Shipman & Goodwin LLP

Public Employer Alert

February 2009

CONCESSIONS, CUTS AND PUBLIC SECTOR BARGAINING

COMMUNICATION

Most employees are already aware of the serious economic problems facing our nation and our state. One cannot avoid the daily barrage of bad news in the media – foreclosures, layoffs, business closings, stock market decline – and the concomitant loss of consumer confidence. But your employees may not know how the larger economic crisis is likely to affect your city, town or school system. It is wise to communicate early and often with union leaders and employees. Meet with union leaders, either unit by unit or in a group. Provide them with the facts as you know them and keep them up to date. While it may not be possible to predict the end-game, there will be markers and trends along the way – are tax collections likely to decline due to high unemployment in the town or business closings, what is happening at the State level with aid to schools and municipalities, how badly will the decline in investment income hurt the general budget and/or pension funds?

It is also acceptable to communicate directly with employees. An employer may communicate in non-coercive terms with employees, even if negotiations are in progress. Such communications should be factual and not in any way disparage unions. Moreover, if the employer is defending a position it wants to take in concession or other negotiations, the proposal must be made first to the employees' collective bargaining representatives. Otherwise, the employer's communication may be viewed as illegal direct dealing.

Some government officials are using flyers and e-mails to keep employees informed. One town has set up a place on its web site for employees and citizens to make suggestions on ways the town can deal

with its impending budget shortfall. Communication can be helpful not only in solving fiscal problems, but also in maintaining employee morale. Straight talk, without hyperbole and with honesty about the uncertainties ahead, is a critical component of successful communication with employees and their representatives.

CONCESSION BARGAINING

- **Consider Asking Unions for Concessions**

  Depending on the circumstances facing the public entity, concessions may be justified. When we speak of concessions here, we mean reductions in wages or benefits already negotiated and fixed by contract. Remember that an employer cannot force a union with an existing contract to reopen negotiations to change its terms. A union might worry about a breach of its duty of fair representation if it agreed to just open up a contract that was previously ratified by the membership. Both the employer and the union may be reluctant to have formal mid-term bargaining because of the prospect of binding arbitration in the event of impasse. Therefore, most parties prefer to engage in discussions with an assurance that neither will claim negotiations have occurred unless and until there is an agreement.

- **Be Realistic and Consider the Long Term**

  There is a limit to what an employer can expect from concession bargaining. It is difficult for a union to agree to and obtain membership ratification for concessions unless certain conditions exist. This may be a time when economic conditions convince unions and employees to sacrifice. Management can make that easier by taking the lead and having non-union employees subject to the same types of changes being requested of unions and their members. For example, if you ask unions to freeze wages, be prepared to do so for all non-union employees.

  As to what can be proposed in concession bargaining, there is no limit on the topics which can be considered, especially if the parties are engaged in "discussion" rather than "negotiation." It is most helpful for the employer to have concrete goals, such as the dollar savings needed or benefit modifications required to stave off future increases in the next couple of years. Remember that savings also may be achieved by changes in work rules, such as those involving staffing, which reduce overtime but not base wages. Be open-minded and do not be greedy. Your employees did not cause the economic crisis and cannot alone solve it. And you do not want to lose your ability

to attract and retain highly qualified employees by having a compensation package that is not competitive in your labor market. Other measures, such as program or service modifications, may be essential to an overall solution to budget woes, particularly those expected to persist for a number of years.

On the employer side, there are some proposals with short-term appeal but potential long-term problems. For example, a union may want a "no layoff" provision in exchange for wage concessions. Given the uncertainty all are facing over the next several years, a "no layoff" commitment, particularly without an end date, may be difficult to manage. Similarly, simply deferring obligations to a future date, in the hope that prosperity will return in the next two years, appears unwise at this juncture.

- **Follow the Applicable Statutory Process When the Time Is Right**
  All of Connecticut's public sector labor laws contain provisions for mid-term bargaining – bargaining over particular issues which takes place while a full contract is in effect. If a public employer is fortunate enough to reach an agreement with a union on concessions, the required statutory steps should be followed from that point forward. In State negotiations, that means sending the agreement to the General Assembly; in municipal and non-certified employee negotiations, that usually means submitting the agreement to the legislative body; and in local education agency negotiations with teachers and administrators, that means filing the agreement with the town clerk. Protection from a rejection by the legislative body which leads to binding interest arbitration may be possible if the agreement is worded properly. There are also some who argue that an agreement which requires no appropriation or, in the case of a municipal contract, does not conflict with existing charter or ordinance provisions, need not be sent to the legislative body at all. We suggest that there is no simple rule here, so that each situation should be reviewed by counsel to determine the appropriate path to finalizing the agreement.

CUTS IN POSITIONS, PROGRAMS OR SALARIES

It may not be possible to obtain concessions, or to obtain sufficient concessions to avoid layoffs. Therefore, it is best to be prepared, so that you will achieve needed results without risking contract or other claims that could eviscerate any savings from layoffs. Here are a few suggestions for getting it right.

- **Know Your Contracts and Train Managers**

  Many employers have not had occasion to apply the seniority, layoff, bumping and reemployment provisions of their collective bargaining agreements for years, if ever. It is critical that the personnel or human resources department study existing agreements, be familiar with the language of these contract provisions and work through some "real life" examples, particularly with respect to bumping. This information needs to be conveyed to department heads and other managers who may be involved in layoffs. In addition, it is important that seniority lists be up to date, and in compliance with contractual definitions of seniority, including any "superseniority" provisions for union stewards. If contract language is ambiguous on any of these issues, do not hesitate to discuss it with union representatives in advance, preferably before cuts are announced, so the discussion is not clouded by considerations as to the individual employees affected.

- **Exercise Your Management Prerogatives Wisely**

  The decision to eliminate a position for legitimate economic or other business reasons does not require collective bargaining, unless there is a "no layoff" clause or other promise to maintain positions in the contract. Even if a position is listed in the wage schedule, it can be eliminated for a proper reason. However, employers occasionally succumb to the temptation of using a fiscal problem to try and get rid of poor performers or employees who are seen as troublemakers. Arbitrators and juries are likely to see through any attempt to use layoffs for the wrong reason. In the same vein, be wary of recommending elimination of positions which are funded by grants or are revenue producing. When the State had fiscal problems in 2003, it laid off some workers whose positions were funded by insurance taxes rather than the general fund. An arbitrator ruled that the layoffs were not done for economic reasons and reinstated the employees with back pay.

- **Bargaining May Be Required**

  As discussed below, management generally has the right to eliminate positions. However, most personnel cost cutting measures short of that require bargaining – if not over the decision, at least over the impact. In addition to the "usual suspects" of wages and benefits, here are some examples of the rules on mandatory bargaining, based on Connecticut labor relations statutes and decisions of the State Board of Labor Relations:

Change in the Work Year. For teachers and other school employees, a change in the length of their work year is a negotiable issue. Even if the legislature adopts a proposal to change the number of school days required for students, negotiation over at least the impact of that decision on compensation will be required.

Furloughs. In 1994, the Board ruled that a town could not furlough employees without bargaining. In that case, the employer had a strong management rights clause which allowed the employer to "relieve" employees from duty for legitimate reasons. The Board applied its general rule requiring that a management rights clause contain a clear waiver of rights on a specific topic in order to relieve the employer of its duty to bargain. It is unlikely that Connecticut courts would give the power to furlough unilaterally to public employers the way the courts in California did , due to differences in our laws and the fact that we do not face the "emergency" faced by California with its deficit of $42 billion and the potential it will run out of cash this month.

Reassignment of Work to Others. As most public employers know, the decision to contract out work, or to transfer work from one bargaining unit to another, is a mandatory subject of bargaining unless there is express contract language permitting it. This rule can even make it difficult to shift duties from one position to another, if the positions are in different units or if one is unionized and one is not. A union may also have a claim for impact bargaining over pay if, by combining the functions of two positions into one, there is a substantial change in job duties or workload.

Reduction in Work Hours. A reduction of hours which removes a position from the bargaining unit is negotiable. So is any other reduction in hours which has a substantial impact on other conditions of employment such as eligibility for health insurance or pension. In addition, of course, reducing hours may be a breach of contract if the contract specifies weekly and/or daily work hours for employees.

Reorganization. As a general rule, management has the right to organize its operations as it sees fit. For example, a consolidation of departments or change in the lines of supervision may be made with negotiations over the decision. Nevertheless, if reorganization significantly affects working conditions, there may be a duty to bargain over the impact.

In short, if an action by management will cause a change in working conditions, it is likely that bargaining will be required, unless there is an explicit contract provision (e.g., a management rights clause that permits subcontracting) giving management the authority to make the change. And there may be a duty to bargain over impact or secondary effects even if there is no duty to bargain over the decision itself.

CONCLUSION

There is no "one size fits all" for employers dealing with financial exigencies. We offer the above as initial guidance. Our labor and employment lawyers stand ready to assist you in applying these principles to your unique circumstances.

QUESTIONS OR ASSISTANCE?

This Alert was prepared by Saranne P. Murray. If you have any questions or concerns regarding this matter, you may contact Saranne at (860) 251-5702. However, you should also feel free to contact the labor relations attorney with whom you work on a regular basis.

SAVE THE DATE

Shipman & Goodwin will be hosting our annual Public Sector Update on April 3, 2009 at the Farmington Marriott in Farmington, Connecticut from 8:00 a.m. to 12:00 noon. Concession bargaining will be a key topic and we will address the issue in greater depth at that time. You will receive a formal invitation shortly, but we encourage you to mark your calendars and save the date.

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