STATE INITIATIVES AFFECTING PUBLIC EMPLOYEES’ COLLECTIVE BARGAINING RIGHTS

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INTRODUCTION

In 2011, attacks on public employee collective bargaining rights made headlines. State employees’ rights came under fire even in states like Wisconsin that had long supported rights of public employees to organize and engage in collective bargaining. Although this attack on public employee rights was not new, it was well funded and well coordinated. Some of these efforts succeeded in curtailing public employees’ rights; many did not. Even in states like Wisconsin where a complete overhaul of public employee collective bargaining eventually passed, there have been successful attempts to block this legislation through the courts. Below is a brief summary of some of the state initiatives affecting public employees’ collective bargaining rights. This article is an update of a Powerpoint presentation given at the 2011 ABA Employment Rights and Responsibilities Committee Midwinter Meeting.

I. Various State Attempts to Overhaul Public Employee Collective Bargaining

Wisconsin’s new governor’s attempts to overhaul its public employee collective bargaining rights received much attention early in 2011. In 1959, Wisconsin was the first state to enact a collective bargaining law for public employees. In 2011, citing a budget deficit that many claimed was exaggerated and compounded by new corporate tax breaks, Governor Scott Walker proposed a new budget bill that would eliminate most collective bargaining rights for public employees and that would require workers to pay half of their pension costs and at least 12% of state health insurance premiums. The state’s Democratic state senators left the state hoping to prevent a quorum and passage of the bill.

Despite numerous protests and the absence of the state’s Democratic senators, Wisconsin Act 10 was passed and Governor Walker signed it on March 11, 2011. The law
takes away all collective bargaining rights for state employees except for bargaining over wages. Any raises beyond the rate of inflation would require voter referendum and approval. The law requires public employees to pay more for pensions and health insurance and prohibits state and municipal governments from collecting union dues.

The Dane County District Attorney filed suit for violations of Wisconsin’s open meeting laws and the Dane County, WI Circuit Court has now issued a permanent injunction against the Act, ruling that the joint Assembly-Senate conference committee violated the open meeting laws when it considered and passed Wisconsin Act 10.

The Wisconsin Supreme Court held oral argument on June 6, 2011 on whether it should accept jurisdiction over an appeal. On June 14, 2011, the Wisconsin Supreme Court in a 4-3 decision vacated the lower court’s injunction, stating the lower court “usurped the legislative power which the Wisconsin Constitution grants exclusively to the legislature” by enjoining publication of the law and further held that in enacting Wisconsin Act 10, the legislature did not violate the open meetings provisions of Wisconsin’s Constitution.

With respect to the claim that Wisconsin’s open meetings laws were violated by posting a notice less than 24 hours before the meeting to consider the bill, the Supreme Court held that Wisconsin legislature relied on interpretations of its own rules and that the court would not determine whether internal operating rules or procedural statutes have been complied with by the legislature in the course of enacting legislation. In a strong dissent that began by reprinting the front cover of the Wisconsin State Journal calling the bill a “Capitol Shocker,” the Chief Justice stated that the majority opinion’s explanations for upholding the bill were “clearly disingenuous, based on disinformation.” Chief Justice Abrahamson further stated that the
majority opinion lacked “a reasoned, transparent analysis” and incorporated “numerous errors of law and fact.”

Ohio, which enacted public employee collective bargaining legislation in 1983, passed Senate Bill 5 which was signed into law on March 31, 2011. The law, which applies to public employees, removes the continuation, modification or deletion of an existing collective bargaining agreement from a subject of bargaining. In other words, for public employees an expiring collective bargaining agreement is essentially torn up and they have to start from scratch to reach a new agreement. The law also prohibits bargaining about retirement system contributions, health care benefits, privatization, contracting out or the number of employees required to be employed. The law continues to allow bargaining on wages, hours, terms and conditions of employment and the decision to enter into a collective bargaining agreement. The law also prohibits strikes by public employees.

Opponents of Ohio’s Senate Bill 5 have demonstrated against the bill and are now engaging in an effort to place the bill on the November ballot. If opponents can obtain 230,000 signatures within 90 days of the bill’s passage, a referendum will be placed on the ballot where voters can determine the law’s fate.

Michigan enacted Emergency Financial Manager legislation in March 2011. The law extends the powers of emergency managers to remove locally elected officials, terminate collective bargaining, and force consolidation of schools, townships, cities, and counties – all without seeking authority or approval from any elected body or from the electorate. In April 2011, the first City Emergency Manager was appointed for Benton Harbor, MI, taking away all power of the elected City officials. The cities of Ecorse and Pontiac and the Detroit public school system now have emergency managers in place.
In Oklahoma, HB 1593 was signed into law on April 29, 2011. The law repeals the Oklahoma Municipal Employee Collective Bargaining Act, which effectively eliminates all collective bargaining rights for municipal workers. Indiana Democrats left the State to prevent a quorum on HB 1585, which would have prohibited state employee collective bargaining, would have criminalized strikes by public employees and would have prohibited municipal and school employers from deducting union dues from paychecks. Indiana eventually passed an act that codified an earlier executive order that prohibited collective bargaining rights for most state employees and a similar act that prohibited collective bargaining for school employees on the school calendar, teacher dismissal criteria, restructuring options, teacher evaluation process or other matters that do not include salary, wages and fringe benefits.

Other state initiatives seeking wholesale changes in public employee collective bargaining have met with less success. For example, Iowa House File 525 passed the Iowa House but stalled and died in the Iowa Senate. The bill would have excluded retirement systems, staff cuts, outsourcing and layoffs from collective bargaining, would have increased state employee health insurance premiums and would have changed the state public employee interest arbitration provisions (used in the event of impasse in contract negotiations) by eliminating the right of an arbitrator to consider past contracts and by requiring arbitrators to compare public employee wages, benefits, hours or working conditions to the private sector and to consider whether the public employer had the ability to finance changes to the collective bargaining agreement without raising taxes. A bill in Illinois that would have stripped collective bargaining rights from state employees failed in the Senate.
Likewise, in Minnesota, HF 192, appears to have no chance of success. The bill was referred to Committee in February 2011. The law would have frozen public employee compensation, including employer contributions for benefits, would have required a study to determine future compensation and would have required that public employee compensation be comparable to private sector employment “with similar skill, effort, responsibilities and working conditions.” HF 192 also would have required reductions in the state workforce and would have removed restrictions on contracts with private vendors if public employees are available.

II. “Right to Work” Laws

A right to work state is a state where an employee cannot be compelled to join a union as a condition of employment and/or that outlaws union security clauses, which in some cases require a member to pay dues or be terminated. As of the beginning of March 2011, 22 states had right to work laws that prohibited employees from being required to join a union or pay dues or fees to a union as a condition of employment.\(^1\) Since then, right to work bills have been considered, are expected to be introduced or have passed in at least 16 other states. New Hampshire’s governor recently vetoed a “right to work” law in that state and a vote to override that veto has been postponed.

III. “Paycheck Protection” Laws and Public Employee Political Rights

In 2010 and 2011, several states considered or enacted so-called “paycheck protection” laws prohibiting or restricting what union dues may be deducted from public employee paychecks. Many of the same states have also considered or passed laws limiting

\(^1\) These states include: AL, AZ, AR, FL, GA, ID, IA, KS, LA, MS, NE, NV, NC, ND, OK, SC, SD, TN, TX, UT, VA and WY
public employees’ political rights. Alabama passed perhaps the most controversial of these laws. Alabama Act 2010-761 (also called the “Ethics Reform Package”) banned all payroll deductions for employee associations and banned any checkoffs to any organization if the dues are used for a political purpose. The law also prohibited public employees from engaging in “political activity” on state time or soliciting political contributions from subordinates or coercing subordinates to “work in any capacity in any political campaign or cause.” The law defines “political activity” extremely broadly to include, *inter alia*: making contributions to or contracting with any entity which engages in any form of political communication; engaging in or paying for public opinion polling; engaging in or paying for any form of political communication; engaging in any type of political advertising in any medium; phone calling for any political purpose; distributing political literature of any type, or providing any type or in-kind help or support to a political candidate. The law provides for criminal penalties for violations.

A lawsuit was filed by the Alabama Education Association and a preliminary injunction was issued enjoining much of the law on March 18, 2011. The Eleventh Circuit has so far upheld the preliminary injunction. A new lawsuit was filed by several firefighters associations after some cities claimed the preliminary injunction was only binding on the defendants in the original lawsuit. Injunctions were granted also enjoining the law in those cases.

Arizona had two different bills governing paycheck deductions and governing political activity with two different results. Both laws passed the legislature, but the Governor vetoed a bill that would have prohibited public employees from engaging in political activity or lobbying a governmental entity during working hours but signed into
law a requirement that employees annually reauthorize union dues deductions for any union
dues that are utilized for a political purpose. In Florida, a bill that would have prohibited
dues from being used for political activity unless there was annual re-authorization and that
would have authorized a member to cancel their union membership at any time and have
their dues refunded was withdrawn from consideration.

So-called “paycheck protection” legislation is still pending or expected in many
other states. For example, in California, there is a campaign to put a so-called “paycheck
deception” measure that would ban automatic dues deduction for any portion of union dues
that are used for political purposes on the November 2012 ballot.

IV. “Save our Secret Ballot” Laws

Currently, under the National Labor Relations Act (“NLRA”), there are two paths to
obtaining union representation. One is through certification of representation based upon a
Board conducted secret ballot election. The other path allows for voluntary recognition of a
union where there is reliable evidence of majority union support.

However, despite what might be considered obvious preemption, four states,
Arizona, South Carolina, South Dakota and Utah, passed measures in 2010 that required
secret ballot elections for union representation. In January 2011, the National Labor
Relations Board (“NLRB”) wrote to the states advising them that the laws were in conflict
and preempted by the NLRA. After some dialogue with the states, the NLRB filed suit
against the State of Arizona, National Labor Relations Board v. State of Arizona. The
NLRB has indicated that it will also sue South Dakota. Despite the threat of a lawsuit,
many other states are considering or have passed similar legislation. Virginia recently
failed to enact similar, proposed legislation.
V. Anti-Prevailing Wage Legislation

Generally, prevailing wage laws require state contractors and subcontractors to pay not less than the prevailing rate of pay (usually hourly wage plus benefits for work of similar character in the county in which the work is performed). A prevailing wage is often based on state department of labor classifications and rates. In 2011, proposed bills have been introduced in several states aimed at limiting or curtailing prevailing wage laws and are expected in many other states. For example, in Indiana, the prevailing wage law was slightly modified, to raise the threshold for an applicable contract from $150,000 to $350,000 in 2012. Indiana also modified the composition of the committee that determines the prevailing wage so that it includes a representative to the Associated Builders and Contractors, along with a representative of the AFL-CIO. In Ohio, there is a bill under consideration that would raise the prevailing wage threshold for public contracts from $80,000 to $3.5 million.

VI. Public Employee Compensation and Retirement Systems

In 2011, numerous states and municipalities cut employee compensation and cut back public employee benefits. In addition, many states and municipalities have proposed significant privatization. In Florida, for example, the Senate and House reached an agreement requiring state employees to contribute 3% of their salaries to the state pension fund, eliminated a 3% cost of living adjustment for retirees and the state now requires new employees to have 8 years of employment in order to be vested in the state retirement system. Washington eliminated cost-of-living increases for state retirees. In Hawaii, many public employees have received a 5% pay cut and the pay cuts will be in effect for at least two more years. Michigan passed a bill that would freeze wages and benefits for certain
public employees during contract negotiations. It was sent to the Governor for signature on May 26, 2011.

Several lawsuits have been filed challenging the cuts and changes in public employee benefits and others are expected.

**VII. Public Employee Merit and Teacher Tenure Systems**

In 2011, several states proposed or enacted legislation designed to end teacher tenure, implement merit pay systems and/or end merit protection systems for public employees. For example, Florida enacted legislation ending teacher tenure and implementing merit pay systems based on test scores. Tennessee passed a law that allows teachers to engage in “collaborative conferencing” only on certain subjects and does away with collective bargaining for teachers. Idaho passed bills removing most collective bargaining rights from teachers and implementing a merit pay system. Several other states are considering similar legislation. For example, Arizona’s governor is considering a special session to address proposals to revise merit protection systems to make it easier to fire employees. New Jersey’s governor has called for overhaul of the public school systems, ending teacher tenure and instituting a merit based pay system for all teachers.

The lower court granted a preliminary injunction against the lockout, but the Eighth Circuit stayed that ruling and the lockout continues. The Eighth Circuit heard oral argument on the preliminary injunction on June 3, 2011.

**CONCLUSION**

Public employees earn less than their private sector counterparts, taking education levels into account. Wages in the public sector lag the private sector by 11.5%. Benefits in public employment are higher, but even after factoring in benefits, total compensation lags