

Frequently Asked Questions on Collective Bargaining

For Virginia Local Governments



Introduction

For the first time in nearly fifty years, certain public sector employees in the Commonwealth of Virginia will have an opportunity to pursue collective bargaining agreements with their employers. Although public employees in Virginia have long had the ability to join and form unions and to meet and confer with their employers on certain terms and conditions of employment, the Virginia General Assembly recently granted local government employers the ability to authorize collective bargaining with their workforces.

As of May 1, 2021, Virginia localities may pass an ordinance or resolution which allows for:

- (1) the recognition of unions or employee associations as the exclusive bargaining representatives for certain segments of their workforces; and
- (2) collective bargaining with such exclusive representatives.

See Va. Code § 40.1-57.2(A).

Localities may also choose to pass an ordinance or resolution which makes clear that they will not authorize exclusive bargaining agents and/or collective bargaining.

If a locality does not pass a resolution or ordinance regarding collective bargaining, then a majority of such locality's employees "in a unit considered by such employees to be appropriate for the purposes of collective bargaining," may certify to the locality their intention to be represented by an exclusive bargaining agent and to collectively bargain with the locality. Va. Code § 40.1-57.2(C).

The locality will then have 120 days from such certification within which to hold a vote on an ordinance or resolution regarding collective bargaining. No locality will be required to authorize collective bargaining, and no resolution or ordinance which authorizes collective bargaining shall restrict the locality's authority to establish its budget or to appropriate funds. Va. Code § 40.1-57.2(B).

Every Virginia locality will have the right to decide its own course of action that best fits its workforce culture, personnel administration, mission, and the needs of its constituents. As localities weigh their options now and after May 1, 2021, however, we have provided a few frequently asked questions regarding the impact of Va. Code § 40.1-57.2, Virginia's collective bargaining law.

Sands Anderson attorneys are ready to provide advice and counsel to local governments as they evaluate the pros and cons of collective bargaining.

FAQs

What is collective bargaining?

Collective bargaining is not defined in Virginia statutory law. As commonly and historically understood, collective bargaining is the process by which a locality, through a representative such as a county or city manager, meets with the exclusive bargaining agent (i.e. union or employee association) of a specific bargaining unit of employees. The two sides then negotiate in good faith regarding the terms and conditions of employment for employees in the bargaining unit with the intention of entering into an enforceable contract.

What is a bargaining unit?

Employees in an appropriate bargaining unit share a community of interests based on, for example, common supervision, skills, training, compensation, functions, work locations, benefits, and job duties. Importantly, Virginia's collective bargaining law does not define or identify appropriate bargaining units, so individual localities may choose to define authorized bargaining units in their ordinance or resolution. Bargaining units often exclude supervisors, managers, or confidential employees who work closely with management. Va. Code § 40.1-57.2(D) prohibits constitutional officers (e.g. Sheriffs) and their employees from recognizing bargaining agents in their workforces or from engaging in collective bargaining with their employees.

Which employees may be members of a bargaining unit?

Collective bargaining laws often exclude from bargaining "supervisors," "managers," or "confidential" employees (typically defined terms) and others who execute employer labor policy, are responsible for implementing collective

bargaining agreement terms for management, or have authorized access to, or responsibility for, developing confidential information regarding management's bargaining positions. Note that Va. Code § 40.1-57.2(D) prohibits local constitutional officers from recognizing bargaining agents in their workforces and from engaging in collective bargaining with their employees.

Also, the statute is very specific in stating that only city, county, town, and school board public employers may enable collective bargaining. It does not extend such authority to other political subdivisions or entities, whether created, funded, or otherwise affiliated with those governing entities that are permitted to bargain.

What terms and conditions of employment are subject to bargaining?

Virginia's collective bargaining law does not define the terms and conditions of employment that are subject to bargaining if a locality decides to authorize collective bargaining with its workforce. Localities can decide to define the scope of bargaining in their ordinances and resolutions (e.g. "wages and benefits"), or they can choose to allow bargaining on all terms and conditions of employment. As a practical matter, the scope of allowable bargaining should not include matters or subjects that are controlled or preempted by state or federal law.

What constitutes the "certification of majority support" that mandates a vote on collective bargaining under the statute, and is it different than the process for "certification of exclusive bargaining representatives" that the statute requires in

an ordinance/resolution? What procedures are involved?

These two "certifications" are not the same. As to the certification of majority support, if a locality has not adopted a collective bargaining ordinance or resolution by May 1, 2021, employees in a *self-determined bargaining unit* may present the locality with "certification" that a majority of the unit desires to be represented by a union or employee association. This "certification" triggers the requirement that the locality "take a vote to adopt or not adopt" a collective bargaining ordinance or resolution within 120 days of its presentation. Va. Code § 40.1-57.2(C).

The state law does not specify any procedure for majority support certification. Localities are thus well-advised to develop their own procedural rules rather than allowing employees to self-determine their bargaining unit for purposes of majority support certification (provided, of course, the basic rights and obligations specified in the statute are not impaired by the chosen procedure).

As to "certification of exclusive bargaining representatives," Virginia's collective bargaining law requires that any collective bargaining ordinance establish "procedures for the certification and decertification of exclusive bargaining representatives." Va. Code § 40.1-57.2(A). Certification in this regard (also known as "recognition") is the means by which employees in a bargaining unit demonstrate majority support to be represented in collective bargaining by a single (exclusive) union or other employee organization in a locality or school division where collective bargaining has been enabled by ordinance/resolution.

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Borrowing from procedures commonly employed in federal and other state collective bargaining laws, an employer may certify/recognize an organization as the exclusive bargaining representative for a particular unit of employees in varying ways. In a so-called “card check” certification process, the employer agrees to certify/recognize an exclusive bargaining representative when a majority of employees in a given bargaining unit return completed “cards” to their employer signifying their membership in an employee organization and their desire for that organization to serve as their representative. Historically, these cards were actual membership cards showing that the employee has already joined or agreed to join the union, hence the description.

Another means of certification is by secret ballot election, conducted or overseen by a neutral third party, in which each employee within a bargaining unit has the opportunity to vote on representation by a particular organization (or another) or for no representation at all. Employers may allow mail-in balloting or in-person delivery of ballots during a set time frame. In the case of an election, ballots should allow the employee to indicate: (1) whether they desire to be represented by an exclusive bargaining agent for the purpose of collective bargaining; and (2) if so, which named bargaining agent the employee desires to be recognized as the agent.

A locality may require in its enabling ordinance or resolution that a certain percentage of employees in a bargaining unit (usually 30 percent) indicate their desire to be represented by a bargaining agent in a “show of interest” to trigger an election or other certification process described in its enabling ordinance/resolution. With a showing of actual majority support for a particular bargaining representative pursuant to the chosen process, an organization is

thereby certified or recognized as the sole and exclusive agent. The exclusive agent is then entitled to bargain with the employer on behalf of the bargaining unit on whatever matters have been defined by the ordinance as within the scope of bargaining or that are otherwise permissible subjects of bargaining.

Once a bargaining agent has been certified, the locality may require a similar showing of employee interest in decertifying (withdrawal or loss of recognition) of the bargaining agent, meaning elimination of the union or association’s status as the exclusive bargaining agent for a given bargaining unit via a similar process (card check, ballot election, etc.).

Both localities and exclusive bargaining representatives will likely desire to limit the frequency with which that exclusivity may be challenged, such as by prohibiting further certification/recognition contests within a particular period of time since the last election.

What is a collective bargaining agreement?

A collective bargaining agreement (“CBA”) is a legally binding contract between a locality’s governing body and the exclusive bargaining agent representing the employees in an appropriate bargaining unit, whether such bargaining unit is explicitly authorized by ordinance or resolution or deemed appropriate in accordance with the terms of such ordinance or resolution. CBAs typically range from three-year to five-year terms, and they are the product of collective bargaining between the exclusive bargaining agent and the locality’s governing body. The CBA is usually ratified by a majority vote of the governing body and by a majority vote of employees in the bargaining unit, but an ordinance or resolution may require a specific ratification procedure.

Are collective bargaining negotiations subject to the Virginia Freedom of Information Act?

Presently, the Virginia Freedom of Information Act, Va. Code § 2.2-3700, et. seq. does not contain any explicit provisions regarding collective bargaining. As such, the presumption of open meetings and publicly available records may apply to some aspects of the collective bargaining process and records arising in the course of collective bargaining by application of the usual interpretation of FOIA’s requirements and exemptions.

How much does collective bargaining cost? Who pays for it?

The costs of collective bargaining will depend upon the specific authorizations included in each locality’s ordinance or resolution. Disputes over issues such as bargaining unit composition, election procedures, unfair labor practices, and scope of bargaining are typically resolved by a third party such as a labor administrator, a labor board, or an arbitrator. Costs associated with collective bargaining include personnel for labor relations administration and contract negotiations, attorneys’ fees, and the costs of arbitration or mediation.

Depending on what terms and conditions of employment are subject to collective bargaining, a locality may also face additional costs related to increases in wages and benefits or to changes in grievance and/or disciplinary procedures. The size and number of bargaining units will also impact the administrative costs related to negotiation and dispute resolution. Importantly, no matter what form a collective bargaining ordinance or resolution takes, it may not restrict the locality’s authority to establish its budget or to appropriate funds. Va. Code § 40.1-57.2(B).

What is an unfair labor practice?

An unfair labor practice (ULP) may be defined by a locality's collective bargaining ordinance or resolution. Some of the categories of behavior that typically constitute ULPs are: (1) interfering with, restraining or coercing employees in the exercise of their rights granted by the collective bargaining ordinance or resolution; (2) employer domination of or interference with an employee organization (i.e. union); (3) discrimination or other adverse action against employees for exercising their rights under the ordinance; or (4) refusal of the employer and/or bargaining agent to negotiate in good faith regarding the subjects of bargaining.

I thought Virginia was a “right to work” state—has that changed?

State and local employees in Virginia have long had the right to form or join unions or other associations for the purpose of promoting their interests with their employer. Va. Code 40.1-57.3. However, Virginia continues to prohibit agreements which require employees to join a union or association as a condition of employment, or to remain a dues-paying member thereof as a condition of continued employment. Va. Code §§ 40.1-59-60, 62.

On the other hand, local governments may not require their employees to abstain from joining a union or employee association as a condition of employment or continued employment. Va. Code § 40.1-61. Virginia's collective bargaining law does not change its status as a “right to work” state.

Does this mean that local government employees will be able to go on strike after May 1, 2021?

No. Employees of the Commonwealth of Virginia—or of any county, city, town or other political subdivision of Virginia—are barred from striking. If such employees do decide to go on strike, or to willfully refuse to perform the duties of their employment, they will be deemed to have terminated their employment, and they will be ineligible for re-hire by the Commonwealth or any political subdivision thereof for the next 12 months. Va. Code § 40.1-55. During the 2020 legislative session, the General Assembly clarified that the prohibition against public employee strikes continues to be the law of the Commonwealth, notwithstanding any provision of a local government collective bargaining ordinance or resolution enacted after May 1, 2021.

Sands Anderson lawyers help public sector employers understand the complexities of collective bargaining. We serve as a trusted advisor and assist localities in developing the best approach to achieve their specific collective bargaining goals. With experience drafting ordinances and resolutions, evaluating policy options, and preparing responses to certifications, our lawyers understand how to guide local governments through the many facets of collective bargaining.

Our practice is augmented by a deep bench of employment lawyers and experienced labor practitioners who regularly work with counties, cities, towns, school boards, and other public entities across Virginia on all matters affecting local public governing bodies.

We represent more localities in Virginia and perform a wider variety of legal services for our local government clients than any other law firm in the Commonwealth. From these experiences, we've developed in-depth knowledge and insight into the strategic legal needs of our government clients.



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