

1
2 **STATE OF CALIFORNIA**

3 **AGRICULTURAL LABOR RELATIONS BOARD**

4
5
6 **GERAWAN FARMING, INC.,**

7 **Respondent,**

8
9 **and**

10 **UNITED FARM WORKERS OF**
11 **AMERICA,**

12 **Charging Party**

Case Nos.: 2013-CE-011-VIS

2014-CE-023-VIS

2014-CE-024-VIS

2015-CE-003-VIS

2015-CE-022-VIS

2015-CE-024-VIS

**DECISION AND RECOMMENDED
ORDER**

13 *Appearances*

14
15 For the ALRB General Counsel

Julia Montgomery, General Counsel

Chris A. Schneider, Regional Director, Visalia

Merced C. Barrera, Graduate Legal Assistant

16
17
18 For the Charging Party United Farm Workers of America

Edgar Iván Aguilasocho, Esq.

Brenda Rizo, Paralegal

Martinez Aguilasocho & Lynch

19
20
21
22 For the Respondent Gerawan Farming, Inc.

Ronald H. Barsamian, Esq.

Patrick S. Moody, Esq.

Barsamian & Moody

23
24
25 *Neil Mallery*

Gerawan Farming, Inc.

Office of the General Counsel

1
2
3 DECISION
4

5 The issues in these consolidated cases are

- 6 • Whether Gerawan Farming, Inc. (Respondent or Gerawan) refused to
7 provide relevant information to United Farm Workers of America (Charging
8 Party or UFW) pursuant to requests of
9 1. March 1, 2013 (copies of documents employees were asked to sign at
10 meetings held on December 7, 2012 with a human resources
11 representative);
12 2. June, July, and August 2014 (detailed information about changes in
13 crops and acreage as well as data reflecting impact of employee wages
14 and hours);
15 3. August 2014 (information about any health insurance plan); and
16 4. April 10 and May 1, 2015 (documents relating to property access of a
17 non-employee promoting decertification at Respondent).
- 18 • Whether Gerawan instituted unilateral changes without affording UFW
19 notice or the opportunity to bargain about
20 1. Changes to a health plan instituted on December 29, 2014; and
21 2. Implementation of a paid sick leave policy on July 1, 2015.

22 The parties stipulated many of the underlying facts in this proceeding and
23 agreed to the authenticity and admissibility of all exhibits.¹ These stipulations and
24 exhibits were approved and received on the record. Further, the parties presented
25 limited testimony at a hearing held in Fresno, California on Tuesday, March 6,
26 2018. On the entire record, including the briefs of all parties, the following
27 findings of fact and conclusions of law are made.
28

¹ The unfair labor practice charges were properly filed and served as follows: 2013-CE-011-VIS, March 20, 2013 (alleging failure to furnish information employees signed during mandatory meetings); 2014-CE-023-VIS, September 9, 2014 (alleging failure to furnish information regarding crop planting); 2014-CE-024-VIS, September 9, 2014 (alleging refusal to provide health care plan information); 2015-CE-003-VIS, February 2, 2015 (alleging unilateral change in health plan(s)); 2015-CE-022-VIS, July 2, 2015 (alleging failure to provide information regarding access to company property); and 2015-CE-024-VIS, July 2, 2015 (alleging unilateral change in sick leave policy). There is no dispute that the ALRB has jurisdiction of this matter.

1 I. FINDINGS OF FACT

2 Respondent is a California corporation with its principal place of business in
3 Fresno, California. It is engaged in growing and harvesting fresh fruit. Respondent
4 admits and it is found that, at all material times, Respondent has been an
5 agricultural employer within the meaning of Section 1140.4(a) and (c) of the
6 Agricultural Labor Relations Act (the Act). Respondent admits and it is found that
7 at all material times, UFW has been a labor organization within the meaning of
8 Section 1140.4(f) of the Act. On July 8, 1992, the UFW was certified by the
9 Agricultural Labor Relations Board (the Board) as the exclusive collective-
10 bargaining representative of all Respondent’s agricultural employees.² The parties
11 agree that there has never been a collective-bargaining agreement in effect.³ In late
12 2012, the UFW requested negotiations and requested employee information.⁴

13 A. Information Requests

14 1. March 1, 2013 Information Request Regarding Documents which
15 Employees Were Required to Sign on December 7, 2012⁵

16 In or about December 2012, Gerawan Human Resources Director Jose
17 Erevia (Erevia) met with Gerawan crew and cultural labor employees and read
18 from a prepared script related to the UFW’s demand to bargain and request for
19 employee information. The prepared script was handed out to the employees that it

20 ² *Gerawan Ranches* (1992) 18 ALRB No. 5, slip op. 19-20. A decertification election was
21 conducted on November 5, 2013. The ballots were impounded subject to resolution of election objections and
22 alleged unfair labor practices. In *Gerawan Farming, Inc.*, (2016) 42 ALRB No. 1, the Board found many of the
23 objections and unfair labor practice allegations meritorious and held that Gerawan’s objectionable conduct tainted
24 the entire decertification process. Thus, the Board dismissed the decertification petition. This decision was appealed
25 and is currently pending before the Fifth District Court of Appeals. *Gerawan Farming, Inc. v. ALRB* (Docket
26 #F073720).

27 ³ Following negotiations in early 2013 in which no collective-bargaining agreement was reached,
28 on March 29, 2013, the UFW invoked the Board’s mandatory mediation and conciliation (MMC) process set forth in
29 Sec. 1164 et seq. of the ALRA. The mediator’s report establishing the final terms of a collective-bargaining
30 agreement was submitted to the Board and the Board’s final order adopting the mediator’s report took effect on
31 November 19, 2013. (*Gerawan Farming, Inc.* (2013) 39 ALRB No. 17). On review, the Fifth District Court of
32 Appeal held that the MMC statute was, inter alia, unconstitutional. *Gerawan Farming, Inc. v. ALRB* (2015) 236
33 Cal.App.4th 1024. This holding was reversed by the California Supreme Court. *Gerawan Farming, Inc. v. ALRB*
34 (2017) 3 Cal.5th 1118. The California Supreme Court holding is now pending before the United States Supreme
35 Court on writ of certiorari filed March 28, 2018. (Docket No. 17-1375).

⁴ This request for employee information is not at issue in this proceeding.

⁵ Stipulations 1-6 as well as relevant testimony and exhibits.

1 was read to in December 2012, and copies were attached to the paychecks of all
2 employees who were working at that time and mailed to all employees who were
3 not working at that time.

4 Armando Elenes (Elenes), Third Vice President of the UFW, testified that
5 after these meetings, employees reported “captive audience” meetings that they
6 were required to attend. They also reported to Elenes that they were asked to sign
7 “certain documents” at these meetings.

8 Gerawan and the UFW met and negotiated during six sessions in 2013
9 before March 1, 2013. These sessions were on January 17 and 18; February 12, 13,
10 27, and 28, 2013. At these meetings, the UFW, through its representatives, never
11 requested any documents concerning the prepared script of December 2012.

12 By letter of March 1, 2013, the UFW requested that Gerawan produce
13 alleged documents signed by Gerawan employees on or about December 7, 2012,
14 including sign-in sheets, during or immediately following Erevia’s discussions
15 with them.⁶ Gerawan’s attorney Ron H. Barsamian (Barsamian) to whom the letter
16 was addressed, agreed that he did not provide a specific written response to the
17 letter and did not turn over sign-in sheets to the UFW. Gerawan and the UFW met
18 and negotiated on March 19, 2013. During that session, the UFW never mentioned
19 its request of March 1, 2013.

20 2. June, July, and August 2014 Request for Detailed Information about Crops
21 and Acreage⁷

22 On November 27, 2013, Gerawan attorney Barsamian emailed a letter to
23 Elenes that notified the UFW that it had made a tentative decision about how to
24 utilize 940 acres of land, which had become available due to normal pulling of
25 trees and vines. The letter stated that Gerawan had tentatively decided to plant
26 almond and pistachio trees with 825 acres of almonds and 115 acres of pistachios.
27 Gerawan stated that it was relaying this information to UFW in order to provide an

28 ⁶ The March 1, 2013 request for information also asked for other information including documents
that employees were asked to sign and all documents distributed to employees “since negotiations were first
requested last year.” Failure to respond to this second category of requested documents is not alleged as an unfair
labor practice. Only the documents signed by employees regarding the December 7, 2012 meeting are at issue in this
information request allegation.

⁷ Stipulations 7-31 as well as relevant testimony and exhibits.

1 opportunity to discuss “the tentative decision and any effects it may have on the
2 workforce.” Gerawan further noted that preparation of the land for the new
3 planting would begin immediately. Although the letter noted that the almond and
4 pistachio land preparation would differ somewhat from the preparation for planting
5 stone fruit or vineyards, Gerawan opined that this would “not significantly change
6 the amount of cultural labor normally associated with planting stone fruit and/or
7 vineyards.” UFW did not make any request for information at this point. The UFW
8 did not request information regarding the contents of this letter.

9 Gerawan began pre-harvest work in its fruit trees and vineyard acreage in
10 late March 2014 and began harvesting tree fruit in May 2014. After receiving
11 reports from employees in May and June 2014 that Gerawan was pulling more
12 acreage than in previous years, on June 18, 2014, the UFW requested information
13 about 12 “bargaining unit issues” regarding crop pulling and planting as follows:

- 14 1. The actual acreage and specific blocks of trees that were pulled and the
15 approximate age of those trees.
- 16 2. The actual acreage and specific blocks of vines that were pulled and the
17 approximate age of those vines.
- 18 3. Maps for both the trees and vine blocks that were pulled.
- 19 4. Maps for trees and/or vines blocks that have been pulled in the years
20 2010-2013.
- 21 5. Information on the impact in terms of reduced work hours and numbers
22 of employees that such action(s) will or could have on bargaining.
- 23 6. Hours worked and gross wages paid for all bargaining unit classifications
24 in pre-harvest and harvest work performed in the blocks of vines that
25 were pulled during the last full year of production.
- 26 7. Hours worked and gross wages paid for all bargaining unit classifications
27 in pre-harvest and harvest work performed in the blocks of trees that
28 were pulled during the last full year of production.
8. Average hours worked and gross wages paid per acre for all bargaining
unit classifications in cultivation and harvest work in existing almond
crop operations performed in the last full year of production.
9. Average hours worked and gross wages paid per acre for all bargaining
unit classifications in cultivation and harvest work in existing pistachio
crop operations performed in the last full year of production.
10. Total number of acres pulled for each crop involving bargaining unit
work for each of the years, 2010-2013.

1 11. Total number of acres planted for each crop involving bargaining unit
2 work for each of the years, 2010-2013.

3 12. Total number of tons harvested for each crop involving bargaining unit
4 work for each of the years, 2010-2013.

5 On July 10, 2014, the UFW renewed its June 18, 2014, request for
6 information regarding crop changes and data regarding impact on wages and hours.
7 On July 23, 2014, Gerawan responded to the UFW's June 18, 2014 information
8 request regarding crop changes but did not provide any of the information. Rather,
9 Gerawan's July 23, 2014 letter noted the UFW's delay in requesting information
10 from the November 27, 2013 announcement until June 18, 2014. The letter further
11 stated that Gerawan was not agreeing that all of the requested information would
be provided. Finally, the letter advised that "much of the information you have
requested will need to be kept strictly confidential. . . ." No specific confidentiality
agreement was tendered at this time.

12 On July 31, August 19, and September 3, 2014, the UFW renewed its June
13 18, 2014 request for the information to crop changes. In these requests, the UFW
14 averred that there was no legal basis for requiring confidentiality.

15 On March 18, 2015, Gerawan responded to the UFW's requests for
16 information regarding crop changes without providing information. Rather,
17 Gerawan proposed discussions relating to the form and content of the information
to be provided and the need for confidentiality.

18 On May 18, 2015, the UFW renewed its June 18, 2014 request for the
19 information regarding crop changes and its data on impact to wages and hours. On
20 May 29, 2015, Gerawan responded to the UFW and renewed its March 18, 2015
21 request to meet. The letter stated that the information could not be provided
22 without a confidentiality agreement.

23 On August 11, 2015, Gerawan sent the UFW a proposed confidentiality
24 agreement concerning information requested by the UFW. The proposed
25 confidentiality agreement set liquidated damages for intentional or negligent
disclosure at \$10,000 per occurrence.

26 On August 24, 2015, the UFW responded to Gerawan's proposed
27 confidentiality agreement claiming that the proposed confidentiality agreement
28 forwarded by Gerawan on August 11, 2015, was "overbroad, illegal and

1 unacceptable.” The UFW stated that it was willing to negotiate a reasonable
2 confidentiality agreement.⁸

3 Gerawan replied on September 5, 2015 advising that it would reply soon to
4 UFW’s objections to the confidentiality proposal. On September 18, 2015,
5 Gerawan replied to UFW’s concerns regarding the confidentiality proposal.
6 Specifically, Gerawan advised that it did not seek confidentiality for every
7 document and that it would designate which documents need to be maintained on a
8 confidential basis. On November 10, 2015, Gerawan once again followed up with
9 the UFW noting that it had not received a response to the September 18, 2015
10 letter.

11 On December 4, 2015, UFW received a letter from Gerawan which attached
12 a table regarding current acreage entitled “Planted Acreage by Commodity.” The
13 letter further stated that Respondent might be pulling trees and vines in the next
14 several weeks. Respondent reiterated that it was not able to provide UFW with
15 “current thinking about future crop mixes” until the confidentiality agreement was
16 executed.

17 In the meantime, the parties were involved in extensive litigation and other
18 information requests. As was mentioned earlier, in late 2013 a decertification
19 petition was filed. The election was conducted on November 5, 2013. On May 30,
20 2014, the General Counsel issued its status report concerning the expedited
21 investigations of unfair labor practice charges related to the election objections
22 filed by the UFW after the decertification election. From May through August
23 2014, the General Counsel conducted interviews of Gerawan supervisors as part of
24 its investigation of unfair labor practice charges related to the decertification
25 election. Attorney Barsamian testified that this investigation tied up crew bosses
26 and human resources director Erevia on a daily basis. On August 29, 2014, the
27 General Counsel issued a subpoena duces tecum for numerous telephone records,
28 employee documents, and other records for its investigation of the unfair labor
practice charges related to the decertification election. From September 2014

⁸ The parties executed a confidentiality agreement in 2012 following the UFW’s demand for bargaining. This agreement related to employee information and did not provide for liquidated damages.

1 through mid-March 2015, the parties were engaged in weekly litigation regarding
2 the decertification petition.⁹

3 In addition to the litigation, on June 6, 2014, the UFW requested Gerawan
4 provide employment information for all direct and farm labor contractor
5 employees. On June 11, 2014, Gerawan responded to the UFW's request for
6 employment information for all direct and farm labor contractor secured
7 employees.¹⁰

8 On June 26, 2015, the UFW sent Gerawan a request to continue negotiations
9 for a collective-bargaining agreement and requested information related to crops
10 and the amount of acreage, the farm labor contractors involved in the operation, a
11 detailed summary of employee benefits (including health, dental, and vacation),
12 and copies of current employee manuals and policies. This request did not repeat
13 the request for information regarding crop changes and data on its impact on wages
14 and hours.

15 On November 20, 2015, the UFW responded to a request from Gerawan
16 dated September 24, 2015. This request was for UFW benefits plans. UFW
17 provided a partial response and noted further that the remaining information due
18 from the UFW would need to be subject to the confidentiality agreement that the
19 parties were working on.

20 On December 18, 2015, Gerawan informed the UFW that it was pulling all
21 of the table grape vineyards and fully closing its table grape operation. On January
22 5, 2015, the UFW requested effects bargaining regarding the closure of Gerawan's
23 table grape operation and requested information regarding employees involved in
24 table grape operations. On February 5, 2015, Gerawan provided this requested
25 information.

26 ⁹ On September 9, 2014, the General Counsel issued its Second Amended Complaint concerning
27 21 unfair labor practice charges related to the decertification election. Motions and orders concerning severance and
28 consolidation with election objections were filed and issued during September 2014 and a new consolidated
complaint was issued. During September 2014, subpoenas, motions, and prehearing briefings requested by the
administrative law judge were filed. The hearing began on September 29, 2014 and continued weekly, save for short
breaks for administrative purposes and holidays until March 12, 2015.

¹⁰ There are no unfair labor practice issues with regard to this information request.
DECISION AND RECOMMENDED ORDER - 8

1 Throughout these discussions, extensive litigation, and other information
2 requests not at issue here, UFW did not receive the information it requested in
3 June, July, August, and September 2014 regarding detailed information about plans
4 for pulling and planting crops and the impact of implementation of these plans on
employee wages and hours.

5 3. August 2014 Information Request Regarding Employee Health Plans¹¹
6

7 On August 6, 2014, the UFW requested that Gerawan provide it with
8 information related to its employee health plan in light of changes to be made in
9 legal requirements under the federal Affordable Care Act.¹² The details requested
were as follows:

- 10 1. Detailed description(s) and any summary description(s) of the
11 Company's present medical plan(s);
- 12 2. The identity, address and phone number of your present medical plan(s)
13 administrator(s);
- 14 3. The Company's present contribution rate(s) regarding any medical
15 plan(s);
- 16 4. The express terms of any life, health and/or welfare plan(s) presently
17 offered bargaining unit employees by or through the Company;
- 18 5. The name, employee number, address, and phone number of all seniority
19 employees presently eligible for the Company's life, health and welfare
20 plan(s);
- 21 6. Detailed description(s) and any summary description(s) of any Company
22 self-insured plan(s) that presently provide medical benefits or life, health
23 and welfare benefits to bargaining unit employees;
- 24 7. The total monthly costs per eligible employee presently paid by the
25 Company to provide medical coverage to bargaining unit employees;
- 26 8. A record of all costs of life, health and welfare coverage, where said costs
27 were or are now borne directly by any bargaining unit employee(s);
- 28 9. The name, employee number, address, and phone number of all seniority
employees who, during the past year, have borne any costs of life, health
and welfare coverage;

¹¹ Stipulations 32-34 as well as relevant testimony and exhibits.

¹² The Patient Protection and Affordable Care Act of 2010 (ACA).

- 1 10. Payroll records detailing the amounts withheld from pay from all
2 seniority employees who, during the past year, have borne any costs of
3 life, health and welfare coverage;
4 11. The name, employee number, address, and phone number of all seniority
5 employees who during the past year have borne any costs of their life,
6 health and welfare coverage as a co-payment.
7 12. Please inform the Union whether the Company's medical plan is a
8 "grandfathered" plan or a Non-Grandfathered plan under present federal
9 regulation;
10 13. Please inform the Union whether the Company's medical plan is granted
11 or intends to solicit a waiver for any amount of time under present federal
12 regulation;
13 14. The name, address, and phone number of any plan provider for any
14 plan(s) that have provided or might later provide a medical plan or life,
15 health and welfare plan or coverage for bargaining unit employees.

16 This request was renewed on August 19 and September 3, 2014. UFW did not
17 receive the requested information in 2014. However, on August 7, 2015,
18 Respondent provided "information concerning current company benefits and
19 premiums you requested." Gerawan provided this detailed information about its
20 health plans in anticipation of renewed bargaining over a collective-bargaining
21 agreement. On August 12, 2015, the UFW sent a health plan questionnaire to
22 Gerawan. On September 5, 2015, Gerawan sent the completed questionnaire and
23 information to the UFW.

24 4. April 2015 Information Request Regarding Access to Gerawan Property¹³

25 On April 10, 2015, the UFW wrote Gerawan requesting any documentation
26 which authorized non-employee Jesse Rojas (Rojas) to enter Gerawan fields
27 property and information about the nature of Rojas' association with Gerawan
28 Farming. As explained by Elenes, the reason for this request was employee reports
that Rojas was entering Gerawan property, visiting crews, and distributing leaflets
to employees. Elenes was aware that Rojas, a member of an organization known as
"Pick Justice," was associated with decertification efforts at Gerawan along with
Sylvia Lopez.¹⁴ Elenes also knew that Gerawan's employee manual insisted on

¹³ Stipulations 28-30 and 42-46 as well as relevant testimony and exhibits.

¹⁴ Sylvia Lopez was the decertification petitioner in 2013-RD-003-VIS.

1 strict application of visitor rules and prohibited solicitation on company property
2 by non-employees.

3 On May 1 and May 20, 2015, the UFW renewed its April 10 request for
4 information. In the May 1 letter, the UFW stated that Rojas had been seen the prior
5 day, April 30, on Gerawan field property passing out literature. Gerawan never
6 provided the UFW with a response to its April 10, 2015 or subsequent requests
7 related to the same topic. According to Barsamian's testimony at hearing, no one
8 was aware of anybody taking access. There had been no reports of anything like
9 that.

10 B. Alleged Unilateral Changes

11 1. Health Plan¹⁵

12 The Affordable Care Act (ACA)¹⁶ required, inter alia, that certain employers
13 provide essential health benefits to employees. There is no dispute that Gerawan
14 was required to provide this benefit. There is further no dispute that prior to 2014,
15 Gerawan had no ACA health plan benefit. Barsamian agreed that an ACA-
16 mandated plan was adopted in early 2014. He also agreed that this new plan was
17 not negotiated with the UFW.

18 The complaint alleges that on or about December 29, 2014, that is, about one
19 year following implementation of the ACA-mandated plan, Gerawan instituted
20 changes to its employee health insurance plans including but not limited to
21 changing the health plan options for employees, changing the deductible, and
22 modifying the percentage of the premium that Gerawan would pay. Barsamian
23 testified that one change was made in late 2014: the premiums were decreased for
24 both the employer and employees.

25 Barsamian's testimony is consistent with Elenes' testimony. Elenes testified
26 that employees informed UFW in late December 2014 that health plan literature
27 was being distributed by Gerawan. Both Elenes and Barsamian testified that no
28 changes were negotiated with UFW.

¹⁵ Stipulations 36-38 as well as relevant testimony and exhibits.

¹⁶ The Patient Protection and Affordable Care Act was signed into law on March 23, 2010 with
most major provisions becoming effective by January 2014.

1
2 There is no dispute that Gerawan did not negotiate any changes to its 2014
3 options, the deductible, or decreasing the amount of total employee premium when
4 these changes were made in December 2014.

5 2. Paid Sick Leave Plan¹⁷

6 California's paid sick leave law¹⁸ took effect on July 1, 2015. The law sets
7 forth mandatory requirements for accrual of paid sick leave time and for taking the
8 accrued sick leave. It applies to all California employers, including Gerawan and
9 the UFW. The UFW did not request any information from Gerawan concerning its
10 plans for compliance with the new paid sick leave law before or after July 1, 2015.
11 On July 1, 2015, Gerawan implemented a sick leave policy in compliance with
12 new requirements under California law. Prior to this time, Gerawan did not have a
13 sick leave policy. Gerawan did not negotiate implementation of the sick leave
14 policy with UFW.

15
16
17
18
19
20
21
22
23
24
25
26
27
28
II. ANALYSIS

A. Information Requests

“There can be no question of the general obligation of an employer to
provide information that is needed by the bargaining representative for the proper
performance of its duties. . . .”¹⁹ This obligation is rooted in recognition that union
access to such information can often prevent conflicts which hamper collective
bargaining.”²⁰ In order to bargain meaningfully, there is a reciprocal duty²¹ on the
part of unions and employers to supply, on request, information that is necessary
and relevant.²²

¹⁷ Stipulations 39-41 as well as relevant testimony.

¹⁸ The California Healthy Workplace Healthy Family Act of 2014, Cal Labor Code Sec. 245 et seq. Administrative notice is taken of Sec. 246(a)(1) providing that, “An employee who, on or after July 1, 2015, works in California for the same employer for 30 or more days within a year from the commencement of employment is entitled to paid sick days as specified in this section.”

¹⁹ *NLRB v. Acme Industrial Co.*, (1967) 385 U.S. 432, 435-436, citing *NLRB v. Truitt Mfg. Co.*, (1956) 351 U.S. 149.

²⁰ *Florida Steel Corp. v. NLRB*, (1979) 601 F.2d 125, 129 (4th Cir.).

²¹ *American Commercial Lines, Inc.*, (1989) 296 NLRB 622, 652; *National Union of Hospital and Health Care Employees (Sinai Hospital of Baltimore)*, (1980) 248 NLRB 631, 646, enfd. 673 F.2d 1314 (T) (4th Cir. 1981).

²² *NLRB v. Acme Industrial Co.*, supra, 385 U.S. at 435-436.

1
2 Information is relevant if it relates to the union's function as bargaining
3 representative and is "reasonably necessary" for the performance of that function
4 in negotiation, contract administration, and grievance processing.²³ The standard
5 for determining relevance is a liberal, discovery-type standard²⁴ and it is necessary
6 only to establish "the probability that the desired information is relevant and that it
7 would be of use to the union in carrying out its statutory duties and
8 responsibilities."²⁵

9 Once a union makes a good faith request for relevant information, an
10 employer must make a diligent effort to provide the information in a timely
11 manner²⁶ and in a useful form,²⁷ if it has the information.²⁸

12 Examination of UFW's four requests reveals that the information requested
13 was necessary and relevant to its duties as the bargaining representative of
14 Gerawan's employees. UFW has been the certified representative of Gerawan's
15 agricultural employees since 1992. Although the parties have never had a
16 collective-bargaining agreement, there is no claim that lack of a bargaining
17 agreement in any way affects the duty to provide information.

18 1. March 1, 2013 Information Request about Documents which Employees
19 were Required to Sign

20 Regarding the first request, UFW learned from employees of meetings held
21 on December 7, 2012. These employees expressed uncertainty and concern to the
22 UFW about the nature of "certain documents" that they had been asked to sign at

23 ²³ *Beth Abraham Health Services*, (2000) 332 NLRB 1234, 1234-1235.

24 ²⁴ *NLRB v. Acme Industrial*, supra, 385 U.S. at 437; see also, *Cardinal Distributing Co. v. ALRB*,
25 (1984) 159 Cal.App.3d 758, 767; *Perez Packing, Inc.* (2013) 39 ALRB No. 19, slip op. at 3.

26 ²⁵ *NLRB v. Acme Industrial*, supra, 385 U.S. at 437.

27 ²⁶ In making a determination regarding whether there has been unlawful delay, the totality of the
28 circumstances surrounding the incident is considered. *Allegheny Power* (2003) 339 NLRB 585, 587. The
information must be supplied as promptly as circumstances allow. *The Good Life Beverage Co.*, (1993) 312 NLRB
1060, 1062 n. 9. In examining the promptness of the response, the complexity and extent of the information sought,
its availability and the difficulty in retrieving the information are considered. *Samaritan Med. Ctr.* (1995) 319
NLRB 392, 398.

²⁷ *Cincinnati Steel Castings Co.* (1949) 86 NLRB 592, 593.

²⁸ See, e.g., *Hanson Aggregates* (2008) 353 NLRB 287, 288 (employer must make reasonable
effort to secure unavailable information; if information is unavailable, employer must explain to the union the
reasons for the unavailability).

1 these “captive audience” meetings.²⁹ Thus, the March 1, 2013 request for all
2 documents employees were asked to sign on or about December 7, 2012 was
3 reasonable and relevant to UFW’s duties. From the employees’ statements to the
4 UFW, it was reasonable to conclude that UFW’s exclusive bargaining
5 representative status might be the subject of the meetings and documents.

6 Gerawan argues that it made a reasonable good faith effort to respond as
7 promptly as circumstances would allow. But, in fact, Gerawan never responded to
8 this request which was narrowly tailored to a single date and presumably readily
9 available.³⁰

10 Gerawan references the “totality of the circumstances” noting that it was
11 involved in complex and lengthy litigation. However, when this request was
12 propounded, there was no lengthy litigation ongoing.³¹ Moreover, this is no
13 defense.³²

14 Gerawan also notes that this discrete, targeted request for information was
15 only a part of a vague, overbroad request for information.³³ This argument lacks

16 ²⁹ The standard for determining whether an information request must be honored is a liberal
17 discovery-type standard. The union is not required to show that the information triggering the request is accurate,
18 non-hearsay or ultimately unreliable. *United Parcel Service* (2005) 362 NLRB No. 22, slip op. at 10.

19 ³⁰ Gerawan argues that the sign-in sheets for the December 7, 2012 meeting would appear just as
20 any other sign-in sheets for training meetings. In other words, these sign-in sheets would not state that they were for
21 a “Meeting with Jose Erevia.” The record does not indicate whether other training meetings were held on December
22 7, 2012. Under these circumstances, no undue burden may be found. Moreover, even were a legitimate claim that a
23 request for information is unduly burdensome, the employer must articulate these concerns to the union and make a
24 timely offer to cooperate with the union to reach a mutually acceptable accommodation. *United Parcel Service*,
25 supra, 362 NLRB No. 22, slip op. at 11, citing *Mission Foods* (2005) 345 NLRB 788, 789 (if a party wishes to assert
26 that a request for information is too burdensome, this must be done at the time the information is requested, and not
27 for the first time during the unfair labor practice hearing.

28 ³¹ Gerawan also avers that the request is unduly burdensome. However, this argument
misconstrues the complaint allegation. The complaint relates only to documents signed on December 7, 2012.
Accordingly, this argument is rejected. See also, *Fawcett Printing Corp.* (1973) 201 NLRB 964, 974 (“The mere
fact that a Union’s request encompasses information which the employer is not legally obligated to provide does not
excuse him from complying with the Union’s request to the extent that it also encompasses information which he
would be required to provide if it were the sole subject of the demand.”)

³² The Act does not permit a party to hide behind the crowded calendar of the negotiator whom it
selects. *Radiator Specialty Co.* (1963) 143 NLRB 350, 360.

³³ The General Counsel may utilize its discretion in determining whether to issue complaint on
failure to provide all or part of the information requested. Here the General Counsel alleged a violation only to a
specific portion of the requested information. Respondent claims the narrowing of the complaint allegation was an
“unwarranted, after-the-fact attempt to whittle down” the request. This argument is rejected.

1 merit. Ambiguity in the request does not excuse a response. “It is well established
2 that an employer may not simply refuse to comply with an ambiguous and/or
3 overbroad information request, but must request clarification and/or comply with
4 the request to the extent it encompasses necessary and relevant information.”³⁴

5 Finally, Gerawan argues that, as a practical matter, there is no showing that
6 UFW was prejudiced by Gerawan’s failure to provide the requested information.
7 This argument is rejected. Prejudice to the requesting party is not a defense to
8 failure to produce information.³⁵ It need only be shown that the information is
9 relevant and necessary to the union’s duties as exclusive bargaining representative.
10 That showing has been satisfied. Accordingly, it is found that Gerawan violated the
11 Act by failure to provide the information regarding documents signed by
12 employees on December 7, 2012.

13 2. June, July, and August 2014 Request for Detailed Information about 14 Crops and Acreage

15 UFW learned from Gerawan in November 2013 that Gerawan had made a
16 tentative decision to plant 940 acres which had become available. In June 2014,
17 UFW requested information regarding implementation of this plan. The requested
18 information regarding actual acreage pulled and planted, the specific crops, as well
19 as hours worked and gross wages paid for bargaining unit classifications relating to
20 these crops was timely requested³⁶ and necessary and relevant to the UFW’s
21 functions in negotiation, contract administration, and potential grievance activity.³⁷
22 Because the requested information dealt with matters impinging employee wages,
23 hours, and terms and conditions of employment it was presumptively relevant.³⁸

24 ³⁴ *Keauhoa Beach Hotel* (1990) 298 NLRB 702 at 702 and fn 3.

25 ³⁵ See, e.g., *Cardinal Distributing Co. v. ALRB* (1984) 159 Cal.App.3d 758, 767-768 (it is not
26 necessary to show prejudice or that delay in the bargaining process occurred).

27 ³⁶ Gerawan faults the UFW for waiting seven months after it announced its tentative decision to
28 request the information. This argument is nonsensical in that it was only after implementation of the tentative
29 decision that any of the requested information would be available.

30 ³⁷ See *O. P. Murphy & Sons* (1979) 5 ALRB No. 63 at pp. 14, 15, cited by the General Counsel
31 (employer yield and production figures closely related to income of employees); see also *Boise Cascade Corp.*,
32 (1986) 279 NLRB 422, 429 (information regarding implementation of changes that had effect on employee wages is
33 presumptively relevant).

34 ³⁸ Information related to wages, hours, and terms and conditions of employment is presumptively
35 relevant and the union need not make any showing of relevance. If the employer effectively rebuts the presumption

1 Thereafter, a “standoff” over confidentiality took place. In July 2014,
2 Gerawan stated a generalized need for confidentiality regarding this information.³⁹
3 In July, August, and September 2014, UFW renewed its request for the information
4 averring that no basis for confidentiality had been stated. This stalemate continued
5 into 2015. In March 2015, nine months following the first request for information,
6 Gerawan proposed that the parties engage in discussions regarding the form and
7 content of the information and again asserted general confidentiality concerns.⁴⁰
8 There is no evidence that any discussions took place.

9 Fourteen months post-request, in August 2015, Gerawan propounded a
10 confidentiality agreement which UFW immediately characterized as “overbroad,
11 illegal, and unacceptable.” Eventually, in December 2015, Gerawan provided a
12 summary chart setting forth the amount of planted acreage by crop. This chart did
13 not provide the specific information which had been requested by the UFW
14 eighteen months earlier and offered no basis for determining the impact of crop
15 changes on the bargaining unit.

16 In *Detroit Edison Corp. v. NLRB* (1979) 440 U.S. 301, 318, the Court held
17 that the NLRB abused its remedial discretion by ordering the employer to turn over
18 a test battery and answer sheets directly to the union. Citing *NLRB v. Truitt Mfg.*
19 *Co.* (1956) 351 U.S. 149, 153, the Court found that the duty to supply information
20 depends on the particular circumstances of each case. Balancing the parties’
21 relative interests, the Court held that because the employer’s interest in
22 confidentiality was well demonstrated and the danger of inadvertent leaks was
23 substantial, the minimal burden placed on the union to obtain employee consents
24 for release of the information was a valid constraint. *Detroit Edison*, supra, 440
25 U.S. at 319-320. The Court made clear that it may frequently be necessary to
26 balance the legitimate needs of the parties to determine whether and how specific
27 information might be produced. *Id.*, 317-320.

28 of relevance or otherwise shows that it has a valid reason for not providing the requested information, the employer
is excused from providing the information or from providing it in the form requested. *United Parcel Service*, supra,
362 NLRB at pp. 10-11, citing *Coca-Cola Bottling Co.* (1993) 311 NLRB 424, 425.

³⁹ The July 23, 2014 letter from Barsamian to Elenes stated in relevant part, “I will tell you that
much of the information you have requested will need to be kept strictly confidential from any disclosures
whatsoever, so please alert your counsel that we will have a confidentiality agreement prepared for his review.”

⁴⁰ “[W]e do not want information about our current crop acreage and future plans shared beyond
those that have an actual need for it. We need to work something out to protect our interests while providing you
with what you need. We can discuss this when we meet as well.”

1 Gerawan argues that it had a legitimate and substantial confidentiality
2 interest in its proprietary crop information. Gerawan's September 18, 2018
3 correspondence explained that it did not require "blanket" confidentiality but did
4 require confidentiality, for example, for future plans and projections and current or
5 past acreage. Gerawan explained that it required confidentiality for such
6 information to protect disclosure to its competitors. Even so, there was no
7 explanation offered regarding how disclosure would have injured the business.
8 This was Respondent's burden.⁴¹ Because Respondent did not provide sufficient
9 evidence to support its claim for confidentiality, there is insufficient evidence with
10 which to assess the appropriate balance to weigh against the union's per se need
11 for the information.

12 More importantly, this specific request for confidentiality was not intended
13 as a basis for unilaterally withholding the entirety of the requested information.⁴²
14 The request for information was directed not only at acreage pulled and planted but
15 also hours worked and gross wages paid for bargaining unit classifications relating
16 to these crops.⁴³ Even if the need for confidentiality were established as to the
17 crops, the UFW's information request about hours and wages was never addressed.
18 None of the hour or wage information was ever supplied. This failure to produce
19 wage and hour information and the delay in suggesting discussion for
20 accommodating confidentiality concerns or propounding a proposed confidentiality
21 agreement for the crop information speak volumes. Under these circumstances, it is
22 found that Gerawan violated the Act by its failure to provide the requested
23 information.⁴⁴

24 ⁴¹ See, e.g., *Bud Antel, Inc.* (2013) 39 ALRB No. 12, slip op. at 10 (burden is on employer to show
25 how disclosure would injure business); *Richard A. Glass Co., Inc.* (1988) 14 ALRB No. 11, slip op. at 15-16 (Bare
26 assertion of a trade secret or other grounds for confidentiality of information sought not adequate since Board must
27 be permitted to balance the union's need for information against the legitimate and substantial confidentiality
28 interests of the employer); see also *SBC California* (2005) 344 NLRB 243, 246 (insufficient evidence was cited in
support of confidentiality assertion and it therefore fails).

⁴² See, e.g., *Transcript Newspapers* (1987) 286 NLRB 124, 129-130 enfd (1st Cir. 1988) 856 F.2d
409; *Washington Star Co.* (1984) 273 NLRB 391, 397.

⁴³ See, *Tex-Cal Land Management, Inc.* (1986) 12 ALRB No. 26, slip op. 43-44 (employer's
failure to provide production information about pruning so as to enable union to bargain over new rate was
violation).

⁴⁴ See, e.g., *Oil, Chem. & Atomic Workers Local 6-418 (Minnesota Mining & Mfg. Co.) v. NLRB*,
(D.C. Cir. 1983) 711 F.2d 348, 362 (Company's trade secret defense applied to only a small portion of requested
information and could not justify total noncompliance. *Detroit Edison* "certainly affords no support for the
proposition that an employer is absolutely privileged from revealing relevant proprietary or trade secret
information.")

1 3. August 2014 Request for Information about Employee Health Plans

2 The UFW's request for specific information about employee health plans
3 was honored a year later when Gerawan furnished such information. This
4 information was necessary and presumptively relevant to the UFW's duties as
5 exclusive bargaining representative.

6 Respondent argues that the issue of providing employee health plan
7 information has already been litigated. In support of this argument, Respondent
8 requests that administrative notice be taken of an order granting Gerawan's petition
9 to revoke a two-item General Counsel pre-complaint investigative subpoena duces
10 tecum in cases 2014-CE-024-VIS and 2015-CE-003-VIS. Gerawan's request is
11 granted. In that ruling, Administrative Law Judge William L. Schmidt held that
12 Gerawan had complied with the General Counsel's first request, which was for
13 health benefit eligibility criteria for calendar years 2012, 2013, 2014, and 2015 by
14 providing a page of its employee manual which described the criteria for workers
15 to participate in the health care benefits together with a sworn statement from its
16 compliance manager stating that the eligibility criteria previously furnished had not
17 changed since May 2011. The second request was for all documents and
18 communications between UFW and Gerawan regarding the health plan from
19 November 1, 2012 to the present. Judge Schmidt held that demand for materials
20 during this period was subsumed in the parties' Mandatory Mediation and
21 Conciliation process and were irrelevant.

22 Having carefully considered the substance of Judge Schmidt's ruling, it is
23 found inapplicable to the facts before me. First, the types of information sought by
24 the investigative subpoena are different from the information sought by the UFW.
25 The subpoena dealt with eligibility for health care and communications between
26 Gerawan and UFW about health care. The UFW information request was for
27 changes in employee health plans due to the ACA. Secondly, two separate entities
28 are involved. In the investigative subpoena, the General Counsel sought
information for potential litigation purposes – not by the UFW. The information
requested by the UFW was relevant to its obligation to represent employees. Thus,
for these reasons, Gerawan's argument that the issue in the current litigation was
previously determined by Judge Schmidt is rejected.

 Gerawan also argues that the one-year delay in providing the information
was not unreasonable under the circumstances. The UFW requested the
information in August 2014. Gerawan provided the information in August 2015.

1 Gerawan notes the parties' litigation from September 29, 2014 to March 12, 2015
2 as well as "numerous, burdensome requests for information such as a request
3 related to all employees who worked for Gerawan in 2013, information related to
4 close to 1,000 acres of crop changes, information related to all 2014 Gerawan
5 employees . . ." as well as the health plan information. In light of these
6 circumstances, Gerawan argues it was not reasonably possible to provide the
7 information earlier.

8 Under the circumstances, however, one year constituted an unreasonable
9 delay.⁴⁵ There is no evidence that Gerawan's compliance manager, who was
10 involved in furnishing the responsive materials for the investigative subpoena was
11 occupied with the lengthy litigation or the other information requests. As noted
12 before, the fact that Respondent's lawyer was tasked with providing information
13 does not provide a valid defense. Thus, Gerawan's argument that surrounding
14 circumstances precluded turning attention to this matter for one year is rejected. A
15 preponderance of the evidence indicates that no legitimate reason precluded a
16 prompt response to this request. Thus, it is found that Respondent violated the Act
17 by failing to timely respond to this request for information.

18 4. April 2015 Information Request Regarding Access to Gerawan Property

19 The UFW sought information regarding the reported presence of a known
20 anti-union activist on Gerawan property in April 2015 in order to investigate filing
21 a potential grievance or unfair labor practice charge alleging unlawful assistance in
22 decertification activity. Gerawan did not provide any information. Barsamian
23 testified at hearing that this was because no such information existed. However, the
24 duty to provide information includes a duty to inform the bargaining representative
25 that no such information exists.⁴⁶

26 ⁴⁵ Gerawan cites *Union Carbide Corp.* (1985) 275 NLRB 197, 201 in which the administrative
27 law judge found that because there was no showing that the employer was dilatory or that the union was prejudiced
28 by the delay, no violation occurred. The judge noted that the employer made a diligent search. The Board decision
did not treat this finding and it is unclear that exceptions to it were filed. Nevertheless, the judge's decision is not
persuasive regarding the facts of this case in that, apparently, Respondent here did conduct a search but failed to
inform the Charging Party that there were no responsive documents.

⁴⁶ See, e.g., *Hanson Aggregates BMC, Inc.* (2008) 353 NLRB 287, 288 (if documents unavailable,
there is a duty to explain or document the reasons).

1 One of the myriad of duties of an exclusive bargaining representative is to
2 monitor the workplace for the existence of potential grievances and unfair labor
3 practices. This access information request thus relates to employee conditions of
4 employment and is necessary information to UFW's performance of its duties.
Gerawan violated the Act by failure to respond to this request.

5 Nevertheless, Gerawan claims it has no duty to provide information because
6 UFW's request was not supported by any factual basis, in that no location was
7 provided. Gerawan agrees that a date, April 30, 2015, was provided in the UFW's
8 second request for information dated May 1, 2015.⁴⁷ Thus, Gerawan asserts that
9 the request was "unsubstantiated" and, in any event, there was no such
10 information. These defenses are unavailing. The factual basis of the report was
11 clearly identified. There is no evidence that Gerawan made any attempt to seek
12 clarification at the time the request was made. Further, although there was
13 testimony at the hearing that no such information existed, this was not conveyed to
14 the UFW in a timely manner. Thus, it is concluded that Respondent violated the
15 Act by failing to timely respond to the UFW's request for information.

16 B. Alleged Unilateral Changes

17 An employer must provide notice and an opportunity to bargain before
18 altering a mandatory subject of bargaining.⁴⁸ Unilateral action harms the process of
19 collective bargaining itself and minimizes the influence of organized bargaining by
20 interfering with the right of self-organization, emphasizing to employees that there
21 is no necessity for a bargaining representative.⁴⁹

22 Employee health care and sick leave are mandatory subjects of bargaining.⁵⁰
23 It is well established that an employer who is compelled to make changes in terms

24 ⁴⁷ Respondent's Brief at p. 25, lines 18-19.

25 ⁴⁸ *NLRB v. Katz*, (1962) 369 U.S. 736, 738, 743 (finding a violation "in fact" even in the absence
26 of overall bad faith); see also *Warmerdam Packing* (1996) 22 ALRB No. 13, slip op. at 5 (Neither employer's
27 motivation nor effect of a unilateral change is relevant to finding of violation because unilateral changes in
28 mandatory subjects of bargaining are per se violations).

⁴⁹ *NLRB v. McClatchy Newspapers* (D.C. Cir. 1992) 964 F.2d 1153, 1162 (Concurrence of
29 Edwards, Circuit Judge).

⁵⁰ See, e.g., *Mid-Continent Concrete* (2001) 336 NLRB 258, 259 (health care plan is mandatory
30 subject of bargaining); see also, *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157,
159 and cases cited at fn. 2 (1971); *FirstEnergy Generation Corp.*, 358 NLRB 842, 848 (2012) (health care plan).
Similarly, sick leave is a mandatory subject of bargaining. *NLRB v. Katz* (1962) 369 U.S. 736, 744.

1 and conditions of employment in order to comply with the mandates of another
2 statute must nevertheless provide its employees' representative with notice and an
3 opportunity to bargain over the discretionary aspects of the changes.⁵¹ There is no
4 dispute that Gerawan failed to notify UFW prior to implementing the health plan
5 change in late 2014 and instituting the sick leave policy in July 2015. Neither the
6 ACA nor the California Health Workplace Act insulate employers from the duty to
7 bargain.

8 Gerawan asserts that UFW was aware of the statutory mandates for
9 compliance with the ACA and the California Healthy Workplace Act but failed to
10 request bargaining thus waiving that right. Thus, Gerawan claims that the UFW's
11 general knowledge of the upcoming statutory changes constituted clear notice. This
12 argument fails. General awareness of upcoming statutory implementation does not
13 constitute clear notice required to satisfy the duty to bargain in good faith.⁵²
14 Waiver of bargaining rights requires clear and unmistakable conduct.⁵³
15 Specifically, proof of waiver requires clear and unequivocal notice such that the
16 union's subsequent failure to demand bargaining constitutes a "conscious
17 relinquishment" of the right to bargain.⁵⁴ There was no notice at all much less clear
18 and unequivocal notice. Thus, Gerawan's waiver argument is rejected.

19 Gerawan further argues that even if there was a duty to bargain in general,
20 because the employer has no discretion regarding the change, no duty to bargain
21 attaches to these statutory mandates. Gerawan distinguishes *Western Cab*, supra,
22

23 ⁵¹ *Western Cab Company*, (2017) 365 NLRB No. 78, slip op. at 5-6, noting that the ACA appears
24 to offer flexibility as to how an employer can satisfy the requirements of the ACA. See generally Shared
25 Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (Feb. 12, 2014) publishing Final Rule
26 amending 26 C.F.R. Parts 1, 54, and 301 (noting different methods to establish that a plan satisfies minimum value
27 and affordability criteria. See also cases cited by UFW: *Watsonville Register-Pajaronian*, 327 NLRB 957, 958-959
28 (1999) (FLSA overtime provisions do not excuse failure to bargain regarding employee schedules); *Keystone
Consolidated Industries, Inc.*, 309 NLRB 294, 297 fn. 7, 298 (1992), rev'd on other grounds, 41 F.3d 746 (D.C. Cir.
1994) (ERISA did not excuse refusal to bargain over changes to pension plan); *Foodway*, (1978) 1234 NLRB 72, 77-
78 (mandate of other statutes may serve to limit the area of discretion to be exercised in fulfilling the bargaining
obligation but does not minimize or obviate duty to bargain).

⁵² Notice of a contemplated unilateral change in employee working conditions must be formally
given. *NLRB v. Rapid Bindery, Inc.* (2d Cir. 1961) 293 F.2d. 170, 176: "[C]onjecture or rumor is not an adequate
substitute for an employer's formal notice to a union." Moreover, notice must be given to a union agent authorized
for this purpose. *California Portland Cement Co. v. NLRB* (9th Cir. 2001) 19 Fed.Appx. 683, 684-685 (enforcing
Board's finding that notice given to union steward was inadequate as the steward was not the union's agent for
purposes of receiving notice of unilateral changes in job duties).

⁵³ *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, 708 n. 12.

⁵⁴ See, e.g., *NL Industries, Inc.*, (1975) 220 NLRB 41, 43 enfd (8th Cir. 1976) 536 F.2d 786.

1 because in that case the employer made discretionary changes. Gerawan asserts
2 that it made no discretionary changes to its prior health plan offerings or eligibility
3 criteria other than to make the plans available to additional employees as required
4 by the ACA. It argues that it made no changes to the statutory requirements of the
5 sick leave policy and, accordingly, there was nothing discretionary to bargain
6 about regarding sick leave as well.

7 There is no dispute that Gerawan failed to notify UFW that it was going to
8 implement a sick leave policy or make a change to health care premium amounts.
9 There is further no dispute that Gerawan failed to bargain with UFW prior to
10 implementation of the health care premium change or the sick leave policy.
11 Accordingly, it is found that Gerawan's failure to notify and provide UFW with an
12 opportunity to bargain over the discretionary aspects of the changes to its health
13 care premium and implementation of its sick leave plans prior to unilateral
14 implementation violates the Act.

15 CONCLUSIONS OF LAW

- 16 1. By failing or delaying to provide necessary and relevant information to the
17 UFW regarding documents employees were required to sign on December 7,
18 2012; detailed information about crop acreage pulling and planting changes
19 and impact on employee pay in 2014 and 2015; information regarding
20 employee health care plans in 2014; and documents which authorized non-
21 employee access to property in April 2015, Gerawan violated Section
22 1153(a) and (e) of the Act.
- 23 2. By unilaterally implementing changes to its health care premium in
24 December 2014 and unilaterally implementing a sick leave policy in July
25 2015, Gerawan failed to provide notice and an opportunity to bargain about
26 discretionary aspects of these legislatively-mandated programs in violation
27 of Section 1153(a) and (e) of the Act.

28 REMEDY

Having concluded that Respondent violated the Act as alleged in the General
Counsel's complaint, it will be ordered to cease and desist from the unlawful
conduct and take certain affirmative action to remedy the unlawful conduct.

1 Information Requests

2 Respondent must produce, on request, the information it has withheld.
3 Respondent will also be required to grant ALRB agents access to work sites where
4 their agricultural employees are employed at mutually arranged times to provide a
5 reading of the attached Notice outside the presence of supervisory personnel.
6 Following the reading, Respondent's agricultural employees must be provided a
7 reasonable period in which to ask questions of the ALRB agents about the Notice
8 or about their rights under the Act. Respondent shall compensate the time spent
9 during the reading and the question and answer period at the employees' regular
hourly rates, or each employee's average hourly rate based on their piece-rate
production during the prior pay period.

10 Unilateral Implementation of Health Care Plan
11 and Sick Leave Policy

12 Violations of the Act have been found in unilaterally implementing changes
13 to an ACA-mandated health care plan and unilaterally implementing a sick leave
14 policy to comply with the California Healthy Workplace Act. Although there was
15 ACA health insurance prior to Respondent's unilateral changes to the plan, in this
16 somewhat novel situation, the General Counsel argues that, on request, Respondent
17 rescind the unlawfully implemented changes to its ACA-mandated health care plan
as far as permissible by law.

18 It is unclear on this record whether the changes made in December 2014 to
19 the ACA-mandated plan were required by ACA or were discretionary changes
20 made by Respondent. Thus, it is unclear whether Respondent could restore the
21 status quo ante without depriving employees of the changes to their health
22 insurance and running afoul of the ACA. Thus, no rescission order is
23 recommended.⁵⁵ If, however, it is determined in compliance that any employee was
24 negatively affected by Respondent's refusal to bargain over a discretionary aspect
of the implementation, Respondent shall make such employee whole for losses
attributable to the Respondent's unlawful conduct. Such amounts shall include
interest thereon, computed in accordance with *H & R Gunlund Ranches, Inc.*

25 _____
26
27 ⁵⁵ See, *Western Cab*, supra, 365 NLRB No. 78, slip op. at 3, "In view of the absence of a request
28 for rescission, along with the fact that it is unclear how the Respondents might restore the status quo ante without
depriving recently-hired employees of health insurance, we shall not order rescission of the changes."

1 (2013) 39 ALRB No. 21. It is recommended that, on request, Respondent be
2 ordered to negotiate with UFW regarding those changes to the health insurance
3 plan that allow for discretion or flexibility.

4 Similarly, the General Counsel requests that Respondent, upon request,
5 rescind its unilaterally implemented sick leave plan as far as permissible by law.
6 Respondent did not provide sick leave prior to unilateral implementation of the
7 plan. It is unclear how Respondent could restore the status quo ante without
8 depriving employees with sick leave and potentially violating the California
9 Healthy Workplace Act. Thus, no rescission order is recommended.

10 As far as a make whole remedy for the unilateral change in sick leave, none
11 appears warranted under the particular facts of this case. Prior to the unilateral
12 change, Respondents did not provide sick leave.

13 On these findings of fact, conclusions of law, and the entire record, the
14 following order is recommended:

15 **ORDER**

16 Pursuant to Labor Code section 1160.3 of the Agricultural Labor Relations
17 Act, the Agricultural Labor Relations Board (Board) ORDERS that Respondent
18 Gerawan Farming, Inc., its officers, agents, labor contractors, successors and
19 assigns shall:

20 1. Cease and desist from:

- 21 (a) Failing to bargain in good faith in violation of section 1153(a) and (e)
22 of the Act by failing and refusing to provide United Farm Workers of
23 America (UFW), the certified bargaining representative with
24 necessary and relevant information.
25 (b) Failing to bargain in good faith in violation of section 1153(a) and (e)
26 of the Act by unilaterally implementing a health care plan and a sick
27 leave policy without prior notification to the UFW or providing UFW
28 an opportunity to negotiate about discretionary aspects of such plans.
(c) In any like or related manner interfering with, restraining, or coercing
its agricultural employees in the exercise of the rights guaranteed
them by section 1152 of the Agricultural Labor Relations Act.

1 2. Take the following affirmative actions necessary to effectuate the policies
2 of the Act:

- 3 (a) Upon request, make available to UFW the relevant and necessary
4 information requested.
- 5 (b) Upon request, bargain in good faith with UFW regarding
6 discretionary changes in health plans and sick leave.
- 7 (c) Upon request of the Regional Director, sign the attached Notice to
8 Agricultural Employees and, after its translation by a Board agent
9 into all appropriate languages, reproduce sufficient copies in each
10 language for the purposes set forth below.
- 11 (d) Post copies of the Notice in all appropriate languages at
12 conspicuous places on Respondent's property, including places
13 where notices to employees are usually posted, for sixty (60) days,
14 the times and places of posting to be determined by the Regional
15 Director. Respondent shall exercise due care to replace any copies
16 of the Notice which may be altered, defaced, covered or removed.
17 Pursuant to the authority granted under section 1151(a) of the Act,
18 give agents of the Board access to tis premises to confirm the
19 posting of the Notice.
- 20 (e) Mail signed copies of the attached Notice in all appropriate
21 languages within 30 days after the date this Order becomes final or
22 thereafter if directed by the Regional Director to the last known
23 address of all agricultural employees it employed, including those
24 employed by farm labor contractors, during the planting and
25 harvesting periods or other relevant periods of employment from
26 November 2012 to September 2015.
- 27 (f) Grant ALRB agents access to work sites where the agricultural
28 employees in the bargaining unit work at mutually arranged times
in order to read the attached Notice to them and to answer
questions employees may have about their rights under the Act
outside the presence of supervisory personnel.
- (g) Compensate employees for the time spent during the Notice
reading and the following question and answer period at the
employees' regular hourly rates, or each employee's average
hourly rate based on their piece-rate production during the prior
pay period.
- (h) Provide access during the notice-posting period to ALRB agents to
ensure compliance with the notice-posting requirements of this
ORDER.

- 1 (i) Provide a signed copy of the Notice to each person it hired for
2 work as an agricultural employee during the 12-month period
3 following the issuance of the ALRB's Order in this case.
4 (j) Notify the Regional Director in writing within thirty (30) days after
5 the date of issuance of this Order of the steps Respondents have
6 taken to comply with the terms and, on request, also notify the
7 Regional Director periodically in writing of further actions taken to
8 comply with the terms of this Order until notified that full
9 compliance has been achieved.

10 DATED: _____

11 
12 _____
13 Mary Miller Cracraft
14 Administrative Law Judge
15 Agricultural Labor Relations Board

1 NOTICE TO AGRICULTURAL EMPLOYEES

2 The Agricultural Labor Relations Act is a law that gives you and all other farm
3 workers in California these rights:

- 4 1. To organize yourselves.
- 5 2. To form, join, or help a labor organization or bargaining representative.
- 6 3. To vote in a secret ballot election to decide whether you want a union to
- 7 represent you.
- 8 4. To bargain with your employer about your wages and working conditions
- 9 through a union chosen by a majority of the employees and certified by the
- 10 Board.
- 11 5. To act together with other workers to help and protect one another.
- 12 6. To decide not to do any of these things.

13 Because you have these rights, we promise that:

14 WE WILL NOT refuse to provide the United Farm Workers of America (UFW)

15 with information necessary for it duties as your exclusive representative.
16 WE WILL NOT make changes in your health care or sick leave without first

17 giving the UFW notice and an opportunity to bargain.
18 WE WILL NOT in any like or related manner, refuse to bargain with the Union

19 over wages, hours or conditions of employment, or interfere with, restrain or
20 coerce employees from exercising their right under the Act

21 WE WILL make available to UFW the necessary and relevant information it has
22 requested.
23 WE WILL, on request, bargain with UFW about changes to your health care and
24 sick leave.

25 DATED:

26 GERAWAN FARMING, INC.
27 By

28 _____
Representative Title

If you have any questions about your rights as farm workers or about this Notice,
you may contact any office of the Agricultural Labor Relations Board.