## PERS Reform: Upheld

### *James v. State* (Or. S. Ct.) (# 1)

- 2019 PERS reform legislation upheld
  - Redirection of a portion of PERS contributions to a debt-reduction fund
  - Salary-cap provision on future earnings
- Changes were prospective only
- No impairment of employment contracts under common law or constitution

## What Is A Fragment?

### ***AFSCME v. Yamhill County Court (Or. Ct. App.) (# 2)***

Reversing an ERB order that certified a bargaining unit consisting of 27 court employees in Yamhill County

- Not sufficient that employees in the "fragment" have a community of interest
- Their interest must be distinct from the larger group
- To challenge efforts to organize a fragment, focus on the common interests of the fragment with the larger group

## Who is A Supervisor?

### ***City of Salem (# 5), City of Portland (# 6), Salem Mass Transit (# 7)***

1. Take action or effectively recommend in any of 12 areas:
  - Hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action
2. Use independent judgment
3. Act in interest of management

## Did The Employer Object?

### Jackson County: The Bargaining Option (#8)

- Dispute over Union's insurance proposal with PEBB option
- County asserted such proposal was permissive, but did not object to the inclusion of such provision in the Union's final offer
- Union's "final" offer:
  - Includes PEBB option *that Union must approve*
  - Core feature is choice of carrier = PERMISSIVE
  - But County didn't object until after final offer = NO VIOLATION
- Union's first and second amended final offers:
  - Both include PEBB option *at County's choice*

Now, core feature is contribution rate = MANDATORY

## Is That Permissive?

### TriMet v. ATU DR-002-19 (# 9)

- ATU proposed to maintain BOLI-administered apprentice programs
- TriMet sought declaratory ruling that the Union proposal addressed a permissive subject of bargaining
- Union opposed petition on grounds ERB needed to consider extrinsic evidence
- ERB dismissed declaratory ruling petition

## Once Again, Is That Permissive?

### *TriMet v. ATU, UP-001/003 ( # 10), on appeal*

On reconsideration, ERB ruled:

- ATU proposals to maintain BOLI-administered apprentice programs
- BOLI involved setting permissive subject of bargaining
- Minimum qualifications, making assignments, and determining staffing levels, among other traditionally permissive subjects of bargaining
- A proposal that diverts a decision on or discussion about permissive subjects is itself a permissive subject of bargaining
- Affirmed initial order: contractual obligation to hire from the outside is permissive and not binding after the contract expires

## Do I Have To Bargain?

### *Corr Dep Assn v. Multnomah County ( # 13), on appeal*

- Union can demand to bargain over subjects not covered by CBA
- ORS 243.698 not restrict other mid-term bargaining
- Complete agreement/zipper clause defense
- Member Umscheid concurs in result disagrees with majority analysis

## Can An Agreement Be Binding Without Bargaining?

### *Portland Fire Fighters v. City (on remand) (#11)*

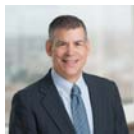
- On appeal, court reversed ERB decision that:
  - Discussions between union president and mayor office over operational changes were bargaining, and
  - Satisfied duty to bargain before making changes
- On remand, ERB nonetheless held that:
  - Union and mayor's office had a verbal agreement
  - It constituted a clear and unmistakable waiver of a right to bargain over the impact of the operational changes

## Is Answering Questions OK?

### *United Academics v. OSU (# 14), on appeal*

- ER violate "neutrality" law ORS 243.670
- OSU publishes FAQs during organizing drive
  - FAQs created in accordion fashion
  - Requires OSU staff to "virtually" ask a question
- ERB found fault for # reasons
- Attempt-to-influence test = intent

# Thank You!



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