

I. Introduction

The State of Wisconsin has repealed the QEO, and it is now time to start the new bargaining process. This presentation will provide possible strategies that school districts can use leading up to the mediation/arbitration process in trying to bargain contract settlements. What can school management be doing to reach a reasonable settlement? What should school management be doing to prepare for mediation/arbitration if there is the possibility of not reaching a settlement? The purpose of this session is to provide suggestions about how to negotiate up to the mediation/arbitration process. It does not cover the mediation/arbitration process.

II. Wisconsin's New Bargaining Context (In Light of Recent Changes to School Funding, QEO, and Interest Arbitration)

A. Aid to Schools

1. The American Reinvestment and Recovery Act (ARRA) was signed into law on February 17, 2009. The ARRA funds are to be spent quickly to save and create jobs and to improve student achievement through school improvement and reform. These funds are expected to only be available through September 30, 2011.
2. The ARRA funds have two parts.
 - a. The first part involves one-time stimulus funds that are provided as part of existing programs in addition to the regular federal funding (with some new reporting requirements). These programs include:
 - i. Title I Part A & School Improvement Grants
 - ii. IDEA (Special Education)
 - iii. Competitive Grants (Race to the Top, Teacher Incentive Fund, State Longitudinal Data Systems, Investing in Innovation Fund)
 - iv. State Educational Technology Grants
 - v. Title VI-B of the McKinney-Vento Homeless Assistance Act
 - b. The second part involves a new education initiative, the State Fiscal Stabilization Fund. This is made up of the Education Stabilization Fund (81.8% of the State's allocation), and the Government Services Fund (18.2% of the State's allocation).

3. Wisconsin's ARRA Education Stabilization Fund was allocated to Wisconsin school districts through the school aid formula.
 - a. Under 2009 Wisconsin Act 11, \$291,000,000 in federal ARRA funding was appropriated in 2008-2009 for the June 2009 equalization aid payments.
 - b. 2009 Wisconsin Act 23 increased the amount of federal ARRA funding used for the June 2009 general school aids by \$261,278,000, to a total of \$552,278,000.
 - c. 2009 Wisconsin Act 28 reduces general school aids by \$147 million in 2009-2010 and makes no changes to funding in 2010-2011. For 2009-2010, \$237 million of federal stimulus funds will be used for state equalization aids.
4. Education Stabilization Funds pursuant to the ARRA can be used to fund programs offered through:
 - a. Elementary and Secondary Education Act of 1965 (ESEA);
 - b. The Individuals with Disabilities Education Act (IDEA);
 - c. The Adult Education and Family Literacy Act (AEFLA);
 - d. The Carl D. Perkins Career and Technical Education Act of 2006 (Perkins Act);
 - e. To the extent consistent with State law, an LEA may use funds for modernization, renovation or repair of public school facilities, including modernization, renovation, and repairs that are consistent with a recognized green building rating system. If the LEA uses Education Stabilization funds for this purpose the LEA must comply with specific requirements relating to the use of American iron, steel, and manufactured goods in the project (*See*, Section 1605 of the ARRA).
5. Education Stabilization Funds pursuant to the ARRA cannot be used for:
 - a. Maintenance costs;
 - b. Stadiums or other facilities primarily used for athletic contest, exhibitions or other events for which admission is charged to the general public;
 - c. The purchase or upgrade of vehicles;

- d. Improvement of stand-alone facilities whose purpose is not the education of children, including central office administration or operations or logistical support facilities.

B. Revenue Limits

1. Act 28 sets the per-pupil adjustment under revenue limits at \$200 per pupil in 2009-2010 and 2010-2011. The governor had initially proposed maintaining the current law for these school years, which was estimated to be about \$275 per pupil in 2009-2010.
2. Act 28 also allows increases in revenue limits for energy efficiency measures beginning in 2009-2010 and allows increases in revenue limits for expenditures on school security, transportation and nurses beginning in 2011-2012.

C. Repeal of the Qualified Economic Offer (QEO)

1. Under prior law, the primary difference between support staff (nonprofessional) arbitration and teacher (professional) arbitration was the qualified economic offer (QEO). A QEO was an offer to the professional employees of a school district that amounted to a 3.8% total package increase in wages and benefits in each year of the bargaining agreement. Generally speaking, a valid QEO would:
 - a. Preserve fringe benefits as they existed on the 90th day prior to the expiration of the previous bargaining agreement between the parties;
 - b. Preserve the percentage contribution toward fringe benefits as they existed on the 90th day prior to the expiration of the previous agreement; and
 - c. Provide for a total package increase of at least, but not more than, 3.8%.
2. The QEO offered an advantage to school districts by allowing them to settle all “economic issues” with professional employees without going to interest arbitration. “Economic issues” were defined by statute and included, but were not limited to, salaries, health insurance, overtime, sick leave, vacation, holiday pay, workers compensation, etc. Arbitration was still available for noneconomic issues that qualified as mandatory subjects of bargaining. However, permissive subjects of bargaining did not need to be continued as part of a QEO in order to ensure the QEO’s validity. *Dodgeland Education Association v. WERC*, 240 Wis.2d 287 (2002).

3. The QEO, revenue limits, and two-thirds commitment were implemented in the early 1990s to work in tandem as part of a system for financing K-12 education. An annual increase in the two main sources of operational funding for districts (property taxes and general aids) would be provided under revenue limits, with the state providing an ongoing and significant portion of that increase through general aids under the two-thirds commitment. The QEO was intended to give districts a means to control teacher compensation costs to more easily stay within the revenue limits. The state's two-thirds commitment was repealed in the 2003-05 budget act. *See* LFB Paper #330 (May 26, 2009).
4. Now, with 2009 Wisconsin Act 28, the QEO has been repealed. These changes first apply "to petitions for arbitration that relate to collective bargaining agreements that cover periods beginning on or after July 1, 2009, and that are filed under section 111.70 (4) (cm) 6. of the statutes, as affected by this act, on the effective date of this subsection." Revenue limits, therefore, are the only remaining component of the major modifications to the school finance system that were made in the early 1990s.

D. Repeal of Certain Interest Arbitration Factors For School Districts

1. The statutory factors that an arbitrator may consider when choosing the most reasonable final offer in an interest arbitration proceeding have undergone two significant revisions since their adoption. The pre-1995 statutory factors were as follows:

'Factors considered.' In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall give weight to the following factors:

- a. The lawful authority of the municipal employer.
- b. Stipulations of the parties.
- c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.
- d. Comparison of wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services.

- e. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees generally in public employment in the same community and in comparable communities.
- f. Comparison of the wages, hours and conditions of employment of the municipal employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees in private employment in the same community and in comparable communities.
- g. The average consumer prices for goods and services, commonly known as the cost-of-living.
- h. The overall compensation presently received by the municipal employees, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
- j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

See Wis. Stat. § 111.70(4)(cm)7.(a.-j) (1993-94).

2. In 1995, the Legislature revised the statutory factors considered by arbitrators. The Legislature broke the factors into three categories: (1) factors given greatest weight; (2) factors given greater weight; and (3) factors to be given weight under the old interest arbitration law.

‘Factor given greatest weight.’ In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give the greatest weight to any state law or

directive lawfully issued by a state legislative or administrative officer, body or agency which places limitations on expenditures that may be made or revenues that may be collected by a municipal employer. The arbitrator or arbitration panel shall give an accounting of the consideration of this factor in the arbitrator's or panel's decision. *See*, Wis. Stat. § 111.70(4)(cm)7.

‘Factor given greater weight.’ In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall consider and shall give greater weight to economic conditions in the jurisdiction of the municipal employer than to any of the factors specified in subd. 7r. *See*, Wis. Stat. § 111.70(4)(cm)7g.

‘Other factors considered.’ In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator or arbitration panel shall also give weight to the following factors:

[a. through j. same as above]

See Wis. Stat. § 111.70(4)(cm)7r (a.-j) (1995-96).

3. Under the post-1995 arbitration framework, arbitrators are required to give the “greatest weight” to revenue limits. This means that school boards must present economic data establishing the impact that the revenue limits have on the district. Arbitrators must give “greater weight” to local economic conditions, which can benefit either the school district or the union, depending on the health of the local economy. The pre-1995 criteria remained post-1995; however, they were considered by arbitrators after the greater and greatest weight factors.
4. 2009 Wisconsin Act 28 modifies the statutory factors an arbitrator may consider. These changes first apply “to collective bargaining agreements entered into, extended, modified, or renewed, whichever occurs first, on the effective date of this subsection.” Specifically, under 2009 Wisconsin Act 28, the weight-factor approach is maintained for interest arbitration proceedings relating to all general municipal employees, except school district employees. Thus, Act 28 exempts decisions involving a collective bargaining unit consisting of school district employees from the greatest-weight or greater-weight factors. Only the remaining “other factors” are required as considerations by the arbitrator for interest arbitration proceedings relating to school district employees.

5. Although Act 28 eliminates the requirement that arbitrators give greatest and greater weight to certain factors, it does not necessarily prevent arbitrators from considering such factors as revenue and expenditure limitations and the economic conditions of the community. *See* LFB Paper #331 (May 26, 2009).

III. Effect on Bargaining of Recent Changes

A. QEO Repeal Puts Greater Emphasis On Interest Arbitration Factors

1. With the QEO removed from the equation, school districts have lost some leverage afforded by the QEO and are forced to think in terms of either voluntary settlement or interest arbitration.
 - a. The QEO permitted a school board to hold strong to the proposals to be included in a successor teacher agreement, particularly with respect to its economic proposals. School boards could be resolute in their decision to offer no more than a minimum QEO unless the union agreed to make concessions in exchange for exceeding the minimum QEO.
 - b. School boards must now look closer at whether their offer can be justified in light of the interest arbitration factors.
2. It is important to remember that, even under the QEO law, the school board always had the option to proceed to final and binding interest arbitration.
3. In some cases, a school board would not utilize the QEO because the board was unable to fund it. Circumstances that contributed to the district's inability to fund the QEO included:
 - a. Maintaining mandatory subjects of bargaining during a contract hiatus proved too costly;
 - b. Industry-wide fringe benefit increases;
 - c. Increasing pressure of revenue caps/fiscal limitations;
 - d. Unfunded mandates (No Child Left Behind Act, PI 34, special ed., etc.);
 - e. Rising cost of post-employment benefits, and their accounting (Governmental Accounting Standards Board (GASB));

- f. Continued steady increase in Wisconsin Retirement System (WRS) rates.
4. In certain circumstances, the QEO was not a viable option for school districts because it served as a “safe haven” for the union, because it:
- a. Preserved the salary schedule configuration.
 - b. Preserved benefits.
 - c. Preserved the percentage of district contribution toward benefits.
 - d. Preserved step movement.
 - e. Preserved the status quo with respect to all district policies and practices affecting fringe benefits.
5. The elimination of the QEO puts the emphasis on interest arbitration and puts a premium on research and information. In short, school districts must research and understand the decision-making patterns of the arbitrators to show that their offer is reasonable.
6. Arbitrators may place a greater emphasis on comparability. Because of the greater emphasis on comparability, school districts should:
- a. Identify traditionally comparable districts and compare wages and benefits of both professional and non-professional staff in order to evaluate the strength of the district’s leverage before commencing negotiations.
 - b. Identify other comparables that the district may wish to propose including on the list of external comparables for the purpose of improving the district’s ranking with respect to wages and benefits.
 - c. Coordinate and participate in sharing information across districts and amongst comparables in order to develop a coordinated and consistent strategy to control costs.
 - d. Anticipate that unions may fear that school districts will look to make changes based on comparables.

B. Unions May Now Look To Other Sources of Funding

1. Unions may argue that school districts should look to fund balances to use for settlement purposes. However, districts should be careful in entering into settlements that result in a depletion of fund balances. In *Madison*

Teachers, Inc., (Educational Assistants), Case 271 No. 54438 INT/ARB-8018 (Dichter, 8/97), the arbitrator rejected the union's argument that the district utilize the fund balance to pay the wage and benefit increases advocated by the union's final offer. Arbitrator Dichter concluded that it was inappropriate to use the fund balance for wages and benefits versus a one-time non-recurring expense such as the bonus payment contained in the Madison teachers' bargaining unit final offer.

2. The American Reinvestment and Recovery Act (ARRA), while it does provide stabilization and stimulus funds, is not a continuing source of revenue and should not be utilized in negotiations to fund recurring expenses like teacher salaries or benefits. The use of federal stimulus funds is governed by the conditions of various special education programs and grants. In addition, the reporting requirements and transparency connected to the ARRA funds are clearly in place to ward against districts investing in unsustainable commitments that continue after the expiration of the ARRA funds. Finally, the 2009-2010 equalization aid, even with the additional federal stabilization dollars, is less than the 2008-2009 level and will not be increased for 2010-2011.
3. The elimination of the QEO, decreases in revenue limits, and decreases in school aid may now lead to increases in school district property taxes or referenda. A school district's revenue limit determines the maximum amount, absent an approved referendum, that the school district may raise through the property tax and general aids. In common or union high school districts, any property tax effect would be determined by the electors at the annual meeting.

C. Districts May Look To Alternatives For Salary Schedules and Costing

1. In light of the elimination of the QEO, school districts should assess salary schedules, costing methods, and typical application of cost saving methods to the salary schedule. School districts should design schedules to address revenue concerns and to hire and retain quality teachers.
2. School districts may want to focus more heavily on total salary, rather than total package, or propose creative ways of providing money to everyone on the schedule (even those who are at the top of the schedule), through perhaps adding a step, freezing step movement and applying those funds across-the-board, or paying one-time stipends.

IV. Evaluation of Interest Arbitration Factors

Interest arbitration may be an attractive option at this time, in light of economic conditions in the school district. The elimination of the greatest and greater weight criteria for school district employees means that the remaining factors will be considered by each arbitrator. However, the particular weight the arbitrator gives to any factor will not be decided by statute, but rather by the arbitrator in light of the evidence presented by the parties. Below is an in depth look at each factor in order for districts to evaluate whether interest arbitration is a viable option.

A. **The Lawful Authority of the Municipal Employer.**

1. The statutory criteria requiring arbitrators to examine the lawful authority of the municipal employer “logically and necessarily” authorizes the arbitrator to look to external law to determine the extent of the lawful authority of the municipal employer. While questions relating to an employer’s lawful authority more typically arise in connection with state rather than federal law, there is nothing in the statute to suggest that the legislature intended to restrict that authority. *City of Watertown (Fire)*, Dec. No. 23156-A (Petrie, 6/86) (holding that arbitrators have the authority to hear and decide questions concerning the non-discrimination provisions of the Fair Labor Standards Act).
2. Nevertheless, the factor requiring the arbitrator to consider the lawful authority of the employer has generally been interpreted as referring to the authority of the employer to levy taxes necessary to implement an offer when levy limits are in effect. *Village of Greendale*, Dec. No. 25579-A (Nielsen, 3/89).
3. However, that limitation is not express and the criterion certainly is capable of sustaining a broader interpretation. The mere fact that the arbitrator is able to consider the employer’s lawful authority does not inevitably lead to the conclusion that the arbitrator is the appropriate agent for determining the scope of that authority. *Id.*
 - a. Where the legality of a particular offer is plain on its face, or can be calculated with some certainty, the arbitrator may proceed on the basis of that evident legality or illegality. *Id.*
 - b. Where the issue involves an initial determination of legality or illegality on an arguable point of prohibited practices under MERA, the more appropriate forum for such determination is the WERC. The declaratory ruling process is specifically intended to resolve such questions arising during the bargaining process, and the agency has an expertise in interpreting MERA’s provisions which an individual arbitrator cannot claim. As such, interest

arbitration is not the appropriate forum for litigating arguable questions of illegality under MERA. *Id.*

B. Stipulations of the Parties

1. Arbitrators are precluded from modifying the tentative agreements reached by the parties. Stipulations are individual agreements between the parties over which the arbitrator has no jurisdiction. *Lakeshore Vocational Technical and Adult Education District*, Dec. No. 19085-A (Rothstein, 7/82).
2. However, arbitrators may take into consideration the tentative agreements reached by the parties when evaluating which offer is more reasonable under the statutory criteria. This is particularly true when:
 - a. The tentative agreements represent significant language or benefit concessions on behalf of one party or the other.
 - b. The tentative agreements contain fiscal implications with respect to concessions made by either party in the final offer.

C. The Interests And Welfare Of The Public And The Financial Ability Of The Unit Of Government To Meet The Costs Of Any Proposed Settlement.

1. This criterion requires an arbitrator to consider both the employer's ability to pay either of the offers and the interests and welfare of the public. *Wisconsin Indianhead Technical College*, Dec. No. 32460-A (Grenig, 12/08).
2. The interests and welfare of the public include both the financial burden on the taxpayers and the provision of appropriate municipal services. *Id.*
 - a. The public has an interest in keeping the employer in a competitive position to recruit new employees, to attract competent experienced employees, and to retain valuable employees now serving the employer. *Id.*
 - b. Presumably, the public is interested in having employees who by objective standards and by their own evaluation are treated fairly. What constitutes fair treatment is reflected in the other statutory criteria. *Id.*
3. However, arbitrators are also cognizant of the welfare of the public as it relates to the ability of the taxpayer to fund governmental operations.

- a. The ultimate factor is the weight of the comparability criteria juxtaposed with the weight of the interest and welfare of the public standard. Recognizing the recessionary condition of the state and nation carries added weight in determining which of these offers is more reasonable, the arbitrator reviewed the final offers of the parties, keeping in mind the ability of the public to continue financing the costs of government. *Milwaukee County*, Dec. No. 32241-A (Engmann, 7/08) *citing Cochrane-Fountain City Community School District*, Dec. No. 19771-A (Imes, 1/83).
- b. When unemployment is high and the general economic conditions are tenuous, moderation in pay increases is demanded. *Id.*

D. Internal Comparability

- 1. The mainstream of arbitral opinion is that internal comparables of voluntary settlements should carry heavy weight in arbitration proceedings. *City of New Berlin*, No. 27293-B (Krinsky, 2/93).
 - a. An employer's ability to negotiate to a successful voluntary agreement with other unions, the same terms that it proposes in interest arbitration, is a factor to be accorded significant weight, if not controlling weight. *City of Tomah*, No. 31083-A (Yaeger, 2/05).
 - b. Internal comparability is very important in interest arbitrations. If you can show similar proposals to multiple units, it is more likely that an arbitrator will select your final offer. *City of Marshfield*, Dec. Nos. 30638-A (Dichter, 5/04).
 - c. Interest arbitrators usually find that internal comparables, rather than external comparables, determine the outcome of fringe benefit disputes. *Walworth County Handicapped Children's Board*, Dec. No. 27422-A (Rice 5/93); *Monroe County*, Dec. No. 29593-A (Dichter, 9/99).
 - d. Arbitrators will provide different weight to different comparisons providing the greatest weight to the most similar employees (non-represented / represented; administrative / professional /support; school year / full year, etc.).
- 2. However, internal comparability is not always controlling when there is a compelling justification to support the departure from a settlement pattern.
 - a. Normally, arbitrators give internal patterns of settlement great weight and follow the pattern unless there is good reason to

deviate. This provides stability to the bargaining process and promotes the morale of employees by treating employees equitably. This, however, is not a hard and fast rule. *Polk County*, Dec. No. 32364-A (Torosian, 9/08).

- b. Generally, internal comparability is entitled to significant if not controlling weight when an employer has successfully negotiated the same wage/salary increases with its other units. However, even if one concludes that an internal settlement pattern has been established, it cannot be the case that, therefore, the arbitrator is precluded from considering the union's claim that a catch-up adjustment is warranted. *Milwaukee County (Airport Fire Department)*, Dec. No. 31600-A (Yaeger, 6/07).

E. External Comparability

1. The purpose behind comparing wages, hours, and other conditions of employment in comparable employers is to obtain guidance in determining the pattern of settlements among the comparables, as well as the wage rates paid by these comparable employers for similar work by persons with similar education and experience. *Wisconsin Indianhead Technical College*, Dec. No. 32460-A (Grenig, 12/08).
 - a. External comparables are essential to demonstrate the need for proposed changes. *Trempealeau County*, Dec. No. 30595-A (Honeyman, 11/03).
 - b. In addition, the strength of that comparable support diminishes the extent to which a quid pro quo for a particular change is necessary. *Sauk County*, Dec. No. 29584-A (Vernon, 2/00).
2. Arbitrators will look at the local labor markets when determining an appropriate external comparable group. Typically, the athletic conference has been shown to be an appropriate comparable pool for teachers. However, geographic proximity can play a larger role than athletic conference in support staff comparisons.
3. Arbitrators generally accord significant weight to the ranking of a school district's wages and benefits relative the wages and benefits achieved in comparable school districts. However, rankings are not always determinative.
 - a. Even when the parties' offers result in some change in the benchmark ranking of the district amongst its comparables, such ranking changes should not be given significant weight, particularly, where, the district remains in the mainstream of the

comparable benchmarks. *Wittenberg-Birnamwood School District (Teachers)*, Dec. No. 27299-A (Yaffe, 1/93).

- b. If such changes were not allowed to occur, catch-ups and other legitimate salary schedule adjustments would never be allowed to occur without a spillover effect on comparable district schedules. Such an effect would be both illogical and inequitable. *Id.*
4. In fact, there is substantial arbitral authority for the proposition that even in situations where bargaining units have historically been paid at a low level in relation to similar employees in comparable jurisdictions, where that pattern has been the result of voluntary bargaining, departures from that pattern should not be ordered “absent compelling evidence.” *Jefferson School District*, Dec. No. 27468-A (Briggs, 7/93).
 - a. Each school district bargains agreements with its teachers that reflect the local interests of each party. As a result, some school districts are higher or lower or average. There will be employees who are paid above the average and there will be employees who are paid below the average and there will be employees paid the average. When certain teachers achieve rankings above the average or below the average because of voluntary agreements, they do exactly what free collective bargaining was intended to do. *Slinger School District*, Dec. No. 26757-A (Rice, 7/91).
 - b. Some units fall below the average with respect to salaries as a result of trade-offs they make on insurance or other issues that are important to them and may or may not have an economic impact. The mere fact that the employer’s teachers at some benchmarks are paid less than other teachers with similar experience and training, does not necessarily mean that there is an inequity. When those differentials are the result of voluntary agreements, the arbitrator who did not participate in any of the negotiations should not disrupt the relationships. *Id.*

F. Private Employment Comparables

1. Private sector comparability under this statute requires the arbitrator to note trends, particularly in the payment of benefits. *City of Monona (Fire Department)*, Dec. No. 32036-A (Malamud, 4/08).
2. However, most arbitrators do not accord significant weight to private employment comparables for a variety of reasons, including:

- a. The duties and responsibilities of similarly situated employees in the private sector differ from those in the public sector. *See Monroe County*, Dec. No. 31374-A (Brotzlaw, 12/05).
- b. The pattern of better health insurance benefits for municipal workers versus similarly situated workers in the private sector is general and not specific to a particular bargaining unit. Therefore, this discrepancy in benefits is presumably reflected in the general bargaining among external and internal municipal comparables as well. *Village of Germantown*, Dec. No. 31006-A (Honeyman, 3/05).
- c. Because difficulty in surveying private sector employers in the particular jurisdiction of the municipal employer results in data of poor quality, the veracity of this data is easily attacked. *Id.*

G. CPI – Cost of Living

1. The weight placed on cost of living varies with the state of the economy and the rate of inflation. Generally, in times of high inflation, public sector employees lag the private sector in their economic achievement. Likewise, in periods of time such as we are currently experiencing, public sector employees generally do somewhat better not only with respect to the cost of living rate, but also vis-à-vis the private sector. *Clark County*, Dec. No. 32092-A (McAlpin, 1/08).
2. In addition, the movement in the consumer price index is generally not a true measure of an individual family's cost of living due to the rather rigid nature of the market basket upon which cost of living changes are measured. Therefore, cost of living considerations are best measured by the external comparables and wage increases and wage rates among those external comparables. *Id.*
3. Generally speaking, arbitrators examine the cost of living increases or decreases that occur during the years preceding the effective date of the contract, or in other words, from the period during which the parties were formulating their bargaining proposals. Thus, if the contract duration is for the calendar years of 2007-2008, the arbitrator will examine the cost of living from the calendar years 2006-2007. *See Buffalo County (Highway)*, Dec. No. 32180-A (Krinsky, 3/08).
4. There are two theories employed by arbitrators when it comes to evaluating the cost of living factor in the context of the mediation-arbitration framework. *Buffalo County*, Dec. No. 32181-A (Dichter, 2/08).

- a. One theory requires the arbitrator to use the total package increases as the basis for measuring the increases provided under the parties' final offers by the consumer price index. *Id.*
 - i. This is because the consumer price index is based on a market basket approach in which a number of items are identified, and the increase in the cost of those items is tracked. *Necedah Area School District*, Dec. No. 28259-A (Malamud, 8/95).
 - ii. Therefore, because the increase in medical care and housing as well as food, apparel and transportation are all identified in the increase in the cost of living assessment, a total package comparison is more appropriate. *Id.*
- b. The countervailing theory requires the arbitrator to evaluate the cost of living against only the wage increases offered by both parties in their final offer. *Buffalo County*, supra.
 - i. The theory is premised on the belief that the wage increase insulates the employees against the erosion of the dollar caused by inflation, while the costs to the employer do not. *Vernon County*, Dec. No. 26360-A (Friess, 9/90).
 - ii. Therefore, this theory does not take into account the rising cost of health care, or any non-wage economic issues contained in either final offer, even if the employee is receiving a financial benefit.

H. Total Package

- 1. A number of arbitrators have concluded that the total package cost must be given weight, even when it includes increases in the health insurance premiums.
 - a. It is valid to consider total cost, including the cost of insurance premiums, because it is the cost experienced by the employer as a direct result of a benefit negotiated by the union. *Marion School District*, Dec. No. 19418-A (Vernon, 7/83).
 - b. This cost, like the cost of any other benefit that can be expressed in dollar terms, should be considered when comparing the costs of the final offers of the parties to comparable districts. *Id.*
- 2. Additionally, arbitrators have held that changes in the size of the workforce are not relevant to costing determinations, absent the employer

arguing the ability to pay, because the most significant consideration is the “value” of the improvements actually received by affected employees. *Kenosha Service Employees*, Dec. No. 19882-A (Yaffe, 5/83).

3. When examining the total package costs, arbitrators generally require different costing mechanisms for professional employees than non-professional employees.
 - a. Most arbitrators have excluded the cost of step increases and the cast forward costing method when comparing wage levels and wage increases of non-professional employees. *Waunakee Community School District*, Dec. No. 30305-A (Stern, 9/02).
 - b. However, arbitrators permit the inclusion of step increases and the use of the cast forward method when examining the total package increase of a final offer involving a teacher or other professional employee. Arbitrator Malamud explains the different treatment:
 - i. A teacher salary schedule may have 6 salary lanes and 15 steps on each lane. The result is 90 steps or increments which generate additional income over and above the increase in the base which is to be paid “across the board” to all teacher on the schedule. However, the schedules employed for blue collar workers may contain only four or five steps. The maximum may be achievable in two or three years and the majority of the unit may already be at the maximum rate. *City of Beloit*, Dec. No. 22374-A (Malamud, 11/85).
 - ii. Philosophically, the maximum rate for a non-professional employee is labeled as the rate for the job. Anything which is paid below that rate is considered to be payment less than the rate for the job. Such consideration is given to an employer in light of the time and expense expended in training and orienting a new employee to the tasks of the job. Such considerations do not enter into the establishment of a teacher salary schedule. *Id.*

I. Changes In Circumstances During The Pendency Of The Arbitration Proceedings.

1. This factor requires the arbitrator to examine changes in circumstances that occurred during the arbitration proceedings. These changes may include:

- a. Changes in the law governing the arbitrator process or the legality of the provisions contained in either party's final offer;
 - b. Changes in economic data or the cost of living represented by the consumer price index;
 - c. Voluntary settlements within the district affecting internal comparability; and
 - d. Arbitration awards affecting other units within the district that affect internal comparability.
2. Nevertheless, typically the economic data available at the time the parties should have reached voluntary settlement is given more weight than any changes that occur during the pendency of the arbitration proceedings. *Forest County*, Dec. No. 22061-B (Imes, 8/85).

J. Other Factors -- Quid Pro Quo as a Requirement for Change in Status Quo.

1. Most arbitrators will require less of a quid pro quo for changes that are overwhelming supported by comparables.
2. Some arbitrators believe that the party proposing a change in status quo is required to justify the change and offer a quid pro quo for the change. *See e.g., Middleton-Cross Plains School District*, Dec. No. 28489-A (Malamud, 4/96). Arbitrator Malamud explained that where arbitrators are presented with proposals for a significant change to the status quo, they apply the following factors to determine whether the proposed change should be adopted:
 - a. Has the party proposing the change demonstrated a need for the change?
 - b. If there has been a demonstration of need, has the party proposing the change provided a quid pro quo for the proposed change?
3. Arbitrators require the proponent for a change in the status quo to present clear and convincing evidence to establish that there is a demonstrated need for the change, and the offer includes a quid pro quo for the change.
4. However, if there is a problem that necessitates change, the more the proposal directly addresses and remedies a problem, the less likely an arbitrator is going to require a quid pro quo. *See, Waukesha County (Master Unit)*, Dec. No. 30468-A (Dichter, 5/03).

5. Moreover, with respect to changes in health insurance, a number of arbitrators have concluded that the undisputed economic impact of rising health insurance costs has reduced the employers' burden of establishing a traditional quid pro quo. Arbitrators have recognized that the spiraling costs of providing health care insurance for its current employees is a mutual problem for the employer and the association. *Village of Fox Point*, Dec. No. 30337-A (Petrie, 11/02). As such, in light of the mutuality of the underlying problem, the requisite quid pro quo is somewhat less than would be required to justify a traditional arms-length proposal to eliminate or modify negotiated benefits or advantageous contract language. *Id.*
6. In fact, some arbitrators do not require a quid pro quo for health insurance benefit changes at all. Arbitrators have found that the quid pro quo concept does not prevail where comparables support change. *See Pierce County (Sheriff's Department)*, Dec. No. 28187-A (Friess, 4/95); *Cornell School District*, Dec. No. 27292-B (Zeidler, 11/92). Other arbitrators have concluded that increasing health insurance premiums alone alter the status quo and negate any presumption that the prior contract arrangements for contributions should carry over. *Walworth County Handicapped Children's Education Board*, Dec. No. 27422-A (Rice, 5/93).

V. Strategies Based On Current Fiscal and Legal Environment

A. Consider Changes in Health Insurance / Carriers

1. Explore alternate lower cost plans (self-funded, HMO, PPO).
2. Shift a greater portion of the cost on to the employee/retiree (premium costs, larger deductibles, larger office visit fees and/or increased out-of-pocket limits).
3. Propose new eligibility rules (less benefits for part-time employees, less benefits for school-year support staff, do away with early retirement, raise the retirement age, and/or review spousal coverage for retiree).
4. Eliminate grandfathered benefits.
5. Place a cap on employer-provided benefits (bargain a flat dollar contribution or have both employee and employer share increases when benefit costs increase)
6. Propose a Flexible Spending Account (FSA), Health Savings Account (HSA), or Health Reimbursement Arrangement (HRA), as allowable.
7. In some cases, arbitrators have not required any quid pro quo for changes in health insurance benefits. *See e.g., Pierce County (Sheriff's*

Department), Dec. No. 28187-A (Friess, 4/95) (comparative tests contained in the statutory criteria are sufficient burden of proof for implementation of changes in health insurance premiums through arbitration); *Walworth County Handicapped Children's Education Board*, Dec. No. 27422-A (Rice, 5/93) (rising health insurance premiums alone alter the status quo and negate any presumption that the prior contract arranges for paying health costs should carry over to the successor agreement); *Cornell School District*, Dec. No. 27292-B (Zeidler, 11/92) (where comparables indicate a change may be in order, the concept of quid pro quo does not prevail).

B. Changes To Retirement Benefits.

1. Generally speaking, a collective bargaining provision which provides for compensation or continued insurance benefits after retirement is a mandatory subject of bargaining.
 - a. Retirees are not municipal employees under the Municipal Employment Relations Act (MERA). *City of Milwaukee*, Dec. No. 19091 (WERC, 10/81) (“proposals that have a primary impact on non-bargaining unit members and only indirect impact on unit members are permissive subjects of bargaining.”). However, the Wisconsin Employment Relations Commission has concluded that labor organizations representing municipal employers have the right to bargain over post-employment benefits because they represent active employees who expect to receive such benefits in the future. *Racine County*, Dec. 31378-B (WERC, 2006).
 - b. If a deferred compensation proposal applies only to current employees who retire during the term of the agreement, then the proposal is a mandatory subject of bargaining even though the employer’s obligation to such individuals would begin only at the time of the individuals’ retirement. *Random Lake School District*, Dec. No. 29998-B, -C (WERC 2001). A “deferred compensation proposal” includes a proposal that would provide for employer-paid health insurance benefits upon retirement. *Id.*
2. It is presumed that retirement benefits vest at the time of the employees’ retirement and that such benefits cannot be reduced, modified or eliminated through subsequent bargaining. However, if the language of the collective bargaining agreement under which the employee retires expressly reserves unto the school district the right to reduce, modify or eliminate retirement benefits, then the school district will be able to do so. Where the contract language does not address this issue, the parties will be forced to rely upon extrinsic evidence, such as bargaining history or past practice in order to justify the reduction, modification, or elimination of

retirement benefits. *Roth v. City of Glendale*, 2000 WI 100, 237 Wis. 2d 173, 614 N.W.2d 467.

3. However, employers may modify their existing retirement benefit policies for current employees that have not yet retired. The Wisconsin Supreme Court recently held that an employee did not have a contractual right to free health insurance under the City's collective bargaining agreement, despite completing the requisite years of service required by the agreement before the agreement was modified to include a retiree premium contribution. The Court held that, in addition to the requirement that the employee complete fifteen years of service, the agreement required the employee to be between sixty and sixty-five years of age and have retired. Therefore, because the agreement was modified to include a shared premium before the employee retired and before the employee reached the age of sixty, the employee was not entitled to free health insurance, despite completing the requisite years of service. *Loth v. City of Milwaukee*, 2008 WI 129, 758 N.W.2d 766.
4. Individual bargaining is defined as negotiations that occur between an employer and an employee. *St. Croix County*, Dec. No. 28791-A (Crowley, 5/97). Under Wis. Stat. § 111.70 (1)(a), an employer is obligated to bargain wages, hours and conditions of employment with the representatives of the collective bargaining unit. Pursuant to Wis. Stat. § 111.70(3)(a)4, it is a violation of law for a municipal employer to find a way around the representatives in order to obtain or negotiate a contract directly with individual employees. However, once an employee has retired, an employer may bargain freely with retirees; unions are not the exclusive bargaining representative for retirees. *Rossetto v. Pabst Brewing Co., Inc.*, 128 F.3d 538 (7th Cir. 1997).
5. The Wisconsin Supreme Court has agreed that the term "retirement" implies that one will stop working and not trade a present position for a similar one elsewhere. *Chapman v. Board of Education of the School District of the Menomonie Area*, Unpub. Court of Appeals Decision (August 10, 2004). When an individual leaves the employ of the school district, it is important to know whether the individual is *resigning* or *retiring*, especially when benefits are at stake.
6. Generally, health insurance benefits provided to retirees, which are reduced solely on age, violate the age discrimination statutes. The U.S. Supreme Court expanded the scope of the ADA, holding that plaintiffs could establish age discrimination by showing that a practice had a "disparate impact" on older workers. *Smith v. City of Jackson*, No. 03-1160 (March 30, 2005). The Court limited disparate impact claims to cases in which a specific employment practice (1) has a disparate, adverse impact on older workers as a group and (2) is not supported or based on a

reasonable factor other than age. For example, a retirement provision providing retirement benefits for five years to the age of 65, whichever comes first has a disparate impact on older workers because employees who retire at age 63 get less benefit than those retiring at age 60.

C. Recognition and Benefits Clauses.

1. School districts may be able to eliminate positions and still meet specific needs for services, by utilizing temporary, interim or seasonal employees. In doing so, school districts may also experience financial savings in the form of reduced wage and benefits costs, because many recognition clauses provide that such employees are not members of the bargaining unit.
2. School districts may also be able to minimize wage and benefit costs by remaining cognizant of minimum hour requirements found in recognition and benefits clauses when scheduling employees. For example, many recognition clauses specify that employees who regularly work less than 10 hours per week are not included in the bargaining unit. Similarly, under some contracts employees are not entitled to health insurance benefits unless they regularly work at least 35 hours per week.

D. Consider Subcontracting

1. Generally, subcontracting has been found to be a mandatory subject of bargaining. The Wisconsin Employment Relations Commission utilizes the “primary relationship” test in determining whether a subject is mandatory or permissive. Under MERA, the decision to substitute private employees for public employees is found to be a mandatory subject of bargaining if the decision to subcontract is primarily motivated by cost, because cost is more directly related to wages, hours, and conditions of employment than to public policy matters or social-political objectives. If the employees’ legitimate interest in wages, hours, and conditions of employment outweighs the employer’s concerns about restrictions on managerial prerogatives or public policy, the proposal is a mandatory subject of bargaining.
2. Conversely, where the employer’s management and direction or formulation of public policy predominates, the matter is not a mandatory subject of collective bargaining. *Brown County v. WERC*, 138 Wis.2d 254 (1987).
3. Where the governmental or policy dimensions of a decision predominate, the matter is properly reserved to decision by the representatives of the people. Where a decision merely substituted private employees for public employees, where the same work was performed in the same place and in

the same manner and did not “represent a choice among alternative social or political goals or values,” the decision to subcontract was a mandatory subject of bargaining. *Unified School District No.1, Racine County v. WERC*, 81 Wis.2d 89 (1977).

4. In most cases, when a school district and a union are unable to reach a voluntary settlement concerning a mandatory subject of bargaining, the method for resolving the dispute is for the parties to proceed to final and binding interest arbitration. *Wausaukee School District.*, Dec. No. 32479-A (Schiavoni, 2009) (the arbitrator selected the District’s final offer, which included a new provision that would allow the District to subcontract bussing services under certain circumstances).
 - a. However, the WERC has held that, when the parties have bargained to impasse over a mandatory subject of bargaining, a municipal employer may unilaterally implement the proposed change in the mandatory subject of bargaining, if the matter is not subject to interest arbitration and, generally, interest arbitration is not available for disputes which arise during the term of a collective bargaining agreement.
 - b. As such, in situations where the issue of subcontracting has not been previously addressed in the collective bargaining agreement, school districts have historically waited to raise the issue of subcontracting to the union until a new collective bargaining agreement is in place and a contract hiatus is in the distant future. This way, the school district had the option of unilaterally implementing the decision to subcontract, if the parties bargaining resulted in impasse. This option may now be complicated by the *Washington County* case discussed below.
5. The WERC recently considered the obligations of a municipal employer in the context of bargaining when Washington County, which operates the Samaritan Health Center (Samaritan), decided to pursue the subcontracting of housekeeping services. *Washington County*, Dec. 32185-B (WERC, 1/09).
 - a. During the fall of 2006, the County had been engaged in negotiations with the Service Employees International Union Local 150 (Union), which serves as the exclusive bargaining representative for many Samaritan employees. The parties had been bargaining over the terms for a successor to the collective bargaining agreement, which was set to expire on December 31, 2006. In January 2007, the parties ratified the new collective bargaining agreement, which covered the period of January 1, 2007, through December 31, 2008.

- b. The newly ratified collective bargaining agreement retained a Management Rights clause that included the explicit “right to contract out for goods or services,” as long as the right was not used for the purpose of discrediting or weakening the Union. Further, the collective bargaining agreement retained a layoff clause, which referenced explicitly what would happen if the County deemed it necessary to contract out the operation of Samaritan. Based on these provisions, the County believed it had the right to subcontract all or part of its workforce for the purpose of saving money.
- c. In April 2007, a committee of Samaritan management employees finalized a Request for Proposals (RFP) to subcontract the housekeeping and custodial work at the facility. In June 2007, the County reviewed the responses it received to the RFP and selected a bid from BSG Maintenance of Green Bay, Inc. (BSG), which projected significant savings for Samaritan in labor costs. On June 8, 2007, the County issued layoff notices to 18 employees whose positions were eliminated effective August 1, 2007, as a result of the County’s contract with BSG.
- d. In May 2007, the Union filed a grievance alleging that the County’s intention to subcontract housekeeping, laundry and/or custodial services would violate various provisions of the collective bargaining agreement. The arbitrator denied the grievance, concluding that the collective bargaining agreement permitted the County to contract out the bargaining unit work at issue.
- e. On July 2, 2007, the Union also filed a prohibited practice complaint with the WERC alleging that the County violated its duty to bargain in good faith. The WERC held that the County failed to bargain in good faith with the Union during negotiations for the 2007-2008 collective bargaining agreement because the County failed to disclose that it was seriously considering subcontracting while the parties were negotiating that successor agreement.
- f. The WERC explained that the County must bargain in good faith with the Union over both the decision and the impact of subcontracting bargaining unit work. The decision to subcontract is a mandatory subject of bargaining in that it primarily relates to working conditions because it was a decision based on cost.

- g. According to the WERC, the County could not lawfully take unilateral action to subcontract housekeeping, laundry and/or custodial services because to do so undermined the Union's right to meaningful negotiations and defeated the basic purpose of MERA. As such, the County had a duty to notify the Union that it intended to take action to subcontract those services and offer the Union the opportunity to negotiate beforehand.

VI. **Other Recent Legislative Changes Affecting Bargaining**

A. **Longer Durations for Collective Bargaining Agreements in School Districts**

1. Under prior law, the duration of collective bargaining agreements between school districts and their professional teaching staff was required to be a two-year duration, from July 1 of each odd-numbered year through June 30 of the ensuing odd-numbered year. However, collective bargaining agreements covering other municipal employees, if mutually agreed to, could be up to three years.
2. 2009 Wisconsin Act 28 made changes to the duration of collective bargaining agreements between school districts and their employees. Specifically, Act 28 now provides that contracts for school district employees may be up to four years. These changes first apply "to collective bargaining agreements entered into, extended, modified, or renewed, whichever occurs first, on the effective date of this subsection."
3. Except for the initial collective bargaining agreement between the parties, where parties have not agreed upon the term of the agreement as a part of the stipulation of agreed upon terms, final offers must provide for a term of agreement of two years. Wis. Admin. Code § ERC 32.10.
4. **Impact on Bargaining:** Certainly, under prior WERC law, school districts had the option to enter into two two-year agreements, which some have followed in recent years. However, now, school boards can enter into agreements for up to four years pursuant to state law. School boards may be able to negotiate significant changes in health insurance or retirement benefits in order to obtain a multiple year contract. However, there are certain risks associated with multiple year agreements, especially considering the unknown nature of revenue limits, school aid, and pupil enrollments for future years, and therefore, any long-term agreements are generally inadvisable.

B. **Ability to Combine Bargaining Units Inside (and Outside) of the District**

1. Under prior law, a collective bargaining unit was defined under the Municipal Employment Relations Act (MERA) as a unit consisting of

municipal employees who are school district professional employees or of municipal employees who are not school district professional employees that is determined by the Wisconsin Employment Relations Commission (WERC) to be appropriate for the purpose of collective bargaining. Further, MERA prohibited the WERC from deciding that any group of municipal employees constitutes an appropriate collective bargaining unit if the group included both municipal employees who are school district professional employees and municipal employees who are not school district professional employees. Thus, school district professional employees and nonprofessional, educational support personnel employees were, by law, required to be organized into separate collective bargaining units. *See* LFB Paper #331 (May 26, 2009).

2. 2009 Wisconsin Act 28 changes the law in two respects. These changes first apply “to collective bargaining agreements entered into, extended, modified, or renewed, whichever occurs first, on the effective date of this subsection.”
 - a. First, it provides that professional and nonprofessional employees of a school district could be combined into a single collective bargaining unit if a majority of the professional employees vote for inclusion. This conforms the treatment of school district employees with the current law treatment of other municipal employees. The provision also returns the treatment of school district employees to the pre-QEO law provisions relating to such combinations.
 - b. Second, the Act requires the WERC to combine two or more collective bargaining units consisting of school district employees into a single unit if a majority of the employees voting in each unit vote to combine upon the expiration of any collective bargaining agreement. This provision does not have precedent in current law for other municipal workers or in pre-QEO law. The provision would allow the combining into a single collective bargaining unit of school district employees working for different school districts.
3. **Impact on Bargaining:** For now, such bargaining units are a new creature under MERA, and, therefore, there are many unknowns related to the formation of such units. Bargaining units consisting of various constituencies may complicate and prolong bargaining and may result in added costs for school boards. As a result, school districts should be cautious in forming such bargaining units.

Governor Doyle recently announced that he would like to see the state cut down the number of contracts (from 425 to possibly 100) and to see school districts work with other surrounding districts to form bargaining

groups of at least 500 members. In exchange, school districts could get relief from the restrictive impact of state revenue caps, based on possible future legislative reforms. Governor Doyle stated that these future reforms could possibly come in the form of a legislative proposal this fall.

C. Domestic Partnership

1. Act 28 modifies a number of existing laws in order to establish rights for domestic partners.
2. In particular, the Act extends spousal rights under Chapter 40 to domestic partners. Chapter 40 of the statutes governs the administration of the Wisconsin Retirement System (WRS), which includes nearly all public employees in the state except employees of Milwaukee County and the City of Milwaukee, which operate separate retirement systems. Chapter 40 also authorizes various benefit programs, primarily applicable to state employees, including health insurance coverage. Under these Chapter 40 provisions, spouses are provided with a legal status and a range of beneficiary rights pertaining to retirement benefits and other benefit programs.
3. The Act now extends these spousal rights to domestic partners, and the Act provides a definition of “domestic partner” and a “domestic partnership” in Chapter 40. Both same-sex and opposite-sex partners would be covered under the definition provided in the bill. Under Wis. Stat. § 40.02(21c) and (21d), the two individuals must satisfy all of the following criteria: (1) each individual is at least 18 years old and otherwise competent to enter into a contract; (2) neither individual is married to, or in a domestic partnership, with another individual; (3) the two individuals are not related by blood in any way that would prohibit marriage under Wis. Stat. § 765.03; (4) the two individuals consider themselves to be members of each other’s immediate family; (5) the two individuals agree to be responsible for each other’s basic living expenses; and (6) the two individuals share a common residence. Such domestic partners began to be recognized on June 30, 2009.
4. The Act also creates new requirements for the establishment of same-sex domestic partnerships under Chapter 770 of the statutes to provide domestic partners with certain rights and benefits that parallel some of the rights and benefits provided to spouses under current law. Under Wis. Stat. ch. 770, the two individuals must register with the Register of Deeds for the county in which they reside and certify as follows: (1) each individual is at least 18 years old and capable of consenting to the domestic partnership; (2) neither individual is married to, or in a domestic partnership with, another individual; (3) the two individuals share a common residence; (4) the two individuals are not nearer in kin to each

other than second cousins, whether of the whole or half blood or by adoption; and (5) the two individuals are of the same sex. Each county's Register of Deeds began accepting domestic partnership registrations on August 3, 2009.

5. As a result of Act 28, protected leave under the Wisconsin Family and Medical Leave Act (WFMLA) has now been extended to domestic partners. Prior to June 30, 2009, an eligible employee could take WFMLA leave to care for the employee's child, spouse, or parent with a serious health condition. The statute defines a spouse as the "employee's legal husband or wife." As a result of Act 28, effective June 30, 2009, an eligible employee may now take leave to care for his or her domestic partner.
6. **Impact on Bargaining:** Covered employers should review existing policies and collective bargaining agreement provisions to ensure compliance with the new rights for domestic partners established by Act 28. School districts should also anticipate discussion items or proposals from unions to discuss the impact of Act 28 domestic partner rights on collective bargaining agreements.

D. Preparation Time

1. Another new law, 2009 Wisconsin Act 34, also impacts school district bargaining. Effective with collective bargaining agreements that cover any period that begins after June 30, 2011, school districts will be required to bargain collectively with respect to preparation time, that is, time spent during the school day, separate from pupil contact time, to prepare lessons, labs, or educational materials, to confer or collaborate with other staff, or to complete administrative duties.
2. **Impact on Bargaining:** This is a dramatic change under the current law, and school boards may be interested in eliminating such language or other permissive language if it hinders management rights. Some union bargaining representatives have stated that, in light of the current personnel serving on the WERC, they may be willing to challenge the permissive nature of language, even if it has been established as permissive under prior WERC case law.

E. Maintenance of Arbitration and Fair Share During Contract Hiatus

1. 2009 Wisconsin Act 21 provides that it is a prohibited practice under MERA for a municipal employer, after a collective bargaining agreement expires and before another collective bargaining agreement takes effect, to fail to follow any grievance arbitration agreement or fair-share agreement in the expired collective bargaining agreement. The Act also provides that

it is a prohibited practice under MERA for a municipal employee, after a collective bargaining agreement expires and before another collective bargaining agreement takes effect, to fail to follow any grievance arbitration agreement in the expired collective bargaining agreement. The Act took effect on June 23, 2009.

2. **Impact on Bargaining:** After a collective bargaining agreement expires and before another collective bargaining agreement takes effect, school districts must be aware that they must follow any grievance arbitration agreement or fair-share agreement in the expired collective bargaining agreement. School districts must also be aware of its legal obligation to maintain any dynamic status quo with respect to any practices or mandatory subjects of bargaining following the expiration of the collective bargaining agreement. However, certain practices can be eliminated during the contract hiatus, and school districts may be interested in repudiating any practices that hinder management rights.

F. Wisconsin Retirement System Increase

1. On June 19, 2009, the Department of Employee Trust Funds (ETF) announced that, for 2010, Wisconsin Retirement System (WRS) employer and employee contribution rates will increase from 10.4% of payroll to 11%. The rate increases, expressed as a percentage of salary, go into effect for salaries and wages paid beginning January 1, 2010. According to the ETF, the increases in contribution rates for 2010 are a direct result of investment declines in 2008, brought about by the global economic crisis.
2. The Wisconsin Association of School Boards (WASB) has also informed school districts that they should anticipate that WRS rates should continue to rise for the next several years, considering a presentation to the ETF Board prior to the release of the 2010 increase. During the presentation, it indicated that there would be a strong upward pressure on contribution rates over the next four years. WASB anticipates increases annually from 0.8% to 1.0% over the next three or four years.
3. **Impact on Bargaining:** School districts should be aware of these potential increases and factor these increases into the costs related to future bargains.