



States Take Aim at Pensions Through Collective Bargaining Restrictions

The tidal wave of Republican lawmakers and governors voted into office last November has resulted in a flood of legislation in statehouses across the country aimed at restricting collective bargaining. While anti-labor sentiment is a component of many of these actions, the bills also provide a means for states to alter their budget obligations to public pensions at a time when state treasury funds are tight.

Here are updates on activity in three states at the heart of this anti-union, anti-public pension activity:

Wisconsin

In mid-April, a circuit judge dismissed one of three lawsuits challenging legislation pushed through by state Republicans that, in addition to severely restricting collective bargaining rights, requires higher contributions for pension and healthcare benefits from state employees. Meanwhile, implementation of the legislation remains on hold due to an earlier order by Dane County circuit judge Maryann Sumi while she considers the various legal challenges to its legitimacy.

Sumi dismissed Democratic county executive Kathleen Falk's suit on

April 14 because, Sumi said, state law forbids an agency or arm of government, such as a county, from challenging the constitutionality of state laws. Not to be deterred, Falk, as well as Dane County board chairman Scott McDonell, are now petitioning the court to allow them to challenge the law as private citizens.

Two other lawsuits remain ongoing, one brought by the Dane County district attorney and one by firefighters and other public workers. Republican governor Scott Walker is strongly defending the new state law and is seeking a dismissal from the Wisconsin Supreme Court of the lawsuit brought by the county district attorney. The court has yet to announce whether it will take the case.

Ohio

Ohio's Senate Bill 5 restricting union collective bargaining rights may show up on the ballot there in November, leaving it up to Ohio residents to accept or reject it. The bill allows for bargaining on wages and certain working conditions but not on pension benefits or health care.

Petition-signing events organized by the We Are Ohio campaign, which describes itself as a grassroots

bipartisan group, have been held statewide to build support for a referendum. A first round of signatures has already been submitted to state officials, and it is expected to make it onto the November ballot.

New Hampshire

New Hampshire is the latest battle front in the debate, with the state senate passing a bill April 20 prohibiting collective bargaining agreements that require employees to join a labor union and prohibiting unions from collecting mandatory fees. Earlier, the house of representatives passed similar legislation. A compromise bill must be worked out between the two houses before it can be sent to governor John Lynch for signature.

Lynch, a Democrat, has promised to veto the measure, but the action is not expected to stop it from becoming law. The veto will send the bill back to the legislature, where proponents say they have the necessary support for an override vote.

The Monday General Session at the [NCPERS Annual Conference](#) will feature a panel discussion on this topic. And as always, NCPERS will continue to closely monitor this activity and will keep members informed of developments.

CRS Examines State Actions to Modify Pension Benefits

The Congressional Research Service (CRS) recently released a report examining from a legal perspective the ability of state and local governments to modify pension benefits as a means of addressing underfunding issues and budget shortfalls. The report provides an overview of how public pension plans are regulated at the federal and state level, discusses selected legal issues that may arise in attempting to remedy or prevent public pension plan underfunding by modifying benefits, and addresses possible federal regulation of state and local public pension plans.

According to the report, almost two-thirds of states have taken action to modify pension benefits, at least as far as future participants or benefit accruals are concerned. Such changes include reducing benefit levels, requiring higher employee contributions, or amending age and service requirements to lengthen the accumulation period and shorten the distribution period of pension benefits.

However, CRS notes that while changes to benefits available to new employees may not face legal “obstacles,” the question is less clear when it comes to existing employees. Many courts now characterize public pensions as “deferred compensation” to which an employee is entitled for work that has already been performed. A number of state courts have found

that based on common law, state statute, or state constitution, public pension benefit plans create a contract between the state and the plan participant. If such a contract is found to exist between the state or local government and pension plan participants, its existence can limit the ability of a state to amend its pension plans. For instance, the CRS report noted that at least six states have a constitutional provision explicitly providing that membership in or accrued benefits from a state’s retirement system create a contract between the state and its employees that cannot be impaired.

Even without an express constitutional provision, a state’s statute or case law may provide the basis for state and local government employees to have contractual rights to their pension benefits. The contract clause of the US Constitution or an analogous state constitutional provision may also provide protection to an employee’s contractual right to an unaltered pension benefit.

Courts typically look at whether a state law violates the contract clause, but since state statutes establishing retirement plans generally do not address whether a contract is created, CRS stressed that it can be difficult to ascertain whether a contract exists for a public plan pensioner.

If able to establish the existence of a contract, courts would then need to determine whether the state or local government’s modification

“substantially impairs” a pensioner’s contractual rights. Steps would include determining whether a statute applies prospectively or retroactively; disrupts a party’s “reasonable expectations” regarding an agreement; or “alters its terms, imposes new conditions, or lessens a contract’s value.” Other factors some courts have found to be “substantial impairments” in certain circumstances are benefit formula changes, changes in plan funding sources or methodology, or the elimination of supplemental cost-of-living payments. However, in general, CRS said that state law amendments not anticipated to have an impact on pension benefits or employer rights and responsibilities may not be considered impairments.

Should a “substantial impairment” exist, the state law may still be constitutional so long as it is “reasonable and necessary” to serve “an important public purpose,” stated CRS. This rule ensures that in impairing a contract, a state is protecting the broad public interest rather than its own self-interest. However, CRS noted that states trying to reduce spending and avoid a financial crisis by modifying pensioners’ contractual rights on the basis that it serves “an important public purpose” have met with mixed results in the courts. While some courts have found such actions acceptable under the contract clause, others have ruled to the contrary.

CRS further observed that a number of state courts permit “reasonable” modifications to an individual’s pension benefits with the caveats that (1) the

modification must bear some “material relationship” to the purpose and successful operation of the pension system and (2) any disadvantage to employees must be accompanied by comparable new advantages, such as an increased pension amount.

Courts must also deal with the issue of when the contract is deemed to be formed and what terms and conditions it includes. For cases involving current employees, some states have held that an employee’s right to a pension cannot be changed in any way that reduces the benefit payable upon the day of hire or the first day the employee could participate in the plan. Other states have prohibited reductions in pension plan benefits when, under the terms of a state statute, a participant is eligible to receive a pension (that is, when the employee has fulfilled the plan’s service requirement). This approach is in line with federal requirements for private-sector pension benefits.

CRS noted that courts have generally been consistent regarding retired employees, ruling that the benefits of these individuals may not be diminished or impaired. It pointed to ongoing cases in three states – Minnesota, North Dakota, and Colorado – in which retired state workers are challenging the post-retirement modification of benefits but no rulings have yet to be handed down.

The Congressional Research Service (CRS) is the research arm of Congress. Its purpose is to provide Congress

unbiased, research-based reports on topical issues. Its investigations can be initiated on its own or at the request of a member of Congress.

While it welcomes the interest by CRS, NCPERS finds the premise and purpose of the report faulty and some of the legal analysis incomplete. NCPERS will be drafting a response letter asking the lead author of the report to read our findings, re-evaluate the matter, and issue a revised report that is more reflective of the current state of the law.

No Likely Winners in Deficit Debate

The political atmosphere in Washington, D.C., remains highly charged as the Administration and Congress continue to thrust and parry in a duel over the budget and how to help cut the federal deficit. Meanwhile, the clock is ticking on raising the debt ceiling. Without some agreement, the Treasury will have to begin defaulting on some of its obligations by July 8, and so far, Republicans have been adamant that there will be no deal to raise the ceiling without significant spending cuts.

The debate hinges on two competing views of how to rein in government spending. President Obama’s vision encompasses a 12-year plan built around tax increases for those earning at least \$250,000 annually accompanied by cuts to defense spending. Republicans want to tame the deficit in 10 years by privatizing Medicare and

turning Medicaid into a block grant program run by states.

In an effort to push the process forward, President Obama created a new congressional budget task force in April chaired by vice president Joe Biden. Biden will be confronted early and often by House majority leader Eric Cantor (R-VA) who has made it clear that he will not back down from his goal of attaching an “enforceable” spending cap to any legislation raising the debt ceiling. However, Cantor’s position is not as strong as it could be due to significant divisions within his own party as to what constitutes the right deal.

For instance, some more conservative Republicans are talking about a constitutional amendment requiring a balanced budget. Others have been attracted to a proposal put forward by senators Bob Corker (R-TN) and Claire McCaskill (D-MO) that would reduce both discretionary and mandatory spending over a period of 10 years by capping total spending at 20.6 percent of gross domestic product (GDP) by the end of the decade.

Democrats, on the other hand, want to delink raising the debt ceiling and a vote on specific spending cuts. Given the short time frame to get something accomplished between now and July 8 and the highly contentious nature of the spending cut debate, they argue that connecting the two will only make an already difficult task more difficult. To further stir the pot, the president’s task force will also be competing with the “Gang of Six,” a group of three

Senate Democrats and three Republicans, who are cooking up their own recipe for deficit reduction. Making up the Gang of Six are Saxby Chambliss (R-GA), Tom Coburn (R-OK), Kent Conrad (D-ND), Mike Crapo (R-ID), Dick Durbin (D-IL), and Mark Warner (D-VA). Although they

keep a tight lid on their negotiations, Coburn has publicly stated that their recommendations will not result in a “significant tax hike.” Their plan, which some say could be made public in May, is likely to include changes in defense, health care, and Social Security, as well as closure of tax loopholes.

“Let me assure you, we’re going to make everybody mad with our approach – Democrats, Republicans, independents – because we’re touching every part of the problem,” observed Warner in a recent CBS interview.

Continued on page 6 ♦



Executive Director's Corner

Hank H. Kim, Esq.
Executive Director
& Counsel

Face Time

I was in the grocery store the other day and was struck by the number of people talking on the phone as they pushed carts up and down the aisles. Some appeared to be consulting about what to buy while others were carrying on an office conference call among bins of produce. We truly live in a virtual world where we can conduct both relationships and business across oceans or across the street without ever meeting face-to-face.

This has led to predictions that face-to-face meetings are a relic and will soon go the way of the dinosaur. In this view, social media, chat rooms, YouTube videos, and webinars will rule. But, to paraphrase Mark Twain, I believe reports of the death of in-person meetings are greatly exaggerated.

In-person meetings provide us with a richness of experience that heightens the learning factor. Seeing the speaker, observing the reactions of others in the room, having the ability to dialogue through question-and-answer sessions – all add significantly to what we take home from the event. It’s not surprising that statistics show we all learn better when part of a group.

There is also the benefit of being in a new environment. Breaking out of our normal routines to attend a meeting allows for changes in our thought processes, which can

lead to creative solution finding and development. When we’re face to face, we also communicate more clearly with one another through eye contact and body language, providing an invaluable opportunity to showcase and practice critical business skills.

All of these benefits make attending this month’s NCPERS Annual Conference and Exhibition, May 21–26 in Miami, Florida, a smart business decision. We’ve got an outstanding program anchored by three nationally recognized keynote speakers: Jim VandeHei, executive editor and cofounder of POLITICO; David Altig, senior vice president and director of research, Federal Reserve Bank of Atlanta; and Donna Shalala, president, University of Miami, and former secretary of the US Department of Health and Human Services.

You also won’t want to miss the unveiling of a new campaign to help our nation move forward, titled “The Path to Recovery.” NCPERS president Pat McElligott will be providing the details about an exciting industry initiative aimed at bringing retirement security to all Americans through a new public-private pension system (see related article in this issue of *The Monitor*).

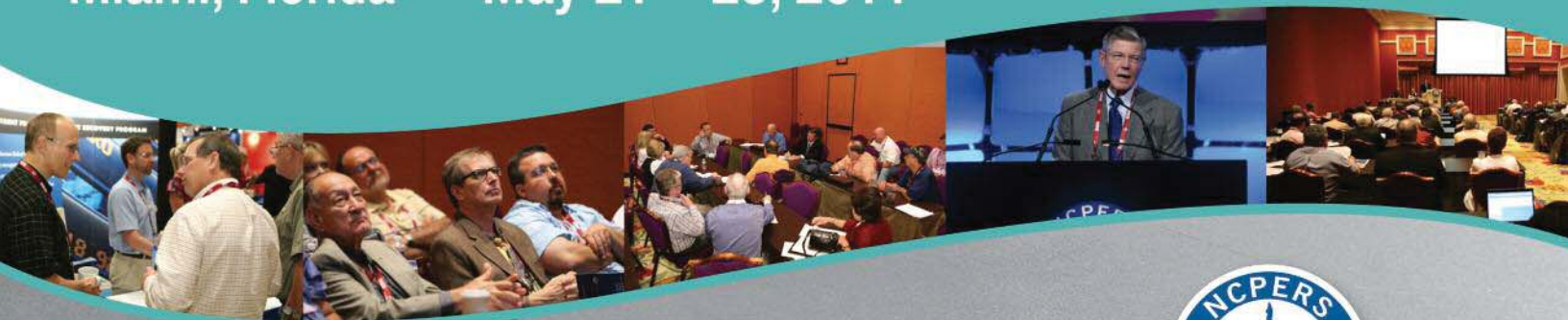
For more details and a complete meeting agenda, click [here](#). I look forward to seeing you there! ■

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THE
PATH TO
RECOVERY

Business leaders are wading into the debate as well and may provide some much-needed support to the Obama Administration. In a statement released in late April, the Committee for Economic Development (CED), a business-led public policy group, pledged to support policymakers who build a “serious and comprehensive” plan to reduce the federal deficit and urged lawmakers to participate in a budget process “such as that proposed by President Obama on April 13.”

The CED’s statement was endorsed by a bipartisan group of 100 senior business leaders representing companies from virtually every major business sector in the economy. Also endorsing the statement were Erskine Bowles and former senator Alan Simpson, co-chairs of the National Commission on Fiscal Responsibility and Reform, and former senator Pete Domenici and Alice M. Rivlin, co-chairs of the Debt Reduction Task Force of the Bipartisan Policy Center.

Policymakers would be wise to heed the CED’s call given that the stakes are high – both economically and politically. Having the United States begin defaulting on its obligations is surely a nonstarter, especially following the action of Standard & Poor’s last month to lower its outlook on US government debt from “stable” to “negative.”

From a political perspective, neither party wants to allow the other side to take the credit for brokering a breakthrough budget deal. But the consequences of no deal are likely to be

even worse. That means some tough decisions will have to be made in the next few weeks, with both parties putting their spin doctors into overdrive while facing the reality that no group will end up getting what it wants.

NCPERS Initiative Targets Retirement Security for All

Retirement security for all Americans – up to now, this concept has appeared to be nothing more than a dream. But the dream may be closer to reality than some might think as a result of an initiative from NCPERS aimed at bridging the gap between the retirement benefits private employers provide and what their employees want.

As recently as 30 years ago, pensions were common for middle-class Americans working in the private sector. However, burdens and costs imposed by enactment of the Employee Retirement Income Security Act (ERISA) coupled with the creation of 401(k) plans led many private employers to abandon pensions for their workers. Today the situation remains dire, with private-sector pensions still too costly for many businesses.

As public pensions continue to come under attack and scrutiny for alleged underfunding issues, NCPERS recognized that unless there is a resurgence of defined-benefit pensions in the private sector, the public pension community will continue to be at risk. With that as the guiding principle, the organization invested in research,

including focus groups and surveys of private-sector employees, to learn more about how they view public pensions and ways to address the common need for retirement security. The result is a new concept based on the success of public pensions – a publicly sponsored, multiple-employer pension plan that would utilize the efficiencies and expertise of public pensions.

According to NCPERS president Pat McElligott, such an approach offers a number of compelling benefits, including an estimated 50 percent additional return on investment for employees as a result of plan administration efficiencies. He added that the cost to private employers to offer the plan would be similar to that of a 401(k).

This new public-private pension system would have the following features: The plan would be administered by a board with members from the public employee pension system and from the private sector, including representatives elected by participating employees.

The fund would be managed by professional money managers accountable to the administrative board. Data on the performance of the plan would be publically available, and members could access their own account information at any time. Every year, the plan would send every account holder a detailed financial report along with an explanation of benefits.

Because the plan would be tied to the public employee pension system, it

would be able to take advantage of experienced advisers, and it could invest in assets like private equity, venture capital, and initial public offerings (IPOs).

Though officials from the public employee pension system would play a role in administering the plan, the money in the private employees' fund would be kept separate from the money in the public employees' fund. Benefits from the plan would be entirely "prefunded," meaning that money employers and employees put in would not go toward paying the benefits of current retirees. Rather, the retirement benefit each employee is paid would depend on how much the employee and the employer put in and the return on that investment.

Employees' accounts in this plan would be entirely portable, meaning that employees who move between

employers that offer it may simply take the account with them. Employees who move to an employer that does not offer it can contribute on their own, stop contributing, or take the money out and roll it into an individual account such as a 401(k).

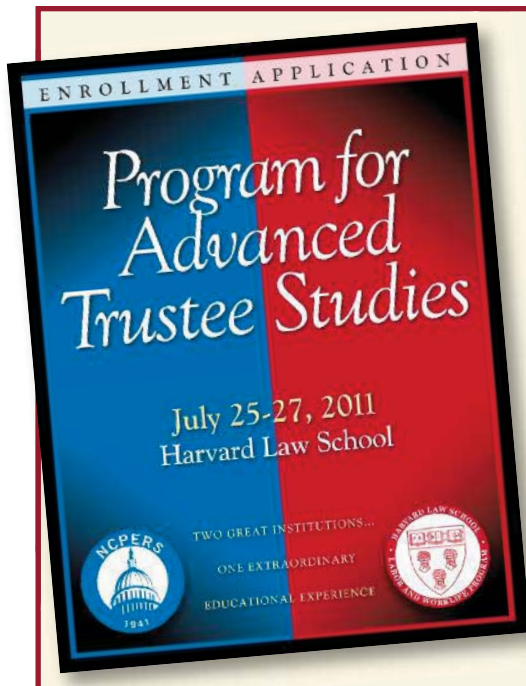
When an employee retires, her or his account would be converted into an annuity that pays a monthly benefit for the rest of the individual's life. Employees may also elect to have survivor benefits. The amount of the monthly benefit may increase or decrease slightly depending upon the performance of the pension fund.

So far, interest in the concept appears strong and growing. NCPERS is continuing to fine tune the proposal and has retained a firm specializing in ERISA law to provide further advice on plan design. The association is also seeking federal legislation that would

effectively exempt the plan from ERISA provisions.

In addition, NCPERS is continuing to work with focus groups to test messages to be incorporated into a public marketing campaign promoting the proposal. At the grassroots level, NCPERS will be mobilizing association members and others in the public pension community to make the case for this new private-public plan before state and local governments as well as on Capitol Hill in Washington, D.C.

"We recognize that tough times are ahead. But NCPERS will be leading the charge and working side by side with each of you in your local jurisdiction and state. We are committed to our industry's defense and helping to expand retirement security to all Americans," stressed McElligott. ■



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