CSEA LEGAL DEPARTMENT

Health Insurance Benefits in RETIREMENT

Your Rights & Options

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I. INTRODUCTION

CSEA is committed to enforcing retirees' rights to health insurance, just as it seeks protections for health insurance coverage for active employees. In recent years, employers have shown a tendency to try to pass the rising cost of retiree health insurance on to retirees. Many employers provide health insurance benefits to employees and their dependents that continue after those employees retire from employment. Questions often do not arise about such benefits until the employer changes or eliminates them. This revised CSEA guide addresses the issues that arise when an employer seeks to unilaterally change retiree health care benefits.

II. MAY THE EMPLOYER AND THE UNION NEGOTIATE RETIREES' HEALTH INSURANCE BENEFITS?

The answer to this question depends on whether the individual retired during the term of the current collective bargaining agreement or during a prior contract. The employer has no duty to bargain over benefits for those employees who have retired under previous contracts because they are no longer "employees," but, rather, are retirees.

A. Retirees Who Retire During the Term of the Current or Future Collective Bargaining Agreements

A negotiation of health insurance benefits is a mandatory subject of bargaining for employees who are current bargaining unit members. Employees who retired during the term of the collective bargaining agreement being

negotiated, but before the new contract is signed are also considered "employees" within the definition provided in the Public Employees' Fair Employment Act (Taylor Law) and the National Labor Relations Act (NLRA).

Because "health insurance" is a mandatory subject of bargaining, the Public Employment Relations Board (PERB) has held that the employer must negotiate in good faith with respect to the maintenance of health insurance premiums for public employees represented by the union who will retire during or after the term of the contract being negotiated. However, pensions in the public sector are governed by statute and are therefore a prohibited subject of bargaining in the public sector.

In addition, the Triborough Amendment (Taylor Law §209-a.1(e)), which requires employers to continue all terms of an expired collective bargaining agreement until a new agreement is negotiated, offers a further source of protection for a retiree who retired after the expiration of the contract but before a new contract is executed.

Under the NLRA, "health insurance" is also a mandatory subject of bargaining, and the National Labor Relations Board (NLRB) has held that the bargaining obligation extends to the level of benefits, the cost of benefits, and the definition of the persons covered by the benefits. Similarly, retirement plans, which may contain health benefits, are a mandatory subject of bargaining in the private sector.

B. Retirees Who Retired During Prior Contracts

Benefits for non-unit members, including persons who retired prior to a period covered by an existing or prospective contract, are non-mandatory subjects of negotiation. This means that the employer may not be compelled to negotiate health insurance benefits applicable to these non-unit members.

III. HOW ARE CHANGES IN HEALTH INSURANCE BENEFITS CHALLENGED?

When employers eliminate or diminish the health insurance benefits for retirees, there are several ways to challenge these actions. First, if the collective bargaining agreement has a provision for retiree health insurance, a lawsuit in court or a grievance can be filed. There is also a state law that protects retirees who worked for school districts, which is further explained in this booklet. That state law, however, only protects retirees from school districts.

If there is no language in the collective bargaining agreement protecting retiree health insurance, and the retirees were not employed by a school district, retirees have very little legal protection. Without a written guarantee of retiree health insurance in the collective bargaining agreement, even if an employer has provided retiree health insurance in the past, the courts have held that retirees do not have the right to continue to receive health insurance from the employer.

A. Grievance versus Court

When taking action against an employer for cutting

retiree health insurance in violation of a collective bargaining agreement, the first question is whether to file a grievance or to file a court proceeding for breach of contract. The answer to this question depends upon the language of the grievance procedure in the collective bargaining agreement.

Most grievance procedures do not permit retirees to file grievances. In the contractual definition of "grievance," it usually states that a grievance is a dispute between "an employee" and the employer. If the grievance procedure has language permitting only employees to file a grievance, then a retiree cannot file a grievance because a retiree is not an "employee." Under these circumstances, where the grievance procedure is limited to employees only, retirees have the right to go directly to court to commence an action for breach of contract.

However, some grievance procedures are extremely broad, allowing any individual to file a grievance about the interpretation of the collective bargaining agreement. If the collective bargaining agreement contains a grievance procedure which is broad enough to allow retirees to file a grievance, then the retirees must file a grievance. Courts will not allow retirees to proceed with a breach of contract action if retirees have the right to file a grievance.

In addition, some collective bargaining agreements explicitly exclude retirement benefits from being challenged under the grievance procedure. Therefore, if a grievance is filed for an alleged violation of a provision of the contract involving retiree health insurance, where the definition of a grievance excludes retirement benefits, the employer may challenge the arbitrability of such grievance. In

such situations, it may be found that the parties agreed that retirement benefits are not subject to arbitration and, therefore, the merits of the issue may be precluded from even being presented to arbitration.

Accordingly, if retirees are permitted to file a grievance, they should do so; however, if the grievance procedure does not permit retirees to file grievances or if the grievance procedure does not allow for retirement benefits to be arbitrated, they should file a breach of contract action in court.

B. Breach of Contract Actions

New York State courts have held that whether a collective beginning agreement can give retirees "vested rights" to health insurance for the remainder of their lives depends upon the language in the agreements. Where they find such vested rights, the courts have generally held that the retiree is entitled to the same health insurance plan, at the same contribution rate, as was in effect on the date they retired.

For example, the courts have generally held that contract language providing for a specific health insurance plan to be fully paid by the employer, for employees retiring with ten or more years of service, entitles the retiree to maintain the same fully paid health insurance plan in effect on their date of retirement for the remainder of the retiree's life. If a contract provides that a surviving spouse receives the same health insurance for the life of the spouse, then the spouse is also entitled to the same health insurance for the remainder of the spouse's life. Issues have arisen where

employers have placed retirees on Medicare plans upon attaining the age of 65, calling into question whether the language of the collective bargaining agreement regarding plan coverage continues post- Medicare eligibility age.

In a 2013 New York State Court of Appeals' decision, in which CSEA represented the plaintiff-retirees, the court determined that a vested right to the same health insurance coverage was established by the language of the collective bargaining agreement, which was found to be clear and unambiguous. That contract involved fairly specific language regarding the level of health insurance coverage, which is discussed below. On the subject matter of retiree health insurance, in 2015, the United States Supreme Court decided another retiree health insurance case involving the level of health insurance coverage and held that where the language of a labor contract is unclear, the court will not infer or presume that there is a vested or lifetime right to coverage. These cases indicate that contract language is important when analyzing benefit levels.

The courts have held that the co-payments in existence on the date of an employee's retirement must also remain unchanged for the retiree's life, if the contract language specifically requires it. Contract language which is ambiguous can be clarified by evidence of the contract negotiations at the time that the retiree health insurance language was negotiated. Ambiguous language can also be clarified by a longstanding consistent practice as to how the employer applied the retiree health insurance language. However, if the contract is silent on the subject of retiree health insurance, courts will not enforce a past practice of employer-provided retiree health insurance.

One court has even held that the collective bargaining agreement required the employer to continue reimbursing retirees for the cost of Medicare Part B because it was reimbursed to retirees when the parties negotiated the right to "fully paid" retiree health insurance. Similarly, if there is a specific contractual contribution that retirees must pay toward premiums (e.g. $200.00 per year), courts have held that the retiree contributions in effect on the date of retirement must remain unchanged for the retiree's lifetime. Therefore, if the collective bargaining agreement contains clear retiree health insurance language, the courts will enforce that language, ordering employers to maintain retiree health insurance.

C. Legislative Protection for School District Retirees

In 1994, the New York State Legislature enacted a "moratorium" prohibiting school districts and certain boards of cooperative educational services ("BOCES") from diminishing health insurance benefits or contributions for retirees without a "corresponding diminution" in health insurance benefits or contributions for active employees. This statutory protection only applies only to school districts and BOCES. This law has been extended for one or two year intervals every year since 1994 and was made permanent in 2009. Most active school district employees do have health insurance provisions in their collective bargaining agreements, so the moratorium guarantees that retirees' benefits in these districts will not be diminished unless benefits are also diminished for active employees, through contract negotiations.

The courts have enforced this moratorium to prohibit a school district from increasing co-payments for retiree health insurance without making the same increase in co-payments for active employees. Similarly, the courts have prohibited school districts from increasing the premium costs for retirees unless the same increase in premium costs is imposed for active employees.

However, one New York Appellate court held in 2006 that any diminution in benefits made by a school district since 1994 can also be implemented for retirees. In that case, a school district increased retirees' rate of contribution to their health insurance premiums in 2004. The court permitted this because the school district had increased the rate of contribution for active employees in the same amount nine years earlier, in 1995, without a corresponding change for retirees.

In the same 2013 New York State Court of Appeals' decision discussed above, the health insurance moratorium law was at issue. The language of the underlying collective bargaining agreement stated that "[t]he coverage provided [to retirees] shall be the coverage which is in effect … at such time as the employee retires." The Court of Appeals determined that the moratorium law could not eviscerate contractual obligations and was only meant to create a floor below which the district could not diminish benefits. Therefore, the moratorium law does not provide a basis for abrogating employees' vested contractual rights.

CSEA has sought legislation to extend this protection to all public employees but we have not been successful—yet.

D. Retiree Health Insurance Grievances

If the grievance procedure in the collective bargaining agreement permits retirees to file a grievance, then retirees can go to arbitration to enforce the retiree health insurance provisions in their contract. Arbitrators will rely on the precise language in the contract to determine retirees' rights to health insurance. In an arbitration proceeding, the arbitrators can enforce a past practice regarding retiree health insurance, even without explicit language in the contract guaranteeing retirees health insurance. This is because arbitrators have broader authority than courts to enforce a past practice, even when the contract is silent on the topic.

But remember, the right to file a grievance on retiree health insurance usually depends on the contract language.

IV. ARE THERE MINIMUM CONTRIBUTIONS THAT AN EMPLOYER MUST PAY OTHER THAN THOSE THE EMPLOYER AGREES TO BY CONTRACT?

Generally, the answer to this question is no.

In the public sector, Section 167 of the Civil Service Law and its accompanying rules and regulations set forth a statutory minimum rate at which an employer must contribute to health insurance premiums for its employees and its retirees if and only if they participate in the New York State Health Insurance Plan ("NYSHIP").

Section 167 states that "the rate of contribution of a participating employer on account of the coverage of its

employees, post-retirees, and their dependents shall not be less than 50% of the charge on account of individual coverage and 35% of the charge on account of dependent coverage."

While the participating employer may exceed this rate and pay a higher portion of the premium, it may not provide lower than the 50/35 rate for premium coverage. In addition, those statutory minimum protections cannot be waived. Thus, as long as the participating employer remains within the statutory parameters of Section 167 of the Civil Service Law, such participating employer may unilaterally reduce its rate of contribution for present retirees (but only to the statutory minimum), unless the applicable contract provides otherwise.

It should be noted that litigation has recently ensued regarding the application of Civil Service Law Section 167 to a collective bargaining agreement. This litigation and recent case law has established that this statute does not necessarily create a contractual or vested right to a certain contribution rate and modifications to health insurance benefits can be made by a public employer beyond that provided for in the statute. Again, this is dependent on the language of the collective bargaining agreement.

V. AM I ENTITLED TO CONTINUE HEALTH INSURANCE COVERAGE UPON MY RETIREMENT AT MY OWN EXPENSE?

Federal Law (COBRA) mandates that upon retirement (or other termination of employment) your employer must offer you the option to continue coverage of health insurance benefits at the employer's group rate at your own expense for

up to 18 months following your termination of employment.

Upon termination of employment, the law requires your employer to provide you with notice of your right to elect coverage. Pursuant to the law, an employee has 60 days in which to elect coverage. To be eligible under this law, you must be enrolled in the employer's group health plan on the day before you separate from service.

Your entitlement to COBRA benefits lasts up to 18 months following your separation from service with your employer. For example, if you retire and your employer continues to provide you with paid health insurance benefits for six months and then coverage ceases, (assuming you have no entitlement to a lifetime benefit as discussed above), your employer must offer you continuation coverage at your own expense for an additional 12 months. The 18-month period can be extended to 29 months if you are determined to be disabled under the Social Security Act within the first 60 days of continuation coverage, and you give appropriate notice of that disability.

VI. EXAMPLES OF CONTRACT LANGUAGE

Courts look to the collective bargaining agreement under which employees retire to determine whether they have the right to a lifetime benefit as well as the scope of coverage and level of benefits.

The following is an example of contract language that may be used to negotiate retirees' health insurance into a collective bargaining agreement. You need not use all of the provisions depending on the particular bargaining unit's

needs. Similarly, you should not expect an employer to agree, necessarily, to any or all of these provisions.

NOTE: Prescription drug, vision care, and dental care coverage may have to be negotiated separately in order for retirees to be deemed covered.

Article __: RETIREES' HEALTH INSURANCE

A. Eligibility

This Article applies to employees who retire while the terms of this collective bargaining agreement remain in effect.

To be eligible for retirees' health insurance, the employee must have [#] years of service at the time of retirement.

The employer shall provide health insurance to retirees starting from date of their retirement and continuing until the date of their death. The employee's surviving spouse, if any, shall be eligible for health insurance under this article subject to the same terms and conditions as a retired employee.

B. Coverage

The employer shall maintain after retirement the same individual or family coverage that the eligible retired employee had on the day prior to retirement.

Alternatively, upon retirement, the employee has the option to enroll in any other plan provided by the employer and/or to select either family or individual coverage, subject

to the terms and conditions of the plan.

Upon [#] days written notice to the affected retired employees and CSEA, the employer can change the plan in which a retiree is enrolled, provided the new plan has the same or lower cost to the retiree and has the same or an enhanced level of coverage, including benefits, co-pays, deductibles, caps, and exclusions (this list is illustrative and not exclusive).

Upon [#] days written notice to the affected retired employees and CSEA, the employer can coordinate coverage with Medicare by paying the full cost of the Medicare Part B premium for all eligible retired employees who are also Medicare eligible and provide such additional coverage as needed to maintain the same or enhanced level of coverage as the employer offers to retirees who are not Medicare eligible (such that the combined Medicare-provided and employer-provided benefits for a Medicare-eligible retiree are not less than the employer-provided benefits of a similarly situated, non-Medicare-eligible retiree).

C. Contribution (if any)

Upon retirement, an employee can convert all unused leave accruals into retirees' health insurance contributions.

Retired employees opting for the indemnity plan shall contribute [# %/$] for individual coverage or [# %/$] for family coverage.

Retired employees opting for the HMO plan shall contribute [# %/$] for individual coverage or [# %/$] for

family coverage.

D. Vested Rights

All retirees shall be entitled to membership in the State Health Insurance Plan or a plan that offers the same or better benefits, at no cost to the retiree, for the lifetime of the retiree. The right to health insurance in retirement is a vested right as of the date of retirement.

E. Prescriptions, Vision Care, Dental Care

These terms of this Article shall apply equally to prescription drug, vision care and dental care as they do to health insurance.

F. Buy out

Upon retirement, eligible retired employees who can show proof of coverage under another health insurance plan that is equal to or better than the coverage offered under this article can waive all rights to coverage under this article in consideration of the payment to them by the employer of the sum of $[#].00. Such waiver is entirely voluntary and cannot be imposed unilaterally by the employer. Such waiver shall be written and, in order to be effective, must satisfy all provisions of the Older Workers Benefit Protections Act of 1990 and as amended. This election is irrevocable and if selected the retired employee shall no longer be eligible for retirees' health insurance through the employer.

G. COBRA for retirees

Employees who retire without being eligible for retiree health insurance under this Article may be eligible to continue their coverage pursuant to State or Federal COBRA. In such cases, the Employer shall pay [#] % of their premiums during the COBRA eligibility period. Additionally, such employees can convert all unused leave credits to COBRA premium payments.

H. Severability

If any provision of this Article is found to be in violation of law or unenforceable for any reason, it shall be severed, and the remainder of this Article shall continue in full force and effect.

VII. CONCLUSION

In summary, there are several factors to be evaluated to determine whether an employer has the right to change retiree health insurance benefits. In most instances, the contract language under which a retirement takes place will be the determinative factor. School district employees and certain cooperative board employees have additional protection under a statutory "moratorium."

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