Questions and Answers

PECBA Unfair Labor Practice Cases

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Questions and Answers:
PECBA Unfair Labor Practice Cases

These questions and answers are provided as an aid to the public in understanding unfair labor practice cases under the Public Employee Collective Bargaining Act (PECBA). PECBA gives most public employees in Oregon the right to organize and collectively bargain and establishes collective bargaining procedures. To protect employees' rights and ensure good faith collective bargaining, PECBA prohibits certain conduct as unfair labor practices.

This document is intended only to provide assistance in understanding the basic processes and procedures in PECBA unfair labor practice cases. **This document is not a legal authority and should never be cited. This document is not an official statement of opinion by the Employment Relations Board. These are commonly asked questions and answers intended to assist community members who wish to understand how PECBA unfair labor practice cases are processed.**

This document is not legal advice. If you have legal questions, you must seek legal advice from your own attorney.

The practices described in this guide may change from time to time as required by changes in the underlying law or changes in ERB structure and practices. To the extent possible, notice of any changes will be provided through ERB's website, http://www.oregon.gov/erb.

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A. OVERVIEW AND BACKGROUND

1. What is the Public Employee Collective Bargaining Act (PECBA)?

The Public Employee Collective Bargaining Act (PECBA), ORS Chapter 243.650-243.809, recognizes the right of public employees to organize and engage in collective bargaining, and establishes a uniform process for employees to join and be represented by labor organizations (a.k.a. unions) of their own choice. PECBA also establishes a collective bargaining process for Oregon's public employers and unions representing public employees. The full text of PECBA and ERB's rules can be found in ERB's Rules which are posted on ERB's website, http://www.oregon.gov/ERB.

2. Which public employers are covered by PECBA?

Employers covered by PECBA include the State of Oregon and its political subdivisions, such as cities, counties, school districts, community colleges, public universities, public hospitals, mass transit districts, metropolitan service districts, special districts, and other public and quasi-public corporations.

3. Which public employees are covered by PECBA?

PECBA covers nearly all employees of covered public employers (see Question 2, above). The exceptions are: elected officials, persons appointed to serve on boards or commissions, incarcerated persons working under section 41, Article I of the Oregon Constitution, and persons who are confidential, supervisory, or managerial employees. PECBA, ORS 243.650, defines the terms "confidential," "supervisory," or "managerial" for the purpose of determining whether an employee is covered by PECBA or not. So, for example, if there's a question about whether a particular employee is an excluded "supervisor," it is important to figure out whether that employee's job meets *PECBA's* definition of supervisor (which is not necessarily the same as the employer's definition or a dictionary definition).

4. Which unions are covered by PECBA?

Any labor organization that represents Oregon public employees for the purposes of collective bargaining is covered by PECBA. Labor organizations are commonly referred to as "unions" or "associations." In this guide, we use the terms "labor organization" and "union" interchangeably.

5. Who administers PECBA?

The Employment Relations Board (ERB or Board) administers the processes established by PECBA, and it decides cases that are filed by employees, labor unions, or employers seeking enforcement or interpretation of PECBA. The most common type of case decided by the Board is called an "unfair labor practice" case.

The Board consists of three full-time, quasi-judicial members who are appointed by the Governor and confirmed by the Senate. The Board operates under the provisions of

ORS chapter 240 (the State Personnel Relations Law (SPRL)), ORS 243.650 through 243.766 (the Public Employee Collective Bargaining Act (PECBA)), ORS 663.005 through ORS 663.325 (private sector labor law), and ORS 662.405 through 662.455 (relating to the State Conciliation Service).

The Board is supported by three administrative law judges, a hearings assistant, an assistant to the Board, the Mediation and Election Coordinator, and the State Conciliation Service, consisting of the State Conciliator and two state mediators.

6. What laws are *not* administered by ERB, and who can I call for more information about those laws?

ERB does not administer federal labor laws, such as the National Labor Relations Act (NLRA) (which covers most private sector employees), the Federal Labor Relations Act (FLRA) (which covers federal government employees), and the Railway Labor Act (RLA) (which covers railway and airline employees).

- For more information about the NLRA, see the National Labor Relations Board website at https://www.nlrb.gov/.
- For more information about the FLRA, see the Federal Labor Relations Authority website at https://www.flra.gov/.
- For more information about the RLA, see the National Mediation Board website at http://www.nmb.gov/.

ERB also does not administer other federal and state employment laws, such as laws that set wage and hour standards, provide for medical or sick leave, or prohibit discrimination on the basis of protected status, including race, color, sex, religion, sexual orientation, national origin, age, disability, and veteran status. For more information about other employment laws, please see the following agency websites:

- US Department of Labor (federal wage and hour laws), at https://www.dol.gov/
- US Equal Employment Opportunity Commission (federal anti-discrimination laws), at https://www.eeoc.gov/.
- Oregon Bureau of Labor and Industries (state employment laws), at http://www.oregon.gov/BOLI.
- Oregon Workers Compensation Board (workplace injuries), at http://www.oregon.gov/wcb.
- Oregon Employment Department (unemployment benefits and assistance), at http://www.oregon.gov/employ

7. I am a private sector employee with questions related to union representation. Where can I get more information?

Most private sector employees are covered by the National Labor Relations Act, which is administered by the National Labor Relations Board. More information about the NLRA is available on the NLRB website, at https://www.nlrb.gov/.

Some Oregon private sector employees who are not covered by the NLRA have the right to union representation and collective bargaining under Oregon's private sector

labor-management relations law (ORS 663.005 through 663.295). If you are a private sector employee, and you are not sure whether you are covered by the NLRA or Oregon labor law, you can contact either the NLRB or ERB for more information.

8. I am an Oregon public employee, and I want to organize or join a union, change to a different union, or stop being represented by a union. Where can I get more information?

PECBA establishes the processes by which employees in a given employee group (called a "bargaining unit") can organize a union, change unions, or stop being represented by any union. Those processes determine what the majority of employees in a given bargaining unit would like to do regarding union representation. Forms and instructions for representation-related procedures can be found on ERB's website. For more information about ERB's representation-related processes, call (503) 378-6471, or email EmpRel.Board@ERB.Oregon.gov.

9. I am an Oregon public employee, but I am not represented by a union and I have a complaint against my employer. Where can I get more information?

If you are not represented by a union and you have a complaint against your employer, an attorney may be able to help you to understand your options related to the complaint. Some complaints are addressed by filing an internal complaint within your workplace, such as with your supervisor or with human resources. A lawyer can listen to your concerns and help you decide what to do. The Oregon State Bar's Lawyer Referral Services, at https://www.osbar.org/public/legalinfo/1171_LRS.htm may be able to help you to locate a lawyer who is willing to work with you:

If your complaint relates to something that a public employer did in relation to efforts to organize a union, see the information provided above, at Question 8.

If your complaint is related to employment rights, such as minimum wage, overtime, family medical leave, sick leave, or discrimination, you may find more information from other federal and state agencies. Links to some other agencies' websites are provided above, at Question 6.

10. I am a public employee and I am represented by a union, and I have a complaint against my employer. Where can I get more information?

If you are represented by a union and you believe your employer has violated the union contract, you may get more information about how to file a grievance from your union representative or by consulting your union contract.

If you believe your employer violated your union contract, and you believe that your union's conduct prevented you from pursuing your claim against your employer, then you might have unfair labor practice claims against your union and employer. When an employee files such claims, the complaint is called a "duty of fair representation complaint." For more

information about "duty of fair representation" complaints, see Section D, Questions 4 and 28.

If your complaint is related to other employment rights, such as minimum wage, overtime, family medical leave, sick leave, or discrimination, you may find more information from other federal and state agencies. Links to some other agencies' websites are provided above, at Question 6. You may also have the option of filing an internal complaint with your employer.

11. I am a public employee, I am represented by a union, and I have a complaint against my union. Where can I get more information?

PECBA imposes a "duty of fair representation" on unions that represent Oregon public employees. An employee who believes that their union has violated the duty of fair representation may file an unfair labor practice complaint against the union with ERB. This guide provides more information about unfair labor practice complaints in general, and all of this information applies to duty of fair representation cases. We also provide some specific information about filing duty of fair representation complaints in Section D, Question 28.

You may also consider contacting your union representative or other union officers to see if they can resolve your complaint or to find out if the union has an internal appeal process.

B. UNFAIR LABOR PRACTICES (ULP)

1. What is an unfair labor practice?

When a public employer or a union that represents public employees engages in conduct that is prohibited by PECBA, it commits an "unfair labor practice." Public employees can also commit certain types of unfair labor practices, but those types of cases are quite rare. "Unfair labor practice" is commonly abbreviated as "ULP." The main purpose of this guide is to provide basic information about the ULP process and procedural rules, and it is not possible to provide detailed information about what conduct is or is not an unfair labor practice. However, we provide some very basic information about the types of conduct that are prohibited by PECBA in the questions below.

2. What kinds of employer conduct are unfair labor practices?

PECBA gives public employees "the right to form, join and participate in the activities of labor organizations of their own choosing for the purpose of representation and collective bargaining with their public employer on matters concerning employment relations." ORS 243.662. Under ORS 243.672(1), it is an unfair labor practice for a public employer to:

a) interfere with, restrain or coerce employees in or because of the exercise of those rights;

b) dominate, interfere with or assist in the formation, existence or administration of any employee organization;

c) discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of encouraging or discouraging membership in an employee organization;

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 relation to a case or proceeding under PECBA;

e) refuse to bargain collectively in good faith with the union representative of its employees;

f) refuse or fail to comply with any provision of PECBA;

g) to 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; or

i) violate ORS 243.670(2), which restricts the use of public funds to support actions to assist, promote or deter union organizing.

Additionally, under ORS 243.752, it is an unfair labor practice for a public employer to refuse or fail to comply with any provision of a final and binding arbitration award.

3. What kinds of union or employee conduct are unfair labor practices?

Under ORS 243.672(2) of PECBA, it is an unfair labor practice for a labor organization or public employee to:

(a) interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under PECBA;

(b) refuse to bargain collectively in good faith with the public employer if the labor organization is an exclusive representative;

(c) refuse or fail to comply with any provision of PECBA;

(d) 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;

(e) refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract;

(f) engage in certain types of unconventional strike activity, such as sitdown, slowdown, rolling, intermittent or on-and-off again strikes; or

(g) picket or cause, induce, or encourage to be picketed, or threaten to engage in such activity, at the residence or business premises of any individual who is a member of the governing body of a public employer, with respect to a dispute over a collective bargaining agreement or negotiations over employment

relations, if an objective or effect of such picketing is to induce another person to cease doing business with the governing body member's business or to cease handling, transporting or dealing in goods or services produced at the governing body's business.

Additionally, under ORS 243.752, it is an unfair labor practice for a labor organization to refuse or fail to comply with any provision of a final and binding arbitration award.

4. How can I lean more about what types of conduct violate PECBA?

You can learn more about the types of conduct that violate (or do not violate) PECBA by reading ERB orders in ULP cases. In each ULP case, ERB has to determine whether the conduct at issue is an unfair labor practice under PECBA. For each case, ERB issues an order that describes the conduct at issue and explains its decision about whether that conduct was an unfair labor practice. ERB publishes its orders on its website. You can also request copies of particular orders from ERB, or review orders and other research materials at ERB's library, which is open to the public.

A private company publishes a digest, called the PECBR Digest, which provides brief descriptions of ERB orders, organized by topic. The PECBR Digest covers all aspects of ULP cases. You can review a copy of the PECBR Digest at ERB's library.

5. What is the law that applies to PECBA unfair labor practice cases?

PECBA is contained in ORS 243.650-243.809. All of PECBA is included in ERB's Rulebook, which is posted on ERB's website. The Oregon Legislature also publishes the Oregon Revised Statutes on its website, and the PECBA sections are posted at https://www.oregonlegislature.gov/bills_laws/ors/ors243.html.

ERB also has rules that govern the processing of ULPs, which are part of the Oregon Administrative Rules. Citations to the Oregon Administrative Rules start with the abbreviation "OAR" and are followed by a specific section number. ERB's rules may be found in ERB's Rulebook, which is posted on ERB's website. The Oregon Secretary of State also publishes all of the Oregon Administrative Rules on its website, and ERB's rules are posted at

https://sos.oregon.gov/archives/administrative-rules/Pages/default.aspx

ERB interprets and applies PECBA in each ULP case. ERB explains how it interprets and applies PECBA in its orders. ERB publishes its orders on its website. You can also request copies of particular orders from ERB, or review orders and other research materials at ERB's library, which is open to the public.

A private company publishes a digest, called the PECBR Digest, which provides brief descriptions of ERB orders, organized by topic. The PECBR Digest covers all aspects of ULP cases. You can review a copy of the PECBR Digest at ERB's library.

6. Are ERB's decisions in ULP cases precedential?

Generally, yes. As a general practice, the Board follows the principles set in prior Board cases. As conditions in the workplace change over time, or for other compelling reasons, the Board may revise or even overturn principles stated in previous cases. On the whole, however, the Board tries to ensure that its decisions are consistent over time and can be relied upon by employees, unions, and employers.

Under ERB's rules, if neither party objects to a recommended order, the Board will adopt the recommended order as its final order, but the Board may designate part or all of the order as non-precedential.

7. What is the difference between a grievance arbitration and an unfair labor practice case?

When employees are represented by a union, there is usually a collective bargaining agreement between the union and the employer. The collective bargaining agreement is often referred to as the "union contract" or "CBA." Most union contracts establish the terms and conditions of employment for the employees who are represented by the union. And, most union contracts give the union and/or an individual employee the right to file a grievance if they believe that the employer has violated the union contract. For example, if the union contract says that the employer must give employees certain benefits, and the employer fails to do so, the union can file a grievance. If the employer and the union cannot resolve the grievance on their own, most union contracts allow for the grievance to be heard by a neutral third party called an "arbitrator." Similar to a judge, the arbitrator will conduct a hearing and issue a decision that resolves the grievance. That process is called "arbitration." Under PECBA, the employer and union are required to comply with the arbitrator's decision.

An unfair labor practice happens when an employer, union, or public employee violates PECBA. For example, PECBA requires both sides to bargain in good faith. If an employer or union believes the other side is not acting in good faith during collective bargaining negotiations, it may file an unfair labor practice complaint. The party that files the complaint is called the "complainant." The party that allegedly violated PECBA is called the "respondent." ERB will process the complaint and determine whether the respondent committed an unfair labor practice.

8. How do I know if my complaint is a grievance or an unfair labor practice?

Generally speaking, if your complaint is that your employer is violating a contract or agreement with your union, then you have a grievance. If your complaint is that an employer or a union is violating a right or duty established by PECBA (such as the right to engage in union organizing or the duty to bargain in good faith), your complaint is an unfair labor practice.

Union contracts typically establish the terms and conditions of employment for a particular group of employees, such as their wages, benefits, and rights at work.

PECBA establishes and protects the rights of employees related to union representation and their right to engage in union-related activities. PECBA also establishes the process and fair rules for collective bargaining, which both employers and unions must follow.

In some cases, an employer's conduct can give rise to a grievance and a ULP at the same time. If you're not sure whether a complaint is a grievance or ULP (or both), it is probably best to consult with a union representative or an attorney as soon as possible. Most grievances must be started by a certain deadline that is specified in the union contract, and that deadline can be very short. Additionally, under PECBA, a ULP complaint must be filed within 180 days of the date of the violation or the date that the complainant knew or reasonably should have known of the violation.

C. ULP REMEDIES AND PENALTIES

1. What kinds of remedies or penalties can ERB order if it finds that a party has committed an unfair labor practice?

ERB has broad authority to grant appropriate remedies when it finds that a party has committed an unfair labor practice. See ORS 243.676(2). At a minimum, ERB will order the party to stop its unlawful action, which is known as a "cease and desist order." Depending on the circumstances, ERB may order other remedies. For example, ERB may order the party to post a notice explaining ERB's order to affected employees or reinstate an employee who was unlawfully discharged. In a case where the ULP caused financial damage, ERB may order compensation for the damage, such as back pay. If an employer unlawfully changed employees' work terms or conditions, ERB may order the employer to rescind the change and make the employees whole.

Representation costs: In each case, ERB will determine who the prevailing party is, if any. The non-prevailing party must reimburse some of the prevailing party's representation costs. ERB automatically awards representation costs according to a schedule set out in ERB's rules. See OAR 115-035-0055 (representation cost schedule and rules). (Please note that if the respondent is the prevailing party, ERB may require the complainant to reimburse the respondent for some of its costs. For more information about what can happen if you file a ULP complaint but lose the case, see Section D, Question 29.)

Under certain circumstances and upon proper request, ERB can also order the following types of special remedies:

- Reimbursement of the $300 filing fee. See Question 2, in this Section C.
- Payment of a civil penalty, and reimbursement of additional representation costs in cases where a civil penalty is awarded. See Question 3, in this Section C.
- Reimbursement of attorney fees on appeal. See Question 4, in this Section C.

When filing a complaint, the complainant should identify all of the remedies that it would like ERB to consider ordering, including any special remedies. For more information about requesting special remedies in a complaint, see Section D, Questions 23-25.

2. Can ERB order one party to reimburse the other party's filing fee?

ERB can order one party to reimburse the other party's filing fee, but only if certain requirements are met.

Under PECBA, the complainant and the respondent each must pay a $300 filing fee.

ERB can order a respondent to reimburse the complainant's filing fee, but only if it finds that the respondent's answer was frivolous or filed in bad faith. Similarly, ERB can order a complainant to reimburse the respondent's filing fee, but only if it finds that the complaint was frivolous or filed in bad faith. See ORS 243.672(3).

Additionally, to be eligible for filing fee reimbursement, a party must make a proper request in their complaint or answer. For information about requesting filing fee reimbursement in a complaint, see Section D, Question 24. For information about requesting filing fee reimbursement in an answer, see Section G, Question 11.

3. What is a "civil penalty," and how does ERB award a civil penalty?

A civil penalty is like a fine. ERB can order a respondent to pay a civil penalty, but only if it finds that the respondent's conduct was egregious, or that the respondent committed an unfair labor practice repetitively and with knowledge that the action taken was an unfair labor practice. See ORS 243.676(4)(a)(A). Similarly, ERB can order a complainant to pay a civil penalty, but only if it dismisses the complaint after finding that the respondent did not commit any unfair labor practice, and it finds that the complainant filed the complaint frivolously or with the intent to harass the respondent. See ORS 243.676(4)(a)(B).

To be eligible for a civil penalty award, a party must make a proper request in the complaint or answer. For information about requesting a civil penalty in a complaint, see Section D, Question 23. For information about requesting a civil penalty in an answer, see Section G, Question12.

In most cases, the maximum civil penalty is $1,000. See ORS 243.676(4)(a). However, if a party is ordered to pay a civil penalty, they may also have to pay for *all* of the other party's representation costs (instead of just a portion of those costs up to $5,000). See OAR 115-035-0055(1)(b)(E). For more information about representation costs, see Question 4 below, in this Section C.

4. What are "representation costs," and how does ERB award representation costs?

Representation costs are the costs that a party incurs to litigate a ULP case before ERB. Generally, representation costs are the fees that the party had to pay for legal representation.

Under ERB rules that went into effect on February 1, 2017, ERB simplified how it awards representation costs. See OAR 115-035-0055.

In each case, ERB will determine which party is the prevailing party. (If there is no clear prevailing party, ERB will not award any representation costs.) See OAR 115-035-0055(1)(d).

In most cases, the amount of the representation cost award can range from $250 to $5000, and depends on the length of the hearing. See OAR 115-035-0055(1)(b) (schedule of representation cost awards).

If the non-prevailing party relied on personal financial resources to litigate the ULP, the maximum amount of representation costs they can be ordered to pay is $500. See OAR 115-035-0055(1)(b)(F).

In most cases, the prevailing party does not need to do anything to obtain the representation cost award; after ERB issues its final order, ERB will automatically determine who the prevailing party is and issue the representation cost award. The prevailing party must file a petition for representation costs only if ERB awarded a civil penalty and they would like reimbursement for representation costs that exceed $5,000. When ERB awards a civil penalty, the prevailing party may petition ERB for reimbursement of all reasonable representation costs. See OAR 115-035-0055(1)(c) and (2)(b) (requirements and process for representation cost petitions).

In cases that involve multiple charges, the Board may uphold some charges while dismissing others. In such cases, the Board may designate the prevailing party by determining which charge was the most significant charge. OAR 115-035-0055(1)(d). If the Board finds that there is no clear prevailing party, it will not award representation costs to any party.

5. What are "attorney fees," and how does ERB award attorney fees?

Attorney fees on appeal are the fees that a party pays for legal representation when an ERB unfair labor practice order is appealed to the Oregon Court of Appeals.

Under ORS 243.676(2)(e), if ERB finds that the respondent committed an unfair labor practice, and a party appeals ERB's order, ERB may award attorney fees to the party that prevails on appeal. Under ERB's rules, the maximum attorney fee award is $5,000, unless ERB awarded a civil penalty that was not reversed by the court. OAR 115-035-0057(4).

If the prevailing party on appeal would like ERB to award attorney fees, they must file a petition. The petition requirements and procedure are set forth in OAR 115-035-0057(1)-(3).

D. HOW TO FILE AN UNFAIR LABOR PRACTICE COMPLAINT

1. What is an unfair labor practice complaint?

An unfair labor practice complaint is the document that alleges a violation of PECBA. To initiate an unfair labor practice case, you must file a complaint. The requirements for filing a complaint are described in more detail below, at Question 8, and throughout this Section D.

2. What do the terms "complainant" and "respondent" mean?

The complainant is the party that files the complaint. The respondent is the party that the complaint has been filed against. In a ULP complaint, the complainant alleges that the respondent has engaged in conduct that is prohibited by PECBA.

3. What happens in a typical unfair labor practice case?

On page 53 of this guide, there is a chart that shows the basic procedural steps in a *typical* ULP case. The chart does not show what happens in every case. Some cases resolve early in the process, for example, because the case is dismissed or the parties voluntarily settle their dispute. Other cases are more complicated.

4. What is a duty of fair representation complaint?

A duty of fair representation complaint is a type of unfair labor practice complaint. PECBA requires a union that is the exclusive representative of a bargaining unit to represent all employees in that bargaining unit fairly and without discrimination. That requirement is called the "duty of fair representation" (DFR). When an employee files an unfair labor practice complaint alleging that their union representative has violated the duty of fair representation, that complaint is called a "duty of fair representation complaint." All of the unfair labor practice complaint rules and procedures described in this guide apply to duty of fair representation complaints. For specific information about duty of fair representation complaints, see this Section D, Question 28.

5. What is the difference between an unfair labor practice complaint and a petition for declaratory ruling?

In a ULP complaint, the complainant claims that an employer or union engaged in conduct that is an unfair labor practice. By filing the ULP complaint, the complainant is asking ERB to determine whether an unfair labor practice occurred, and if so, to order a remedy.

In a petition for declaratory ruling, the petitioner (an employer, union, or employee) asks ERB to answer a particular question of law. Two or more parties (such as a union and employer) can jointly petition ERB for a declaratory ruling. Unlike a ULP case, ERB does not determine whether someone violated the law. Instead, ERB provides guidance to the parties that may help them understand their legal duties and avoid engaging in unfair labor practice conduct. For example, a party may file a petition seeking a ruling on whether a particular proposal is a mandatory subject of bargaining.

Filing a petition for a declaratory ruling can be an efficient way for parties to obtain a ruling on a subject of disagreement and avoid a greater dispute. There is no fee to file a petition for declaratory ruling. The Oregon Attorney General has established rules for declaratory rulings, which set the requirements for how to file the petition and how ERB must process the petition. See OAR 137-002-0020 through 137-002-0060.

6. Who can file an unfair labor practice complaint?

A public employee, union, or employer can file a ULP complaint with ERB if they have been or will be injured by the unfair labor practice conduct of a union or employer that is covered by PECBA. See ORS 243.672(3). Information about which public employers, employees, and unions are covered by PECBA is provided in Section A, Questions 2-4. Information about what types of conduct are unfair labor practices under PECBA is provided in Section B, Questions 2 & 3.

7. Do you have to be an attorney to file an unfair labor practice complaint?

No. A party does not have to be represented by an attorney to file an unfair labor practice complaint. You can represent yourself in a ULP case. An individual who represents themselves (without an attorney) is called a party "appearing pro se." Similarly, a union can be represented by an officer or staff member, and a public employer can be represented by a human resources manager or other management representative, even if the individual is not an attorney.

Most complainants and respondents are represented by attorneys, but not all. An attorney may be helpful in explaining your rights and the procedures. ERB can provide basic information about the process, but ERB must remain neutral in every case and cannot provide legal advice or assistance to any party.

8. What are the requirements for a ULP complaint?

As explained in more detail below, each ULP complaint must include the following:

- A complete ULP form, identifying the complainant, the respondent, and the specific sections and subsections of PECBA that the respondent allegedly violated;
- A statement of claims (see this Section D, Question 10); and
- A $300 complaint filing fee (see this Section D, Questions 12-14).

There are three different PECBA ULP complaint forms, which correspond to the following types of cases:

1) complaints against public employers;

2) complaints against labor organizations or public employees; and

3) public employees' complaints against labor organizations for alleged duty of fair representation violations (which may also include related claims against the employers).

The ULP complaint forms and instructions are available at the end of this guide and on ERB's website. (There is also a form for unfair labor practice charges brought under Oregon's private sector labor management relations law.)

If you would like ERB to consider expedited processing of the ULP complaint, you also must include a request for expedited processing in the complaint and provide a special affidavit. For more information about expedited processing, see OAR 115-035-0060, and this Section D, Question 22.

If you would like ERB to consider ordering the respondent to pay a civil penalty and/or reimburse your filing fee, you also must include those requests in the complaint. For more information about how to request civil penalties and fee reimbursement in a ULP complaint, see this Section D, Questions 23 & 24.

Additionally, please note that PECBA imposes a deadline (also known as a "statute of limitations") for filing ULP complaints, and that deadline cannot be extended. For more information about the complaint filing deadline, see this Section D, Question 18.

9. Do I need to use a form to file a ULP complaint?

Yes, you must fill out the appropriate complaint form when filing a ULP complaint. There are three different PECBA ULP complaint forms, which correspond to the following types of cases:

1) complaints against public employers;

2) complaints against labor organizations or public employees; and

3) public employees' complaints against labor organizations for alleged duty of fair representation violations (which may also include related claims against the employers).

The ULP complaint forms and instructions are available at the end of this guide and on ERB's website. (There is also a form for unfair labor practice charges brought under Oregon's private sector labor management relations law.)

On the complaint form, you must provide your contact information, and information about the respondent. You also must identify all of the sections and subsections of PECBA that you believe the respondent has violated. You also must sign and date the form.

In addition to filling out the complaint form, you must write a statement of claims (see this Section D, Question 10), and pay the ULP filing fee (see this Section D, Question 12).

10. How do I write the "statement of claims" referred to in the ULP complaint form?

Each ULP complaint must include a statement of claims. Typically, complainants fill out the ULP form and then attach a typed statement of claims. In the statement of claims, you should provide basic background information about who is involved (such as the employer, the union, and the affected employees), and describe the events that led to the complaint. Most importantly, you must describe the conduct or actions that you believe violated PECBA. You should include specific dates, names, and places.

The statement of claims should also include a specific reference to each section and subsection of PECBA that you allege the respondent has violated. (For lists of the relevant PECBA sections and subsections, see Section B, Questions 2 & 3.) If you believe that a certain action violated more than one section and subsection of PECBA, you should list all of them and explain that in the statement of claims.

You should also explain which remedies or penalties you would like ERB to order if you win. For more information about remedies and penalties, see Section C.

Typically, each statement or paragraph in the complaint is numbered. If you have questions about how complaints are typically formatted, it may help to look at some examples. You can find examples of recently filed ULP complaints, including statements of claims, on ERB's website.

If you refer to documents in your statement of claims, or if there are documents you consider central to your claims, it is helpful to ERB if you attach copies to the statement of claims (but you don't have to).

Do *not* include anyone's Social Security Number or similarly private or confidential information in the ULP complaint or the statement of claims. If such information appears on any documents you feel are necessary for your case, please redact that information before

submitting the documents to ERB. You can redact information by blacking it out or otherwise making it unreadable.

11. Can I see examples of ULP complaints that have been filed with ERB?

Yes. Generally, ULP complaints are public records. ERB posts copies of recently filed ULP complaints on ERB's website. You may also contact ERB to request a copy of a particular ULP complaint. Call ERB at (503) 378-3807 or email ERB at eERB.Filings@ERB.Oregon.gov or EmpRel.Board@ERB.Oregon.gov.

12. Is there a fee required to file a ULP complaint?

Yes. The complaint filing fee is $300. ERB is required to collect this complaint filing fee under ORS 243.672(3), and ERB does not have the legal authority to waive the fee. PECBA imposes a complaint filing deadline, and ERB must *receive both* the complaint and the filing fee before the filing deadline, or else your complaint will be dismissed as untimely. For more information about the complaint filing deadline, see this Section D, Questions 18 & 19.

13. How can I pay the ULP complaint filing fee?

A check should be made payable to Employment Relations Board.

14. What happens if I do not pay the $300 filing fee with my ULP complaint?

ERB cannot process a complaint or consider it filed until the $300 complaint filing fee is paid. There is a statutory deadline for filing a ULP complaint (see this Section D, Questions 18 & 19). In order for a complaint to be timely, ERB must *receive both* the complaint and the filing fee by the statutory deadline. (If ERB receives a ULP complaint by the statutory deadline but does not receive the filing fee until after the statutory deadline, the complaint is untimely and will be dismissed.)

15. How can I send my ULP complaint to ERB?

You can submit a ULP complaint to ERB by mail (US Mail or other delivery service), email, or fax (there is a $25 fax filing fee). You can also hand deliver a copy to ERB's office. ERB's office address, email, and fax number are listed on the ULP complaint form. Please note that if you email or fax the complaint, you must still send or hand deliver the $300 filing fee, and your complaint will not be considered filed until the date that ERB receives the fee.

16. Do I need to send multiple copies of the complaint to ERB?

No. Please send only one copy of the ULP complaint to ERB.

17. Do I need to serve the complaint on the respondent?

No. As described in more detail below in Section E, ERB will first investigate the complaint to determine whether a hearing is warranted. If ERB concludes that a hearing is warranted, then ERB will formally serve the complaint on the respondent.

18. What is the deadline for filing a ULP complaint?

Under ORS 243.672(3), a ULP complaint must be filed "not later than 180 days following the occurrence of an unfair labor practice." ORS 243.672(3) incorporates a discovery rule, which means that the 180-day limitation period begins to run when a public employee, union, or employer knows or reasonably should know that an unfair labor practice has occurred.

19. Can I get an extension of time to file a complaint?

No. The requirement that a ULP complaint be filed within the 180-day filing period is set by statute, and ERB does not have the authority to extend that deadline. However, ORS 243.672(3) incorporates a discovery rule, which means that the 180-day limitation period begins to run when a public employee, union, or employer knows or reasonably should know that an unfair labor practice has occurred.

20. Is a ULP complaint a public record or otherwise available to the public?

Yes, generally speaking, ULP complaints are public records. In some cases, there may be special circumstances that cause part of a complaint or case file to be confidential and not subject to public disclosure. For more information about how to handle confidential information in your complaint, see this Section D, Question 10.

21. How long does it usually take ERB to process a ULP complaint?

The time it takes to process a ULP complaint varies widely. As explained in more detail in the following sections of this guide, there are multiple stages to the ULP complaint process. The amount of time each case takes depends on many factors, including the amount of time the parties take to provide information, the availability of the parties and witnesses for hearings, and the complexity of the case. When a hearing takes place, ERB's goal is to issue a recommended order by 110 days after the parties submit closing arguments or briefs. If the parties do not file objections to the recommended order, the recommended order will become the final order about a month later. If objections are filed, the process can take several more months, because the parties are entitled to submit additional briefs and present oral argument before the Board. The Board's goal is to issue a final order by 60 days after the oral argument.

22. Can I ask ERB to expedite the processing of a ULP complaint?

Yes. Under OAR 115-035-0060, ERB has the discretion to expedite all or part of a complaint. To request expedited processing, you must file an affidavit together with the ULP complaint.

ERB's rules explain what information must be provided in the affidavit, which depends on the nature of the alleged unfair labor practice. See OAR 115-035-0060(2)-(4).

If ERB grants the request for expedited processing, ERB will process the complaint as set forth in OAR 115-035-0060(5). Generally, expedited processing means that the three-member Board will conduct a hearing instead of an ALJ and the Board will aim to issue its order within 45 days of the complaint filing date.

Even if a case does not qualify for expedited processing, parties can help speed up the process in various ways. For example, they can respond quickly to ALJ requests. And, the parties can reduce the number of issues that need to be addressed in the evidentiary hearing by figuring out which facts they can agree are true, and submitting a list of stipulated facts to the ALJ. If the parties can agree about all of the facts, they can speed up the process by skipping the hearing altogether and just submitting legal briefs to address their disagreements about the law.

23. How does the complainant ask the Board to order the respondent to pay a civil penalty?

In cases where the complainant wins, ERB may order the respondent to pay a civil penalty, but only if certain conditions are met. First, the complainant must have included a proper request for a civil penalty in the complaint. Second, ERB must find that the respondent committed an unfair labor practice repetitively, knowing that the action taken was an unfair labor practice, or ERB must find that the respondent's unfair labor practice was egregious. See ORS 243.676(4)(a)(A).

To properly request a civil penalty in the complaint, you must state that you are requesting a civil penalty in your statement of claims. Then, you must briefly explain why you believe a civil penalty is appropriate and provide a clear and concise statement of the alleged facts that show that the requirements of ORS 243.676(4)(a) have been met. See OAR 115-035-0075. Please note that if you do not *explain in your complaint* why you believe the civil penalty is appropriate in your case, the request will be denied.

24. How does the complainant ask the Board to order the respondent to reimburse the complainant's filing fee?

In cases where the complainant wins, ERB may order the respondent to reimburse the complainant's filing fee, but only if certain requirements are met. First, the complainant must have included a proper request for filing fee reimbursement in the complaint. Second, ERB must find that the respondent's answer was frivolous or filed in bad faith. See ORS 243.672(3).

To properly request filing fee reimbursement in the complaint, you must state that you are requesting filing fee reimbursement in your statement of claims. Then, you must briefly explain why you believe filing fee reimbursement is appropriate and provide a clear and concise statement of the alleged facts that show that the requirements of ORS 243.672(3) have been met. See OAR 115-035-0075. Please note that if you do not *explain in your complaint* why you believe filing fee reimbursement is appropriate in your case, the request will be denied.

25. I would like to request a civil penalty and/or filing fee reimbursement, but I did not include those requests in my complaint. Can I add those requests later in the ULP process?

Yes, but not after the evidentiary hearing is closed. You may add a request for a civil penalty or filing fee reimbursement to the complaint at any time *before* the evidentiary hearing concludes.

If the ALJ has already served the complaint on the respondent, you will need to get permission to add the request for a civil penalty or filing fee reimbursement to the complaint. See OAR 115-035-0075. To get that permission, you may file a simple motion explaining that you would like to amend your complaint to add one or both of these special remedy requests. For more information about filing motions, see Section I.

26. Can I change or amend the complaint after I file it?

It depends on the stage of the case. At any time *before* the ALJ has formally served the complaint on respondent, you can make *any* type of change to the complaint. (As explained in more detail below, in Section E, the ALJ will not formally serve the complaint on the respondent until the ALJ completes an investigation and determines that a hearing is warranted.) In legal terms, a changed complaint is called an "amended complaint."

After the ALJ has formally served the complaint on the respondent, but *before* the evidentiary hearing concludes, you may file a motion to amend the complaint to add a request for a civil-penalty or filing fee reimbursement. OAR 115-035-0075.

To make other types of complaint amendments after formal service, you must show that there is good cause. OAR 115-035-0010. Generally, showing "good cause" means that you have to explain the reasons for the proposed amendments, and explain why the changes were not made earlier and should be permitted. If the ALJ decides to permit the amendment, the ALJ must give the respondent a reasonable amount of time to amend its formal answer.

If you file an amended complaint, you do not have to pay the $300 filing fee again.

27. Can I withdraw my complaint?

Generally, yes. You can withdraw your complaint at any time before the ALJ has issued a recommended order. (For more information about recommended orders, see Section K, Question 2.) After that point, you may withdraw the complaint only if the respondent agrees, or if you file a motion and persuade ERB that there is good cause for withdrawal.

If you withdraw the complaint, you may refile the complaint at a later time, as long as the 180-day deadline for filing a complaint has not passed. (Information about the deadline for filing a complaint is provided above in this Section D, Questions 18 & 19.)

28. I am a public employee. How do I file a duty of fair representation complaint?

The requirements for a duty of fair representation (DFR) complaint are the same as the requirements for other types of unfair labor practice complaints. The ULP complaint requirements are discussed above (starting at Question 8, in this Section D).

There is a "Duty of Fair Representation Unfair Labor Practice Complaint" form. This form is available at the end of this guide and on ERB's website.

In a DFR case, you (the public employee) are the complainant. There may be one or two respondents in a DFR case. The first respondent listed in a DFR complaint must be the labor organization that represents your bargaining unit. (PECBA officially refers to unions as "labor organizations," so that is the term you will see on the complaint form.)

You may list your employer as the second respondent if all of the following circumstances apply to your case: you believe that your employer violated your union contract, you want the employer's contract violation to be addressed, *and* you believe that your union's conduct prevented you from pursuing your claim that your employer violated a term of the labor contract. Under those circumstances, you should file a complaint against the employer at the same time and on the same form as your complaint against the union.

In all ULP complaints, the complainant must specify on the complaint form the section and subsection of PECBA that the respondent(s) allegedly violated. In duty of fair representation cases involving alleged contract violations, the claim against the union should be filed under ORS 243.672(2)(a), and the related claim against the employer should be filed under subsection ORS 243.672(1)(g).

29. What can happen if I file a ULP complaint, but the respondent wins?

If the respondent prevails, ERB may order you to pay some of the respondent's representation costs. ERB awards representation costs according to a set schedule, and the amounts awarded depend on the circumstances. See OAR 115-035-0055 (representation cost schedule and rules). If you are relying on your personal financial resources to litigate the ULP, the maximum amount of representation costs you can be ordered to pay is $500. See OAR 115-035-0055(1)(b)(F). For more information about representation costs, see Section C, Question 4.

If a complainant files a complaint in bad faith, frivolously, and/or with the intent to harass the respondent, the complainant may be ordered to pay a civil penalty, additional representation costs, and/or reimbursement of the respondent's filing fee. See ORS 243.672(3), ORS 243.676(4), and OAR 115-035-0055(1)(b)(E).

E. INITIAL INVESTIGATION OF AN UNFAIR LABOR PRACTICE COMPLAINT

1. What happens when an unfair labor practice complaint is filed?

When a ULP complaint is filed, the case is assigned to one of the administrative law judges (ALJs) on ERB's staff. The ALJ's role is neutral and the ALJ cannot advise or advocate for any party.

The ALJ conducts an initial investigation to determine whether there are issues of law or fact that warrant a hearing. The purpose of this preliminary investigation is limited. Although the ALJ is investigating, the ALJ does not function like a law enforcement investigator or prosecutor. At this stage, the ALJ is *not* trying to determine whether the complainant's allegations are true or whether the respondent committed an unfair labor practice. Instead, the ALJ is determining only whether the complaint should move forward to the next step, which is the hearing, or be dismissed without a hearing. For example, an ALJ may determine that a complaint should be dismissed without a hearing if the complaint clearly was filed after the statute of limitations had expired. (This makes ERB's ULP-case process different from the NLRB's ULP process, and different from the investigation process used by some other state agencies, such as the Bureau of Labor and Industries.) For a description of the ALJ's investigatory process, see Section E, Question 3.

If the ALJ determines that a hearing is warranted, the ALJ will formally serve the complaint on the respondent and schedule a hearing. For more information about what happens after the ALJ formally serves a complaint, see Section F, Question 1. For a brief description of what happens during a ULP hearing, see Section J, Question 8.

2. What is an administrative law judge (ALJ)? What is an ALJ's role?

When a ULP complaint is filed, it is assigned to one of the ALJs on ERB's staff. ALJs have authority to investigate a ULP complaint in order to evaluate whether the case should proceed to a hearing. When an ALJ determines that a hearing is warranted in a ULP case, they conduct the hearing, rule on motions, make factual findings, and write the recommended order. The ALJ's role is neutral. The ALJ cannot advise or advocate for one side or the other.

3. What happens during the ALJ's investigation?

The ALJ conducts the initial investigation for ERB. In this investigation, the ALJ determines whether the complaint presents an issue of fact or law that warrants a hearing. As explained above (in Question 1 of this Section E), the ALJ's preliminary investigation is not like a law enforcement or administrative enforcement investigation. The only purpose of ERB's initial investigation is to determine whether the ULP complaint should move forward to the next step, which is the hearing.

To start an investigation, the ALJ typically will send a copy of the complaint to the respondent. The ALJ will ask the respondent to provide the ALJ with any relevant factual information and an informal statement of the respondent's legal position regarding the allegations. This information is referred to as the respondent's "informal response." The

informal response is confidential, but the respondent may choose to share it with the complainant. See OAR 115-035-0005, and Question 9 in this Section E.

After receiving the informal response, the ALJ may request additional information from the respondent or from the complainant. The ALJ may also talk to the parties to discuss the legal and factual issues raised by the complaint.

If the ALJ determines that a hearing is warranted, the ALJ will schedule the hearing, issue a Notice of Hearing to all of the parties, and formally serve the complaint on the respondent. (The ALJ will formally serve the complaint even if the ALJ sent a copy of the complaint to the respondent as part of the initial investigation.)

4. How does the respondent submit an informal response?

The respondent typically submits an informal response in the form of a letter that briefly describes its legal arguments and position on the facts at issue in the case. Respondents may (but are not required to) submit documents that they believe are relevant to the case. Relevant documents may include correspondence, emails, memoranda, minutes, reports, photographs, diagrams, or other documents that relate to, support, or refute the facts alleged in the complaint. (Before submitting such documents to ERB in an informal response, you should redact confidential or private information such as social security numbers.)

Respondents typically send their informal responses to ERB by email (erb.filings@oregon.gov) or U.S. Mail, and the response is directed to the investigating ALJ.

The information submitted during the investigatory phase of a ULP case is confidential, but the respondent may voluntarily share the informal response with the complainant. See OAR 115-035-0005, and Question 9 in this Section E.

5. Does the respondent have to provide a copy of the informal response to the other party?

No, the informal response is submitted only to the ALJ, and it is confidential. OAR 115-035-0005. However, the ALJ may encourage the parties to share the information submitted during the investigation with the other side. A voluntary exchange of information by the parties may assist in clarifying issues, narrowing the issues in dispute, or resolving the matter through a negotiated agreement.

6. Does the respondent have to pay a filing fee when providing the informal response?

No. The respondent does not have to pay a filing fee with the informal response. A respondent only has to pay a filing fee if it must file a formal answer. We explain the difference between an informal response and an answer below, at Question 7 in this Section E. For more information about filing an answer, see Section G.

7. Is the respondent's informal response the same thing as the answer?

No. The informal response is just the information that the respondent chooses to provide to the ALJ as part of the initial investigation. Based on that initial investigation, the ALJ will decide whether a hearing is warranted. If the ALJ decides that a hearing is warranted, the ALJ will formally serve the complaint on the respondent, and the respondent will then be required to file a formal answer. For more information about how to file a formal answer, see Section G.

8. I am the respondent, and the ALJ sent me a copy of the complaint and asked me to provide information. Does that mean I was served and have to file my answer with the $300 filing fee?

Not necessarily. Check the letter you received from the ALJ. If the ALJ's letter states, "This mailing does not amount to formal service of the complaint," then the ALJ is just conducting the initial investigation and has sent you a copy of the complaint only to help you understand what information to provide to the ALJ.

You do not need to file the formal answer and filing fee until you receive a document that includes a statement like, "Service of Complaint," or, "This constitutes formal service of the complaint by certified mail pursuant to ORS 243.676 and OAR 115-035-0030."

9. Am I required to respond to the ALJ's requests for information during the investigation?

Technically, a party is not *required* to provide information to the ALJ during the investigatory phase of a ULP case, but failing to respond may have consequences for your case. If you fail to provide information, or provide incomplete or insufficient information, the ALJ may have to decide whether a hearing is necessary based only on the allegations in the complaint and any information provided by the other side. For example, if a complainant fails to provide information, that might cause their case to be dismissed; and if a respondent fails to provide information, that might cause the case to go to through a lengthy hearing process that could have been avoided.

Additionally, if a party has information but chooses not to provide it to the ALJ during the investigatory phase of the complaint, and then tries to provide that information at a later time, the Board may decline to consider it, because the party had a responsibility to provide the same information during the ALJ investigation but chose not to.

On the other hand, providing information to the ALJ may help you. For example, in some cases, the respondent's informal response enables the ALJ to narrow the issues in dispute or to dismiss the case without a hearing. Similarly, a complainant might avoid dismissal of the complaint by providing requested information.

10. I am a respondent, and I cannot figure out how to respond to all or part of the complaint because it does not give me enough information. What can I do to get more information about the complainant's claims?

If you do not understand the complaint because it does not have enough information or is too vague, you may file a motion to make the complaint "more definite and certain." (For more information about motions, see Section I, Question 1.) If the ALJ agrees that the complaint is incomplete or insufficient, the ALJ may direct the complainant to amend the complaint. See OAR 115-035-0010.

11. Can an ALJ require a complainant to amend the complaint?

Yes. When a complaint appears to raise an issue of fact or law, but the complaint contains insufficiently detailed allegations or inadvertent omissions, the ALJ may request that the complainant amend the complaint within ten days of the request. If the complainant does not timely amend the complaint, without showing good cause for its failure to do so, the ALJ may dismiss the complaint. OAR 115-035-0010(1).

12. Can the complainant amend the complaint while the ALJ is investigating?

Yes. A complainant may amend the complaint at any time before formal service of the complaint. (The ALJ will not formally serve the complaint on the respondent until the ALJ completes the informal investigation and determines that a hearing is warranted.)

In the time period between formal service and the end of the evidentiary hearing, the complainant may file a motion to amend the complaint to add a request for a civil-penalty or filing fee reimbursement. OAR 115-035-0075. To make other types of complaint amendments after formal service, the complainant must show that there is good cause. OAR 115-035-0010. Generally, this means that the complainant has to explain the reasons for the proposed amendments, and explain why the changes were not made earlier and should be permitted. If the ALJ decides to permit the amendment, the ALJ must give the respondent a reasonable amount of time to amend its formal answer.

13. What happens if the ALJ determines that a hearing is *not* warranted?

If the ALJ's investigation reveals that there is *no* issue of fact or law that warrants a hearing, the ALJ typically sends a letter that is called an "Order to Show Cause" to the complainant. (For more information about show cause letters, see Question 14 below, in this Section E.) If the complainant responds to the show cause letter, the ALJ will investigate further, as needed. If the ALJ again concludes that there is no issue that warrants a hearing, the ALJ will recommend to the Board that the Board dismiss the complaint. See OAR 115-035-0020.

If the ALJ decides to recommend dismissal, the ALJ will notify the parties of that decision. Then, the three-member Board will decide whether to dismiss the complaint. If the Board

agrees that the complaint should be dismissed, it will issue a final order dismissing the case.

If the Board decides that the case should not be dismissed, the Board will direct the ALJ to serve the complaint on the respondent and set the case for hearing.

14. I am the complainant, and I received a letter from the ALJ called an "order to show cause." What does that mean?

If you have a received a letter titled "Order to Show Cause," this means that the ALJ has preliminarily concluded that your case should be dismissed. In the show cause order, the ALJ identifies the reasons for that preliminary conclusion. By sending the show cause order, the ALJ is giving you an opportunity to provide additional information, legal argument, or explanations that address the issues identified by the ALJ. The ALJ will review your response to the show cause order before making a final decision about whether to dismiss the complaint or proceed to a hearing.

15. If the Board dismisses my case without a hearing, what can I do if I disagree with the dismissal?

If the Board decides to dismiss your complaint without a hearing, the Board will issue a final order (typically identified in the caption as a "dismissal order"). You can file a petition for reconsideration or a petition for rehearing with the Board, or you can file an appeal with the Oregon Court of Appeals. (Filing a petition for reconsideration or rehearing with the Board does not cancel your right to file an appeal with the court. For example, if you file a petition for reconsideration and the Board does not change its decision, then you can still file an appeal.) For more information about petitions for reconsideration or rehearing, see Section K, Questions 19 & 21. For more information about appealing a Board final order to the Oregon Court of Appeals, see Section K, Question 23.

16. Can I appeal an ERB order that dismisses my ULP complaint without a hearing to an Oregon state court?

Yes. If the Board decides to dismiss your complaint without a hearing, the Board will issue a final order (typically identified in the caption as a "dismissal order"). All final orders, including dismissal orders, may be appealed directly to the Oregon Court of Appeals. For more information about appealing a Board final order to the Oregon Court of Appeals, see Section K, Question 23.

F. NEXT STEPS WHEN A HEARING IS REQUIRED

1. What happens if the ALJ decides a hearing is required?

If the ALJ decides that the complaint presents an issue of fact or law that requires a hearing, the ALJ will notify the parties and confer with them to schedule a hearing. Then, the ALJ will formally serve the complaint on the respondent. This means that the ALJ will send a copy of the complaint to the respondent (even if a copy was informally provided

earlier) with a cover letter indicating that the complaint is being formally served, as well as a notice of hearing and a prehearing order. The ALJ will also send a copy of the notice of hearing and prehearing order to the complainant.

The respondent must file the answer and $300.00 filing fee within 14 calendar days from the date of the ALJ's formal service of the complaint. For more information about how to file a formal answer, see Section G.

2. How is the hearing scheduled?

When the ALJ first notifies the parties that a hearing is warranted, the ALJ will offer a range of potential hearing dates to choose from, as well as hearing location options. The ALJ will ask the parties to confer with each other to determine which hearing dates and location they prefer. Although PECBA and ERB's rule (OAR 115-010-0040(4)) require ULP hearings to occur within 20 calendar days after the complaint has been formally served, in nearly all cases, both parties waive the 20 day requirement to accommodate everyone's schedules and to give everyone enough time to prepare for the hearing.

Typically, the parties confer with each other, either by telephone or by email, to determine which dates they are both available for a hearing. Usually, they also choose a preferred hearing location. One of the parties sends the information about their agreed-upon dates and location to the ALJ. The ALJ selects a hearing date and notifies the parties of the hearing date and location.

For information about how to request a postponement of the hearing, see Section H, Question 3.

3. What is a notice of hearing?

Once the hearing date has been set by the ALJ, the ALJ will send an official notice of hearing to the parties, usually at the same time as the formal service of the complaint. See OAR 115-035-0030. The notice of hearing sets the date, time, and location of the hearing.

4. What is a prehearing order?

The prehearing order is a letter from the ALJ that directs both parties to take a number of steps to prepare for the evidentiary hearing. The prehearing order contains important instructions and it is a useful guide to the hearing process. The ALJ will propose a statement of the issue or issues to be litigated at the hearing, and will direct the parties to submit any suggested changes to the issue statement. The letter also contains specific instructions about witness lists, exhibits, subpoenas, and additional prehearing procedures. See OAR 115-010-0068 (prehearing procedures). The ALJ's prehearing order is aimed at helping the parties have an efficient and fair hearing that complies with ERB's rules.

It is very important to read the prehearing order carefully, and to follow its instructions.

For more information about prehearing procedures, see Section H.

5. What can happen if I don't comply with the ALJ's instructions in the prehearing order?

If you do not comply with the prehearing order, there may be legal consequences. For example, if a party fails to exchange exhibit or witness lists by the deadline set in the prehearing order, the ALJ may exclude that party's exhibits or witnesses.

6. What is an issue statement?

An issue statement is a precise statement of the legal question presented by the complaint. The issue statement guides the ALJ in deciding what evidence to admit or exclude, what principles of law to apply to the case, and what facts are relevant and material to reaching findings of fact and conclusions of law. There may be multiple issue statements in a single ULP case.

7. Can I resolve a ULP without a hearing?

Yes. The parties are free to resolve the ULP case by negotiating their own resolution or settlement agreement. The parties may do so by negotiating with each other, or they may request the assistance of a mediator. ERB will assign a mediator from the State Conciliation Service if requested by the parties. For more information about settlement or mediation, see Section L.

If the parties cannot settle the ULP case, but they agree about the relevant facts, they can also avoid (or at least shorten) the evidentiary hearing by submitting a list of stipulated facts to the ALJ. When the parties stipulate to facts, there is no need to prove those facts by presenting witnesses or submitting evidence at a hearing.

G. HOW TO FILE AN ANSWER TO A ULP COMPLAINT

1. The ALJ formally served the respondent with the complaint. Does the respondent have to respond?

Yes. If the ALJ formally serves the respondent with the complaint, the respondent must file a written response to the complaint. This written response is called an "answer." The respondent must file an answer even if it already submitted an informal response during the ALJ's initial investigation. (For more information about the difference between the respondent's informal response and the formal answer, see Section E, Question 7.)

When the respondent files the answer, it also must pay a $300 answer filing fee. If a respondent does not submit both the answer and the filing fee by the deadline, the respondent will not be allowed to present evidence or cross-examine witnesses at the hearing before the administrative law judge or present oral argument before the Board, unless the respondent shows it had good cause for failing to meet those requirements. OAR 115-035-0035. For more information about the deadline for filing an answer, see this Section G, Question 3.

2. Does the respondent have to pay a fee when filing the answer?

Yes. The answer filing fee is $300. ERB is required to collect this answer filing fee under ORS 243.672(3), and ERB does not have the legal authority to waive the fee. PECBA imposes a 14-day filing deadline for the answer, and ERB must *receive both* the answer and the filing fee before the filing deadline for the answer to be timely.

3. What is the respondent's deadline for filing the answer?

The respondent has 14 calendar days from the date of service of the complaint to file the answer *and* pay the $300 filing fee. ORS 243.672(3), OAR 115-035-0035(1). The answer will not be considered filed until the Board has *received both* the answer *and* the filing fee.

4. Does the respondent need to serve the answer on the complainant when filing it?

Yes. The respondent must serve a copy of the answer on the complainant, and should provide proof of service when it files the answer with ERB. For more information about how to serve documents, see Section I, Question 7. An optional proof of service form is available at the end of this guide and on ERB's website.

5. What is an answer? What information should be in the answer?

The answer is the document in which the respondent responds to all of the allegations in the complaint. For each allegation in the complaint, the respondent must indicate whether it admits or denies that the allegation is true. For more information about how to respond to the complaint's allegations, see Question 6 below, in this Section G.

In addition to responding to the complainant's allegations, the respondent must state its version of the facts in the answer. OAR 115-035-0035(1). The respondent must include information that may be relevant to the issues raised by the complaint or the answer (including any affirmative defenses). The respondent should provide specific information, giving details such as the names (or initials) of individuals involved, dates, and places. The respondent may also attach any documentary evidence that may be relevant to the issues raised by the complaint or answer. (If you attach documents to your answer, you should redact private or confidential information, such as social security numbers.)

If the respondent has any affirmative defenses, it also must identify those defenses in the answer, and state the facts that support those defenses. For more information about affirmative defenses, see this Section G, Question 7.

If the respondent wants the Board to consider requiring the complainant to pay a civil penalty or reimburse the respondent's filing fee, the respondent must state in the answer that it is requesting those special remedies. For more information about civil penalties and fee reimbursement in general, see Section C, Questions 2 & 3. For more information about how to request those special remedies in the answer, see this Section G, Questions 11 & 12.

Typically, each statement or paragraph in the answer is numbered. If the factual allegations in the complaint are numbered, the respondent usually follows that numbering in the

answer (but it is not required to do so). For example, the respondent typically addresses the complaint's "paragraph number 2" in the answer's "paragraph number 2."

6. How should the respondent respond to the allegations in the complaint?

In the answer, the respondent must respond to each allegation in the complaint.

The respondent must admit any allegations that are true. For example, if paragraph number 2 of the complaint states, "The Respondent is a public employer," and the respondent has no basis for disputing that allegation, the respondent must admit that allegation in the answer. The respondent could state, "Respondent admits paragraph 2," or "In response to paragraph 2, Respondent admits that it is a public employer." If the respondent admits that an allegation is true in the answer, the parties do not have to prove that allegation by submitting evidence at the hearing.

If the respondent disputes any of the allegations in the complaint, the respondent must say so in the answer. The respondent can deny an individual allegation or a group of allegations. For example, the respondent can state, "Respondent denies the allegations in paragraph 2."

If the respondent cannot admit or deny an allegation because it does not have any knowledge about that allegation, the respondent must explain that in the answer. For example, the respondent can state, "Respondent lacks sufficient knowledge to admit or deny the allegations in paragraph 2."

If the respondent fails to respond to an allegation in the answer at all, then the Board will treat that allegation as admitted and true (unless the respondent shows good cause to the contrary).

7. What is an affirmative defense?

An affirmative defense is a special type of defense that a respondent can raise by listing the defense in the answer. If the respondent raises and ultimately proves an affirmative defense, then the respondent will prevail in the case, even assuming that everything the complainant alleges is true. For example, if the complainant alleges that the respondent unlawfully refused to bargain, but the respondent can prove that the complainant waived its right to bargain, then the respondent has an affirmative defense. The respondent has the burden of proving any affirmative defenses it raises. (Examples of regular, non-affirmative defenses include proving that the complainant's factual allegations are not true, or establishing that the complaint's legal position is incorrect.)

The respondent must set forth all of its affirmative defenses in the answer. If the respondent did not include a particular affirmative defense in the answer, the Board may not consider that defense when deciding the case. See OAR 115-035-0035.

Neither PECBA nor the Board's rules identify all of the possible affirmative defenses. Generally, the Board has developed affirmative defenses through its case law (Board orders in unfair labor practice cases). Affirmative defenses commonly raised in ULP cases include timeliness (the complaint was filed after the filing deadline), untimely demand to bargain, waiver of the right to bargain, failure to exhaust a contractual grievance process, privilege, business necessity, and emergency.

8. What happens if the respondent fails to respond to an allegation or fails to identify an affirmative defense in the answer?

If the respondent fails to respond to an allegation made in the complaint, the Board will deem that allegation to be true, unless the respondent shows good cause. "Good cause" means providing a compelling, well-supported reason for the omission.

If the respondent fails to identify an affirmative defense in the answer, but then tries to argue that defense applies at a later stage in the case, the Board may not consider that defense when deciding the case.

9. What happens if the respondent does not file an answer and pay the filing fee, or files late?

If a respondent fails to submit an answer and filing fee, or misses the filing deadline, the respondent will not be permitted to present evidence or cross-examine witnesses at the hearing before the ALJ or present oral argument before the Board, unless the respondent shows that it had good cause for failing to submit a timely answer.

10. Can the respondent amend or change its answer after it is filed?

Yes. The respondent may amend its answer with the ALJ's approval. When the ALJ allows the respondent to amend its answer, the ALJ will also give the complainant a reasonable period to amend the complaint.

11. How does the respondent ask the Board to order the complainant to reimburse the respondent's filing fee?

In cases where the respondent wins, the Board may require the complainant to reimburse the respondent for the filing fee, but only if the respondent properly requested reimbursement in the answer, *and* the Board finds that the complaint was frivolous or filed in bad faith. ORS 243.672(3).

To properly request filing fee reimbursement in the answer, you must state that you are requesting filing fee reimbursement. Then, you must briefly explain why you believe reimbursement is appropriate and provide a clear and concise statement of the alleged facts that show that the requirements of ORS 243.672(3) have been met. *See* OAR 115-035-0075. Please note that if you request filing fee reimbursement but do not *explain in your answer* why you believe that special remedy is appropriate in your case, your request will be denied.

A respondent may move to amend its answer to request filing fee reimbursement at any time before the evidentiary hearing concludes

12. How does the respondent ask the Board to order the complainant to pay a civil penalty?

In cases where the respondent prevails, the Board is authorized to order the complainant to pay a civil penalty only if three conditions are met: 1) the respondent properly requested a

civil penalty in its answer, 2) the Board finds that respondent did not commit did not commit an unfair labor practice, *and* 3) the Board finds that the complaint was frivolously filed or filed with the intent to harass the respondent. ORS 243.676(4)(a)(B).

To properly request a civil penalty in the answer, you must state that you are requesting a civil penalty. Then, you must explain why a civil penalty is appropriate and provide a clear and concise statement of the alleged facts that show the requirements of ORS 243.676(4)(a)(B) have been met. *See* OAR 115-035-0075. Please note that if you request a civil penalty but do not *explain in your answer* why you believe the civil penalty is appropriate in your case, the request will be denied.

A respondent may move to amend its answer to request a civil penalty at any time before the evidentiary hearing concludes.

H. PREPARING FOR THE HEARING AND PREHEARING PROCEDURES

1. Generally, what happens before the evidentiary hearing in a ULP case?

Typically, after the ALJ has issued the hearing notice and the respondent has filed the formal answer, the parties focus on preparing for the evidentiary hearing. The parties may try to obtain additional evidence or identify the witnesses necessary to prove the facts that support their respective positions.

To comply with the ALJ's prehearing order, the parties also should confer about various hearing-related matters, well in advance of the hearing. For example, they should confer to determine the schedule for witness testimony, and to figure out whether they can stipulate that certain facts are true (which would reduce the number of facts that need to be proven at the hearing). The parties may also participate in mediation and try to negotiate a settlement.

2. What are stipulated facts? Should I agree to submit stipulated facts?

The parties may stipulate to facts to make the hearing more efficient. Stipulated facts are facts that the parties agree are true, and thus do not need to be proved by submission of evidence at hearing. If parties agree about any stipulated facts, they list all of the stipulated facts in a written document that is signed by both parties and submitted to the ALJ, typically before the hearing begins. The stipulated facts are binding on both parties, and they can be cited as evidence in the ULP case. OAR 115-010-0070(3).

Typically, the parties can stipulate to at least some facts. For example, they can usually agree that the employer is a public employer covered by PECBA, the union is a labor organization as defined by PECBA, there is a collective bargaining agreement, and certain events occurred on certain dates.

Whether to agree to submit stipulated facts is a decision for each party in each case. Parties typically consider whether the presentation of facts through a written stipulation will be more efficient and cost-effective. Often, stipulating to the undisputed facts can reduce

the amount of hearing time needed in a case, and allow the parties and the ALJ to focus on the facts that are genuinely in dispute.

3. How do I ask to postpone a hearing?

To request a postponement of a hearing, you must first confer with the other party's representative and find out if they will agree to a postponement. The other party can agree to the postponement, not object to your request, or object. After you find out the other party's position, you must submit a motion to the ALJ requesting the postponement. In the motion, you must state your reasons for requesting the postponement, confirm that you conferred with the other party, and state their position. The ALJ has the discretion to grant or deny the request. See OAR 115-010-0040(5). For more information about how to file a motion, see Section I, Questions 2-3. You do not need to use a form to request a hearing postponement, but there is an optional "motion to postpone a hearing" form available for use at the end of this guide and on ERB's website.

4. Can I obtain documents from the other side before the hearing?

In ULP cases, there are several potential methods for obtaining documents from the other side:

- Demand for information under PECBA: employers and unions have a duty to provide information to each other under PECBA. Generally, that duty includes information that may be relevant to a ULP case.
- Subpoena: for more information about subpoenas, see this Section H, Question 7.
- Public records request: you may be entitled to information from a public agency under the public records law, but note that ERB does not enforce the public records law.

In addition, ERB's rules require parties to exchange their hearing exhibits at least seven days before the hearing. See OAR 115-010-0068(3).

5. Can I compel a witness to testify at the ULP hearing?

Yes, a witness who has knowledge that is relevant to the ULP case may be compelled to testify by subpoena. A subpoena is a document that requires the witness to appear and testify at the hearing on the day and at the time stated in the subpoena. If you subpoena a witness, you must pay the witness fees and mileage as prescribed by ORS 44.415 for witnesses in civil proceedings. OAR 115-010-0055(4). For more information about subpoenas, see this Section H, Question 7.

In many cases, it is not actually necessary to subpoena a witness. Typically, witnesses testify voluntarily, and the parties reach informal agreements about the release of witnesses from work so they can testify.

6. Can I call the other party's representative as my witness?

ERB's rules prohibit a party from calling the opposing party's representative as a witness, unless the party shows that such testimony is necessary and will not be cumulative or

repetitive. For the purpose of this rule, the term "representative" refers *only* to the attorney (or advocate) who is litigating the ULP case on behalf of a party. (The rule does not refer to an individual who is merely attending a ULP hearing on behalf of an employer or union. Also, this rule does not apply to a party appearing pro se. OAR 115-010-0060(4).) If you need to call the opposing party's representative as a witness, you must file a notice and a supporting affidavit with the Board, no later than 14 days before the hearing date. OAR 115-010-0060(3).

7. What is a subpoena, and how are subpoenas issued?

A subpoena compels the recipient of the subpoena to testify or produce particular documents at the hearing. There is a sample witness subpoena and a sample document subpoena in the "Samples and Forms" section of this guide, and on ERB's website.

If you subpoena a witness, you must pay the witness fees and mileage prescribed by ORS 44.415 for witnesses in civil proceedings. OAR 115-010-0055(4).

Attorneys of record in ULP cases may issue subpoenas in the manner and form prescribed by ORS 183.440. (Because attorneys have the authority to issue subpoenas, an ALJ generally will not issue a subpoena if party is represented by an attorney or if the party fails to establish that it is necessary for the Board to issue the subpoena on the party's behalf. OAR 115-010-0055(3).)

If you are not represented by an attorney, you may ask an ALJ to issue a subpoena. But note that in most cases, subpoenas are not necessary because the witness will voluntarily testify or produce the documents, and the witness' employer will voluntarily adjust the witness' schedule so they can appear at the hearing. So, *before* you request a subpoena, it is usually helpful to contact the other party to see if the other party will voluntarily make the witness available or provide the documents.

If you submit a subpoena request to the ALJ, you must identify your ULP case by title and case number, and identify the specific witnesses and/or documents you are seeking. If the ALJ issues the subpoena, the ALJ will give the subpoena document to you. Then, *you* must serve the subpoena on the person who is supposed to testify or produce documents. (The ALJ will not serve the subpoena for you.) You must serve the subpoena a reasonable time *before* the hearing or date designated for the production of records or documents, so that the recipient has enough time to respond. OAR 115-010-0055(5). As a practical matter, you should serve the subpoena as soon as possible.

8. Can the party who receives a subpoena contest it?

Yes. A subpoenaed witness or the non-issuing party in the case may contest the subpoena. To contest a subpoena, a party must file a "motion to quash the subpoena" with the ALJ. OAR 115-010-0055(6). If a motion to quash is filed, the ALJ will decide the motion. Generally, the ALJ may enforce the subpoena (deny the motion to quash) if the party that issued the subpoena establishes that the subpoenaed witness or documents are relevant to the ULP case and reasonable in scope.

9. What is a deposition?

A deposition is a formal procedure during which a party questions a witness under oath. A deposition must take place before an officer authorized to administer oaths under state law, typically a court reporter. The court reporter will also prepare a transcript of the deposition, and then the transcript may be admitted as evidence at the hearing.

10. Can a party take a deposition in a ULP case?

Yes, but it is very uncommon for parties in ULP cases to take depositions. Additionally, you cannot take a deposition in a ULP case unless the ALJ orders it. Typically, a party will only take a deposition to perpetuate testimony, which means that the deposition is taken to preserve a witness's testimony. Generally, such a deposition is necessary only if a witness will be unavailable to testify at the hearing by any means, including by telephone or other electronic device. OAR 115-010-0065.

To take a perpetuation deposition, you must file a deposition request. The request must be filed far enough in advance to allow time for the deposition to take place and a written transcript to be prepared before the hearing date (unless everyone agrees to postpone the hearing). As a practical matter, you should submit a deposition request as soon as possible.

In the deposition request, you must identify the name and address of the witness, explain why their testimony is material to the case, explain the reason why the witness will not be available to testify at the hearing, and specify the date and time that the deposition will be completed. The ALJ will decide whether to allow you to take the deposition.

11. I want to offer evidence or call a witness to testify at the hearing by electronic device (such as telephone or video). What do I need to do?

To offer evidence or present a witness by an electronic device (such as telephone, video, or internet devices), you must submit a request to the ALJ. Generally, you must submit the request at least 10 business days before the scheduled hearing date. (If you miss that deadline, you must show good cause for the lateness of the request.)

The ALJ has discretion to grant or deny the request. The factors the ALJ may consider are listed in OAR 115-010-0043.

You should also check the ALJ's prehearing order, because it probably includes more specific instructions that you must follow. Typically, the prehearing order requires the requesting party to do the following (at least ten days in advance of the hearing): provide the electronic-device witness with copies of all of the exhibits that will be used during their testimony; notify the other party which exhibits will be provided to the witness; and provide the witness with any additional exhibits that the other party deems relevant. Additionally, you might need to supply the electronic equipment that you would like to use, and you should make the necessary arrangements before the hearing date. (In some cases, the ALJ may be able to provide a telephone, but ERB has no video or other internet equipment. If you would like the ALJ to supply a telephone, you should ask the ALJ well in advance of the hearing.)

12. There are confidential documents involved in my case. How do I handle that?

Generally, the documents in the case file, such as motions, orders, and correspondence with the ALJ, are public records, and are produced to members of the public if requested. The recommended order and the Board's final order are also public records. The recommended order is posted on ERB's website until the final order is issued by the Board. When the Board issues the final order, the final order is posted on the website and the recommended order is removed (the recommended order remains a public record available upon request).

If you believe that you must include confidential documents or information as evidence in your case, it is best to confer with the other party and the ALJ about how to address confidentiality issues well in advance of the hearing. If there is confidential information in an evidentiary exhibit or other case documents, the parties may use motions for protective orders, confidentiality agreements, or other approaches to protect the confidentiality of the documents. The parties may also present documents to the ALJ to address the confidentiality of certain information.

An example of a "motion for protective order" is available at the end of this guide and on ERB's website.

13. How should I organize and label my exhibits?

The ALJ's prehearing order will include instructions that explain how to organize and label exhibits. (This guide provides some general information, but if you receive instructions from the ALJ that are different from this guide, you should follow the ALJ's instructions.)

If an exhibit contains private or confidential information that is not relevant to the case, such as a social security number, you should redact it. (You can redact information by blacking it out or otherwise making it unreadable.) If there is a confidential document or information that is important to your case, see Question 4-8 above, in this Section H.

Generally, each document you would like to offer as evidence should be treated as a separate exhibit. To assist the ALJ and the witnesses, the exhibits should be organized in a logical manner, such as chronological order or grouped by topic.

Each exhibit must be marked for identification. The ALJ's prehearing notice contains instructions for marking exhibits. Each exhibit must be marked with the appropriate letter and number, and each page number of every exhibit must be marked. (The ALJ typically will provide more specific instructions about how to mark exhibits.) Numbering each page of the exhibit allows the parties, the witnesses, and the ALJ to find the specific portion of an exhibit quickly. For example, the first three pages of the complainant's first exhibit may be marked as follows:

- Exhibit C-1, p. 1 of 15
- Exhibit C-1, p. 2 of 15
- Exhibit C-1, p. 3 of 15

Exhibits must be three-hole punched and presented in three-ring notebooks at the hearing for ease of use by the parties, the witnesses, and the ALJ. In the typical case with only one other party, you would prepare a total of four binders, and each binder would contain one complete set of exhibits, in order. You must separate the exhibits with numbered tabs, to

make it easy to find a particular exhibit. At the start of the hearing you will give two binders to the ALJ and one binder to each other party, and keep one binder for yourself. (At least seven days before the hearing, the parties must provide each other with copies of all the exhibits they intend to present at the hearing. For more information about the requirement to exchange exhibits in advance of the hearing, see Question 14 below, in this Section H.)

You also must prepare a document called an "exhibit list" that identifies each of your exhibits, listed in the order you have organized and numbered them. The list should identify each exhibit's number (*e.g.*, "C-1"), and provide a very brief description of the exhibit. It is helpful to insert a copy of the exhibit list at the start of each exhibit binder. A sample exhibit list form is available at the end of this guide and on ERB's website. (Typically, the ALJ will give you a sample exhibit list form with the exhibit instructions.)

The sample exhibit list form includes columns labeled "offered" and "received." You should leave those columns blank before the hearing. Those columns will help you and the ALJ keep track of which exhibits have been offered and received at the hearing. For more information about how exhibits are offered and received at the hearing, see Section J, Question 14.

There are specific rules for exhibits consisting of material other than documents, exhibits related to voluminous or bulky materials, and transcripts of audio recordings. Those rules are contained in OAR 115-010-0070(6).

14. Am I required to exchange exhibit lists and exhibits with the other side *before* the hearing? If so, when?

Yes. The parties must exchange exhibit lists and exhibits at least seven days before the scheduled hearing, unless the ALJ directs otherwise. OAR 115-010-0068(3). In most cases, the ALJ will set the deadline for exchanging exhibits and provide related instructions in the prehearing order. For more information about prehearing orders, see Section F, Question 4.

When you exchange exhibits before the hearing, the exhibits must be marked in the manner required by the ALJ. For general information about how to organize and label exhibits, see Question 13 above, in this Section H.

Typically, when parties exchange exhibits before the hearing, they email each other electronic copies of their exhibits and exhibit lists (but you can send hard copies if you prefer). The parties will also exchange exhibit binders that contain hard copies of all of the exhibits and exhibit lists on the day of the hearing. (For more information about what happens on the day of the hearing, see Section J, Question 7.)

If a party fails to provide the opposing party with an exhibit by the deadline set by the ALJ, the ALJ may exclude that exhibit unless good cause is shown. OAR 115-010-0068(4).

After exchanging exhibits, the parties should confer to eliminate any duplicate exhibits. Parties can eliminate duplicates by agreeing to submit them as "joint exhibits." Then, one of the parties takes responsibility for marking all of the joint exhibits and including them in their exhibit binders. Each party also should review the other side's exhibits and decide which exhibits they will *not* object to at the hearing. For more information about offering and objecting to exhibits at the hearing, see Section J, Questions 14 & 15.

Unless the ALJ instructs otherwise, you do not need to send the ALJ a copy of your exhibits *before* the hearing—but, on the day of the hearing, you will need to give the ALJ two complete sets of all of your exhibits and your exhibit list (organized in binders, as described

in Question 13 above, in this Section H). (You will need to send the ALJ a copy of your witness list before the hearing. See Question 15 below, in this Section H).

15. Do I have to give my witness list to the other side *before* the hearing? If so, when?

Yes. Each party must give a copy of its witness list to the other side – *and* the ALJ – at least seven days before the scheduled hearing, unless the ALJ directs otherwise. OAR 115-010-0068(3). If you fail to include a witness's name on your witness list, that witness will not be permitted to testify unless you show good cause. OAR 115-010-0068(4).

16. Can I communicate privately with the ALJ or a Board member and *not* include the other party?

Generally, no. The Board's rules require disclosure to the other party of private communications (also known as "ex parte communications"), except in certain circumstances. OAR 115-010-0110. An ex parte communication is an oral or written communication to an ALJ or Board member concerning a fact at issue in any matter that is not made in the presence of all parties.

The Board's rules permit ex parte communications during the initial investigation, before the ALJ serves the notice of hearing. During that period, the ALJ may contact a party privately to discuss the ULP or attempt to resolve the dispute. OAR 115-010-0110(4).

I. FILING MOTIONS AND SUBMITTING DOCUMENTS TO ERB

1. What is a motion?

Motions are requests to an ALJ or the Board. A motion can request a ruling, order, or other relief in a case. Examples of motions include a motion to extend the deadline for filing a brief, postpone a hearing, exclude evidence, dismiss a case, enter a protective order, or quash a subpoena.

The party that is filing the motion is called the "moving party." The other party is called the "non-moving party."

There are samples or forms for some common motions at the end of this guide and on ERB's website.

2. What are the requirements for a motion?

Generally, you must put a motion in writing and submit it directly to the ALJ (or the Board). In the motion, the moving party must state their name, explain their request by specifically identifying what they would like the ALJ or Board to do, and explain why they believe the request should be granted. All motions must be filed with proof of service on the opposing party. OAR 115-010-0033(2). For more information about how to file a motion, see this Section I, Questions 4 & 5. For more information about proof of service, see this Section I, Question 8.

Additionally, for most types of motions, the moving party must make a good-faith effort to confer with the non-moving party and try to resolve the issue *before* filing the motion. Then, in the motion, the moving party must describe their efforts to confer and the result of those efforts. See OAR 115-010-0045(2). For more information about this requirement to confer, see Question 3 below, in this Section I.

Motions generally must be made in writing, but they do not have to be made in any particular form. Parties often submit very short and simple motions, such as requests for an extension of time to file a brief or to reschedule a hearing, in the text of an email (instead of attaching a separate document to the email). If you are making a simple motion by email, you still need to satisfy all of the requirements discussed above, including the requirement to confer with the other party first. You can satisfy the proof of service requirement by including the other party in your email correspondence (see this Section I, Question 8).

Under certain circumstances, a party can make a non-written motion at a hearing by stating the motion orally on the record. See OAR 115-010-0045(5). For more information about how to make an oral motion at a hearing, see Section J, Question 19.

3. Do I have to confer with the other party before I file a motion?

Yes, unless the motion is a dispositive motion. A dispositive motion is a motion that would resolve the entire case, such as a motion to dismiss a case. Most motions are *not* dispositive, such as motions for an extension of time to file a brief or to postpone a hearing. Before filing a non-dispositive motion, the moving party must make a good faith effort to confer with the other party to try to resolve the issue. Then, in the motion, the moving party must describe all the efforts to confer and the outcomes of those efforts. OAR 115-010-0045(2).

For example, if you need more time to file objections to a recommended order, you should contact the other party, explain why you need more time, and find out the other party's position on your request. When you write your motion, explain your request, describe when and how you contacted the other party, and summarize the outcome of that discussion.

4. What does "filing" a document mean?

Filing a document means submitting it to the Board – but note that in ULP cases, a document is not officially filed until it is *received* by the Board (the official filing date is *not* the date the document was sent or postmarked). It is also important to note that if ERB receives a document after 5:00 pm, it won't be considered filed until the following business day. OAR 115-010-0010(10); OAR 115-010-0033. This means that if there is a filing deadline, you should make sure that ERB *receives* the document before 5:00 pm on the date of the deadline.

It is also important to note that complaints and answers are *not* considered officially "filed" unless and until ERB receives the required filing fee.

5. How do I "file" or "submit" documents (such as motions, briefs, or objections) to ERB?

To file or submit documents to ERB, you may send them by mail, email, fax, or hand delivery. There is a $25 charge for each filing by fax. Documents received after 5:00 p.m. are deemed filed the next business day. See OAR 115-010-0033.

Generally, when you file or submit a document to ERB, you must also serve a copy on all other parties and include proof of service with your filing, unless the Board's rules or the ALJ provide otherwise. (Most documents must be served when filed; the main exceptions to this rule are the original complaint and informal responses during the ALJ's initial investigation.) For more information about how to serve documents and provide proof of service, see this Section I, Questions 7 & 8.

Mail or deliver documents to:

Employment Relations Board

1225 Ferry St. S.E.

Salem 97301

E-File via the ERB Case Management System (ERB CMS)

Email documents to: ERB.Filings@ERB.Oregon.gov

Fax documents to: 503-373-0021 (you will be charged a $25 fax filing fee)

6. Is there a fee to file documents with ERB?

Generally, no, but there are two exceptions:

- Special filing fees must be paid when the complaint and answer are filed. See Section D, Question 12 (complaint filing fee), and Section G, Question 2 (answer filing fee).
- Additionally, there is a $25 fee to file by fax.

7. How do I "serve" a document on another party?

If you are required to serve the other party when filing a document with the Board, that simply means you must give a copy of the document to the other party at the same time that you file it with the Board. If there are multiple parties in your case, you must serve all of the other parties.

- To serve a document, deliver a copy to the other party's representative. (If the other party is self-represented, you may send a copy directly to the other party.) Documents may be served by mail, email, fax, or in person. OAR 115-010-0033.

8. What is "proof of service"?

If you are required to serve a document on the other party when you file it, your filing must also include "proof of service." Proof of service is something that identifies when the filing party served the other party and how (by first class mail, fax, email, or hand delivery). ERB has no special formatting requirements for the proof of service. Typically, the proof of service is a separate document or written statement that is attached to the last page of the document that is being filed. A proof of service typically states, "I certify that on (date) I served the (name of document) in (name of case) on the following persons by (first class mail, fax, email, hand delivery): (name and address/fax number/email of each opposing party or attorney)." The filing party signs the proof of service to certify that they served the opposing party as indicated in the proof of service.

There is an optional "proof of service" form available for use at the end of this guide and on ERB's website. You do not have to use this form; you can write your own proof of service statement or document so long as it contains the required information.

If you are filing by email, you can satisfy the proof of service requirement just by simultaneously sending the email to ERB and the other party's representative. As long as the email's heading shows that you emailed both ERB and the other party's representative (the representative is listed as a recipient in the email's "to" or "cc" sections), then the email itself will be sufficient proof of when and how you served the other party (no other proof of service form or statement is necessary).

9. How do I respond to a motion filed by the other party?

You do not have to respond to a motion unless you oppose it and want to explain your reasons for opposing the motion to the ALJ or the Board. If you wish to oppose the motion, then you must file a written response by the response deadline. The response deadline is 14 days from the date the motion is served, unless the ALJ sets a different deadline. OAR 115-010-0045(3)

10. I filed a motion, and the other side filed a response. Can I file a reply to the response?

Generally, no. The moving party cannot file a reply, unless they request and obtain permission from the ALJ or Board, or if the ALJ or Board invites the moving party to submit a reply. OAR 115-010-0045(4).

11. Can I get an extension of time to file a brief or other document?

Generally, you may *ask* for an extension of time to file a document by filing a motion, but the ALJ or the Board has the discretion to grant or deny the request. (You cannot get an extension of the 180-day deadline to file a complaint. See Section D, Question 19.) Depending on the circumstances, you may need to show good cause for your request. For example, if you would like an extension of time to file your closing brief but the other party opposes your request, the ALJ may not grant the request unless you show there is good cause. See OAR 115-010-0077(3). Similarly, you must show good cause to obtain an extension of time to file objections to a recommended order. See OAR 115-010-0090(1). As

a practical matter, it is best to request an extension of time as soon as you can, and to explain why you need the extension.

For more information about how to file a motion, including a motion to request an extension of time, see above in this Section I, Question 2.

J. HEARING PROCEDURES

1. What is the purpose of a ULP hearing?

The purpose of the hearing in a ULP case is to give the parties an opportunity to submit evidence on the issues raised by the complaint and answer.

The ALJ is responsible for ensuring that there is a complete evidentiary record, and that the hearing is orderly, safe, and fair. Thus, all participants must follow the ALJ's directions. OAR 115-010-0075.

2. Are ULP hearings open to the public?

Ordinarily, ULP hearings are open to the public, which includes members of the press. However, if the circumstances warrant, the ALJ may close the hearing. OAR 115-010-0020. Additionally, upon a party's request, the ALJ may sequester witnesses. Sequestering means that witnesses will be excluded from the hearing room while other witnesses are testifying, but non-witnesses are still allowed to observe the hearing.

3. Are ULP hearings recorded?

Yes. The ALJ will make an audio recording of the hearing. The recording is a public record and available upon request for a nominal fee.

ERB generally does not arrange for a court reporter to be present at the hearing. One or more parties may arrange for a court reporter to be present, but they must pay the court reporter's fees *and* pay to provide a copy of the certified transcript to ERB (at no charge to ERB). OAR 115-010-0070(7).

4. Can I get a copy of the audio recording of the ULP hearing?

Yes. You can order a copy of the audio recording from ERB for a nominal fee that covers the cost of reproduction.

5. Can I get a transcript of the ULP hearing?

Yes, there are a few different ways to get a hearing transcript.

If a party knows in advance of the hearing that they would like a certified transcript, they may arrange for a court reporter to attend the hearing, but that party must make the arrangements, pay the court reporter's fees, and pay to provide a copy of the certified transcript to ERB (at no charge to ERB). OAR 115-010-0070(7).

In addition, on occasion, ERB obtains a written transcript based on the ALJ's recording of the hearing. If ERB chooses to prepare a transcript in your case, you can order a copy of ERB's transcript for a fee.

If ERB does not prepare a transcript, a party may obtain one by ordering a copy of ERB's audio recording and sending it to a certified transcriptionist. If a party chooses to have a certified transcript of the hearing prepared in this manner, the party must also provide a certified copy of the transcript to ERB (at no charge to ERB). OAR 115-010-0070(7).

6. When should I arrive for the hearing?

It is helpful to an orderly hearing if the parties arrive at the hearing room early, before the official start time of the hearing. Arriving early gives the parties time to get settled, and ensures that the hearing will start on time. Also, before the hearing officially starts, the parties can discuss the admission of exhibits, resolve any logistical questions (for example, how to accommodate a witness who needs to be called out of order), and any other concerns that will aid in an efficient and orderly hearing.

7. What should I expect when I arrive for the hearing?

Typically, each party has one attorney and one "client representative" at the hearing. The attorney will present exhibits and question witnesses. The client representative observes the hearing and may provide information or assistance to the attorney. The client representative may serve as a witness, and is exempt from being sequestered (excluded from the hearing while other witnesses testify).

The ALJ will sit at the head of the hearing room. The ALJ will designate the place where witnesses will sit when testifying.

Each party will distribute their exhibit binders to the ALJ and the other party before the hearing starts. Each party gives two sets of their exhibit binders to the ALJ, one of which is placed in front of the witness seat.

The parties should confer with each other about all prehearing issues well in advance of the hearing whenever possible, as directed by the prehearing order. Sometimes, however, it may be useful for the parties to confer before the start of the hearing, for example, to resolve any outstanding issues or confirm the witness schedule. The ALJ may also ask the parties if they have any matters to discuss off the record before the hearing begins.

8. What happens during a hearing?

The ALJ presides over the hearing. The ALJ will swear in the witnesses, rule on evidentiary objections and any motions, and make other decisions about the conduct of the hearing, such as when to start and stop the hearing, when to take breaks, and whether to reschedule or continue a hearing to another day. The ALJ may also ask the witnesses questions.

ULP hearings are public hearings. If a party wishes to sequester witnesses, the party should make a request to the ALJ at the beginning of the hearing, before opening statements. The ALJ will decide whether to exclude witnesses from the hearing room.

The ALJ will permit the parties to make opening statements. For more information about opening statements, see this Section J, Question 11.

In a ULP case, the complainant almost always presents its case-in-chief first. This means that the complainant's witnesses will testify first. (The parties can agree, or the ALJ can grant a request, to permit a party's witness to testify out of order, for example, to accommodate a scheduling conflict. And, the ALJ may change the order in which the parties present their evidence if the ALJ finds that to be appropriate in a particular case.) After the complainant finishes presenting its case-in-chief, the respondent presents its case. After the respondent finishes, the ALJ may permit the complainant to present a rebuttal case. For more information about rebuttal cases, see this Section J, Question 12.

9. Are there rules of conduct that apply during a ULP hearing?

Yes. All parties, attorneys, and spectators must conduct themselves in a respectful manner at hearings. Professionalism and civility are expected. Everyone (including the parties, attorneys, witnesses, observers, and members of the press) must follow the ALJ's directions regarding appropriate conduct. The ALJ may remove from the hearing any person who does not comply with the ALJ's effort to retain order. OAR 115-010-0075.

10. What is the burden of proof and who has it?

The burden of proof is the obligation to prove a position or fact related to a contested issue. In unfair labor practice hearings, the complainant has the burden of proving the allegations and claims in the complaint. The respondent has the burden of proving any affirmative defenses raised in the answer. OAR 115-010-0070(5)(b).

The party with the burden of proof must prove its case by a legal standard called the "preponderance of the evidence." When a party must prove a claim by a preponderance of the evidence, that party must provide enough credible evidence to make the factfinder (the ALJ or the Board) believe that the claim is more likely true than not true. Additionally, the supporting evidence must outweigh any opposing evidence. This means that the factfinder finds the supporting evidence more convincing and more probably true and accurate.

11. What is an opening statement? Do I have to present an opening statement?

In an opening statement, a party briefly explains to the ALJ what the case is about and its position, and summarizes the facts that they intend to prove at the hearing. Opening statements are not required, but they can be helpful to the ALJ because they tell the ALJ what to expect.

In a ULP case, the complainant gives an opening statement first, before any witnesses testify. The respondent may give its opening statement right after the complainant, or they may choose to wait until the complainant's case-in-chief is done and the respondent is ready to present its own case.

12. What is a rebuttal case? Do I have to present a rebuttal case?

A rebuttal case is evidence presented by the party with the burden of proof *after* the responding party puts on its case. In a ULP case, the complainant typically has the burden of proof. This means that the complainant will present its case and witnesses first. Then, the respondent will present its case and witnesses. After the respondent's witnesses testify, the complainant may call additional witnesses or offer additional exhibits to respond to an issue that the respondent raised. During the rebuttal case, the ALJ may allow a party to recall a witness who has already testified, or introduce a new witness or exhibit. On rebuttal, the ALJ may allow a party to present a witness or exhibit that was not included in their original exhibit or witness list, for example, if the party needs to respond to an issue that arose unexpectedly.

A party does not have to present a rebuttal case.

13. What standard of evidence applies?

The evidence standard that applies in ULP cases is described in OAR 115-010-0050. Under that rule, "Evidence of a type commonly relied on by reasonably prudent persons in the conduct of their serious affairs is admissible." OAR 115-010-0050(1). However, the ALJ will exclude evidence that is irrelevant, immaterial, or unduly repetitious. OAR 115-010-0050(2)-(3).

Generally, hearsay is admissible in ULP hearings, so long as it meets the other criteria for admissibility. Although an ALJ may admit hearsay, the ALJ or the Board may not credit hearsay evidence as much as more direct evidence.

14. What does it mean to "offer" and "receive" exhibits at the hearing? How do I get my exhibits to be part of the official record in my case?

An exhibit is not officially evidence in a case until it is both "offered" *and* "received" by the ALJ. When an exhibit is received, it becomes part of the official record, and it may be considered by ERB as evidence in the case.

To offer an exhibit, you must start by including it on your exhibit list and in your exhibit binder. Typically, at the start of the hearing, the ALJ will ask the parties if they intend to object to any of the exhibits offered by the other party. If the opposing party does not object to an exhibit that you have offered, the ALJ will receive that exhibit. In many ULP cases, the parties do not object to the majority (or even all) of each other's exhibits, and all of those exhibits are received in evidence at the start of the hearing.

If the opposing party objects to an exhibit that you have offered, the ALJ will not receive the exhibit at the start of the hearing. Instead, you must ask a witness to testify about what the exhibit is, and then ask the ALJ to receive the exhibit. If the opposing party still objects to the exhibit, they must say so and state the reason for the objection at that time (before the ALJ decides whether to receive the exhibit). You should be prepared to explain why the exhibit is relevant to the case, material (important or necessary), and/or not unduly repetitive of other evidence that has already been admitted in the case. The ALJ will rule on the objection, either immediately or when issuing the recommended order. See OAR 115-010-0050(4), and Question 15 below, in this Section J. If the ALJ decides to overrule the

objection, the ALJ will receive the exhibit. If the ALJ sustains the objection, the exhibit will not be part of the official record.

15. How do I object to evidence (an exhibit or witness testimony)?

To object to the admission of particular evidence (an exhibit or a witness's answer to a particular question or line of questioning), you must object on the record during the hearing. Generally, you must raise your objection promptly, at the time that the exhibit is offered, or when the question is asked (*before* the witness answers). Typically, you simply need to state that you object and then very briefly explain the reason for your objection. For example, if you think that the other side is asking a question that is irrelevant, you could simply say, "objection, irrelevant." If necessary, the ALJ may give you and the other side the opportunity to briefly explain your positions.

The ALJ may immediately rule on the objection, or the ALJ may tentatively receive the evidence and rule on the objection later, in the recommended order. If the ALJ receives evidence and later rules that the evidence should be excluded, the ALJ will not consider the evidence when deciding the case. OAR 115-010-0050(4).

16. When should my witnesses arrive?

The ALJ will expect both parties to present their cases without breaks between witnesses. The parties should have testifying witnesses present in the hearing room (or outside the hearing room, if witnesses are excluded from the hearing) at least a few minutes before they are expected to testify. For hearings at ERB's office in Salem, excluded witnesses may sit in chairs in the hallway outside the hearing room while they are waiting to be called to testify. Chairs for excluded witnesses will be provided at other hearing locations, to the extent possible.

If a witness needs to be called out of order or at a specific time, the ALJs appreciate the parties working cooperatively to accommodate the witness' needs.

It can be difficult to predict how much time each witness' testimony will take. It may be helpful to explain to your witnesses that they might have to wait for some period of time before they testify.

17. How are witnesses questioned at the hearing?

The party that calls a witness to testify questions the witness first; this questioning is referred to as the "direct examination." When the direct examination is over, the other party may question the witness; this questioning is referred to as the "cross examination." After the cross examination, the party that called the witness may ask more questions to address issues that arose during the cross; this is called "redirect." Generally, the parties may continue to take turns questioning the witness until they do not have any more questions to ask. However, the ALJ may stop the questioning if it becomes repetitive, harassing, or irrelevant. The ALJ may also question the witness.

18. Will my witnesses be able to watch the hearing?

Possibly. ULP hearings are typically open to the public. At a party's request, however, the ALJ may exclude witnesses from the hearing room. If witnesses are excluded, they may not watch the hearing.

19. How do I make an oral motion during the hearing?

A motion is a request for any ruling, order, or relief made by a party. A motion may be made in writing, or orally at the hearing. To make an oral motion at the hearing, you must briefly explain what you are requesting, and identify the reasons why you believe the ALJ should grant your request. The ALJ may rule on the motion on the record at the hearing, or the ALJ may reserve ruling until they issue the recommended order. OAR 115-010-0045(5). (For more information about filing written motions, see Section I, Question 2.)

20. What is a closing argument or brief?

In a closing argument, a party describes the facts that they believe have been proven by the evidence in the case, and makes legal arguments based on the proven facts. For each fact, the party should identify the specific evidence (testimony and/or exhibits) that supports that fact. Then, the party should explain how those facts establish its legal claims or defenses, and cite the legal authority that supports its position.

In the closing arguments, each party should address all of their claims or defenses, any evidentiary objections that they wish to pursue, and their remedy requests. Failure to address a particular issue in a closing argument is treated as a waiver of that issue. For example, if you objected to a particular exhibit during the hearing, but you do not pursue that objection in your closing argument, the ALJ will treat the objection as withdrawn. (Parties do not need to address requests for representation costs in their closing arguments, because the Board automatically awards representation costs according to the rules set forth in OAR 115-035-0055.)

Closing arguments may be oral or written, but in most ULP cases, the parties and the ALJ agree that the parties should submit their closing arguments in writing. In such cases, the ALJ will establish a schedule for the parties to submit their closing arguments, which are commonly referred to as "closing briefs" or "post-hearing briefs." Closing briefs must adhere to ERB's format requirements and page limits, which are set forth in OAR 115-010-0077. For more information about those formatting requirements, see Question 21 below, in this Section J. For more information about how to submit briefs to ERB, see Section I, Question 5.

Generally, written closing briefs are public records. If you would like to see a sample brief, you can request a copy of the closing briefs from a particular case.

21. Is there a required format for the closing briefs?

Yes. Closing briefs submitted in ULP cases must comply with OAR 115-010-0077. Under that rule, briefs must be typewritten or printed on letter-sized paper (8.5 by 11.0 inches); the first page of the brief must have a caption with the case title and number; the text must be double-spaced, and the length must not exceed 30 pages, unless the ALJ has granted a

request to submit a longer brief. There is a sample caption at the end of this guide, in the Samples and Forms section.

Generally, the closing brief should include the following sections: 1) a brief statement of the pertinent facts, 2) a statement and discussion of the issues, supported by citations to precedential ERB orders or court cases, and 3) a concise summary of the reasons you believe ERB should grant the requested relief.

K. POST-HEARING PROCEDURES

1. What happens after the hearing?

Typically, parties submit written closing briefs after a ULP hearing. (For more information about closing briefs, see Section J, Question 20.) After the ALJ receives the parties' closing briefs, the ALJ will review the evidence and the law, and issue a recommended order. The ALJ will serve a copy of the recommended order on the parties, and ERB will post a copy of the recommended order on our website. OAR 115-010-0085.

2. What is the recommended order?

The recommended order is the ALJ's formal and detailed recommendation to the Board about the case. In the recommended order, the ALJ will state the significant rulings in the case (such as whether the ALJ is admitting evidence that a party objected to), the findings of fact, and the conclusions of law. In the conclusions of law, the ALJ determines whether the respondent committed any of the alleged unfair labor practices. If the ALJ concludes that the respondent committed an unfair labor practice, the ALJ will also decide which remedies are appropriate. OAR 115-010-0010(18).

3. What can I do if I disagree with all or part of the recommended order? Can I ask the three-member Board to review the case?

If you disagree with all or part of the recommended order and would like the three-member Board to review the case, you must file written objections to the recommended order within 14 days from the date of service of the recommended order. If a party files objections, the three-member Board will review the case. For more information about filing objections, see Questions 4-8 below, in this Section K.

4. What are objections and cross-objections? How do I file objections or cross-objections?

If a party disagrees with all or part of a recommended order, the party may ask the three-member Board to make changes to the order by filing objections. "Objections" are the party's written list of disagreements with the recommended order. A party may object to any combination of the ALJ's rulings, findings of fact, statements of law, or analysis or application of the law to the facts.

If one party files objections and the other party does not, the party that didn't file objections may file cross-objections.

To file objections or cross-objections, you must clearly and specifically identify each of the rulings, findings of fact, or conclusions of law that you think the Board should change. OAR 115-010-0090(1). You also should explain why you think the ALJ's recommended order is incorrect. For example, if you believe the ALJ made an incorrect factual finding (or failed to include a relevant fact), you should explain what you think the factual finding should be and identify the specific evidence that supports your position.

Objections and cross-objections must be in writing. You must file and serve your objections (or cross-objections) on the other party by the applicable deadline. You must file objections within 14 days of the date that the ALJ served the recommended order. OAR 115-010-0090. You must file cross-objections within 7 days of the date that the other party served its objections.

For more information about how to file and serve documents, see Section I, Questions 4-8.

5. What are the deadlines for filing objections or cross-objections? Can I get more time to file objections or cross-objections?

You must file objections within 14 days of the date that the ALJ served the recommended order. If you did not file objections but the other party did, and you want to file cross-objections, you must file your cross-objections within 7 days of the date that the other party served its objections.

You can file a motion to request more time to file objections or cross-objections, but the Board will extend the filing deadline only if you show that you have good cause for needing more time. OAR 115-010-0090(1). For more information about how to file a motion, see Section I, Question 2.

6. What happens if the other party filed objections, and I did not file objections?

If the other party files objections and you did not, you can file cross-objections, but you do not have to. If you think the recommended order is completely correct and you do not file any cross-objections, you will still have the opportunity to respond to the other party's objections and explain to the Board why you think the recommended order is correct. If you think any part of the recommended order should be changed (even if you won and agree with most of the order), you can identify your disagreements by filing cross-objections. OAR 115-010-0090(2).

Generally speaking, if a party does not file any objections or cross-objections by the applicable deadlines, the Board will not allow that party to raise disagreements with the recommended order later. OAR 115-010-0090(3).

7. What happens if no one files any objections to the recommended order?

If no one objects to the recommended order, the Board will adopt the recommended order as its final order, without making any changes. In such cases, the Board may designate

some or all of the final order as non-precedential. OAR 115-010-0090(4), (5). If the Board designates all or part of an order as non-precedential, that order is still binding on the parties involved in the case, but it is not binding on others in future cases.

8. What happens when objections are filed? How does the Board review a case?

If objections are filed, the three-member Board will review the case. The Board will give the parties an opportunity to present oral argument to the Board. OAR 115-010-0095. Typically, the parties submit written briefs before the oral argument; those briefs are called "memoranda in aid of oral argument." (A party may choose not to present oral argument and only submit a written brief, called a "memorandum in lieu of oral argument.") After considering the parties' written and oral arguments and the evidentiary record, the Board will decide whether to make any changes to the recommended order and issue a final order.

9. What happens at oral argument before the Board?

If objections to the recommended order are filed and the parties wish to present oral argument, the Board will schedule oral argument on the objections. Oral argument is a type of hearing, but the parties only present legal arguments. Unlike the evidentiary hearing before the ALJ, the parties are not permitted to offer new documentary evidence or witness testimony at oral argument.

Oral arguments occur in the Board hearing room in Salem and are open to the public. Typically, each party may present for 20 minutes. A party may ask for more time by filing a motion at least five days before the date scheduled for oral argument.

At oral argument, the Board Chair will open the hearing. Typically, the Board Chair will ask the parties if there are any preliminary matters to discuss before the hearing begins. After any preliminary matters are addressed, the objecting party will present oral argument first. The objecting party may reserve some of its 20-minute presentation time to offer rebuttal argument after the non-objecting party's argument, and they can make a brief closing argument. (If both parties filed objections, typically the complainant will present oral argument first, and both parties will be allowed to make brief closing arguments.) The Board members typically ask the parties questions about their legal arguments or the evidentiary record in the case.

10. What is a memorandum in aid of oral argument?

When the Board schedules oral argument, each party may submit a written legal brief that helps the Board to understand the facts and legal issues in the case. This brief is called a "memorandum in aid of oral argument."

In a memorandum in aid of oral argument, you should summarize the facts and legal issues in the case, explain your objections to the recommended order, and/or respond to the other party's objections.

11. What is the deadline for filing a memorandum in aid of oral argument?

If you wish to file a memorandum in aid of oral argument, you must file it at least five days before the date set for oral argument. OAR 115-010-0095(2).

12. Is there a required format for a memorandum in aid of oral argument? How do I file it?

The memorandum in aid of oral argument (in the form of a legal brief) must be typewritten, double-spaced on letter sized paper, and no more than 25 pages, unless the Board approves a longer page limit. OAR 115-010-0095(2). The memorandum should be filed and served like other documents. For more information about how to file documents with ERB, see Section I, Questions 4-8.

13. What is a memorandum *in lieu* of oral argument?

If a party does not want to appear at oral argument, but still would like to make factual and legal arguments to the three-member Board, they may submit a written legal brief called a "memorandum in lieu of oral argument." When a party submits this type of memorandum, the party does *not* participate in oral argument and relies solely on their written brief to present their arguments to the Board. OAR 115-010-0095(1).

14. What is the deadline for filing a memorandum in lieu of oral argument?

A memorandum in lieu of oral argument must be filed with the Board at least five days before the date set for oral argument. OAR 115-010-0095(1).

15. Is there a required format for a memorandum in lieu of oral argument? How do I file it?

Yes. This document (in the form of a legal brief) must be typewritten, double-spaced on letter sized paper, and no more than 30 pages, unless the Board approves a longer page limit. OAR 115-010-0095(1). The memorandum should be filed and served like other documents. For more information about how to file documents with ERB, see Section I, Questions 4-8.

16. What is a final order?

After oral argument, the full Board will make a decision about the case. At least two Board Members must agree to the majority opinion.

When the Board reaches a decision, it will issue a written order. Like the recommended order, the Board's final order will list the findings of fact and conclusions of law, and explain the reasons for the Board's decision. If the Board concludes that the respondent committed

an unfair labor practice, the Board will order remedies, and potentially penalties. For more information about remedies and penalties in ULP cases, see Section C.

17. When will the Board order the losing party to pay "representation costs" to the prevailing party?

As required by PECBA, the Board will require the losing party to pay representation costs to the prevailing party. (For more information about representation costs, see Section C, Question 4.) However, the Board will wait to see if a party files an appeal with the Court of Appeals, because an appeal could change the outcome of the case. If no party files an appeal before the deadline set by ORS 183.482, then ERB will issue the representation costs order. If a party files an appeal, the Board will wait for the appellate judgment.

18. What can I do if I disagree with the Board's final order?

If you disagree with the Board's final order, you can file a petition for reconsideration or a petition for rehearing with the Board, or you can file an appeal with the Oregon Court of Appeals.

19. What is a petition for reconsideration?

A petition for reconsideration asks the Board to reconsider a ruling, finding of fact, or conclusion of law in a final order.

When the Board issues a final order without a preceding recommended order, the Board will generally grant a request for reconsideration and grant oral argument.

When the Board issues a final order after a recommended order was issued by the ALJ, a party may file a petition for reconsideration if they believe the final order is wrong for one of the following reasons: (a) there is a factual error; (b) there has been a change in the statutes or case law since the issuance of the final order that affects the case; or (c) the Board erred in construing or applying the law. However, the Board disfavors petitions in which a party merely reargues legal and factual issues that the Board already addressed in the final order. OAR 115-010-0100(3).

Filing a petition for reconsideration or rehearing with the Board does not cancel your right to file an appeal to the Oregon Court of Appeals. For example, if you file a petition for reconsideration and the Board does not change its decision, then you can still file an appeal with the court.

20. When is a petition for reconsideration due?

A petition for reconsideration must be filed within 14 days of the date of service of the Board order. OAR 115-010-0100(1).

21. What is a petition for rehearing?

A petition for rehearing is a petition that asks the Board to return the case to the ALJ so that a party can submit additional evidence. The Board will grant a petition for rehearing only if

the petitioning party would be unduly prejudiced if the petition were denied. If the petitioner is seeking to introduce previously unavailable evidence, the petitioner must establish that the evidence could not reasonably have been discovered and produced at the first hearing. OAR 115-010-0100(2).

Filing a petition for reconsideration or rehearing with the Board does not cancel your right to file an appeal to the Oregon Court of Appeals. For example, if you file a petition for rehearing and the Board does not change its decision, then you can still file an appeal with the court.

22. When is a petition for rehearing due?

A petition for rehearing must be filed within 14 days from the date of service of the Board order. OAR 115-010-0100(1).

23. Can I appeal a final order to a court?

Yes. A final order can be appealed to the Oregon Court of Appeals. Information about the Oregon Court of Appeals may be found at the court's website at: http://courts.oregon.gov/COA.

24. Will the Board's final order be publicly available?

Yes. Final orders are public records. ERB posts ULP final orders on its website. Private companies may also publish ERB's final orders in legal publications called "reporters" or electronic databases.

Decisions issued by the Oregon Court of Appeals are also publicly available on the court's website: http://courts.oregon.gov/COA.

L. SETTLEMENT AND MEDIATION

1. What is settlement?

Settlement occurs when parties negotiate and reach a voluntary agreement about how to resolve a case, instead of continuing through the legal process and allowing ERB to decide whether an unfair labor practice occurred and what the appropriate remedy is.

2. What is mediation?

Mediation is a voluntary settlement negotiation process that is facilitated by a neutral mediator. The role of the mediator is to assist the parties in reaching a mutually acceptable resolution of their dispute. The mediator is not a judge and has no authority to force a settlement on the parties.

3. Do the parties have to participate in mediation to settle a ULP case?

No. The parties are always free to discuss settlement of the case at any time. Mediation is not required.

4. How do I request mediation?

Parties may request ERB-provided mediation through the ALJ. If both parties wish to participate, the ALJ will transfer the case to ERB's Conciliation Division, and the State Conciliator will assign a mediator and schedule the case for mediation.

In ULP cases involving State of Oregon agencies and bargaining units, mediation is funded through interagency assessments and no additional fee is charged. For ULP cases involving other types of employers and bargaining units, each party must pay a mediation fee of $250 per session (the total fee is $500 per session).

The parties may also choose to hire a private mediator. In that case, the arrangements with the mediator (including the mediator's compensation) are decided by the parties. ERB has no role in assisting parties with finding or retaining a private mediator.

5. Can I request mediation before I file my ULP complaint?

Yes. Both you and the other party must agree to participate in mediation. If you both agree, you can request ULP mediation by completing the "Grievance and ULP Mediation Request Form," which is available on the Conciliation Services page of our website.

6. Does mediation postpone a hearing?

Not necessarily. If the parties wish to mediate, the mediation will be scheduled on a day that both parties and the mediator are available. If the ULP hearing has not been scheduled yet, the ALJ will typically ask the parties to waive the 20-day hearing deadline and will either (a) schedule the hearing to occur after the scheduled mediation, or (b) wait to set a hearing date until after the parties have completed mediation. If the ULP hearing has already been scheduled, it might be possible to schedule the mediation before the hearing date. If that is not possible, the parties and ALJ can agree to postpone the hearing to allow time for mediation.

7. Is there a cost for ERB mediation?

In ULP cases involving State of Oregon agencies and bargaining units, mediation is funded through interagency assessments and no additional fee is charged. For ULP cases involving other types of employers and bargaining units, each party must pay a mediation fee of $250 per session (the total fee is $500 per session).

8. What can I expect in mediation?

After mediation is scheduled, the assigned mediator will contact the parties individually by phone to discuss the dispute and the mediation process, and to answer any questions the parties may have in advance of mediation.

Mediation typically begins in joint session (with both parties in the same room) to review the terms of the mediation consent form and to answer any remaining questions about the process.

The mediator may also choose to begin with parties in separate rooms. During the course of mediation, the mediator will determine if and when to meet with the parties jointly or separately, and may also ask to sidebar (have private discussions) with representatives from each party.

Throughout the process, the mediator will seek to understand and communicate each party's concerns and interests. Mediators do not advocate for one party or the other, nor do they impose solutions or make decisions for the parties. The mediator's job is to help the parties develop and evaluate settlement options and find a resolution that will address the needs of both parties.

9. Should I bring an attorney to mediation?

A party does not need to be represented by an attorney at mediation. However, parties are encouraged to consult with attorneys regarding their legal rights and obligations throughout the mediation process.

10. Should I bring someone with me to mediation?

On occasion, a participant in mediation may wish to be accompanied by a non-lawyer, such as a friend or family member. A participant who wishes to be accompanied at mediation should discuss the issue with the mediator before mediation begins. Whether a non-lawyer should attend mediation with a participant is a case-by-case decision.

11. If I participate in mediation and the ULP case does *not* settle, will the mediator tell the ALJ or the Board about the parties' proposals or arguments in mediation?

No. The mediator does not divulge the discussions during mediation with either the ALJ or the Board and cannot be compelled to do so.

12. Is mediation confidential?

Mediation communications are confidential to the extent provided in ERB's rules. See OAR 115-040-0040 through 115-040-0044. Except to the extent allowed in those rules, the mediator may not disclose or be compelled to disclose mediation communications and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all of the parties and the mediator agree in writing.

13. If the parties want to try and settle the ULP case, must that occur before the hearing is scheduled or takes place?

No. The parties are free to discuss settlement of the case at any time, including after the hearing is held.

14. What happens if the parties reach a voluntary settlement?

If the parties settle a ULP case (through mediation or direct negotiation), the parties should promptly notify the ALJ of the settlement and ask the ALJ to consider the ULP complaint withdrawn. (The parties do *not* need to provide information about the terms of the settlement agreement.) When the ALJ receives the notice of settlement and request to withdraw the ULP complaint, the ALJ will notify the parties that the complaint is withdrawn. ERB will take no further action on ULP complaints that are voluntarily settled by the parties and withdrawn.

15. If we settle the ULP case, how should we let ERB know?

You can simply notify the ALJ or, if you have been corresponding with the Board, you can notify the Board. Notice by email is sufficient.

16. If we settle the ULP case, do we need to give the Board a copy of the settlement agreement?

No. You simply need to notify ERB that the case has settled. You do not need to give ERB a copy of the settlement agreement or any information about its terms, unless the parties would like the Board to issue a consent order. For more information about consent orders, see Question 17, below.

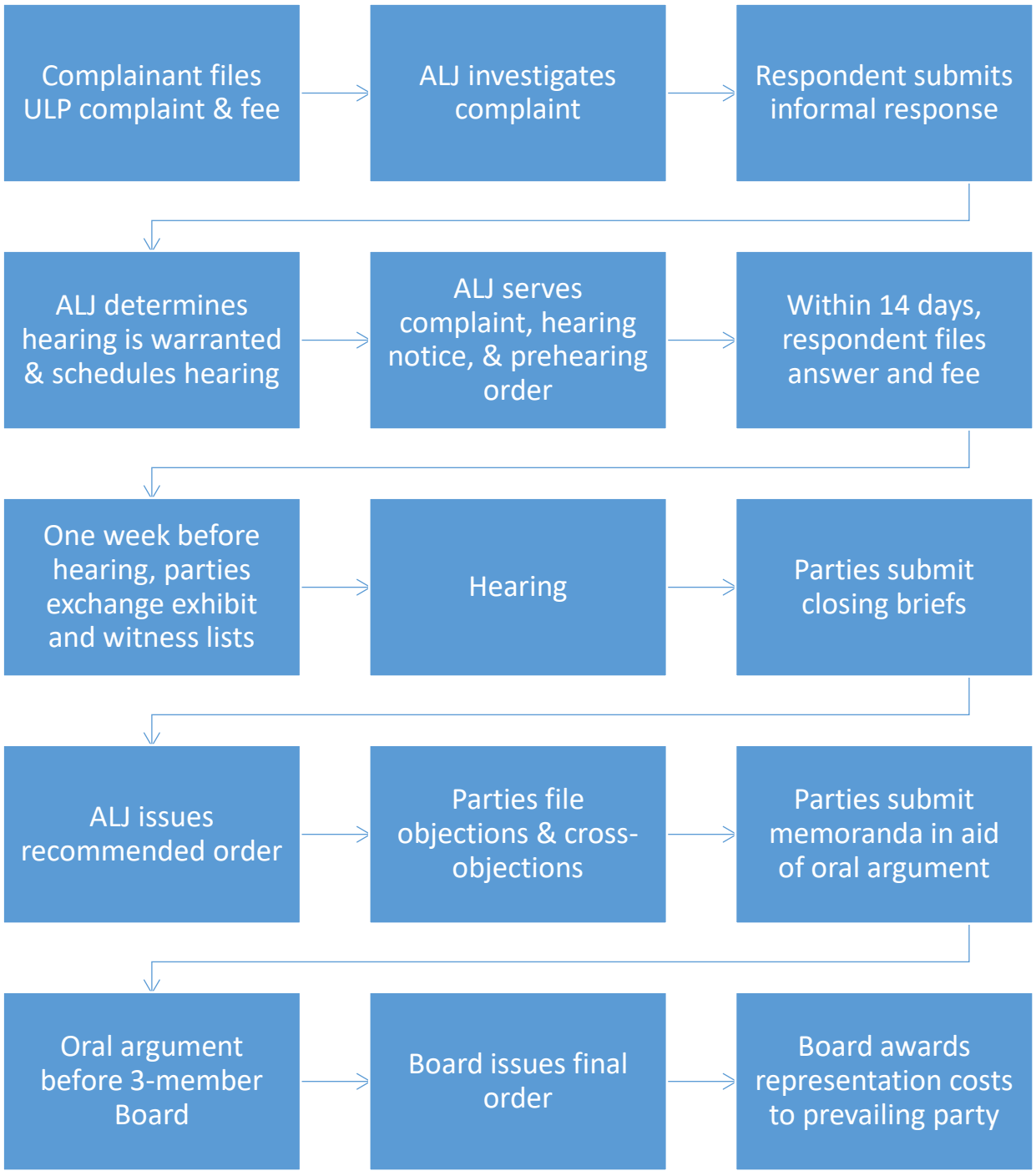
17. What is a consent order?

A consent order is a type of voluntary settlement agreement. Unlike a private settlement agreement, a consent order must be approved by the Board. If the Board approves and issues a consent order, it is enforceable like other final orders issued by ERB.

If the parties in a case settle all of the factual, legal, and remedial issues before ERB issues a final order, they may ask the Board to issue a consent order that reflects the terms of their agreement, subject to the Board's approval. See OAR 115-035-0070.

To request a consent order, the parties must present the Board with a written draft of the consent order that contains a statement of the case (describing the agreed-upon facts, legal conclusions, and remedies) and a statement that the agreement is the complete agreement between the parties. If the parties' agreement does not address representation costs, the Board will award representation costs after it issues the consent order, consistent with OAR 115-035-0055. Upon request, ERB may withhold issuance of its final order to allow settlement discussions between the parties that may result in a consent order.

M. The Typical Unfair Labor Practice Case



**This chart reflects the process in a typical ULP case. Some cases are resolved differently.*

N. GLOSSARY OF COMMON TERMS

Administrative Law Judge (or ALJ): The representative of ERB who investigates an unfair labor practice complaint, conducts the contested case hearing, and prepares the recommended order.

The Board: The three-member Employment Relations Board, which issues final orders in unfair labor practice cases.

Cease and Desist Order: An order that is issued if the Board finds that the respondent committed an unfair labor practice. A cease and desist order requires the respondent to immediately stop engaging in the unlawful conduct at issue in the case.

Complainant: A party that files an unfair labor practice complaint.

Complaint: The document filed by a union, public employee, or public employer to initiate an unfair labor practice case.

Conclusion of Law: A legal conclusion that the administrative law judge (in the recommended order) or the Board (in the final order) reaches in the case, such as, "The respondent violated ORS 243.672(1)(e) by refusing to bargain with the complainant."

Evidentiary Hearing: The trial-like hearing, including opening statements, examination and cross-examination of witnesses, and closing arguments, held in unfair labor practice cases. The evidentiary hearing may also be referred to as a "contested case hearing."

Final Order: An order prepared by the three-member Employment Relations Board. A final order may be appealed to the Oregon Court of Appeals.

Finding of Fact: A fact that the administrative law judge (in the recommended order) or the Board (in the final order) finds has been proven in the case.

Good Cause: Often, when a party makes a special request, they must support the request with a showing of good cause. Generally, to show good cause, you must provide a compelling, well-supported reason for the request, or provide a specific explanation of the special circumstances that justify the request.

Informal Response: The informal statement, factual information, and/or documents submitted by the respondent during the ALJ's initial investigation of the complaint.

Mediation: Voluntary settlement negotiations that are facilitated by a mediator supplied by the Conciliation Service of ERB or by a private mediator (hired by the parties).

Motion: A request for a ruling, order, or other relief. Most motions must be made in writing, but under some circumstances, a motion may be made orally at a hearing.

Notice of Hearing: The formal document issued by the administrative law judge assigned to an unfair labor practice case that notifies the parties of the hearing date and location and identifies prehearing requirements and deadlines (such as the deadlines for exchange and submission of witness lists, exhibit lists, and exhibits).

OAR: The citation abbreviation for the Oregon Administrative Rules, which are rules enacted by state agencies that have the force of law. The full text of PECBA and ERB's rules can be found in ERB's Rulebook, which is posted on ERB's website, http://www.oregon.gov/ERB.

Objections to the Recommended Order: The document filed by a party if the party wants the Board to hold oral argument in the case and review the recommended order issued by the administrative law judge. If only one party files objections, the other party may file cross-objections.

Oral Argument: The hearing before the three-member Employment Relations Board, during which the Board hears the parties' legal arguments addressing the objections or cross-objections to the recommended order issued by the administrative law judge.

ORS: The citation abbreviation for the Oregon Revised Statutes, which are the laws enacted by the Oregon Legislature.

Party: "Party" is a legal term that is used to refer to someone who is officially involved in a case. In unfair labor practice cases, the complainants and the respondents are the parties to the case. And, in most unfair labor practice cases, the parties are an employer and a union.

PECBA: The Public Employee Collective Bargaining Act, ORS 243.650-243.809. The full text of PECBA and ERB's rules can be found in ERB's Rulebook, which is posted on our website, http://www.oregon.gov/ERB.

Pro Se: A party who is not represented by an attorney during the case.

Recommended Order: The order prepared by the administrative law judge that contains recommended findings of fact, conclusions of law, and, if they found that an unfair labor practice occurred, remedies. A party may ask the three-member Employment Relations Board to review a recommended order. The order resulting from the Board's review is called the final order.

Remedy: If the Board concludes that the respondent committed an unfair labor practice, the remedy is the set of actions that the Board orders the respondent to take to stop the unfair labor practice from continuing to occur and, if necessary, to make the complainant whole for harm caused by the unfair labor practice.

Representation Costs: Representation costs are the costs that a party incurs to litigate a ULP case before ERB. Generally, representation costs are the fees that the party had to pay for legal representation. Representation costs do not include the costs that a party incurs if an ERB order is appealed to the Court of Appeals; those costs are referred to as "attorney fees on appeal."

Respondent: The party that the unfair labor practice complaint is filed against.

Show Cause Order: An order that the ALJ or Board issues to the complainant when they have preliminarily determined that the complaint should be dismissed. The show cause order typically explains the reasons why the complaint may be dismissed, and requires the complainant to provide factual and/or legal information that responds to those issues.

Stipulation: A stipulation is an agreement between opposing parties in a case. For example, a "stipulated fact" is a fact that the parties agree is true; if the parties stipulate to a fact, neither party has to prove that fact by presenting evidence at the hearing. Parties can also submit stipulated motions if they agree on the motion's request. For example, parties can submit a stipulated motion for a protective order when they agree that certain information is confidential. Stipulations may simplify or shorten the litigation of the case.

Subpoena: A document that compels the recipient of the document to testify or, in certain circumstances, to produce records.

O. SAMPLES AND FORMS

ERB posts forms, instructions, and samples on our website. For your reference, here is a list of the forms available via the website:

- ULP Complaint Against Public Employer, Form & Instructions
- ULP Complaint Against Labor Organization, Form & Instructions
- Duty of Fair Representation ULP Complaint, Form & Instructions
- *Sample* Caption
- Proof of Service Form
- Exhibit List Form
- *Sample* Witness Subpoena
- *Sample* Documents Subpoena
- *Sample* Stipulated Motion for a Protective Order
- Motion to Postpone Hearing Form
- Grievance & ULP Mediation Request Forms