THE 2010 ARVID ANDERSON PAPER:
PUBLIC SECTOR COLLECTIVE
BARGAINING AT THE CROSSROADS

R. Theodore Clark, Jr.
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By R. Theodore Clark, Jr.¹


This above quote captures in a nutshell the serious problems that are confronting all public sector attorneys who represent management and labor or who serve as neutrals. In my opinion we are at a significant turning point in public sector collective bargaining. It is thus an opportune time to review the rise of public sector collective bargaining, to assess where we are at present, and to take a look at the future.

I. THE RISE OF PUBLIC SECTOR COLLECTIVE BARGAINING

During Arvid Anderson’s tenure as a member of the Wisconsin Employment Relations Commission and later as the long-time Chairman of the New York City Office of Collective Bargaining he was a major player in the single biggest story in labor relations over the past half of a century, i.e., the emergence of public sector collective bargaining as the most dominant force in the American labor movement. It is not an overstatement to suggest that the transformation of the American labor movement from private sector domination to public sector domination is truly revolutionary. ² Statistics tell part of the story³:

- As we all know, the percentage of the American work force that are union members has been in a constant decline since the 1950’s. Between 1960 and 2010, that percentage dropped from 28.6%⁴ to 11.9%.⁵

¹ Partner, Clark Baird Smith LLP, Rosemont and Chicago, IL. Mr. Clark was the recipient of the Arvid Anderson Public Sector Labor and Employment Law Lawyer of the Year award, which was presented to him at the ABA Labor and Employment Law Section’s CLE program in Chicago, Illinois, on November 4, 2010. An abbreviated version of this paper was delivered at the midwinter meeting of the State & Local Government Bargaining & Employment Law Committee on February 4, 2011.


The statistics on private sector union membership are even more telling. Between 1960 and 2010, the percentage of the private sector workers who are union members declined more than five-fold, from 37.0%\(^6\) to just 6.9%.\(^7\)

On the other hand, the percentage of the public sector workforce who are union members increased nearly four-fold, from 9.8% in 1960 to 36.2% in 2010.\(^8\)

The real dramatic change in the American labor movement, however, is reflected in the number of public sector union members as a percentage of the total number of union members. Whereas public sector union members accounted for only 6.0% of the American labor movement in 1960, over the past 50 years that percentage has increased over eight-fold to 51.8%.\(^9\)

In 1960 on one state—Wisconsin—had enacted legislation extending collective bargaining rights to public sector employees, albeit to only local government employees and not to state employees.\(^{10}\) Over the next 50 years, public sector collective bargaining laws were enacted in nearly 40 states, although substantially all of this legislation was enacted in 1985 or before. And in some states the legislation is limited to just one or two categories of public

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\(^7\) Union Membership—2010.

\(^8\) Union Membership—2010. Within the public sector, local government workers had the highest union membership rate, 42.3%, followed by state government at 31.2%, and federal government (including postal employees) at 26.8%. Id., at Table 3.

\(^9\) Union Membership—2010, Table 3. See Greenhouse, “Most U.S. Union Members Are Working for the Government, New Data Shows,” The New York Times, Saturday, January 23, 2010. Of the 2010 union membership total of 1,415,000, the public sector accounted for 7,623,000 members and the private sector for 7,092,000 members, which, in turn, results in the 51.8 percentage number. These membership numbers are taken from Table 3 of the Union Membership—2010 report.

employees. The following is a summary of the public sector collective bargaining laws that are currently on the books:

- 28 states and the District of Columbia have comprehensive public sector laws that cover substantially all of the state’s non-managerial employees, albeit in many states there are two or more laws that cover different categories of employees. For example, in Illinois, there is one law that covers state and local government employees and another law that covers educational employees at all levels of government.

- 3 states have legislation that covers just firefighters (Georgia, Idaho, and Wyoming).

- 3 states have legislation that covers an assortment of public employees (Idaho—teachers and firefighters, two laws; Maryland—state employees and school employees, two laws; and Oklahoma—school employees and fire/police, two laws.

- 2 states have legislation that covers just police officers and firefighters (Kentucky; two laws; Texas).

- 2 states have legislation that covers just certificated/professional educational employees (Indiana and Tennessee), albeit, as discussed below, both were substantially revised in 2011.

11 The website for American Federation of State, County and Municipal Employees (“AFSCME”) includes an excellent compendium of the public sector collective bargaining laws in the various states and web links to those laws, which can be assessed by Googling AFSCME – Public Sector Collective Bargaining Laws.


13 While Missouri is included among the 28 states with comprehensive legislation, the Missouri law is what is known as a “pure meet and confer” law. While the Missouri Supreme Court Missey v. City of Cabool, 441 S.W.2d 35, 41 (1969), held that the law did “not purport to give public employees the right of collective bargaining … guaranteed to employees in the private industry and in the sense that term is usually known with its attendant connotation of unfair labor practice for refusal by the employer to execute and adopt the agreement produced by bargaining,” in its 2007 decision in Independence-National Education Association v. Independence School District, 223 S.W.3d 131, (Mo. banc 2007), the Missouri Supreme Court held that public sector collective bargaining “agreements are enforceable as any other contractual obligations undertaken by the [school] district.”

14 In 2005 Indiana Governor Mitch Daniels rescinded an executive order that provided collective bargaining rights for Indiana state employees. Hunter, “GOP governors trim state employees’
1 state has legislation that covers employees of local governments but not state employees (Nevada)

A total of 11 states have no laws extending collective bargaining rights to any public employee category, i.e., Alabama, Arkansas, Arizona, Colorado, Louisiana, North Carolina, North Dakota, South Carolina, Mississippi, Virginia, and West Virginia.

While public sector collective bargaining in a few of these states is illegal either by law\textsuperscript{15} or by court decision,\textsuperscript{16} in most states without laws or without comprehensive laws, public employers have been held to have the authority to grant recognition to public sector unions and to enter into legally enforceable collective bargaining agreements covering employees in the absence of collective bargaining laws.\textsuperscript{17} In fact, in some states such as Arizona that have opted not to enact statewide collective bargaining laws, local ordinances have been adopted in such cities as Phoenix that grant such employees in those jurisdictions the right to engage in collective bargaining. As a result, there are many examples of jurisdictions that have voluntarily agreed to recognize public sector unions and have negotiated collective bargaining agreements.

In view of the foregoing public sector membership statistics and legislative developments and in light of recent developments that do not augur well for public sector collective bargaining, future labor scholars may well look back on the last 50 years as “The Golden Age of Public Sector Collective Bargaining.”


\textsuperscript{15} North Carolina specifically prohibits public employers in that state from entering into collective bargaining agreements. N.C.G.S. Section 95-98. While public employees have a constitutional right to join and form unions, the Supreme Court, with only Justice Marshall dissenting, has held that they have no constitutional right to require their employer to recognize their union or to engage in collective bargaining. \textit{Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979)} (“… the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it”). At least two states, however, have constitutional provisions extending collective bargaining rights to public employees, i.e., Florida and Missouri.

\textsuperscript{16} The Virginia Supreme Court has held that public employers in that state have no authority to engage in collective bargaining and enter into collective bargaining agreements. \textit{Virginia v. Arlington Cty. Bd.}, 232 S.E.2d 30 (Va. 1977).

II. PUBLIC SECTOR COLLECTIVE BARGAINING IN 2011—THE CHANGED ENVIRONMENT

A. Generally

While legislative enactments and the results of collective bargaining have unquestionably favored public sector labor unions in the past half century, there are significant signs that the tide is beginning to turn. A New York Times lead front page article on January 4, 2011, entitled “Strained States Turning to Laws to Curb Unions,” reports as follows:

- “Faced with growing budget deficits and restive taxpayers, elected officials from Maine to Alabama, Ohio to Arizona, are pushing new legislation to limit the power of labor unions, particularly those representing government workers, in collective bargaining and politics.”

- “But in some cases—mostly in states with Republican governors and Republican statehouse majorities—officials are seeking more far-reaching, structural changes that would weaken the bargaining power and political influence of unions, including private sector ones.”

- “Some new governors, most notably Scott Walker of Wisconsin, are even threatening to take away government workers’ right form unions and bargain collectively.”

That the governor of Wisconsin—the first state to legislatively enact public sector collective bargaining legislation—took such a public stance would have been unimaginable just a year ago. It just goes to show how quickly things can change. The subsequent legislative actions in Wisconsin, Ohio and elsewhere are summarized below.

This sudden move to the right nationwide on public sector labor law and collective bargaining issues has been propelled by public opinion, public opinion that is accompanied by reports of public outrage at public sector wages and benefits, especially public sector pension benefits. A January 2011 lead front page article in the New York Times entitled “Public Workers Facing Outrage in Budget Crisis,” included the following commentary:\textsuperscript{18}:

Across the nation, a rising irritation with public employee unions is palpable, as a wounded economy has blown gaping holes in state, city and town budgets, and revealed that some public pension funds dangle perilously close to bankruptcy. In California, New York, Michigan and New Jersey, states where public unions wield much power and the culture historically tends to be pro-labor, even longtime liberal political leaders have demanded concessions—wage freezes, benefit cuts and tougher work rules.

\textsuperscript{18} New York Times, January 2, 2011, at p. 1. For an article discussing the issues facing public sector unions worldwide, see “(Government) workers of the world unite! Public-sector unions have had a few good decades. Has their luck run out?” The Economist, January 6, 2011, available on the web at http://www.economist.com/node/17849199/print.
B. Compensation and Benefits—Public Sector vs. Private Sector

Numerous commentators have noted that the backlash public sector unions are now facing is based on the perception that the overall compensation received by unionized public employees substantially exceeds what comparable private sector employees receive. As a result, it is legitimate to inquire whether there is objective evidence that public sector wages and fringe benefits are substantially better than what private sector employees receive. To answer this question, and without relying on information provided by organizations that may arguably have an ideological axe to grind, and as reputable as they may be, for the purposes of this paper I have relied solely on wage and fringe benefit data published by the United States Department of Labor, Bureau of Labor Statistics.

1. Hourly Wages—Public Sector vs. Private Sector

In March of 2010 the Bureau of Labor Statistics (“BLS”) released the following data from its National Compensation Survey (NCS) on hourly wages at five different percentiles for private sector workers and state and local government workers:

<table>
<thead>
<tr>
<th>HOURLY RATED PERCENTILES</th>
<th>PRIVATE INDUSTRY</th>
<th>STATE AND LOCAL GOVERNMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>10th</td>
<td>$8.10</td>
<td>$11.64</td>
</tr>
<tr>
<td>25th</td>
<td>$10.63</td>
<td>$15.35</td>
</tr>
<tr>
<td>50th (median)</td>
<td>$15.70</td>
<td>$22.04</td>
</tr>
<tr>
<td>75th</td>
<td>$24.53</td>
<td>$32.53</td>
</tr>
<tr>
<td>90th</td>
<td>$37.02</td>
<td>$44.48</td>
</tr>
</tbody>
</table>

As BLS explained, “The published 10th, 25th, 50th, 75th, and 90th percentiles designate position in the earnings distribution within each published occupation and are used to determine the wage categories.” At the median, the state and local government hourly rate is 40.4% higher than the private sector hourly rate.

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2. **Major Paid Time Off Benefits—Public Sector vs. Private Sector**

The following table provides BLS survey data on the access to and the median number of days for three major paid time off benefits—paid holidays, paid sick leave, and paid vacations:

<table>
<thead>
<tr>
<th>PAID TIME OFF BENEFIT</th>
<th>PRIVATE INDUSTRY, FULL-TIME WORKERS</th>
<th>STATE AND LOCAL GOVERNMENT, FULL-TIME WORKERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid Holidays</td>
<td>90%</td>
<td>75%</td>
</tr>
<tr>
<td></td>
<td>Median: 8 days</td>
<td>Median: 11 days</td>
</tr>
<tr>
<td>Paid Sick Leave</td>
<td>74%</td>
<td>98%</td>
</tr>
<tr>
<td></td>
<td>Median: 6 days</td>
<td>Median: 12 days</td>
</tr>
<tr>
<td>Paid Vacations</td>
<td>91%</td>
<td>67%</td>
</tr>
<tr>
<td></td>
<td>Median:</td>
<td>Median:</td>
</tr>
<tr>
<td></td>
<td>1 yr., 10 days</td>
<td>1 yr., 12 days</td>
</tr>
<tr>
<td></td>
<td>5 yrs., 15 days</td>
<td>5 yrs., 15 days</td>
</tr>
<tr>
<td></td>
<td>10 yrs., 15 days</td>
<td>10 yrs., 18 days</td>
</tr>
<tr>
<td></td>
<td>20 yrs., 20 days</td>
<td>20 yrs., 22 days</td>
</tr>
</tbody>
</table>

At the median, the foregoing BLS data shows that public sector employees receive three more paid holidays, six more paid sick leave days, and approximately two more paid vacation days than their counterparts in the private sector.

3. **Medical Care Benefits/Medical Insurance—Public Sector vs. Private Sector**

The survey data published by BLS provides a plethora of information on the health care and medical insurance benefits received by full-time employees in both the private sector and the state and local government sector:

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22 All the information in this table has been taken directly from BLS, National Compensation Survey, March 2010.

23 The percentage of state and local government workers receiving paid holidays and paid vacations is affected by the substantial number of teachers employed in the state and local government sector and the fact the teachers typically do not receive paid holidays (although they are not scheduled to work on most holidays without any loss of pay) or paid vacations since their work year is usually 9-10 months, with summers off.

24 BLS also reported on access to other paid leave benefits such as personal leave, jury leave, and family leave, but it did not provide any data on the median number of days for such paid leaves. In each instance the percentage of employees who have access to these other types of paid leave was significantly higher for state and local government employees than for employees in private industry. For example, whereas only 43% of private industry workers have access to paid personal leave, 65% of state and local government employees have such access.
Based on this BLS data, compared to private industry, a not insignificantly higher percentage of state and local government employees have access to medical care benefits and the cost to state and local government to provide these benefits is substantially higher, especially for single coverage. And, the percentage of public employees who have retiree health care benefits is approximately four times as great as the percentage of private industry workers who have such coverage.

4. Pension and Retirement Benefits—Public Sector vs. Private Sector

Based on BLS survey data, there is a dramatic difference between the type of pension benefits provided to workers in the private sector versus those provided to workers in the state and local government sector, as evidenced in the following table based:

<table>
<thead>
<tr>
<th>FULL-TIME EMPLOYEE BENEFIT</th>
<th>PRIVATE SECTOR</th>
<th>STATE/LOCAL GOVERNMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Access to coverage</td>
<td>86%</td>
<td>99%</td>
</tr>
<tr>
<td>Single coverage, employer share of premium</td>
<td>77%</td>
<td>89%</td>
</tr>
<tr>
<td>Family coverage, employer share of premium</td>
<td>67%</td>
<td>73%</td>
</tr>
<tr>
<td>Single coverage, average monthly employer cost</td>
<td>$334.92</td>
<td>$427.29</td>
</tr>
<tr>
<td>Family coverage, average monthly employer cost</td>
<td>$802.38</td>
<td>$874.76</td>
</tr>
<tr>
<td>Retiree health care benefits, under age 65</td>
<td>17%</td>
<td>70%</td>
</tr>
<tr>
<td>Retiree health care benefits, age 65 and over</td>
<td>15%</td>
<td>65%</td>
</tr>
</tbody>
</table>

25 All the information in this table has been taken directly from BLS, National Compensation Survey, March 2010, Tables 9, 10, 12, and 40.

26 There is a significant difference in the employer cost for family medical care benefits between union and nonunion state and local government workers. For union employees, the monthly employer cost is $1,024.64 versus $735.47 for nonunion workers. BLS, National Compensation Survey, March 2010, Table 14.
<table>
<thead>
<tr>
<th>TYPE OF PENSION OR RETIREMENT BENEFIT</th>
<th>PRIVATE INDUSTRY, FULL-TIME WORKERS\textsuperscript{27}</th>
<th>STATE AND LOCAL GOVERNMENT, FULL-TIME WORKERS\textsuperscript{28}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defined Benefit</td>
<td>24%\textsuperscript{29}</td>
<td>92%</td>
</tr>
<tr>
<td>Defined Contribution</td>
<td>68%</td>
<td>33%</td>
</tr>
</tbody>
</table>

Although the BLS does not publish data on the dollar amount of the pension benefits that workers in private industry and in state and local government receive,\textsuperscript{30} BLS does collect and publish quarterly a report entitled “Employer Costs for Employee Compensation,” which includes the amount per hour that employers—both private and public—pay for pension and retirement benefits for their employees. The following table set forth this cost information:\textsuperscript{31}

\textsuperscript{27} BLS, National Compensation Survey, March 2010, Table 2 (Retirement benefits: Access, participation, take-up rates, private industry workers).

\textsuperscript{28} BLS, National Compensation Survey, March 2010, Table 2 (Retirement benefits: Access, participation, take-up rates, State and local government workers). While the total in the defined benefit column for state and local government workers exceeds 100\%, some employees have access to both a defined pension benefit and a defined contribution benefit.

\textsuperscript{29} Of the private industry workers who participate in a defined benefit plan, 22\% are participating in a frozen plan, which BLS defines as “[p]lans closed to new workers or plans that cease accruals for some or all plan participants.” BLS, National Compensation Survey, March 2010, Table 4 (Defined benefit retirement plans: open and frozen plans, private industry workers).

\textsuperscript{30} Since I could not find any such data on the BLS web page, I spoke with a BLS economist who confirmed its non-existence. He directed my attention to the employment cost information that BLS does collect and publish for economic fringe benefits that includes the cost per hour that employers—both private and public—pay for pension and retirement benefits.

\textsuperscript{31} U.S. Department of Labor, Bureau of Labor Statistics, “Employer Costs For Employee Compensation—September 2010,” Tables 3 and 5. While BLS cautions that “[c]ompensation levels in state and local government should not be directly compared with levels in private industry” due to differences “from factors such as variation in work activities and occupational structures,” those differences surely do not come close to accounting for the nearly 100\% more per hour that state and local government pays for pension and retirement benefits over what private industry pays. \textit{Id.}, Technical Note, at p. 4.
<table>
<thead>
<tr>
<th>TYPE OF PENSION OR RETIREMENT BENEFIT</th>
<th>PRIVATE EMPLOYERS, COST PER HOUR</th>
<th>STATE AND LOCAL GOVERNMENT, COST PER HOUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defined Benefit</td>
<td>$0.44</td>
<td>$2.94</td>
</tr>
<tr>
<td>Defined Contribution</td>
<td>$0.55</td>
<td>$0.32</td>
</tr>
<tr>
<td>Social Security</td>
<td>$1.32</td>
<td>$1.45</td>
</tr>
<tr>
<td>TOTAL COST PER HOUR</td>
<td>$2.31</td>
<td>$4.71</td>
</tr>
</tbody>
</table>

The foregoing review of the most recent BLS data and wage and benefits unquestionably demonstrates that state and local government employees have an overall compensation package that is far superior to what employees in private industry receive. For better or worse, these facts support the contention being made in many different quarters that the compensation package received by state and local government employees should be scaled back to something more reasonably in balance with the private sector.

C. The Financial Challenges Currently Facing State and Local Governments

Only a modern day Rip Van Winkle would not be aware of the gargantuan fiscal crisis that state and local governments nationwide are confronting, the dimensions of which can only be characterized as staggering in the extreme. Even prior to the demise of Lehman Brothers in September 2008 and the onset of what is now known as the Great Recession, there were ominous signs that state and municipal finances were approaching a precarious state. The Great Recession, however, dealt—and continues to deal—a severe blow to public sector finances nationwide. Consider the following:

- *The New York Times* recently reported that “total state government revenues across the nation plummeted by a record-breaking 30.8 percent in 2009." The largest reported loss—"$477 billion decline in revenues earned by pension funds and other social insurance trust funds”—which, in the words of Donald J. Boyd, a senior fellow at the Nelson A. Rockefeller Institute of Government, “is truly astounding” and “will drive pension contributions by states and localities up considerably in the coming years and that’s true despite the good stock market of 2009, and the relatively good stock market of 2010 had little immediate impact on state budgets.”

- In an eye-popping report in 2010, entitled “The Trillion Dollar Gap,” the Pew Center on the States, reported that based on data as of 2008, states and local governments

32 As the *New York Times* editorially observed on February 7, 2011, “Dozens of states give pension and health benefits far more generous than in the private sector.”


34 Id.

35 The Pew Center on the States, “The Trillion Dollar Gap,” February 2010 [hereinafter cited as Pew Center, “The Trillion Dollar Gap”]. Based on updated data, the Pew Center in April 2011 reported that “[t]he gap between the promises states have made for public employees’ retirement
collectively had unfunded liabilities for pensions of $452 billion dollars and unfunded liability for retiree health care benefits of $555 billion dollars. If anything, the current unfunded liability for these pension and retiree health care benefits is significantly greater today based on a variety of anecdotal data, including the following estimates made by the Wall Street Journal of the unfunded pension liabilities of just municipalities:

Municipalities nationwide are running a $574 billion unfunded pension liability, on top of $3 trillion in state unfunded liability. Philadelphia’s pension fund is set to run dry in 2015 and Boston’s in 2019. Chicago’s fund will be broke by 2019, when over half of the city’s revenues will be dedicated to pensions.

- The New York Times reported in an article entitled “Mounting Debts by States Stoke Fears of Crisis,” commented that “the finances of some state and local governments are so distressed that some analysts say they are reminded of the run-up to the subprime mortgage meltdown or of the debt crisis hitting nations in Europe.” In this same article, Felix Rohatyn, the financier who is credited with helping New York City avert bankruptcy in the 1970s, is quoted as saying, “It seems to me that crying wolf is probably a good thing to do at this point.”

- The end of federal stimulus funds means that states alone will have to make up the estimated $140 billion that they received in the current fiscal year. In Texas, for example, the Dallas News reported that the “federal stimulus payments that helped thousands of Texas workers ride out the recession will ebb next year, just a state

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36 In a report issued in April 2010 by the Center for State and Local Government Excellence, a Washington, D.C., based think tank established by the International City Management Association, the 2009 unfunded liability of the 126 state and local government pension plans surveyed was “over $700 billion.” Munnell, Aubry & Quinby, “The Funding of State and Local Pensions: 2009–2013.”


39 Id.

legislators are likely to enact cuts that could hurt government workers and others who rely on public spending.”

To add salt to the wound, the New York Times reported that the federal government “will charge … [states] $1.3 billion in interest this fall [2011] on the billions they have borrowed from Washington to pay unemployment benefits during the downturn.” And, as the New York Times article commented, “… it heralds a larger reckoning that many states will have to face before long: what to do about the $41 billion they have borrowed from the federal government to help them pay the benefits to millions of unemployed people, a debt that federal officials say could rise to $80 billion.”

State costs for Medicaid—the federal health care program for the poor—are one of the largest expenses in most state budgets, even though the federal government pays approximately 57% of average state costs. In some states such as Illinois and Missouri, Medicaid spending constitutes more than 30% of state spending. As a result of the recession, Medicaid enrollment increased from 42.6 million in 2008 to 47.8 million in 2009, and the “percentage of Americans on Medicaid is the highest since 1987.” And state costs for Medicaid will increase dramatically in 2014 when an estimated 16 million more Americans will be covered by virtue of the health care reform legislation enacted last year.

Because many local governments depend in significant part on state aid to finance operations, the budget woes of many states are inflicting collateral damage on the finances of local governments. In California, for example, 70% of the taxes it collects go to local governments. Significant drops in state payments to local governments will only exacerbate the financial problems of local governments and school districts.

The specter of municipal bankruptcies has become a major topic of discussion in the national news media. For example, in a recent episode of “60 Minutes,” Meredith Whitney predicted 50 to 100 “sizable defaults that could potentially total “hundreds of

41 *Dallas Morning News*, December 27, 2010, at 1A and 15A.


43 *Id*. According to this New York Times article, this state debt was incurred only with respect to the first 26 weeks of basic unemployment benefits, since the extra weeks of unemployment benefits that Congress has authorized beyond the 26 weeks, including the extra weeks that were part of the tax compromise, “are paid for with federal money.” *Id.*, at A3.


45 *Id*.

46 *Id*.

billions of dollars.”\(^{48}\) Although the predicted defaults on municipal debt have not occurred as of the writing of this paper in July 2011, this development, along with the end of the federal Build America Bond subsidy program, is already resulting in municipalities having to pay higher interest rates to borrow needed funds.

- To make matters worse, Federal Reserve Chairman Ben Bernanke in congressional testimony said that he did not believe it was within the Federal Reserve’s mandate to bail out states. “We have no expectation or intention to get involved in state and local finance, Bernanke said, adding that the states “should not expect loans from the Fed.”\(^{49}\)

- While Chapter 9 of the U.S. Bankruptcy Code, as will be discussed below, only permits units of local government to file for bankruptcy, the New York Times on January 21, 2011, reported that “[p]olicy makers are working behind the scenes to come up with a way to let states declare bankruptcy and get out from crushing debts, including the pensions they have promised to retired public workers.”\(^{50}\)

And all of this is taking place against the backdrop of a federal debt that as of January 2011 hit $14 trillion, an amount equal to “$45,300 for each and everyone in the country.” Many are alarmed that the debt has nearly doubled since January 2005, from $7.6 trillion to $14.02 trillion now.\(^{51}\) And the major rating agencies have not ruled out dropping their ratings on U.S. Treasury debt. For example, according to the Wall Street Journal, on January 13, 2011, “Moody’s Investors Service said … that the U.S. will need to reverse the expansion of its debt if it hopes to keep its “Aaa” rating.”\(^{52}\)

### III. STEPS BEING TAKEN TO RESPOND TO THE FISCAL CRISIS

#### A. Legislation to Limit Collective Bargaining


\(^{49}\) Wall Street Journal, January 8, 2011. Bernanke has also commented in August of 2010 that “with the retirement of state employees that are part of the baby-boom generation and the continued rise in health-care costs, states’ retiree pensions and health-care obligations will become even more difficult in coming years.” Quoted in Ricketts, “State Pension Plans in Peril: The Need for Reform,” Federal Reserve Bank of St. Louis Economic Information Newsletter, September 2010.


\(^{51}\) *Dallas Morning News*, January 16, 2011, at 7A.

1. New Jersey

In a portent of changes that have since come to pass, Governor Christie of New Jersey in late December 2010 signed into law an amendment to the state’s police/fire interest arbitration law that caps increases in wages that result from interest arbitration to 2% per year for the period January 1, 2011 to April 1, 2014. Included in the 2% salary cap are longevity pay, step increments and other similar elements of compensation that are considered part of base salary. Finally, arbitrators cannot award new non-salary cost items that do not already exist in order to get around the 2% cap.\(^5\) Interestingly, this legislation was unanimously approved by the New Jersey Senate and it attracted only one negative vote in the New Jersey House of Representatives, both of which have democratic majorities.

2. Wisconsin

In what became a national media story spanning many weeks, in Wisconsin Governor Scott Walker followed through on his call to significantly curtail collective bargaining rights for the state’s public employees. Following the departure of the Wisconsin Senate’s Democrats to Illinois in an effort to stymie passage of the legislation backed by Governor Walker and in the face of massive public protests by organized labor from Wisconsin and elsewhere, the Republican majorities in the Wisconsin legislature found a procedural way to enact the legislation without the need for the presence of any of the absent Senate Democrats. The bill was passed on March 10, 2011 and signed by Governor Walker on March 11, 2011.\(^5\) Although a Wisconsin circuit court enjoined enforcement of the law, on June 14, 2011, the Wisconsin Supreme Court in a 4-3 decision, held that the circuit court had “usurped the legislative power which the Wisconsin Constitution grants exclusively to the legislature.”\(^5\) Following publication, the new law went into effect on June 29, 2011.\(^5\)

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\(^5\) N.J. P.L. 2010, c.105. This new legislation also includes stringent provisions applicable to interest arbitrators, including a requirement that the award must be issued within 45 days of the arbitrator’s appointment by the New Jersey PERC, with a further provision that fines the arbitrator $1,000 per day for each day that an award is late. Moreover, an arbitrator can only charge a maximum of $1,000 per day and an overall maximum of $7,500 for any one case. Id.

\(^5\) 2011 Wisconsin Act 10.


The following is a summary of the major provisions of the legislation signed by Governor Walker:

- Eliminates collective bargaining rights for home health care workers paid by Medicaid, family child care workers, employees of the University of Wisconsin Hospitals and Clinics, and the faculty and staff of the University of Wisconsin.

- Collective bargaining rights for state and local government employees (excepting police, firefighters, and state troopers) are limited to negotiations over wages, and wage increases are capped on the cost of living unless higher wages are approved in a referendum.

- Contracts covering state employees limited in duration to one year.

- State employers are prohibited from collecting union dues and remitting them to unions.

- “Municipal employees have the right to refrain from paying union dues while remaining a member of the collective bargaining unit,”\(^57\) i.e., fair share clauses are no longer legal. However, fair share agreements covering public safety employees are still permitted.

- Annual elections must be held to determine if unions maintain majority status, which is to be based on a majority of all employees in the bargaining unit and not on a majority of the employees who cast ballots.

3. Ohio

On March 31, 2011, Ohio Governor Kasich signed into law what is commonly referred to Senate Bill 5. Like Wisconsin, the Ohio Legislature’s deliberations over S.B. 5 were marked by numerous protests and massive opposition from organized labor. As signed into law, S.B. 5 enacts vast and wide-ranging changes to the Ohio collective bargaining legislation. Since the Ohio Legislative Service Commission’s summary of S.B. 5 totals 54 pages,\(^58\) it is simply not possible in the context of this article to highlight all the changes, but the following is a representative summary of some of the major changes:

**Employees Excluded from Bargaining Units**

- Expands the definitions of “supervisor and “management level employee” who are excluded from bargaining units.

\(^{57}\) 2011 Wisconsin Act 10, Section 219.

■ Prohibits units of firefighters from including employees in the rank of lieutenant and above.\(^59\)

Scope of Bargaining

■ Expands the list of non-mandatory subjects of bargaining to include the privatizing and subcontracting a public employer’s services and/or work and further provides that existing contract clauses that concern non-mandatory subjects of bargaining cannot be considered mandatory subjects of bargaining.

■ Sets forth an extensive list management rights that can be only be waived by specific written provisions in a collective bargaining agreement.

■ Prohibits contracts entered into or renewed on or after the effective date of S.B. 5 from including various paid leave provisions that provide for the accrual or pay out of leave at a higher rate than specified in S.B. 5.

■ Limits contributions made by public employers toward the cost to health care benefits to 85%.

■ Prohibits inclusion in collective bargaining agreements entered into on or after the effective date of S.B. 5 of provisions that do any of the following:
  ➢ Limits a public employer’s determination of the number of employees it employs or has working at any time in any facility, classroom or on any work shift;
  
  ➢ Requires a public employer to pay any portion of a public employee’s pension contribution to five State pension plans;
  
  ➢ Provides for the payment of hourly overtime at a rate that exceeds the overtime rate required by FLSA;
  
  ➢ Requires a public employer to adhere to or continue any past practices or benefits not specifically set forth in a collective bargaining agreement; and
  
  ➢ Requires non-union members to make fair share fee payments to the union.

Impasse Resolution Procedures

■ Prohibits strikes by all public employees and requires public employers to deduct from the wages of any striking employees an amount equal to twice the employees’ daily rate of pay for each day or part day that they are engaged in a strike.

\(^{59}\) Under S.B. 5, public employers can, but are not required to, bargain collectively with supervisors and/or management level employees.
Retains fact-finding for collective bargaining impasses, but now requires that fact-finders must consider as a primary factor the interests and welfare the public and the ability of the public employer to finance and administer the issues submitted to fact-finding.

Eliminates the final offer settlement provisions (aka final and binding interest arbitration) and provides that the public employer’s legislative body is the final decision-maker with respect to any dispute the is not resolved in fact-finding and that the legislative body’s decision must be in effect for three years.

For certain jurisdictions, provides that if the jurisdiction’s chief financial officer cannot or refuses to say that there are sufficient funds to cover the cost of the final submitted to the jurisdiction’s voters if 100 registered voters or 5% of the jurisdictions registered voters, whichever is greater, petition for a referendum on the two last best final offers.

Teacher-specific Provisions

Eliminates “continuing contracts” (aka “tenure”) for teachers who did not have continuing contracts prior to the effective date of S.B. 5.

Requires performance pay for teachers, as well as most other public employees.

Prohibits community schools (aka charter schools) from bargaining collectively with their employees.

The filing of a petition on June 29, 2011, to hold a referendum in November to repeal SB 5 has stayed its implementation. As of this writing in early July 2011 it is widely anticipated that the petition will be supported by the required number of signatures and that the referendum will be held in November. As matters now stand, the law will only take effect if a majority of the voters do not support repeal.

4. Idaho

In early March 2011 the Republican majorities in the Idaho Legislature amended the State’s teacher collective bargaining law in several significant respects, including the following:

60 J. Vardon, “Pro-union coalition delivers 1.3 million signatures for SB 5 referendum,” http://dispatch.com, posted June 29, 2011. As noted in this article, “Given the number of signatures collected compared with the number of valid signatures required for a ballot issue, it’s a virtual lock that Ohio’s voting public will decide on Senate Bill 5 on Nov. 8.” Id.
To have the right to exclusive representative of a school district’s professional employees, the union (“local education organization”) must “chosen and selected” fifty percent (50%) plus one (1) of the district’s professional employees.  

Each school year “the local education organization must provide proof that it has been duly chosen by a majority of the professional employees of the district ….” If it is unable to do so, the school district “shall have no obligation or authority to enter into negotiations ….”

Negotiations are limited to “compensation,” i.e., salaries and benefits, the latter of which “includes insurance, leave time and sick leave benefits.”

“[A]ll negotiation sessions of the parties shall be conducted in open session, with all members of the public able to attend.” Moreover, “[a]ccurate records or minutes of the proceedings [i.e., negotiations] shall be kept and shall be available for public inspection ….”

If the parties reach agreement on compensation, such agreement “shall be offered for approval and ratification by the local education organization at an open meeting on or before June 15.”

If following mediation no agreement has been reached on compensation by June 10 (June 11 if June 10 falls on a Sunday), then the school board “shall establish compensation for professional employees for the ensuing school year as it deems appropriate.”

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61 Section 33-1272(2), as amended by Section 17 of S.B. 1108.

62 Section 33-1273, as amended by Section 18 of S.B. 1108.

63 Section 33-1272(5), as amended by S.B. 1108.

64 Section 33-1271(3), as amended by Section 15 of S.B. 1108.

65 Section 33-1271(1), as amended by Section 15 of S.B. 1108.

66 Section 33-1274A(1), as added by S.B. 1108.

67 Section 33-1274 (2), as amended by S.B. 1108.
The term for all contracts is limited to one fiscal year, i.e., from July 1 through June 30 of the ensuing fiscal year.\(^{68}\)

The amendments to the teacher collective bargaining law were part of broader educational reform legislation that eliminates teacher tenure prospectively, provides for a form of performance-based teacher pay, limits the length of teacher contracts, and ends the use of seniority in determining teacher layoffs. The legislation’s House sponsor, State Representative Bob Nonini commented, “For too long school boards have been shackled to agreements made 10, 20, or even 30 years ago. We don’t bind future legislators and we shouldn’t bind school board members.”\(^{69}\) Idaho’s School Superintendent, Tom Luna, a Republican who crafted the legislation, said he proposed that legislation as part of “an overall comprehensive reform process for education.” Limiting collective bargaining, he said, “restores power to our local school boards.”

5. Michigan

The Michigan Labor Act was amended to provide that “each collective bargaining agreement entered into … after March 16, 2011 shall include a provision that allows an emergency manager appointed under the Local Government and School District Accountability Act … to reject, modify, or terminate the collective bargaining agreement” and that negotiations over this required provision are prohibited.\(^{70}\)

6. Indiana

On April 21, 2011, Republican Mitch Daniels of Indiana signed legislation that amends the State’s teacher collective bargaining law. Among the legislation’s provisions are the following:

- Amends the Indiana Education Code to delete provisions that permitted collective bargaining agreements to alter the requirements for teacher contracts (e.g., number of days in the school term) and permitted the parties to mutually agree to binding arbitration for teacher dismissals.
- The percentage of teachers that an exclusive bargaining representative “may appoint to any statutory or locally created district wide [or school wide] committee may not exceed the percentage of teachers in the school corporation [or school, respectively,] who are members of the exclusive representative.”
- Negotiations are expressly limited to salary and wages, including “[s]alary and wage related fringe benefits, including accident, sickness, health, dental, vision, life, disability,

\(^{68}\) Section 33-1275, as amended by S.B. 1108.


retirement benefits, and paid time off” to the extent statutorily permitted. For contracts entered into after June 30, 2011, school employers are prohibited from bargaining over such subjects as the school calendar, teacher dismissal procedures, restructuring options under federal or state law in situations where the school corporation or school fails to meet federal or state accountability standards, teacher evaluation procedures and criteria, or any subject that is not expressly listed as being negotiable. While school employers are required to “discuss” such issues as hiring, not require either party to enter into a contract, agree to a proposal, or make a concession related to discussable issues and the failure to reach agreement on any such issue “does not allow the use of any part of the impasse procedure ….”

- If negotiations do not result in an overall agreement on issues that are subject to formal bargaining (i.e., wages, salaries, and wage and salary related issues) and mediation fails to result in an agreement, factfinding is mandated, with the factfinder directed to impose “contract terms on the parties,” provided that the “factfinder’s order must be restricted to only those items permitted to be bargained … and must not put the employer in a position of deficit financing ….” Further, the “factfinder’s order may not impose terms beyond those proposed by the parties in their last, best offers.” SB 575 provides that the factfinding hearing shall be conducted “in public in a room or facility owned by the county or unit of local government” where “the school is located.”

- “During the pendency of negotiations, a school employer’s obligation to maintain the status quo is limited to the issues over which negotiations are required, but “with no increase or increment in salary, wages, or benefits for any bargaining unit employee until a new contract is executed, unless continuation of the status quo would put the school employer in a position of deficit financing ….”

7. Tennessee

In Tennessee, Governor Bill Haslam on June 1, 2011 signed into law Senate Bill No. 113), which repeals the State’s teacher collective bargaining law and replaces it with non-binding “collaborative conferencing.” This legislation mandates the development of a “training program in the principles and techniques of interest-based collaborative problem solving for use in collaborative conferencing,” with the requirement that “[s]uch training program shall be implemented .. within each local education agency no later than July 1, 2012. While the scope of collaborative conferencing includes salaries or wages and working conditions, among certain other defined topics, such collaborative conferencing is prohibited on a variety of other topics, including “[d]ifferentiated pay plans and other incentive compensation programs including stipends and associated benefits that are based on professional employee performance that exceeds expectations” and “personnel decisions concerning assignment of professional employees, including, but not limited to, filling of vacancies, assignments to specific schools, positions, professional duties, transfers within the system, layoffs, reductions in force, and recall.”


72 Id., at Section 49-5-608.
B. Pension Reform

Not surprisingly, since unfunded state and local government pension liabilities are one of the major contributors to the fiscal crisis, pension reform has been the primary, although not exclusive, focal point of attempts to address structural deficits. The depth of the problem was summarized as follows in a September 2010 Economic Information Newsletter published by the Federal Reserve Bank of St. Louis:

Pension plans for the combined 50 states have promised to pay future retirees at least $3.35 trillion over the next 30 years. Persistent funding gaps over the past decade have created financial uncertainty for current and future retirees. To make matters worse, pension-plan investments incurred losses during the financial crisis, and declining household and corporate incomes have reduced state tax revenue. In many states, these issues have pushed the likelihood of insolvency to an alarming level. Specifically, some estimate that state pensions will be unable to deliver on $1 trillion of promised payments to future retirees. State governments must make significant changes to avert a crisis.

At a 2011 meeting of the United States Conference of Mayors, the Democratic Mayor of Los Angeles, Antonio R. Villaraigoso said, “That’s not a Democrat or Republican issue. The fact is, our pensions aren’t sustainable.” As a result, the New York Times recently reported that he “is supporting measures that would lower the cost of pensions for new police officers and firefighters and require employees to contribute toward the cost of their retirement health benefits.”

According to a Pew study of state and local pensions, between 2001 and 2010, 20 states both reduced pension benefits and increased employee contributions, thirteen reduced pensions benefits, and four increased employee contributions. Only 11 states took no action at all on

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75 Id.

76 Arizona, Arkansas, Colorado, Iowa, Kansas, Kentucky, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Oregon, Texas, Vermont, Virginia, and Wyoming. Pew Center, “Road to Reform,” at p. 2.

77 California, Connecticut, Delaware, Georgia, Illinois, Massachusetts, Michigan, Nevada, New York, North Dakota, Rhode Island, South Dakota, and Utah. Id.

78 Oklahoma, Pennsylvania, South Carolina, and Washington. Id.
pensions. The following is a review of some of the actions that various states have taken to reduce the public sector pension costs.

1. The move towards defined contribution public sector pension plans

The following summarizes the concrete steps that some states have taken to move toward the private sector model of defined contribution pension/retirement plans rather than defined benefit plans:

- In 2005, Alaska put all new employees in a defined contribution plan.
- In 2008, Georgia enacted a hybrid retirement system for new hires whereby they are offered both a defined benefit plan and a defined contribution plan, the latter of which employees can opt out after 90 days.
- In 2010, Utah replaced its traditional defined benefit plan in 2010 with one that offers newly hired employees a choice between a defined contribution plan or an arrangement that combines features of a defined benefit and defined contribution plan.

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79 Alabama, Florida, Idaho, Indiana, Maine, Montana, North Carolina, Ohio, Tennessee, West Virginia, and Wisconsin. Id. The Pew Center reports that several of these states are considering significant legislative changes in 2011.

80 See, e.g., Diamond, Munnell, Leiserson & Aubry, “Problems with State-Local Final Pay Plans and Options for Reform,” Center for Retirement Research as Boston College, 2010. Other Center publications on retirement and pension topics can be found at: http://www.crr.bc.edu/.


83 Id., at p. 4. According to the Pew Center, the defined benefit part of the hybrid plan “provides about half of the payout of the existing plan and a defined contribution plan” requires “a mandatory 1 percent employee contribution and employer match.” Id.

84 An editorial in the WSJ commented that despite union objections and threats “to defeat any legislator who dared to vote for it [i.e., the new two-tier pension plan],” “[n]ot a single Republican who voted for the reforms lost, and the GOP picked up seats in 2010.” Wall Street Journal, January 19, 2011, at A14.
2. Establishment of Two-Tier Plans with Significantly Less Generous Benefits

Any number of states have or are considering adopting two-tier plans in which the Tier 2 pension benefits are significantly less generous than those received by current retirees and employees who were employed before the effective date of the new Tier 2. The following is a summary of the new two-tier pension plans adopted by a variety of states:

- Pennsylvania established for new two tier plan for participants in its Public School Employees’ Retirement System. Thus, new hires will receive a reduced pension benefit of 2% per year of service versus the 2.5% that grandfathered employees are eligible to receive per year of service; such new employees, however, have the option of retaining employees pay 7.5%).

- Missouri enacted legislation that requires participants in the State Employees’ Retirement System who are hired on or after January 1, 2011 to make an employee contribution of 4% of salary; employees hired before January 1, 2011 are not required to make any employee pension contribution.

- Illinois enacted pension reform legislation that establishes a new two tier structure for most of its major pension systems, with a significant reduction in the new Tier 2 benefits.

3. Reductions in Annual Adjustments to Retiree Pension Benefits

Most state and local government public sector pension plans have provisions that provide for annual adjustments based on either a set percentage or a formula. In the past year many states reduced (and in one state eliminated) the amount of the annual adjustment, as evidenced by the following:

- Colorado passed legislation effectively eliminating the COLA adjustment for 2010 and limits the COLA adjustment “to 2% in 2011 and future years, unless PERA experiences a negative investment return, in which case the COLA will be calculated as the lesser of the inflation from the preceding 3 years or 2 percent.”

- Minnesota either eliminated or reduced the annual adjustment formula for current retirees until the plans are 90% funded.

- South Dakota reduced the COLA adjustment for 2010 to 2.1% from 3.1% and thereafter the adjustment will vary from 2.1% to 3.1% depending on the ratio of the system’s funded market value.

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85 NCLS 2010 Pension Report, at p. 7; this reports notes that “[s]uit has been filed challenging the reduction in benefits as a violation of contract.” Id.
Utah capped the pension COLA adjustment to a maximum of 2.5%, with the proviso that CPI increases above 2.5% will accumulate and will be applied to the COLA adjustment “when the CPI is less than 2.5%.\textsuperscript{86}

Wisconsin, which has one of the best funded public pension systems in the country, replaced its standard cost-of living increase with a dividend that is paid to retirees if investment returns are positive.\textsuperscript{87}

It should be noted that the changes to COLA adjustments for current retirees in in Colorado, Minnesota, and South Dakota are the subject of pending lawsuits,\textsuperscript{88} none of which have been decided yet.

4. Increases In Employee Contributions

At least seven states increased employee contributions for all employees or employees after a specified date:

- Colorado increased the employee contribution from 8% to 10.5%.
- Minnesota increased the employee contribution by 3% of salary.
- Mississippi increased the employee contribution from 7.25% to 9%.
- Missouri for the State Employees’ Retirement System provides that employees hired after January 1, 2011 make an employee contribution of 4% of salary; employees hired prior to January 1, 2011 are not required to make any contribution.
- Vermont for its Teachers Retirement System increased the employee contribution from 3.45% to 5%.
- Virginia increased the employee contribution for all employees except public safety and EMT from 5.57% to 7%.

\textsuperscript{86} NCLS 2010 Pension Report, at p. 20.

\textsuperscript{87} Pew, at p. 11.

And, thus far in 2011, “… eight states, including Wisconsin and Florida, have decided to require government employees to contribute more, sometimes far more, to their pensions.” This same New York Times article noted that “[g]overnors and legislators in 10 other states, including California and Illinois, are proposing their own pension changes as they grapple with budget deficits and underfunded pension plans.”

5. Federal Government Initiatives

There are increasing signs that the federal government will be taking a more active role in overseeing state and local government pension plans, as evidenced by the following:

- A bill entitled the “Public Employee Pension Transparency Act” has been introduced, co-sponsored by, among others, Representative Paul Ryan of Wisconsin, the new Chair of the House Budget Committee, which includes the following provisions:
  - Prohibit federal bailouts of state and local government pensions plan
  - Require state and local government pension plans to report their unfunded liabilities using both the plan’s investment assumptions and a federally prescribed formula that uses the U.S. Treasury bond rate
  - The proposed legislation, however, does not compel the taking of any specific steps to grapple with unfunded liabilities
  - In fact, state and local government pension plans do not have to comply with the reporting requirements, but the failure to do so would result in loss of being able to sell tax-exempt bonds

- The Securities and Exchange Commission in 2010 initiated a fraud investigation that included allegations that New Jersey had misled investors about having the funds to cover a 9% increase in benefits in various bond prospectuses, which was later settled. More recently, it was reported that the SEC was investigating alleged improprieties in the way Illinois has sought to fund it unfunded pension liabilities, as well as “whether

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90 Id.

91 H.R. 6484, 111th Congress, 2d Session.

92 Section 4 (a) of this proposed legislation reads as follows:

The United States shall not be liable for any obligation related to any current or future shortfall in any State or local government employee pension plan. Nothing in this Act (or any amendment made by this Act) or any other provision of law shall be construed to provide Federal Government funds to diminish or meet any current or future shortfall in, or obligation of, any State or local government employee pension plan. The preceding sentence shall also apply to the Federal Reserve.
California [i.e., Calpers] violated securities laws and failed to provide adequate disclosure about its giant pension fund.\(^9^3\)

C. Efforts To Reduce Unfunded Retiree Health Care Costs

The unfunded cost of retiree health insurance or health care benefits is another substantial factor in the structural budgetary deficits that confront many states and local governments. The magnitude of these unfunded health benefits has been made manifest as a result of Standard No. 45 promulgated by the Governmental Accounting Standards Board in 2004. GASB 45,\(^9^4\) as it is commonly referred to as, requires state and local governments to provide information about the actuarial accrued liabilities for promised retiree health benefits, as well as other post-employment benefits other than pensions, associated with past services and whether and to what extent those benefits have been funded.

Unlike pension benefits, state or local government usually have greater latitude to make changes in retiree health insurance benefits--either through legislation or collective bargaining--without running afoul of state constitutional and/or vested rights arguments. In the past few years, numerous states and local governments have taken various actions to try to reduce the unfunded liabilities related to retiree health benefits, including the following:

- Michigan passed legislation in 2010 that requires participants in the public school pension system to contribute 3% of compensation to an irrevocable trust “to pay for retirement health care benefits for retirees and their eligible dependents.”\(^9^5\)

- New Hampshire requires group II state employees must have 20 years of credible state service “in order to receive state paid medical and surgical benefits for retired state employees.”\(^9^6\)

- New Hampshire also adopted a bipartisan plan whereby state employees would be given the opportunity to make tax-free contributions to retiree medical savings accounts managed by their unions. This money would be pooled together and invested, with both the investment returns and the monthly distributions paid to retirees for health care expenses being tax-free. The plan, however, was subject to ratification by the affected unions; I could no information on whether it was ratified.\(^9^7\)


\(^9^4\) A summary of GASB Statement 45 is available at the GASB’s web site at [http://www.gasb.org](http://www.gasb.org).


\(^9^7\) Pew, “Roads to Reform,” at p. 7. According to an article in Governing, “[l]ocal unions representing firefighters and police officers in California, Oregon and Washington state, to name
A federal court in Rhode Island upheld legislation that reduced the retiree medical benefits for state employees who retired early against challenges that it violated the contract clauses in the U.S. and Rhode Island Constitutions, a negotiated collective bargaining agreement, and other state and common law claims, noting that it was an attempt by the state in the midst of the 2008 fiscal crisis “to tighten its belt.”

Efforts by public employers to reduce the costs of unfunded retiree health care costs have also been the subject at several interest arbitration awards. For example, In Racine Water Works Utility, Arbitrator Honeyman awarded an employer offer that capped the retiree health benefit, concluding that “the Employer has made a substantial showing of a need to change an extraordinarily expensive benefit ….” And, in a case involving the Washington Metropolitan Area Transit Authority, Arbitrator Richard Kasher ruled that “employees hired on or after January 1, 2010 will not be entitled to receive retiree health coverage.”

D. Layoffs And Furloughs

The budgetary deficits facing by states and local governments have led to numerous reports of significant layoffs, including the following:

- Camden, New Jersey in January 2011 laid off 335 employees—about one-sixth of its workforce—including police and firefighters. According to the article in the WSJ, a few, have used this approach for many years.” Mulholland, “Minimizing Retiree Health-Care Benefits,” Governing, August 2010, http://governing.com/topics/health-human-services/minimizing-retiree-health-care-benefits.html.


99 Racine Water Works Utility, WERC Decision No. 31232-A (Arb. Christopher Honeyman, December 16, 2005), at p. 13. In responding to the Union’s contention that the actual long term cost impact was unknown, Arbitrator Honeyman stated:

The degree to which GASB’s 45 requirement of “long tail” financial liabilities will drive up financing costs and undermine the employer’s financial viability is, admittedly, speculative. But the recent sad history of some major and formerly rock-solid companies at least partly related to their obligations to retired employees, suggests that the Employer’s concerns are not mere fantasy.

100 Washington Metropolitan Area Transit Authority and Amalgamated Transit Union, Local 689 (Arb. Richard Kasher, November 4, 2009). It should be noted that the wage and pension portions of Arbitrator Kasher’s award are subject to a pending petition to vacate filed by WMATA.

Mayor Redd “said many of the layoffs could have been averted if police and firefighter unions had agreed to concessions, but “[u]nion leaders have said they couldn’t get assurances that doing so would save jobs.”’

In Illinois, at least one cash-strapped Cook County suburb—Sauk Village—told the Cook County Sheriff that the Sheriff’s Department would have to provide police protection for the Village since the Village did not have the funds to pay its two dozen police officers. The mayor said, “We’re in a crisis here in Sauk Village. … I don’t anticipate that our police officers are going to work for free.”

In a joint report issued in July 2010 by the National League of Cities (“NCL”), the National Association of Counties (“NACo”), and the U.S. Conference of Mayors (“USCM”) estimated “that local government job losses in the current and next fiscal year will approach 500,000, with public safety, public health, social services and parks and recreation hardest hit by the cutbacks.”

In his budget message delivered on February 1, 2011, New York Governor Andrew Cuomo declared that New York was “functionally bankrupt” and implied that layoffs of up to 10,000 employees might be necessary if the state was not able to negotiate agreements with the state’s unions on alternative ways to avert the need for such layoffs.

### E. Wages Freezes and Cuts

Not surprisingly, there have been efforts to freeze, and in some instances, to actually cut wages currently received by public employees. An August 4, 2010, New York Times articles reports the following:

> The furloughs that popped up during the recession are being replaced by a highly unusual tactic: actual cuts in pay.

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102 Id.

103 *Chicago Tribune*, August 29, 2010, Section 1, at p. 7.

104 “Local Governments Cutting Jobs and Services: Job losses projected to approach 500,000,” NLC, NACo, and USCM, July 2010.


Pay cuts are appearing most frequently among state and local governments, which are under extraordinary budget pressures and have often already tried furloughs, i.e., docking pay in exchange for time off. Warning that they will have to lay off people otherwise, many governors and mayors are pressing public employee unions to accept a reduction in salary of a few percentage points, without getting days off in exchange.

At the University of Hawaii, professors have accepted a 6.7 percent cut. Albuquerque has trimmed pay for its 6,000 employees by 1.8 percent on average, and New York's governor, David Paterson, has sought a 4 percent wage rollback for most state employees. State troopers in Vermont agreed to a 3 percent cut. In California, teachers in the Capistrano and Pacheco school districts have accepted salary cuts.

Among the more recent development are the following:

- Democratic Governor Jerry Brown in California has proposed cutting state employee wages by 10%. 107
- Democratic Governor Andrew Cuomo in New York has proposed a salary freeze for state employees. 108
- In Illinois, there are at least five interest arbitration awards in which an interest arbitrator awarded a zero percent wage increase in the context of a multi-year award. 109
- The latest quarterly Employment Cost Index (“ECI”) that was released January 28, 2011, shows that the most recent 12-month increase in wages and salaries for state and local government employees dropped from 1.9% for the 12-month period ended December 2009 to only 1.1% for the 12-month period ended December 2010. 110


109 City of Belleville and Illinois FOP Labor Council, Case No. S-MA-08-157 (Arb. Elliott Goldstein, August 26, 2010); City of Rockford and Policemen’s Benevolent Labor Committee (Arb. Byron Yaffe, May 13, 2010); In City of Evanston and Teamsters Local 700, Case No. S-MA-09-086 (Arb. Stephen Goldberg, May 19, 2010); Wabash County/Wabash County Sheriff and Illinois FOP Labor Council, Case No. S-MA-09-020 (Arb. Peter Feuille, July 20, 2010); City of Highland Park and IAFF Local 822, Case No. S-MA-10-282 (Arb. Edwin Benn, July 16, 2010) (stipulated award). See also, Board of Trustees of the University of Illinois at Urbana-Champaign and FOP Labor Council, Case No. S-MA-10-075 (Arb. Robert Perkovich, December 13, 2010) (arbitrator awarded employer’s final offer of no wage increase versus union’s final offer of 2.5% for the one year at issue). To be sure, there are also recent Illinois interest arbitration awards in which salary increases were awarded in situations where the employer’s final offer was a zero increase.

Although this paper is devoted to developments at the state and local government level, it should, nevertheless, be noted that President Obama proposed and Congress approved a two-year federal pay freeze.\textsuperscript{111}

\section*{F. Downsizing Or Right-Sizing Government}

In 1996, President Clinton in his State of the Union address declared, “The era of big government is over.”\textsuperscript{112} That declaration has more meaning today that it did 15 years ago. Thus, regardless of party affiliation, governors nationwide are proposing the reduced size of government. A lead page-one article in the New York Times examining the opening addresses of newly elected governors noted this was the dominant theme of both Republicans and Democrats.\textsuperscript{113} For example, Governor Scott Walker of Wisconsin, a Republican, said he wanted to “right-size” state government so that it provides “only the essential services our citizens need and the taxpayers can afford.” And, Governor Andrew Cuomo of New York, a Democrat, echoed these comments in saying, “We must right-size the state government for today.”\textsuperscript{114} Another Democrat, Governor John Kitzhaber of Oregon, analogized the $3.5 budget deficit that he is confronting to an old house in desperate need of repair:\textsuperscript{115}

\begin{quote}
There are too many rooms, and they are not the right size. There’s no insulation, and the windows are drafty. And the cost of keeping this house is more than the family can afford. The roof needs to be replaced, and the siding is falling off.
\end{quote}

Downsizing in some situations will likely involve some consolidation of the myriad of overlapping units of local government. For example, the state-appointed receiver is in charge of overseeing the finances of Central Falls, Rhode Island, in a report issued in mid-December 2010 said that bankruptcy protection was an option of “last resort” if the city was not able to control its finances through, among others, merging with a neighboring city or regionalizing its services.\textsuperscript{116}

In Illinois, many police and fire departments have shed their dispatch function to regional dispatch center. In my judgment, this is just the tip of the iceberg, not only in Illinois but nationwide, in terms of efforts by revenue-starved local governmental entities to reduce costs by consolidating and/or merging services.


\textsuperscript{112} \url{http://clinton4.nara.gov/WH/New/other/sotu.html}.


\textsuperscript{114} Id., at A15. In his budget message delivered on February 1, 2011, Governor Cuomo included “plans to merge 11 existing agencies or authorities into 4.” \textit{New York Times}, February 2, at A4.

\textsuperscript{115} Id.

G. Chapter 9-- Municipal Bankruptcies

There has been a virtual onslaught of articles and speeches that raise the specter of municipal bankruptcies. The following are just of few of the titles of articles that have appeared in the last several months:

- “Chapter 9 Weighted in Pension Woes”\(^{117}\)
- “Mayors See No End to Hard Choices for Cities, Including Bankruptcy”\(^{118}\)
- “New Michigan Governors Says Hundreds of Cities Could Go Bankrupt In Next Four Years”\(^{119}\)

And, at an investment conference less than a month ago, JPMorgan Chase & Co. CEO Jamie Dimon said that “[t]here have been six or seven municipal bankruptcies already” and “I think unfortunately you will see more.”\(^{120}\)

To date, however, there have been relatively few municipal bankruptcy filings. In late December, the WSJ reported that there were 10 filings in 2009 and just 5 to date in 2010.\(^{121}\) There are, however, several poster children for municipal bankruptcy, including the following:

- Vallejo, California, which declared bankruptcy in 2008. While the City was not successful in negotiating concessions with its employee unions prior to declaring bankruptcy, Mayor Osby Davis said “bankruptcy got us what we needed: we got to adjust collective bargaining agreements.”\(^{122}\)

- Hamtramck, Michigan, which is seeking permission from the state to declare bankruptcy because of a $3 million deficit in it $18 million dollar budget. Editorially, the WSJ commented that “Hamtramck began running million-dollar deficits 10 years ago due to union contracts that would make Greeks blush,” noting further that “City workers were entitled to annual wage increases at four times the inflation rate and eight paid weeks of


\(^{122}\) Id., at C2.
vacation each year, … in addition to 15 paid sick leave days, three paid emergency leave days, three paid personal days and one paid birthday.”¹²³

Chapter 9 of the U.S. Bankruptcy Code provides the mechanism whereby municipalities and other units of local government can seek to reorganize their financial affairs.¹²⁴ The web site for the United States Bankruptcy Courts notes:

In the more than 60 years since Congress established a federal mechanism for the resolution of municipal debts, there have been fewer than 500 municipal bankruptcy petitions filed. Although chapter 9 cases are rare, a filing by a large municipality can—like the 1994 filing by Orange County, California—involves many millions of dollars in municipal debt.

The following is a summary of the basic statutory parameters governing Chapter 9 municipal bankruptcies¹²⁵:

- **Municipalities Who Can File.** Only a municipality, which is broadly defined under the Bankruptcy Code as a “political subdivision or public agency or instrumentality of a State.” The federal court bankruptcy web site notes that this definition “is broad enough to include cities, counties, townships, school districts, and public improvement districts.” However, to file for a Chapter 9 bankruptcy a “municipality must be specifically authorized by state law or by a governmental officer or organization empowered by State law to authorize the municipality to be a debtor.”¹²⁶ If authorized, a municipality “must voluntarily seek protection under the Bankruptcy Code” by filing a petition with “a list of creditors,” although the bankruptcy court may permit a later filing.

- **Assignment of Bankruptcy Judge.** Unlike other bankruptcy filings, “the clerk of court does not automatically assign the case to a particular judge.” Rather, the bankruptcy judge is assigned by the “chief judge of the court of appeals for the circuit embracing the district in which the case is commenced.” The purpose for this unique provision is “to


¹²⁵ Unless identified otherwise, all the quotes in this primer on municipal bankruptcy are taken from the Federal Court bankruptcy web site at http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.

¹²⁶ An article in the *Wall Street Journal* noted that “[t]wenty one states don’t authorize their municipalities to file bankruptcy” and for “others, a city typically must demonstrate that [it] is technically insolvent ….” *Wall Street Journal*, December 23, 2010, at C2.
remove politics from the issue of which judge will preside over the chapter 9 case of a major municipality and to ensure that a municipal case will be handled by a judge who has the time and capacity to do so.”

- **Automatic Stay.** The filing of a Chapter 9 bankruptcy petition operates as an automatic stay “to stop all collection actions against the debtor and its property.” Chapter 9, however, “does not operate to stay application of pledged special revenues to payment of indebtedness secured by such revenues.”

- **Debtor’s Day-to-Day Activities.** Because of 10th Amendment concerns, Chapter 9 “makes it clear that the debtor’s day to day activities are not subject to court approval and that the debtor may borrow money without court approval.” In addition, the “court cannot interfere with the operations of the debtor [i.e., municipality] or with the debtor’s uses of its property and revenues.”

- **Role of Creditors.** “The role of creditors is more limited in chapter 9 than in other cases. For example, “[t]here is no first meeting of creditors, and creditors may not propose competing plans.” There is, however, “a creditors’ committee that has the powers and duties that are very similar to those of a committee in a chapter 11 case.”

- **Parties Entitled to Intervene.** “The Bankruptcy Rules provide that ‘[t]he Secretary of the Treasury of the United States may, or if requested by the court shall, intervene in a chapter 9 case.’” In addition, representatives of the state in which the municipality may intervene, as well as parties in interest. “Parties in interest include municipal employees, local residents, non-resident owners of real property, special tax payers, securities firms, and local banks.”

- **Municipality’s Powers During Bankruptcy Proceedings.** “The municipal debtor has broad powers to use its property, raise taxes, and make expenditures as it sees fit. It is also permitted to adjust burdensome non-debt contractual relationships under the power to reject executory contracts and unexpired leases, subject to court approval, and it has the same avoiding powers as other debtors.” Moreover, “[m]unicipalities may also reject collective bargaining agreements and retiree benefit plans without going through the usual procedures required in chapter 11 case” (emphasis added).

- **Grounds for Dismissal.** A bankruptcy petition can be dismissed by the court “if it concludes that debtor did not file the petition in good faith or if the petition does not meet the requirements of chapter 9.” “The court may also dismiss the petition for cause, such as lack of prosecution, unreasonable delay by the debtor that is prejudicial to creditors, failure to propose or confirm a plan with the time fixed by the court, material default by the debtor under a confirmed plan, or termination of the confirmed plan by reason of the occurrence of a condition specified in the plan.”

- **Filing a Plan.** Within the time fixed by the court, the municipality must file a plan. Unlike chapter 11, “[t]here is no provision in chapter 9 allowing creditors or other parties in interest to file a plan.”
**Conditions for Confirmation of Plan.** Chapter 9 specifies the various conditions that must be met for confirmation of a plan, one of which “any regulatory or electoral approval necessary under applicable non-bankruptcy law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval” and “the plan is in the best interests of creditors and is feasible.” If the claims of more than one class of creditors are impaired, “the court may confirm the plan only if … at least impaired class has accepted the plan.” “If only one impaired class of creditors consents to the plan, plan confirmation is still possible under the ‘cram down’ provisions of 11 U.S.C. Section 1129 (b).” Under such circumstances, if all other conditions for confirmation have been met, “the plan is confirmable if it does not discriminate unfairly and is fair and equitable.”

**Definition of “Best Interest of Creditors.”** “The requirement that the plan be in the ‘best interest of creditors’ means something different under chapter 9 than under chapter 11.” Since a municipalities cannot be liquidated to pay creditors under chapter 9, “the ‘best interests of creditors’ test has been generally interpreted to mean that the plan must be better than other alternatives available to the creditors.” “An interpretation of the ‘best interest of creditors’ test to require that the municipalities devote all resources available to the repayment of creditors would appear to exceed the standard.”

**Right of Interested Parties to Object.** “Parties in interest may object to confirmation, including creditors whose claims are affected by the plan, an organization of employees of the debtor, and other tax payers, as well as the Securities and Exchange Commission.”

While bankruptcy may be an option for some municipalities that are unable to negotiate their way out of debt, it is not a panacea. While Vallejo, California, got some relief via Chapter 9, it reportedly “cost Vallejo $9.5 million in legal fees.” As a result, some observers believe “out-of-court negotiations yield better results.”

In addition to all the competencies that public sector labor lawyers of all stripes must process, the emergence of pension reform and the possibility of municipal bankruptcies means that there will be the need to develop at least two new competencies:

- First, to understand the parameters of the Contract Clause of the U.S. States Constitution and similar state constitution provisions, especially as they relate to efforts to alter pension and retirement benefits for already retired public employees and/or already employed public employees who have not yet retired.
- Second, to become knowledgeable about Chapter 9 and its implications.

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H. BACK TO THE FUTURE

It seems that every decade or so, state and local governments have had to deal with economic downturns. On at least four different occasions since over the last thirty years I have made presentation on collective bargaining during hard fiscal times.\textsuperscript{128} I mention this seemingly every decade cycle to suggest that, hopefully, the tide will turn and some degree of normalcy will return to public sector collective bargaining. The BIG question is when. The current downturn is clearly far more severe than the downturns in the early 80’s, 90’s, and following 9/11 in 2001. And, unfortunately, that means that the currently challenging economic times faced by most state and local governments will continue for at least the next several years,\textsuperscript{129} and probably longer, especially if the major structural budget deficits that many states and municipalities are not addressed in a positive and forthright manner.

As we face the future, I am concerned about any number of issues, including the following:

- The ability of the public sector collective bargaining process to respond to very real fiscal challenges in a timely manner.\textsuperscript{130} Unfortunately, the formal collective bargaining process as it has evolved in the public sector is very status quo oriented and is laden with opportunities for delay. In many instances, such delays only make matters worse and may result in even harsher results later on.

- Decisions in some states that hold that issues like minimum manning—especially as they relates to the overall size of a department or the number of employees who must be on duty on a shift-- are mandatory subjects of bargaining, which, in turn, means that an interest arbitrator would have jurisdiction to issue decisions on such policy-laden issues. In my opinion, these are essentially political issues that should be resolved in the public arena and not at the bargaining table or in interest arbitration. While I acknowledge that there is a split of authority on this issue, I agree with the following comments of the Washington Public Employees Relations Commission in City of Yakima\textsuperscript{131}:

\textsuperscript{128} I gave presentations on this subject on four different occasions, i.e., in 1981 at the annual conference of the International City Managers Association, in 1991 at an American Arbitration Association conference in New Hampshire, in 2002 at a Illinois Public Employer Labor Relations Association seminar, and in 2010 at a Clark Baird Smith LLP client seminar.

\textsuperscript{129} In this regard, it is important to remember that there is at least a six to twelve month lag time between when the economy improves and when governments receive increased tax revenues.

\textsuperscript{130} See generally, “Getting to Yes, Maybe—Bargaining in a Struggling Economy,” the materials provided to participants at the American Bar Association 4\textsuperscript{th} Annual Section of Labor and Employment Law Conference,” November 5, 2010.

\textsuperscript{131} Decision No. 1130-PECB (Wash. PERC, 1981). Accord, Oak Park Public Safety Officers Ass’n v. City of Oak Park, __ Mich. App. __ (2007) (MERC decision holding that minimum staffing, layoff and recall were not mandatory subjects of bargaining affirmed); City of Orange Twshp., 36 NJPER Para. 119 (N.J. PERC, 2010); Hawaii Firefighters Ass’n, Dec. No. 102 (Haw.}

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In the public sector, the public officials are vested with the authority to make basic decisions to allocate resources and to determine the levels of service to be provided to the public. Whether a community will have a large police force, a small one, or none at all, is a very basic managerial decision which ultimately must be determined by the voting public through its elected representatives.

Let me elaborate further on my concerns about the interest arbitration process as it relates to efforts by fiscally challenged public jurisdictions to find ways to reduce costs. A major problem that I see emerging for unionized bargaining units where interest arbitration is the terminal point of the impasse procedure is how arbitrators will deal with the major policy issues that may, depending on the jurisdiction, fall within the mandatory scope of bargaining, including the following:

- In jurisdictions where pensions are subject to collective bargaining, proposals to make major structural changes to pension plans in order to reduce pension costs.
- Proposals to eliminate a function entirely that was previously performed by bargaining unit employees.\(^{132}\)
- Proposals to outsource work currently performed by public employees to the private sector, e.g., a municipality seeks to subcontract and/or civilianize certain non-core functions currently performed by sworn personnel, such as fire prevention, fire inspections, public education, etc. Or, in some situations, to subcontract the entire work performed by the bargaining unit, e.g., bus driving for a school district where interest arbitration is the terminal point of the impasse procedure.\(^{133}\)

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\(^{132}\) See, e.g., Chippewa Cty., Decision No. 25003 (Wis. ERC, 1987), aff’d, 461 N.W.2d 286 (Wis. App. Ct. 1990), where the Wisconsin Commission held that “[w]here a municipal employer decides to get out of the health care service business, it need not bargain that choice with the union even though another entity may continue to provide such services to the citizens.”

\(^{133}\) See School District of Wausaukee, Dec. No. 32479-A (Arb. Mary Jo Schiavoni, 2009) (arbiter awarded employer’s final offer that included the right to subcontract bus driving, which accounted for 45% of support staff bargaining unit, noting that “[b]ut for the current economic environment and the compelling case presented by the District of its need to cut or at least assure known, predictable ‘transportation costs,’ such a subcontracting proposal without a substantial *quid pro quo* would doom such an offer.” *Id.*, at p. 33.
Proposals to restructure salaries and economic fringe benefits in order to reduce costs where they are demonstrably more generous than the private sector.

Where interest arbitration is the end of the line following an impasse in negotiations, I am concerned about the willingness of arbitrators to deal with the new financial realities facing many public entities and to seriously entertain the type of proposals outlined immediately above. Since most arbitrators view interest arbitration as a conservative process, arbitrators are normally very reluctant to award major structural changes, opining that major changes should be negotiated at the bargaining table. While in normal circumstances this is an entirely appropriate way of dealing with such issues, I would suggest that these are definitely NOT normal times.¹³⁴

As if the financial challenges confronting most public entities are not enough to keep public sector management and union attorneys, as well as public sector neutrals, busy, many other issues are moving to the fore, including the following:

- Proposals to end teacher tenure, or at least make it significantly easier to terminate ineffective teachers.
  - New Jersey Governor Christie in his State of State address called for the end of teacher tenure, saying “the time to eliminate teacher tenure is now.”¹³⁵

- Proposals to end the lock step salary schedules that are common in school districts nationwide with some form of pay based on performance.
  - The founder of former chairman of Microsoft, Bill Gates, in a speech to the Council of Chief State School Officers in November 2010, recommended an end to teacher pay practices based on seniority and advanced degrees.¹³⁶

¹³⁴ Some arbitrators realize that the circumstances have changed dramatically and that new approaches must be considered in addressing the financial constraints that most public employers now have to confront. For example, in Illinois, Arbitrator Edwin Benn has issued several interest arbitration awards in which he has painstakingly reviewed the changed landscape since September 2008. As he noted in his decision in Cook County Sheriff/County of Cook, L-MA-09-003, 004, 005 & 006 (Arb. Edwin Benn, September 29, 2010):

The problem for interest arbitrators struggling to set economic terms and conditions of employment for new contracts remains as it surfaced after the economy crashed in the fall of 2008. The tools typically used by interest arbitrators before the economy crashed are of little help in this environment.

The website for the Illinois Labor Relations Board includes links to all of the interest arbitration awards issued pursuant to the provisions of the Illinois Public Labor Relations Act. See http://www.state.il.us/ilrb/subsections/arbitration/IntArbAwardSummary.htm.


Proposals to base teacher layoffs primarily on performance rather than seniority

According to a report in the New York Times, “Colorado, Oklahoma and Arizona have passed bipartisan legislation that would require that teacher layoffs be decided primarily on performance rather than seniority.”

These issues and many more, will keep labor lawyers of all stripes busy for the foreseeable future. How we collectively respond to these issues will be important to all affected parties. I am very concerned that if we, and I am speaking of attorneys for both management and labor, as well as neutrals where they are involved in the process, do not come up with solutions to these pressing issues in a manner designed to address the interests of all parties, then I am afraid that the decisions will be made by state legislatures, or in extreme cases, by a bankruptcy court. As the New York Times noted editorially on the need for reform in the system used to weed out incompetent teachers, “If the unions want to have more input, they need to quickly come up with a legitimate proposal of their own.” We can either try to devise our own solutions to these issues or let the solutions be dictated on another level. If it is the latter, none of us may like the results.

137 Id., at A21.

138 As the New York Times observed editorially, “Union contracts and benefits need to be changed at the bargaining table.” New York Times, February 7, 2011, at A18. The following point was also made in this editorial:

Governors … have a huge megaphone at their disposal, and should not hesitate to remind both the public and union members that financial emergencies require sacrifice. Government employees accept a special civic responsibility when they go to work for the taxpayers that is not always shared by their private counterparts—they are working to serve the public’s needs, not just themselves.”

Id.

139 New York Times, January 24, 2011, at A22. Somewhat ominously, an article in Education News observed that “[t]here is growing sentiment within the education reform movement that the time has passed for compromise with teachers unions.” EducationNews, “Indiana latest to curtail collective bargaining and reclaim control over schools,” April 22, 2011.