

LABOR LAW IN THE PUBLIC SECTOR

(MAKES THE HEADLINES IN 2011)

1. Introduction.

The news is filled with reports of democratic movements challenging authoritarian rule in the Middle East and elsewhere. In the United States a conflict over collective bargaining rights of public-sector workers has similarly been newsworthy. With descriptions of the economy ranging from a second recession, to stalled, to slowing, to uncertain, it is not surprising that persons world-wide have reacted by participating in an extensive variety of reactions, including public protests whether organized or not organized.

First a few definitions are helpful. A “labor union” is an organization that, when certified as the “exclusive representative”, acts on behalf of employees in an “appropriate unit”. “Collective bargaining” refers to a process in which a union representing its members and an employer negotiate over “terms and conditions of employment” to reach a “collective bargaining agreement” which is the written labor contract between the employer and the union. The labor union also enforces the terms of contract.

2. U. S. Federal Regulatory System.

In 1935, the National Labor Relations Act (NLRA), also known as the Wagner Act (after its sponsor, Senator Robert F. Wagner), established in the private sector the right of unions to organize by detailing union membership, collective bargaining representation and the right to strike rules.¹ The Act defined and prohibited five unfair labor practices which still exist, while others have been added under later legislation. The act does not apply to federal, state or local government workers. The National Labor Relations Board (NLRB), created as part of the NLRA, is an independent federal agency with the authority to administer the Act by considering unfair labor practice charges and conducting employee representation elections. The NLRB is subject to appellate review by the federal courts. The 1947, Taft Hartley Act amended the NLRA by allowing states to pass right-to-work laws.² President John Kennedy issued Executive Order 10988 in 1962, and established the legal right for federal employees to bargain.³ Federal employees have their own labor relations statute, the Federal Labor Relations Act.⁴

3. State Regulatory System. The fifty states have individually established public sector union legislation that vary from state to state and the variations are substantial. Three-fourths of the states grant collective bargaining rights to some or all of their public employees. Five states, North Carolina, Virginia, Texas, South Carolina, and Georgia have laws prohibiting collective

¹ 29 U.S.C. Secs. 151-169.

² Pub L.80-101, 61 Stat. 136.

³ 27 Fed Register 193. January 9, 1962.

⁴ 5 U.S.C. Secs. 7101-7135.

bargaining in the public sector. These bargaining rights are separately defined in each state and vary widely. When contract negotiations fail workers may be permitted to strike or they may be required to submit to binding arbitration depending upon the state law. Essential employees may be required to arbitrate. Employees deemed confidential may be prohibited from being part of a bargaining unit.

In 2010, the union membership rate in the United States was 11.9 per cent.⁵ The union membership rate of 36.2 percent for public sector workers was substantially higher than the rate of 6.9 percent for private sector workers. Within the public sector, local government workers had the highest union membership rate, 42.3 percent. This group includes workers in heavily unionized occupations, such as teachers, police officers, and fire fighters. The number of public sector union workers now exceeds the number in the private sector.

A comprehensive listing of all state and agency labor laws can be accessed at the Cornell University Law School website: http://topics.law.cornell.edu/wex/table_labor.

4. State Fiscal Issues.

Public Pensions. The public sector topic currently generating the most discussion has been retirement benefits for state and local government workers.⁶ The one issue is whether the plans provide benefits which are too generous. The second issue is how to deal with plans which are underfunded due to the economic downturn.⁷ The response by the public employer has been to look at reducing benefits for future workers, for existing workers to increase the years of work to qualify and require higher employee contributions, and for retirees roll back the cost of living increases.⁸ Whether the benefits are the extreme burden that critics claim is disputed.⁹ First, pension contributions amount to only three to four per cent of total state spending. Second, pension funds are not broke they have been become underfunded. Third, while 91 per cent of the state and local government workers have defined-benefit plans many, like in the private sector, are turning to defined-contribution plans for current employees.

Bankruptcy. Bankruptcy in the public sector is rare and, as a result, public sector unions are not faced with the prospect that the employer may go bankrupt. However, the city of Vallejo, California, filed for bankruptcy in 2008 after it lost its biggest employer, the U.S. Navy Mare

⁵ Union Members Summary, Bureau of Labor Statistics, bls.gov/news.release/union2, January 21, 2011.

⁶ "Public Pensions, Once Off Limits, Face Budget Cuts", The New York Times, April 25, 2011.

⁷ "A \$176 Billion Gap for Public Pensions", New York Times, June 21, 2011.

⁸ "Two Rulings Find Cuts in Public Pensions Permissible", New York Times, June 30, 2011; *New Front in Benefit Fight, Atlanta May Drop Pensions*", The Wall Street Journal, June 22, 2011.

⁹ "The Revenue Demands of Public Employee Pension Promises", Novy-Marx and Rauh, June 2011; "Why Employee Pensions Aren't Bankrupting States," McClatchy Newspapers, March 6, 2011; "Addressing Media Misconceptions About Public-Sector Pensions and Bankruptcy", www.gabrielroeder.com, February 11, 2011; "Public Pension Asset Exhaustion – Only a Remote Possibility", National Institution on Retirement Security, May 5, 2011; "Lessons from Well-Funded Public Pensions: An Analysis of Plans that Weathered the Financial Storm", National Institution on Retirement Security, June 2011.

Island shipyard. On August 5, 2011, it emerged from bankruptcy.¹⁰ The small city of Central Falls, Rhode Island, filed for bankruptcy on August 1, 2011, after operating under a receiver for a year.¹¹ Jefferson County, in the state of Alabama, with a \$3.14 billion debt is in settlement discussions with its creditors.¹² Government employers in the public sector having the power to issue general obligations bonds to cover debt are generally not likely to consider bankruptcy as an option.

Revenues. The sources of state and local revenues have been hit by the economic recession. With income down income tax revenues have dropped. With less money to spend sales taxes are down. Finally, a drop in residential and commercial property values, many caused by mortgage foreclosures, means less property taxes based on the properties lower valuation. During the ongoing economic downfall local governments have also been left with stalled or defaulted economic developments for which the streets, sewers, and lights in the development were publically financed with general obligation bonds backed by the full faith and credit of the local government and taxpayers. With the developer unable to pay the bond debt the municipality must make the payments. Municipal bonds, by contrast, have resumed their traditional role as a safe haven for investors.¹³

5. 2011 Headlines.

Every state has had public discussions regarding the impact of public workers compensation on state budgets. In several states these discussions have drawn nation-wide attention.¹⁴ Proponents of statutory law changes argue that they are addressing the financial deficit in the state budget. Critics reply that there is no significant correlation between collective bargaining rights and state deficit levels. The states of Wisconsin and Ohio have gotten the most press.

Wisconsin. The state of Wisconsin has had a long tradition of establishing workers rights including the first state to enact a workers' compensation law one hundred years ago and in 1959, the first public sector employment law. Early this year recently elected Wisconsin Governor Scott Walker, a Republican, proposed and the Republican controlled legislature passed a law limiting public sector workers collective bargaining rights. Governor Walker argued that the proposal was needed to close a projected \$3.6 billion, two-year budget gap. The law eliminates collective bargaining altogether for home health care workers, family child care workers, employees of University of Wisconsin hospitals and clinics, and faculty and staff at the

¹⁰ "After 3 Years, Vallejo Emerging From Bankruptcy", Associated Press, 8-21-2011.

¹¹ "'Dire' Finances Force R.I. City Into Bankruptcy", Bloomberg, August 1, 2011; "A Small City's Depleted Pension Fund Rattles Rhode Island", The New York Times, July 11, 2011.

¹² "Alabama County Officials Travel to NY To Negotiate With Creditors", The Wall Street Journal, August 23, 2011.

¹³ "A Brighter Outlook for Municipal Bonds", Wall Street Journal, August 21, 2011.

¹⁴ "Labor-Public Sector Unions Under Fire", The New York Times, Topics, July 12, 2011; "State Legislators Target Public Sector Labor Rights", Richard M. Fischl; "Running the Government Like a Business": Wisconsin and the Assault on Workplace Democracy, 121 Yale Law Journal Online 39 (2011); American Bar Association, Section of Labor and Employment Law, Spring 2011, Vol. 39, No. 3.

University of Wisconsin. The law removed many, but not all, of the rights to collectively bargain for some public workers. The changes included work rules and non-wage benefits for non-public safety employees and bars local governments from deducting union dues from employees' paychecks, prohibits non-union state employees from being required to pay union dues, and requires annual recertification by a majority of all the union members each year in order to continue serving as their members' bargaining representative. The collective bargaining agreement is limited to one year. Wage increases are capped to the Consumer Price Index. Employees would contribute 5.8% of their salaries to their pensions and pay at least 12.6% of their health-care premiums.

The legislative process ignited an ongoing public response and made national headlines. On February 17, about 25,000 demonstrators took over the Capital Building, occupying it round the clock for several days in an effort defeat the bill. All fourteen Democrats in the state Senate responded by driving off to Illinois to block the quorum needed to hold a vote on the bill. The number of protestors, for and against the bill, grew up to 70,000 to 100,000 by February 26. After weeks of impasse, the Republican senators reintroduced a version of the bill that dealt only with the collective bargaining section of Governor Walkers plan. With the fourteen Democratic senators absent the measure passed 18-1. The Wisconsin General Assembly, which included Democrats, passed the measure by a 53-42 vote. This provision was reattached to the original "Budget Repair Bill, which had been previously approved. Governor Walker signed the bill on March 11 and was to take effect in late March.¹⁵

The Wisconsin State Ethics Board considered hundreds of complaints filed against Democratic and Republican lawmakers and dismissed all of them saying they lacked specific violations of the ethics code for state public officials, as well as the campaign finance, elections, and lobbying law.¹⁶

Three separate lawsuits were then commenced challenging the law. The Dane County Executive brought an action which was dismissed on April 13 by the Circuit Court holding lack of standing by an agency or arm of government to challenge the constitutional of state laws. The Dane County District Attorney in a lawsuit challenged the final bill stating that sending the final bill to the Senate floor, with insufficient time for debate, was a violation of the State Open Meeting Law.¹⁷ A Circuit Court judge issued a temporary injunction on March 18, which prompted the Democratic senators to return home, and the judge issued a permanent injunction on May 26.¹⁸ A third lawsuit challenging the law was brought by firefighters and other public workers.

Also a lawsuit has been filed in federal court by a consortium of major union coalitions alleging the law takes away the unions' constitutional freedom of speech and association, while illegally discriminating on the basis of employee classification.¹⁹ Another federal lawsuit by Madison and

¹⁵ 2011 Wisconsin Act 10.

¹⁶ "Lawmaker Ethics Complaints Fall Under Politics, Board Rules", St. Paul Pioneer Press, May 19, 2011, p.3.

¹⁷ WisStat Secs. 19.81-19.98.

¹⁸ "Wis. Judge Voids Anti-Union Law", StarTribune.com, May 16, 2011, p. A1.

¹⁹ The Wall Street Journal, 6-15-11, p. 2.

Dane County public workers alleges that the law by exempting some public workers is a violation of equal protection rights and also rights under the First Amendment.²⁰

On April 5, Wisconsin Supreme Court Justice David Prosser narrowly survived, by 7,316 votes out of close to 1.5 million votes cast, a re-election that became a referendum on the collective-bargaining law. Justice Prosser faced challenger Joanne Kloppenburg, an assistant state attorney general. A combined total of about \$5 million was spent on the race which got national attention.²¹ Voter turnout was far above expectations and the voting result kept shifting as county-by-county tallies shifted the leader from one candidate to the other. The Waukesha County clerk's office announced it had made an error in sending voting data which netted Justice Prosser 7,582 votes.²²

The Wisconsin Supreme Court, on June 14, in a 4 to 3 decision, with Justice Prosser the fourth vote, found no violations of the Open Meetings Law overturning the injunction.²³

The decision prompted the collection of voter petitions to provide recall elections for six Republican senators who had voted for Governor Walker's bill and three Democratic assemblymen who had fled to Illinois. The recall open primary was held July 12 for the Republican seats. Republicans filed as Democrats in the Democratic primary but all six Democratic candidates won. On July 19, one recall election was held with the Democratic senator winning. In the Republican general election on August 9, four of the six incumbent Republican state senators won. On August 16, two Democratic incumbents in general recall elections won. The result was the Republicans maintained a majority, 17 to 16, in the state senate. It is estimated that \$33 million was spent on the recall elections.²⁴

Ohio. In the state of Ohio newly elected Republican Governor John Kasich indicated early in his term a desire to reform Ohio's public employee union system, and supported Senate Bill 5 which, upon passage on March 31, substantially amended the State Employment Relations Act. The bill changed significantly from the beginning to the end of the legislative process and ended in preserving collective bargaining for most employees but narrowed the range of topics on which a public employer can negotiate with a union representing its employees. The new law includes:

- No Fair Share Fee – A collective bargaining agreement for public employees may not require non-union members to pay the union a fee for representation services.

²⁰ "Second Federal Lawsuit Filed Over Union Law", Minneapolis StarTribune, July 28, 2011.

²¹ "Supreme Court Race Uses \$4.5 in Outside Advertising Funds", The Badger Herald, April 19, 2011.

²² 1 Politico.com 4-14-11.

²³ State of Wisconsin v. Fitzgerald, etc. al, No. 2011 AP000613, June 14, 2011.

²⁴ ABC News, August 9, 2011.

- Easier to Decertify – Decertification of a public employee union requires petition signatures from only 30% of workers in the collective bargaining unit, as opposed to the previous requirement of 50%.
- No Automatic Pay Increases for Longevity – Instead, the bill institutes a performance pay system for all public workers and requires that layoffs no longer be based solely on seniority.
- Scope of Bargaining Narrowed – Bargaining over health care, sick leave, and pension benefits is limited.
- No Strikes – It is unlawful for any public employee to strike.
- Eliminates Binding Arbitration – The bill eliminates binding interest arbitration as a means of resolving bargaining disputes. Instead, in all public collective bargaining negotiations, the bill adopts mediation and fact-finding as the means to resolve contract disputes. However, if either the employer or the union rejects the fact finder’s recommendation, then the last, best offers made by both sides are presented at a public hearing. At the hearing’s conclusion, the legislative body of the employer is required to accept either its final offer or that of the union.
- Employee Health Care Cost Minimum – The bill requires public workers to pay at least 15% of their health care costs.

Opponents of the law quickly moved to seek by petition a statewide ballot referendum which could overturn the law. The opponents needed 231,149 signatures to place the referendum on the ballot and on June 29, delivered 1,298,301 signatures in a parade of 6,200 marchers. The issue will be on the November 8 ballot and the law will go into effect only if the electorate votes in favor of it.²⁵

Michigan. In Michigan, Governor Rick Snyder signed a law on March 15, enabling gubernatorial-appointed emergency financial managers to alter or terminate public-sector union contracts in order to help avert local governments’ fiscal crises.²⁶ The next day thousands participated in a rally sponsored by unions.²⁷

New Jersey. The Democrat controlled state legislature, with protestors outside the capitol, passed pension and health care benefit cuts pushed by Republican Gov. Chris Christie.²⁸

²⁵ “Record 1.3M Back Vote to Torpedo Senate Bills”, ToledoBlade.com, June 30, 2011.

²⁶ Michigan Legislative Analysis Local Government and School District Accountability Act, February 21, 2011; Mich. Public Act 4 (2011).

²⁷ “Thousands Rally Against Gov. Rick Snyder’s Budget in Lansing”, Detroit Free Press, March 16, 2011.

²⁸ “New Jersey Lawmakers Approve Benefits Rollback For Work Force”, New York Times, June 21, 2011.

Idaho. In Idaho, Republican Governor Butch Otter signed a bill restricting collective-bargaining rights of teachers to salary and benefits, ended tenure, limits contracts to one year, and prohibited layoffs based on seniority (“last in, first out”).²⁹

New York. In New York labor leaders commenced a carefully planned campaign to persuade state employees to accept a wage freeze and other measures to avoid layoffs. Democratic Governor Andrew Cuomo had approved a state budget that depends upon a \$450 million in labor savings.³⁰ On August 15, the rank and file of the state’s largest public workers union agreed to a new five-year contract that freezes wages for three years.³¹

Massachusetts. The Massachusetts state legislature, heavily Democratic, passed a bill restricting the collective-bargaining rights of municipal employees for health care benefits. The new law allows municipalities to change current co-payments, deductibles and certain other out-of-pocket costs. The municipality is required to have thirty day discussion with the unions before making changes.³² Massachusetts unions are on pace to break state records for spending on lobbying, sixty per cent more than last year and triple what they spent five years ago.³³

Indiana. With protestors outside the capitol Democratic legislators fled the state for five weeks as the legislature considered bills proposed by Republican Governor Mitch Daniels to curb the power of public sector workers. The compromise law which passed significantly limits the scope of bargaining for teachers.

Connecticut. In Connecticut, Democratic Governor Dannel Malloy sought a balanced budget by proposing a labor agreement that would save \$1.6 billion over two years. After union rejection of the proposal layoff notices went to 3,000 workers. On August 18 the workers accepted the proposal.³⁴

6. Federal Headlines.

In April the NLRB filed a complaint finding that aircraft giant Boeing Corporation illegally proposed to build a 787 Dreamliner production line at a new nonunion plant in South Carolina, a state where unions are weak, instead of in the state of Washington where union employees were already building such aircraft. In June, Boeing asked that the complaint be dismissed.³⁵

²⁹ “Idaho OKs Bill Limiting Bargaining”, Politico, March 8, 2011.

³⁰ “New York Unions Press Members to Accept Deal”, The New York Times, July 17, 2011.

³¹ “NY Public Workers Union Agrees to Wage Freeze”, The New York Times, August 16, 2011.

³² Wall Street Journal, July 2, 2011, p. 13.

³³ “Massachusetts Unions Ramping Up Lobbying Spending In 2011”, BostonHerald.com, Associated Press, August 20, 2011.

³⁴ New York Times, August 19, 2011.

³⁵ “Boeing Urges Judge to Toss NLRB Case”, The Washington Times, June 14, 2011.

In June this year the NLRB proposed a sweeping change to the federal rules governing union organizing election which would compress the time between a formal call for a vote by workers on whether to join a union, and the election itself. The median time is now 38 days. Cutting the time before an election would likely make it harder for the employer to build a case for opposing the union, because union campaigns often begin months earlier often without an employer's knowledge.³⁶

7. International.

Greece. As Parliament considered sweeping public spending cuts in exchange for an international financial bailout thousands of Greeks demonstrated in Athens outside Parliament in late June. The demonstrations began peacefully, but later turned violent resulting in about 100 injuries. Greece's two major umbrella unions, private sector GSEE and public-sector ADEDY, held the protest which disrupted public and private services around the country.³⁷

Britain. The government of Prime Minister David Cameron has said that the current public pension arrangement is unsustainable. Public pensions currently cost Britain nearly \$50 billion a year. The proposal is to raise the working age to 66 by 2020, increase the monthly employee pension contribution, and change the pension calculation from the workers' final salary to an average career salary. Tens of thousands of British teachers and public-sector workers walked off their jobs on June 30 to protest the proposed changes.³⁸ The government release of its plans to raise public service employees pension contributions also brought union anger over the timing of the release prior to union/employer negotiations.³⁹

8. Conclusion.

The several well publicized events have quite possibly resulted in a re-energizing of the labor movement. It has given workers a genuine voice in important decisions about their work lives and the power to make their voices heard. It further provides the opportunity to build new support with new members.

The events have also raised what political role should unions play in the current economy. The debates and proposed statutory changes to collective bargaining rights may have more to do with weakening unions for partisan political purposes than balancing the budget and support for the proposed law changes have been largely along partisan lines.

On August 25, the AFL-CIO President, Richard Trumka, called for President Barack Obama to press for job creation and left open the question of whether the AFL-CIO will participate in next

³⁶ "Proposed NLRB Rules are Sensible and Should be Adopted", Los Angeles Times, July 9, 2011; "N.L.R.B. Rules Would Streamline Unionizing", The New York Times, June 22, 2011; Proposed amendments to NLRB election rules and regulations fact sheet, NLRB.gov/node/525.

³⁷ The Wall Street Journal, June 29, 2011, p.1.

³⁸ "Public Workers Strike in Britain Over Pensions", The New York Times, June 30, 2011.

³⁹ "Public Sector Pensions: Union Anger on Contributions", BBC News Business, July 28, 2011.

year's Democratic National Convention.⁴⁰ Trumka noted that despite a steady decline in membership unions remain healthy and pointed to the recall elections in Wisconsin as proof that they are active, relevant and successful. He has also stated that financial and manpower resources will be directed to the state and local levels through the creation of a Super PAC.⁴¹

⁴⁰ "Trumka: Labor Support for Obama in Question", The Washington Times, August 25, 2011.

⁴¹ "AFL-CIO Backs Off Support for Obama, Democrats; Forms New Super PAC," thenewamerican.com, August 30, 2011.