



Lozano Smith
ATTORNEYS AT LAW

The Foundations of Negotiations Legal and Practical Applications

Presented by Darren Kameya and Angelique Cramer
With Dr. Mercedes Gutierrez

ACHRO 2022 Fall Training Institute
October 26, 2022

WHO WE ARE & WHAT WE DO

Lozano Smith is a full-service education and public agency law firm serving hundreds of California's K-12 and community college districts, and numerous cities, counties, and special districts. Established in 1988, the firm prides itself on fostering longstanding relationships with our clients, while advising and counseling on complex and ever-changing laws. Ultimately, this allows clients to stay focused on what matters most – the success of their district, students and communities they serve. Lozano Smith has offices in eight California locations: Sacramento, Walnut Creek, Fresno, Monterey, Bakersfield, San Luis Obispo, Los Angeles, and San Diego.

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- Charter School
- Community College
- Facilities & Business
- Governance
- Investigations
- Labor & Employment
- Litigation
- Municipal
- Public Finance
- Public Safety
- Special Education
- Student
- Technology & Innovation
- Title IX

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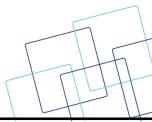


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Presenter

Darren C. Kameya

AT LOZANO SMITH

Darren C. Kameya is a Partner in Lozano Smith's Los Angeles office. For many years, Mr. Kameya has advised school district clients in both the northern and southern California regions. Mr. Kameya's legal experience includes labor and employment matters and extends to issues of board governance, public meetings laws, charter schools, facilities use agreements, student rights and discipline, tort liability, insurance coverage issues, public records and privacy rights. Mr. Kameya's background covers other public agencies as well, including cities and special districts. As a litigator, Mr. Kameya has represented clients in federal and state courts, including representation of the City of Carson during trial and on appeal in a published case involving public financing issues. *City of Carson v. City of La Mirada* (2004) 125 Cal.App.4th 532.



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Presenter

Angelique A. Cramer

AT LOZANO SMITH

Angelique A. Cramer is Senior Counsel in Lozano Smith's San Diego office. Her practice focuses on labor and employment aspects of public agency law, and student issues faced by public school districts. Ms. Cramer frequently advises school districts, community colleges, charter schools, and auxiliary organizations. She provides counsel on labor relations, collective bargaining negotiations and employment contracts. She also advises clients on employee hiring, discipline, layoff, termination, grievance processing, and leaves, and often drafts PERB and agency filings. In addition to her labor and employment experience, Ms. Cramer regularly reviews board policies, settlement agreements, and charter petitions.



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Mercedes Gutierrez, Ed.D

AT LOZANO SMITH

Dr. Gutierrez is the Vice President of Human Resources and Assistant Superintendent at Cerritos College. She holds an impressive background in human resources management in the public education sector. Her experience includes serving as Los Angeles County Office of Education (LACOE)'s Coordinator of Human Resource Services for nine (9) years, which included the leadership of LACOE's certificated employee recruitment and transfers, compensation unit, certificated employee investigations, management professional development, and membership on the collective bargaining team. Following her tenure with LACOE, in 2019 Dr. Gutierrez was hired as the Los Angeles Community College District (LACCD)'s Director of Human Resources, and shortly thereafter was appointed in 2020 as LACCD's Interim Vice Chancellor of Human Resources.



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Overview

- The Duty to Bargain and Scope of Bargaining
- The Bargaining Process
- Good Faith Bargaining
- Effective Communication
- Tips to Avoid Common Missteps

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What comes to mind when you think of union negotiations?



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Duty to Bargain & Scope of Bargaining

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Duty To Bargain

Under the Educational Employment Relations Act ("EERA"), a public school employer is required to meet and negotiate with the exclusive representatives of employee organizations upon request with regard to matters that are within the scope of representation.

(Govt. Code, § 3543.3)

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Duty to Consult

Government Code § 3543.2, Districts are required to consult with the exclusive representative on "the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law."

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Mandatory Subjects of Bargaining

Scope of Bargaining

- Hours
- Wages
- Other Terms and Conditions of Employment

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Other Terms and Conditions of Employment

“Terms and conditions of employment” include:

- Health & welfare benefits
- Leaves of absence
- Transfer and reassignment
- Evaluation Procedures and criteria
- Retraining and reemployment rights
- Grievance procedures
- Organizational security
- Safety conditions
- Disciplinary causes and procedures

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Unenumerated Terms and Conditions of Employment



An unenumerated issue still is within the scope of bargaining if:

- It's **logically and reasonably related** to an enumerated term and condition; **and**
- It's **likely to result in a conflict** between management and employees and **collective bargaining is an appropriate means of resolution**; **and**
- Negotiating would **not significantly abridge the college district's freedom to exercise its managerial prerogatives** (including matters of fundamental policy) essential to achieving the district's mission.

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Examples of “Terms and Conditions” of Employment That Are Negotiable



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- The impact of adding job duties not listed in job description or wages and hours
- Transferring work out of the unit, whether it is transferred to another unit, private contractor, or management
- Requirement that all trades workers sign in at the Maintenance Office before starting shift on time.

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Examples of “Terms and Conditions” of Employment That Are NOT Negotiable



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- Daily assignment of tasks within the job description
- Assigning supervisors to a department
- Compliance with County Department of Public Health requirements

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Negotiation Challenges - Understanding the Issues



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What are you bargaining?

- Decisions?
- Effects?
- Both?

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Understanding the Issues

- Employer must allow union opportunity to request to bargain over negotiable effects.
- Union should identify effects it believes are subject to negotiation.
- However, employer has the duty to attempt to clarify ambiguities in a union's request to bargain over effects of a non-negotiable decision prior to refusing to bargain.

(Rio Hondo Community College District (2013) PERB Decision No. 2313)

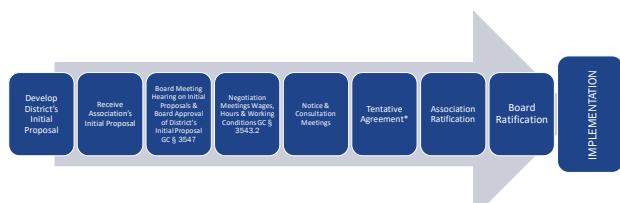
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The Collective Bargaining Process

Overview of Collective Bargaining Process



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Negotiation Methods and Techniques

Interest Based Bargaining



Traditional/Positional



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Budget Considerations

- Projected or Actual State COLA & Other Funding Streams
- Projected and Historical Ending Fund Balances
- Revenue projections for next three years (COLA, attendance)
- Unique expenditures (retiree benefits, uncontained health care costs, litigation risks)



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Preparing for Negotiations—Know your data!



- Cost to fund step/column/longevity
- Cost for health benefits for active employees
- Cost of 1% increase to the salary schedules
- Cost of retiree health benefits
- Cost of salary driven benefits (worker's comp, unemployment, STRS/PERS)
- Cost of staffing ratios

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During Bargaining

Ordered issue discussion process:

- Presentation and discussion of nature and history of issue
 - Discussion of interests
 - Development of options
 - Culling of options based on criteria developed by parties
 - Consensus on best option
 - Tentative language development on each issue

Crafting of final agreements and language

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During Bargaining



- Formulate ground rules
 - Jointly gather and analyze info
 - Group issues and prioritize them
 - If needed, use subcommittees or other expertise to develop information and proposals
 - Use package proposals

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Good Faith Bargaining

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Good Faith Bargaining

Both the college district and the union are required to "negotiate in good faith." To determine this, PERB will review:

- The course of negotiations
- The parties' outward conduct

To determine whether there has been a "serious attempt to resolve differences and reach a common ground."



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Bad Faith Bargaining

Bad Faith Actions

- Unilateral Changes
- Refusal to Bargain
- Failure to Execute Agreed-On Contract
- Insistence to Impasse on Non-Mandatory Subjects
- Proposals Conditioned on Waiver of Rights
- Provisions of Inaccurate Information
- Bypassing Representatives
- Coalition (not Coordinated) Bargaining

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Bad Faith Bargaining

Totality of the Circumstances (Indicia)

- Surface Bargaining
- Failure to Exchange Proposals Counterproposals
- "Take It or Leave It" Ultimatum
- Dilatory Tactics in Scheduling and Attending Negotiation Sessions
- Negotiators Without Adequate Authority
- Predictably unacceptable proposals
- Failure to Provide Public Notice (Sunshine) or Come to the Table
- Regressive Bargaining

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Effective Communication During Negotiations

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Communications Include . . .

Verbal Announcements	Newsletters
Emails	Press Releases
Posts on the District's Website and District's Social Media	



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ABCs of Permissible Communications

Accuracy

Cannot Bypass the Union

Not Coercive



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What District Speech Is NOT Effective or Permitted?

- Do not engage in unprofessional, offensive, or disrespectful conduct toward the union away from the table or at the table.
- Do not undermine the union's leadership of the unit or induce employees to withdraw support for the union.
- Do not negotiate directly with unit members or bypass the union at the table. (Don't publicize a proposal until it has been passed at the table.)
- Do not undermine the collective bargaining process by publicly expressing cynicism about the process or likely outcomes.
- Do not coerce unit members by threatening a reprisal if they support the union's proposal, or by promising a benefit if they support the district's proposal.
- Do not seek to gauge the degree of employee support for the union's bargaining position.

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What Union Speech is Permitted?

Almost anything.

Union related speech is protected unless it is "sufficiently opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause a substantial disruption of or material interference with the workplace."

(Mt. San Antonio CCD (1982) PERB Dec. No. 224.)

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Negotiation Tips

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General Bargaining Tips

- **Follow the Golden Rule.** Treat the union team as you would like to be treated by them.
- **Strike a Fair Deal.** A successful T.A. will benefit each side enough to justify its ratification or adoption.
- **Draft Intentionally and for a Third Party.** Contract provisions should be carefully drafted for a third party to interpret.
- **Take Positions That can be Justified in Public.** If you can't justify a position in an open session meeting, reconsider it.

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General Bargaining Tips

- **Don't Count on Correcting it in the Future.** Once a benefit is in the contract, it's difficult and expensive to take it away.
- **Build Trust and Relationships.** Maintain budget accuracy and consistency; follow through with promises at the table.
- **Be Transparent.** Share budget assumptions and priorities, future operational plans.
- **Keep Your Eye on the Prize.** Remember your BATNA and plan your current actions to move toward the final bargaining objectives.

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Questions



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