SENATE BILL 7, THE *PERFORMANCE EVALUATION REFORM ACT* ("*PERA*"), THE AFFORDABLE CARE ACT & THE BARGAINING TABLE

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I. IN GENERAL

A. What are We Required to Bargain? Mandatory Subjects of Bargaining

1. The Central City test is used to determine whether a topic is a mandatory subject of bargaining. Is the matter one of wages, hours, and terms or conditions of employment? If not, the district is not required to bargain. If it is, the second question is whether the matter is also one of inherent managerial authority. If not, it is mandatory subject of bargaining. If it is, we balance the benefits of bargaining with the burdens that bargaining imposes on the district's authority.

2. Prohibited subjects of bargaining are any topic in violation of, inconsistent with, or in conflict with any statutes of the state of Illinois. This includes any topic which negates, abrogates, replaces, reduces, diminishes, or limits in any way, any employee rights, guarantees or privileges pertaining to wages, hours or other conditions of employment provided by any statute of the State of Illinois.

    a. Impact bargaining may still be required even when the subject is controlled by statute.

3. Anything that is not a mandatory or prohibited subject of bargaining is a permissive subject of bargaining. Employers have no duty to bargain on permissive topics. The parties may not insist on bargaining to impasse on a permissive topic of bargaining. A union may not strike over a permissive topic of bargaining.

II. SENATE BILL 7

A. Reductions-in-Force

1. There is very little that should be bargained regarding reductions-in-force ("RIF") because the law contains very specific procedures. However, districts may want to review the RIF procedures with union leadership to make sure everyone understands the procedures. This should help the district avoid disputes in the future.

2. SB 7 sets forth how RIF groups will be organized and expressly permits bargaining of an alternative in two well defined areas.

a. Within Groups Three and Four, the teachers with the least seniority must be dismissed first, unless an alternative method has been negotiated between the union and the district.

    i. In most districts, most teachers are rated "satisfactory" and will be in Group Three. Hopefully, with evaluator training and the use of student performance, only truly proficient/satisfactory teachers will be in this group in the future.

    ii. This is an area where it would benefit the district to bargain an alternative method for determining the sequence of dismissal to avoid reverting back to the strict seniority method for the majority of the teaching staff. One possibility would be to use the Group Two method (average evaluation rating calculation) and seniority as a tie breaker.

    iii. The unions are comfortable with decisions based on seniority so this is an area where they will probably want to follow the law strictly.

b. Only teachers in Groups Three and Four are eligible for recall to positions for which they are qualified. For recalls, districts use the inverse order of dismissal, unless a district and a union agree to an alternative order. Implementing a different method for recall than dismissal would probably cause a few administrative headaches. It is easiest to use the same method for dismissal and recall.

3. SB 7 also requires the creation of a joint committee composed of an equal number of representatives for the teachers and the school district. The joint committee must convene by December 1 annually and conclude its work by February 1 annually.

    a. The joint committee MUST CONSIDER and MAY AGREE upon:

        i. Criteria for moving teachers from Group Two to Group Three when a teacher has received a "needs improvement" and either a "proficient" or "excellent" rating.

        ii. An alternative definition for Group Four. Such a definition must take into account prior performance evaluation ratings and may take into account other factors that relate to the district's educational objectives, but may not permit inclusion of a teacher with a "needs improvement" or "unsatisfactory"

performance evaluation rating on either of the last 2 performance evaluations.

NOTE: If the union is unwilling to agree to use a performance driven method for the sequence of dismissal in Groups Three and Four, as mentioned above, the district should avoid allowing lower performing teachers from moving into Groups Three and Four. If moved to Group Three or Four without an alternative sequence for dismissal, a lower performing teacher could be retained and higher performing teacher RIFed because of seniority. And remember, teachers in Group Three and Four have recall rights.

b. The joint committee may agree to include in the definition of "performance evaluation rating" a rating administered by a district other than the district determining the sequence of dismissal.

c. If a district administers performance evaluation ratings that are inconsistent with SB 7, the district must consult with the joint committee on the basis for assigning a rating that complies with SB 7.

d. Any agreement to revise Groups Two and Four would need to be by agreement of the joint committee.

4. Agreements of the joint committee require a majority vote of all committee members. Agreements of the joint committee do not go to the school board or the membership for approval. If the joint committee does not reach agreement by February 1 annually, the statutory definitions of the groupings are used.

5. Unions may request to bargain a notice period for RIF greater than the 45 day notice required by the law. Districts can bargain with unions to extend procedural time periods beyond what the law requires (permissive subject), but it is not recommended. However, a district and a union cannot agree to shorter notice periods, or otherwise reduce employee rights set forth in the law.

6. The district's RIF list, which sets forth each group and ranking, must be prepared 75 days in advance of the end of the school year. However, with notice to the employee representative, probationary teachers may be moved from Group One to another group, based on evaluation of Group One teachers during the 75 day period up to 45 days prior to the end of the school year.

7.

a. In order for the performance evaluation rating for the current school year to be utilized in grouping teachers, other than those teachers in Group One, the evaluation must be completed at least 75 days prior to the end of the school year. For Group One teachers, the evaluation must be completed at least 45 days prior to the end of the school.
b. Practically, evaluations will need to be completed even earlier than set forth above to allow time to apply the evaluations ratings to the groupings list.

c. Unions may try to negotiate early deadline for evaluations.

B. Dismissal of Tenured Teachers

1. Tenured teacher dismissal is not a topic that should be bargained. Teacher contracts generally do not address this topic and the unions probably will not attempt to bring this to the table.

2. Some unions may seek to expand the procedural timelines for the teacher dismissal process, but districts should follow the dismissal procedures set forth in Section 24-12 of the *Illinois School Code* and resist requests to make modifications to the process. The purpose of the reform legislation was to streamline the process. That intent should not be circumvented by agreement of the parties.

3. The revised dismissal procedures took effect September 1, 2011.

4. Exceptions can be handled on a case by case basis.

C. Filling New and Vacant Positions

1. In filling new positions, a district must consider factors which include certification, qualifications, merit, ability (including performance evaluations) and relevant experience.

a. The length of continuing service with a district must not be considered, unless all other factors among two competing candidates for a position are considered to be equal.

2. A district's decision to select a candidate for a position will not be subject to review under grievance resolution procedures, provided that the school

district complies with the procedural requirements set forth in its CBA with the union.

a. The unions are likely to seek procedural protections because that is the only way they can influence the filling of vacancies.

i. If the prior agreement did not include language on filling new and vacant positions, the district should resist attempts to add language on the matter.

ii. If the prior agreement did include language on filling vacancies, the district may leave the procedural requirements in place and eliminate the selection requirements, where applicable.

3. If a district's CBA already includes language applicable to filling new and vacant positions, that language will remain in effect for the duration of the agreement.

D. Collective Bargaining and Right to Strike

1. Unions often prefer to include as much as possible in the collective bargaining agreement, so districts should anticipate some unions wanting to propose procedures for impasse, mediation, strike, etc. in the agreement.

2. Both districts and unions are already required to comply with the procedures set forth in the Act. Including the procedures in the agreement is unnecessary. Also, repeating statutory requirements in an agreement requires modification of such language anytime the law is amended.

3. Anytime a school board agrees to include statutory or regulation requirements in a collective bargaining agreement, the school board should also negotiate into the agreement that the provision is not subject to the grievance procedure.

E. Climate Survey

1. Unions may want to discuss how these surveys will be used by the district. Unions may be concerned the district will attempt to use these climate surveys against teachers. With most unions, simply discussing the issue should be enough.

2. Teachers are required to complete these climate surveys during teacher meetings, professional development, non-instructional time or any other time that will not interfere with classroom and instructional duties.

3. Unions may want the school board to agree to provide time for teachers to perform this task so teachers do not have to complete these surveys on their time. Currently, there is insufficient information available to even engage in a meaningful discussion on this issue. ISBE has not selected an instrument and no one knows how much time it will take to complete this task.

4. Some unions may propose additional compensation for teachers to complete this task. At a time when funds for education are so limited, it is doubtful that any school board is going to agree to such a request. However, as discussed above, a district approached about this at the bargaining table can avoid the discussion altogether by explaining there is insufficient information for a productive discussion.

II. THE *PERFORMANCE EVALUATION REFORM ACT* OF 2010

A. Evaluation Procedures are a Mandatory Subject of Bargaining

1. PERA establishes the majority of the procedural aspects of teacher performance evaluation plans by statute, leaving the district and the union only a few decisional matters.

2. PERA requires, no later than September 1, 2012, that each district's teacher evaluation plan ensure that non-tenured teachers are evaluated at least once every school year; tenured teachers are evaluated at least once every two school years; and any tenured teacher whose performance is rated either "needs improvement" or "unsatisfactory" must be evaluated at least once in the school year following receipt of such rating.

   a. Bargaining with the union will focus on the deadline for completing the required evaluations and various aspects of the evaluation plan, and other procedural issues.

3. Who can evaluate is also controlled by statute, essentially eliminating any need to bargain over who is qualified to evaluate.

4. Districts are required to bargain over the procedural aspects of Professional Development Plans ("PDP"), which are applicable if a tenured teacher is rated "Needs Improvement."

a. PERA only requires that within 30 school days of a tenured teacher receiving a "Needs Improvement" rating, the evaluator, in consultation with the teacher and taking into account the teacher's on-going professional responsibilities, develop a PDP directed to the areas that need improvement and any supports that the district will provide to address the areas identified as needing improvement.

    i. Districts will need to bargain the length of the PDP.

    ii. Unions may seek to bargain more input into specific employee PDPs.

b. Tenured teachers who receive a "needs improvement" rating will need to be evaluated during the school year following implementation of the PDP. If a tenured teacher is evaluated as "satisfactory" or "proficient" or better, he/she must be reinstated to the regular tenured teacher evaluation cycle.

    i. Districts will need to bargain over the timing of the re-evaluation.

B. Evaluation Criteria is a Permissive Subject of Bargaining

1. Evaluation criteria are not a mandatory subject of bargaining, but most districts bargain them because an evaluation plan is more likely to be successful when the teachers believe in the merits of the plan.

2. By September 1, 2012, teachers must be rated as "excellent," "proficient," "needs improvement" or "unsatisfactory."

    a. Union's will likely request to bargain over the definitions of these ratings.

3. PERA provides that the decision to use data and indicators on student growth as a significant factor in rating teacher performance is not a mandatory subject of bargaining under the *Illinois Educational Labor Relations Act*. However, we expect requests to bargain the impact of using data in teacher evaluations as the implementation deadline approaches.

4. PERA requires each district, in good faith cooperation with its teachers union, to incorporate the use of data and indicators on student growth as a factor in the teacher evaluation process.

a. Districts must use a joint committee to incorporate the use of data and indicators of student growth as a significant factor in rating teacher performance.

b. The joint committee must be composed of equal representation selected by the district and its teachers or union.

c. If the joint committee does not reach an agreement on the evaluation plan within 180 calendar days of the committee's first meeting, the district will implement the model teacher evaluation plan created by ISBE, with respect to the use of data and indicators on student growth as a significant factor in rating teacher performance.

5. ISBE will be adopting rules related to the methods for measuring student growth.

6. It is how the student growth data and indicators will be used as part of the evaluation standards, how assessments or other indicators of student performance will be used in measuring student growth, the weight each indicator will bear on the evaluation process, and any other criteria that will be used in the evaluation plan that must be established and set forth in the evaluation plan.

III. AFFORDABLE CARE ACT

JANUARY 1, 2014 MARKS THE BEGINNING OF MAJOR IMPLEMENTATION OF HEALTHCARE REFORM

A. Most school districts will be required to offer health insurance coverage to full-time employees.

1. Employers with more than 50 full-time employees (or FTE's) will be required to offer health insurance to at least 95% of those full-time employees (and their dependents).

2. How do we know who is a full-time employee?

a. Employed on average at least 30 hours per week.

b. Cutting people back under 30 hours will likely be ineffective to stay under the 50 employee threshold because part-time employees count as FTE's.

c. The IRS has issued guidance (Notice 2012-58) on implementing a "look back" period to determine if current employees are "full-time" and on how to classify new employees at the time of hire.

d. For new hires, employers will be required to either (a) determine at the time of hire if the employee is reasonably expected to work at least 30 hours per week, or (b) use the employee's first three months of employment as representative of the hours expected to be worked.

e. Special rules exist for variable hour and seasonal employees.

3. When do we have to start this offering?

a. If you have a fiscal year plan (or a plan year other than January 1), the IRS is proposing to delay implementation until the start of the employer's 2014 plan year. If your plan is a calendar-year plan, then January 1, 2014 is the effective date.

b. Plan year cannot be altered for purposes of delaying implementation.

B. Do I have to automatically enroll new hires once these new requirements apply to my plan?

1. Not yet. The "automatic enrollment" provisions apply to employers with more than 200 full-time employees. However, the employee must be given a chance to opt out. This requirement is on hold until the Department of Labor issues implementing regulations, which is expected to happen sometime in 2014 for implementation in 2015.

2. Can I still have a waiting period before enrolling a newly hired employee?

a. Waiting periods of up to 90 calendar days will be the only waiting periods permitted before coverage must take effect (for full-time and part-time employees.)

b. During the waiting period, the employer will not be subject to a penalty for failing to offer coverage.

C. WHAT TYPE OF COVERAGE MUST BE OFFERED AND IS THERE A LIMIT ON HOW MUCH THE EMPLOYEES CAN BE REQUIRED TO PAY?

1. Employers must offer "affordable" coverage to at least 95% of their full-time employees.

A. What does it mean to be "affordable"?

1. If the employee's share of the premium for single coverage under the lowest cost option available exceeds 9.5% of the employee's annual household income, the coverage is not considered "affordable" for that employee.

2. How will I know the employee's household income?

(a) This will be difficult to establish without a cooperative employee. There is no authority as of now to compel an employee to provide his or her entire household's financial records.

(b) The IRS is proposing that employers simply look at Box 1 of an employee's W-2 and use that figure to determine if the employee's share of the premium exceeds 9.5% of income.

(c) Example: Employee's Box 1 income on the most recent W-2 is $30,000. The employee's annual share of the healthcare premium (for the lowest cost option available) cannot exceed $2,850 per year or $237.50 per month.

3. Employers should begin working with insurance consultants, brokers or cooperatives now to determine the best way to offer an affordable coverage option.

(a) Analyze the earnings of employees working at least 30 hours per week to identify the lowest income levels. Working from the low end, an employer should be able to calculate the maximum it can charge for its lowest cost coverage option.

(b) The affordability test applies to single coverage only.

(c) Only one option needs to meet the affordability test, provided it also meets the "minimum value" test.

2. The coverage offered must provide "minimum value".

A. A "minimum value" calculator will be provided by the IRS and Department of Health and Human Services. Employers will be able to input certain information about the plan (e.g. services covered, deductibles, co-pays) to determine if the plan will be responsible for at least 60% of the total allowed cost of benefits.

B. The IRS is also proposing simple "safe-harbor" tests that will not require actuarial calculations:

1. Safe harbor checklists would be issued that will include characteristics of plans that the IRS will automatically deem to provide minimum value

2. Employer funds deposited to and HSA or HRA for an employee will be considered in determining whether the plan provides minimum value.

C. There is also a proposal to allow plans with non-standard features to engage an actuary to perform an assessment and certify that the plan provides the required minimum value.

D. WHAT HAPPENS IF WE DO NOT OFFER COVERAGE TO AT LEAST 95% OF OUR FULL-TIME EMPLOYEES?

1. If at least one full-time employee receives a premium tax credit for purchasing coverage on a State Exchange, the employer will be required to pay a penalty.

A. The penalty is calculated by multiplying the total number of full-time employees employed for the year (minus 30) by $2,000.

B. Example: 200 full-time employees (at least 30 hours per week) and affordable, minimum value coverage is not offered to at least 190 of those employees.

1. Penalty = (200-30) x $2,000 = $340,000. The IRS will assess and collect the penalty.

2. Note that a separate penalty may be assessed if any one of the 5% full-time employees in this example who are not offered coverage receive a premium tax credit to help pay for insurance purchased on an Exchange.

E. WHAT HAPPENS IF OUR PLAN IS NOT AFFORDABLE OR IT DOES NOT PROVIDE MINIMUM VALUE?

1. If an employer offers coverage to at least 95% of its full-time employees, penalties will still be assessed if:

A. A full-time employee not offered coverage receives a premium tax credit for purchasing coverage on an Exchange.

B. The coverage made available is not affordable to all eligible full-time employees and at least one of those employees receives a premium tax credit.

C. The coverage made available does not provide minimum value and at least one full-time employee receives a premium tax credit.

2. How will this penalty be calculated?

A. The penalty is calculated on a monthly basis.

B. The amount of payment for the month will be the number of full-time employees who receive a premium tax credit for that month multiplied by $250 (1/12th of $3,000).

C. However, there is a maximum monthly penalty equal to:

(1) Total number of full-time employees minus 30 multiplied by $2,000 divided by 12 ($166.666667)

3. Can I appeal the IRS determination?

A. The IRS will send an initial determination of liability and give the employer a chance to respond for a final determination is made.

B. The first round of determinations will be made after employees file their 2014 tax returns in 2015. Employee claims for the premium tax credit on

their returns will trigger the initial assessment of penalties. Employers will also be required to file information returns describing the type of coverage offered and identifying their full-time employees.

F. WHO CAN GET THESE PREMIUM TAX CREDITS?

1. Premium tax credits will generally be made available to those who:

A. Have income between 100% and 400% of the federal poverty level and enroll in coverage through an Affordable Insurance Exchange;

B. Are not eligible for coverage through a government-sponsored program such as Medicaid or CHIP; and

C. Are not eligible for coverage offered by an employer or are eligible for coverage that is unaffordable or does not provide minimum value.

D. Federal poverty levels for 2013 for the lower 48 states:

Household Size	100%	133%	150%	200%	300%	400%
1	$11,490	$15,282	$17,235	$22,980	$34,470	$45,960
2	15,510	20,628	23,265	31,020	46,530	62,040
3	19,530	25,975	29,295	39,060	58,590	78,120
4	23,550	31,322	35,325	47,100	70,650	94,200
5	27,570	36,668	41,355	55,140	82,710	110,280
6	31,590	42,015	47,385	63,180	94,770	126,360
7	35,610	47,361	53,415	71,220	106,830	142,440
8	39,630	52,708	59,445	79,260	118,890	158,520
For each additional person, add	$4,020	$5,347	$6,030	$8,040	$12,060	$16,080

G. WHY DON'T WE JUST GET OUT OF THE INSURANCE BUSINESS?

1. Some employers may find the $2,000 per employee penalty financially preferable to spending much more than that on insurance coverage. Some things to consider:

A. The penalty may go up. There is nothing permanent about $2,000.

B. If you get rid of insurance for one, it is likely for all. Your top administrators, who you may wish to retain, may not like being pushed to the Exchanges to find health insurance. It is unlikely any insurer will write a plan (that you can afford) just for top administrators.

C. You may hear about morale plummeting (more so than usual).

D. If other school districts do not drop coverage, you may have a harder time attracting and keeping top talent.

E. Collective bargaining obligations.