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# Collective Bargaining Challenges Facing the Retail Sector

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*This article examines some of the protections and language changes that unionized retail employers will want to secure in their labor contracts in order to meet the new and upcoming challenges posed by the technology revolution.*

It is difficult to imagine a business sector that will be as hard-hit by the burgeoning technology revolution as the retail sector. Already we have seen “Black Fridays,” characterized by hordes of shoppers sleeping out and lining up overnight in front of stores on Thanksgiving evening to seize holiday season sales, become almost an afterthought as holiday shoppers now make online shopping (Cyber Monday) their preferred method. And, as drones are completing deliveries for online sellers such as Amazon, we are witnessing the concomitant closures of big-box stores, anchor stores at malls, and mom and pop shops along Main Street, which can no longer engage in price wars with online sales operations or which can no longer tolerate the exorbitant rents that they are required to pay in order to keep their doors open. And, lest we kid ourselves, this is only the beginning. Some hi-tech retailers, such as Amazon, are doing away with the check-out line, in favor of a consumer friendly swipe station near the exit door. Self-checkout at supermarkets is another example of technology’s impact on human labor. Other establishments are rapidly (and I do mean rapidly) exploring and studying ways for artificial intelligence (AI) to automate functions at their establishments. Indeed, with driverless cars and trucks already being tested for purposes of deliveries, can anything, indeed everything, else really be very far behind? Likely not.

## LABOR AND THE TECHNOLOGY CURVE

Thus, as retailers attempt to stay ahead of the technology curve as a means of survival, we cannot ignore the impact that these changes will have on the need for future labor—at least as we presently know it. With the need for a smaller labor force, or at least a dramatically changing one, front-and-center in the economics of this changing landscape, it is critical for retail employers to make sure that their collective bargaining agreements with unions representing their workforces do not tie their hands in a variety of ways as we move through the next decade.

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(I'm loathe to even imagine what the business world might look like beyond that!) Many retail employers are not encumbered with labor unions to restrict their freedom to manage. These businesses will enjoy the flexibility to make and implement business decisions as necessary, with the caveat that they comply with applicable employment laws (*e.g.*, federal and state laws that require advance notice of certain types of workforce reductions, such as WARN). However, many retail sector employers in the northeast, and especially in New York City, do have labor unions representing their employees and many of these employers have collective bargaining agreements (CBAs) in place that govern the terms and conditions of employment for the unionized workforce. This article will examine some of the protections and language changes that unionized retail employers will want to secure in their labor contracts in order to meet these new and upcoming challenges.

## **COLLECTIVE BARGAINING AGREEMENTS**

### ***Job Security Provisions***

First and foremost, if your labor contract does not contain strong job security provisions or minimum-hours guarantees, count your blessings—and do not let the union negotiate those in during the next round of bargaining. However, employers that are signatory to a labor contract containing *job guarantees* over the life of the CBA, *work-hour guarantees*, and/or *restrictions on the right to lay-off* workers will want to jettison these provisions when the parties bargain for a renewal agreement. It will not be easy (job security issues are viewed by labor unions as big “give backs”), but it is probably necessary. Consider the retail chain that plans on closing 20 stores in coming 24 months (and we’re reading about this regularly, especially with regard to some of the big-box, shopping mall anchor chains). Now picture the cost implications if the employees’ union can point an arbitrator to a CBA provision that guarantees 25 cashier jobs per store for the life of the CBA. Or, picture the retail establishment that wants to phase-out its cashiers and move to an automated check-out system, and, thus, reduce the workweek of its 10 full-time cashiers to part-time, only to find its hands tied with a guaranteed 40-hour workweek. Similarly, consider the retail establishment that currently has not only a sales-floor, but a large inventory warehouse in the back, and a delivery operation as well. While this employer may wish to keep open the sales-floor, it may want to rid itself of the inventory tracking, shelf-stocking, and delivery services due to the increasing prevalence of online buying and drone drop-offs. But, imagine that it is saddled with CBA provisions guaranteeing against the dilution of the bargaining unit, or prohibiting the closure of departments within the store (*e.g.*, warehouse, delivery) without the union’s consent. Or, likewise, imagine the store that wants to convert itself from a full-service

store to a showroom so that customers can browse, but order online (as is becoming a popular trend) only to find language in its CBA restricting or even prohibiting its right to lay off workers during the CBA term.

### ***Management Rights Language***

Not only will all of these employers want to rid their CBAs of such restrictive language, but they will want to negotiate very strong and unambiguous *management rights* language that will give them the desired flexibility in these areas. Such language might look like the following:

Management, in its sole and absolute judgment and discretion, shall have the unlimited right to lay-off, eliminate the jobs of, and/or reduce the workweek of bargaining unit employees during the term of this agreement. The Employer shall have the right to open or close departments as it deems appropriate and to use new and improved methods (including automation) which it deems to be in the best interests of its business.

### ***Right to Subcontract***

In addition, retail establishments should check to be sure their CBAs have no restrictions on the right to subcontract; if they are in your CBA, negotiate to get them out. But further, even if your CBA is silent on the issue of *subcontracting*, since it is considered to be a mandatory subject of bargaining under the National Labor Relations Act, it is imperative to negotiate a right to subcontract-out work covered by the CBA. Consider the following:

The Employer shall have the absolute and unlimited right to subcontract out bargaining unit work at any time, including the right to subcontract out the work of the entire bargaining unit, or any part thereof. The Employer shall further have the absolute right to select subcontractor(s) of its own choosing, in its sole judgment and discretion. This agreement shall satisfy any obligation that the Employer may have to bargain about the decision to subcontract.

Language like this will allow you to sub-out the warehousing and delivery services to a drone operation that can do it more cost effectively because their associates' labor costs are negligible.

### ***Minimum Wage Laws***

Retail establishments always have been known as highly transient workplaces for employees, and, accordingly, employers have been able

to keep wages fairly low for the first few years of employment; offering rewards as seniority increases for those who stay. However, as drastically higher minimum wage laws are sweeping the country (especially in large urban markets like New York City), many retail establishments coming out of long-term CBAs might find their *wages* falling short of what the law now requires or will require in the near-term; and, of course, any union worth its salt will want to exceed the minimum rate required by law significantly. In negotiating your economic package, make sure that you factor sales-commission arrangements into calculating and negotiating how you will comply with those minimum wage laws.

### ***Pension Plans***

Likewise, because retail employers may find themselves spending more on the wage component of economics than they anticipated, where is that extra money going to come from, especially in the face of declining sales? One place might be *pensions*, but, be careful. Many CBAs require employers to contribute to multi-employer pension plans. As many multi-employer pension plans have been hurt financially over the past decade, their contributing employers' contribution rates have sky-rocketed to help the plan capture the money necessary to cover the costs of its vested and, as yet, unvested pension liabilities. Employers want out, and it's reasonable to try to negotiate your way out (although it may be as hard as trying to get out of the union medical plan), but make sure you look into the ERISA withdrawal liability status of the pension plan in issue before you jump to do so. If you do not, you may find yourself saving, *e.g.*, \$100 per/month per employee on the contribution side, but holding a withdrawal liability bill of several hundred thousand dollars as the cost of ending your participation in the plan. Nevertheless, employers should consider the withdrawal option since, as many retail employers escape from these pension plans through bankruptcies and negotiated withdrawals, you do not want to be the employer left holding the bag.

### **CONCLUSION**

These are but a few of the challenging issues facing retailers today and likely tomorrow. There will be more as artificial intelligence increasingly emerges on the playing field, automates tasks, and changes the ways that consumers shop. As business owners, you need to be vigilant to stay on top of these trends, and equally vigilant in giving yourselves the flexibility you need to manage your unionized workforce and compete in this new and challenging landscape.