



# TAYLOR MADE

## The Cost and Consequences of New York's Public-Sector Labor Laws



2018  
Edition

Terry O'Neil  
E.J. McMahon

EMPIRE  CENTER

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Terry O'Neil and E.J. McMahon

Empire Center for Public Policy  
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Terry could not have undertaken and completed this updated edition of "Taylor Made" without many hours of research and editorial support provide by **Jacqueline Smith, Kate Cronin** and especially **Emily Iannucci**, then all of Bond, Schoeneck & King, whose contributions to the finished product were indispensable.

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Mayor John Lindsay at a City Hall press conference during the transit strike of January 1966.

*John Hurley/New York Daily News*

## OVERVIEW

In the mid-1960s, the Empire State was a scene of growing public-sector labor unrest. Government employees from Long Island to Buffalo were lobbying for the same organizational and collective bargaining rights as members of private-sector unions, then near a historic peak. Municipal unions in New York City had been negotiating contracts since the late 1950s, yet essential city services had been repeatedly interrupted by strikes or threats of strikes – culminating in a disastrous walkout by transit workers in January 1966.

From this atmosphere of recurring crises emerged New York’s landmark Taylor Law, designed to create a comprehensive framework for orderly resolution of labor-management disputes in state and local government.

After a rocky start, strikes by public employees in New York became exceedingly rare. The vast majority of contract negotiations are now settled without resort to third-party intervention.

But New Yorkers have paid a steep price for public-sector labor peace. Salaries and benefits comprise the largest component of New York’s exceptionally heavy state and local tax burden. Efforts to reduce taxes are hampered by aspects of the Taylor Law that have evolved to the distinct disadvantage of management, and thus the general public.

Informed by the perspective of an experienced labor negotiator, this paper reviews the background of the Taylor Law and highlights Taylor Law provisions and precedents in need of state legislative reform. These include:

- Compulsory “interest arbitration” for police and firefighters, which tends to drive up salaries for uniformed services while hindering creative approaches to improving efficiency and reducing costs. The state needs to more broadly apply a standard of “ability to pay” linked to the property tax cap, and consider the option of “last-best-offer” arbitration as an alternative.<sup>1</sup>
- The Triborough Amendment, which has perpetuated generous pay arrangements, especially for teachers, while also creating a disincentive for unions to reach timely settlements of contract disputes. The law should be amended to prevent automatic pay increases in an expired contract from continuing in the absence of a new contract.
- Public Employment Relations Board (PERB) rulings on “mandatory items of negotiation” that, among other things, restrict the ability of government employers to pursue subcontracting of services and other cost-saving alternatives.\*

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\* Due to the sheer volume of PERB cases, this paper focuses primarily on decisions of the full PERB Board, along with some decisions by PERB administrative law judges.

The 50<sup>th</sup> anniversary of the Taylor Law is an appropriate time for state officials to strongly reaffirm their commitment to the law's prohibition on strikes by public employees. Any weakening of the law's penalty provisions for unions and employees who participate in illegal strikes would be against the public interest.

This paper is organized into three sections.

The first reviews the background and development of the Taylor Law.

The second explains how subsequent amendments and PERB rulings have limited management options.

The third recommends needed reforms to better balance the playing field between the legitimate interests of government employees and broad public interest.

Interspersed throughout are narrative exhibits and charts illustrating the cost and consequences of the Taylor Law.



Governor Nelson A. Rockefeller, seated, signs the Taylor Law in 1967.

*New York State Archives*



## 1. THE BACKDROP

Employees in New York were granted the right to organize and collectively bargain under Article 1, Section 17 of the state constitution, adopted in 1938. At that point, however, government employers were under no reciprocal obligation to negotiate with their worker organizations. Prior to the 1950s, courts across the country generally held that collective bargaining by government employees could be denied under the common-law doctrines of sovereign immunity<sup>2</sup> and illegal delegation of powers.<sup>3</sup> As late as 1937, President Franklin D. Roosevelt opposed public-sector unionism.<sup>4</sup>

The civil service salary grading system, including annual pay increments, was introduced in New York in 1937. By 1941, civil service employees won the right to a hearing if faced with disciplinary charges. In 1955, all competitive class employees were granted tenure. Public pensions, guaranteed by the state constitution, were available to virtually all full-time public employees by the 1950s.

**In other words, before collective bargaining commenced anywhere in New York's public sector, public employees were already entitled by law to privileges and benefits that private sector unions had organized to fight for.<sup>5</sup>**

Government employee organizations became increasingly assertive in the years immediately following the end of World War II, which saw an increase in labor militancy in all sectors of the economy. A strike by Buffalo teachers precipitated the passage in 1947 of New York's first statutory prohibition on public employee strikes, the Condon-Wadlin Act.<sup>6</sup>

New York State courts historically had treated public-sector strikes as illegal and never hesitated to enjoin unions from striking. Condon-Wadlin, however, created new penalties that would come to be seen as draconian. Under the law, striking workers were automatically fired and could be reappointed only if they derived no financial benefit from the strike. Employee compensation following a strike could be no higher than pre-termination levels for at least three years, and rehired workers were placed on probation for five years.

Adopted the same year as the federal Taft-Hartley Act, which reined in some of the rights granted to private-sector labor unions under the New Deal's Wagner Act, New York's Condon-Wadlin law had mixed effectiveness through the 1950s. However, after a series of strikes including walkouts by New York City teachers in 1960 and 1962, the law came to be widely seen as flawed and unenforceable. In 1963, it was temporarily amended. Striking employees no longer automatically lost their jobs but risked incurring a "2-for-1" penalty – two days lost pay for each day they refused to work. The probationary period for strikers was reduced from five years to one year, and the pay freeze period following a strike was reduced from three years to six months.

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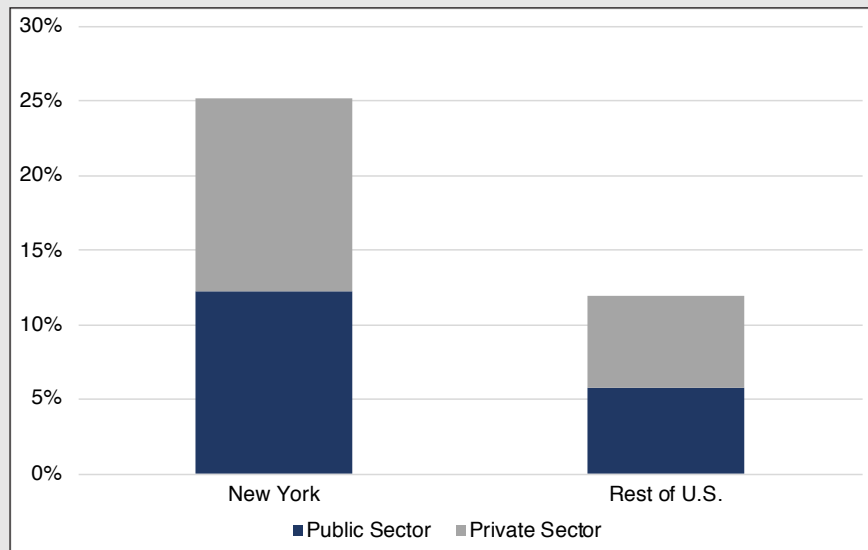
## Government with a Union Label

The 2.1 million New Yorkers whose jobs were covered by union contracts as of 2017 comprised 25 percent of the state's workforce. That was the highest unionization rate in the country, more than double the average for all states, although New York has tracked the national decline in union membership over the past 45 years.

Roughly half of all unionized jobs in New York State are in the public sector. Although most states allow at least some government workers to collectively bargain, New York has the most heavily unionized public-sector workforce of any state. Over the past 10 years, an average of 73 percent of New York government workers—including a small component of federal employees—have been covered by union contracts, nearly double the national average of 40 percent.

If anything, these estimates probably understate the true extent of unionization in New York's state and local governments and school districts, where supervisors (such as school principals, police captains and maintenance foremen) as well as line workers commonly are unionized. At least one out of every nine workers in the Empire State is a unionized government employee; in the rest of the country, the ratio is roughly one out of 20.

**Figure 1. Unionized Share of Employment, 2017**



Source: Barry T. Hirsch and David A. Macpherson, "Union Membership and Coverage Database from the Current Population Survey." 10-year sector averages, posted at [www.unionstats.com](http://www.unionstats.com)

The 1963 Condon-Wadlin amendments were due to expire in 1965, at which point the more onerous penalties of the original law would return. That same year, employees of the New York City Welfare Department went on strike for 28 days – the longest strike in the history of the state at that time. Over 5,000 workers were automatically “terminated,” and 19 union leaders were jailed. The law itself became a major obstacle to making a settlement. Consequently, the strike settlement called for: 1. a fact-finding panel; 2. the release of the jailed union leaders; and 3. the suspension of Condon-Wadlin until the union could test the law’s constitutionality in the courts.

In January 1966, Mike Quill, the President of the Transit Workers Union (TWU), led a 12-day strike in New York City that resulted in economic losses estimated in excess of \$100 million per day. The transit strike was the final straw for Condon-Wadlin. The Legislature ultimately granted amnesty from Condon-Wadlin penalties to both the welfare and transit workers.

## The Taylor Committee

Days after the end of the transit strike, Governor Nelson Rockefeller appointed a committee to “make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees.”<sup>7</sup> The committee was chaired by Professor George W. Taylor of the University of Pennsylvania, an eminent industrial relations expert and labor arbitrator (hereinafter the “Committee”).<sup>8</sup>

Mayor Robert F. Wagner had granted collective bargaining rights to nearly all of New York City’s municipal employees under an executive order issued in 1958.<sup>9</sup> President John F. Kennedy issued an executive order extending limited collective bargaining rights to federal employees in 1962.<sup>10</sup> But as of 1966, there was still no similar collective bargaining law on the state level in New York. Condon-Wadlin dealt only with strike penalties.

Although New York City employees enjoyed extensive organizational and collective bargaining rights by the early 1960s, the city’s public-sector labor relations were in frequent turmoil. This was seen in Albany as evidence of the need to move beyond the purely punitive approach on a statewide basis.

“There is now widespread realization that protection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment,” the Committee said in the opening to its March 1966 final report.<sup>11</sup>

Strikes are “an integral part of the collective bargaining process” in the private sector, the Committee said, but the same should not be true in government. It explained the difference as follows:

A work stoppage in the private sector involves costs primarily to the direct participants. They also undertake considerable risk in fixing the terms of settlement; the volume of sales and opportunities for employment are at stake. On the other hand, a strike of government employees ... introduces an alien force in the legislative processes. With a few exceptions, there are no constraints of the marketplace. The constraints in the provision of ‘free services’ are to be found in the budget allocation and tax decisions which are made by legislators responsive to the public will.<sup>12</sup>

While acknowledging that some public services might be viewed as more “essential” than others, the Committee indicated that it was unable and unwilling to identify which was which. It ultimately concluded that a strike by any group of state or local government workers was not compatible with the orderly functioning of the democratic form of representative government.

The Committee also pointedly rejected compulsory arbitration as a dispute-resolution tool:

Compulsory arbitration is not recommended. There is serious doubt whether it would be legal because of the obligation of the designated heads of government departments or agencies not to delegate certain fiscal or other duties. Moreover, it is our opinion that such a course would be detrimental to the cause of developing effective collective negotiations. The temptation in such situations is simply to disagree and let the arbitrator decide.<sup>13</sup>

## Blueprint for a Revolution

The key recommendations of the Taylor Committee in 1966 would form the basis for the law adopted a year later. The Committee said the Condon-Wadlin Act should be replaced with a new statute that would, among other things:

... grant public employees the right to organize for collective bargaining purposes;

empower state and local governments and other political subdivisions to recognize, negotiate with, and enter into written agreements with organizations representing public employees;

create a state Public Employment Relations Board (PERB), consisting of three “public members” appointed by the governor with Senate confirmation, to assist in the resolution of disputes between unions, public employees and their employers[;]



continue the ban on strikes, broadly defined as “concerted work stoppage(s) or slowdown(s) by public employees for the purpose of inducing or coercing a change in the conditions of their employment.”

The Taylor Committee recommended that employees who participated in an illegal strike should be subject to misconduct charges under Section 75 of the Civil Service Law – which contains penalties up to and including dismissal, depending on the extent of the misconduct – and that the representation privileges of striking unions, including the valuable automatic “check-off” deduction of union dues from member paychecks, should be subject to cancellation by PERB. A union guilty of striking would not be reinstated under the Committee’s recommendations without agreeing that it would not assert the right to strike going forward.

Underscoring its desire to see the prohibition on strikes enforced, the Taylor Committee also recommended that it be “obligatory by law” for a public employer’s chief executive or legal officer to initiate court action for injunctive relief as soon as it became apparent that a public employee strike was imminent, and to institute a criminal contempt proceeding against a striking union as soon as such an order was violated.

As for the specific steps to be followed in negotiating contracts, the Committee recommended that collective bargaining agreements include procedures “developed by the parties themselves”<sup>14</sup> to be invoked in the event of an impasse. In the event these procedures failed to produce a settlement, the Committee recommended PERB intervention through a series of steps, proceeding from mediation, through fact-finding and possible voluntary arbitration. If a final fact-finding report was not accepted by both sides, the Committee recommended a show cause hearing before the employer’s legislative body – usually an elected board or council – with the chief executive officer taking on a negotiator’s role separate from the legislative body.<sup>15</sup>

The Committee concluded that when all other efforts to resolve an impasse failed, the ultimate determination should rest with the people’s elected representatives.

## **Taylor Law I**

In 1967, after a year of political wrangling – and over the strenuous objections of public employee unions angered by the prohibition on strikes – the Legislature passed and Governor Rockefeller signed the Public Employees Fair Employment Act, which immediately became known as the Taylor Law.<sup>16</sup>

The law, which took effect in September 1967, incorporated nearly all the key recommendations of the Taylor Committee Report, including the creation of PERB. However, it left room for substantially equivalent local statutes, which paved the way for a separate but parallel Collective Bargaining Law to be passed and administered by New York City.<sup>17</sup>

*Continued on page 9*

## The Public-Sector Compensation Edge

State and local government employees were paid higher average salaries than private-sector workers in eight out of 10 regions of New York as of 2016, as shown in Table 2. Private-sector average salaries were higher only in New York City and (barely) in the Southern Tier.

On a statewide basis, the \$60,011 average state and local government salary was 87 percent of the \$69,111 average private-sector salary. However, excluding the very well-paid financial sector, the average private salary statewide was slightly lower than the average state and local government pay.

Wages and salaries are only part of the compensation package, however. The public-sector premium is considerably larger when benefits are considered as part of the mix. As shown in Table 1, state government employees—whose benefit package is typical of those available to most public employees in New York—have more paid time off than private-sector workers and are universally eligible for retirement and health benefits not available to all private-sector workers. One additional and invaluable benefit is job security: government workers (not just teachers) are tenured in their jobs. Layoffs in government are exceedingly rare and generally implemented on a “first in, last out” basis, affecting only the most junior employees.

**Table 1. Selected Employee Benefits, Private Sector and New York State Government**

Benefit	State*	Private
Number of paid holidays <sup>†</sup>	12	8
Number of paid vacation days <sup>†</sup>		
After 1 year	14	10
After 5 years	18	14
After 10 years	20	17
Percent with access to: <sup>‡</sup>		
Retirement benefits, any kind	100	94
Defined-benefit pension	100	50
Percent with access to employer-supported health benefits <sup>§</sup>		
Medical	100	89
Dental	100	69
Vision	100	39
Outpatient prescription drug	100	88
Percent employee share, health insurance premium <sup>§</sup>		
Single coverage	12-16	17
Family coverage	27-31	26

\* CSEA classified service employees in Executive Branch who are subject to attendance rules for state employees <sup>†</sup> Private firms ≥ 100 employees <sup>§</sup> Private firms ≥ 500 employees. Sources: Bureau of Labor Statistics, National Compensation Survey, March 2017

**Table 2. Average Wages and Salaries, 2016, State and Local Government vs. Private Sector**

	State	Local	State & Local Government	Private	Ratio*
Statewide	\$62,289	\$59,525	\$60,017	\$69,111	0.87
Statewide Private Excluding Finance and Insurance				\$58,905	1.02
Capital Region	\$64,815	\$47,548	\$56,081	\$49,406	1.14
Central New York	\$48,128	\$48,091	\$48,102	\$45,731	1.05
Finger Lakes	\$60,013	\$46,059	\$48,465	\$46,614	1.04
Long Island	\$54,967	\$74,125	\$71,657	\$55,641	1.29
Mid-Hudson	\$66,371	\$70,026	\$69,365	\$56,437	1.23
Mohawk Valley	\$58,645	\$40,942	\$45,271	\$38,103	1.19
New York City	\$76,647	\$61,866	\$62,945	\$89,111	0.71
North Country	\$61,431	\$42,031	\$48,405	\$37,034	1.31
Southern Tier	\$52,341	\$42,361	\$44,858	\$45,519	0.99
Western New York	\$56,398	\$49,777	\$51,426	\$43,217	1.19

\*State and local government average divided by private sector average.

Source: New York State Department of Labor, Quarterly census of Employment and Wages

Public employee unions received some invaluable benefits in the statute—including the right to automatic paycheck deductions of union dues, and certification on the basis of dues authorization cards alone without a secret-ballot election, except in cases where more than one union was vying to represent a group of employees. Collection of “agency fees” from non-members was not initially authorized, although it would ultimately become the norm. (See “Agency Fees and *Janus*,” p. 27.)

The Taylor Law granted state and local government employees the right to collectively bargain with their employers over “terms and conditions of employment,” including wages, salaries and hours. However, in line with the Taylor Committee Report, the law did not otherwise specify what government employers had to negotiate (“mandatory” subjects), what they need not negotiate (“nonmandatory” or “permissive” subjects), and what they could not negotiate (“prohibited” subjects).<sup>18</sup> The answers would evolve over the next several decades on the basis of PERB decisions.<sup>19</sup>

Less than two years after it first took effect, in the wake of strikes by New York City teachers and sanitation workers in 1968, the Taylor Law was amended to revive the “2-for-1” penalty that had been part of the 1963-65 version of the Condon-Wadlin Act. Consistent with the Taylor Committee recommendations, the 1969 amendments also lifted the ceiling on fines against unions involved in illegal strikes and provided for legislative determinations as the ultimate end of unresolved impasses.

Impasse procedures under the Taylor Law, as amended in 1969, consisted of four successive steps that would become familiar to New Yorkers following the twists and turns of local government and school district labor relations over the next few years:

1. mediation;
2. fact-finding;
3. superconciliation (i.e., post-fact-finding mediation or voluntary arbitration); and, if all else failed,
4. legislative determination (i.e., a final “settlement” imposed by the vote of the local school board, city council or other elected body with budgeting power).

## 2. REVISION AND WRONG TURNS

Within eight months of its enactment, the Taylor Law was described as having an “almost revolutionary effect” on public-sector labor relations.<sup>20</sup> By the fall of 1968, an additional 360,000 state and local government employees had been unionized, in addition to the roughly 340,000 (mostly in New York City) who were already engaged in collective bargaining before the law passed.<sup>21</sup>

It was inevitable that the new law would undergo a period of trial and testing—in and out of court. Municipal officials and school boards were often less well prepared to begin collective bargaining than professional union negotiators. Misunderstandings and miscalculations were frequent during a period when negotiators on both sides were still trying to establish the law’s limits.

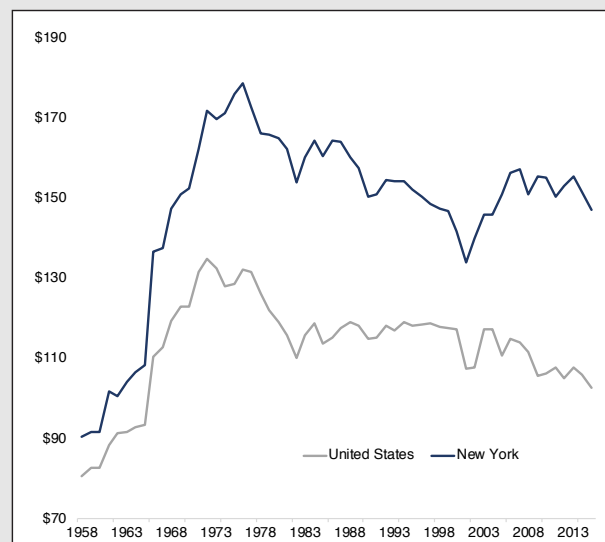
Newly empowered teachers’ unions around the state proved especially willing to flout the law’s anti-strike penalties during the first 15 years of the Taylor Law’s existence. Indeed, the majority of public employee strikes in New York during the 50-year history of the Taylor Law have involved teachers.<sup>22</sup> In the law’s early years, many were undoubtedly influenced by the example of New York City’s militant United Federation of Teachers (UFT) and its nationally prominent leader, Albert Shanker, who led several strikes during the 1960s and 70s.

### New York’s Tax Burden

New York as of 2015 had the nation’s second heaviest state and local tax burden relative to personal income, according to unadjusted Census Bureau data. (North Dakota, which relies on oil and mineral production taxes, was highest.) New York’s taxes per \$1,000 of personal income were 43 percent higher than the 50-state average.

But the difference wasn’t always so great. In 1962, New York’s tax burden was only 9 percent above average, placing New York well down the list in 50-state rankings. The upsurge in New York’s relative tax level in the mid-1960s followed two events: the establishment of the state’s Medicaid program, and the passage of the Taylor Law.

**Figure 2. State and Local Taxes per \$1,000 of Personal Income, NY and U.S., 1958-2015**



Source: U.S. Census Bureau; Commerce Department, Bureau of Economic Affairs



In 1973, the Taylor Law was amended to specifically exclude retirement benefits from the definition of “terms and conditions of employment” considered mandatory items of negotiation. As explained in the most authoritative legal treatise on the law,<sup>23</sup> “this provision was included because of growing concern over the cost of public employee pensions and the excessive burden they were putting on taxpayers, particularly because of their open-ended costs.”<sup>24</sup>

## Interest Arbitration Arrives

The Taylor Law was in existence for only seven years when, in 1974, the State Legislature adopted amendments making binding “interest arbitration”<sup>25</sup> by a tripartite panel<sup>26</sup> the final step in resolving police and fire impasses.<sup>27</sup> There was no overwhelming evidence that unions representing uniformed services were having an exceptionally difficult time settling contracts without the ability to strike or to invoke arbitration.<sup>28</sup> Rather, the changes more likely reflected the lobbying effectiveness of police and firefighter unions in a statewide election year. The law was regarded as an “experiment” when enacted<sup>29</sup>, but it has been extended every few years ever since.

Armed with the right to seek compulsory arbitration of contract disputes, police and firefighter unions would ultimately start winning bigger percentage pay increases than other municipal employees. The average salaries of police and firefighters since 1974 have risen faster than those of non-uniformed state and local government employees, other than teachers, outside New York City.<sup>30</sup>

Compulsory arbitration promoted this salary surge in several ways:

- As the Taylor Committee had predicted, the ability to turn to compulsory arbitration created an incentive for many government employers and their unions to simply “disagree and let the arbitrator decide.”
- Arbitration made it possible for some government employers to steer contract talks towards “imposed” settlements with costs that otherwise would have been difficult to defend before voters. Elected officials could thus avoid direct responsibility for (or even wink at) big pay increases—pinning the blame on the unelected arbitrator—while avoiding tension with police and fire unions.
- Employers have settled on terms they would otherwise find unacceptable out of fear that an arbitrator would award an even worse result. Affluent communities, in particular, have less difficulty settling for what seems to be the going rate in arbitration awards to police and fire unions—even if this rate is somewhat inflated by the fear of arbitration. Poorer municipalities suffered from the ripple effect of generous precedents set by richer areas.

Because many communities — for better or worse — engage in some form of pattern bargaining, whereby the settlements of every union bargaining unit have a significant impact on the settlements with other units, generous awards to police and fire unions also have had a way of driving up salaries for other non-uniformed employees. In a poor community where the police might get a 4 percent raise from an interest arbitration panel, public employers have felt pressure to give the same raise to blue collar, white collar and even non-union workers.

### ***Stifling Creativity***

In addition, arbitrators in police and firefighter cases generally have not been inclined to address creative means of financing pay increases through concessions in other areas, such as employee health insurance contributions. Meaningful contributions have rarely been awarded in interest arbitration.

Public employers have had much more success negotiating increased health insurance contributions in contracts with teachers and other non-uniformed employees not subject to the compulsory arbitration provisions. Bargaining units unable to lean on the crutch of compulsory arbitration are more willing to consider alternatives when an employer is sufficiently determined to win offsetting savings from other areas of the contract.

Some recent interest arbitration awards have included permanent contributions to health insurance for new hires, a longer salary schedule to get to top rates and additional “tiers” of benefits. However, historically, the interest arbitration process for police and firefighters has remained far more favorable to the interests of employees than of taxpayers.

The 1974 amendment to the Taylor Law also changed impasse procedures for school districts by eliminating a little-used provision that allowed district legislative bodies — i.e., boards of education — to impose a settlement after airing the issues in a public hearing. This meant that school boards would no longer have the ultimate say in deadlocked contracts talks. However, since the “legislative hearing” provision was seldom invoked in teacher contract disputes, its elimination did little to stem the tide of teacher strikes during the 1970s.

### **The Triborough Amendment**

Within a few years of the Taylor Law’s enactment, PERB held that, following the expiration of a contract, public employers were prohibited from unilaterally altering “terms and conditions of employment” while negotiating a successor agreement. This doctrine was adopted in 1972 in a case involving Triborough Bridge and Tunnel Authority employees, and thus became known as the *Triborough* doctrine.<sup>31</sup> The rationale was based on a quid pro quo theory: since unions could not

strike to protest a failure to agree on a new contract, employers should not be able to unilaterally change “terms and conditions of employment” while negotiations continued.

However, nonmandatory subjects of bargaining were not deemed “terms and conditions of employment” under the Taylor Law, even if they were contained in a collective bargaining agreement. As a result, after a contract expired, the original *Triborough* doctrine allowed employers to alter any nonmandatory subjects even if included in the expired agreement.

Employers could also refuse to negotiate a union’s demand to continue contractual provisions that were nonmandatory subjects of bargaining, such as staffing levels. Unions thus lost some nonmandatory provisions in a successor agreement when they did not settle prior to the expiration of an existing agreement and invoked arbitration. This often occurred when police and fire negotiations reached compulsory arbitration. Employers filed “improper practice” charges in connection with such subjects (also known as “scope charges,” because they involved the scope of bargaining), and such provisions were “scoped” out of the contract during the interest arbitration process.

If a union went on strike, it lost all the protections of the *Triborough* doctrine — the “quid” was gone, so the employer did not have to grant the “quo.”<sup>32</sup>

For decades, most government employees in New York, as in other states and the federal government, have been paid according to salary schedules with multiple pay grades and “steps” based on years of service. Teachers also can move to higher pay “lanes” by accumulating additional graduate credits. As a result, the resulting pay progression is especially steep and rapid for teachers. (See Figure 3 in “The Triborough Effect,” p. 14.)

During the first 10 years after enactment of the Taylor Law, union negotiators for teachers commonly insisted on treating costs associated with step and lane movements as “old money”; only raises applied to base salaries on the pay schedule were considered “new money.” The unions generally refused to acknowledge the costs of increments as part of a final settlement, regarding them as “guaranteed.” Thus, a 4 percent raise, plus increment, generally meant a 5 to 7 percent settlement cost to the employer. An added percentage point was usually also added to cover the cost of lane movements.

In 1977, public employers scored a major victory in the state’s highest court on the applicability of the *Triborough* doctrine to step increments. In the case of *BOCES v. PERB*, the Court of Appeals found that the doctrine “should not apply where the employer maintains the salaries in effect at the expiration of the contract but does not pay increments.”

*Continued on page 15*

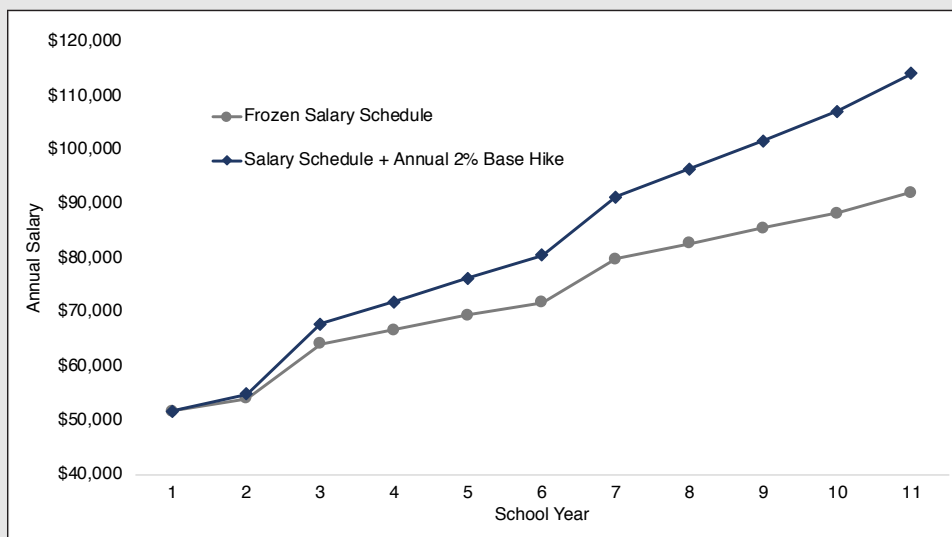
## The Triborough Effect

Teacher salary schedules in New York State typically include 20 to 30 annual pay “steps” on each of at least four “lanes”—for teachers with bachelor’s degrees, master’s degrees, master’s plus 30 credits of graduate credits and a master’s plus 60 credits. The following is a simplified example; many districts actually have more steps and lanes than shown here.

Most teachers spend most of their careers moving up salary steps—and, occasionally, across salary lanes—even if their union contract has expired, because the Triborough Amendment guarantees these changes. As a result, a school district’s salary costs rise even when union negotiations have reached an impasse and there is no new contract. For the same reason, contract settlements calling for seemingly modest, inflation-level increases in base salaries can be far costlier than they look. This is especially true in districts with predominantly younger teaching staffs.

Figure 8 illustrates the projected 10-year pay history of a newly hired teacher, fresh out of college, working in a district with a salary schedule based on reported median levels for all Suffolk County districts in 2016-17. Assuming the teacher earns a master’s degree within two years—a prerequisite for certification—and assuming all base salary steps also increase annually by a modest 2 percent

**Figure 3. A Teacher Climbs the Pay Scale**



Assumes BA on Steps 1-2, MA on Steps 3-6 and MA+30 on Steps 7-11.  
Based on 2016-17 Suffolk County Salary Schedules at 50<sup>th</sup> Percentile  
Source: Calculations based on data from Nassau-Suffolk School Boards Association



under the union contract, her salary by Step 6 will have risen from \$51,707 to \$79,272, a pay boost of 53 percent after five years.

Even if the salary schedule is frozen at 2016-17 levels due to a contract impasse, the Triborough Amendment guarantees that the Step 6 salary for a certified teacher with the same level of experience will reach \$71,799, a pay increase of 39 percent in five years.

Earning 30 more graduate or “in-service” credits by the end of her sixth year will move the teacher up yet another lane on the salary schedule. Assuming continued annual 2 percent increases in base steps, the salary for this teacher in the “Masters+30” lane by Step 11 will reach \$112,352—an increase of 117 percent over the starting salary. Even if the salary schedule remained frozen throughout the period, Triborough would guarantee that the teacher’s pay by Step 11 reached \$92,168—an increase of 78 percent in 10 years.

**Table 3. Sample Teachers’ Salary Schedule  
Based on Suffolk County Medians, 2016-17**

Steps	Lanes			
	Bachelors	Masters	Masters+30	Masters+60
1	\$51,707	\$58,966	\$64,091	\$68,874
2	\$54,017	\$61,580	\$66,922	\$71,579
3	\$56,328	\$64,195	\$69,753	\$74,284
4	\$58,638	\$66,809	\$72,584	\$76,989
5	\$60,948	\$69,423	\$75,415	\$79,694
6	\$62,822	\$71,799	\$77,037	\$82,230
7	\$65,386	\$74,646	\$79,866	\$85,026
8	\$67,950	\$77,494	\$82,695	\$87,917
9	\$70,514	\$80,341	\$85,524	\$90,906
10	\$73,078	\$83,189	\$88,354	\$93,997
11	\$74,793	\$86,118	\$92,168	\$97,421
12	\$76,984	\$89,001	\$94,890	\$100,149
13	\$79,176	\$91,883	\$97,611	\$102,953
14	\$81,367	\$94,766	\$100,333	\$105,836
15	\$83,559	\$97,649	\$103,055	\$108,799
16	\$84,116	\$99,735	\$106,425	\$111,901
17	\$84,690	\$101,220	\$108,234	\$113,803
18	\$85,263	\$102,706	\$110,044	\$115,738
19	\$85,837	\$104,191	\$111,853	\$117,706
20	\$86,410	\$105,676	\$113,662	\$119,707
21	\$89,721	\$108,596	\$115,581	\$121,813

*Source: “Salary Workbook and Fringe Benefit Study, Long Island, NY, 2016-17,” Long Island Schools Boards Association. Assumes uniform increments in between selected steps.*

The unanimous court explained:

The concept of continual successive annual increments ... is tied into either constantly burgeoning growth and prosperity on the part of the public employer, or the territory served by it, or a continuing general inflationary spiral, without admeasurement either of the growth or inflation and without consideration of several other relevant good faith factors such as comparative compensation, the condition of the public fisc and a myriad of localized strengths and difficulties. In thriving periods the increment of the past may not squeeze the public purse, nor may it on the other hand be even fair to employees, *but in times of escalating costs and diminishing tax bases, many public employers simply may not be able in good faith to continue to pay automatic increments to their employees.*<sup>33</sup> [emphasis added]

The *BOCES* ruling meant all pay increases were truly negotiable—and the employer was not required to implement the approximately 2.5 percent to 6 percent increases applicable to individuals who had not yet reached the top step.<sup>34</sup> This leveled the playing field for both employers and taxpayers, putting more pressure on unions to settle without prolonged negotiations because no member of the unit was assured of a raise until a settlement was reached.

However, this pro-taxpayer precedent lasted less than five years. In 1982, then-Governor Hugh Carey and the Legislature amended the Taylor Law to make it an “improper practice” for an employer to refuse to continue all of the terms of an expired agreement until a new agreement was negotiated. The *Triborough* doctrine thus gave way to what became known as the Triborough Amendment.<sup>35</sup> Within a year, PERB had interpreted the amendment to require employers to continue paying for both steps and lane movements in the absence of a new contract.<sup>36</sup> Technically, the continuation of pay steps and lanes could still be negotiated like any other provision of a contract. Practically speaking, however, unions have treated these provisions as off limits in contract talks.

Revisiting the issue in a 2011 decision, PERB held that a school district was not required to award a “vertical” step increment beyond three dates specifically cited in the union contract.<sup>37</sup> Other recent decisions have made it clear that PERB analyzes the duty to continue steps based on whether the expired agreement expressly “sunsetted” an otherwise statutorily required obligation. “[A]n employer and an employee organization,” the board said, “are free under the [Taylor Law] to place a restriction upon the duration of a contract term, including a provision that the contract term expire coterminously with the agreement.”<sup>38</sup>

With regards to the interplay of arbitration clauses and expired contracts, a court held the continuation of a step increase provision after the expiration of a contract

was a matter of contract interpretation regarding wages, and therefore, could be subject to arbitration.<sup>39</sup>

However, courts also have held that, when the state Legislature prospectively changes retirement benefits for a particular class of workers, the Triborough Amendment cannot be invoked to extend benefits to workers hired after a contract has expired.<sup>40</sup> For example, in *Buffalo Niagara Airport Firefighters' Association v. DiNapoli*,<sup>41</sup> the court held that a union's expired collective bargaining agreement would not trump state legislation assigning newly hired firefighters to a contributory pension plan.

The court determined the expired contract was not "in effect" at the time the legislation passed requiring police and firefighters hired after a certain date to contribute to the newly created Tier 5 retirement plan; therefore, the legislation's exception for employees to join a noncontributory plan did not apply. Similarly, in *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*,<sup>42</sup> the court noted that if the Legislature intended to invoke the Triborough Amendment, it would have made that explicit in the law establishing the new pension tier.

The Triborough Amendment also had an unintended impact on the use of compulsory interest arbitration. PERB held that under the Triborough Amendment, the provisions of an existing contract could not be altered by an interest arbitration award.<sup>43</sup> This was based on the statutory language that provisions of an expired agreement could only be changed by a new "negotiated contract."<sup>44</sup>

PERB subsequently ruled that an employer could not exercise its right to initiate interest arbitration unless a union first waived its own rights under the law to have the contract continued or filed its own arbitration petition.<sup>45</sup> Thus, a union may "stand on the contract," leaving the employer with no way of initiating compulsory interest arbitration.

While compulsory interest arbitration has driven up salaries for police and firefighters, there are some circumstances in which an employer might find it beneficial to pursue the arbitration option. However, as a result of the Triborough Amendment, a union that has a favorable contract—especially one protecting a costly non-salary item, such as a "no-layoff" guarantee—may simply stop the bargaining process at mediation and refuse to go any further. Interpreted strictly, the law would allow a union to block arbitration indefinitely if the impasse involves a provision the union does not want to change.<sup>46</sup>

There has yet to be a case in which a government employer in New York has been able to proceed to arbitration over a union's objections. If, however, a union refuses to consent to interest arbitration, an employer may file an improper practice charge alleging that the union is violating its duty to bargain in good faith.<sup>47</sup>

## Impact of PERB Decisions

The police and firefighter interest arbitration amendments – which are subject to renewal every two years – and the Triborough Amendment are the two major provisions of the Taylor Law that affect the size of pay increases and the resulting burden on taxpayers. That said, a number of decisions by PERB also have had financial impacts.<sup>48</sup>

PERB has generally taken a balanced approach in determining “scope of negotiations” cases; i.e., those items public employers should not be required to negotiate under the law, such as staffing levels, layoffs and class sizes. However, public employers are greatly restricted as a result of PERB decisions holding some items to be mandatory subjects of negotiation.

## *Subcontracting and Reassignment of Unit Work*

PERB has consistently held that both subcontracting and the reassignment of “unit work” – work done by members of a particular union bargaining unit – are mandatory subjects of bargaining.<sup>49</sup> Virtually any idea for saving money through outsourcing or consolidation of services must first be negotiated and agreed to by the union representing the employees who currently provide the service.<sup>50</sup> Thus, absent a union’s agreement, the taxpayers may be forced to shoulder the burden of outdated, inefficient or costly delivery of services. PERB’s “emergency doctrine,” which theoretically should allow some relief in these areas, has not been applied to circumstances where “mere monetary savings” are at stake. PERB has held that the goal of saving money is “insufficient” to overcome an employer’s obligation to fully bargain the topic.<sup>51</sup>

It is also clear under current law that with regard to police and fire, absent any waiver by the union, subcontracting issues must be negotiated, mediated and ultimately subject to interest arbitration. Thus, crucial decisions – such as whether a city can contract with the county sheriff’s department for services currently provided by city police – require the union’s agreement or are subject to the decision of an arbitrator. This is also true for decisions on whether to move certain tasks from uniformed employees to other employees of the same municipality.<sup>52</sup>

## *Binding Past Practices*

PERB has found many unilaterally established, outdated, inefficient and expensive “past practices” to be binding on public employers. It has done so even where the establishment and continuation of the practice was not approved by the employer’s chief executive officer and legislative body – the two parties necessary to produce a binding contractual guarantee.



To establish a binding past practice, the union must show that the practice was unequivocal and continued uninterrupted for a long enough period of time to create a reasonable expectation among the affected unit members that the practice would continue.<sup>53</sup> Under PERB's employee-friendly regime, employers have recently been forced to continue the following practices:

- paying for routine veterinary care and food for police canines that were taken out of service and given to their handlers;<sup>54</sup>
- reimbursing active and retired employees (age 65 or older), and their spouses, for the cost of Medicare Part B health insurance premiums;<sup>55</sup>
- allowing fire department battalion chiefs to select their vacations on or before the 15<sup>th</sup> day of each month for vacation to be taken the following month, as opposed to forcing them to select their vacations all at once and limiting the number of vacations to three per year;<sup>56</sup> and
- providing employees with take-home vehicles, even where a local law arguably prohibited it.<sup>57</sup>

PERB has, however, suggested that an employer may be able to prevent a practice involving the provision of benefits from becoming binding by retaining discretion to reevaluate whether to grant the benefit each year.

For example, PERB held that the State Comptroller's Office did not violate the Taylor Law when it reduced employees' hourly rate of pay after granting steady increases in the preceding years.<sup>58</sup> In that case, the agency was able to show that it annually determined the appropriate pay rate based on a consistent set of criteria and subject to approval by the Civil Service Department and the Division of Budget. According to PERB, where evidence of a practice to extend a benefit to employees establishes that a decision is made annually, and it is not automatic, but rather is based on the agency's best interests at the time, the practice at issue is one which vests discretion in the employer.

### ***Retiree Health Insurance***

PERB has held that health insurance for future retirees, also known as Other Post Employment Benefits (OPEB) is a mandatory subject of negotiation.<sup>59</sup> However, once employees actually retire, there is no way for an employer to negotiate a change in OPEB.<sup>60</sup>

A state law affecting only school districts prohibits employers from "diminishing" health insurance for current retirees unless a "corresponding diminution" in benefits is negotiated with active employees in the same bargaining units.<sup>61</sup> This effectively prevents school districts from making any alteration in health insurance for any retirees, unless the same change is negotiated with a corresponding group of active employees. Lawmakers also have introduced bills that would extend the same provision to all public employees.<sup>62</sup>

In recent years, some New York local governments have sought to unilaterally reduce retiree health insurance benefits.<sup>63</sup> For any given government employer, the legal enforceability of such actions hinge on whether retirees have vested contractual rights to retirement health insurance benefits at fixed contribution rates.<sup>64</sup> A resolution or policy granting retiree health insurance to employees and elected officials does not, by itself, establish a constitutionally protected vested property interest in such benefits.<sup>65</sup>

Generally, a past practice of paying for retiree health coverage is insufficient to create a contractual right to continued health insurance benefits.<sup>66</sup> However, even if a practice does not create a vested property right to retiree health insurance benefits, employers may have an obligation to bargain with employee organizations before changing their practice of paying for retiree health insurance.<sup>67</sup>

The enormous long-term cost of promised retiree health coverage has been revealed over the past decade under Government Accounting Standards Boards (GASB) rules requiring state and local governments to estimate and report the full long-term liabilities associated with OPEB. Unlike constitutionally guaranteed defined-benefit pensions, which are pre-funded through annual deposits into publicly managed retirement investment funds, OPEB for government employees in New York is generally financed on a pay-as-you-go basis. Current budget allocations for health insurance include retiree coverage earned years or even decades ago—effectively allowing current elected officials to agree to larger benefits and pass the bill to future generations of taxpayers.

GASB Rule 45, first effective in 2007-08 fiscal years, disclosed the full size of the unfunded long-term financial liability associated with promised retiree health benefits at every level of New York government. The figure now is approaching \$300 billion, including \$87 billion for the state government alone as of 2017-18.<sup>68</sup> Further improving transparency, fiscal years beginning in 2017 will bring the first government financial statements subject by GASB Rule 75, which will require governments to report their total net unfunded OPEB liabilities on their balance sheets.

### ***Minimum Staffing***

PERB has consistently held that the issue of “manning” is not a mandatory subject of negotiation. Time and time again, however, unions attempt to conflate manning with safety, which is a mandatory subject. According to PERB, even though increasing staffing levels on a piece of apparatus or on a platoon improves safety, the predominant nature of a proposal to increase the number of personnel on duty or on equipment is one of staffing.<sup>69</sup>

Citing *Johnson City Professional Firefighters, Local 921 v. Village of Johnson City*, a state Supreme Court justice recently held that a minimum manning clause constituted a job security clause and therefore violated public policy.<sup>70</sup> As explained by the court, “no-layoff contract provisions are against public policy if they mandate certain staffing levels without regard to budgetary, economic, or other reasonable concerns, unless the contract is explicit as to the intent of the parties to so limit the ability to do so.”<sup>71</sup>

### ***Mandatory / Nonmandatory Subjects of Bargaining***

Whether a subject of bargaining is mandatory or nonmandatory depends on a variety of factors—and as the workplace evolves, new bargaining subjects are created.

PERB has long held that management “has the inherent managerial right to establish the standards to determine sick leave abuse and to monitor an employee’s use of sick leave under those standards.”<sup>72</sup> However, the board does not give employers much leeway when it comes to the steps employers take to monitor employees’ sick leave usage. For example, PERB recently held that an employer had a duty to negotiate a sick leave management program requiring some workers to produce doctor’s notes more frequently and participate in counseling sessions with supervisors.<sup>73</sup>

Management decisions—such as the decision to conduct a benefits audit or review manpower—are nonmandatory subjects of bargaining. However, often the *procedures* associated with nonmandatory subjects of bargaining constitute mandatory subjects of bargaining. For instance, PERB has held that procedures by which employees may obtain pre-approved time off must be negotiated, provided they do not interfere with the employer’s predetermined staffing requirements.<sup>74</sup> PERB has also held that the decision to undertake a benefits audit is not a mandatory subject, but the procedure requiring employee participation in such an audit is.<sup>75</sup>

In a troubling trend further impinging on management prerogatives, recent judicial decisions have compelled employers to accept arbitration of disputes involving nonmandatory subjects deemed to have a “reasonable relationship ... to the general subject matter of the CBA [collective bargaining agreement].”<sup>76</sup> In one such case, the Locust Valley Teachers’ Association was able to force arbitration of the school district’s attempt to recover compensation earned by a teacher during a period when, by his own admission, he had sexually abused students.

Responding to high-profile cases involving charges of excessive force and false arrest, more municipalities are now requiring or considering the use of police body cameras. While PERB has not yet spoken on this issue, it has ruled in recent

*Continued on page 23*

## The Strike-Out Record

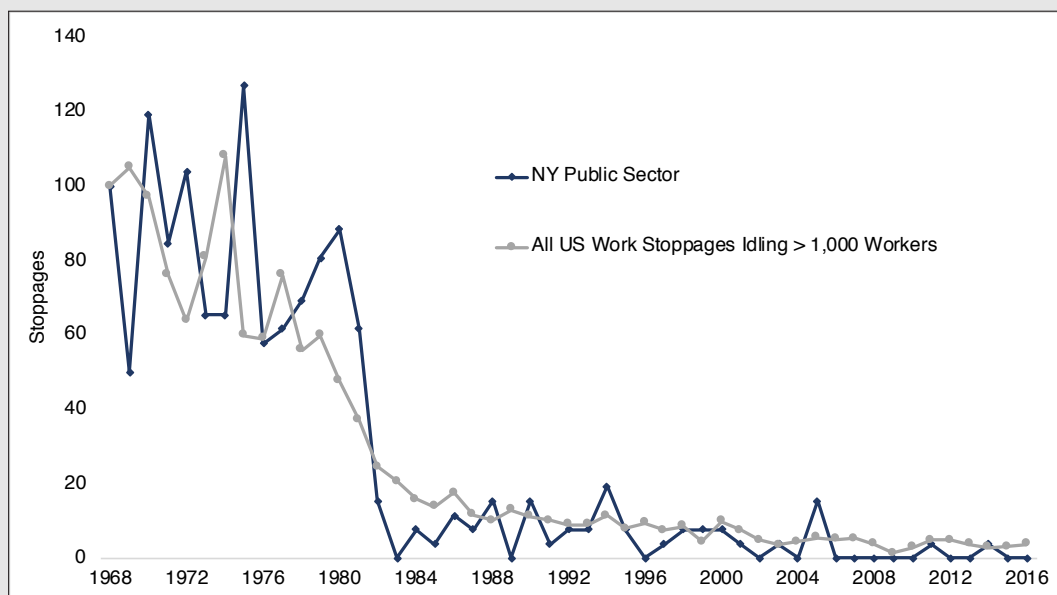
The Taylor Law was designed to prevent the kind of public-sector strikes that periodically disrupted public services in various New York State cities in the 20 years following the end of World War II. However, once the new law had opened the floodgates to mass unionization of New York's public sector, strike activity and job actions by government workers sharply increased. In the first 15 years after the Taylor Law was enacted in 1967, the state Public Employment Relations Board ("PERB") was asked to intervene in 299 walkouts, the vast majority involving teachers' unions. Strikes averaged 20 a year in the 1970s, despite PERB's willingness to impose the Taylor Law's full sanctions on striking workers and their unions in roughly two-thirds of those cases.

The trend abruptly changed in the early 1980s. Between 1983 and 2016, PERB recorded only 43 confirmed work stoppages by government workers in New York. Since 2005, there have been two confirmed findings of a public-sector union strike in the state. Compared to the tumultuous 1960s and 70s—with some significant exceptions—the last 35 years has been an era of labor tranquility in the state and local government.

Does the Taylor Law—and in particular the 1982 Triborough Amendment freezing salary increments in the absence of a contract—deserve credit for the change?

Some—but not all. In fact, federal labor statistics show that strikes of all sorts, in both the public and private sectors, decreased sharply across the country in the 1980s. (See Figure 6.) Analysts have offered a variety of reasons for the trend, including corporate restructurings and increased global competition affecting the once heavily unionized manufacturing

**Figure 4. Public-Sector Strikes in New York and Major Work Stoppages in U.S.**



Source: NYS Public Employment Relations Board statistics from Annual Report and U.S. Department of Labor

sector. A watershed event in the history of American labor relations came in 1981 with President Ronald Reagan's tough response to a strike by federal air traffic controllers. Overwhelming public support for Reagan's decision to fire and replace all the striking workers played an important role in changing the climate of labor relations across the country.

Another likely explanation for the decrease in New York public-sector strikes, supported by compensation data: the walkouts of the 60s and 70s led to permanently higher pay and benefits for the vast majority of state and local government employees in New York. Once in place, public-sector compensation packages and work rules are difficult to change. Increasingly shielded from management pressure by Taylor Law amendments, court precedents and PERB rulings, the state's public-sector unions by the 1980s no longer had much to strike over.

years on whether management can be required to bargain over the use of other new technologies and equipment, including the following:

- *Global Positioning System (GPS)*. On two occasions, a PERB administrative ruling has deemed GPS to be a form of equipment or surveillance technology, use of which is considered a management prerogative.<sup>77</sup>
- *Workplace Cameras*. In the leading case of *Nanuet Union Free School Dist.*,<sup>78</sup> PERB held that not only would the use of the cameras be a mandatory subject of bargaining, but also, "the circumstances under which the cameras would be activated, the general areas in which they may be placed, and how affected employees will be disciplined if improper conduct is observed" would be mandatory subjects as well.
- *Bulletproof Vests*. In most cases, bulletproof vests are considered a management prerogative and a nonmandatory subject of bargaining if the work rule mandating their use is focused on when and where the vests must be worn.<sup>79</sup> Because a rule requiring the use of bulletproof vests is directly related to the department's control of the manner and means in which its officers provide services to the public, it remains a management prerogative despite the safety implications that result from the rule.

In some cases, mandatory subjects of bargaining have overridden public policy concerns which would otherwise support a unilateral policy change. For example, New York City was found to have violated the Taylor Law when, in order to decrease congestion and pollution, it unilaterally changed the past practice of providing employees free parking permits.<sup>80</sup> Free parking, the Appellate Division agreed, is a mandatory subject of bargaining.<sup>81</sup>

However, in a different case, parking placards were deemed a nonmandatory subject of bargaining where: 1. the employee utilized the placard in the performance of their job function; 2. the employee was not responsible for paying for parking with or without the placard; and 3. the placard provided no economic or personal benefit to the employee.<sup>82</sup>

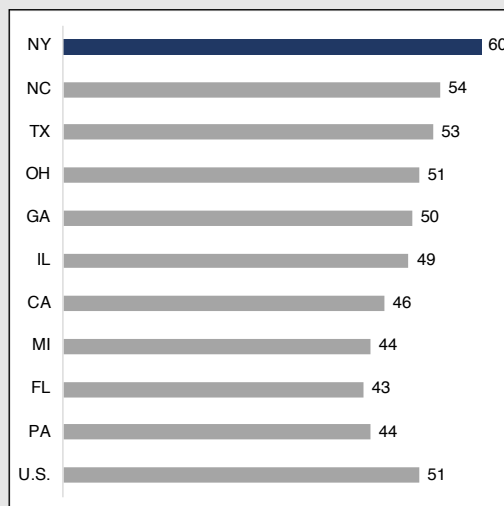


## Big Government, Big Headcount

With 60 full-time equivalent employees per 1,000 residents, New York's state and local government workforce is 18 percent larger than the national average.

As shown in Figure 5, New York has the largest government workforce of the 10 most populous states. The Empire State ranks 10<sup>th</sup> overall on this measure.

**Figure 5. State & Local Government Employment per 1,000 Residents March 2016, 10 Most Populous States**



Source: U.S. Census Bureau

## Disabilities

Under Section 71 of the Civil Service Law, a public employee may be separated from service after a cumulative absence of at least one year by reason of a disability resulting from occupational injury or disease as defined in the Workers' Compensation Law. Section 73 of the Civil Service Law similarly provides that a public employee who has been consecutively absent for one year due to a non-work-related injury. These are no-fault statutes, which were not intended to provide additional job security.

In a 2017 opinion with statewide implications, PERB ruled that an employer's obligation to disabled workers does not end with providing those workers with notice and an opportunity to be heard prior to separation from service under Section 71 or 73.<sup>83</sup> The board said employers must also bargain the procedures by which they separate employees from service under Sections 71 and 73. This means unions can delay an employee's termination (which the Legislature has clearly authorized after one year) by insisting on negotiating procedures and deliberately delaying such negotiations. In the case of police and fire, the issue ultimately could be subject to interest arbitration.

Unless an employer has already negotiated or unilaterally established procedures for separating employees under Sections 71 and 73 without objection from the applicable union, that employer may have to negotiate such procedures before exercising its rights under those provisions.

## Management: Alive and Fighting

Through all of this, public employers have succeeded in excluding certain crucial issues from the bargaining table.

Perhaps the most important and controversial of the items found to be “nonmandatory” is police disciplinary procedures. The state Court of Appeals has held on three different occasions (2006, 2012 and in 2017) that such procedures are generally not negotiable for the overwhelming majority of employers in New York State.<sup>84</sup> Police unions have attempted to overturn this case law and make police discipline a subject of collective bargaining by lobbying for legislation that would mandate negotiation of police discipline procedures. The bill has passed several times only to be vetoed by several governors, most recently Governor Cuomo.<sup>85</sup>

Another key area in which employers have retained a modicum of managerial control involves the generous and costly disability benefits available to uniformed officers. Under General Municipal Law Sections 207-a and 207-c, respectively, firefighters and police officers (including sheriff’s deputies and corrections officers) who suffer a disabling injury “in the performance of [their] duties” are entitled to continue at full salary until the disability has passed, or they reach the maximum retirement age, whichever comes first. Firefighters outside New York City who are retired with a performance-of-duty pension receive 100 percent of their salary tax-free until the maximum age of retirement, plus whatever annual raises and longevity increases are granted to active firefighters. This amount is almost always supplemented by tax-free Social Security disability payments. Some contracts also allow non-working disability recipients to continue receiving the same benefits as active employees, at least for a stated period of time.

These laws were originally based on the understandable premise that police work and firefighting are inherently more dangerous than other work, and that uniformed employees are entitled to financial security when injured in the line of duty.

However, the disability provisions are easily subject to abuse.

This was dramatized in a Pulitzer Prize-winning 1994 investigative series in *Newsday*, which documented “a boom in police disability cases” that had cost Long Island taxpayers tens of millions of dollars. As *Newsday* reported:

The police disability system, whose financial rewards have been stretched and sweetened over the years by the State Legislature and the courts, has evolved into a program that invites malingering and fraud and pays a large portion of its benefits to officers whose injuries had nothing to do with fighting crime. Long Island police officials believe that as many as one in three disability claims may be fraudulent or highly exaggerated.<sup>86</sup>

While police disabilities on Long Island decreased in the years following the *Newsday* series, the Legislature has not changed the law that made possible the abuses in the first place.<sup>87</sup> The Court of Appeals has not helped matters in recent years by abandoning its previous standard limiting 207-a and 207-c disability status to those injuries resulting from the “heightened risk” involved in public safety work.<sup>88</sup> As a result, uniformed officers injured in routine workplace accidents can qualify for the same disability benefits as officers who are shot in the line of duty.<sup>89</sup> For example, courts have approved 207-c benefits for a corrections officer who pulled his back while opening a stuck door to admit some inmates to a kitchen, an officer who was hit in the shoulder by a closing office door while supervising an inmate who was cleaning a hallway and an officer who bumped his head on a television set hanging from the ceiling of the correctional facility where he was taking an inmate count.<sup>90</sup>

On the limiting side, applications for 207-c benefits may be denied based on timeliness, proof of injury or on the ground that the officer was not injured in the performance of his/her police duties.<sup>91</sup> For instance, in the case of an officer who injured her back while changing into her uniform in the women’s locker room, the court upheld the 207-c benefit denial because her injury was not a result of an act performed in the “line of duty.”<sup>92</sup>

Unions have sought to make disability determinations a mandatory subject of negotiation, which effectively means they could force arbitration of an employer’s denial of benefits. With direction from the state Court of Appeals, PERB has held that the decision on whether an employee is eligible for Section 207-a or 207-c disability is a nonmandatory subject of negotiation.<sup>93</sup> On the other hand, PERB has ruled that the procedures for administering these statutes are mandatory subjects of bargaining, with the definition of “procedures” generally covering whether to remove an officer from the disabled category or place him on light duty.<sup>94</sup>

## Agency Fees and *Janus*

Until recently, two-long-standing provisions of state law—Article 93B of the General Municipal Law and Section 201 of the state Finance Law—allowed public employees to withdraw their consent to union dues deductions simply “by filing written notice ... with [their employer’s] fiscal or disbursing officer.”

The right of unions to collect “agency fees” from such nonmembers was a hotly contested issue in public-sector collective bargaining during the early years of the Taylor Law. Under a 1977 amendment to Article 93B and Section 201, agency fees were authorized subject to negotiations between unions and employers. A 1992 amendment effectively made these fee payments mandatory.

The constitutionality of such public-sector agency fee statutes was upheld by the U.S. Supreme Court in the 1977 case *Abood v. Detroit Board of Education*. In *Abood*, a Michigan law allowing agency fee requirements was found permissible, as long as employees were not “coerced” into supporting union political activity and had the choice to seek a rebate for the “ideological” portion of their dues. New York enacted its agency fee law two months after the ruling.

But the *Abood* precedent was challenged on constitutional grounds in the case of the *Janus v. AFSCME*, which reached the Supreme Court in early 2018.

Mark Janus, an Illinois state government employee required to pay an agency fee to AFSCME Council 31, contends that any money used by the union to negotiate with the government—not just explicit spending on politics and lobbying—constitutes compelled political speech, which violates the First Amendment.\*

If the court rules for Janus and allows government employees to opt out of paying agency fees, which for many exceed \$1,000 a year,

past experience indicates many employees may choose to opt out of membership and pay nothing. The financial stakes are enormous: as of 2016, New York government unions received at least \$862 million in union dues and fees, including at least \$110 million in “agency fees” from nearly 200,000 nonmembers.

To limit the damage from a ruling for the plaintiffs, unions successfully lobbied Governor Cuomo and the Legislature to modify state law to make it harder for employees to opt-out of paying unions dues, to reduce the scope of required union representation of workers who choose not to join and to make it easier for unions to sign up new employees.

The revenue bill passed with the fiscal 2019 budget—specifically, Part RRR of Chapter 59 of 2018—repealed existing General Municipal Law and Finance Law language allowing employees to opt out merely by filing written notice with their employers.

The new law requires public employers to continue deducting union dues unless an employee revokes union membership according to the terms set by his or her union. In practice, unions have made it clear that withdrawal terms will be designed to make it harder for employees to opt out.

Chapter 59 also imposes two new obligations on public employers. Within 30 days of hiring or promoting a worker covered by a union agreement, they must share the employee’s contact and employment information with the union and allow a union representative to meet with the employee during work hours.

In addition, the new law allows unions to limit their representation of nonmembers to “negotiation or enforcement” of the contract, and says the union is not required to provide representation during questioning, statutory, administrative, grievance, arbitration or contractual proceedings.

\* In early 2016, the Supreme Court heard arguments in a similar case, *Friedrichs v. California Teachers Association*, originally brought by a public-school teacher and former union officer, which more broadly challenged the *Abood* precedent. The *Friedrichs* case ended in a 4-4 deadlock following the sudden death of Justice Antonin Scalia, who was thought likely to side with the plaintiffs.

### 3. RECOMMENDATIONS

First and foremost, New York State should reaffirm its strong commitment to the principle that public employees have no “right” to strike. At a minimum, this means preserving the no-strike penalties contained in the Taylor Law, including the “2-for-1” penalty for workers and stiff financial sanctions for unions that illegally go on strike. Perhaps not coincidentally, two of New York’s largest public employee strikes in recent years—by transit workers in New York City in 2005 and teachers in Yonkers in 1999—were directed against employers headed by appointed boards. Unions chose to violate the law when they could not achieve their aims through political pressure on elected officials, and only the employers remained bound by the Taylor Law’s provisions (with the exception of the Triborough Amendment).

Public employees have done well in negotiations—to say the least—without this added weapon in their arsenal. The Taylor Committee had it right to begin with: “The strike cannot be a part of the negotiating process.”

Moving from what needs to be preserved to what needs to be changed in the Taylor Law, three reform priorities stand out.

#### **Make Arbitrators Give Affordability More Weight**

The Taylor Committee was also right about compulsory arbitration. The state would have been better off—and police and fire would still be fairly paid—if the Legislature had continued following its advice. As the state Conference of Mayors has noted in past legislative programs, “The compulsory arbitration process is an unfunded mandate upon municipalities and should be repealed.”

The ultimate problem with compulsory interest arbitration is the way it undermines accountability in government. After all, unions are single-mindedly focused on protecting and promoting the interests of their members. Professional arbitrators are considered successful if they produce results perceived by both sides as “fair.” Elected officials must think beyond the demands of a particular group of employees in a particular arbitration proceeding and make tough decisions on how to allocate scarce resources among a variety of public services. Yet unelected arbitrators can essentially end up making these decisions for them.

However, after more than three decades of this practice, it may be argued that compulsory arbitration is so deeply ingrained in the negotiating systems for police and firefighters that simply repealing it now would be severely disruptive and destabilizing, even if politically feasible.

Governor Cuomo took a stab at reforming the process in his 2013-14 Executive Budget, which included statutory language imposing a 2 percent cap on compensation cost increases resulting from arbitration, defining “compensation” to include health benefits while excluding steps and longevity increments.<sup>95</sup> As originally presented, Cuomo’s cap would have been limited to fiscally distressed municipalities.



Faced with resistance from unions and the Legislature, Cuomo’s final budget dispensed with a formal cap. Instead, it amended Civil Service Law § 209 to require that interest arbitration panels “shall, first and foremost, consider ability to pay by assigning a weight of seventy percent to that portion of the criterion.”<sup>96</sup> This consideration is limited, however, to a relatively small category of “fiscally eligible municipalities,” defined as those with relatively high property tax burdens or fund balances of less than 5 percent.<sup>97</sup>

As an alternative to traditional interest arbitration, the law also was changed to allow referral of contract impasses to the Financial Restructuring Board, a 10-member panel dominated by gubernatorial appointees, if so requested by both parties. In the five years since the provision took effect, no parties have chosen that option.

The “ability to pay” criterion needs to be strengthened in two respects.

First, affordability should be most heavily weighted, without exception – with the goal of preventing undue fiscal stress on municipalities.

Second, the interest arbitration guidelines should be clarified to link the definition of affordability to compliance with the 2 percent property tax levy cap, prohibiting settlements that would drive up total compensation by amounts larger than the cap would allow when combined with other foreseeable expenses.

Finally, New York State should move from its traditional issue-by-issue interest arbitration format to a last-best-offer system, in which an impartial arbitrator could choose between the complete “final offers” of the employer and the union. Last-best-offer arbitration is not a panacea, but experience suggests that management advocates in New York would use the opportunity to present more reasonable packages to the panels. This approach would offer a better chance of addressing the skyrocketing cost of health insurance benefits in a manner that has been resisted by traditional arbitration panels. Like the existing interest arbitration provision, last-best-offer arbitration could be regarded as an “experiment,” scheduled to sunset after several years.

## **Tackle the Triborough Amendment**

Since the majority of teachers in most districts are eligible for some step or lane movement every year, the Triborough Amendment means only the most senior and highly paid teachers go without a pay increase while negotiations for a new contract continue. Consequently, there is less pressure on the union to settle things quietly or quickly.

Protracted negotiations generally are more difficult for a school board than for a teachers’ union to withstand. During this period, union members can put pressure on boards through legal job actions such as picketing and distributing leaflets, or through illegal job actions such as refusing to volunteer for co-curricular activities. In many districts, lawn signs ticking off a local union’s “days without a contract” mislead district residents into assuming that the teachers are enduring a hard pay freeze while negotiations continue.

## The Police and Fire Pay Premium

Pay statistics indicate that police and firefighter unions outside New York City have used their access to compulsory arbitration to build a significant edge in pay over other state and local government employees.

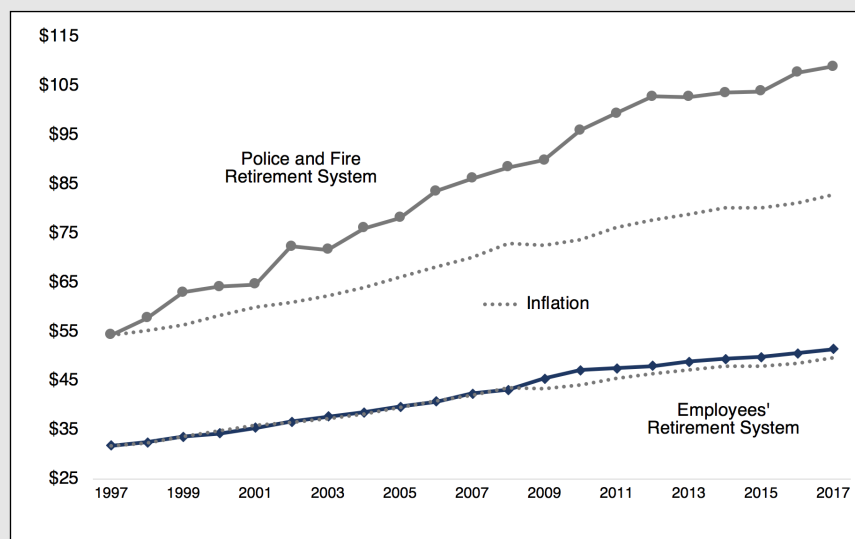
Between 1997 and 2017, the average pay for members of the state Police and Fire Retirement System (PFRS) increased 101 percent, from \$54,308 to \$108,930, according to data from the state retirement system. Police and firefighters are now paid more than twice as much as members of the state Employee Retirement System (ERS), whose average pay during the same period rose 62 percent, from \$31,829 to \$51,406, closely tracking the inflation rate.\* The added compensation costs for police officers and firefighters are even higher once pensions are considered. Because PFRS members can retire younger with full benefits—after as few as 20 years in the system, compared to

no fewer than 30 for most ERS members—the required employer pension contribution is 23.5 percent of payroll for PFRS members, compared to 14.9 percent of payroll for other employees, as of 2018.

The most highly paid public employee union members in New York are county police officers, whose average pay as of 2016-17 was \$156,546 (including overtime). This group consists mainly of Nassau and Suffolk County police, who benefited from a series of exceptionally large compulsory arbitration awards between the late 1970s and early 2000s. New York State Police—mainly troopers—are the second best-paid group, with an average salary of \$111,370. The average state police pay has increased by roughly 150 percent, or triple the inflation rate, since they were granted the right of compulsory interest arbitration in the mid-1990s.

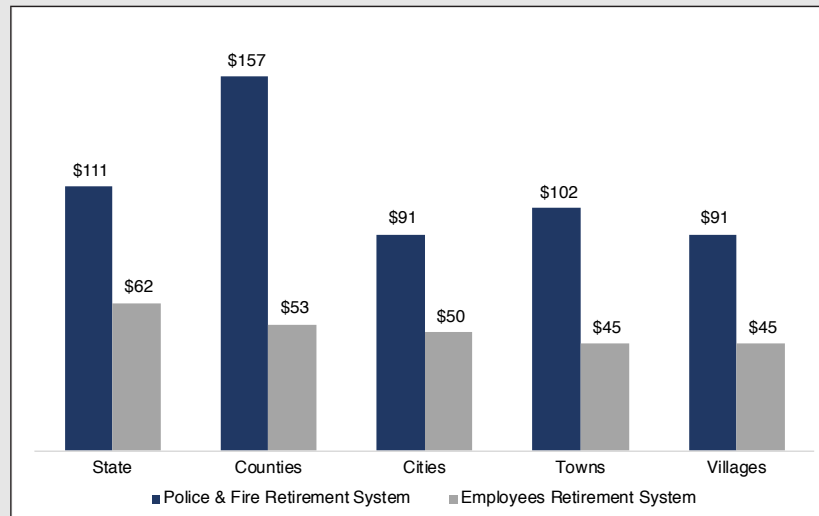
\* Both the PFRS and ERS also include employees of public authorities, including the bistate Port Authority of New York and New Jersey.

**Figure 6. Average Pay, NYS Retirement System Members, 1997-2017**



Source: New York State and Local Retirement System, Comprehensive Annual Financial Report

**Figure 7. Average Pay by Employer, 2016-17  
(Thousands of Dollars)**



Source: New York State and Local Retirement System,  
Comprehensive Annual Financial Report

If there is to be any real economic control over rising costs in school district negotiations, employers should not be required to continue financing step increments and lane movements after the expiration of a collective bargaining agreement. Pay hikes that require new taxes should not be considered “old” money.

Salaries and benefits make up 75 percent of total operating expenditures for an average school district in New York State. School budget increases are driven primarily by the cost of personnel—not extras like clubs, sports or transportation, although these are usually the first areas cut when money must be found to accommodate the steadily growing teacher pay packages protected by the Triborough Amendment.

In addition to preventing automatic pay increases, the Triborough Amendment needs to be modified to give employers the same right as unions to petition for interest arbitration. The rights at issue are analogous to the Taylor Committee’s recommendation that employers and unions have equal access to mediation and fact-finding. PERB interpretations and subsequent legislative history that produced this inequity should be overridden by new statutory language.

### **Modify PERB’s Approach to Key Issues**

The ultimate decision on subcontracting and reassignment of “unit work” should—after good-faith bargaining with affected unions—be left to elected officials who

ultimately are responsible for managing costs and delivering services. A public employer should have far more flexibility in this area than it currently possesses under PERB's decisions.<sup>98</sup>

Like pensions, OPEB should be removed from the scope of negotiations due to its impact on long-term government finances. Employers need the flexibility to address this challenge in a manner that balances the legitimate interests of employees, retirees and taxpayers.

Past practices in the workplace, such as policies allowing personal use of vehicles or equipment, should only be held contractually binding if explicitly authorized by the chief executive. For practices involving the direct expenditure of funds, the approval of the legislative body should also be required. In other words, to be considered binding, such practices should meet at least the same threshold of approval as any contractual provision.

And given the demonstrated potential for serious and costly abuse of the police and firefighter disability provisions of the General Municipal Law, employers should retain as much discretion as possible in determining the fitness of employees to return to light duty or full duty.<sup>99</sup>

### **Clarify Minimum Manning Clause Enforceability**

The Legislature must realize that a minimum manning clause that prohibits employers from laying off employees is a job security clause.<sup>100</sup> This is significant because, as explained by the Court of Appeals in *Johnson City*, not all job security clauses are valid and enforceable, nor are they "valid and enforceable under all circumstances."<sup>101</sup> A job security provision is valid and enforceable "only if the provision is 'explicit,' the CBA [collective bargaining agreement] extends for a reasonable period of time,' and the CBA was not negotiated in a period of legislatively declared financial emergency between parties of unequal bargaining power."<sup>102</sup> According to the Court of Appeals,

From a public policy standpoint, our requirement that 'job security' clauses meet this stringent test derives from the notion that before a municipality bargains away its right to eliminate or terminate or lay off workers for budgetary, economic or other reasons, the parties must explicitly agree that the municipality is doing so and the scope of the provision must evidence that intent. Absent compliance with these requirements, a municipality's budgetary decisions will be routinely challenged by employees, and its ability to abolish positions or terminate workers will be subject to the whim of arbitrators.<sup>103</sup>

In sum, a minimum manning clause which does not meet the criteria set forth in *Johnson City* is void and unenforceable.

## CONCLUSION

The Taylor Law was a response to the challenges of a previous era. But more than 50 years later, in an intensely competitive global economy, New York faces very different challenges that demand new solutions. These include:

- State pressure on local governments and school districts to consolidate and share services. Under legislation enacted in 2017, Governor Cuomo promoted county-led shared services initiatives designed to promote cooperation among local governments.<sup>104</sup> But, left unchanged, PERB's interpretation of the subcontracting and "unit work" issues will make it very difficult for taxpayers to realize significant savings or efficiency improvements.
- Growing unfunded liabilities for retiree health insurance coverage. New GASB rules will soon make official, in an accounting sense, that long-term liabilities significantly exceed the value of total assets at every level of New York government. Unlike pension obligations, which are pre-funded and pooled in common investment funds, OPEB liabilities accrue to individual government units and their taxpayers — a significant but overlooked future burden.

Over the past five decades, the Taylor Law has made it possible for public employee unions to secure significant gains in wages and benefits for their members — with significant costs and consequences for New York, its taxpayers and its economy. Meanwhile, the state Legislature has been increasingly receptive to union proposals that would further tilt the collective bargaining rules in favor of employees.

Lawmakers and the governor should be moving in the opposite direction — updating and improving the Taylor Law in ways that can benefit all New Yorkers.



## ENDNOTES

- 1 Civ. Serv. Law §209(4-a). The term “fiscally eligible municipality” is defined in N.Y. Local Finance Law § 160.05.
- 2 A government or government agency cannot be sued or forced into a contract without its consent.
- 3 The legislature cannot delegate its powers to a third-party.
- 4 Samuel I. Rosenman, ed., *The Public Papers and Addresses of Franklin D. Roosevelt* (New York, 1937) 6: p. 325, as cited by William Gomberg in “The Problem of Arbitration-The Resolution of Public Sector Disputes,” *Proceedings of the American Philosophical Society*, Vol. 118, No. 5 (Oct. 15, 1974), pp. 409-414. To quote Roosevelt: “The process of collective bargaining as usually understood cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public personnel management. The very nature and purpose of government makes it impossible for administrative officials to represent fully or bind the employer in mutual discussions with government employee organizations.”
- 5 Various New York State laws other than the Taylor Law guarantee additional benefits for public employees, including: paid military leave; limits on suspensions without pay for almost all government workers; limits on the number of hours police officers can work in the “open air,” on a daily and weekly basis; the maximum number of hours firefighters can work; the number of holidays and vacation days to which police and firefighters are entitled; the maximum number of consecutive hours teachers may work; the minimum number of sick leave days for teachers; maximum sick leave accumulations for teachers; and terminal leave calculations for teachers based on accumulated sick days.
- 6 Contributing to the climate of public unhappiness with government work stoppages, Rochester city workers had gone on strike in 1946, and New York City transit workers threatened to strike the following year.
- 7 State of New York, Governor’s Committee on Public Employee Relations, Final Report, March 31, 1966, as reprinted in Jerome Lefkowitz, Melvin H. Osterman and Rosemary A. Townley, eds, *Public Sector Labor and Employment Law*, Second Edition, New York State Bar Association (1998), 60.
- 8 In addition to Taylor, the Committee consisted of E. Wight Bakke of Yale University; David L. Cole, a New Jersey lawyer and labor mediator; John T. Dunlop of Harvard; and Frederick H. Harbison of Princeton. None of the Committee members were from New York State.
- 9 Police were initially excluded, but collective bargaining provisions were extended to them in 1962.
- 10 Unlike state and local government in New York, the federal government is an “open shop” employer, meaning that employees can choose not to join a union or pay union dues. Moreover, since pay and benefits are set by statute on the federal level, the scope of bargaining between the federal government and its employee unions is limited to personnel policies and working conditions. The current statute governing labor relations in the federal government includes a strong management rights provision, further constraining the scope of bargaining.
- 11 Governor’s Committee on Public Employee Relations, op cit, 60.
- 12 *Id.* at 67.
- 13 *Id.* at 95.
- 14 Experience indicates that reliance on impasse procedures in a local contract, as opposed to the state statutory process, has been the exception rather than the rule.
- 15 In practice, elected municipal executives exercise a more clear-cut role as negotiators separate from their legislative bodies than do superintendents of schools, who function both as chief executives and school board employees.
- 16 Article 14 of the New York State Civil Service Law.
- 17 Collective bargaining by public employees in New York City is overseen by a city agency, the Office of Collective Bargaining, whose adjudicatory body for dispute resolution is the Board of Collective Bargaining (BCB). In case of impasse, the city and its unions can turn to PERB for fact-finding.
- 18 The 1967 law did not contain the remedial improper practice sections, which were not enacted until 1969.
- 19 As of 2006, PERB had defined 367 mandatory subjects, 256 nonmandatory subjects, and 13 prohibited subjects. See State of New York, Public Employment Relations Board, *Mandatory/Nonmandatory Subjects of Negotiation*, 2006 Edition.
- 20 “New Taylor Law Has Wide Impact,” *The New York Times*, May 5, 1968.
- 21 Ronald Donovan, *Administering the Taylor Law: Public Employee Relations in New York*, Cornell University ILR Press (1990), 67.
- 22 From 1967 to 1981, the peak period for illegal public employee strikes in New York State, teachers unions were involved in 121 of the 215 total walkouts, according to PERB.
- 23 Jerome Lefkowitz, Melvin H. Osterman and Rosemary A. Townley, eds, *Public Sector Labor and Employment Law*, Second Edition, New York State Bar Association (1998); pension and retirement benefits issue cited at pp. 489-91.
- 24 As of 2017, the New York State and Local Retirement System administered seven pension plans for deputy sheriffs and county law enforcement officers, and 13 plans for police and firefighters. The plans impose varying expenses on government employers based on whether they are contributory or non-contributory for employees, and on minimum retirement age and service requirements. Unions can seek to negotiate a shift of their members from one such plan to another, but the benefit levels established by law *within* each

plan are prohibited subjects of bargaining.

25 Interest arbitration is where a third-party arbitrator awards all the term of a new contract. In the more traditional forms of rights or grievance arbitration, a third-party arbitrator decides disputes over the meaning of disputed clauses in collective bargaining agreements.

26 The union and the employer each appoint one panel member. The parties choose the third, neutral member from a list of professional arbitrators supplied by PERB.

27 The amendments initially maintained the existing fact-finding procedures in contract disputes, but ultimately eliminated that step in 1977 after most interest arbitration interest arbitrations had become rubber stamps of the preceding fact-finding recommendations.

28 Out of 86 public employee strikes in New York between 1967 and 1974, only five involved police or fire unions.

29 “End Jailings in Strikes, Taylor Law Panel Urges,” *The New York Times*, March 29, 1975.

30 New York City police also have had the ability to take impasses to compulsory interest arbitration, but until the late 1990s, their arbitration panels were appointed by the city Board of Collective Bargaining. Hoping to duplicate the success of police elsewhere in the state, the city Patrolmen’s Benevolent Association (PBA) waged a long and ultimately successful battle to have their contracts arbitrated by a state PERB panel, which the Legislature approved over the city’s objections in 1998. So far, however, this has not produced the quantum leap in city police salaries that the PBA might have hoped for. Impartial arbitrators have attached strong weight to New York City’s long tradition of pattern bargaining, in which the pay increases for one group of workers do not vary significantly from those won by others.]

31 *Triborough Bridge and Tunnel Auth.*, 5 PERB ¶ 3037 (1972).

32 PERB has also recognized another exception to the *Triborough* doctrine where an employer has a “compelling need” to change a term and condition of employment before it is able to get the union’s agreement. Under this exception: (a) the employer’s action must have been required at the time it was taken; (b) the employer must have bargained to impasse with the union over the proposed change; and (c) the employer must have recognized a continuing willingness to negotiate over the change after it was made. *See Wappingers CSD*, 5 PERB ¶ 2074 (1972). Despite this exception, PERB does not appear to have allowed any meaningful change of a term and condition of employment made by an employer. In such cases, the Board generally found the employer’s actions only rose to the level of “administrative convenience” or an “economic benefit” – as would be gained, for example, by moving ahead with

a plan to contract out bus service in time for the start of school.

33 *BOCES of Rockland County v. PERB*, 41 N.Y.2d 753 (1977).

34 The overall cost of steps generally ranges from 1 percent to 3 percent for an employer. This is the “average” cost for an entire unit. The movements from one step to another for an individual generally range from 2.5 to 5 percent. The overall cost to the employer is lower because there are some teachers on top step who are no longer eligible for increments. When these “zero” increases on the top steps are averaged with the 2.5 percent to 5 percent increases on lower steps, they generally produce an average 1 percent to 3 percent overall cost to the employer depending upon the seniority of the staff.

35 1982 N.Y. Laws chs. 868, 921

36 *Cobleskill Ctr. Sch. Dist.*, 16 PERB ¶ 3057 (1983).

37 *Deer Park Union Free Sch. Dist.*, 44 PERB ¶ 3032 (2011).

38 *Cortland Enlarged City Sch. Dist.*, 45 PERB ¶ 3022 (2012) (finding that the expired contract did not contain a durational restriction to sunset the District’s statutory obligation to continue paying step increments and the District violated the Taylor Law by failing to advance eligible employees on the applicable salary step schedule).

39 *In re Schuyler*, 80 A.D.3d 1140 (3d Dep’t 2011).

40 N.Y. L 2009, ch 504, part A, § 8.

41 *Buffalo Niagara Airport Firefighters Ass’n v. DiNapoli*, 111 A.D.3d 994 (3d Dep’t 2013).

42 *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 20 N.Y.3d 651 (2013).

43 *City of Kingston*, 18 PERB ¶ 3036 (1985).

44 PERB applied the same rationale to legislative determinations but, given their limited frequency, this ruling had little impact.

45 *City of Kingston*, op. cit.

46 *In Matter of Utica (Zumpano)*, 672 N.Y.S.2d 844, 91 N.Y.2d 964 (1998), the New York Court of Appeals rejected a city’s challenge to the continuation of a minimum staffing and equipment provision in an expired collective bargaining agreement with its firefighters. The city unsuccessfully argued that continuing the provision after expiration of a contract would violate the State Constitution’s home rule provisions.

47 *See City of Ithaca*, [49 PERB P3030](#) (2016) (employer filed scope charge alleging that the PBA’s demands concerning 2012 and 2013 were improper since the PBA refused to consent to submit to interest arbitration interest arbitration concerning that period).

48 Because PERB is unlikely to revisit and reverse the cases presented here, legislation would be necessary to address the problems they create.

49 *Manhasset Union Free Sch. Dist.*, 41 PERB ¶ 3005 (2008), *aff’d*, 61 A.D.3d 1231 (3d Dep’t 2009) “For over three decades, the Board has held that the subcontract-

ing of bargaining unit work, for economic or other reasons, constitutes a mandatory subject of negotiations under the Act where there is no curtailment in the level of services.”

50 Some public employers have negotiated contract provisions that explicitly allow subcontracting actions. However, these provisions were generally negotiated long ago and are the exception, rather than the rule.

51 *Enlarged Ctr. Sch. Dist. of Troy*, 11 PERB ¶ 3056 (1978). See also *Cayuga Comm’y College*, 50 PERB ¶ 3003 (2017) (“[t]he asserted merits or demerits of a decision to transfer unit work, including the fiscal and operational wisdom of a decision to privatize, are immaterial to whether the subject matter is mandatorily negotiable.”); *City of Lockport*, 47 PERB ¶ 3030 (2014) (finding that city employer violated the Act by unilaterally transferring the work of ambulance billing services from unit members to contractor and noting that “the fiscal or operational wisdom of a decision to subcontract unit work is immaterial to the negotiability of the subject”).

52 A line of PERB decisions (for example, *Town of Mamaroneck*, 33 PERB ¶ 3010 (2000)) allows for the civilianization of certain police functions when various preconditions are met. However, analysis of these cases is beyond the scope of this paper.

53 *New York State (Office of Parks, Rec. & Historic Pres.)*, 50 PERB ¶ 3024 (2017) (employer did not violate the Act by unilaterally ceasing to provide Forest Ranger with a State-owned take-home vehicle because Ranger could not have reasonably expected continued use of the vehicle where employer reserved right to withdraw the benefit at any time for any reason).

54 *Kingston Police Benev. Ass’n*, 40 PERB ¶ 3015 (2007).

55 *Chenango Forks Teachers Ass’n v. N.Y.S. Pub. Empl. Rels. Bd.*, 21 N.Y.3d 255 (2013).

56 *City of Watertown*, 47 PERB ¶ 3015 (2014).

57 *Town of Islip v. N.Y.S. Pub. Empl. Rels. Bd.*, 991 N.Y.S.2d 583 (2014). But see *State of New York (Dept. of Transp.)*, 50 PERB ¶ 3004 (2017) (employer did not violate the Act when it discontinued the practice of providing take-home cars because the employees could not reasonably expect the practice to continue where the employer retained discretion to annually reevaluate whether employees would be assigned a vehicle for commuting purposes).

58 *State of New York (Office of State Comptroller)*, 48 PERB ¶ 3009 (2015). See also *State of New York (Dept. of Transp.)*, 50 PERB ¶ 3004 (2017) (employer did not violate the Act when it discontinued the practice of providing take-home cars because the employees could not reasonably expect the practice to continue where the employer retained discretion to annually reevaluate whether employees would be assigned a vehicle for commuting purposes).

59 *Inc. Village of Lynbrook*, 10 PERB ¶ 3067 (1977).

60 Unions do not represent retired workers, leaving

employers no one to negotiate with.

61 L. 2009, c. 504, pt. B, § 14 (commonly referred to as the “Health Insurance Moratorium Law”).

62 The latest such bills were S.4637 (2017-18) and S.3252 (2016-17).

63 The Legislature amended Section 167 of the Civil Service Law to permit reductions in the State’s contribution towards retirees’ health insurance premiums in the event that a collective bargaining agreement between the state and an employee organization so provided. See *Retired Pub. Empls. Assn., Inc. v. Cuomo*, 123 A.D.3d 92 (3d Dep’t 2014) (citing Civ. Serv. Law §167(8)).

64 See, e.g., *Kolbe v. Tibbetts*, 22 N.Y.3d 344 (2013); *Adamo v. City of Albany*, (3d Dep’t 2017); *Lippman v. Sewanaka Ctr. High Sch. Dist.*, 17 PERB ¶ 4521, *aff’d*, 17 PERB ¶ 3049 (1984), *rev’d*, 104 A.D.2d 123 (3d Dep’t 1984), *aff’d*, 66 N.Y.2d 313 (1985); *Guerrucci v. Sch. Dist. of City of Niagara Falls*, 126 A.D.3d 1498 (4th Dep’t 2015); *Agor v. Bd. of Educ., Northwestern Clinton Ctr. Sch. Dist.*, 115 A.D.3d 1047 (3d Dep’t 2014); *Warner v. Bd. of Educ., Cobleskill-Richmondville Ctr. Sch. Dist.*, 108 A.D.3d 835 (3d Dep’t 2013); *Elia v. Highland Ctr. Sch. Dist.*, 78 A.D.3d 1265 (3d Dep’t 2010); *Della Rocco v. Schenectady*, 252 A.D.2d 82 (3d Dep’t 1998).

65 See, e.g., *Weaver v. Town of N. Castle*, 153 A.D.3d 531 (2d Dep’t 2017); *Covel v. Town of Peru*, 123 A.D.3d 1244 (3d Dep’t 2014); *Kapell v. Inc. Village of Greenport*, 63 A.D.3d 940 (2d Dep’t 2009); *Suttlehan v. Town of New Windsor*, 31 Misc. 3d 290 (Sup. Ct. Orange Co. 2011).

66 See *Aeneas McDonald PBA v. City of Geneva*, 92 N.Y.2d 326 (1998). Also see *Emerling v. Village of Hamburg*, 255 A.D.2d 960 (4th Dep’t 1998), which held that although there was not express contractual benefit, there was a unilateral contract because the plaintiffs had worked for years based on the employer’s promise to provide such benefits.

67 See, for example, *Civ. Serv. Empls. Assn., Inc. v. Rockland County*, 144 A.D.3d 793 (2d Dep’t 2016); *Taconic Hills Ctr. Sch. Dist.*, 45 PERB ¶ 4517 (ALJ Burritt, 2012). Also, on the employer’s side, *City of Albany*, 48 PERB ¶ 3026 (2015).

68 E.J. McMahon, *Iceberg Ahead: The Hidden Cost of Public-Sector Retiree Health Benefits in New York*, Empire Center, September 2012. Total figure reflects updated estimate of state government’s unfundd OPEB liability as cited in the 2018-19 Executive Budget Financial Plan, state Division of the Budget.

69 See *County of Nassau*, 50 PERB ¶ 4550 (ALJ Blassman, 2017).

70 *Watertown Prof. Firefighters Ass’n, Local 191 v. City of Watertown*, Index No. 2017-2368 (Sup. Ct. Jefferson Co. Dec. 6, 2017).

71 *Id.*

72 *Village of Scarsdale*, 50 PERB ¶ 3007 (2017), citing *City of New York*, 40 PERB ¶ 3017, 3069 (2007) and *Poughkeepsie City Sch. Dist.*, 19 PERB ¶ 3046, at 3099 (1986).



- 73 *Village of Scarsdale*, 50 PERB ¶ 3007. See also *State of New York (Office of Mental Health – Rochester Psychiatric Center)*, 48 PERB ¶ 4610 (2015).
- 74 *City of Watertown*, 47 PERB ¶ 3015 (2014); see also, *City of Niagara Falls v. NYS Public Empl. Relations Bd.*, 34 Misc. 3d 1227(A), 2012 N.Y. Slip Op. 50263(U) (Sup. Ct. Niagara Cnty. 2012).
- 75 *County of Cortland*, 48 PERB ¶ 3028 (2015).
- 76 See, for example, *Matter of City of Watertown (Watertown Professional Firefighters' Assn. Local 191)*, 152 A.D.3d 1231 (4th Dept. 2017).
- 77 See *Village of Hempstead*, 41 PERB ¶ 4554 (ALJ Maier 2008); *County of Nassau*, 41 PERB ¶ 4552 (ALJ Maier 2008); *County of Nassau*, 41 PERB ¶ 4553 (ALJ Maier 2008). The issue of surreptitious employer GPS monitoring has not been decided.
- 78 *Nanuet Union Free School Dist.*, 45 PERB ¶ 3007 (2012); *Town of Clarkstown*, 44 PERB ¶ 4625 (ALJ Doerr 2011).
- 79 See *City of New York*, 40 PERB ¶ 6601 (2007); see also *City of New York*, 40 PERB ¶ 3017 (2007).
- 80 *City of New York v. NYS Public Emp't Relations Bd.*, 103 A.D.3d 145 (3d Dep't 2012).
- 81 *Id.*
- 82 *State of New York (Office of Medicaid Inspector General)*, 50 PERB ¶ 3025 (2017), cf. *City of New York*, 103 A.D.3d 145.
- 83 See *City of Long Beach*, Case No. U-34671 (Nov. 6, 2017) (appeal pending in Appellate Division, Second Department).
- 84 *Matter of City of Schenectady v. New York State Pub. Emp't Relations Bd.*, 2017 N.Y. LEXIS 3074 (2017); *Matter of Town of Walkill v. Civil Servs. Empls. Ass'n, Inc.*, 19 N.Y.3d 1066 (2012); *Matter of Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. New York State Pub. Emp't Relations Bd.*, 6 N.Y.3d 563 (2006).
- 85 See S.7801 (2014-15), Veto No. 589 ("pocket" vetoed by Governor Cuomo on Feb. 2, 2015). If such a bill became law, many cases now resolved within police departments (through what is commonly referred to as "command discipline") would be pursued to disciplinary arbitration, which involves costly fees for lawyers and arbitrators. Discipline in these paramilitary operations would suffer if employers prove unwilling or unable to bear the costs of such proceedings, as is now often the case with school districts under the teacher discipline provisions in Education Law Section 3020-a. See also E.J. McMahon, *A bill to loosen police discipline*, *New York Post*, Dec. 7, 2014, available at <http://nypost.com/2014/12/07/a-bill-to-loosen-police-discipline/>.
- 86 Brian Donovan & Stephanie Saul, *For Some LI Cops... Lucrative Disability*, *Newsday*, June 26, 1994, at 3.
- 87 As of 2017, disability pensions were being collected by 18 percent of all retired city, town and village police and firefighters outside New York City, and by 23 percent of retired county police officers (nearly all from Long Island), according to the Comprehensive Annual Financial Report of the New York State and Local Retirement System.
- 88 The "heightened risk" standard was established in *Balcerak v. County of Nassau*, 94 N.Y.2d 253 (1999).
- 89 In addition, public safety officers stricken by heart disease, strokes, tuberculosis, H.I.V., and hepatitis are automatically deemed to have "line-of-duty" disabilities qualifying them for tax-free disability pensions worth three-quarters of their final salaries.
- 90 *Theroux v. Reilly*, 1 N.Y.3d 232 (2003).
- 91 See, e.g., *Lombardo v. Monroe County*, 2008 N.Y. Slip Op. 52604 (U) (Sup. Ct. Monroe Co. 2008).
- 92 *DiMeglio v. Village of Briarcliff Manor*, 67 A.D.3d 908 (2d Dep't 2009); see generally, *Balcerak v. County of Nassau*, 274 A.D.2d 580 (2d Dep't 2000); cf. *Parker v. Village of Johnson City*, 27 Misc. 3d 1228(A), 2010 N.Y. Slip Op. 50957(U) (Broome Cnty. Sup. Ct. 2010).
- 93 See, e.g., *Matter of Poughkeepsie Professional Firefighters' Ass'n, Local 596, IAFF, AFL-CIO v. New York State Public Emp't Relations Bd.*, 6 N.Y.3d 514 (2006).
- 94 *Matter of Park v. Kapica*, 8 N.Y.3d 302 (2007); *City of Watertown*, 30 PERB ¶ 3072 (1997), aff'd, 95 N.Y.2d 73 (2000); *City of Lackawanna*, 47 PERB ¶ 4589 (ALJ Fitzgerald, 2014).
- 95 Part Q of the Governor's 2013-14 Education, Labor and Family Assistance bill, S.2607/A.3008.
- 96 Civ. Serv. Law § 209.
- 97 Civ. Serv. Law § 209(4-a). The term "fiscally eligible municipality" is defined in N.Y. Local Finance Law § 160.05.
- 98 For purposes of this limited discussion, decisions to outsource services performed by a public employer, and decisions to move work from one unionized group to another bargaining unit or to other unorganized employees of the same employer, are treated as the same. Although these decisions are quite different, a public employer is bound by the same obligation—that is, absent a contract clause that makes it permissible, it must bargain such decisions with the unions.
- 99 Although police and firefighter disability benefits are not within the Taylor Law, Sections 207-a and 207-c clearly need to be amended. At a minimum, the Legislature needs to restore a common-sense standard of "heightened risk" that stresses injuries incurred in the course of hazardous duties and excludes routine workplace accidents.
- 100 *Burke v. Bowen*, 40 N.Y.2d 264, 266 (1976).
- 101 *Matter of Johnson City Professional Firefighters Local 921 and Village of Johnson City*, 18 N.Y.3d 32 (2011) quoting *Matter of Board of Educ. of Yonkers City Sch. Dist. v. Yonkers Fedn. of Teachers*, 40 N.Y.2d 268, 275 (1976).
- 102 *Johnson City*, 18 N.Y.3d at 37, quoting *Burke*, 40 N.Y.2d at 267.
- 103 *Id.*
- 104 See description at <https://www.ny.gov/programs/shared-services-initiative>

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