



## *School Law FYI*

# ***Bargaining Reminders and Issues in the Era of 4.70% CPI Increase***

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*This article was updated on 2/13/2022 to clarify and expound on the implications of this topic for school districts.*

Those of you who have collective bargaining agreements covering some of your employees (those bargaining representatives (unions) that were recertified in the fall 2021 elections conducted by the Wisconsin Employment Relations Commission (WERC)) are likely struggling with the prospect of bargaining “total base wage increases” in the face of the most recent Department of Revenue certified Consumer Price Index (CPI) increase of 4.70% for contracts beginning July 1, 2022. Even if you don’t have a collective bargaining agreement and any duty to bargain, this CPI number and the recent inflationary pressures will certainly be something all districts will have to contend with when it comes to wage increases for existing or new staff. Since Act 10 was passed in 2011, the CPI increases have ranged from a low of 0.12% up to 3.16% (and that was back in July of 2012). Many districts have been accustomed to CPI increases of 1 – 2% which are much more manageable from a budgeting standpoint. And bargaining was somewhat of a formality – sometimes taking one meeting lasting not more than 20 – 30 minutes. Some districts may have also gotten sloppy in their procedures. This year is likely to be different.

This article will provide you some reminders for those who are beginning bargaining and discuss some issues that could present themselves in an inflationary

environment.

### **Duty To Bargain Over Base Wages Only**

School boards are restricted to only bargain over the amount of total base wage increases of bargaining unit employees, as well as the distribution thereof. The total base wages for each bargaining unit will be calculated using the “snap shot date” of January 1 of the calendar year in which the collective bargaining agreement will be effective (e.g., January 1, 2022, for a contract covering the 2022 – 2023 school year). The parties should use the same method of calculating base wages as they used previously. Unless approved by a referendum, the law prohibits bargaining an increase in the total base wages that exceeds 4.70% for collective bargaining agreements effective July 1, 2022. There is no requirement that districts pay the maximum CPI limit. Boards can bargain for and pay less than the CPI cap.

School boards also have flexibility regarding bargaining distribution. Distribution does not have to be an across the board percentage or an across the board fixed dollar amount. Distribution can favor a group of employees or even specific employees.

### **Statutory Notices Regarding Collective Bargaining**

The parties must notify the WERC of the commencement of negotiations on a WERC form (<http://werc.wi.gov/doaroot/werc-08.pdf>). Notice must also be given to the public and news media of the re-opening of collective bargaining agreements that complies with the requirements of the Open Meetings Law. See Wis. Stats. §§ 19.86 and 19.84(1)(b).

Presentation of initial bargaining proposals, along with supporting rationale, must be presented at an open meeting which has been posted pursuant to Wis. Stat. § 111.70(4)(cm)2. Initial proposals must be in writing. In many cases, both parties will make their initial proposals at the same meeting. However, initial proposals can also be made at separate meetings. In those situations, frequently the union would present its proposal at one meeting and the district would present its proposal at the next meeting. Both meetings needs to be properly noticed and conducted under Wis. Stat. § 111.70(4)(cm)2.

After the initial meeting(s), the Open Meetings Law does not apply to a school board or a committee which is formed for or meeting for the purposes of collective bargaining. See Wis. Stat. § 19.82(1). Negotiations shall be conducted in closed session if either party requests to do so. Despite the fact the Open Meetings Law

does not apply to negotiation sessions, the Attorney General has recommended that the parties post such notices anyway.

## **Mechanics Of Bargaining**

Each party is free to designate almost anyone it wants as a bargaining representative. The board cannot object to a member of the union's negotiation committee and vice versa. Negotiators for each side must have meaningful authority to negotiate (although not necessarily authority to make a final decision on behalf of the party they represent).

In many situations, negotiating committees decide to have a single spokesperson at a bargaining session and agree to have only that person speak at the bargaining table. If other members of the committee have questions or concerns about what has been said or what can be said, the person should let the spokesperson know of the desire for a caucus (a meeting held separately and confidentially away from the other side to discuss strategy). Either side can request a caucus at any time and you can have more than one caucus during a single negotiation session. The negotiating committee should decide whether they are comfortable having someone else attempt to answer any questions that may be directed at the bargaining committee. The negotiating committee should work to present a unified front.

Discussions of the negotiating committee and the board regarding bargaining strategy is confidential and should not be discussed with anyone else, other than legal counsel for the board. This includes spouses and family members. Spouses and family members do not have a fiduciary duty to maintain confidentiality, so no information should be shared with them from any closed session, including negotiation strategy discussion.

All proposals and counter-proposals should be made in writing. This is especially true at the stage at which they are tentatively agreed upon. If you orally agree to something, it is just as though you agreed to it in writing. In the course of negotiations you should only tentatively agree on a provision subject to agreement on an entire contract. In other words, don't communicate tentative agreement on the percentage of increase in the total base wages unless and until you also have an agreement on its distribution.

Make the union aware that any tentative agreement reached by the two negotiating committees must be ratified by the full board. The union will also likely inform you that any agreement reached needs to be ratified by the membership. It is common, although not required, that the union membership approve the tentative agreement prior to the school board considering doing so.

## **Discussions Outside Of Negotiations**

You may not bypass the union negotiators in an attempt to negotiate directly with employees. You may also not attempt to undermine the union by your communications with employees. However, if you are concerned that the union negotiating committee may not be providing full or accurate information to the bargaining unit employees, you can provide your employees with information regarding what has gone on in negotiations. This is particularly true with information that is given in response to employee questions. You may wish to consult with your attorney before making any such communications to employees, however.

## **Supplemental Pay**

Many districts have developed compensation plans which may involve a component of total base wages and other components of supplemental pay. Just because the CPI is 4.70% for contracts starting July 1, 2022, does not mean that districts need to abandon these compensation plans. The parties can still agree to a smaller amount as the total base wage increase and put any additional compensation as supplemental pay. Districts can also pay any individual employee an amount the board decides is appropriate without regard to the CPI cap (including more than 4.70%). The only restriction is the total base wage increase for the overall bargaining unit cannot exceed the CPI cap. And districts can pay more than a total wage increase of 4.70%, but it just needs to be done as supplemental pay.

Given the low CPI rates over the last few years, supplemental pay was usually the portion of the pay above the CPI increase. But there is no requirement that continue. As a reminder, general discussions concerning supplemental pay or alternative compensation models must be conducted in open session and are usually conducted with a broader range of stakeholders, including certified bargaining representatives. However, discussions regarding specific supplemental pay to individual employees may be discussed in closed session. Also, only those portions of supplemental pay or alternative compensation models that affect base wage bargaining can be discussed in closed session with the union. Finally, the parties may not condition agreement on a total base wage increase or the distribution thereof upon agreement on a particular supplemental pay or alternative compensation model.

## **Meet And Confer**

Any topics the parties want to discuss other than base wages is a prohibited subject of bargaining under the current statutes. The law does not prevent the parties from discussing other topics (such as health insurance or COVID safety issues including

masking or isolation policies), but this must be done in the context of a meet and confer session. Those meet and confer sessions should be noticed separately and conducted separately. The meetings can be on the same night or back-to-back. However, there should just be a distinct end of one meeting and beginning of the next.

### **Final Agreements and Ratification**

If an agreement is reached with respect to total base wage increase and the distribution thereof, the agreement should be reduced to writing and ratified by both parties and signed as a collective bargaining agreement.

### **Implementation**

It is possible the parties may not reach an agreement on total base wages or their distribution. Both parties have an obligation to bargain in good faith, which means approaching bargaining with an open mind and making a sincere effort to try and settle their differences.

The board should not have a “take-it-or-leave-it” approach on any issue related to base wage increases and distribution. Rather, it should approach bargaining willing to listen and seriously discuss any proposal the union makes on base wage increases and distribution. Any position the board takes with respect to its own proposals should be based on provable facts or a legitimate reason.

Because Act 10 limits the subjects of bargaining to base wage increases and the distribution thereof, bargaining generally takes less time than it used to, but you still must be mindful of discussing and responding to proposals. You must meet with reasonable frequency and for reasonable periods of time. What is considered reasonable depends on the circumstances, but generally you should promptly respond to a request to bargain and offer dates and times you are available. You must meet for a reasonable length of time, but you do not have to agree to marathon bargaining. In recent years, bargaining sometimes could be accomplished within a matter of minutes and sometimes did not require more than one meeting. Given the CPI increase for this round negotiations, it is likely that negotiations may not be concluded as quickly and may require multiple sessions.

If after a reasonable attempt to reach agreement is made, and you cannot reach an agreement, the board may implement its final offer with respect to base wages and the distribution thereof. Before implementing a proposal, however, the board should declare there is an impasse and attempt to have the union agree that the parties are at impasse. Parties may voluntarily seek mediation if they are at impasse, but

mediation is not required for impasse determination or prior to the board implementing its final proposal. Before implementing a final proposal, a district may wish to consult legal counsel as impasse is a term of art in labor law and involves a specific process.

If a board implements its final offer, it does not have a collective bargaining agreement for that affected year. Rather, the parties would be operating from an implemented proposal and the implemented proposal is what would generate the operative numbers when you begin negotiations for the next contract period.

### **Budget Considerations**

Given the high CPI numbers, it is likely that any negotiations you have with a certified collective bargaining representative will have an impact on wage increases for other staff. In addition, the scarcity of employees in many positions (bus drivers, certain teaching positions, substitutes) will likely strain districts' budgets this year beyond the normal strain that you have been experiencing. Districts should also be cautious in allocating certain amounts of money to alternative compensation plans since doing so could undercut your position that you are bargaining in good faith over total base wages.

### **Conclusion**

Even though Act 10 simplified collective bargaining in many respects, the high CPI number this year will make negotiations more interesting and likely more difficult. School boards should make sure they are complying with the legal requirements regarding notices and the topics they may legally discuss in negotiations. Boards should also be prepared to consider unilateral implementation, if necessary.

If you have any questions regarding your bargaining obligations or the mechanics of bargaining, please feel free to reach out to a Boardman Clark attorney who can assist you with these issues.

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