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News For School Clients

Issuance and Renewal/Nonrenewal of Individual Teacher Contracts

Wisconsin law requires school boards to have written contracts with qualified teachers. These individual contracts must include certain provisions and are subject to renewal requirements, including the requirement to provide preliminary notice of nonrenewal by February 29, 2012, and written notice of renewal or refusal to renew on or before March 15, 2012. Pending legislation (Senate Bill 2), which may be enacted this month, would change the February 29 deadline to April 30 and the March 15 deadline to May 15. Given these impending deadlines, and in light of changes resulting from 2011 Wisconsin Act 10, school boards should plan now to address individual teacher contracts in the district. This FYI addresses the various issues involving individual teacher contracts.

What *must* the contract contain?

Wisconsin statutes set forth the minimum requirements for individual teacher contracts. In particular, Wis. Stat. § 118.21 requires that school boards contract in writing with qualified teachers, that the contracts be filed with the school district clerk, and that a copy of the teacher's authority to teach is attached. The contract, in addition to fixing the teacher's wage, may provide for compensating the teacher for necessary travel expense. The statutes do not mandate that all forms of compensation be included in the individual contract; the contract only must set

forth the teacher's wage. Other forms of compensation and benefits may be set forth in board policy.

In addition, to avoid a prohibited practice charge under Wis. Stat. § 111.70(3)(a)4, a school board is required to include language stating that the contract is subject to amendment by a subsequent collective bargaining agreement. Such language should be carefully worded to remain consistent with the statute. The requirement to include this language exists as long as the teachers continue to be represented by a union. If the union is decertified, the requirement ends.

What *should* the contract contain?

The other contents of an individual teacher contract are largely a matter of school board discretion. Many existing individual contracts include a provision stating that the contract will be subject to state and federal law and to the rules, regulations, and policies of the school board and administration (now existing and as may be hereinafter enacted). Many contracts also include a provision that states that the contract is conditioned upon the teacher's possession of or eligibility for a Wisconsin teacher's license or certificate and that the contract shall be invalid in the absence of such a license or certificate. Boards may be interested in adding such

provisions, if they are not currently included in the contract.

School boards may also be interested in adding a provision concerning liquidated damages. A liquidated damages provision is an agreement between the parties that identifies a specific dollar amount that will be paid by a teacher in the event that the teacher breaches the contract. Such provisions were often contained in a collective bargaining agreement. However, if no collective bargaining agreement exists containing such a provision, the board may want to include a provision in the individual teacher contract. A court may likely not enforce a liquidated damages provision unless the teacher and school board have expressly agreed on the terms and amount of the liquidated damages.

What should the contract *not* contain?

As stated above, the contents of an individual teacher contract are largely a matter of school board discretion. As a result, the exclusion of a provision from the contract will generally be left to the school board. However, school boards should not issue contracts that are inconsistent with state or federal law or inconsistent with board policies. Further, school boards should consider excluding provisions that may hinder the board's ability to manage the business of the district, such as standards for termination or nonrenewal or provisions that are not written in a clear and understandable manner. Boards may also want to avoid including any reference to the renewal statute (Wis. Stat. § 118.22) for teachers who are part-time teachers, considering that the renewal/nonrenewal statute only applies to full-time teachers.

In addition, for those school districts that still have a collective bargaining agreement in place, the school board should be cautious if an individual teacher contract states that it "incorporates" all of the terms and conditions of a bargaining agreement. There is an argument that allowing those individual

contracts to renew may carry the terms of an expired bargaining agreement into the renewed contracts. This argument is probably not as strong for teacher contracts that say they are "subject to" or "subordinate to" a bargaining agreement.

Finally, if boards want to pay a teacher over a twelve-month period, it must have an agreement with the teacher to do so. Under prior law, collective bargaining agreements were able to include an agreement on twelve-month payrolls for school year employees. Act 10, however, no longer allows collective bargaining agreements to include such an agreement on twelve-month payrolls. As a result, boards will need to obtain written authorization, as required by law, from the teacher annually before paying the teacher over a twelve-month period. This required authorization could be included in the individual teacher contract or in a separate authorization.

Can we *change* content in the contract?

If there is still a collective bargaining agreement in place, the terms of the bargaining agreement may affect the board's ability to obtain changes to the individual teacher contract. Districts with a collective bargaining agreement in place should consider obtaining legal advice about whether and how language in the collective bargaining agreement affects the board's ability to make changes to the individual teacher contract.

If there is no collective bargaining agreement in place, one means of changing the terms of the contract is for the board to mutually agree with the teacher to make the change. For example, if the board and the teacher agree that the contract will include a liquidated damages clause, the board can add the provision and will have a new contract with the clause for the 2012-2013 school year.

Another means of changing the terms of the contract for teachers who are not covered by a collective bargaining agreement is through

nonrenewal. Boards can advise a teacher who is not covered by a collective bargaining agreement that, if the teacher does not accept the modified individual teacher contract by a certain date, the board may nonrenew the existing contract and offer the modified individual teacher contract.

If a school board elects to change the terms of the contract through nonrenewal pursuant to Wis. Stat. § 118.22, the board must be careful to meet all procedural requirements, including timelines. For teachers in Wisconsin, their individual teacher contracts automatically renew pursuant to statute, unless the school board takes action to prevent the renewal. As mentioned above, in order to prevent the renewal, the board must provide preliminary notice of nonrenewal of the contract by February 29, 2012, (or April 30, 2012 if Senate Bill 2 is enacted) and provide the teacher with written notice of renewal or refusal to renew the contract for the ensuing school year on or before March 15, 2012 (or May 15 if Senate Bill 2 is enacted). The board must also be aware of other procedures (such as the private conference) and standards (such as just cause) that may affect any nonrenewal for purposes of modifying the contract. School boards should confer with their legal counsel on these issues.

It is also important to note that, unless a bargaining agreement specifically allows the parties to change these deadlines for nonrenewal, the parties will not be able to delay these deadlines. The Wisconsin teacher nonrenewal statute formerly authorized school districts and unions to agree to modify or waive any of the provisions of the nonrenewal statute, including the statutory timelines. However, Act 10 repealed the language authorizing the modification or waiver of nonrenewal provisions. As a result, school boards must avoid agreeing to any change in the deadlines, unless the board is currently subject to a bargaining agreement that allows such extensions.

What happens if the board does *not* take action to nonrenew the contract? If no preliminary notice of refusal to renew is issued to the teacher, the statute indicates that the board will provide a written notice of renewal to the teacher. Boards should review the language of any notice of renewal before issuing it to ensure that it reflects changes under Act 10. Typically, this notice simply informs the teacher that the contract will be renewed for the following school year. This renewal, however, likely has the effect of renewing all of the terms within the existing contract for the following school year.

If no written notice of renewal or refusal to renew the contract is given to the teacher by March 15 (or May 15 if Senate Bill 2 is enacted), the statute provides that the contract then in force shall continue for the ensuing school year. If the contract then in force continues, it likely means that all of the terms contained in the contract remain in place for the next school year.

A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew the teacher's contract for the ensuing school year on or before March 15 (or May 15 if Senate Bill 2 is enacted), must accept or reject in writing such contract not later than the following April 15. If Senate Bill 2 is enacted, the April 15 date will change to June 15. It is important to note that nothing in Wis. Stat. § 118.22 requires the board to issue the actual individual teacher contract to the teacher before the start of the 2012-2013 school year. However, the above procedure certainly contemplates that the terms of the contract will be determined during the spring of the 2011-2012 school year.

Should we use nonrenewal for *layoffs*? The question of whether a board can rely on layoff language in an existing bargaining agreement in lieu of nonrenewal remains a complicated area of school law which

depends upon a case-by-case analysis of any bargaining language and facts unique to an individual school district. Therefore, we recommend that school district officials review their language and consider getting legal advice before making any final decisions about whether to rely on layoff language rather than the nonrenewal procedure under the statute. In addition, if an existing collective bargaining agreement contains criteria and procedures for layoff and bumping, districts will most likely be required to follow those provisions in making economic layoffs or risk grievances.

Boards that do not have a settled bargaining agreement in place are strongly encouraged to meet the nonrenewal deadlines of Wis. Stat. § 118.22 for any full-time teacher that it believes may be subject to layoff because of budget constraints. In the absence of a valid layoff provision, a school board must meet the statutory timelines and other procedures of the nonrenewal statute in order to lay off a teacher. School boards must take any necessary actions with enough lead time that the preliminary notice of nonrenewal can be in the teacher's hand by February 29, 2012.

School boards that have a collective bargaining agreement covering the 2011-2012 school year and that are not yet subject to the impact of Act 10 will likely be able to rely upon language permitting layoffs to lay off teachers to the same extent they could have prior to the effective date of Act 10. This is

particularly true if the board abides by any recall rights as set forth in the bargaining agreement for any laid off employees.

However, an argument may be made that layoffs issued under existing bargaining agreements are ineffective after the expiration of the agreement because the recall provisions contained in the agreements also expire. As a result, a teacher may argue that, although the board laid off the teacher, the agreement and recall rights expired, and because the individual contract was renewed, the teacher is entitled to a contract for the 2012-2013 school year. To avoid this argument, the safest approach is to identify all teachers who may be subject to layoff and follow the nonrenewal procedures for those teachers. However, in such cases, boards that elect to nonrenew teachers should still abide by any provisions of the layoff language in selecting teachers for nonrenewal. Other provisions of the bargaining agreement may also affect this decision, including language that prohibits using the nonrenewal process for layoffs due to economic reasons.

School boards should confer with their legal counsel and get specific legal advice based upon the language of their individual teacher contracts, their collective bargaining agreements, and any practice that has developed with regard to notices of renewal and individual teacher contracts before issuing notices of renewal of teacher contracts and individual teacher contracts.

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