



2007-2009 Bargaining Goals: WASB Position Paper Series

Written by the WASB Employee Relations Staff

Teacher Post-Employment Benefits: Benefits Above and Beyond

This bargaining goals position paper addresses post-employment (retirement) benefits that go above and beyond the teachers' already substantial Wisconsin Retirement System pension. Typically, these additional benefits include district-paid health insurance during retirement and/or additional cash stipends paid during retirement.

The costs and consequences of the additional post-employment benefits sought (and sometimes obtained) by unions in collective bargaining should be an area of concern to school boards. School board members are the stewards and caretakers of public education, and many board members have begun to see that the *current* cost of post-employment benefits is directly affecting *current* educational programs. However, an even greater concern in many districts should be the *future* cost of the post-employment benefits that are being promised to *future* retirees. Only a limited number of districts have quantified these future costs, and fewer still have set any money aside to pay for the benefits. As a result, the costs remain largely unknown and misunderstood—even as proposals to increase post-employment benefits cross the table during bargaining. In many cases, we suspect that districts will be unable to afford the retirement benefits they have agreed to pay, and future educators and pupils will suffer the consequences. We encourage school board members and administrators to use the information in this position paper as they participate in developing state-wide and local bargaining goals for 2007-2009 teacher contracts.

Why not "Early Retirement Benefits"?

In the past, we have often seen bargaining goals that refer to "early retirement benefits." The WASB Employee Relations Staff believes that labeling the post-employment benefits sought by the unions as "early retirement benefits" plays into the misleading rhetoric surrounding such benefits. Either expressly or implicitly, unions often position their "early retirement" bargaining proposals as proposals that generate "savings" for the district. According to the unions, here is how "early retirement" works:

1. The retirement benefits the teachers are asking for will give high-salaried teachers nearing retirement an incentive to actually retire.
2. The district will replace the high-salaried senior teachers with lower-salaried new teachers, generating "savings."
3. The "savings" generated by the staff turnover are split between the district and union. The union's portion of the savings is represented by the benefits that were offered to the senior teachers at retirement.

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

The following are some of the significant problems with the “early retirement” proposals offered by the employee unions:

1. The union proposals are rarely structured to give employees an actual incentive to retire “early.” That is, the benefits that the unions seek would be available to an employee regardless of whether the employee retires this year, next year or five years from now. If the benefits do not actually accelerate staff turnover, there are no “savings,” and the benefits represent a pure cost.
2. Employees are going to retire at some point regardless of whether these additional benefits are available. The union models that purport to calculate “savings” are often based on unrealistic assumptions about how long people will actually work in the absence of the benefit. The window for generating any savings is (at the very most) a function of the number of years that a teacher retires earlier than he or she would have retired without the benefits.
3. The benefits that unions seek to provide to each retiring teacher usually far exceed any realistic estimate of the savings that can be generated. Paying \$100,000 in health insurance to each retiree to generate \$50,000 in speculative “savings” is a losing proposition for the district from the outset.
4. The union proposals often include costs that will increase over time. Offering ten years of 100% district-paid retirement health insurance to someone who retired in 1985 is a very different benefit from ten years of 100% district-paid retirement health insurance in 2006-2007. What will ten years of 100% district-paid retirement health insurance cost in 2020?
5. The union proposals and calculations often ignore hidden costs to the school district, such as the “implicit rate subsidy,” which is represented by the decrease in the single and family health insurance premium rates that would exist if no retirees (an expensive group to insure) were still on the plan and affecting the calculation of overall premiums.
6. The union proposals are often drafted in a manner that creates potential liability under the tax laws and age discrimination laws.
7. If properly understood and funded as the benefits are accrued, providing post-employment benefits for teachers generally means that less money is available for current and future salaries and other educational program costs. School boards are uniquely responsible for balancing these competing priorities. Union proposals generally have only one constituency in mind.
8. If misunderstood and unfunded, agreeing to substantial post-employment benefits for teachers is akin to placing a fiscal time bomb in the district’s teacher contract—a burden that is unfair to future school boards, administrators, teachers, taxpayers, and, above all else, future students.

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

The bottom line is that the WASB Employee Relations Staff believes that “early retirement” is a euphemism that is used by the unions to conjure up images of true retirement incentives and cost savings. Most of the proposals offered by the unions are not true incentives and/or cost the district thousands of dollars more than any amount that could possibly be “saved.” Accordingly, we refer to the retirement benefits discussed herein as “post-employment benefits” rather than “early retirement benefits.”

Bargaining Goals from 2005-2007

In 2005-2007, the WASB bargaining goals process suggested bargaining goals aimed at curtailing any expansion of existing post-employment benefits and, in some cases, altering the benefits to reduce future cash outlays and to reduce potential legal liabilities. The 2005-2007 bargaining goals also urged school districts to educate themselves on the current and future costs associated with the post-employment benefits that have been promised to current and future employees. In particular, the “final” 2005-2007 bargaining goals included the following specific statements:

1. Retirement incentives: School districts should avoid negotiating any “permanent” post-employment benefits, including increases to existing post-employment benefits. In this context, a “permanent” benefit is one that is defined in the main collective bargaining agreement and/or that becomes part of the *status quo* when negotiating a successor agreement.
2. If any retirement incentive is offered, it should be offered on a temporary basis through a one-time, non-precedent setting Side Bar Agreement.
3. School districts that are already offering retirement benefits that increase in cost as health insurance costs increase should convert those benefits into capped, fixed dollar amounts.
4. If a school district with unmanageable retirement incentive costs is unable to negotiate voluntary changes to the benefits, the district should consider using interest arbitration as a means to reduce the present and/or future costs of the benefits.
5. School boards should be aware of (1) the projected future costs of any existing retirement incentives and (2) the amount of money that would have to be set aside annually to ensure that those future liabilities are fully funded as they are accrued. These amounts should be determined in accordance with the standards established by the Governmental Accounting Standards Board.
6. School boards should require the union to determine, at the union’s expense, the projected future costs and present annual accrued liability for any union proposal addressing retirement incentives.

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

7. If retirees are allowed to remain in the district's group health insurance plan, retirees should agree to accept any changes in the plan carrier or benefit package that are agreed to by active employees or ordered by an interest arbitrator. Include waiver of claims provisions to protect the district from potential lawsuits. Retirement benefits can raise complex QEO, discrimination and tax issues.
8. All schools should seek advice of legal counsel or WASB Employee Relations Staff Counsels about any retirement benefit modifications.

The WASB Employee Relations Staff believes that these bargaining goals continue to be sound guides for school districts. For our suggested refinements to these goals, especially refinements to item no. 7 in the above list, please see the discussion of "Medicare Part D," below, and the draft goals at end of this document.

Recent Legal Developments Related to Post-Employment Benefits

There are at least three ongoing legal developments that are affecting post-employment benefits offered to public employees. The first important development relates to accounting standards for post-employment insurance benefits. The second important development relates to the Equal Employment Opportunity Commission (EEOC) position on post-employment health insurance benefits that are coordinated with Medicare eligibility. The third important development concerns the implementation of Medicare Part D and some school districts' commitment to provide retirees with a certain level of insurance benefits, as opposed to a specified dollar contribution toward insurance premiums.

Accounting Treatment for Post-Employment Benefits

The Governmental Accounting Standards Board (GASB) will soon require school boards to report the cost of all accrued, unfunded post-employment insurance benefits as liabilities in the district's financial reports. The concern motivating the change is that many public employers, including Wisconsin school districts, have operated on the "bargain now, pay-as-you-go" system with respect to insurance benefits in retirement. Under the "pay-as-you-go" system, the school district does not set aside any money for the cost of a teacher's post-employment benefits while the teacher is actually working at the district. Instead, the full cost of the post-employment benefits will be paid out of future budgets as the bills come due. To the extent the cost of retiree health insurance escalates in the future, a future school board will have to deal with where to find the money. Funding post-employment benefits on a "pay-as-you-go" basis without knowledge of the potential future costs is unwise. At worst, it is fiscal mismanagement that will ultimately affect the district's ability to borrow money and offer educational programs. Nonetheless, the "pay-as-you-go" approach is a very common practice among public employers that offer post-employment insurance benefits.

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

Under the new accounting rules, school districts will not be required to actually set aside money to pay for the post-employment benefits being accrued by current employees. However, school districts will be required to quantify the expected future costs of their existing post-employment benefits, and the failure to fund the benefits as employees make their way toward retirement will be reflected as a liability on the district's financial reports. The WASB Employee Relations Staff believes that the change in the accounting rules represents sound public policy. It will force school districts to assess and, hopefully, confront the costs and consequences of the retirement benefits in their existing collective bargaining agreements and in future bargaining proposals. It will also encourage public awareness and examination of the costs and consequences associated with teacher post-employment benefits. Mandatory implementation of the new accounting rules will be phased in over a three-year period from 2006 to 2008, depending on the size of the governmental unit.

Coordination of Retirement Health Insurance Benefits with Medicare

Age discrimination issues with respect to post-employment benefits have been a concern for several years. Experienced school district negotiators are now generally familiar with the concept that age-based cutoffs in retirement benefits are generally unlawful. The issue that continues to be of interest to school districts (and the teachers' unions) is that the Equal Employment Opportunity Commission (EEOC)—the federal agency charged with administering the federal age discrimination laws—has proposed an administrative rule that would expressly permit employers to coordinate retirement health insurance benefits with Medicare eligibility. In the past, Medicare-based reductions in benefits (like age-based reductions) have been treated by some courts as a form of age discrimination.

The current status of the EEOC's "coordination" rule is that the validity of the rule was challenged in the federal courts, and the courts have not yet permitted the EEOC to implement the rule. The last court to issue a decision in the case concluded that the EEOC rule was valid, but prohibited the rule from taking effect during the appeals process. The appellate court has not yet issued a decision in the case. Thus, the EEOC rule is not presently in effect and cannot be relied upon as legal authority for Medicare-based reductions in post-employment benefits.

Should the EEOC's rule become fully effective, the rule will likely permit an employer to reduce or eliminate contributions toward retiree health insurance when the retiree becomes eligible for Medicare. The rule represents a significant reversal in the EEOC's approach to enforcement of the federal law. See, e.g., *Legal Comment: EEOC Rule for Retiree Coordinated Health Care Benefits*, WISC. SCH. NEWS at 27 (July, 2004). For school districts that still have age-based cutoffs in the health insurance benefits currently offered to retiring teachers or administrators, replacing the age-based cutoffs with a Medicare-based cutoff is an option that should be reviewed with counsel as a means of reducing potential liability for age discrimination. For school districts that do not have age-based cutoffs for retirement health insurance benefits in their existing collective bargaining agreements, relying on the EEOC's "coordination" rule may also have advantages. However, such districts should carefully assess potential savings and

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

review remaining liability concerns with district legal counsel before agreeing to or proposing changes in benefits that are based on the EEOC's "coordination" rule. Remaining legal concerns about the federal rule include (1) the status of the appeal that is pending before the federal courts; and (2) the state law prohibitions against age discrimination that may apply even if Medicare-based reductions are allowed under federal law.

Issues Surrounding Medicare Part D

Medicare Part D is the new federal government program that provides prescription drug benefits for Medicare-eligible retirees. The program first went into effect during 2006. Initially, the creation and implementation of Medicare Part D was not expected to create substantial new issues for school districts. However, that expectation was shattered when the WEA Trust insurance company announced that it intended to shift all retirees' prescription drug coverage from the Trust's own prescription drug plans to coverage under Medicare Part D. In effect, the WEA Trust unilaterally decided to drop retiree prescription drug coverage from the insurance plans it was offering to school districts. Further, the Trust was not offering a "supplemental" plan that would have filled any gaps between Medicare Part D and the drug coverage it used to offer. Although such "supplemental" plans are common with Medicare Part A and Medicare Part B benefits, Medicare Part D was intentionally structured to avoid giving employers and insurance companies an incentive to use Medicare Part D with a traditional supplemental plan.

The Trust's announcement created two significant problems for some school districts. The first problem was that some school districts had promised in their collective bargaining agreements that retirees who received post-employment benefits would be receive the "same" insurance benefits that they had at the time of retirement (or the "same" benefits that the group plan offered to remaining active employees), including the "same" prescription drug coverage. All of the sudden, the WEA Trust was unwilling to provide retirees with such identical coverage, and school districts faced the prospect of (1) bargaining an immediate change in the benefits; (2) securing an alternate carrier for retirees; and/or (2) self-funding the gaps (in coverage and in cost) between Medicare Part D and the WEA Trust prescription drug plan. The second problem, also mostly applicable to school districts that had made contractual promises regarding particular benefit levels, was that there would be a potential age-discrimination issue surrounding any Medicare-based reductions in benefits. (See the section above addressing the status of the EEOC's "coordination" rule).

Fortunately, the most pressing concerns facing school districts on the brink of Medicare Part D's implementation were somewhat alleviated when the WEA Trust changed direction and offered to continue retiree prescription drug coverage under limited circumstances. School districts were then faced with some difficult questions surrounding their eligibility for (and the desirability of) the Trust's limited exception, but at least an alternative to self-funding was available for the districts that needed it.

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

The entire sequence of events surrounding Medicare Part D revealed inherent problems with the post-employment insurance benefits that have been offered to retired teachers. The main problem that the Medicare Part D issue brought to light is that many school districts have promised to maintain particular benefit levels for retirees, but the school districts do not control the insurance-company decisions that ultimately determine whether it is possible to live up to those contractual promises. The school district's lack of control is exacerbated by the fact that insurance companies have identified retirees as a particularly costly group to insure, and the insurance companies are looking at ways to avoid incurring all of the costs associated with insuring that group.

What solutions exist? At least arguably, the "best" solution is for the contract to state post-employment benefits as a dollar-denominated contribution toward the cost of the retiree's health insurance premiums, while expressly stating that the school district does not promise, or in any way guarantee, the availability of any particular insurance carrier, plan structure, or benefit level for any retiree. The remaining problem is that this "solution" will be difficult to bargain. For those districts that already have contract language that promises a particular level of benefits, the unions will demand "concessions" for any attempt to limit the district's contractual promises to items that are within the district's control.

Other Significant Legal Issues

In addition to the age discrimination concerns already mentioned, there are several other legal pitfalls associated with post-employment benefits.

Tax Issues. The tax treatment of post-employment benefits is extremely complicated. When offering cash stipends as retirement benefits, there can be issues with respect to when the employee/retiree is required to report the cash benefits as income. In some circumstances, an employee may be required to report the value of retirement cash stipends as taxable income before the employee has even retired. School districts already offering cash payments to retirees may want to review the potential advantages and disadvantages of negotiating a post-employment 403(b) plan as a means to avoid unintended tax consequences associated with cash payments.

School districts that presently offer retirees a choice between non-taxable health insurance benefits and taxable cash payments also face significant issues in regard to the tax law. Generally, a choice between a taxable benefit and a non-taxable benefit must be structured through a formal alternative benefit plan under Section 125 of the tax code. However, an alternative benefit plan cannot be implemented if it is primarily for the benefit of retirees. Thus, a district's ability to provide retirees a choice between cash payments and health insurance depends, in part, on whether active employees are offered a similar benefit. This basic summary of tax issues surrounding post-employment benefits is not intended to be comprehensive, but should put school board on their guard that all existing benefits and future proposals should be reviewed for their tax consequences.

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

QEO Issues. Wisconsin's Qualified Economic Offer (QEO) law creates post-employment benefit issues that are unique to Wisconsin school districts. School board members should note that the "total package" costing required under the QEO law does not include the cost of most post-employment benefits. Thus, if the teachers offer to settle at a 4.0% "total package", but their proposal includes new or increased post-employment benefits, the 4.0% "total package" may be misleading. The QEO law also creates problems for districts that offer a temporary retirement incentive. Without appropriate QEO waivers from the union, a district implementing a QEO may be required to extend a temporary retirement incentive much longer than the board intended.

Vesting of Benefits. Generally, employees are entitled to receive the retirement benefits defined in the collective bargaining agreement that was in place at the time of their retirement. And, once an employee retires and becomes legally vested in a set of benefits, the union loses the power to negotiate changes in that set of benefits. In practical terms, retirees with vested benefits can inhibit the board's flexibility to negotiate with active employees. For example, even if the active employees are willing to make changes to their health insurance benefits, there may be retirees still enrolled in the "old plan" who are entitled to the "old benefits." The way out of this particular bind is to ensure that the district's post-employment benefits allow nothing more than participation in a district-sponsored group health insurance plan during the benefit period, and to expressly state in the contract that the district has not promised, and that the retiree has no vested right to enforce, any particular plan structure or level of benefits.

Practical Issues to Confront when Offering Post-Employment Benefits

Impact on Staff. True retirement incentives will likely accelerate turnover among the district's most experienced teachers. School boards considering a temporary retirement incentive to avoid layoffs or to achieve short-term savings should consider the possibility that losing too many experienced teachers in a short period of time may affect the quality of education the district is able to provide. The school board should also consider whether the district will be able to find a qualified replacement if the incentive will cause turnover in high-demand areas such as special education, technology education, math, or science.

Political Aspects of Post-Employment Benefits. School boards should consider the community perception of post-employment benefits. Many taxpayers who review teacher benefit packages (health insurance, WRS, etc.) wonder why their tax dollars should finance benefits that far exceed the benefits they receive from their own full-time jobs (public or private), particularly at a time when teachers continually complain about their "low" and "unfair" salaries. Even if the teachers are seeking "just a small increase" to their retirement benefits that will get the deal done, the board's constituents may strongly prefer that the settlement not include any additional retirement benefits.

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

Bargaining Realities. Is it impossible to find a situation where it is reasonable for a board to offer increased post-employment benefits? Of course not. Agreeing to implement a carefully-drafted, temporary retirement incentive window in lieu of laying off the district's least senior staff members can certainly be a reasonable choice. In addition, bargaining realities, comparable contracts, and recruitment and retention all play a factor in the final decision. However, as we hope to have communicated in this discussion document, the WASB Employee Relations Staff believes that, in nearly all cases, post-employment benefit proposals pushed by the unions are not in the best interest of Wisconsin school districts. Placing available funds on the main salary schedule will often serve to boost the competitive position of the district's compensation package with fewer long-term negative consequences for the district.

Bargaining Goals Recommendations

The WASB Employee Relations Staff recommends the following bargaining goals related to teacher post-employment benefits:

1. School districts should avoid negotiating any "permanent" post-employment benefits, including increases to existing post-employment benefits. In this context, a "permanent" benefit is one that is defined in the main collective bargaining agreement and/or that becomes part of the "dynamic *status quo*" when negotiating a successor agreement.
2. If the district is going to offer any type of retirement incentive, it should be offered on a temporary basis through a one-time, non-precedent setting Side Bar Agreement, and even then only after a careful analysis of the cost of the benefits and the impact on the supply of qualified staff. The temporary, non-precedent setting Side Bar Agreement would establish a defined "window" for accepting the benefits, and then expire for all purposes. Districts should work with the WASB Employee Relations Staff and/or district legal counsel to ensure that any early retirement "window" is drafted with proper attention to the QEO law and other significant legal issues. The benefits offered as temporary retirement incentives should be expressed as fixed dollar amounts.
3. If an existing post-employment benefit is structured such that costs increase automatically in connection with insurance premium increases and/or increases in employee salaries, then proposals should be made to convert the benefit to a fixed-dollar amount.
4. If a school district with unmanageable post-employment benefit costs is unable to negotiate voluntary changes to the benefits, the district should consider using interest arbitration as a means to reduce the present and/or future costs of the benefits.
5. School districts offering post-employment benefits should consider having an actuary determine (1) the projected future costs of post-employment benefits, and (2) the amount

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

of money that would have to be set aside annually to ensure that those future liabilities are fully funded as they are accrued. The actuarial review should be conducted in accordance with the rules established by the Governmental Accounting Standards Board (GASB). If a union proposes new or enhanced post-employment benefits, the school board should require the union to determine, at the union's expense and under GASB standards, the projected future costs and present annual accrued liability associated with the proposal.

6. School districts should structure bargaining proposals in a manner that reduces current and/or future post-employment benefit costs in favor of increased salary where possible.
7. If retirees are allowed to remain enrolled in the district's group health insurance plan (regardless of whether there is a district contribution toward premiums), the contract should state that the right to participate in a district-sponsored group insurance plan during retirement does not create or include any vested right to health insurance that is offered (1) by a particular carrier; (2) under a particular plan structure, or (3) at a particular benefit level.
8. School districts should not rely on contract language purporting to allow the district to reduce or terminate post-employment benefits once the district proves that anticipated "savings" do not materialize. First, there are rarely any actual "savings" involved with most post-employment benefits—the benefits almost universally represent an additional cost to the district from the outset. Second, these "guarantees" would be extremely difficult and expensive to enforce because such provisions (1) are usually hopelessly ambiguous; (2) are generally inadequate in terms of specifying how "savings" will be calculated; and/or (3) rely on assumptions that represent an unrealistic picture of costs and savings.
9. All school districts should work directly with district legal counsel to review their existing collective bargaining agreements and all bargaining proposals related to post-employment benefits. The review, at a minimum, should include the following:
 - An assessment of whether the district's post-employment benefits are in compliance with the state and federal age discrimination laws. This may include an assessment of whether the district could benefit from the EEOC's proposed rule that would permit employers to coordinate post-employment medical insurance benefits with Medicare eligibility.
 - Districts should obtain a waiver of claims (e.g., age discrimination claims) from any employee who voluntarily accepts post-employment benefits.
 - An assessment of the impact of the implementation of Medicare Part D on current and future retirees, particularly for school districts that offer a group health insurance plan from the WEA Insurance Trust.
 - If existing post-employment benefit provisions offer retiring employees a choice between a taxable benefit (e.g., cash) and a non-taxable benefit (e.g., health

2007-2009 Bargaining Goals: WASB Position Paper Series

Teacher Post-Employment Benefits: Benefits Above and Beyond

insurance), the benefits should be reviewed to determine whether they constitute a valid alternative benefit plan under the tax laws. An alternative benefit may apply to retirees, but may not be structured primarily for the benefit of retirees.

- If existing post-employment benefit provisions include cash stipends, the cash stipends should be structured so that the employee is not required by the tax laws to declare the cash stipends as income prior to receiving the benefits. (This problem is known as “constructive receipt.”)