



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: House Committee on Appropriations
CC: House Committee on Government Operations
From: BetsyAnn Wrask, Legislative Counsel
Date: June 22, 2020
Subject: Pay Act: Implications of various CBA funding options

I. Overview

The Pay Act is proposed in [2020, H.964 As Introduced](#). It would fully fund the Executive Branch, Judicial Branch, and State's Attorneys' employees' collective bargaining agreements (CBAs) in FY21 and FY22. It would also allow Executive Branch exempts and statutory officers in the three branches to receive a compensation increase in FY22 consistent with the CBA provisions for FY22. It would also allow the three branches to apply FY21 and FY22 CBA compensation increases to employees not covered by CBA.

The terms of the CBAs would provide in FY21 a 1.9% step increase and a \$1400 one-time payment to individuals employed on July 1, 2020, and would provide in FY22 a 1.9% step increase and 2.25% ABI for a total of 4.15% increase. They also include non-salary provisions for tuition reimbursement, child and elder care, and participation in the Governor's family medical leave plan, if implemented (or an additional 0.25% ABI if not implemented).

Legislators are seeking information on the implications of alternative CBA funding decisions. What follows is my understanding of the implications of different alternative funding of the Pay Act CBAs.

However, if the General Assembly will pursue one of these CBA funding alternatives, legislative committees of jurisdiction should take testimony from the parties to the bargaining agreements to confirm how the enacted law would be executed and its implications, and what it would mean for the parties in practice.

II. General Rules

First, there are two general rules that serve as the basis for these alternative funding implications:

Obligation to support current CBA. Via [3 V.S.A. § 982\(c\)\(1\)](#), now that the parties have ratified the CBAs, the Governor is statutorily obligated to request sufficient funds from the General Assembly. This statute provides that “. . . agreements . . . shall, after ratification by the appropriate unit memberships, be submitted to the Governor who shall request sufficient funds from the General Assembly to implement the agreement.” The same is true for the Executive Director of the Department of State’s Attorneys and Sheriffs for the State’s Attorneys’ employees via [3 V.S.A. § 982\(c\)\(2\)\(B\)](#) and for the Court Administrator for Judiciary employees via [3 V.S.A. § 1036\(c\)](#).

Renegotiating if CBA is not fully funded. Absent the General Assembly fully funding the CBAs, the parties have to renegotiate the CBA. [3 V.S.A. § 982\(c\)\(1\)](#) (Ex. Br.) and (c)(2)(B) (State’s Attorneys); [3 V.S.A. § 1036\(c\)](#) (Judiciary).

- These statutes provide that “[i]f the General Assembly appropriates a different amount of funds, the terms of the agreement affected by that appropriation shall be renegotiated based on the amount of funds actually appropriated[.]”
- The current CBAs are proposed for a two-year period that begins July 1, 2020 (start of FY21) and runs through June 30, 2022 (end of FY22). The CBAs begin by providing the \$1400 one-time payment for individuals employed on July 1, 2020 and the calculation of any step increase available to eligible employees.
- The General Assembly holds the constitutional appropriation power via [Vt. Const. Ch. II, § 27](#). Therefore, whether to fully fund the CBAs is a legislative policy decision.
- However, the General Assembly not fully funding these CBAs for the full two-period that begins on July 1, 2020 would require the parties to renegotiate.

III. Possible Alternative Funding of CBAs and Implications

What follows is a list of possible alternatives for funding the CBAs and what is understood to be the resulting implications. There may be other options, including ones that combine these main options.

1) Only fully fund the CBAs’ FY21 provisions.

a. ***Without addressing FY22.*** If the Leg. only funds the CBAs’ FY21 provisions without appropriating for or otherwise addressing the CBAs’ FY22 provisions, the parties will need to renegotiate, because the CBAs are for a full two-year period.

- However, without legislative guidance as to FY22, the Governor, Ex. Dir. of DSAs, and Court Administrator still have their statutory obligation to support the existing CBA terms, so the parties will likely renegotiate a “wait and see” provision to see what action the Leg. will take for FY22, and the renegotiation may be a placeholder to agree to continue to request the current FY22 provisions.

b. **And addressing FY22.** If the Leg. knows now what it will be willing to fund in FY22, it could state so explicitly. That way, the parties can renegotiate the FY22 CBA provisions based on that legislative direction.

- *Caution:* Stating this legislative directive now for FY22 will cause the parties to renegotiate FY22 based on that legislative direction. If the Leg. subsequently amends its directive on what provisions of the CBAs it is willing to fund in FY22, it will cause an administrative burden because the parties will need to renegotiate again under the revised directive.

2) Wait until after July 1, 2020 to make any CBA funding decision. This will require the parties to renegotiate, because the CBAs begin on July 1, 2020. This will include a renegotiation on step increases that were supposed to start at the beginning of FY21, as well as the one-time payment due the first pay period of FY21.

- Renegotiation alone will be an administrative burden, but if the Leg. decides in August or September to fully fund the CBAs so that the benefits are applied retroactively, there may be renegotiation based on that decision, and that will also cause a separate administrative burden because the State will have to contend with any CBA employees who left State government. For example, if an employee covered by CBA leaves State government in between July 1st and the subsequent enactment of the Pay Act, the State will need to find that employee to provide the one-time payment, as well as calculate any step increases they would have received during that time.
- Therefore, there will be an administrative cost to doing this.

3) Less than full funding of CBAs.

- If the Leg. is clear about what it refuses to fund, the parties will renegotiate based on that legislative directive.
- If, instead, the Leg. only appropriates \$X when the CBAs call for \$Y—without expressing the provisions with which it doesn’t agree—then the parties would have more flexibility to renegotiate based on the total amount appropriated.

4) Explicitly appropriate \$0 but leave door open for parties to renegotiate. If the Leg. explicitly enacts the Pay Act to say that it is appropriating \$0 for the Pay Act, but that it will reconsider a renegotiated CBA, the parties will renegotiate and resubmit a

CBA. If the Leg. gave guidance on what provisions of the CBA it does not agree with, the parties could renegotiate based on that information.

5) Fully fund both FYs of the CBAs, then enact later legislation to reduce or eliminate the benefits that would have been provided.

- This would require renegotiating what was agreed to and relied upon.
- It could also subject the State to litigation based on an alleged violation of the Contracts Clause. Although the general holdings of Contracts Clause caselaw indicate that a court will give deference to the Legislative Branch, and courts may uphold *substantial interference* in contracts if the legislation is drawn in an *appropriate and reasonable way that advances a significant and legitimate public purpose*, there is still a risk of litigation in which plaintiffs may argue the State failed to meet this test.

6) “Eat the Pay Act” by funding the CBAs through existing budgets, without additional appropriation, by saying the savings must come from elsewhere. Parties would not have to renegotiate, but this is likely to result in cuts to programs or layoffs or both. Moreover, the Leg. should consider whether it should use its policy-making authority to decide what these cuts should be.