

# **Considering Final Offer Arbitration to Resolve Public Sector Impasses in Times of Concession Bargaining**

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## **Abstract**

The U.S. recession, which began in the fall of 2007, continues to severely affect many organizations in the private and public sectors. Many governmental entities and unions have been forced to negotiate during a period of stagnant or declining tax revenues, combined with continuously rising health insurance and pension costs. These economic realities have resulted in a substantial number of contract talks leading to impasse. In the public sector, the laws providing for collective bargaining also often require certain forms of alternative dispute resolution (ADR) to resolve impasse, primarily mediation and fact finding or advisory arbitration. Both of these methods however, contain major limitations—primarily no guaranteed settlement. “Final-offer arbitration,” also called “last, best offer” or “baseball arbitration,” has been used by some governments as an ADR method that guarantees a settlement. A new Indiana law covering public sector teachers and school employers contains some unique features that should be considered by public sector organizations seeking changes in their current impasse resolution method. This paper reviews the topic of public sector collective bargaining during the current recession, the new Indiana law, final-offer arbitration as a means of resolving impasse, and final-offer issues for consideration.

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## **II. Background: Bargaining in the Public Sector**

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## I. INTRODUCTION

State and local governments are feeling a world of economic pain. Revenues have dropped considerably since the current recession began in 2008, yet health care and pension costs have continued to rise.<sup>1</sup> Because personnel costs comprise up to 85% of the total operating cost of some state and local governments,<sup>2</sup> these governments have looked to their employees as a source of budget cuts. Public-sector employees, many of whom are unionized and covered by collective bargaining agreements (CBAs), however, understandably are not keen on layoffs or cuts in wages and benefits, but in many cases accepted furloughs or wage cuts to avoid layoffs.<sup>3</sup>

Ideally, public-sector employers and employees would collectively bargain to resolve their differences. That process largely worked in times of economic prosperity, but it has not worked as well during the Great Recession as governments faced with reductions in revenues, but expected to continue the same levels of service, have sought to negotiate reductions in worker wages and benefits.<sup>4</sup> "Evergreen" clauses—providing that when a CBA expires, its terms remain in effect until a new CBA is negotiated<sup>5</sup>—in

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<sup>1</sup> U.S. CENSUS BUREAU, STATE GOVERNMENT FINANCES: SUMMARY 2010 (Dec. 2011), available at <http://www2.census.gov/govs/state/10statesummaryreport.pdf>.

<sup>2</sup> Clyde W. Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 U. TOL. L. REV. 265, 268 (1987) (stating that "labor costs may be 70% of a city's budget."). That percentage has certainly risen since 1987 thanks to significant increases in health care benefit costs.

<sup>3</sup> Leslie Eaton, Ryan Knutson, & Philip Shishkin, *States Shut Down to Save Cash*, WALL ST. J., Sept. 4, 2009, at A1, 6.

<sup>4</sup> See Chris Edwards, *Public Sector Unions and the Rising Costs of Employee Compensation*, 30 CATO J. 87, 110 (2010).

<sup>5</sup> BLACK'S LAW DICTIONARY 369 (9th ed. 2009).

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many CBAs give unions a disincentive to negotiate.<sup>6</sup> Both parties may agree to mediation, fact-finding or non-binding arbitration when the parties' positions are at impasse, and neither party fears the other's use of the types of economic weapons (e.g., strike, lockout) with the knowledge that at the end of the ADR process, they may very well still be at impasse.<sup>7</sup> Binding "interest" arbitration encourages the parties to stake out extreme positions rather than encouraging them toward middle ground.<sup>8</sup> For these reasons, public-sector labor negotiations have become more acrimonious and less likely to lead to a successful resolution.

For public-sector parties seeking a means of avoiding impasse, final-offer arbitration may offer a solution. Known also as baseball arbitration for its use in resolving salary disputes between Major League Baseball (MLB) owners and players, in final-offer arbitration, both parties submit a proposal to the arbitrator, and the arbitrator must select one or the other proposal *in toto*.<sup>9</sup> It offers at least four benefits to public-sector bargaining. First, it encourages the parties toward middle ground because the arbitrator will pick the more reasonable of the two offers.<sup>10</sup> Second, it encourages pre-hearing settlement by the parties before the case is sent to arbitration.<sup>11</sup> Third, it provides finality, unlike mediation or non-binding arbitration.<sup>12</sup> Fourth, it avoids the politically unpalatable prospect offered by interest arbitration of an unelected arbitrator drafting a public-sector contract from whole cloth.<sup>13</sup>

This article argues that public sector employers and unions should consider adding final-offer arbitration as a tool in their negotiation toolbox. Part II of this article discusses the current status of collective bargaining in the public sector. Part III describes final-offer arbitration as it currently is used by the MLB. Part IV reviews the limited circumstances in which final-

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<sup>6</sup> See, e.g., Alex Bloom, *Court Decision Re-Shapes Union Negotiations*, EAGLE TR. (Nov. 14, 2010) <http://www.eagletribune.com/local/x1930917848/Court-decision-re-shapes-union-negotiations>.

<sup>7</sup> Michael R. Carrell & Christina Heavrin, *Negotiating Public Sector Labor Agreements in Times of Deficit Budgets: Alternative Methods*, 1–17 PROCEEDINGS OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, 74<sup>th</sup> Annual Conference, Miami, FL (Oct. 20, 2009), 14.

<sup>8</sup> PETER FEUILLE, *FINAL OFFER ARBITRATION: CONCEPTS, DEVELOPMENTS, AND TECHNIQUES* 6 (Steven B. Rynecki ed., 1975).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Robert G. Howlett, *Interest Arbitration in the Public Sector*, 60 CHI.-KENT L. REV. 815, 828 (1984).

<sup>12</sup> FEUILLE, *supra* note 8.

<sup>13</sup> *Id.*

offer arbitration has been used in public sector bargaining, evaluates the advantages and disadvantages of its use in this context, and makes recommendations on when and how it can be used most effectively. Part V concludes

## II. BACKGROUND: BARGAINING IN THE PUBLIC SECTOR

### A. Fiscal Pain

The current economic recession which began in 2008 has been cited as the worst in the U.S. since the Great Depression of the 1930s.<sup>14</sup> The impact on the budgets of public-sector entities, such as state and local governments and school boards, has been devastating.<sup>15</sup> Tax revenues have remained stagnant or fallen<sup>16</sup> even as the costs of providing health care and pensions to employees have continued to rise.<sup>17</sup> Because personnel costs can comprise up to 70–85% of total operating costs for many governments,<sup>18</sup> the double impact of declining or stagnant revenues with continually rising personnel costs has caused significant budgetary pain.<sup>19</sup> Cuts in non-personnel areas have not been sufficient to balance the annual budgets for many governments.<sup>20</sup> Governments with non-organized workforces typically have responded with layoffs, wage or hiring freezes, or furloughs.<sup>21</sup> Governments

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<sup>14</sup> Chris Isidore, *Its Official: Recession Since Dec. '07*, CNN MONEY (Dec. 1, 2008, 12:26 PM), <http://money.cnn.com/2008/12/01/news/economy/recession/index.htm>; see also, *US Business Cycle Expansions and Contractions*, NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org/cycles/cyclesmain.html> (calculating that the recession that began in December 2007 lasted 18 months and ended in June of 2009, making it the longest recession since the 1930s).

<sup>15</sup> Elizabeth McNichol et al., *States Continue to Feel Recession's Impact*, CTR. ON BUDGET AND POLICY PRIORITIES (Jan. 9, 2012), <http://www.cbpp.org/files/2-8-08.sfp.pdf>; see also, Stephen F. Befort, *The Constitutional Dimension of Unilateral Change in Public Sector Collective Bargaining*, 27 ABA J. LABOR & EMPLOY. L. 165, 165–66 (2012) [hereinafter *Constitutional Dimension*]; Stephen F. Befort, *Public Sector Employment Under Siege*, 87 IND. L.J. 231, 231–34 (2011).

<sup>16</sup> U.S. CENSUS BUREAU, *supra* note 1.

<sup>17</sup> *Id.*

<sup>18</sup> See Summers, *supra* note 2.

<sup>19</sup> McNichol, *supra* note 15.

<sup>20</sup> *Id.*

<sup>21</sup> Michael Z. Green, *Unpaid Furloughs and Four-Day Work Weeks: Employer Sympathy or a Call for Collective Action?*, 42 U. CONN. L. REV. 1139 (2010); Nicholas Johnson et al., *State Budget Cuts in the New Fiscal Year are Unnecessarily Harmful*, CTR.

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with organized workforces are constrained in how they can cut personnel costs by the terms of existing CBAs.<sup>22</sup> As those CBAs have expired, however, governments have come under intense economic pressure to engage in concessionary bargaining—or even to unilaterally change the terms of existing CBAs<sup>23</sup>—to cut personnel costs and balance budgets.

This is the first time that many governments and their labor organizations have experienced severe concessionary bargaining for two reasons. First, the current recession has affected the public sector more than any recession since the National Labor Relations Act was passed in 1935.<sup>24</sup> Prior recessions have tended to impact the private sector much more than the public sector.<sup>25</sup> Second, the public sector is much more heavily organized today than it was several decades ago, and this is the first major recession that many newly organized public sector workforces have experienced.<sup>26</sup> Although in 2011 private-sector union density is at a post-World War II low of 6.9%, the overall (federal, state, local) public-sector union density is over five times that of the private sector at 37%, and the density of state employees has risen to 31.5% and local governments have the largest percentage of employees represented by a union, 43.2%, of any occupational category.<sup>27</sup>

Concession bargaining, sometimes called “givebacks,” is defined as collectively-bargained reductions in previously negotiated wages and benefits usually in exchange for some form of job security.<sup>28</sup> Concession bargaining in the private sector first gained national attention in 1979 when Chrysler Corporation, facing bankruptcy, negotiated over \$200 million in givebacks.<sup>29</sup> The recession of the early 1980s then caused the airline industry and other hard-hit industries to experience severe economic pain.<sup>30</sup> Private-sector concession bargaining spread to most industrial sectors, eventually

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ON BUDGET AND POLICY PRIORITIES (Mar. 22, 2012), <http://www.cbpp.org/files/3-22-12.sfp.pdf> (calculating that since December of 2007, 44 states have reduced their personnel costs through layoffs, unpaid leaves, hiring freezes, or similar actions).

<sup>22</sup> Befort, *Constitutional Dimension*, *supra* note 15.

<sup>23</sup> *Id.*

<sup>24</sup> Bob Herbert, *Invitation to Disaster*, N. Y. TIMES, Jan. 9, 2010, at A19.

<sup>25</sup> Carrell & Heavrin, *supra* note 7, at 1–3.

<sup>26</sup> U.S. DEP’T OF LABOR, Bureau of Labor Statistics, ECONOMIC NEWS RELEASE (January 27, 2012), <http://www.bls.gov/news.release/union2.nr0.htm>.

<sup>27</sup> *Id.*

<sup>28</sup> BLACK’S LAW DICTIONARY 328 (9<sup>th</sup> ed. 2009).

<sup>29</sup> Thomas Miner, *The Kenneth M. Piper Lectures: Concession Bargaining*, 59 CHI.-KENT L. REV. 981, 986 (1983).

<sup>30</sup> BUREAU OF NATIONAL AFFAIRS, REPORT ON LABOR RELATIONS IN AN ECONOMIC RECESSION: JOB LOSSES AND CONCESSION BARGAINING 56–59 (1982).

reaching more than two-thirds of all private-sector CBAs.<sup>31</sup> The public sector, however, generally avoided such concessions, except for occasional wage freezes or modest health-insurance-premium or co-pay increases.<sup>32</sup>

Today, things are different. The current economic recession has caused public-sector management negotiators to seek significant concessions in wages, hours, health care, and pensions, often leading to prolonged negotiations and impasse.<sup>33</sup> In past difficult economic times, many governments and their labor organizations negotiated wage freezes and modest increases in health care premiums and co-payments, but very few were forced to negotiate significant concessions beyond those givebacks.<sup>34</sup> The current recession, however, has precipitated a “new era” of wage and benefit concessions—new both in scope and magnitude.<sup>35</sup>

### B. *Differences with the Private Sector*

Federal and state statutes covering public-sector collective bargaining are largely modeled after the National Labor Relations Act (NLRA).<sup>36</sup> Nonetheless, many laws, practices, and economic forces in the public sector are very different from those in the private sector, and often vary widely among each other as well.<sup>37</sup> Though these differences may include the mechanics of organizing employees and negotiating agreements, of determining bargaining issues and positions, of costing wage and benefit proposals, and of processing of grievances and arbitrations<sup>38</sup> three differences are particularly relevant for the purpose of this article. First, public-sector labor negotiators are less affected by external economic constraints than their private-sector counterparts.<sup>39</sup> Second, public-sector

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<sup>31</sup> BUREAU OF NATIONAL AFFAIRS, *Employers Will Seek Concessions in Benefits, May Make Them on Wages, BNA Report Finds*, in 2005 SOURCE BOOK ON COLLECTIVE BARGAINING 37–38 (2005).

<sup>32</sup> *Id.*

<sup>33</sup> BUREAU OF NATIONAL AFFAIRS, *Communication Called Essential for Bargaining in Tough Times, BNA Reports*, in 2010 SOURCE BOOK ON COLLECTIVE BARGAINING 91 (2010).

<sup>34</sup> *Id.*

<sup>35</sup> Carrell & Heavrin, *supra* note 7, at 1–17.

<sup>36</sup> VICTORIA E. ULLMANN, LABOR AND EMPLOYMENT LAW 331 (Pamela Fuller et al. eds., 2004).

<sup>37</sup> WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 189–95 (4<sup>th</sup> ed. 2004).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 189.

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labor negotiators have fewer and less potent economic weapons at their disposal.<sup>40</sup> Third, public-sector labor negotiations are affected by electoral politics in a way that private-sector labor negotiations are not.<sup>41</sup>

The first salient difference is the extent to which bargaining is affected by external economic forces. In the private sector, collective bargaining is significantly shaped by external economic forces, especially domestic and foreign competition.<sup>42</sup> Companies are driven by profits; their assets and income must exceed liabilities and expenses or they will not be in business for long.<sup>43</sup> The private sector must be responsive to its customers because it operates in a competitive arena, and unless it provides its customers with the best value for the price, the customers will go elsewhere.<sup>44</sup> Management thus has a built-in incentive to keep labor costs low.<sup>45</sup> Unions, though they have a strong incentive to bargain for high labor cost, recognize that labor costs cannot be so high as to make the company's products or services uncompetitive in the marketplace.<sup>46</sup>

In the public sector, however, collective bargaining ultimately is shaped by internal and political forces, and less the external forces present in the private sector.<sup>47</sup> The services that are provided by governments generally are not available elsewhere and are critical to health, safety, and welfare of a community or state, including education, public safety, public health and social services, and public utilities.<sup>48</sup> The public sector is largely financed by taxes and fees, and thus is not subjected to a competitive marketplace.<sup>49</sup> Governments are not businesses; they often operate as a monopoly without the pressures of external competition, especially in areas such as fire

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<sup>40</sup> *Id.* at 192.

<sup>41</sup> *Id.* at 191.

<sup>42</sup> Donald A. Dripps, *New Directions for the Regulation of Public Employee Strikes*, 60 N.Y.U. L. REV. 590, 603 (1985).

<sup>43</sup> *Id.* at 605.

<sup>44</sup> *Id.* at 604.

<sup>45</sup> *Id.* at 605.

<sup>46</sup> *Id.*

<sup>47</sup> Janet C. Fisher, *Reinventing a Livelihood: How United States Labor Laws, Labor-Management Cooperation Initiatives, and Privatization Influence Public Sector Labor Markets*, 34 HARV. J. ON LEGIS. 557, 563–84 (1997). However, as Joseph Slater pointed out in a comment to this draft, there often are significant areas in which there is private competition for public services, either through similar private institutions, such as schools, or through privatization plans or threats. Such external market forces subject some of the public sector to some degree of wage competition.

<sup>48</sup> *Id.* at 569.

<sup>49</sup> *Id.*

protection and police forces.<sup>50</sup> Public-sector management and unions thus do not feel the pressure of external competitive forces; public-sector unions can pressure elected officials to raise taxes or make budget reductions in other government services, and public-sector management may be less inclined to resist those pressures than private-sector management.<sup>51</sup>

The second salient difference between public-and private-sector bargaining is the availability of economic weapons. In the private sector, a union's chief economic weapon is the right to strike.<sup>52</sup> This weapon is balanced—some would argue unevenly—by the employer's right to lock-out<sup>53</sup> workers during a labor dispute and to “permanently replace”<sup>54</sup> workers who strike. These economic weapons at least in theory encourage management and unions to bargain for terms and conditions of employment that are reasonable given the prevailing economic circumstances.<sup>55</sup> For example, if management offers too little at the bargaining table (too small of wage/benefit increases during economic prosperity or too many concessions during recession), the union will be able to call a strike and management will have a difficult time finding replacement workers on the terms being offered. On the other hand, if the union demands are out of line with economic reality (too large of wage/benefit increases during economic prosperity or too few concessions during recession), the employer will easily be able to hire replacement workers on the terms being offered and will break the strike. These reciprocal economic weapons thus encourage both management and unions to adjust their bargaining demands to prevailing economic conditions—in a recession like the current one, unions tend to accede to concession bargaining because economic conditions diminish the bargaining efficacy of their chief economic weapon.<sup>56</sup>

Not so in the public sector, on both sides of the bargaining table. Public-sector management negotiators are loath to lockout garbage collectors and

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<sup>50</sup> *Id.* at 564.

<sup>51</sup> *Id.* at 566.

<sup>52</sup> See *NLRB v. Int'l Union of Ins. Agents*, 361 U.S. 477, 477 (1960).

<sup>53</sup> *Am. Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965).

<sup>54</sup> *NLRB v. Mackay Radio & Tele. Co.*, 304 U.S. 333, 343 (1938).

<sup>55</sup> The effects that unions have on labor and strike economics was first significantly theorized by J.R. Hicks in his 1932 book *THE THEORY OF WAGES*; his theories have been expanded on since then but still remain influential. See PAUL FLATAU, *HICKS'S THE THEORY OF WAGES: IT'S PLACE IN THE HISTORY OF NEO-CLASSICAL DISTRIBUTION THEORY* 1, 7 (2002), <http://www.mbs.murdoch.edu.au/workingpapers/187.pdf>.

<sup>56</sup> Stephanie Fitch & Christopher Steiner, *Critical Mass*, 185 *FORBES* 24-26 (June 7, 2010).



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teachers, and police officers and firefighters are not easily replaceable.<sup>57</sup> On the union side, most public-sector employees and their labor organizations do not have the legal right to strike.<sup>58</sup> Consequently, whereas reciprocal economic weapons drive private-sector labor negotiators toward a settlement reflecting current economic conditions, public-sector labor negotiators operate under no such constraints.<sup>59</sup> Most state and local collective-bargaining legislation attempts to compensate by adding to the general duty of good-faith bargaining the additional burden of completing an ADR regimen.<sup>60</sup> This addition offsets the union's right to strike with an increased burden to use some form of ADR.<sup>61</sup>

The third salient difference between public- and private-sector bargaining is the existence of electoral politics. Unions in both the public and private sectors often lobby on behalf of their members.<sup>62</sup> In the public sector, however, the lobbying goes beyond just seeking favorable labor legislation and often includes direct lobbying for increased pay and benefits, either to approve a tentative agreement reached with management negotiators, or to bypass management and appeal directly to the legislative body.<sup>63</sup> Employee organizations also affect the budgeting process through the election process.<sup>64</sup> Public employees are highly motivated to vote,<sup>65</sup> to support certain

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<sup>57</sup> GOULD, *supra* note 37, at 192-93.

<sup>58</sup> ULLMANN, *supra* note 36 (noting that the fear of being unable to provide essential services to citizens may provide a rationale for denying public workers the legal right to strike). *But cf.* Martin H. Malin, *Public Employee's Rights to Strike: Law and Experience*, 26 U. MICH. J. L. REFORM, 313, 313 (1992) (showing that studies of public workers in Illinois and Ohio have demonstrated that strike legalization did not increase strike incidence and may very well have decreased it).

<sup>59</sup> See Malin, *supra* note 58, at 317.

<sup>60</sup> See, e.g., MINN. STAT. ANN. § 179A.07 (West 2006); WIS. STAT. ANN. § 111.77 (West 2006).

<sup>61</sup> See *Mountain Valley Educ. Ass'n. v. Maine Sch. Admin. Dist.*, 655 A.2d 348 (1995).

<sup>62</sup> See Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT'L AFFAIRS, Fall 2010, at 3.

<sup>63</sup> *Id.* There is, however, a debate on the efficacy of these tactics. See, e.g., Ronald N. Johnson & Gary D. Libecap, *Public Sector Employee Voter Participation & Salaries*, 68 PUB. CHOICE 137, 146-49 (1991) (analyzing voter turnout, union lobbying, and salaries between federal and local government employees revealed that even though local workers had a higher voter turnout and more organized local lobbying, they still received lower salaries than federal government workers).

<sup>64</sup> DiSalvo, *supra* note 62, at 10.

<sup>65</sup> For example in the November 2010 election 60.3% of government workers voted as opposed to only 43% of private industry workers. *Voting and Registration in the*

candidates, and to have a seat at the table when government resources are allocated.<sup>66</sup> However, because governmental resources are not elastic, substantial increases in one area mean decreases in others.<sup>67</sup> So public employees, when engaged in the collective bargaining process, are influencing the budget-making process as well.<sup>68</sup>

### C. Public Sector Impasse Resolution Options

The general philosophy of both management and labor negotiators during the economic recession has been to “share the pain.”<sup>69</sup> Rather than trying to achieve significant budget cuts solely by layoffs, which often was the only solution in the past, the goal has been to reduce the wages and/or hours and benefits of both union and non-union workers.<sup>70</sup> These efforts have in some cases been combined with limited layoffs, particularly of nonunion employees.<sup>71</sup> 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 alternatives in addition to layoffs.<sup>72</sup> While layoffs may be easier, human resource managers noted it may be cheaper and more humane to cut hours or wage rates than lay off workers.<sup>73</sup>

Nonetheless, many public-sector concessionary bargaining efforts have resulted in impasse.<sup>74</sup> One reason for this is that many public-sector CBAs

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*Election of November 2010, U.S. CENSUS BUREAU*  
<http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/tables.html>  
 (last visited Feb. 9, 2012).

<sup>66</sup> DiSalvo, *supra* note 62, at 11–12; *see also* Don Bellante et al., *Vallejo Con Dios: Why Public Sector Unionism is a Bad Deal for Taxpayers and Representative Government*, POLICY ANALYSIS NO. 645 (Sept. 28, 2009), <http://www.cato.org/pubs/pas/pa645.pdf>.

<sup>67</sup> Bellante, *supra* note 66.

<sup>68</sup> *Id.*

<sup>69</sup> Beth Mirza, *Look at Alternatives to Layoffs*, SOC’Y. FOR HUM. RESOURCES MGMT. (Dec. 29, 2008), *available at* <http://www.shrm.org/hrdisciplines/businessleadership/articles/Pages/AlternativestoLayoffs.aspx>; Matthew Boyle, *Cutting Costs Without Cutting Jobs*, BUSINESSWEEK 5 (March 9, 2009).

<sup>70</sup> Mizra, *supra* note 69.

<sup>71</sup> *Id.*

<sup>72</sup> Mizra, *supra* note 69.

<sup>73</sup> Boyle, *supra* note 69.

<sup>74</sup> *See, e.g.,* Bloom, *supra* note 6 (discussing court abrogation of evergreen clauses in Massachusetts’ CBAs).

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contain “evergreen clauses” providing that when the agreement expires, the terms remain in effect until a new CBA is negotiated.<sup>75</sup> Evergreen clauses vary, and some require the continuation only of employee benefits so affected employees do not suffer a break in health insurance coverage, pension contributions, and other benefits until a new agreement is reached.<sup>76</sup> Other clauses, however, provide continuation of the entire CBA in perpetuity until a new agreement is reached.<sup>77</sup> Thus, union negotiators with evergreen clauses in their CBAs have little reason to agree to concessions—except possibly goodwill, public pressure, or to guarantee job security for members by minimizing layoffs in the bargaining unit.<sup>78</sup>

Public-sector labor negotiators that have managed to resolve negotiation impasses generally have done so in one of two ways. The first is by finding creative ways to share the pain, such as unpaid furloughs, reduced hours, reducing costs, or using indexed changes in future economic conditions (akin to private-sector profit-sharing plans—see Table 1).<sup>79</sup> The second is by using ADR, especially mediation and arbitration.<sup>80</sup>

Because most public employees do not have the legal right to strike, reaching an impasse in the public sector is often different than in the private sector.<sup>81</sup> In the private sector, impasse is reached when the parties have exhausted bargaining efforts without reaching agreement.<sup>82</sup> However, most public-sector legislation giving public employees the right to collectively bargain specifies that impasse cannot occur as a matter of law until the parties have exhausted bargaining efforts and then completed some form of ADR protocol, such as mediation, fact-finding, and/or arbitration.<sup>83</sup> The rationale for this additional element of impasse lies in the restrictions placed

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<sup>75</sup> *Id.*

<sup>76</sup> Bloom, *supra* note 6; *see, e.g.*, CONN. GEN. STAT. ANN. § 5-278(a) (West 2006).

<sup>77</sup> *See, e.g.*, MINN. STAT. ANN. § 179A.102(3) (West 2006); WASH. REV. CODE ANN. § 41.56.123 (West 2006).

<sup>78</sup> Bloom, *supra* note 6.

<sup>79</sup> *See* Mizra, *supra* note 69; *see also* Boyle, *supra* note 69.

<sup>80</sup> STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER RESOURCES 112, 209 (2003).

<sup>81</sup> Gary Long & Peter Feuille, *Final-Offer Arbitration: Sudden Death in Eugene*, 27 INDUS. & LAB. REL. REV. 186, 186 (1974).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* *See, e.g.*, IOWA CODE ANN. § 20.22 (West 2006); HAWAII REV. STAT. ANN. § 89-11 (West 2006). *But see*, Martin H. Malin, *Two Models of Interest Arbitration*, - OHIO ST. J. DISP. RESOL. \_\_\_\_ (arguing that the right to strike is particularly preferable to interest arbitration in times of recession, and citing illustrative data from Illinois).

on public employees.<sup>84</sup> Because the law withholds from public-sector unions the economic weapon most potent in the private-sector union arsenal—the strike—lawmakers often add to the duty of good-faith bargaining the burden of completing an ADR regimen.<sup>85</sup> This addition is intended to offset the union's restricted rights with a burden most often borne by management.

For example, in a case involving the Maine School District, the Supreme Court of Maine held that a school district's unilateral implementation of changed contract terms prior to completion of the statutory ADR regimen would be a *per se* violation of the duty to bargain in good faith.<sup>86</sup> The court explained that the “‘peaceful’ third-party intervention procedures are intended as substitutes for strikes and work stoppages, “and are designed to provide escalating pressure on both parties to produce a voluntary settlement.”<sup>87</sup>

Impasse resolution options in the public sector often are more limited than in the private sector. For example, the private sector has increasingly used profit-sharing plans to negotiate future economic wage enhancements or one-time bonuses.<sup>88</sup> These plans are popular because they tie employee gains to the employer's profitability and thus ability to pay.<sup>89</sup> In the public sector, of course, no profit-sharing plans exist.<sup>90</sup> However, a few public-sector entities have negotiated clauses that index future wage or benefit increases to future revenue increases. In Louisville, Kentucky, for example, negotiators agreed on a variable wage formula which directly links future pay rates with future increases in tax revenues (see Table 1). Such an approach offers benefits to both parties. Local governments prefer an indexed formula because it does not lock them into fixed-rate pay increases they may not be able to afford in the future. Employees avoid the downside risk of a wage cut and, if tax revenues increase, obtain the benefit of wage increases without having to resort to a risky wage re-opener process. Both sides benefit from the ability to negotiate longer term contracts.<sup>91</sup> Both sides also benefit because wage rates become tied to current economic conditions—wages will

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<sup>84</sup> Long & Feuille, *supra* note 81, at 186.

<sup>85</sup> *Id.* See also, MINN. STAT. ANN. § 179A.07 (West 2006); WIS. STAT. ANN. § 111.77 (West 2006).

<sup>86</sup> Mountain Valley Educ. Ass'n, 655 A.2d at 354. See also Wasco Cnty. v. AFSCME, 613 P.2d 1067, 1069–71 (Or. Ct. App. 1980).

<sup>87</sup> *Id.*

<sup>88</sup> Carrell & Heavrin, *supra* note 7, at 1–17.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

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rise when a strong economy causes tax revenues to rise, but will remain constant in times of recession.<sup>92</sup>

**TABLE 1 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)

### *D. Public Sector ADR Methods*

Traditional forms of ADR include mediation, arbitration, and fact-finding.<sup>93</sup> In any public-sector negotiation impasse, one or more of these techniques, each of which has unique advantages and disadvantages, may be successful.

**Mediation** is required in most states with public-sector collective bargaining.<sup>94</sup> As in the private sector, the mediator has no independent authority to render a decision, but uses acquired skills to bring the parties back together and reach an agreement.<sup>95</sup> Mediation may be provided by the Federal Mediation and Conciliation Service (FMCS),<sup>96</sup> American Arbitration Association (AAA),<sup>97</sup> state labor departments, or local mediation boards.<sup>98</sup>

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<sup>92</sup> Carrell & Heavrin, *supra* note 7, at 6–8.

<sup>93</sup> W.D. HEISIL & J.D. HALLIHAN, QUESTIONS & ANSWERS ON PUBLIC EMPLOYEE NEGOTIATION 103–12 (1967).

<sup>94</sup> ELKOURI & ELKOURI, HOW ARBITRATION WORKS 1366 (Alan M. Ruben ed., 6th ed. 2003) [hereinafter ELKOURI & ELKOURI].

<sup>95</sup> HEISIL & HALLIHAN, *supra* note 93, at 103.

<sup>96</sup> FED. MEDIATION AND CONCILIATION SERV., available at <http://www.fmcs.gov/internet/> (last visited Jan. 25, 2012).

<sup>97</sup> AM. ARB. ASS'N, available at <http://www.adr.org/about> (last visited Jan 25, 2012).

<sup>98</sup> HEISIL & HALLIHAN, *supra* note 93, at 103.

The primary advantage of mediation is the parties themselves develop an agreement they believe they can live with and do not have a decision imposed on them.<sup>99</sup> The primary disadvantage is that, because the mediator lacks the power to compel a resolution, mediation often results in simply prolonging the impasse.<sup>100</sup>

**Fact-finding and advisory arbitration** is more common in the public sector than in the private sector.<sup>101</sup> Under these processes, an unbiased third party examines the collective bargaining impasse and provides factual findings and recommendations on how the parties might resolve the impasse.<sup>102</sup> The factual findings may help resolve the impasse by eliminating the distrust one party feels for the other party's facts or figures.<sup>103</sup> Reasonable recommendations may pressure a party to accept an offer that otherwise would not have been considered.<sup>104</sup> Fact-finding and advisory arbitration are particularly effective when the findings and recommendations are announced publicly because of the political pressure likely to be brought by elected officials and the public on a party with an unreasonable bargaining position.<sup>105</sup> However, like mediation, fact-finding and advisory arbitration do not permit the neutral to compel a resolution and therefore may simply prolong impasse.<sup>106</sup>

**Interest arbitration** differs from mediation, fact-finding, and advisory arbitration in that the neutral makes a final and binding decision on a negotiation dispute.<sup>107</sup> It often is used in the public sector to resolve impasses as an alternative to the economic pressure of a strike used in the private sector.<sup>108</sup> It has two primary advantages. First, it resolves the impasse and ends the need for further bargaining.<sup>109</sup> Second, the threat of looming interest arbitration often motivates the parties to settle without interest arbitration

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<sup>99</sup> FED. MEDIATION AND CONCILIATION SERV., *Using a Third-Party Neutral*, <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=141&itemID=15911> (last visited Jan. 25, 2012).

<sup>100</sup> DANIEL P. O'MEARA, *ARBITRATION OF EMPLOYMENT DISPUTES* 64–65 (2002).

<sup>101</sup> HEISIL & HALLIHAN, *supra* note 93, at 108.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 109.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 108–09.

<sup>106</sup> O'MEARA, *supra* note 100, at 65.

<sup>107</sup> HEISIL & HALLIHAN, *supra* note 93, at 107.

<sup>108</sup> *Id.* at 108.

<sup>109</sup> ELKOURI & ELKOURI, *supra* note 92, at 1367.

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having to be used.<sup>110</sup> In jurisdictions with interest arbitration, the majority of collective bargaining contracts are settled voluntarily by the parties without resorting to arbitration, which according to one study was only used to resolve between 6–29% of negotiations.<sup>111</sup> In jurisdictions permitting strikes, or where strikes occur even if they are forbidden, interest arbitration may reduce conflict and build consensus between the two parties as an alternative to a strike.<sup>112</sup>

There are also, however, several disadvantages to interest arbitration. First, if the parties view negotiations as a prelude to a mini-trial in front of an interest arbitrator, the parties may be less willing to make their strongest arguments at the bargaining table, and instead may sandbag until the arbitration;<sup>113</sup> this may have a “chilling effect” on negotiations and discourage the “give and take” necessary for good-faith collective bargaining.<sup>114</sup> Second, knowing that the arbitrators will “begin” the deliberations with where the parties “ended” their negotiations, the parties may be more likely to stake out polar positions and less likely to compromise at the bargaining table.<sup>115</sup> Third, interest arbitrators may be tempted to “split the difference” between the parties’ positions, which will further tend to encourage the parties to stake out polar positions at the bargaining table.<sup>116</sup> Fourth, it is quite possible that the arbitrator will impose a resolution that neither party is happy with. Fifth, interest arbitration places decisions that affect citizens and taxpayers in the hands of non-elected officials who are politically accountable to no one.<sup>117</sup> This accountability problem may be magnified because an interest arbitration decision setting wages/benefits/working conditions for one bargaining unit could have a ripple effect on collective bargaining negotiations with other bargaining units

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<sup>110</sup> MICHAEL R. CARRELL & CHRISTINA HEAVRIN, *LABOR RELATIONS AND COLLECTIVE BARGAINING: PRIVATE AND PUBLIC SECTORS* 107 (10th ed. 2012).

<sup>111</sup> David B. Lipsky & Harry C. Katz, *Alternative Approaches to Interest Arbitration: Lessons from New York City*, 35 PUB. PERS. MGMT. 265, 267 (2006).

<sup>112</sup> RICHARD C. KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* 287 (Evan M. Berman ed., 4th ed. 2008).

<sup>113</sup> ELKOURI & ELKOURI, *supra* note 92, at 1366.

<sup>114</sup> Peter Feuille, *Final Offer Arbitration and the Chilling Effect*, 14 INDUS. REL. 302, 304 (1975); *see also* Raymond L. Hogler & Kurt Kriksciun, *Impasse Resolutions in Public Sector Collective Negotiations: A Proposed Procedure*, 6 INDUS. REL. L. J. 481, 487 (1984).

<sup>115</sup> ELKOURI & ELKOURI, *supra* note 92, at 21.

<sup>116</sup> Benjamin A. Tulis, *Final-Offer “Baseball” Arbitrations: Contexts, Mechanics & Applications*, 20 SETON HALL J. SPORTS & ENT. L. 85, 88 (2010).

<sup>117</sup> DiSalvo, *supra* note 62, at 17.

that are not in front of the arbitration panel.<sup>118</sup> Sixth, there are serious questions about whether public-sector interest arbitration is an unconstitutional delegation of legislative authority.<sup>119</sup>

**Final-offer arbitration**, also known as “last best offer” (LBO) or baseball arbitration, is a less-common method of public-sector ADR. As in interest arbitration, the arbitrator in final-offer arbitration generally makes a final and binding decision on a negotiation dispute.<sup>120</sup> However, unlike interest arbitration, where the arbitrator has the authority to fashion whatever resolution s/he sees fit, in final-offer arbitration, the arbitrator is limited to choosing between the parties’ last best offers either on a “total package” basis or on an issue-by-issue basis.<sup>121</sup> In other words, the arbitrator must choose whichever party’s last offer is the most reasonable.

Final-offer arbitration offers all the advantages of interest arbitration: it resolves the impasse with finality and encourages the parties to settle before arbitration.<sup>122</sup> It simultaneously avoids the disadvantages of interest arbitration. First, because the arbitrator must choose the more reasonable of the parties’ final proposals, the process encourages the parties to negotiate toward middle ground rather than staking out polar positions.<sup>123</sup> Second, the existence of a clear winner and loser in final-offer arbitration encourages the parties settle before arbitration.<sup>124</sup> Third, because the arbitrator must choose one of the parties’ proposals, final-offer arbitration avoids the politically unpalatable prospect offered by interest arbitration of an unelected arbitrator drafting a public-sector contract.<sup>125</sup> In essence, when the parties are worried that the arbitrator will accept the offer of the other party, they are pressured to make more reasonable offers in negotiations, which may promote a settlement prior to the hearing.<sup>126</sup> Although only a few state public sector dispute resolution techniques explicitly permit or require final offer

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<sup>118</sup> For example, if an interest arbitrator awards a certain pay increase to firefighters, police officers are likely to expect an equal amount.

<sup>119</sup> Kenneth P. Swan, *Public Bargaining in Canada and the U.S.: A Legal View*, 19 INDUS. REL. 272, 278 (1980).

<sup>120</sup> FEUILLE, *supra* note 8, at 12.

<sup>121</sup> ELKOURI & ELKOURI, *supra* note 92, at 1367–69.

<sup>122</sup> FEUILLE, *supra* note 8, at 12–13.

<sup>123</sup> ELKOURI & ELKOURI, *supra* note 92, at 1367.

<sup>124</sup> Long & Feuille, *supra* note 81, at 190.

<sup>125</sup> ELKOURI & ELKOURI, *supra* note 92, at 1367; *see also* DiSalvo, *supra* note 62, at 7.

<sup>126</sup> Tulis, *supra* note 116, at 89.



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arbitration, this article argues that final offer arbitration should be considered by future public sector policy-makers and negotiators.

### III. FINAL-OFFER ARBITRATION IN MAJOR LEAGUE BASEBALL

Public-sector employees and Major League Baseball players in many ways are similarly situated.<sup>127</sup> Both, for example, must bargain exclusively with employers that maintain a semi-monopoly, and thus the employees are “locked-in” to a relationship with a single employer making it impossible to establish a true market value for their services.<sup>128</sup> Additionally, often the disputed issues are few and center on salaries and wages.<sup>129</sup> Final-offer arbitration often is referred to as “baseball” arbitration because of its high-profile use in deciding salary disputes between players and clubs. Final-offer arbitration serves both baseball and public-sector entities well because it provides incentive for a pre-hearing settlement to avoid loss, and it guarantees a final decision and an end to the dispute.<sup>130</sup>

The Major League Baseball Player’s Association (MLBPA) was formed in 1953.<sup>131</sup> In 1966, the MLBPA hired Marvin Miller, from the United Steelworkers of America, to negotiate for higher player salaries and pensions, and to fight the reserve clause which bound players to the team with which they originally signed for one year beyond the end of an existing contract.<sup>132</sup> In 1968, Miller negotiated the players’ first CBA, raising the annual minimum salary from \$6,000 to \$10,000.<sup>133</sup> In 1970, Miller negotiated for an arbitration clause in the CBA to resolve all disputes arising under the CBA; previously, disputes were resolved by the MLB Commissioner who served at the whim of MLB owners.<sup>134</sup>

In 1969, when Curt Flood was traded to the Philadelphia Phillies from the St. Louis Cardinals, he refused the trade and in 1970 sued Major League

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<sup>127</sup> *Id.* at 101.

<sup>128</sup> *Id.* at 102.

<sup>129</sup> ELKOURI & ELKOURI, *supra* note 92, at 1328 (the scope of arbitration varies from state to state and is almost always limited by statute).

<sup>130</sup> Tulis, *supra* note 116, at 101–02.

<sup>131</sup> GLENN M. WONG, *THE ESSENTIALS OF SPORTS LAW* 462 (4<sup>th</sup> ed. 2010).

<sup>132</sup> ROGER I. ABRAMS, *THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION* 29–30 (2000).

<sup>133</sup> *Id.* at 30 (indicating a change from \$5,000 to \$10,000 per year); *but see*, Marvin Miller, *A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION* 163 (2004) (recognizing the \$6,000 to \$10,000 per year increase).

<sup>134</sup> *See* Miller, *supra* note 134, at 173.

Baseball for violation of the federal antitrust laws.<sup>135</sup> In 1972, the U.S. Supreme Court, in *Flood v. Kuhn*, a five to three decision, sided with the owners and cited the longstanding exemption of major league baseball from antitrust laws.<sup>136</sup>

Nonetheless, over the next several years the MLBPA achieved at the bargaining table and through arbitration what it could not in the courts. In 1974, Miller used arbitration to resolve a dispute when Oakland A's owner Charlie Finley failed to make an annuity payment as required by Catfish Hunter's contract.<sup>137</sup> The arbitrator ruled that Finley had breached the contract, rendering Hunter free to negotiate a new contract with any team.<sup>138</sup> When Hunter signed a five-year, \$3.5 million contract with the Yankees, the players saw the value of free agency.<sup>139</sup>

Also in 1974, Miller encouraged two players, Andy Messersmith and Dave McNally, to play out the succeeding year without signing a contract.<sup>140</sup> After the year had elapsed, both players filed a grievance arbitration.<sup>141</sup> The arbitrator ruled that both players had fulfilled their contractual obligations and had no further legal ties to their teams, thus effectively eradicating the reserve clause.<sup>142</sup>

Owners worried that universal free agency would increase team payroll costs exponentially.<sup>143</sup> Miller worried that universal free agency would drive down the salaries of star players because of unrestricted supply.<sup>144</sup> The parties therefore agreed to a provision in the CBA that limited free agency to players with more than six years of service.<sup>145</sup>

This was terrific for the players who now became free agents and could sell their talents on the open market, but it would not have been much help to players within their first six years of service who were restricted to negotiating with a single team.<sup>146</sup> Miller wanted to find a way for these early-

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<sup>135</sup> *Flood v. Kuhn*, 407 U.S. 258, 265 (1972).

<sup>136</sup> *Id.* at 285.

<sup>137</sup> Susan B. Seabury, *The Development and Role of Free Agency in Major League Baseball*, 15 GA. ST. U. L. REV. 335, 351 (1998).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 352.

<sup>140</sup> See Miller, *supra* note 134, at 238–53.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 266–67.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> ABRAMS, *supra* note 132, at 30.

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career players to receive a fair market price for their talents, while still encouraging owners to bid up the price of a limited pool of free agents. He also worried that early-career players' bargaining power over salaries would be diluted because the individualized nature of salary negotiations would render impotent the threat of a strike (which, as discussed above, is labor's most potent bargaining weapon) or other form of concerted action to resolve salary disputes.

Miller's solution was what we now know as baseball arbitration—final-offer salary arbitration for the early-career players who were restricted to negotiating with a single team.<sup>147</sup> From Miller's perspective, salary arbitration would give early-career players the ability to use free agents' playing statistics and salaries as benchmarks for their own performance and value—they could say to the arbitrator, in effect, "Free agent X had this statistical profile as a pitcher and made \$Y; my profile is better than his so I should make \$Y+."<sup>148</sup> From the owners' perspective, salary arbitration was preferable to the alternative of universal free agency.<sup>149</sup> For these reasons, MLB owners and MLBPA agreed that MLB players would have a contractual right to free agency after six seasons with their initial team, and the right to final-offer arbitration to settle salary disputes between the termination of their first salary contract and the advent of their free agency.<sup>150</sup>

It should be noted here that the final-offer arbitration clause in the MLB CBA pertains only to player salaries, and not to benefits or other terms and conditions of employment (other disputes arising under the CBA are resolved through the traditional arbitration clause that Miller negotiated in 1970).<sup>151</sup> This is because in MLB, as in the CBAs of the highest level of professional sports but unlike the CBAs in almost any other setting, the CBA specifies the benefits and working conditions for all players, but wages are negotiated individually between player and owner.<sup>152</sup> Note, then, the two critical

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<sup>147</sup> *Id.* at 30–31 (under the current CBA, players with at least three but no more than six years of Major League service are arbitration-eligible and players with at least two but no more than three years are eligible if they have accumulated at least 86 days of service in the immediate prior season and are ranked within the top 17% of second year players).

<sup>148</sup> *Id.* at 158 (explaining the core issue of arbitration as deciding how well the player performed as compared to other players).

<sup>149</sup> *Id.* at 29.

<sup>150</sup> Michael J. Hauptert, *The Economic History of Major League Baseball*, (Feb. 1, 2010), available at [eh.net/encyclopedia/article/hauptert.mlb](http://eh.net/encyclopedia/article/hauptert.mlb). (last visited Nov. 11, 2011).

<sup>151</sup> ABRAMS, *supra* note 133, at 90.

<sup>152</sup> *Id.* (the CBA stipulates a minimum salary, but negotiations for wages above the minimum are left to the players and owners).

institutional similarities between early-career MLB players and public-sector employees: both are tied to a single employer and cannot negotiate in an open market (though market forces will indirectly constrain bargaining), and the scope of the dispute centers largely on wages.

The CBA between MLBPA and MLB owners describes player salary arbitration in Section E.<sup>153</sup> This Section provides that the two sides (player's agent and club's representative) can present their respective cases to a three-person arbitration panel, and then "the panel is limited to awarding only one or the other of the two figures submitted" (last offers by the player's agent and team representative).<sup>154</sup> In practice, however, most salary disputes since 1973 have been resolved after both sides have submitted final offers, but before the arbitrators hear the dispute.<sup>155</sup> Thus, one major advantage of baseball arbitration has been the pressure it puts on both sides to settle.<sup>156</sup>

A second advantage of baseball arbitration is that it encourages the parties to bargain in good faith, without sandbagging strong arguments until arbitration.<sup>157</sup> If traditional arbitration was used, the parties might fear an arbitrator would simply split the difference of the last-best final offers; this would encourage the parties to take polar positions in negotiations to posture themselves for arbitration.<sup>158</sup> In baseball arbitration, however, the parties have the opposite incentive—they have every incentive to make a reasonable proposal to the arbitrator because the arbitrator will choose the more reasonable offer.<sup>159</sup> This undoubtedly explains why the majority of cases settle before arbitration in the pre-hearing process (for example, in 2009 111 players filed for arbitration, forty-six exchanged final offers with teams, and

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<sup>153</sup> MLBPA, 2012-2016 BASIC AGREEMENT, 17-22 [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) (last visited Jan. 28, 2012) [hereinafter 2012-2016 Basic Agreement].

<sup>154</sup> *Id.* at 16.

<sup>155</sup> MLB PLAYERS, *MLBPA Info*, <http://mlbplayers.mlb.com/pa/info/faq.jsp> (last visited Jan. 25, 2012).

<sup>156</sup> Haupt, *supra* note 150.

<sup>157</sup> ABRAMS, *supra* note 132, at 149.

<sup>158</sup> *Id.*

<sup>159</sup> By contrast, the National Hockey League (NHL) also uses arbitration to resolve player salary disputes. In the NHL, however, unlike in MLB, arbitrators need not choose either the player's or the owner's offer, but may choose any salary the arbitrators see fit. This has made NHL salary arbitration particularly contentious and has resulted in the parties making polarized offers to each other and to arbitrators. See Trevor Levine, *Two Worlds Collide: Salary Arbitration for NHL Players in the Salary Cap Era*, 26 OHIO ST. J. ON DISP. RESOL. 729, 736-37 (2011).

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only three continued to an arbitration hearing.<sup>160</sup> Consistent with this, one non-MLB empirical study has shown that pre-arbitration settlement is twice as likely in jurisdictions using final-offer arbitration as it is in jurisdictions using traditional arbitration.<sup>161</sup>

The criteria utilized by panel arbitrators in baseball arbitration are generally specified by the CBA and include a player's:<sup>162</sup>

- Contributions during the past season
- Special qualities of leadership and public appeal
- Length and consistency of career contributions
- Compensation of past year
- Compensation of comparative players (at the same position)
- Mental or physical defects (length on disabled list during season)
- Recent performance of Club including league standings and attendance

Not admissible criteria include:

- Financial position of Player or Club
- Press comments except annual awards
- Offers made by either side during negotiations prior to arbitration
- Costs to the parties including fees of attorneys, representatives
- Salaries in other sports

When the owners and players first agreed to the free agency and final-offer arbitration, Charley Finley, then-owner of the Oakland A's (and the owner who precipitated free agency by breaching his contract with Catfish Hunter), noted that "arbitration panels are not baseball people" and predicted owners would regret agreeing to the new process.<sup>163</sup> By most accounts, however, the process has been quite successful. It was first used in 1974 to settle three salary disputes; in the thirty-seven years since (through 2011), it has been used 501 times.<sup>164</sup>

Baseball arbitration has been criticized, albeit relatively mutely, on three grounds. First, some have argued that the owners have fared better than the players because through 2011 they won 287 (57%) of the cases submitted to

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<sup>160</sup> Tulis, *supra* note 116, at 90.

<sup>161</sup> STEPHEN GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 288–89 (4th ed. 2003).

<sup>162</sup> 2012-2016 BASIC AGREEMENT, *supra* note 153, at 20–21.

<sup>163</sup> Maury Brown, *Breaking Down How Salary Arbitration Functions in Major League Baseball*, THE BIZ OF BASEBALL (Jan. 30, 2009), available at [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=2916:breaking-down-how-salary-arbitration-functions-in-mlb&catid=26:editorials&Itemid=39](http://bizofbaseball.com/index.php?option=com_content&view=article&id=2916:breaking-down-how-salary-arbitration-functions-in-mlb&catid=26:editorials&Itemid=39).

<sup>164</sup> MLB PLAYERS, *supra* note 155.

final offer arbitration, while the players won 214 (43%) of the cases.<sup>165</sup> However, Maury Brown, founder and president of Business Sports Network (which among other things tracks baseball arbitration decisions), notes that most salary disputes are settled in the weeks after the last offers are submitted and before the arbitrator hears the case, and that the players usually receive huge increases in salary.<sup>166</sup> For example in 2008, the 110 players that settled before arbitration received an average of 120% increase in salary.<sup>167</sup> Second, and inconsistent with the first criticism, baseball arbitration has been criticized for inflating player salaries.<sup>168</sup> However, baseball salary increases are roughly commensurate with salary increases in the three other major league sports with national television revenues and fan bases; the average major league baseball player salary in 2010 was \$3.3 million, which trailed basketball (\$5.8 million ) and hockey (\$4.3 million), and led only football (\$1.8 million).<sup>169</sup> Third, some critics of baseball arbitration have speculated that the panels have a tendency to split their decisions between clubs and players so as to not favor one side and therefore be hired again (this is, not coincidentally, the same charge frequently levied against all forms of arbitration). However, Donald Fehr, Executive Director of the MLBPA cited highly regarded arbitrator Thomas Roberts as saying, "That's an illusion. A successful arbitrator doesn't pay attention to his box score, in baseball or anywhere else."<sup>170</sup>

#### IV. FINAL-OFFER ARBITRATION IN PUBLIC-SECTOR BARGAINING

##### A. *Experience in the States*

According to the U.S. General Accounting Office, twenty-six states provide public employees collective bargaining rights, twelve states provide some public-sector employees collective bargaining rights, and twelve states

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<sup>165</sup> *Id.*

<sup>166</sup> Brown, *supra* note 163.

<sup>167</sup> *Id.* Maury Brown, *Arbitration Scoreboard*, THE BIZ OF BASEBALL (Feb. 10, 2007), available at [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=719&Itemid=116](http://bizofbaseball.com/index.php?option=com_content&view=article&id=719&Itemid=116).

<sup>168</sup> Brown, *supra* note 163.

<sup>169</sup> MICHAEL R. CARRELL & CHRISTINA HEAVRIN, *LABOR RELATIONS AND COLLECTIVE BARGAINING* 29 (10th ed. 2012).

<sup>170</sup> Stephen Raymond, *Perspectives From a Mediator/Arbitrator*, ST. PETERSBURG TIMES, Feb. 18, 2008, at C1.

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do not allow collective bargaining by any public sector employees.<sup>171</sup> Of the states permitting public-sector collective bargaining, most do not allow public-sector employees the right to strike and, therefore, provide some third-party process such as mediation, advisory arbitration, or fact-finding to resolve bargaining impasses.<sup>172</sup>

Currently fourteen states have codified final-offer arbitration as summarized in Table 2,<sup>173</sup> and several of those are limited to certain public employee groups. In 2011, bills providing for final-offer arbitration for teachers were introduced in three states. Indiana passed a new law requiring a unique last-best offer process for teachers and school employers that took effect July 1, 2011.<sup>174</sup> In Pennsylvania a bill to settle teacher-employer disputes was introduced<sup>175</sup> and in Rhode Island, a new bill including last, best offer (total package) arbitration for teachers (and a ban on strikes) was introduced and passed the senate,<sup>176</sup> but the house failed to act on it before the session ended.<sup>177</sup>

Here is some additional information about the final-offer arbitration statutes described in Table 2. Maine, prior to 1987, provided for non-binding arbitration of all disputes within its most important industry, agriculture,<sup>178</sup> but in 1987 changed to binding final-offer to limit strikes and protect the general welfare of the state.<sup>179</sup> Michigan, like Wisconsin and New Jersey, prohibits police and fire employees from striking, and the statute provides a

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<sup>171</sup> Jeannie Hayes & John Moran, *Comparison of Connecticut's State Employees Collective Bargaining Laws With Those of Bordering States*, OLR RESEARCH REPORT (March 22, 2010), available at <http://www.cga.ct.gov/2010/rpt/2010-R-0127.htm> (last visited Nov. 29, 2011).

<sup>172</sup> Carrell & Heavrin, *supra* note 7, at 12–15.

<sup>173</sup> KEARNEY, *supra* note 112, at 278–79 (4th. ed. 2008) (stating that fifteen states have final-offer arbitration; note that the number fluctuates as legislation changes).

<sup>174</sup> IND. CODE ANN. § 20-29-6-15.1 (West 2012).

<sup>175</sup> H.B. 1660, 2011 Leg. Sess. (Pa. 2011), available at <http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2011&sessInd=0&billBody=H&billTyp=B&billNbr=1660&pn=2075>.

<sup>176</sup> Katherine Gregg, *Breaking News: Senate Passes Binding Arbitration Bill for Teacher Contracts*, PROVIDENCE J. (June 29, 2011), available at <http://news.providencejournal.com/breaking-news/2011/06/senate-passes-binding-arbitrat.html>.

<sup>177</sup> Jennifer D. Jordan, *Breaking News: RI House Kills Binding Arbitration Bill*, PROVIDENCE J. (June 30, 2011), available at <http://news.providencejournal.com/breaking-news/2011/06/ri-house-kills-binding-arbitra.html>.

<sup>178</sup> ME. REV. STAT. ANN. tit. 13, § 1958-A (repealed 1978).

<sup>179</sup> Tulis, *supra* note 116, at 97–98.

“binding procedure for the resolution of disputes” as an alternative to maintain the public service.<sup>180</sup> The Connecticut statute provides not only that the parties submit last, best offers on unresolved issues, but also requires that the parties estimate the cost of each of their offers on economic issues, and allows the parties to continue to settle issues right up to the time of the arbitrator’s award.<sup>181</sup> This somewhat unusual provision, therefore, may provide incentives for greater pre-award settlements than is common during conventional arbitration and the process specified in other states. In Minnesota, the statute for “essential employees” provides that if the parties both agree in writing to arbitrate their bargaining dispute on a final-offer package basis or on a final-offer issue-by-issue basis, then the arbitrators are restricted to that choice.<sup>182</sup> Principles and assistant principals are limited to final offer arbitration on an issue-by-issue basis.<sup>183</sup>

**TABLE 2 States’ Public Sector Final-offer Interest  
Arbitration/ Factfinding**

State	Statute	Type of Final -offer	Employees
Iowa	Iowa Code Ann. § 20.22	Final offer on all economic and noneconomic issues on issue-by-issue basis	State employees
Maine	Me. Rev. Stat. Ann. tit. 13, §1958-B(5A)	Final offer after mandatory mediation	Agricultural employees & associations.
Connecticut	Conn. Gen. Stat. Ann. § 5-276a (c)	Final offer on issue-by-issue basis. Parties estimate costs of their LBOs of economic issues	State employees
Minnesota	Minn. Stat. Ann. § 179A.16	Final offer on issue-by-issue for some employees, package basis for others.	State employees
Oklahoma	Okla. Stat. Ann. tit. 11, § 51-108(4)	Final offer by package	Fire Fighters & Police Officers
Pennsylvania	Pa. Stat. Ann. § 11-1122-A	Final offer	Labor disputes
Washington	Wash. Rev. Code §	Final offer by package	Labor disputes

<sup>180</sup> MICH. COMP. LAWS. ANN. § 423.231 (West 2006).

<sup>181</sup> CONN. GEN. STAT. ANN. § 5-276a (West 2006).

<sup>182</sup> MIN. STAT. ANN. § 179A.16 (West 2006).

<sup>183</sup> *Id.*



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	41.56.100		
Michigan	Mich. Comp. WS. Ann. § 423.238	Final offer on issue-by-issue basis	Fire Fighters & Police Officers
Wisconsin	Wis. Stst. Ann. § 111.77(4)(b)	Final offer by package basis, or conventional if chosen by parties.	Public Safety – State Patrol Troopers and State Patrol Inspectors
New Jersey	N.J. Stat. § 34.13A-16	Choice of six variations of conventional and package (non-economic) and issue-by-issue final offer (economic)	Fire Fighters & Police Officers
Ohio	Ohio Revised Code 4117.14	Final offer on issue-by-issue basis	Public Safety
Oregon	Or. Rev. Stat. § 243.746 (4)(a-h)	Final offer package basis, economic and non-economic issues	Protective Services
Illinois	5 Ill. Comp. Stat. Ann. 315/14	Final offer on package of economic issues	Security, Peace Offers, Fire Fighters
Indiana (7/1/11)	Ind. Code Ann. 20-29-6-15.1 (West 2012)	Final-offer by package basis after mandatory mediation	Teachers (K-12)

### *B. Indiana's Last Best Offer (LBO) Arbitration for Teachers*

A new Indiana statute requires last, best-offer (LBO) arbitration when a teachers' union and school employer have reached impasse.<sup>184</sup> The experience in the state before the new law in many ways mirrors that of many other public-sector collective bargaining negotiations during the recent recession—a high percentage of negotiations resulted in impasse, especially because the prior law contained an evergreen clause providing that an expired CBA remain in effect until a new CBA is ratified. Thus, during years when employers were seeking concessions, unions had little motivation to settle. The new law includes mandatory mediation and last, best-offer arbitration in the fall of each year.<sup>185</sup> In its first year (2011), six of the eight cases sent to mediation/arbitration were resolved by mediation (two were still

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<sup>184</sup> IND. CODE ANN. § 20-29-6-15.1 (West 2012).

<sup>185</sup> IND. CODE ANN. § 20-29-6-13 (West 2012).

pending when this article was being written), and none went to arbitration.<sup>186</sup> Thus, if the first year is any predictor of the future, the new law will eliminate the impasse problem of the past and provide effective incentives for more mediated settlements. The sole objective of this article is to review the features of the new law as means of resolving impasse, and not to debate the merits of the law.

A controversial feature of the new statute is the narrow scope of subjects allowed to be negotiated.<sup>187</sup> Primarily only wage, salary, and related fringe benefits are subjects for negotiation.<sup>188</sup> Issues such as working conditions, school calendar, teacher dismissal procedures, and teacher evaluation processes, which were on the table under the old law, are no longer bargaining subjects.<sup>189</sup> On the one hand, limits on the subjects of bargaining may make it easier for the parties to successfully negotiate or mediate a new CBA—there is simply less to disagree about. On the other hand, the limits may remove a safety valve that previously would have allowed the parties to bargain—as opposed to using economic weapons such as a strike — over subjects such as working conditions and dismissal procedures that many teachers may feel strongly about. The limits on the subjects of bargaining may in the long run—when the overall economic tide turns — make reaching an agreement more rather than less difficult if teachers begin to use wages and benefits — which are proper subjects of bargaining—as a proxy to obtain employer concessions on matters of working conditions and dismissal procedures.<sup>190</sup> Regardless of the effect on bargaining, the restrictions unquestionably should be viewed as more desirable to school districts, which now have undisputed rights over issues previously subject to negotiation, and therefore a loss to the teachers' unions.

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<sup>186</sup> INDIANA EDUCATION EMPLOYEE RELATIONS BOARD, [www.in.gov/IEERB](http://www.in.gov/IEERB) (last visited Sept. 17, 2012).

<sup>187</sup> IND. CODE ANN. § 20-29-6-4 (West 2012).

<sup>188</sup> *Id.*

<sup>189</sup> IND. CODE ANN. § 20-29-6-5 (West 2012).

<sup>190</sup> See Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1370 (2009) (arguing that the narrowness of negotiable topics leads to collective bargaining impeding effective government); see also, Martin H. Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Relationship?*, 30 HARV. J. L. & PUB. POL'Y 885, 921–23 (2007) (suggesting that limiting topics of negotiations for teachers can limit performance in the classroom and stifle positive change that can lead to a more productive classroom experience). For a related argument, see Paul M. Secunda, *Privatizing Workplace Privacy*, 88 NOTRE DAME L. REV. 277, 294–302 (2012), available at (arguing that public sector employees should have greater—not fewer—workplace privacy rights because of the unique characteristics of public employment).

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The new statute was passed largely in response to the large number of bargaining impasses between Indiana school boards and teachers' local unions during the current recession.<sup>191</sup> The statute repealed the evergreen provision of the prior law.<sup>192</sup> It (1) requires mediation before arbitration;<sup>193</sup> (2) limits the scope of bargaining to salary and wage – related benefits including paid time off;<sup>194</sup> (3) sets a short time frame for the parties to move from impasse, through mediation, to LBO fact-finding;<sup>195</sup> and (4) requires fact-finding and limits the fact-finders to the last, best final offer that does not impose a financial hardship on the organization.<sup>196</sup> The new law provides that within sixty days of a declared impasse, the Indiana Education Employment Relations Board (IEERB) will appoint a mediator and that the mediation may consist of no more than three sessions (and no more than thirty days) and must result in either (1) an agreement between the parties, or (2) each party's tender of its LBO.<sup>197</sup> When the second option is the result—i.e., each party provides a last best offer—then the new law requires that within fifteen days the IEERB must initiate fact-finding, and the fact-finder “must select one party's LBO as the contract terms.”<sup>198</sup> The fact-finder's order is restricted to only those terms permitted to be bargained for in the law, and cannot put the employer in a position of deficit financing.<sup>199</sup> The fact-finder's decision may be appealed to the IEERB.<sup>200</sup> The new law specifies that unlike the old law under which fact-finding was advisory, the purpose of fact-finding now is to provide a final decision if mediation is unsuccessful:

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<sup>191</sup> *Indiana Governor O.K. 's Teacher's Collective Bargaining Limits*, *BUSINESSWEEK*, Apr. 21, 2011, available at <http://www.businessweek.com/ap/financialnews/D9MO4GC00.htm>.

<sup>192</sup> IND. CODE ANN. § 20-29-6-5 (West 2012).

<sup>193</sup> IND. CODE ANN. § 20-29-6-13 (West 2012).

<sup>194</sup> IND. CODE ANN. § 20-29-6-4(a) (West 2012).

<sup>195</sup> IND. CODE ANN. § 20-29-6-13(a), (e) (West 2012) (after reaching an impasse mediation must begin within 15 days and be concluded after 30 days); IND. CODE ANN. § 20-29-6-15.1(a) & (c) (West 2012) (if no solution is reached through mediation, parties will enter fact-finding within 15 days and fact-finding must be completed within 15 days).

<sup>196</sup> IND. CODE ANN. § 20-29-6-15.1(b) (West 2012).

<sup>197</sup> IND. CODE ANN. § 20-29-6-13 (West 2012).

<sup>198</sup> IND. CODE ANN. § 20-29-6-15.1 (West 2012).

<sup>199</sup> IND. CODE ANN. § 20-29-6-15.1(b) (West 2012).

<sup>200</sup> IND. CODE ANN. § 20-29-6-18 (West 2012).

Sec. 5. The purpose of factfinding is to provide a final solution on the items permitted to be bargained under IC 20-29-6-4 whenever the parties are unable by themselves, or through a mediator, to resolve a dispute.<sup>201</sup>

The new Indiana statute in § 7(a) also specifies the appointment process of the final-offer fact-finder, and in § 7(b)(3) specifies that the fact-finder must choose one of the parties' LBOs:

Sec. 7. (a) When a factfinder is requested or required under IC 20-29-6, the board shall appoint a factfinder from the staff or panel established under section 6 of this chapter.

(b) The factfinder shall make an investigation and hold hearings as the factfinder considers necessary in connection with a dispute.

(c) The factfinder:

(1) may restrict the factfinder's findings to those issues that the factfinder determines significant;

(2) must restrict the findings to the items listed in IC 20-29-6-4; and

(3) may not impose terms beyond those proposed by the parties in their last, best offers.

(d) The factfinder may use evidence furnished to the factfinder by:

(1) the parties;

(2) the board;

(3) the board's staff; or

(4) any other state agency<sup>202</sup>

The new Indiana statute further specifies the factors a factfinder may consider in rendering a decision:

Sec. 8. In conducting hearings and investigations, the factfinder is not bound by IC 4-21.5. The factfinder shall, however, consider the following factors:

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<sup>201</sup> IND. CODE ANN. § 20-29-8-5 (West 2012).

<sup>202</sup> IND. CODE ANN. § 20-29-8-7 (West 2012).

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- (1) Past memoranda of agreements and contracts between the parties.
- (2) Comparisons of wages and hours of the employees involved with wages of other employees working for other public agencies and private concerns doing comparable work, giving consideration to factors peculiar to the school corporation.
- (3) The public interest.
- (4) The financial impact on the school corporation and whether any settlement will cause the school corporation to engage in deficit financing as described in IC 20-29-6-3.<sup>203</sup>

Mediation as a means of resolving an impasse existed, in fact was mandatory, in the old Indiana law that was repealed with the creation of the new law.<sup>204</sup> However, under the old law, when mediation failed, a party could request fact-finding—but the decision of the factfinder was only advisory, not binding, and the evergreen clause in the old law continued the existing CBA until a new one was reached,<sup>205</sup> which in recent years with no possibility of any salary or benefit increases, often lasted for years. The new law, however, gives substantial leverage to the mediation process because the parties must either agree or submit to the mediator their LBO, which will be submitted to final arbitration.<sup>206</sup> The possibility of the arbitrator choosing the LBO of the other party significantly increases the incentives of both parties to reach an agreement through mediation because they will participate in the formation of that agreement, and it eliminates the possibility of them being forced to accept the other party's LBO in arbitration. While the new law has been in effect only a short time, at least two mediators who experienced mediation under the old law and the new law have witnessed the profound impact on the parties' desire to reach agreement through mediation.<sup>207</sup>

The new Indiana LBO contains several potential advantages that have been verified through recent experience. First, by requiring a mediation process that can only end with an agreement or the parties' giving the mediator their LBO, the new law eliminates the primary disadvantage of both traditional mediation and traditional interest arbitration. That is, the primary

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<sup>203</sup> IND. CODE ANN. § 20-29-8-8 (West 2012).

<sup>204</sup> IND. CODE ANN. § 20-29-8-6 (West 2012).

<sup>205</sup> IND. CODE ANN. § 20-29-8-8 (West 2012).

<sup>206</sup> IND. CODE ANN. § 20-29-6-13(c). (West 2012)

<sup>207</sup> The mediators are Michael R. Carrell, one of the co-authors of this article, and his colleague Louis Manchise.

risk of traditional mediation—ending without an agreement—may be significantly reduced because of the parties’ desires to avoid final-offer fact-finding. Additionally, the primary disadvantage of traditional arbitration— the parties receiving a decision they feel they had little input in developing and cannot easily live with—is significantly reduced because they will be incentivized to reach an agreement through mediation—a process in which they do have a significant role in developing.

A second potential long-term advantage of the new law is the inclusion of language that restricts mediation or fact-finding from resulting in deficit financing for an affected school employer.<sup>208</sup> The new law further specifies that the budget revenues discussed by the parties must be those General Fund revenues certified by the state before the negotiations begin.<sup>209</sup> Other potential limited or one-time sources of revenues (Rainy Day funds) cannot be used in a LBO or in fact-finding.<sup>210</sup> This provision will keep the parties focused on a limited amount of funds to be negotiated, and thus create a greater probability of success.

A third potential advantage of the new law is that it ends the evergreen nature of the old law by requiring binding LBO fact-finding and thus guaranteeing that a new CBA will be in place before January 1 of a new year, and it limits the term of any new CBA to two years<sup>211</sup>—thus minimizing effects on future budgets.

### *C. Advantages & Disadvantages of Final-Offer Arbitration*

In professional baseball, the final-offer arbitration process has changed very little since it was first used in 1974. Today, owners can offer arbitration to players with more than six years of service, and the players have the option of arbitration or free agency.<sup>212</sup> In 2009, a typical year, only three of the 23 free agents offered arbitration chose to arbitrate, rather than go into the market.<sup>213</sup> The major change has been in the weeks after final offers are

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<sup>208</sup> IND. CODE ANN. § 20-29-6-3 (West 2012).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> IND. CODE ANN. § 20-29-6-12 (West 2012).

<sup>212</sup> 2012-2016 BASIC AGREEMENT, *supra* note 153, at 17–18.

<sup>213</sup> Maury Brown, *From Pujols to Jeter to Clemens to Freak: Salary Arbitration Records*, THE BIZ OF BASEBALL (Nov. 30, 2010), available at [http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=4901:from-pujols-to-jeter-to-clemens-to-freak-salary-arbitration-records&catid=26:editorials&Itemid=39](http://bizofbaseball.com/index.php?option=com_content&view=article&id=4901:from-pujols-to-jeter-to-clemens-to-freak-salary-arbitration-records&catid=26:editorials&Itemid=39).

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made and before the three member arbitration panels meet.<sup>214</sup> Today, more salary disputes are settled in this period and most “meet somewhere in the middle,” rather than risk arbitration.<sup>215</sup>

Compared to mediation, fact-finding and conventional arbitration, final-offer or last, best offer arbitration provides at least four advantages. First, it can greatly reduce the chilling effect common in conventional arbitration of economic issues—it encourages the parties to take a middle ground—rather than polar position because the arbitrator will pick the more reasonable of the two offers.<sup>216</sup> Second, as it has in major league baseball, it offers a strong incentive to the parties to settle during the pre-hearing stage.<sup>217</sup> Third, it provides finality – it can provide public officials a final decision in a contract dispute which can then be implemented during a new budget cycle.<sup>218</sup> Fourth, it avoids the politically unpalatable prospect offered by interest arbitration of an unelected arbitrator drafting a public-sector contract. As arbitrator Charles Rumbaugh has written, the nonbinding ADR steps often do not work.<sup>219</sup> The best incentive is knowing the final resolution is within a certain range or one of two outcomes – it creates an atmosphere for voluntary resolution.<sup>220</sup>

One common criticism of final-offer arbitration is that there is the possibility that neither party will submit a reasonable package.<sup>221</sup> When this occurs, an arbitrator must choose between two unreasonable offers.<sup>222</sup> Respondents to this criticism have suggested using an issue-by-issue approach instead of a total package approach.<sup>223</sup> Additionally, research on final-offer arbitration demonstrates that the more transparent the final-offer arbitration process, the more reasonable the parties’ proposals will be and the more likely the dispute is to settle.<sup>224</sup> For example, in one study of final-offer arbitration scenarios structured in different ways, the study found that when

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<sup>214</sup> Maurey Brown, *Evolution of Salary Arbitration: an ironic tale*, Yahoo! Sports (Jan. 19, 2011), available at <http://sports.yahoo.com/mlb/news?slug=ys-maurybrownarbitration011910>.

<sup>215</sup> *Id.*

<sup>216</sup> Tulis, *supra* note 116, at 100.

<sup>217</sup> *Id.* at 91.

<sup>218</sup> ABRAMS, *supra* note 133, at 146–47.

<sup>219</sup> Charles Rumbaugh, *Baseball Arbitration* 2000, <http://www.sbcadre.org/articles/0010.htm> (last visited Feb. 1, 2011).

<sup>220</sup> *Id.*

<sup>221</sup> FEUILLE, *supra* note 8, at 13.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Howlett, *supra* note 11, at 828.

the parties knew their final offers would be disclosed to the other side, their final offers were more reasonable and the parties were more likely to settle their dispute.<sup>225</sup> A 1980 study in New Jersey concluded that final-offer, compared to conventional arbitration, increases the probability of negotiated settlements and compels the parties to present more reasonable, middle-ground offers.<sup>226</sup>

Another possible disadvantage of using final-offer arbitration in the federal public sector is suggested by Elkouri & Elkouri in *How Arbitration Works*.<sup>227</sup> The authors point out that in some cases where the parties under the District of Columbia Code were required to use final-offer arbitration, they proceeded to move further apart, rather than closer to an agreement.<sup>228</sup> To limit such a possible “chilling effect” on the negotiations when final-offer is immediate, both parties should be required to show, in fact, that their last offer is their best offer, and thus they have not included in it new items.

#### D. Recommendations

Public sector officials, employers, and labor organizations considering final-offer arbitration as a method of minimizing or eliminating negotiation impasses should carefully consider several issues:

1. *Conventional v. final-offer*. As described above, the advantages of final-offer arbitration compared to conventional arbitration include encouraging the parties toward middle ground, encouraging pre-hearing settlement, finality, and party control over outcome.<sup>229</sup> Final-offer arbitration is particularly attractive in situations, like MLB and public-sector negotiations, where the traditional economic weapons are unavailable and the parties’ “locked-in” relationship with each other makes it difficult to ascertain value on the open market.<sup>230</sup>

2. *Day v. night version*. In the “day” version of final offer arbitration the arbitrator chooses one of two proposals submitted by the parties.<sup>231</sup> In the “night” version, the two proposals are submitted but held from the arbitrator

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<sup>225</sup> Justin Kelly, *Study of Final-Offer Arbitration*, 63 DISP. RESOL. J. 8 (Jan. 2009).

<sup>226</sup> Joan Weitzman & John M. Stochaj, *Attitudes of Arbitrators Toward Final-Offer Arbitration in New Jersey*, 35 ARB. J. 25, 33 (1980).

<sup>227</sup> ELKOURI & ELKOURI, *supra* note 94, at 1143-45.

<sup>228</sup> *Id.*

<sup>229</sup> Tulis, *supra* note 116, at 89.

<sup>230</sup> *Id.* at 102.

<sup>231</sup> Amy Moor Gaylord, Interest Arbitration – Pros, Cons and How To’s, ABA Annual Meeting Section of Labor and Employment Law (Aug. 5-10, 2010).



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until the arbitrator has independently decided an award—and then the offer closest to that value is the award.<sup>232</sup> This “night” version is most likely to work when the parties are negotiating over a single issue—such as wages in baseball arbitration. It is less likely to work when the parties are negotiating over multiple issues, because that will make it much more difficult to ascertain which offer is closest to the arbitrator’s award.

3. *Total package v. issue-by-issue.* It is not clear, given the experience of both forms in the public sector, if total package or issue-by-issue is the better method of final-offer arbitration.<sup>233</sup> Critics of total-package final-offer arbitration note that parties may include a few outrageous provisions in a package that otherwise is relatively reasonable—and thus the issue-by-issue format is preferable because it forces parties to present reasonable offers on all issues.<sup>234</sup> Total-package arbitration may also be a challenge if some of the issues in dispute are non-economic issues—it may be difficult for the arbitrator to compare the apples offered by one side to the oranges offered by the other side. It also is possible that the issue-by-issue format may allow arbitrators to split-the-difference and award each party some issues—a flaw in traditional arbitration which final-offer arbitration is intended to avoid.<sup>235</sup> However, in reality the issue-by-issue format is not likely to cause the chilling effect on issues because the parties still strive to make the more reasonable offers on each issue so their offer is selected, and the process promotes pre-hearing settlement on at least some issues.<sup>236</sup> The advantages of total-package arbitration over issue-by-issue arbitration are that (1) it is procedurally easier and faster because each side presents only one proposal, and (2) the arbitrator can consider how the various pieces of the dispute fit together as a whole—issue-by-issue arbitration may result in an agreement containing lots of individually-reasonable provisions that do not fit well into an integrated whole.<sup>237</sup>

4. *Include mandatory mediation.* Both the revised Maine and new Indiana statutes require mediation before final-offer arbitration.<sup>238</sup> The obvious benefit of this provision is to strongly encourage settlement by bringing in an experienced mediator just as looming arbitration is giving the parties a particularly strong incentive to settle. Furthermore, the Indiana law

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<sup>232</sup> *Id.*

<sup>233</sup> Tulis, *supra* note 116, at 102.

<sup>234</sup> *Id.* at 102–03.

<sup>235</sup> Howlett, *supra* note 11, at 830.

<sup>236</sup> Tulis, *supra* note 116, at 102–04.

<sup>237</sup> Howlett, *supra* note 11, at 830.

<sup>238</sup> *Id.* at 831.

specifies that the mediation must result in either a settlement or the parties submitting a LBO;<sup>239</sup> this promotes settlement during mediation and, if not, then the arbitration process begins quickly.<sup>240</sup>

5. *Timing of final offers.* The exact timing of submissions of final offers is critical.<sup>241</sup> Submitting final offers as early as possible before the arbitration hearing, and then allowing a “grace period” during which they may be adjusted before the hearing begins—but not right up to the start of the hearing—provides the parties incentive to achieve last minute settlement on issues.<sup>242</sup> The Connecticut statute even allows the parties to extend the grace period and continue negotiating and possibly settle individual issues until the award is issued—further incentive for last-minute settlements.<sup>243</sup>

6. *Economic v. Noneconomic issues.* Baseball arbitration includes only one economic issue – a player’s salary for the upcoming season.<sup>244</sup> Generally, due to their quantitative nature, economic issues might be considered more appropriate for final-offer arbitration.<sup>245</sup> Also, non-economic issues are less likely to be compromised in conventional arbitration, and therefore the need for final-offer arbitration is diminished.<sup>246</sup> Iowa, however, provides that both economic and non-economic issues can be included in final offers with issue-by-issue method of final-offer arbitration.<sup>247</sup> Critics of the issue-by-issue approach might argue that including more issues, especially non-economic, increases the probability of an arbitrator “splitting-the-difference” by roughly dividing the issues between the parties—therefore losing one of the potential advantages of final-offer versus conventional arbitration. Supporters might argue that by expanding the list of issues for a final-offer arbitration, the advantages of the process may be expanded. In Oregon, after the state law of twenty-two years requiring conventional arbitrational was changed to final-offer package arbitration, a study of the first three years of decisions noted that the prevailing party frequently submitted fewer issues, and often only

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<sup>239</sup> IND. CODE ANN. § 20-29-6-13(c) (West 2012).

<sup>240</sup> IND. CODE ANN. § 20-29-6-15.1(a) (West 2012).

<sup>241</sup> FEUILLE, *supra* note 8, at 41.

<sup>242</sup> Tulis, *supra* note 116, at 105.

<sup>243</sup> CONN. GEN. STAT. ANN. § 5-276(a) (West 2006).

<sup>244</sup> ABRAMS, *supra* note 133, at 29.

<sup>245</sup> Tulis, *supra* note 116, at 100.

<sup>246</sup> *Id.* at 88.

<sup>247</sup> IOWA CODE ANN. § 20.22 (West 2006).

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economic issues.<sup>248</sup> In general, final-offer arbitration might work best when limited to fewer issues and issues of an economic nature.

7. *Criteria.* State statutes often require that an arbitrator consider certain factors, most commonly: (1) employee wage comparability, (2) employer financial position, and (3) public interests.<sup>249</sup> The New Jersey Act, for example, lists nine criteria that an arbitrator may consider.<sup>250</sup> Comparability of wages and salaries both within a public organization, and across a region or state within a certain profession such as police or teaching and financial impact on the employer are the most common criteria.<sup>251</sup> The new 2011 Indiana statute specifies a short list of four clear criteria arbitrators should consider; (1) comparability, (2) past CBAs and MOUs between the parties, (3) the public interest, (4) the financial impact on the school corporation and whether any settlement will cause the school corporation to engage in deficit financing.<sup>252</sup> The short list limits the discretion of the arbitrator, and in practice will likely focus on comparability and financial impact—while specifically excluding the possibility of deficit financing, a major issue in cases under the prior law. This is expected to be largely achieved by the state certifying in advance of the negotiation process the budget dollars available to the school organization for the year.

## V. CONCLUSION

The current U.S. recession severely affected the budgets and therefore negatively impacted the contract negotiations for many governments and unions. For years in some cases, tax revenues have been flat or even declined while health care and pension costs continued to climb—causing many governments to seek concessions in the forms of wage cuts, unpaid furloughs, and other forms of salary reductions. For many negotiators, it is their most difficult round of economic negotiations since their very first CBA because many bargaining units were initially formed in the 1970s and 1980s. The result for many negotiations, especially for those CBAs with evergreen clauses, has been at impasse for months or even years. Alternative dispute resolution methods available to public sector negotiators to move beyond

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<sup>248</sup> RANDALL B. GROVES, *LAST BEST OFFER, TOTAL PACKAGE ARBITRATION: ANALYSIS OF CHANGE IN INTEREST ARBITRATION FOR OREGON'S PROTECTIVE SERVICES* 38-39 (1998).

<sup>249</sup> ELKOURI & ELKOURI, *supra* note 94, at 1403-04, 1442.

<sup>250</sup> Tulis, *supra* note 116, at 122.

<sup>251</sup> *Id.* at 120-21.

<sup>252</sup> IND. CODE ANN. § 20-29-8-8 (West 2012).

impasse primarily include mediation, and fact-finding or advisory arbitration.<sup>253</sup> Both of these methods do not guarantee a settlement even in normal times, and especially not in economic conditions like those in recent years. Conventional arbitration, seldom used in the public sector, provides a guaranteed settlement—but also often causes a chilling effect during negotiation, and in addition, may result in decisions in which arbitrators “split-the-difference.”<sup>254</sup> Final-offer arbitration, available in some states as well as in major league baseball, also guarantees a settlement of negotiation impasses, but in comparison to conventional arbitration can provide the parties a strong incentive to settle during the pre-hearing period and can eliminate or minimize the chilling effect of conventional arbitration.<sup>255</sup>

A new Indiana law provides for last, best offer arbitration for teachers and school employers and contains some unique features that may be of interest to others seeking an alternative method of impasse resolution. These potential advantages of the new law include: (1) a mandatory mediation process that includes a grace period during which the parties can continue to strive to reach a settlement, (2) a restriction from deficit financing for the affected schools, and (3) a timetable that guarantees that a new CBA will be in place before a new budget year begins.

Public-sector officials, labor organizations, and employers considering final offer arbitration as a means of avoiding or settling impasses should consider several issues before making a decision: (1) the possible advantages of final offer arbitration compared to conventional arbitration—the elimination of the chilling effect and the encouragement of pre-hearing settlements by the parties; (2) adopting the “day” or “night” version of final offer arbitration; (3) adopting the total package or the issue-by-issue form of final offer arbitration; (4) the inclusion of mandatory mediation, as in the new Indiana law, to increase the probability of pre-hearing settlements; (5) together with mandatory mediation, a grace period during which the parties after reviewing the final offers may continue to negotiate settlements; (6) restricting the final offer process to economic issues and as few as practical; and (7) specifying criteria for the arbitrators to consider, including those factors most commonly used by the states; public interests, wage comparability, and the financial position of the employer—possibly including the prohibiting of deficit financing as included in the new Indiana law.

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<sup>253</sup> Malin & Kerchner, *supra* note 190, at 913.

<sup>254</sup> Tulis, *supra* note 116, at 88.

<sup>255</sup> Tulis, *supra* note 116, at 99-100.