WISCONSIN AND BEYOND:
The State of Public Sector Bargaining in the United States

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State Legislators Target Public Sector Labor Rights

By Joseph E. Slater

The widespread and aggressive attacks on public sector collective bargaining (CB) rights have been the most significant trend in labor and employment law so far in 2011. While the most highly publicized and extreme changes have occurred in Wisconsin and Ohio, significant moves are afoot in a number of states. The changes in Wisconsin and Ohio represent the most radical revisions of any labor law in the United States in decades, and they have set off a political firestorm.

Wisconsin Legislation
Prior to recent amendment, Wisconsin had two fairly similar public sector labor statutes, one covering local and county government employees and the other state employees. Ironically, the former, enacted in 1959, was the first state law permitting public sector CB in the country. The bill recently passed and signed by Governor Scott Walker would make sweeping revisions to these laws (except for certain employees in “protective occupations,” mainly police and firefighters). While the bill is currently enjoined, it would make the following changes, among others, in public sector bargaining rights.

It would eliminate CB rights entirely for some employees: University of Wisconsin (UW) system employees, employees of the UW Hospitals and Clinics Authority, and certain home care and child care providers.

For other public employees, it would generally limit CB to bargaining over a percentage increase (of total base wages) no greater than the percentage change in the consumer price index. No other issues could be negotiated.

The bill would make Wisconsin a “right-to-work” jurisdiction for public employees, meaning that it would be illegal for unions and employers to agree to “fair share” union security clauses. It would also limit the duration of CB agreements to one year, which is very unusual in labor law.

The law would make it illegal for an employer to agree to automatic dues deduction for employees who wish to pay dues. It would enact an unprecedented mandatory recertification system under which every union would face a recertification election every year. The union would be recertified only if 51% of the employees in the CB unit—not merely those voting—voted for recertification. So if a bargaining unit had 400 members and the recertification vote was 201 favoring union representation and 100 against, the union would be decertified because 201 is less than 51% of 400.

Further, it would require employees to pay one-half of all required contributions to their retirement system. Currently, the amount of employee contributions is negotiable; for example, the employer could agree to pay part or all of the employee contributions.

The Wisconsin law was temporarily enjoined in March by Judge Maryann Sumi of the Dane County Circuit Court, on the grounds that the legislature passed the law in violation of a statutory requirement that 24 hours’ notice be given before passing such a law. Sumi then issued a permanent injunction in late May. On June 14, the Wisconsin Supreme Court ruled 4–3 that
Sumi had exceeded her authority in granting the injunctions. Another legal challenge has been filed, and others are likely, some based on the process and some on the substance of the law.

Some unions and public employers are signing contracts in this period, as the law does not apply to contracts in place as of its effective date. Setting the table for further complications later, defenders of the bill argue that if they prevail in the Wisconsin Supreme Court, the effective date of the law will be retroactive to March 25.

The law has prompted considerable political activity, from massive protests in Madison to recall efforts aimed at both Republicans (six pending) who voted for the bill and Democrats (three pending) who fled the state in an attempt to block the bill by preventing a legislative quorum. A recent state supreme court justice race between Republican incumbent David Prosser and Democrat Assistant Attorney General JoAnne Kloppenburg was obviously affected by the politics of this issue (after a recount, Prosser’s small lead shrank only slightly, he was certified the winner, and Kloppenburg decided not to request judicial review).

**Ohio Legislation**

Prior to recent amendments, Ohio had a public sector labor law applicable to most public employees. Enacted in the early 1980s, it even allowed most public workers to strike. The new bill recently signed into law, SB-5, would profoundly alter this law. SB-5 may soon be on hold for a referendum process, as described further below. But as passed, it does the following things, among others.

SB-5 eliminates CB rights entirely for certain employees, including most college and university faculty, lower-level supervisors in police and fire departments, and charter school employees. It also limits the bargaining rights of some other employees; for example, regional council of government employees and certain members of the unclassified civil service could bargain only if the public employer elects to do so.

For employees who retain bargaining rights, SB-5 eliminates both the right to strike for public employees who currently have that right (all public employees with the exception of police, firefighters, and a few other categories) and the right to binding interest arbitration at impasse for employees who cannot strike under preexisting law.

SB-5 provides stiff penalties (two days’ pay for each day striking and removal) for striking or instigating a strike. Encouraging or condoning a strike is also forbidden.

Instead, the parties are left to mediation and fact-finding, and if these do not lead to an agreement, the governing legislative body can simply choose to adopt the employer’s final offer. A majority of the union or the employer can reject a fact-finder’s recommendations (previously, a two-thirds vote was required to reject).

If either side rejects, the parties’ last best offers will be submitted to the public employer’s legislative body to make a selection. If the legislative body fails to choose, the law requires the public employer’s last best offer to become the agreement. For certain employers, if the legislative body selects the last best offer that costs more and if the body’s chief financial officer cannot or refuses to determine whether sufficient funds exist to cover the agreement, the last best offers will be submitted to the voters. This is the only impasse procedure SB-5 allows, unlike the
previous law, under which parties could mutually agree to a wide range of procedures to resolve impasses.

SB-5 imposes right-to-work rules by barring fair-share agreements. It also bars public employers from agreeing to provide payroll deductions for any contributions to a political action committee without written authorization from the individual employee.

Further, it restricts the scope of bargaining and expands the list of subjects that are inappropriate for CB: (1) employer-paid employee contributions to retirement systems, (2) health care benefits (except the amount of premium the employer and employees pay, although not negotiable is the provision of health care benefits, which the employer is required to pay more than 85% of), (3) privatization or contracting out of a public employer’s work, and (4) the number of employees required to be on duty or employed.

It also permits public employers to refuse to bargain on any subject reserved to the management of the governmental unit, even if the subject affects wages, hours, and terms and conditions of employment. It bars CB agreements (CBAs) from providing for an hourly overtime payment rate that exceeds the overtime rate required by the Fair Labor Standards Act. It bars CBAs from containing provisions for certain types of leave to accrue above listed amounts or to pay out for sick leave at a rate higher than specified amounts. And it bars grievances and arbitrations based on past practice of the parties.

SB-5 further restricts bargaining in education, including barring negotiating on minimum number of personnel, anything restricting the employer’s ability to assign personnel, and maximum number of students assigned to a class or teacher. Also, employers cannot agree to any restriction on the public employer’s authority to acquire any products, programs, or services from educational service centers.

The bill also gives greater rights for a public employer in a state of fiscal emergency or under “fiscal watch” to terminate, modify, or negotiate the agreement. The law appears to repeal the “contract bar” rule. And it repeals the provision requiring the public sector labor law to be liberally construed.

SB-5 is also facing challenges. Currently, a petition drive is underway to place repeal of the law on the ballot in November 2011. If enough signatures are gathered, the law will be put on hold until the referendum vote.

**Initiatives in Other States**

While Wisconsin and Ohio have gotten the most press, other states where Republicans control most or all of state government have also passed bills limiting the CB rights of public workers.

**Michigan.** In Michigan, the recently enacted Local Government and School District Fiscal Accountability Act allows the governor to appoint an “emergency manager” for local governments experiencing a “financial emergency.” The manager can reject, modify, or terminate any terms of CBAs with public sector unions. A pair of Detroit municipal pension funds has filed lawsuits alleging that this violates the Contracts Clause of the Constitution. Also, a proposed bill would provide even harsher penalties for striking teachers, including the sanction of suspending or revoking teaching licenses.
New Hampshire. The New Hampshire House, on March 30, approved legislation that would eliminate the negotiated terms of employment for public workers and make them “at-will” employees at the end of a CBA’s term. Both houses subsequently passed a right-to-work bill that would apply to both public and private sector unions. New Hampshire governor Jane Lynch vetoed the bill. At press time, it is unclear whether the legislature has the votes to override the veto.

Alabama. Alabama passed a statute making it a crime to arrange for public employee payments “by salary deduction or otherwise” to political action committees or organizations, including unions, that use part of the money for “political activity.” That law has been enjoined by the U.S. District Court for the Northern District of Alabama, on the grounds that it is overbroad regarding activities the First Amendment protects and it is too vague to provide adequate notice. The state is appealing.

Idaho. Idaho recently enacted a series of bills that curtail teachers’ CB rights. One bill limits such bargaining to wages and benefits. It also eliminates teacher seniority protections during layoffs and replaces tenure-track contracts for new teachers with renewable agreements of one or two years. As in Ohio, this bill is facing a campaign for repeal via a referendum.

Indiana. Indiana passed a statute significantly limiting the scope of bargaining for teachers—for example, by forbidding the parties to agree in a contract to what were formally “permissive” topics of negotiation (those over which unions and employers may, but are not legally required, to bargain). It also appears to bar arbitration over contract grievances, and to substitute fact-finding for arbitration in impasse resolution.

Oklahoma. Oklahoma recently repealed a 2004 law requiring cities with populations of at least 35,000 to bargain collectively with unions. This change does not affect police and firefighters, who are covered by a separate statute. However, a separate bill is pending that would affect the rights of police and firefighters to binding arbitration.

Issues and Criticisms
Proponents of these bills argue they address problems with state deficits. Critics reply that there is no significant correlation between CB rights and state deficit levels. At a congressional hearing, Representative Mike Quigley (D-Ill.) observed that states that allow public sector CB on average have a 14% deficit relative to their budgets, while states that bar CB have 16.5% deficits.

For example, Texas and North Carolina, with little or no public sector CB, have very high deficit levels (20% anticipated in North Carolina in 2012). Meanwhile, some states with strong public sector bargaining laws have smaller-than average deficits. Wisconsin was projected to have a deficit of 12.8% of its budget for fiscal 2010, Ohio 11%, and Iowa 3.5%.

These proposals have also prompted numerous studies on whether public employees are “overpaid” compared to private sector employees. Studies finding that public workers are overpaid tend to look at gross average pay or median pay and do not take into account the different types of jobs and the different types of workers in the public sector. The public sector has many more professional jobs, fewer unskilled service jobs, and older, more educated workers. Multiple studies making adjustments for these factors have found that public workers as a whole are paid less than private workers, even including benefits such as health care and
pensions. (Public workers at the bottom of the pay scale are sometimes somewhat overpaid relative to the private sector, but workers in the middle and nearer the top are significantly underpaid.)

Proponents also point to the underfunding of many public employee pension systems. Critics reply that in most public sector jurisdictions, pension benefits are not a legal subject of bargaining and that problems lie more with the stock market crash and dubious actuarial assumptions. Apart from changes in public sector CB laws, many states have recently revised their public sector pension statutes (19 states from January to September 2010 alone). These laws increased employee contributions to retirement plans, reduced benefits, or both.

Finally, critics point to right-to-work provisions, rules barring or restricting the use of dues checkoff, and the onerous recertification rules in Wisconsin to suggest that these laws have more to do with weakening unions for partisan political purposes than balancing the budget. Indeed, support for these laws has been along partisan lines, with Republicans generally backing them and Democrats opposing them. The political battles will not end soon.

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