International Municipal Lawyers Association
74th Annual Conference, Miami, FL.

Work Session VIII: Employment Law

Negotiating Public Sector Labor Agreements in Times of Deficit Budgets: Alternative Methods

Christina Heavrin, J.D.
Labor Negotiator and Special Counsel to the Mayor
Louisville/ Jefferson County Metro Government

Michael R. Carrell
Director, Alternative Dispute Resolution Center
Northern Kentucky University

This is an informational and educational report distributed by the International Municipal Lawyers Association during its 75th Annual Conference, held October 17-21, 2009 in Miami FL. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents. ©2009 International Municipal Lawyers Association.

Negotiating Public Sector Labor Agreements In Times Of Deficit Budgets: Alternative Models

Christina Heavrin, J.D.
Labor Negotiator and Special Counsel to the Mayor, Louisville/ Jefferson County Metro Government

Michael R. Carrell
Director, Alternative Dispute Resolution Center,
Northern Kentucky University

[NOTE: *This paper presents a summary of the "new wave" of concession bargaining alternatives based on the presenters own experience as well as those reported around the country. In addition, it examines some of the practical and legal issues in concession bargaining in the public sector*.]

The current economic recession has been cited as the worst in the U.S. since the Great Depression of the 1930s. However, since collective bargaining began in most local governments after the Great Depression, the current period of substantial budget deficits due to falling tax revenues is unprecedented. Following the enactment of Executive Order 10988 by President John Kennedy in 1962, which gave federal employees the right to form unions,[1] many local and state governments gave their employees the right to form unions. As a result the percentage of state and local employees in unions rose from 13.8 % in 1962 to 42.2 % in 2008, giving local government the largest percentage of employees represented by a union, 46.1%, of any private or public sector occupational category.[2]

Certainly since the 1960s the U.S. economy experienced several swings, but most economists today agree the current recession, which began in the fall of 1997, is the worst since the Great Depression. Therefore for local government and union negotiators, the current recession has caused the most difficult budget periods. In past difficult economic times many local governments and their unions negotiated wage freezes and some increases in health care premiums and co-payments, but very few were forced to negotiate significant concessions beyond those givebacks. The current recession, however, began what may be viewed as a "new era" of local government wage & hour concessions both new in scope and magnitude.

Concession bargaining, or givebacks, is collectively bargained reductions in previously negotiated wages and benefits. Concession bargaining in the private sector first gained national attention in 1979 when Chrysler Corporation, facing bankruptcy, negotiated over $200 million in givebacks, mostly in reduced worker benefits. The airline industry in the 1980s was the first to experience major industry–wide economic concessions. But by 2005, the practice had spread to

most private sector industries and reached over two-thirds of all private sector contracts, while the public sector generally avoided such concessions except for occasional wage freezes or modest health insurance premium or co-pay increases.[3] The current economic recession has significantly affected not only the private sector, but also the revenues of local governments to the point that contract negotiators have begun to utilize concession bargaining tactics in an unprecedented level, many for the first time in their history.

A. NEW WAVE ECONOMIC CONCESSIONS

New wave economic concessions presented by this paper generally fall into the following three models: (1) Negotiated wage & hour concessions including reductions in hourly wage rates, restricted overtime usage, reduction in hours worked, furloughs and layoffs, changes in health care premiums and co-pays, changes in pension benefits, and reductions in pay supplements such as clothing allowances, longevity pay, and paid leave; (2) a newer concept - the "Economic Matrix" of options presented by management to the union that provides annualized costs of a variety of wage and benefit items and the possible cost savings for a specified, realistic reduction for each item. A union is then able to make direct comparisons between the cost and the value of such benefits and is given greater control over cost reductions; (3) and a resourceful "Variable Wage Formula" that provides both sides the greater security of long-term agreements even in difficult economic times.

1. New Wage & Hour Concessions: "Sharing the Pain"

The general overall philosophy in the wage & hour concessions has been termed "sharing the pain" meaning rather than trying to achieve significant budget cuts solely by layoffs, reduce the wages and/or hours of both union & non-union workers. A 2009 survey by the Society for Human Resource Management found that 37% of both private and public sector human resource managers reported that they had developed such alternatives in addition to limited layoffs. While layoffs may be easier, HR managers noted it may be cheaper and more humane to cut hours or wage rates for all workers rather than layoff a few workers. For example, a 5% wage cut saves more than a 5% layoff because no severance payments are required.[4]

These budget cutting tactics have included the freezing and reduction of wages, reduction in scheduled hours worked per week, as well as layoffs and furloughs. Perhaps the most widely publicized public sector example was in California in February 2009 when Governor Schwarzenegger ordered more than 200,000 state employees to take two Fridays each month as furlough days to help cut a $42 billion dollar deficit. The unpaid furloughs cost workers about 10% of their annual income.[5] In Cincinnati, Ohio City Manager Milton Dohoney announced in June 2009 that all employees would be scheduled for 6 unpaid furlough days in 2009 and 10 days in 2010 as well as other budget cuts. However,

when the police and fire unions refused to agree to the days, which were not provided for in current union contracts, Dohoney announced a "Plan B" which would layoff over 100 police officers and over 100 firefighters.[6] Mayor Richard Daley of Chicago also imposed furlough days to achieve $19 million in annual savings. Newark New Jersey Mayor furloughed city workers one day per month, except police and fire who were protected by union contracts. In Tulsa, Oklahoma Mayor Kathy Taylor negotiated with police, fire, and other unions and reached an agreement that required everyone to take 8 furlough days or 64 unpaid hours for 3% in annual savings. Nevada state workers were required to take one furlough day per month and teachers and college professors took an equivalent 4% salary cut in a measure passed by a joint Assembly and Senate committee.[7] Similar scenarios can be found in local and state governments across the nation. Faced with substantial budget cuts, most have utilized not only layoffs as was common in the past, but also furloughs, hiring and wage freezes, and reductions in hours to balance budgets. Unfortunately, in this recession compared to past ones, the use of furloughs, wage rate reductions, and reductions in hours of work have not totally eliminated layoffs.

Some very important lessons may have been learned by local government officials, union leaders and public employees from this historic period of budget cutting. First, unorganized public employees have certainly borne the brunt of the budget cutting. In jurisdictions where public employees are allowed to organize, local governments may see an increase in unionized employees. Second, while some cities have been able to renegotiate how to balance the personnel budgets with givebacks by police, fire and other groups working under an existing agreement, other cities, including Cincinnati and Louisville, were not able to gain the consent of unions. Thus as city leaders re-negotiate those agreements at term end, they must try to change provisions that prohibit layoffs or do not provide for furloughs when faced with an unforeseen budget crisis.

In times of budget crisis, employing the "sharing the pain" philosophy by utilizing a combination of budget–reduction methods other than, or in addition to layoffs, offers possible advantages. First, it may save more in the short-run – no outlay for accrued benefits - and in the long–run because when the economy recovers experienced employees are still on the payroll. Second, it sends a more humane message to all employees. Third, the need for budget flexibility, especially when collective bargaining agreements cover a large percentage of workers, must be considered and provided for through cost saving measures or, in the alternative, local governments may need to consider only agreeing to one-year contracts.

2. The Economic Matrix of Savings Options

The Economic Matrix is based on the negotiation tactic "multiple equivalent simultaneous offers" (MESO) posited by Victoria Husted Medvec and Adam D. Galinsky.[8] The MESO tactic includes three steps: (1) identify three or

more issues involved in a negotiation that are unresolved, (2) develop different potential outcomes or alternatives for each issue, (3) and then create at least three or four different proposals of approximately equal value to the party making the proposal. Research indicates that while more then three offers is possible, many more than three offers, say four, five, or six may, in some cases cause the other party to become confused or overwhelmed.[9]

The MESO tactic includes both economic and non-economic issues and thus requires the subjective weighting of different proposed outcomes. The Economic Matrix simply applies the MESO tactic to only economic issues in a collective bargaining setting. The Economic Matrix tactic includes the advantages of the MESO tactic and adds the advantage of easier, direct comparisons of economic proposals. The Economic Matrix was recently applied by the presenters in a local government collective bargaining negotiation. The general bargaining situation was one of great difficulty due in large part to the current economic recession which had caused a substantial decline in tax revenues and resulting budget cuts as discussed in the prior section. The management team determined that in addition to a zero wage increase, economic concessions of $500,000 were needed from the costs included in the current expiring contract.

Thus the MESO steps were applied. In the first step management identified four economic issues of substantial annual cost. In prior bargaining sessions, none of these issues had been identified by the union as a "top priority." The four issues were: (1) annual leave accruals (vacation, holidays, etc.), (2) clothing & equipment allowance, (3) the number of unused leave days that could be redeemed for cash (savings in overtime), and (4) longevity pay. In the second step different outcomes for each issue were identified, in this case, due to economic conditions, all of the outcomes were reductions with the savings for each estimated. The third step included different combinations of outcomes that would approximately equal the $500,000 goal.

The resulting Economic Matrix of concession proposals is presented in Table 1: Economic Matrix of Savings Options. The total savings for each option exceeds the target minimum of $500,000 in annual savings. Any savings greater than $500,000 would be made available for other economic enhancements. Each option represents a particular focus; Option #1 is focused on Annual Leave Accruals and Clothing & Equipment Allowance; Option # 2 is entirely focused on Longevity Pay and thus would cause no reductions in the other three benefits; Option # 3 is balanced with savings generated from all four benefits; and Option # 4 focuses heavily on Annual Leave Accruals with some reduction in Clothing & Equipment Allowance.

TABLE 1. ECONOMIC MATRIX OF SAVINGS OPTIONS

Benefit	**Estimated Annual Savings**	**Option # 1**	**Option # 2**	**Option # 3**	**Option # 4**
Annual Leave Accruals	$130,000 / day reduction	Two days ($260,000)		One day (130,000)	Three days ($390,000)
Clothing & Equipment Allowance	$45,000 / one-tenth annual reduction	One-half reduction ($225,000)		One-half reduction ($225,000)	One-quarter reduction ($112,500)
Number of days held from vacation & paid at straight time	$30,000/ day	One day ($30,000)		Two days ($60,000)	
Longevity Pay	$285,000 / one-eighth reduction		One-quarter reduction ($570,000)	One-twenty-fourth ($95,000)	
Total Savings $500,000 minimum)		**$515,000**	**$570,000**	**$510,000**	**$502,500**

Central to the Economic Matrix tactic is the advantage of bringing together three core elements of a negotiation:[10]

1. Several economic issues are included in one proposal
2. The total value of the options is limited, thus causing an increase or decrease in one to be offset by changes in others.
3. Presenting options of equal value to the other party.

In the presenters' experience, the fourth core element of a negotiation that the Economic Matrix addresses, is framing the negotiations so that there is at least the possibility of a discussion on givebacks.

The Economic Matrix provides a city negotiator proposing concessions three potential advantages. First, the focus is shifted from battling through reductions in individual issues to reach an unstated goal to presenting the *total value needed to achieve the savings* and the different potential options available to achieve those savings. Second, the party receiving the proposal may respond more

positively because people generally prefer having choices. Third, the matrix of options gives the other party significant input into the final negotiated decision. It is most likely, of course, that the response by the other party will not be to accept the options exactly as presented, but focus further negotiations on considering one option – which communicates a great deal about their interests. One potential disadvantage of proposing an Economic Matrix is that the receiving party may choose to "cherry-pick" some items in one or more of the options, and not agree to a proposal that would meet the total savings goal. To avoid that potential, the focus must continuously be on the need to meet the total goal – while allowing for flexibility among the options. While this example represents options for gaining **concessions** from a union, the Economic Matrix tactic can also be utilized during normal economic times to narrow the focus of the negotiations.

3. Variable Wage Formula: Sharing Uncertain Future Revenues

In the U.S. private sector profit-sharing was first introduced by United Automobile Workers Union president Douglas Fraser in 1948. The U.S auto manufacturers, however, expressed no interest in the concept until the 1980s when they experienced a troubled market, declining sales and profit losses. Ford management in 1984, in response to the UAW request for a 3% wage increase, proposed a profit sharing plan so that if profits grew in later years under the contract the union's members would share in the growth. By using a profit sharing plan, the parties avoided a wage-reopener and yet had the ability to enter into a long-term agreement. If, of course, no profits were realized then no wage enhancements would be given. The 1984 Ford-UAW agreement was the first major private sector agreement to contain a profit-sharing clause and provided the means for both sides to deal with an uncertain economic future. Profit-sharing clauses quickly appeared in other private sector agreements, especially in industries experiencing hard economic times, and were found in about 10 percent of all U.S. private sector agreements by 2002.[11]

Thus the core idea of profit-sharing is the well known labor relation concept "ability to pay" meaning that since labor is one of the primary inputs into an organization's financial success, when management has the financial ability to provide greater wages to workers it will provide some level of wage increase. To a large extent profit-sharing provisions replaced Cost of Living Adjustments (COLAs) in agreements in the past twenty-five years. Management favored profit–sharing primarily because: (1) additional wages are only paid if profits are available, (2) unlike the COLA provision, profit-sharing is not tied to inflation, which often has little relationship to management's financial ability, (3) worker's may feel more closely linked to the financial success of the organization and develop greater interest in reducing waste and increasing efficiency.

Due to the current difficult financial times similar to those in the U.S. auto industry of the 1980s, the **Variable Wage Formula** directly links a local government's future tax revenues, and thus ability to pay, with future wage rate

increases or bonuses. Local governments may prefer a formula for pay increases linked to tax income rather than wage rate increases of specific amounts it may not be able to afford in the future. Union employees may benefit from higher wage rate increases if tax revenues increase during a multi-year agreement without resorting to a risky wage re-opener process. In addition, both sides benefit from the ability to negotiate longer term contracts because the uncertainty of future tax revenues and their affect on future wage increases is, to a great extent, muted. The concept of tying pay increases to increases in tax revenue is generally new to many local government because, as discussed in the opening section of this paper, most have not faced the tax revenue shortfalls experienced in the current economic crisis.

The Variable Wage Formula concept contains three key values: (1) the exact form of tax revenue that would trigger a wage increase; (2) how the amount of the wage increase would be determined, such as a percentage of revenue growth; and possibly (3) a minimum or floor wage increase to be provided in any given year. For example, in the Table 2 provision the tax revenue that would trigger a wage increase is an increase in the city's occupational tax (or income tax). Wages would increase by a percentage equal to half of the percentage increase in the occupational tax from the preceding year. And, to protect employees if no increase in occupational taxes occurred, there is a floor or minimum increase of 2% per year. Therefore if in a year under the Table 2 provision revenues were increased by less than 4%, the employees would still receive a 2% raise. However, if tax revenues increased by more than 4%, the employees would share in that increase, for example, a tax revenue increase of 7%, would give the employees a wage increase of 3.5%.

TABLE 2. VARIABLE WAGE FORMULA

Article 20 – Schedule Of Pay And Longevity

Section 1. c. On July 1, 2008, the hourly base pay rates shall be increased by a percentage equal to one-half of the percentage increase in the occupational license fee revenue received by Metro Government from the Revenue Commission for the then most recently concluding fiscal year as estimated in Metro Government's Annual Budget Document and confirmed within 90 days of the close of the fiscal year and retroactively added to the hourly rate so to be effective on July 1 of the respective fiscal year or 2 % whichever is more.

Source: Collective Bargaining Agreement By and Between Louisville/Jefferson County Metro Government and Louisville Professional Firefighters Association Local Union 345, IAFF AFL – CIO – CLC (October 10, 2007 – June 30, 2009)

The Variable Wage Formula could easily be modified to adapt to other conditions as desired by parties. For example, if under particularly volatile economic circumstances the parties agreed to allow for no floor or minimum

wage increase and in fact allow for a wage rate reduction as a percentage of decline in tax revenues the example in Table 2 could be modified to read; ". . . the hourly base pay rates shall be changed (increased or decreased) by a percentage equal to one-half of the percentage change in the occupational license fee revenue received by Metro Government . . ."

In general, the Variable Wage Formula tactic provides potential advantages similar to those provided by a profit–sharing provision in the private sector. The primary advantages of such a formula for determining future wage increases are similar to those of profit-sharing in the private sector: (1) both sides feel more comfortable negotiating a long-term agreement because swings in tax revenues can be accommodated without resorting to a wage-reopener, (2) management knows that future wage increases will only be required if revenues increase and thus the "ability to pay" exists, (3) union members realize that if tax revenues increase substantially they will share in the growth. Perhaps the major reason that variable wage formulas are resisted is because it is a new concept born out of economic necessity. In normal times union members may prefer the certainty of a specified future wage increase, and management may prefer knowing exactly how much to budget for future wage rates. However, the current recession may cause local government negotiators to realize that some of their financial stress is due to inflexible wage rates negotiated during better times, and thus cause them to consider a variable wage formula in future years to provide budget flexibility.

B. LEGAL ISSUES IN CONCESSION BARGAINING

There is no federal law currently governing the collective bargaining relationship between state and local governments and their employees.[12] Some state statutes and local ordinances provide collective bargaining rights under laws that deal exclusively with one class of public employees, such as firefighters, policemen, or teachers; while others grant such rights to all state or municipal employees, though they may exempt certain classes of employees from their terms. The statutes and ordinances vary considerably but usually mirror the core principles of the National Labor Relations Act, i.e., prohibiting public employers from:

- interfering, restraining, or coercing public employees in the exercise of their rights to form, join, or assist labor organizations, or to refrain from such activity;
- encouraging or discouraging membership in labor organizations;
- sponsoring, dominating, or otherwise assisting their employees' labor organizations; and
- refusing to negotiate, or to meet and confer, with the duly recognized representative of its employees.

Unless specifically mandated by the enabling legislation, most courts will apply federal labor law when adjudicating public sector labor disputes. However, concession bargaining in the public sector highlights three areas where labor law in the public and private sectors diverge. Specifically, whether pattern bargaining is an unfair labor practice; how an "inability to pay" claim due to declining tax revenues is being treated by the courts; and what impact a bargaining impasse has on negotiating in the public sector.

1. Pattern Bargaining

Budget-making for state and local governments is a political process in which various interest groups seek to have larger shares of the budget allocated for particular purposes. Within this budget-making process public employees constitute one interest group. In the absence of collective bargaining they are one among many interest groups. Collective bargaining provides them with a special procedure through which they can participate in the budget decision making process in a way not made available to others. When a union becomes the exclusive representative of all employees in the bargaining unit it gives those employees increased influence. A public official must bargain in good faith with this interest group until either an agreement or impasse is reached. This means that a public official must deal with the union face-to-face on substantive issues. Management's proposals must be given and argued with explanations and supporting facts, not something usually done with other interest groups. Once a collective bargaining agreement is concluded, its terms are binding for the duration of the agreement. Unlike terms established by ordinance or regulations, they cannot be reconsidered and changed without the consent of the union.

If all, or most, of the employees of a state or local government are organized, though in separate bargaining units, and if bargaining decisions are centralized on management's side, the bargaining process will create pressures for uniformity. The high visibility of settlements in the public sector creates almost compelling pressures on the employer's representatives to treat all groups with an even hand, regardless of their individual "political weight" or relative value to the mission of the state or city. The structured bargaining process thus strengthens the position of groups which are otherwise politically weak. In practice, the agreement with one major bargaining unit will become the pattern for all other groups and negotiation with the other groups will stagnate until the pattern agreement is reached. This does not mean that all groups will necessarily be given identical benefits, but differences must be perceived as fair and not based solely on differences in political or negotiating power.

Pattern bargaining, however, can lead to practices which may run counter to legal rules developed in the private sector as to what constitutes good faith bargaining. The public employer's refusal to settle with other unions until it has settled with the pattern-setting unit would be, according to traditional notions, bad faith bargaining. ("Neither an employer nor a union is free to insist, as a condition

of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other units." *Utility Workers Local 111 (Ohio Power)*, 203 NLRB 230, 238 (1973) enfd. 490 F. 2d 1383 (6th Cir. 1974). In the public sector, however, the principle of "equal treatment" virtually ensures that every visible benefit granted one group will be given in some form to all. Since employee costs in the public sector are a significant figure for budgetary purposes, some technique such as pattern bargaining must be devised to control the ultimate budgetary impact. Pattern bargaining means, in effect, that the wages and terms and conditions of employment granted one union determines the bargaining parameters for all those bound by the pattern. It should not be considered bad faith for the parties to bargain in accord with these political and economic realities. Certainly the non-pattern-setting union is more than willing to negotiate assurances that, if the pattern settlement entered into after it is more favorable, they will receive equal benefits ("most favored nation clause"). The pattern-setting union may object that it is being required to bargain for employees not in it bargaining unit, contrary to traditional notions of good faith bargaining. But if the unions find the pattern bargaining practice unacceptable, they can propose two-level bargaining where they negotiate together those terms determined by the pattern and bargain separately for those that fall outside the pattern.

The three negotiating techniques above, particularly the **Variable Wage Formula,** are very useful techniques in concession bargaining. Regardless of what else is in a public sector union contract, the one item by which employees judge their success in negotiating is the percentage increase in base wages. The Variable Wage Formula takes the percentage increase out of the competition by pegging it to an objective and not a subjective standard. Insisting on the Variable Wage Formula to impasse with a pattern-setting union is not bad faith bargaining if the formula is based upon the economic reality facing the state or city, even if management is motivated by a desire to treat all of its unions the same. (". . . an employer's reliance on company-wide policy for its bargaining position [does not evidence] bad faith." *NLRB v. Hi-Tech Cable Corp*., 128 F.3d 271, 276 (5th Cir. 1997).

2. Inability To Pay

In the NLRA it is an unfair labor practice for an employer to refuse to bargain collectively and in good faith with the representatives of its employees. This obligation to bargain in good faith requires that employers and unions exchange relevant information when necessary to substantiate assertions made during collective bargaining. An employer's refusal to substantiate a claim of inability to pay increased wages may support a finding of a failure to bargain in good faith with a union. *NLRB v. Truitt Mfg. Co.* 351 U.S. 149, 152 (1956). In *Truitt*, the Supreme Court held that when an employer bases its bargaining position on an asserted inability to pay, information about the employer's finances becomes relevant to the negotiations. In this situation, a union may be entitled to

examine the company's books in order to verify the claim. A company that asserts an inability to pay and then refuses to furnish substantiating financial information upon request fails to bargain in good faith. The Board's application of *Truitt*' s mandate has been evolving.

Prior to 1991, the Board construed *Truitt* to oblige an employer to provide financial information to a union upon request even when the employer asserted only a "competitive disadvantage." In *Nielsen Lithographing Co.,* 305 NLRB 697, 699 (1991), the Board changed its course and ruled that a claim of competitive disadvantage is not the same as a claim of financial inability to pay. Subsequent decisions, both from the NLRB and various courts, have emphasized a distinction between asserting an inability to pay, which triggers the duty to disclose, and asserting a **mere unwillingness to pay**, which does not.

In the public sector, financial information of a public entity is generally available to everyone under typical open records or so-called "sunshine laws." When a government employer does not offer pay raises that meet the expectations of their union employees, or otherwise engage in concession bargaining to reduce the employees' economic benefits, furnishing information in support of that position is generally not an issue. What is at issue, is whether local and state governments are allowed to set funding priorities with the revenues they have available when those priorities reduce funds available for employees' wages and benefits.

Recently a federal court in Maryland threw out a furlough plan to save $20 million that was put in place by Prince George's County to meet a revenue short fall of approximately $57 million.[13] The court ruled that the County had the right to pass a Personnel Policy to impose furloughs on all of its workers, even though the contracts with its unions did not include furloughs[14]; and that the County Executive properly exercised his discretion in setting the furloughs into motion.[15] The Court invalidated the furlough plan, however, by finding that the County's actions violated the Contract Clause of the U.S. Constitution.[16] The court stated:

> The County, without a doubt, voluntarily entered into a contractual relationship with the Unions, and each of the contracts were ratified by the County Council. Under the contracts, covered employees were guaranteed certain salaries/wages and hours. By furloughing employees, the County reduced these salaries/wages and hours. The contracts were not subject to unilateral adjustment by the County. To find otherwise would render the contracts virtually meaningless, because the union employees would not be able to 'order their personal and business affairs' and rely upon the rights and obligations they bargained for.[17]

Having found that the contracts had been impaired, and that the impairment was substantial, the court went on to determine if the County's actions were

reasonable and necessary and therefore permissible using the tests found in a Fourth Circuit case, *Baltimore Teachers Union v. Mayor and city Council of Baltimore,* [18] decided more than 15 years ago under similar circumstances. The court examined the financial situation facing Prince George's County and how it decided to address the tax revenue deficits and said that in light of other options open to it, the decision to recoup $20 million of the needed $57 million shortfall from union employee pay was not reasonable. The court concluded that the County had available to it $97 million in reserve funds, had budgeted $8 million for real estate and equipment purchases that were not under contract; could have reduced funding to the Community College or the County Hospital; or asked for additional funds from the Parks and Planning Commission.

> The Court will not instruct the County how to conduct its fiscal affairs, but the Court believes that the County had several other, more moderate alternatives that would have served its purposes equally well. . . Perhaps the County could have taken small portions from a variety of sources, or eliminated non-contractual expenditures, or cut the budget of the Community College, or . . . as it did in years past, balance the budget using monies from the UFB [Undesignated Fund Balance]. The choice of which revenue-saving measure the County selected is outside the Court's purview, however the 'menu of alternatives does not include impairing contract rights to obtain forced loans to the [County] from its employees.'[19]

3. Impasse Issues

Under the National Labor Relations Act, both employees and employers have a duty to bargain collectively in good faith. Generally to "negotiate collectively in good faith," means that the parties must seriously work to resolve differences and reach a common understanding. But this duty does not require either party to agree to the others demands or to make a concession. So while it is not unlawful for an employer to insist on concessions from its union by asking the employees to give up gains made under previous agreements, it may be difficult to reach agreement. *Sage Development Co.*, 301 NLRB 1173 (1991). When the parties cannot agree on a new contract they are at impasse. In the private sector, the most common form of employee impasse resolution is a strike; and for the employer, it is unilaterally imposing contract terms and conditions that are reasonably comprehended within its pre-impasse proposals.

During good faith negotiations, an employer cannot unilaterally change wages, hours or the terms and conditions of its union employees. See *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). During good faith negotiations, then, the employer must maintain the status quo as to wages and benefits. So in concession bargaining the parties are presented with some unique challenges. First, the employees must agree to give up pay or benefits rather than