



School Law FYI

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COVID-19 and Individual Teacher Contracts

During the last several weeks, Wisconsin school administrators have been considering many employment issues impacted by COVID-19. One of these employment issues relates to the renewal and nonrenewal of teacher contracts, which is an issue governed by statutes that have April, May, and June deadlines. This article will address this topic and address some of the issues that must be considered in light of COVID-19.

RENEWAL OR NONRENEWAL OF THE CONTRACT

Wisconsin Statute § 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 be attached. In general, these contracts are one-year contracts.

Wisconsin Statute § 118.22 sets forth the procedures that a school board must follow to renew or nonrenew a full-time teacher's contract for the ensuing school year. This statute, however, can also apply to a part-time teacher's contract, if the school board has incorporated this statute into the part-time teacher's contract (either within the contract itself, board policy, or employee handbook). As a result, for part-time teachers, school officials will want to review these provisions to determine whether the statute will apply to part-time teachers.

Under Wis. Stat. § 118.22, full-time teacher contracts automatically renew pursuant to statute, unless the school board takes action to prevent the renewal. The board must be careful to follow all statutory, contractual, handbook, and policy requirements that may be applicable to any such renewal or nonrenewal of the contract.

- Under Wis. Stat. § 118.22, in order to nonrenew a contract for the 2020-2021 school year, the board must inform the teacher by written notice of preliminary consideration of nonrenewal of the contract **by Thursday, April 30, 2020**, and give the teacher final written notice of refusal to renew the contract for the ensuing school year on or before **Friday, May 15, 2020**. The statute also sets forth the right for a teacher to request a private conference with the school board after receiving any preliminary notice. As a result, school boards typically take action on such a preliminary notice in early or mid-April in order to allow time for a private conference, if requested, to be conducted prior to final board action and issuance of final notice of nonrenewal.
- If a school board intends to renew a contract for the 2020-2021 school year, a school board must still consider the requirements under Wis. Stat. § 118.22. The statute requires that the board give written notice of renewal to the teacher on or before Friday, May 15, 2020. A teacher who receives a notice of renewal of contract, or a teacher who does not receive a notice of renewal or refusal to renew the teacher's contract, must accept or reject in writing such contract not later than **Monday, June 15, 2020**.
- The parties will likely not be able to delay these deadlines. The teacher nonrenewal statute formerly

authorized districts to agree to modify or waive any of the provisions of the statute. However, this part of the statute was repealed. Thus, boards must avoid agreeing to any change in the deadlines.

It is important to note that nothing in the law requires the board to issue the actual individual teacher contract to the teacher before the start of the 2020-2021 school year. However, the above procedure certainly contemplates that the terms of the contract will be determined during the spring of the 2019-2020 school year.

REDUCTION OF STAFF

In general, school boards must meet the nonrenewal deadlines of Wis. Stat. § 118.22 for any full-time teacher that it believes may be subject to reduction. Of course, school boards should review their individual contract, handbook, and board policy and should consult legal counsel to determine whether the nonrenewal procedure should be used for any reductions in staff. Boards must also take any actions with enough lead time so that the preliminary notice of consideration of nonrenewal can be in the teacher's hand by April 30.

SPECIAL COVID-19 CONSIDERATIONS

Notice. Wisconsin Statute § 118.22 states that the board must “inform” the teacher of a preliminary notice in writing. It also states that the board must “give” the teacher written notice of renewal or refusal to renew the teacher's contract for the ensuing school year. However, the statute does not identify any specific method (e.g., certified mail, etc.) by which such notices must be provided to the teacher.

The board must take action on any notice. Also, the notice must be from the board, although the board can delegate authority to an administrator to provide the notice to the teacher. The best practice (particularly for any preliminary notice or final notice of nonrenewal) is for an administrator to hand deliver any notice and have a copy signed and dated by the teacher to confirm receipt. In general, school officials can require a teacher to meet with them to deliver this notice. If hand delivery is not feasible at this time, alternative methods may be to send the notice by either email (return receipt requested) to a home or work email address and/or by certified mail to the teacher's home address (in addition to mailing a copy by first class mail in case a teacher does not sign for receipt of the certified mail). School districts should consult their legal counsel for special situations.

Board Meeting. Wisconsin Statute § 118.22 states that “no teacher may be employed or dismissed except by a majority of the full membership of the board.” Thus, the statute likely requires that the decision not to renew a contract be made by a majority vote of the full membership of the school board. Therefore, for a seven-member board, four members must vote in favor of any such decision to renew or nonrenew a contract, not just the majority of a quorum of the board.

During this time, board members may be questioning whether they need to be physically present at a meeting in order to vote on such notices. In this respect, school boards should note the recent March 24, 2020, Safer at Home Order. This Order reaffirmed that school districts should continue to follow the Wisconsin Department of Justice's Office of Open Government guidance regarding holding government meetings and should consult directly with that office regarding specific open meetings questions. The Order also provided the following link to DOJ guidance: <https://www.doj.state.wi.us/news-releases/office-open-government-advisory-additional-information-regarding-covid-19-and-open> Our firm also provided guidance: <https://www.boardmanclark.com/assets/newsletters/mar182020.pdf>

Based on the guidance above, boards likely do not all need to be physically present for such a meeting, and any board should consider this guidance when deciding whether to meet using other means. If members are not present and are instead participating in the meeting by other virtual means, the board still must meet the overall requirement that any action to renew or nonrenew must occur by a vote of a majority of the full membership. To assure compliance, any such action should be by roll call vote.

Private Conference. Wisconsin Statute § 118.22 states that, after receiving the preliminary notice of consideration of nonrenewal, the teacher has a right to a private conference with the board. This private conference must be afforded to the teacher prior to the teacher being given final written notice of refusal to renew the teacher's contract. The board must inform the teacher of this right to a private conference when it informs the teacher of the preliminary notice of consideration of nonrenewal and must inform the teacher that the private conference will be provided if the teacher files a request with the board within five days after receiving the preliminary notice.

Because of the circumstances surrounding school closure with COVID-19, it is advisable for the board, when providing any preliminary notice to the teacher, to inform the teacher how exactly the teacher should file a request for a private conference. If such a request should be provided to the district administrator, then that should be specified in the preliminary notice, along with how such a request should be sent (e.g., by email or by other means).

Also, if a teacher files a request for a private conference, it is important for any school board to remember that such a private conference is a "meeting" of the board, and therefore, subject to the Open Meetings Law. The purpose of the private nonrenewal conference is to afford the teacher the ability to meet with the board and to provide facts and arguments bearing on the board's decision whether to go through with the contemplated nonrenewal. As a result, it is important for the board to hold such private conferences in a way that affords the teacher the opportunity to sufficiently present such facts and arguments and to effectively allow board members to objectively consider such facts and arguments.

The structure of such meetings depends on many factors, including any standards that are applicable to such a nonrenewal as set forth in board policy, employee handbook, teacher handbook, or district grievance procedure. In addition, the structure will be influenced by the recent Safer at Home Order. The board should also consider whether the teacher has the right to have a representative at the private conference, and it should also consider whether to permit the district administrator or any other administrators to attend the private conference. A board should also consider whether any constitutional due process requirements must be met during any private conference, including where a just cause provision may be applicable. Boards should likely consult with legal counsel on this issue.

Under normal circumstances, it is advisable for all individuals to be physically present for a private conference, particularly because of the important nature of such a proceeding and because it may be important for the board to see and hear a teacher's arguments and information. Such presence is still encouraged if possible and if consistent with the requirements of the Safer at Home Order. However, if such an in-person private conference cannot be achieved, it is important for the board to carefully consider the structure of such meeting, particularly in light of the DOJ's guidance on meetings and any standards in any policy, handbook, or contract. If a board member votes on this issue, the board member should be participating for the entirety of the private conference. The board should also seek guidance from legal counsel on this issue as appropriate.

Content of Contracts. Wisconsin statutes set forth the minimum requirements for individual teacher contracts. The contract, in addition to fixing the teacher's wage, may provide for compensating the teacher for necessary travel expense. 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. The requirement to include this language exists in school districts in which the teacher union has been certified as the exclusive bargaining representative for the 2020-2021 school year.

The other contents of an individual contract are largely a matter of school board discretion, subject to the individual teacher's agreement to these contents. There is no requirement that each individual teacher contract in the district contain the exact same contents. A contract may vary from one teacher to another, as long as the different terms are not based on some protected category (e.g., religion, race, etc.). Among

other provisions, many contracts include a provision stating that the contract will be subject to the rules, handbook, and policies of the school board and administration. Boards may also include a provision concerning liquidated damages, written authorization to pay a teacher over a twelve-month period, and contracted number of days.

School boards should not issue contracts that are inconsistent with state or federal law or inconsistent with board policies, handbook provisions, or base wage determinations in an applicable collective bargaining agreement. School boards should also consider excluding provisions that may hinder their ability to manage the district's business. Considering the current circumstances, districts may want to review the existing contracts to determine whether any provisions may need to be changed, particularly provisions that could be affected by potential continued school closures in the 2020-2021 school year. Changing most material terms of the contract, however, cannot be done unilaterally by the board, and the board may need to take certain steps in order to incorporate such changes, including, absent mutual agreement with the affected teachers, following the process for nonrenewal and reissuance of the revised contracts. Such changes may not be advisable at this time, considering the amount of time required for such steps. Boards, however, may want to consider changes for the future.

CONCLUSION

School boards should plan now to address any issues related to renewal and nonrenewal of individual teacher contracts. Boards need to base any decision in light of provisions contained in the applicable statutes, handbooks, policy, bargaining agreements, and practices in the district and should seek legal counsel as necessary.

For advice on specific matters or how to apply a policy to particular facts, please consult one of our School Practice Group attorneys.

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