What Superintendents Need to Know about Employee and Collective Bargaining Law in a Time of Financial Exigency and Changing Expectations

During 2010-11 and for the next few years, Oregon school districts will choose from a variety of options to reduce expenditures and balance their budgets. Here are recent legal and practical considerations that impact the choice and implementation of these options:

A. Reduction in Staff

1. Reductions in staff will likely increase in spring, 2011.

Most districts have reduced staff by attrition, and some have reduced staff substantially by layoff. Spring, 2011, is likely to be a season when many districts are forced to cut more deeply and lay off teachers, classified and administrative staff.

   -- Retirements and resignations have diminished, so attrition will not “downsize” staff without layoffs.
   -- Pressure on districts to run a full school year, or cut fewer days, will leave staff reduction as the only way to reduce personnel costs.
   -- Increases in PERS employer contributions will cause reductions in staff even if salaries and insurance benefits remain flat.
   -- Even with 0% increases in salaries and insurance, “step” and “longevity” increases will increase personnel costs, with little or no “turnover savings” as an offset.
   -- Loss of targeted federal and state funds will result in the elimination of special positions (TOSAs, literacy coaches, etc.), triggering “bumping” back into classroom positions.
   -- Changes in school schedules will result in teachers teaching more classes, or the number of classes offered to students will be cut, thus reducing the need for teaching staff, particularly at the secondary level.
   -- Further reduction in elementary specialists will result in excess staff, some with years of experience in areas like library, music, or physical education.
   -- Unemployment compensation costs are likely to be greater because fewer laid-off employees will find replacement work.
2. Oregon law provides for consideration of “competence” and “merit” in addition to licensure and seniority, but only small districts have used these options, for the most part.

- Licensure requirements for remaining positions may not encompass Highly Qualified status, so HQ may have to be bargained as a “competence” consideration. Licensing can be applied rigidly, but districts that have commonly used “misassignments” may need to explain why a senior teacher must be laid off for lack of a second endorsement area.

- Among teachers with the right licensure for the remaining position(s), seniority will rule unless the District determines that a less senior teacher has greater “competence” or “merit.”

- Many districts have bargained away the ability to use “merit” as a criteria for teacher layoffs because the evidence to establish “lesser merit” may be about the same as to nonrenew or dismiss, plus recall rights mean that a performance concern will not go away.

- “Competence” means the ability to teach a subject or grade level based on recent teaching experience (within the last five years) in that subject or grade level, within or outside of the district. “Competence” considerations can be used to retain junior teachers at grade levels where the cuts are not being made (i.e., high school band, elementary counseling) from “bumping” by senior teachers from another grade level where the cut is being made. “Competence may also be used to shield junior teachers from “bumping” by senior teachers with newly-acquired or never-used endorsements.

- “Competence” cannot be bargained out, but can be redefined by bargaining. Some districts have added “bilingualism” to the definition; some unions have effectively eliminated reliance on prior experience where teachers are willing to undergo retraining.

- Using “competence” and/or “merit” to retain a junior teacher and lay off a senior teacher will invariably lead to a grievance, but districts have prevailed in most of the cases that have gone to arbitration.

3. Using “competence” and “merit” in administrative reduction in force is often seen as more critical because of the diversity of necessary experience and specialized knowledge attached to each position.

- School districts are not required to transfer laid-off administrators to other positions, even vacant positions, unless the administrator is both “licensed...
and qualified.” ORS 342.934(2). Example: elementary principal laid off where there are vacancies in special education director position and high school principal position. Centennial School District (2011).

When “competence” and/or “merit” is used to retain a junior administrator, a laid-off senior administrator may arbitrate the decision under ORS 342.934(7), but arbitrators will generally not second guess superintendent decisions where the proper process is followed and there is substantial evidence for the “competence” or “merit” determination. Baker School District (2002), Centennial School District (2011).

Laid-off administrators who were formerly contract teachers in the same district may have the right to “bump” a less senior teacher if the administrator retains necessary licensure. ORS 342.934(5).

“Non-extension” decisions are separate from layoff decisions, both for administrators and teachers.

As always, a district may transfer a licensed administrator into any other administrative position as long as the current salary is maintained. ORS 342.845(4)(b).

4. Part-time and retired licensed staff pose additional reduction in force issues.

By law (ORS 342.845(2)), part-time licensed staff may be assigned within .5-.99 FTE range without invoking reduction in force, unless CBA or policy/practice has been to guarantee retention of existing FTE. Greater Albany (2010), Lake Oswego (2010).

Licensed administrators and teachers of less than .5 do not have RIF/recall rights under Oregon law (ORS 342.815(9)), but teachers may have such rights under CBAs that include less than half-timers as bargaining unit members.

Seniority is accumulated without regard to part-time or full-time status.


Automatic “first out” or “last recalled” provisions for rehired retirees may pose age discrimination issues. (This would not be true for retirees rehired on temporary contracts for the remainder of the school year only).
5. **Classified collective bargaining agreements have RIF provisions that pose even more complex considerations, especially in case of reducing hours and/or work days.**

- Many classified CBA reduction in force articles do not cover reduction in hours at all.
- Some classified CBAs specify a portion of hours that can be cut without it being considered a “reduction in force” (usually a percentage of hours, or number of minutes, or loss of insurance benefits).
- Most classified CBAs contain special provisions allowing retention of junior employees with “special skills” that cannot be taught to the more senior replacement in a reasonable time.
- A few CBAs provide a limited number of “employer choice” protected employees who can be retained regardless of seniority.

6. **Recall provisions in CBAs and policy should be carefully considered.**

- Recall “in inverse order of layoff” or “in inverse order of seniority” effectively cancels out ability to consider “merit” and/or “competence” in recalls.
- Recall “to the position held at the time of layoff,” with the option to be considered for recall to other positions for which the employee is licensed and qualified gives the district the most options.
- Providing greater options for the employee in accepting or refusing a recall may be mutually advantageous, as long as unemployment compensation obligations do not increase.
- *Each district must adopt an administrative recall policy,* as required by ORS 342.934(6) “in consultation with its employees.” A minimum of 27 months recall period is required. *This should be done in advance of a need to recall, ideally before layoffs.*

**B. Many Oregon school districts will again reduce the number of work days and proportionately reduce salaries, at least as a part of the means to balance the 2011-12 budget.**

- Few teacher contracts contain an effective “reopener” that allows a school board to open bargaining over salaries and/or work days, and most teacher
CBAs specify an annual salary schedule and fixed number of work days. Thus, reducing work days in most districts requires mutual agreement with teacher unions, generally achieved as an alternative to substantial layoffs.

- School boards are attempting to gain the right to reopen the contract to rebargain compensation and/or reduced work days. Alternatively, boards are negotiating one-year contracts or automatic reopeners for second and third-year economics and work years.

- In some cases, CBAs have been negotiated tying the number of paid work days to a certain level of state funding.

- Classified contracts typically provide for an hourly pay rate and do not guarantee a number of work days. Thus, reducing work days or work hours/day is not a change in the status quo that must be bargained. However, unions representing classified employees are now filing unfair labor practice complaints based on a “change in status quo” argument where the district did not bargain with classified over reductions in days. *OSEA v. Woodburn School District* (pending); *OSEA v. Parkrose School District* (pending).

- Administrator and supervisor contracts should contain a “funding” clause that allows reduction in pay or benefits in case of financial difficulty.

- OAR 581-022-1620 requires the school district to annually adopt and implement a school calendar that provides students at various grade levels a minimum number of instructional hours for a year (K- 405 hours, Grades 1-3 – 810 hours, Grades 4-8 – 900 hours, Grades 9-12 – 990 hours). ORS 327.103 provides that schools districts may fail to meet state standards (including standards for instructional time) without penalty if a corrections plan is filed and the deficiency has been corrected before the beginning of the next school year. However, the State Superintendent may allow an extension of time up to 12 months, if the superintendent determines that deficiencies cannot be corrected or removed before the start of the next school year.

C. Continued reductions in funding have forced a change in bargaining strategy because of the unpredictability of revenue.

- Few multi-year CBAs are now being negotiated without automatic or “triggered” reopeners on economic terms and conditions.

**UNILATERAL REOPENER:** “If the Board determines that resources will not meet the expenditure requirements, then all provisions of this Agreement shall be subject to renegotiation under ORS 243.698 between the parties upon written request for renegotiation being made by the District to the Association.”
NOT UNILATERAL REOPENER: “The parties recognize that the revenue needed to fund the compensation provided by this Agreement must be approved by established budget procedure, and in certain circumstances by vote of the citizens. The District agrees not to modify the compensation specified in this Agreement unless mutually agreed to by the District and the Association but cannot and does not guarantee any level of employment.”

QUESTIONABLE REOPENER: “If the District is unable to fund the provisions of this [compensation] article, it will notify the Association and the Association shall immediately enter into negotiation with the District under ORS 243.698 to revise the compensation provided by this Article.”

NOTE: If the reopener specifies that the expedited process will be used or refers to bargaining under ORS 243.698, the district may unilaterally implement its last offer if no agreement is reached after 90 days of good faith bargaining. If there is no reference to expedited bargaining or ORS 243.698, then the entire regular process must be exhausted (150 days of bargaining, 15 days of mediation, final offers, 30-day cooling-off period). In the Matter of the Joint Petition for Declaratory Ruling Filed by the Medford School District and OSEA, 20 PECBR 721, 725 (2004).

- Collective bargaining is extended for a longer and longer period, in some cases (North Bend, Rainier, Reynolds, Rogue River) extending for an entire year before resources become well enough known to allow for settlement.

- CBAs with second and third-year salary increases tied to cost-of-living increases are rare. U.S. CPI-U (for calendar year 2010) is now at an annualized 1.5%, Portland CPI-U at 1.6% at the most recent report (for July 1, 2009-June 30, 2010).

- Unions seek to tie economic reopeners to a reduction in Ending Fund Balance below a specified percentage (3% or 4%, generally)

- More agreements have postponed step increases, or in some cases have eliminated some steps increases in order to reduce costs in the short term.

- Almost no CBAs have renegotiated step increases to reduce the cost (generally 3-5% for teachers not at the top of a column), but reducing the cost of “step” may be unavoidable. In most cases, step increases absorb all funds available for compensation increases, resulting in no increases in the salary schedule or insurance contribution, and thus pit more recent hires against long-time staff members.

- Few boards have yet proposed to permanently reduce the salary schedule or benefits. Union strategy has been to resist such permanent changes and agree, if necessary, to MOUs providing for short-term cuts such as
reduced work years, delayed steps, or postponed salary increases, so that the prior level of compensation is reinstated after the financial crisis has passed.

- Few boards have proposed to eliminate PERS pickup. Some CBAs contain automatic salary increases if pickup is eliminated.

- “Hard bargaining” is not an unfair labor practice. However, regardless of economic conditions, the parties are obligated to “make some reasonable effort in some direction to reach agreement” with each other at the bargaining table and may not engage in “surface” bargaining. AFSMCE Local 2936 v. Coos County, 21 PECBR 360 (2006), OSEA v. Clatskanie School District, 21 PECBR 599 (2007), aff’d without opinion, 219 Or App 546 (2008); Blue Mountain Faculty Assn. v. Blue Mountain Community College, 21 PECBR 673 (2007).

- ERB will decide claims of “surface bargaining” based on these factors: Whether dilatory tactics were used; the content of the party’s proposals; the behavior of a party’s negotiator; the nature and number of concessions made; whether the party failed to explain its bargaining positions; and the course of negotiations. Although unusually harsh or unreasonable bargaining proposals can be evidence of failing to bargain in good faith, the proposals will be considered in light of the needs of the employer, such as severe financial crisis. SEIU v. School District No. 1, Multnomah County, 20 PECBR 420 (2003).

- Budgeting decisions are independent of the requirement to bargain in good faith. Thus it was not a ULP for a school board to adopt a budget based on a shortened school year and no salary increase before the bargaining process was completed. Portland Assn. of Teachers v. Portland School District, 15 PECBR 692 (1995).

- Regressive bargaining proposals are not a violation of the duty to bargain in good faith where there is a reasonable rationale for decreasing compensation proposals from an original or preceding offer. SOBA v. Rogue River School District, 23 PECBR 767, 878 (2010) (on appeal).

**D. Bargaining over insurance contributions remains contentious**

- Most Oregon school districts have a dollar “cap” on the district’s contribution toward medical, dental and vision insurance.

- A few CBAs still provide for the employer to pay 90-95% of the premium for a specified plan.

- Increases in “caps” paid by districts have continued, but at a much reduced pace as insurance costs have risen so much faster than salaries.
As a result, employees are paying more and more in monthly payroll deductions for their share of the premium. This has led to an increase in employees choosing plans with higher deductibles and co-pays. Based on past OEBB experience, this may moderate future premium increases for these lower-cost plans.

“Composite” insurance plans may become less and less acceptable to single and one-party-enrolled bargaining unit members as they (along with full-family enrollees) are forced to pay $100-$300 per month for insurance. Cash payouts, Section 125 payments, or Health Savings Account payments have been negotiated to induce more employees to sign up for single-party coverage only or opt out entirely.

“Pooling” plans can stretch insurance dollars, where the district contributes the same amount per full-time employee into a pool but insurance is purchased on a “tiered” basis.

Some districts have bargained VEBA or 125 payments to induce employees to switch to higher-deductible, lower-cost plans (i.e., OEBB’s ODS Plans 6-8 instead of 3-5).

Some units have dropped vision insurance entirely and/or have reduced dental benefits.

Some units have bargained to have members assume the cost of LTD insurance premiums, which benefits the employee who later qualifies for LTD payments, when then become nontaxable.

E. Some districts have acted to contract out services formerly provided by district employees, but these changes have become problematic with the passage of H.B. 2867.

H.B. 2867, which became “operative” on Jan. 10, 2010, restricts public contracting by public entities, including school districts, by requiring the district to demonstrate, by means of a written cost analysis, that the district would save money. But even if this is true, the district “may not proceed with the procurement if the sole reason” that the costs of contracting out are lower is that costs for wages and benefits are lower.

A school district’s plan to contract out services currently performed by bargaining unit members will trigger an obligation to bargain, upon demand by the association, over both the decision and the impact of contracting out UNLESS the current CBA has enabling language,
specifically recognizing that the association has given up that right. Generally, bargaining will be conducted under the 90-day expedited process spelled out in ORS 243.698 UNLESS the current CBA refers to bargaining over contracting out but doesn’t provide for such bargaining to be conducted under ORS 243.698; then ERB’s position is that bargaining must be under the regular process (150 days at the table, etc.).

- If the current CBA does not reference contracting out, then the 90-day expedited bargaining process under ORS 243.698 is the one that will apply, if notice is given before the parties are in bargaining over a successor agreement. In the Matter of the Joint Petition for Declaratory Ruling Filed by Multnomah County School District No. 1 and SEIU, 19 PECBR 837 (2002). If the current CBA has expired or is going to expire and the association has already come to the table with a bargaining proposal, ERB takes the position that the longer, ”regular” bargaining process applies and the bargaining over contracting out must be rolled into the successor bargaining. Sandy Union High School District Declaratory Ruling Petition, 16 PECBR 699 (1996).

F. Many districts have changed staffing schedules or ratios to reduce staffing costs. Examples are:

- Eliminating a block schedule at the secondary level (which may require ¼ of the teaching staff being on prep at any point in time) and returning to teachers teaching 6 of 7 periods each day. Because this change usually increases teachers’ “student contact time” – a subject usually not addressed in the CBA – such a change in the status quo must be bargained (usually under the 90-day expedited provision), although the district can unilaterally implement the change in the status quo at the end of that period. Changes that increase teacher contact time with students (instruction and/or supervision) without bargaining to completion before implementing will be deemed ULPs because teacher-student contact time is a mandatory subject of bargaining.

- Reducing or eliminating elementary positions in music, media, and PE. However, this will be difficult if the CBA contains guarantees of elementary prep time within the student day. Elimination of elementary positions in music, media, PE have also resulted in difficult decisions regarding whether “competence” will be used to prevent the return of more senior teachers to elementary classroom positions (if licensed) or to “bump” junior teachers in secondary music or PE positions.

- Changing schedules so that guaranteed minutes of prep time are placed outside the student day is a management prerogative unless an existing CBA requires otherwise, because the scheduling of prep time is a
permissive subject. (However, if there is a resulting increase in student contact time, that change must be bargained to completion before implementation).

- Increasing class sizes need not be bargained because class size is a permissive subject of bargaining.

- Some districts use alternative ways of stretching licensed teacher time, such as on-line classes supervised by classified employees or credit for proficiency.

G. Legislative changes could impact school districts’ ability to control personnel costs.

- Eliminating “automatic” step and longevity increases as part of the “status quo” that must be maintained during the “hiatus period” after expiration of the contract would allow step costs to be included in the total negotiation over compensation.

  Under the PECBA, if the CBA has expired and no new agreement has been reached (the “hiatus” period), “the status quo with respect to employment relations shall be preserved until completion of impasse procedures except that no public employer shall be required to increase contributions for insurance premiums unless the expiring collective bargaining agreement provides otherwise. Merit step and longevity step pay increases shall be part of the status quo unless the expiring collective bargaining agreement expressly provides otherwise.” ORS 243.712(2)(d).

- Change or repeal of restrictions on public contracting might result in districts once again considering contracting out certain services as a means of cutting costs.

- Legislation eliminating the employee’s PERS contribution (6%) would not automatically save school districts money (by eliminating PERS pickup) because, under the PECBA, bargaining would be required over the impact of this change.

- Legislation amending ORS 243.698 could make expedited bargaining the required practice for any mid-term or reopener bargaining. Alternatively, the PECBA could be amended to shorten the period of regular (successor) bargaining.

- “Legislative concepts” proposals from the House Education Committee could increase personnel costs in special education by requiring local districts, not ESDs, to run self-contained classrooms if six or more students local students need such a classroom.
H. Oregon school districts have taken only minimal steps to rethink teacher and administrator compensation systems.

- “Stipends” for special education teachers have become acceptable, based on a consideration of extra time required for IEP preparation and IEP meetings extending beyond the work day (despite the fact that special education teachers often receive additional regular preparation time).

- “Stipends” or “signing bonuses” for teachers in other specialized fields, with limited candidates, have typically not been negotiated. Even “signing bonuses” may require negotiation with the union. *Northwest Education Association v. Northwest Regional ESD*, 22 PECBR 247 (2008).

- Additional compensation for additional responsibilities has long been standard in Oregon CBAs, as long as the “stipends” or extra payments have involved extra time. Typically, these decisions are not seniority-based, and of one year in duration (department chairs, TOSAs with added contract days, lead teachers, mentor teachers).

- During the 1980’s and 1990’s, salary schedules were changed through bargaining to include larger steps for more senior teachers, a higher ratio between base and top (with a union goal of 1:2), and easier movement across columns (eliminating required masters degrees, requiring only added credit hours, adding credit for district in-service). Some efforts to reverse these practices have been made since 2000.

- Formalized systems to link “add-on” compensation to student achievement are now being developed, spurred on by federal grants. Generally, teachers must volunteer to participate. Measurements of “student achievement” in subject areas not covered by standardized (usually state or national) tests must be developed.

- Proposals to require achievement of specific goals in order to receive a step increase have not been adopted in bargaining, except in small districts or on an experimental, non-mandatory basis.

- Additional compensation for service in schools with greater challenges (not meeting AYP, higher poverty levels, etc.) has rarely if ever been negotiated in Oregon.

- A “Legislative Concept” bill produced by the House Education Committee would provide $50 for any AP teacher per student earning a grade of “3” or higher on an AP exam, up to a maximum of $2000 per year.