Post-Arbitration Deferral of Unfair Labor Practices in the Public Sector: An Examination of State Approaches

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Introduction

The National Labor Relations Act (NLRA or the Act) was designed, in part, to permit private sector employees to bargain collectively.[1] Section 8 of the NLRA further protects this right by prohibiting private employers from committing unfair labor practices.[2] While there are many forms of unfair labor practices, three particularly common examples arise under Sections 8(a)(1), (3), and (5).[3] Many states have similar statutes permitting state and local government employees to bargain collectively.[4] Many of these states also have unfair labor practice statutes that parallel NLRA Section 8.[5] If an employer is alleged to have committed an unfair labor practice, an employee may have two potential claims: (1) a contract violation under the collective bargaining agreement (CBA) between the employer and the employee's union; and (2) a statutory claim under the NLRA (for private sector workers) or the respective state's unfair labor practice statute (for state public sector workers).[6]

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1. Charles O. Gregory, *The Collective Bargaining Agreement: Its Nature and Scope*, 1949 WASH. U. L.Q. 3, 4 (1949).

2. National Labor Relations Act (NLRA), 29 U.S.C. § 158(a) (2012).

3. These provisions state: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." *Id.*

4. *See infra* Appendix.

5. *See infra* Appendix.

6. Michael K. Northrop, *Distinguishing Arbitration and Private Settlement in NLRB Deferral Policy*, 44 U. MIAMI L. REV. 341, 342 (1989).

When a contract claim under a CBA arises, it enters a grievance process that may culminate in binding arbitration.[7] However, a statutory claim may be submitted to a labor relations agency. In the private sector, this agency is the National Labor Relations Board (NLRB or the Board).[8] Under certain circumstances, the NLRB may put the statutory issue on hold while the contract claim proceeds through the grievance process.[9] This practice is referred to as pre-arbitration deferral. In *Collyer Insulated Wire*, the NLRB defined the federal requirements for pre-arbitration deferral.[10] If, upon completion, the arbitration grievance process meets certain requirements, the NLRB may choose not even to consider the statutory unfair labor practice issue.[11] This practice is referred to as post-arbitration deferral.[12] For thirty years, the NLRB's standard for determining when it was appropriate to defer to an arbitration award arising from a Section 8(a)(1), (3), or (5) unfair labor practice charge was governed by Board decisions in *Spielberg Manufacturing Co.*[13] and *Olin Corp*.[14] Although not binding on states, the *Spielberg*/*Olin* standard significantly influenced the public sector.[15] Most states permitting public employees to bargain collectively and prohibiting public employers from committing unfair labor practices developed post-arbitration deferral standards that resemble *Spielberg*/*Olin*.[16]

However, in 2014, the NLRB in *Babcock & Wilcox Construction Co.*[17] significantly altered the federal, private sector deferral standard

7. Babcock & Wilcox Constr. Co., 361 N.L.R.B. 1127, 1131 (2014).

8. 29 U.S.C. § 153 (2012).

9. Collyer Insulated Wire, 192 N.L.R.B. 837, 839–40 (1971).

10. The National Labor Relations Board (NLRB or Board) will defer to the parties' collective bargaining agreement's arbitration clause when "the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the [National Labor Relations Act]." *Id.* at 841–42.

11. *Babcock*, 361 N.L.R.B. at 1131.

12. *Id.*

13. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955) (requiring that the parties agreed to be bound by arbitration, the arbitration proceedings were fair and regular, and the arbitration panel's decision was not clearly repugnant to the NLRA's policies and purposes).

14. Before *Olin*, the NLRB had added a fourth requirement to *Spielberg*—that the arbitrator actually considered the unfair labor practice issue. Raytheon Co., 140 N.L.R.B. 883, 885 (1963). *Olin* scaled back this fourth requirement by explaining that if an unfair labor practice issue was factually parallel to the contractual issue and if the arbitrator was presented generally with the facts relevant to the unfair labor practice issue, then *Raytheon*'s "actual consideration" requirement would be satisfied. Olin Corp., 268 N.L.R.B. 573, 574 (1984).

15. *See infra* Appendix.

16. *See infra* Appendix (some states borrow more from *Spielberg* and *Olin* than others).

17. *Babcock*, 361 N.L.R.B. 1127.

for claims arising under Sections 8(a)(1) and (3) of the NLRA while retaining *Spielberg/Olin* requirements for claims arising under Section 8(a)(5). States have not responded to this new federal standard.[18] The NLRB justified creating different deferral standards for Sections 8(a)(1) and (3) claims than for 8(a)(5) claims because the impact of deferral "is particularly significant in 8(a)(1) and (3) cases . . . where employees' contractual rights . . . are separate from their rights under the Act."[19] Most states' deferral standards do not distinguish between these claims. Thus, this Note includes analysis of some 8(a)(5)-equivalent claims in the public sector.

Part I of this Note describes development of the NLRB's post-arbitration deferral standard. Part II first addresses which states allow public employees to bargain collectively and which states prohibit public employers from committing unfair labor practices. Part II then focuses on states with clearly articulated post-arbitration deferral practices. Part III explains how a state's post-arbitration deferral standard affects the rights of public employees, public employers, and states. The conclusion encourages states to reconsider their standards in light of *Babcock* and states' interests, laws, and resources.

I. The Evolution of the Federal Deferral Standard

A. Historical Standards

Before 1955, the NLRB determined on an ad hoc basis whether to defer to an arbitration award on a contract claim that also gave rise to an unfair labor practice charge.[20] In its 1955 *Spielberg* decision, the NLRB articulated its initial standard.[21] The Board required that (1) the proceedings appeared fair and regular, (2) all parties agreed to be bound by the decision, and (3) the arbitrator's decision was not clearly repugnant to the purposes and policies of the NLRA.[22]

In 1963, *Raytheon Co.* added a fourth requirement that the arbitrator actually have considered the unfair labor practice issue.[23] This requirement was designed to avoid giving binding effect to an arbitration award that did not resolve the statutory dispute.[24]

Olin refined the four-part test in 1984, dialing back *Raytheon*'s actual consideration requirement.[25] The Board explained that "an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue,

18. *See infra* Appendix.
19. *Babcock*, 361 N.L.R.B. at 1130.
20. Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955).
21. *Id.* at 1080.
22. *Id.* at 1082.
23. Raytheon Co., 140 N.L.R.B. 883, 886 (1963).
24. *See id.* at 884.
25. Olin Corp., 268 N.L.R.B. 573, 574 (1984).

and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice."[26] The Board also stated that the "not clearly repugnant" requirement meant that deferral was appropriate unless the arbitration award was "palpably wrong."[27] Following *Olin*, the federal post-arbitration deferral standard became known as the *Spielberg*/*Olin* standard and lasted for thirty years.[28]

B. The Current Standard

In 2014, the NLRB fundamentally altered its post-arbitration deferral policy for claims arising under Sections 8(a)(1) and (3) of the NLRA.[29] *Babcock* announced that the NLRB would defer if the arbitration proceedings appeared to be fair and regular, all parties agreed to be bound by the arbitration, and "the party urging deferral show[ed] that: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permit[ted] the award."[30]

Babcock retained the first two *Spielberg*/*Olin* requirements but changed the requirement of the unfair labor practice being "adequately considered" to the arbitrator being "explicitly authorized" to decide the issue.[31] *Babcock* also altered the "not clearly repugnant" requirement to "[NLRB] law reasonably permit[s] the award."[32] These two revisions significantly heightened the threshold requirements that a grievance arbitration must meet for deferral. The NLRB rejected *Spielberg*/*Olin* as "amount[ing] to a conclusive presumption that the arbitrator 'adequately considered' the statutory issue if the arbitrator was merely presented with facts relevant to both an alleged contract violation and an alleged unfair labor practice."[33] *Babcock* continues to control NLRB deferral, although the holding may be a candidate for reversal by the current Board.[34] State labor relations agencies, however, have not followed it.[35] Rather, most states' standards resemble the Board's earlier *Spielberg*/*Olin* standard.[36] Regardless of what the NLRB decides to do

26. *Id.*
27. *Id.*
28. Bryan R. Bienias, *NLRB Makes Sweeping Changes to Arbitration Deferral Standards*, SEYFARTH SHAW LLP (Dec. 16, 2014), https://www.employerlaborrelations.com/tag/olinspielberg-deferral.
29. Babcock & Wilcox Constr. Co., 361 N.L.R.B. 1127 (2014).
30. *Id.* at 1131.
31. *Id.*
32. *Id.* at 1133.
33. *Id.* at 1130.
34. U.S. CHAMBER OF COMMERCE, THE RECORD OF THE NATIONAL LABOR RELATIONS BOARD IN THE OBAMA ADMINISTRATION: REVERSALS AHEAD? 60–63 (2017), https://www.uschamber.com/sites/default/files/chamber_nlrb_review_-_final_-_march_2017.pdf.
35. *See infra* Appendix.
36. *See infra* Appendix.

with the *Babcock* precedent, the deferral issue should be assessed independently by states in light of considerations relevant to state public sector labor relations.

II. States' Public Sector Deferral Standards

For a state labor relations agency to have a post-arbitration deferral policy, the state must (1) give public employees the right to bargain collectively[37] and (2) prohibit employers from committing unfair labor practices.[38] Most states have statutes granting some public sector employees the right to bargain collectively. However, many limit this right to certain categories of employees, such as public school teachers, police officers, or firefighters.[39] This Note does not examine these statutes. Rather, the analysis of state post-arbitration deferral standards that follows focuses on states that allow broad public sector collective bargaining. Twenty-three states satisfy these two criteria.[40]

A. States Lacking Post-Arbitration Deferral Standards

Of these twenty-three, six states lack definitive post-arbitration deferral standards.[41] Nebraska has not confronted the issue.[42] Minnesota, Washington, New Hampshire, Montana, and Alaska have come closer than Nebraska, but lack definitive standards.[43]

In Minnesota, the Office of Administrative Hearings responded to a comment in a rulemaking proposal that the Minnesota Public Employment Relations Board include a provision for deferral, stating that the agency will determine any deferral practice on a case-by-case basis, rather than by rule.[44] The Office of Administrative Hearings did not address what circumstances would be relevant to future agency deferral decisions.

The Washington Public Employment Relations Commission addressed one circumstance in which deferral was appropriate in a unilateral change case when allegations against the employer paralleled Section 8(a)(5) of the NLRA.[45] If the employer's conduct was

37. *See supra* text accompanying note 6. *Contra* Va. Code Ann. § 40.1-57.2 (2017).

38. *See, e.g.*, 43 Pa. Cons. Stat. Ann. § 211.6 (2018). State statutes may also label unfair labor practices as "prohibited practices." *See, e.g.*, N.M. Stat. Ann. § 10-7E-19 (2018).

39. *See, e.g.*, Ga. Code Ann. § 25-5-4 (2017); Idaho Code § 44-1802 (2018); Ky. Rev. Stat. Ann. § 67A.6902 (West 2018); Okla. Stat. tit. 51 § 103 (2017); Tenn. Code Ann. § 49-5-602 to 603 (2018); Wyo. Stat. Ann. § 27-10-102 (2018).

40. *See infra* Appendix.

41. *See infra* Appendix.

42. *See infra* Appendix.

43. *See infra* Appendix.

44. In the Matter of the Proposed Rules of the Minn. Pub. Emp't Relations Bd., OAH 68-9010-33057, 2016 WL 3029802, at *37 (Minn. Office of Admin. Hearings. 2016).

45. *See generally* City of Olympia, Decision No. 4160, 1992 WL 795485 (Wash. Pub. Emp't Relations Comm'n 1992).

"arguably protected or prohibited" by the CBA, the agency would defer.[46] The justification was that a finding that the employer's conduct was permitted by contract would resolve the unfair labor practice issue.[47] However, the agency did not address whether this would be the only circumstance in which it would defer to an arbitration award.[48] Moreover, it did not state whether it would treat allegations under Section (1)(e) differently from allegations under Sections (1)(a) or (c) of the state unfair labor practice statute.[49] Thus, Washington's labor agency has not articulated a deferral standard for cases that parallel NLRA Sections 8(a)(1) and 8(a)(3).

New Hampshire's labor agency also has addressed only one circumstance in which deferral was appropriate. In *Laconia Education Ass'n, NEA-New Hampshire v. Laconia School District*,[50] the union filed unfair labor practice charges alleging that the district violated various sections of New Hampshire's unfair labor practice statute by unilaterally changing terms of a teacher's contract in response to the teacher's union activities.[51] The labor agency cited *Spielberg* as instructive,[52] while asserting authority to review arbitration awards if no contractual provision called for final and binding arbitration.[53] But the agency deferred to the arbitrator's award to reinstate and compensate the teacher because it "essentially covered the subject matter of the [unfair labor practice by] . . . virtually eliminat[ing] any remaining statutory claims."[54] The agency did not state whether it was articulating a general standard or whether *Spielberg* requirements had been met.[55] Thus, while New Hampshire's labor agency has not clearly articulated a standard, it will likely defer to awards that virtually eliminate statutory claims.

Montana also lacks a definitive post-arbitration deferral standard. In *Winchester v. Mountain Line*,[56] the Montana Supreme Court, ruling on an appeal of a pre-arbitration deferral motion, followed the federal *Collyer* pre-arbitration deferral standard and cited *Spielberg* and *Raytheon* in a footnote.[57] This footnote, and the Montana Supreme Court's

46. *Id.* at *2.
47. United Classified Workers Union v. Renton Sch. Dist., Case 9178-U-912033, 1993 WL 832864, at *1 (Wash. Pub. Emp't Relations Comm'n 1993).
48. *See generally id.*; *City of Olympia*, Decision No. 4160, 1993 WL 795485.
49. *See generally United Classified Workers*, Case 9178-U-912033, 1993 WL 832864; *City of Olympia*, 1993 WL 795485.
50. Case No. T-0239-22 (Decision No. 2002-078) (N.H. Pub. Emp't Labor Relations Bd. 2002).
51. *Id.* at 1.
52. *Id.* at 7 n.4.
53. *Id.* at 9.
54. *Id.* at 8 n.4.
55. *See generally id.*
56. Winchester v. Mountain Line, 1999 MT 134, 294 Mont. 517, 982 P.2d 1024.
57. *Id.* at ¶ 20 n.1, 294 Mont. at 521 n.1, 982 P.2d at 1027 n.1.

characterization of federal pre-arbitration deferral practices as persuasive, suggest that the Montana Board of Personnel Appeals may rely on *Spielberg* and *Raytheon* for post-arbitration deferral standards.[58] However, because post-arbitration deferral was not at issue, this conclusion is only speculative.

Similar to the Montana Supreme Court, the Alaska Supreme Court cited the federal pre-arbitration standard and simply hinted at the Alaska Labor Relations Agency's post-arbitration deferral standard in dicta. In *Public Safety Employees Ass'n v. State*,[59] the Alaska Supreme Court reviewed a decision by the Alaska Labor Relations Agency holding it an unfair labor practice for the state to reclassify state trooper recruits, effectively transferring several employees from one bargaining unit to another.[60] The court recognized that Alaska's unfair labor practice statute prohibited "essentially the same conduct" as Sections 8(a)(1) and (3) of the NLRA.[61] The court cited *Collyer* and noted: "The Agency gives 'great weight' to federal decisions in the area of labor relations."[62] The court concluded that the agency's refusal to defer was justified because requiring the union to follow contractual dispute resolution further was "very arguably a futile act" and because agency review of the unfair labor practice claim was "highly desirable."[63] Rather than articulate specific deferral criteria, the court simply upheld the agency's decision not to defer because arbitration would be futile.[64] The decision suggests that the agency enjoys significant discretion but may consider *Spielberg*/*Olin* factors or the current federal *Babcock* standard.[65]

B. Discretionary Approaches of Hawaii, Kansas, and New York

Hawaii, Kansas, and New York come closer to articulating deferral practices than the six states just discussed. However, neither Hawaii nor Kansas has identified relevant factors to consider. While New York has suggested it considers factors similar to *Spielberg*, all three states' labor agencies ultimately assume wide discretion to determine whether deferral is appropriate.

In an unfair labor practice claim involving warehouse employees' working conditions, the Hawaii Public Employment Relations Board recognized its exclusive jurisdiction over the claim. It stated that it has "deferred to the contractual grievance process except where there exists countervailing policy considerations or the Union[ ] fail[s] to satisfy its

58. *See id.*
59. Pub. Safety Emps. Ass'n v. State, 799 P.2d 315 (Alaska 1990).
60. *Id.* at 319.
61. *Id.*
62. *Id.* at 318.
63. *Id.* at 323.
64. *Id.*
65. *Id.* at 315–23.

duty of fair representation effectively depriv[ing] the claimant access to the grievance process."[66] The agency concluded that countervailing policy considerations existed "based on [the union's] allegations that the contract violations were part of a pattern . . . in systematic derogation of the employees' rights" that may have gone undetected in the grievance process.[67] Thus, Hawaii's deferral standard is not based on an articulated set of factors. Rather, it relies on the agency's discretionary analysis of policy considerations, such as a pattern of derogation of employees' rights.[68]

The Kansas Public Employment Relations Board in *International Ass'n of Firefighters* also declined to adopt a multifactor deferral test.[69] The CBA between the city and the firefighters' union required employees to request vacation at least one working shift in advance, although the fire chief mandated that requests be made forty-five days ahead.[70] The union's unfair labor practice charge claimed that the city violated the Kansas Public Employer-Employee Relations Act (PEERA) by unilaterally changing the vacation leave policy.[71] The labor agency cited *Spielberg*[72] but decided that *Spielberg*'s policy justifications were not consistent with Kansas's collective bargaining statute.[73] Unlike federal law, PEERA does not favor arbitration as a dispute resolution mechanism.[74] Rather, PEERA states that "any controversy concerning prohibited practices may be submitted to [the agency]."[75] The agency explained that PEERA does not require it automatically to defer to private arbitration of a prohibited practice complaint.[76] Even if *Spielberg* requirements are met, the agency may hear the prohibited practice complaint and decline deferral to an arbitration award. Thus, Kansas's deferral standard may consider *Spielberg* factors, but the agency retains discretion to make deferral decisions on other bases.[77]

Similar to Kansas, New York's Public Employment Relations Board considers *Spielberg* factors but retains discretion not to defer to

66. In the Matter of United Pub. Workers, AFSCME, Local 646 & Glenn Okimoto, Case No. CE-01-515, 2003 WL 25792393, at *15 (Haw. Labor Relations Bd. 2003).

67. *Id.* at *15.

68. *Id.*; *see also* Fasi v. State Pub. Emp't Relations Bd., 591 P.2d 113, 117 (Haw. 1979) (Supreme Court of Hawaii recognized the board's considerable discretion "to take such action . . . as it deems necessary and proper" in light of the statute).

69. Int'l Ass'n of Firefighters v. City of Junction City, Case No. 75-CAE-4-1994, 1994 WL 16779813 (Kan. Pub. Emp't Relations Bd. 1994).

70. *Id.* at *4.

71. This alleged violation is parallel to a Section 8(a)(5) NLRA claim, but the Public Employee Relations Board did not distinguish between 8(a)(5) and 8(a)(1)- or (3)-equivalent claims. *Id.* at *23–25.

72. *Id.* at *18.

73. *Id.* at *23–25.

74. *Id.*

75. *Id.* at *24.

76. *Id.* at *25.

77. *Id.*

an arbitration award. In *Chenango Forks Central School District v. New York State Public Employment Relations Board*,[78] the New York Appellate Division explained New York's standard of deferral.[79] The Public Employment Relations Board found that the school district committed an improper employer practice[80] by failing to negotiate discontinuance of its practice of reimbursing retirees' Medicare Part B premiums.[81] The court concluded that the agency did not abuse its discretion by not deferring to the arbitrator's decision that the district was not obligated to continue reimbursements.[82] The court cited past board precedent to hold that the board "is not required to defer to a determination made by an arbitrator and certainly should not defer to such a determination where [it] concludes that the statutory scheme is not effectuated by an award."[83] Despite this policy, the court noted that the board may defer to an arbitrator's award "under certain limited circumstances" articulated in *New York City Transit Authority*.[84] To defer, the board must find at a minimum that "the issues raised by the improper practice charge were fully litigated in the arbitration proceeding, that arbitral proceedings were not tainted by unfairness or serious procedural irregularities, and that the determination of the arbitrator was not clearly repugnant to the purposes and policies of the [Act]."[85] Although New York's standard fails to mention the first *Spielberg* requirement—that the parties agreed to be bound by the arbitration—that requirement may be implicit, and two of the deferral factors are borrowed from *Spielberg*. Like Kansas, New York's Public Employment Relations Board may decline deference to an arbitrator's award if other undefined factors so require.[86] The remaining fourteen states have more specific standards than Hawaii, Kansas, and New York.

C. State Standards Following Spielberg

The standards of Oregon and Pennsylvania resemble *Spielberg*'s most deferential standard. Oregon follows *Spielberg*'s three-part test for claims paralleling NLRA Section 8(a)(5), and likely also for claims paralleling Sections 8(a)(1) and (3). In *Siegel v. Gresham Grade Teachers Ass'n*,[87] petitioners alleged a school district had committed an unfair

78. Chenango Forks Cent. Sch. Dist. v. N.Y. State Pub. Emp't Relations Bd., 95 A.D.3d 1479 (N.Y. App. Div. 2012).

79. *Id.* at 1482.

80. An "improper employer practice" is New York's equivalent of an unfair labor practice. *See* N.Y. Lab. Law § 704 (2017).

81. *Chenango*, 95 A.D.3d at 1480.

82. *Id.* at 1487.

83. *Id.* at 1482–83 (quoting N.Y.C. Transit Auth., 4 PERB ¶ 3031 (1971)).

84. *Id.* at 1482 (quoting *N.Y.C. Transit Auth.*, 4 PERB ¶ 3031).

85. *N.Y.C. Transit Auth.*, 4 PERB ¶ 3031.

86. *Cf. Chenango*, 95 A.D.3d at 1483 (board should not follow the arbitrator's award because it was repugnant to New York law).

87. Siegel v. Gresham Grade Teachers Ass'n, 574 P.2d 692 (Or. Ct. App. 1978).

labor practice when it withheld part of their salaries.[88] The Oregon Employment Relations Board deferred to the arbitration award affirming the union's fair share provision, and the Oregon Court of Appeals upheld the deferral.[89] The court cited *Spielberg*'s three requirements that (1) the proceedings appear fair and regular, (2) the parties agreed to be bound, and (3) the arbitrator's decision was not repugnant to the unfair labor practice statute.[90] The court justified the agency's borrowing its standard from the private sector because the Public Employee Relations Act (PERA) made binding arbitration a favored means of dispute resolution.[91] Even though the dispute was not equivalent to a claim under Section 8(a)(1) or (3) of the NLRA, the court did not distinguish between these claims. Having identified arbitration as a favored means of dispute resolution for PERA claims, it is likely that Oregon's deferral standard for parallel 8(a)(1) and (3) claims would also be the deferential *Spielberg* standard.

Pennsylvania's standard does not differ significantly from Oregon's, but it is not as similar to *Spielberg*. In *York Paid Fire Fighters Ass'n v. Pennsylvania Labor Relations Board*,[92] the union filed an unfair labor practice charge and a grievance against the city for unilaterally implementing a policy on light-duty assignments of temporarily ill or injured firefighters.[93] Although this is an 8(a)(5)-equivalent case, the Pennsylvania Labor Relations Board did not distinguish 8(a)(1) and (3) cases from 8(a)(5)-equivalent cases.[94] The Pennsylvania Commonwealth Court acknowledged that the labor board described its post-arbitration deferral policy as requiring "(a) the grievance arbitration proceedings were fair and regular; (b) the dispute was amicably settled or submitted promptly to arbitration; and (c) the result reached was not repugnant to the Act."[95] The union argued that deferral to the arbitrator's decision to deny the grievance was inappropriate because the arbitrator did not address statutory aspects of the unfair labor practice charge.[96] The court rejected this argument, declining to add a fourth requirement to the agency's deferral standard.[97] Pennsylvania's standard requires two *Spielberg* factors, but fails to specify that the parties must have agreed to binding arbitration and adds the require-

88. *Id.* at 693.
89. *Id.* at 694–95.
90. *Id.* at 695.
91. *Id.*
92. York Paid Fire Fighters Ass'n v. Pa. Labor Relations Bd., 630 A.2d 527 (Pa. Commw. Ct. 1993).
93. *Id.* at 527.
94. *See generally id.*; City of York, No. PF-C-90-110-E, 22 PPER ¶ 22146 (Pa. Labor Relations Bd. 1991).
95. *York Paid Fire Fighter's Ass'n*, 630 A.2d at 528.
96. *Id.*
97. *Id.*

ment that the dispute be settled or submitted to arbitration. Similar to *Spielberg*, Pennsylvania's standard establishes a fairly low threshold.

D. State Standards Influenced by Spielberg/Olin

Although Oregon's and Pennsylvania's standards most closely follow *Spielberg*, twelve states have adopted at least two of the three *Spielberg* factors.[98] Most of these jurisdictions have also added a fourth requirement similar to *Olin*'s definition of actual consideration.[99]

Connecticut is one of the states that added a fourth factor. In *City of Hartford v. Hartford Municipal Employees Ass'n*,[100] civil engineers filed an unfair labor charge challenging city personnel rules affecting work schedules.[101] The State Board of Labor Relations found that the city committed an unfair labor practice by refusing to comply with a grievance settlement providing employees the opportunity to alter their schedules.[102] The Supreme Court of Connecticut recognized that the labor board had adopted a post-arbitration deferral policy analogous to the NLRB's standard.[103] The court stated that the federal post-arbitration deferral standard required that

> (1) the unfair practice had been presented to and considered by the arbitral tribunal; (2) the arbitral proceedings were fair and regular; (3) all parties had agreed to be bound by the arbitral award; and (4) the award is not repugnant to the purposes and policies of the labor relations statutes.[104]

The court concluded that the NLRB's policies were "sufficient safeguards for the integrity of the dispute resolution procedures agreed upon by the parties."[105] The second, third, and fourth requirements are taken directly from *Spielberg*. The first requirement resembles *Olin*'s definition of actual consideration, as *Olin* requires the facts relevant to the unfair labor practice issue to have been "presented generally" to the arbitrator.[106] However, *Olin*'s definition of actual consideration also includes the requirement that the contractual grievance and the unfair labor practice issue be "factually parallel."[107] This element of *Olin* is absent from Connecticut's standard.[108]

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98. *See infra* Appendix.
99. *See infra* Appendix; *see also* Olin Corp., 268 N.L.R.B. 573, 574 (1984); Raytheon Co., 140 N.L.R.B. 883, 885 (1963).
100. City of Hartford v. Hartford Mun. Emps. Ass'n, 788 A.2d 60 (Conn. 2002).
101. *Id.* at 63.
102. *Id.*
103. *Id.* at 81.
104. *Id.*
105. *Id.* at 82.
106. Olin Corp., 268 N.L.R.B. 573, 574 (1984).
107. *Id.*
108. *City of Hartford*, 788 A.2d at 81–82.

Illinois's standard is identical to Connecticut's. The Illinois Labor Relations Board follows *Spielberg/Olin* deferral with the exception that its first requirement is not exactly *Olin*'s definition of actual consideration.[109] Rather, it is the same "presented to and considered by" requirement as in Connecticut's standard, which reproduces only part of *Olin*'s standard.[110] In *Service Employees International Union*, the union alleged that the employer's unilateral implementation of a shutdown day the day after Thanksgiving violated Sections 10(a)(1) and (4) of the Illinois Public Labor Relations Act.[111] The Illinois labor agency found deferral to the arbitrator's decision to dismiss the grievances appropriate, stating that *Spielberg* deferral demands that

> (1) the unfair labor practice issues have been presented to and considered by an arbitrator; (2) the arbitration proceedings appear to have been fair and regular; (3) all parties to the arbitration agreed to be bound by the award; and (4) the arbitration is not clearly repugnant to the purposes and policies of the [Illinois Public Labor Relations] Act.[112]

These factors resemble Connecticut's standard and the long-standing *Spielberg/Olin* standard.

New Jersey assesses almost precisely the same factors as Connecticut and Illinois. In *New Jersey Transit Bus Operations*,[113] the New Jersey Public Employment Relations Commission considered an unfair practice charge alleging that New Jersey Transit Bus Operations suspended the union's president in retaliation for his grievance activity.[114] The labor agency deferred to the arbitration award that the president's suspension, while based on protected conduct, was not motivated by anti-union animus and found it "instructive" to examine the evolution of the federal deferral doctrine.[115] The agency distinguished Section 8(a)(5)-equivalent NLRA claims from Section 8(a)(3)-equivalent claims before holding that it would not defer to an arbitration award of a Section 8(a)(3) allegation unless "(1) the arbitrator had authority to consider the issues of contractual interpretation underlying the unfair practice charge; (2) the proceedings were fair and regular; (3) the award was not repugnant to the Act; and (4) the unfair practice

109. Serv. Emps. Int'l Union at 9, Case No. L-CA-15-020, 33 PERI ¶ 133 (Ill. Labor Relations Bd. Gen. Counsel 2017).

110. As with Connecticut's standard, Illinois's lacks *Olin*'s factual parallelism requirement. *Id.*; *Olin*, 268 N.L.R.B. at 574.

111. *Service Emps. Int'l Union* at 1, Case No. L-CA-15-020, 33 PERI ¶ 133.

112. *Id* at 9. Section 10(a)(1) parallels Section 8(a)(1) of the NLRA, and Section 10(a)(4) parallels Section 8(a)(5) of the NLRA. *Compare* 29 U.S.C. § 158(a) (2012), *with* 5 ILL. COMP. STAT. 315/10 (2014).

113. N.J. Transit Bus Operations, No. CO-87-99-52, 13 NJPER ¶ 18294 (N.J. Pub. Emp't Relations Comm'n 1987).

114. *Id.*

115. *Id.*

charge was presented to and considered by the arbitrator."[116] The first requirement apparently means that the parties had previously agreed to binding arbitration, thereby giving the arbitrator authority to act. Thus, these requirements are similar to *Spielberg* and to Connecticut's and Illinois's second, third, and fourth requirements. New Jersey's last requirement is the same as Connecticut's and Illinois's first requirement, containing an element of *Olin*'s actual consideration definition.

In sum, Connecticut, Illinois, and New Jersey's standards borrow from *Spielberg* and add the requirement that the unfair labor practice issue be "presented to" and "considered by" the arbitrator. This factor resembles, but does not directly adopt, *Olin*'s definition of "actual consideration" because it lacks the factual parallelism element.[117]

Rhode Island's, Ohio's, and Maine's standards are also similar to *Spielberg*/*Olin*, but differ from Connecticut, Illinois, and New Jersey because they include the factual parallelism requirement. In *University of Rhode Island v. University of Rhode Island Chapter of the American Ass'n of University Professors*,[118] the superior court of Rhode Island heard an appeal from a State Labor Board decision.[119] The union had alleged that the University violated Sections (6) and (10) of Rhode Island's unfair labor practice statute by failing to bargain with the union and interfering with the employees' right to bargain collectively.[120] The court cited the three *Spielberg* requirements as authoritative and added a fourth, requiring the agency to defer to an arbitrator's resolution of an unfair labor practice issue if the issue is "factually parallel" to the contractual grievance.[121] Because the unilateral employer action here was factually parallel, the court required the matter be sent to arbitration.[122] This "factually parallel" requirement borrows the second part of *Olin*'s definition of actual consideration.[123] The agency also cited the first part of *Olin*'s definition of actual consideration, although it did not state that this part of *Olin*'s definition must be met.[124] Thus, Rhode Island's standard is very similar to *Spielberg*/*Olin*.

Ohio also requires a relationship between the facts presented at the arbitration and those relevant to the unfair labor practice issue. In

116. *Id.*; *see also* N.J. Stat. Ann. § 34:13A-5.4(a)(1), (3) (West 2017).
117. Olin Corp., 268 N.L.R.B. 573, 574 (1984).
118. No. 2000-5007, 2001 WL 1558774 (R.I. Super. Ct. 2001).
119. *Id.* at *1.
120. *Id.*; R.I. Gen. Laws § 28-7-13(6), (10) (2016).
121. Univ. of R.I. v. Univ. of R.I. Chapter of Am. Ass'n of Univ. Professors, No. 2000-5007, 2001 WL 1558774, at *6.
122. *Id.* The court suggested unilateral employer actions and employee discipline are most likely to be factually parallel. *See id.*
123. *Compare id.*, *with* Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955), *and* Olin Corp., 268 N.L.R.B. 573, 574 (1984).
124. *Univ. of R.I.*, No. 2000-5007, 2001 WL 1558774, at *4, *6.

Otsego Local School District Board of Education,[125] Otsego Educators Association had filed an unfair labor practice charge with the State Employment Relations Board,[126] alleging that the district violated sections (1), (5), and (6) of Ohio's unfair labor practice statute by transferring five bargaining unit members.[127] The labor board acknowledged it was not bound by the NLRB, but found its standard worthy of consideration.[128] The board decided it "will defer to arbitration awards where the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act."[129] In this case, the unfair labor practice issue had been dismissed by the arbitrator and, because "the facts considered by the Arbitrator in the grievance proceeding are essentially the same facts required to resolve the unfair labor practice charge," the board deferred to that decision.[130] Thus, the agency seemed to add a fourth requirement—that the unfair labor practice issue was implicitly considered in the arbitration through presentation of facts both relevant to the contractual issue and parallel to the unfair practice issue. This requirement restates the "factually parallel" element of *Olin*'s actual consideration requirement.

Maine has a similar requirement, but labels it an "identity of issue" mandate. The Supreme Court of Maine explained its deferral practice in a footnote in *City of Bangor v. Maine Labor Relations Board*.[131] The Bangor Firefighters Association had filed a prohibited practice complaint alleging that the city failed to provide notice and opportunity to bargain before unilaterally changing its health policy.[132] The court explained that the Maine Labor Relations Board's deferral standard stems partially from *Spielberg*, but adds another element.[133] Maine's test thus requires that (1) the parties agreed to binding arbitration, (2) the arbitration proceedings appear fair and regular, (3) the arbitration decision is consistent with the policies embodied in the act, and (4) an identity of issues exists between the prohibited practice complaint and the grievance.[134]

In analyzing whether the identity-of-issue requirement was met, the Maine court found that "the contractual question at the heart of the prohibited practice complaint was presented to the arbitrator."[135]

125. Otsego Local Sch. Dist. Bd. of Educ., No. 91-ULP-05-0323, 9 OPER ¶ 1673 (Ohio State Emp't Relations Bd. 1992).
126. *Id.*
127. *Id.*; OHIO REV. CODE ANN. §§ 4117.11(A)(1), (5), (6) (West 2016).
128. *Otsego Local Sch. Dist. Bd. of Educ.*, No. 91-ULP-05-0323, 9 OPER ¶ 1673.
129. *Id.*
130. *Id.*
131. City of Bangor v. Me. Labor Relations Bd., 658 A.2d 669, 672 n.2 (Me. 1995).
132. *Id.* at 671.
133. *Id.* at 672 n.2.
134. *See id.*
135. *Id.*

Ultimately, the court declined to address the merits of the deferral question as the city failed to preserve the issue, holding instead that the board's decision not to defer to the arbitrator's decision dismissing the grievance was not an abuse of discretion.[136] The court did not explain whether the contractual question at the heart of the statutory issue must always be presented to the arbitrator, but it is clear that some level of arbitral consideration of the prohibited practice complaint is required.[137] This portion of Maine's standard also resembles *Olin*. However, the third factor in Maine's standard is somewhat unique. By mandating that the arbitration decision be consistent with the prohibited practice statute's policies, the Maine court's approach resembles *Babcock*'s requirement that the NLRA "reasonably permits" the arbitration award more than it resembles *Spielberg*'s "not clearly repugnant" requirement.[138] This suggests that Maine's standard has a higher threshold than *Spielberg* and most other states' standards.

The standards of Rhode Island, Ohio, and Maine contain elements of *Spielberg* and the second part of *Olin*'s definition of actual consideration—that the contractual and statutory issues be "factually parallel." Because the factual parallelism requirement could be met without the arbitrator having considered the unfair labor practice issue, these three standards are slightly lower thresholds than Connecticut, Illinois, and New Jersey, which mandate that the unfair labor issue be "presented to and considered by" the arbitrator.

Iowa, Delaware, Florida, Massachusetts, and Vermont have higher thresholds than all the previously mentioned states, although they still resemble *Spielberg*/*Olin*. These five states require the arbitration to have "resolved,"[139] "dispose[d] of,"[140] or "clearly decided"[141] the unfair labor practice issue. This requirement mandates more than the "factually parallel" and "presented to and considered by" requirements.

Iowa's Public Employment Relations Board explained its deferral standard in two decisions. In *American Federation of State, County & Municipal Employees Council 61 v. State*,[142] the union alleged that the state violated Sections 10.2(a), (b), (c), (d), and (f) of the Public Employment Relations Act by denying leave to two employees in retaliation for

136. *Id.* at 672–73.

137. *See generally id.* at 672 n.2.

138. Babcock & Wilcox Constr. Co., 361 N.L.R.B. 1127, 1131 (2014).

139. Amalgamated Transit Union v. State, ULP No. 13-05-902, 2013 WL 4806473, at *3 (Del. Pub. Emp't Relations Bd. 2013); City of Miami v. Fraternal Order of Police, Miami Lodge 20, 511 So.2d 549, 551 (Fla. 1987); Mar-Mac Educ. Ass'n v. Mar-Mac Cmty. Sch. Dist., Case No. 2279, at 9 (Iowa Pub. Emp't Relations Bd. 1983).

140. Westfield Sch. Comm., Case No. MUP-2263, 2002 WL 34459859, at *1 (Mass. Labor Relations Comm'n 2002).

141. Milton Educ. & Support Ass'n v. Milton Bd. of Sch. Trs., 824 A.2d 605, 607 (Vt. 2003).

142. Case No. 2574, at 1 (Iowa Pub. Emp't Relations Bd. 1984).

their union activities.[143] Iowa's labor board cited *Spielberg* and insisted that any deferral policy must assure that the prohibited labor practice was "presented to, considered by, and ruled upon by the arbitrator."[144] In *Mar-Mac Education Ass'n v. Mar-Mac Community School District*,[145] the labor board further explained that deferral would be improper if the arbitration award did not resolve both the contract and prohibited practice disputes.[146] Thus, not only must the arbitration proceeding consider the prohibited labor practice issue, it also must have resolved it. This requirement goes farther than *Olin*'s explanation of what constitutes actual consideration of the unfair labor practice issue.[147]

Delaware's standard also mandates that arbitration resolves the unfair labor practice issue for deferral to be appropriate. In *Amalgamated Transit Union v. State*,[148] the Delaware Public Employment Relations Board articulated its deferral practice.[149] The union alleged that the Delaware Transit Corporation violated Delaware's Public Employment Relations Act[150] by refusing to pay two union officials for Christmas Day because they were not at work due to union business the day before the holiday.[151] In determining whether to defer, Delaware's labor agency considered (1) whether the arbitration award resolves the statutory claim, (2) whether the arbitration award is repugnant to the applicable statute, (3) whether the arbitral process is fair, and (4) whether the dispute is being resolved by arbitration with reasonable promptness.[152] Thus, two of the three *Spielberg* requirements are factored into Delaware's deferral standard.[153] Unlike *Spielberg*, Delaware does not explicitly require the parties to "agree to be bound" by the arbitration, although the requirement may be implicit.[154] Delaware additionally requires that the arbitration "resolve the statutory claim" or at least be in the process of being resolved "with reasonable promptness."[155]

Florida's standard is similar to Delaware's. In *City of Miami v. Fraternal Order of the Police, Miami Lodge 20*,[156] the city unilaterally

143. *Id.* at 1.
144. *Id.* at 6.
145. Case No. 2279 (Iowa Pub. Emp't Relations Bd. 1983).
146. *Id.* at 9.
147. *See* Olin Corp., 268 N.L.R.B. 573, 574 (1984).
148. Amalgamated Transit Union v. Delaware, ULP No. 13-05-902, 2013 WL 4806473 (Del. Pub. Emp't Relations Bd. 2013).
149. *Id.* at *3.
150. DEL. CODE ANN. tit. 19 § 1307(a)(1), (2), (4) (2016).
151. *Amalgamated Transit Union*, ULP No. 13-05-902, 2013 WL 4806473, at *1.
152. *Id.* at *3.
153. *Id.*
154. *Id.*
155. *Id.*
156. City of Miami v. Fraternal Order of Police, Miami Lodge 20, 511 So.2d 549 (Fla. 1987). Section 1(a) of Florida's unfair labor practice statute parallels Section 8(a)(1) of the NLRA, and Section 1(c) parallels Section 8(a)(5). FLA. STAT. § 447.501(a), (c) (2016).

increased employees' insurance premiums, resulting in an unfair labor practice charge alleging violations of Sections (1)(a) and (c) of Florida's unfair labor practice statute.[157] The Public Employees Relations Commission deferred to an arbitration award dismissing one grievance and granting in part and dismissing in part another grievance.[158] The Supreme Court of Florida upheld the labor agency's decision and stated in a footnote that the agency defers unless "(a) [t]he arbitration proceedings were not conducted fairly or regularly, or (b) [t]he dispute was not resolved by the arbitration award, or (c) [t]he result reached by the arbitrator was repugnant to [the unfair labor practice statute]."[159] The court also elaborated that, if an arbitration award "effectively disposes" of the unfair labor practice issue, deferral is appropriate.[160] Like Delaware's standard, Florida's differs from *Spielberg* by omitting the mandate that the parties agreed to binding arbitration. Also like Delaware's, Florida's standard requires resolution of the statutory issue.[161]

Massachusetts's standard utilizes similar language to Florida's. The Massachusetts Labor Relations Commission explained Massachusetts's deferral standard in *Westfield School Committee*.[162] The union alleged that the school district unilaterally changed guidance counselors' job duties.[163] The district prohibited guidance counselors from continuing a practice of holding weekly department meetings during school hours.[164] The union's unfair labor practice charge asserted that the district discriminated against the guidance counselors for their concerted activity.[165] The agency concluded that deferral to the arbitration award dismissing the grievance was appropriate,[166] citing *Olin* as useful guidance and stating it would defer to an arbitrator's award if

> the arbitrator's proceedings have been fair and regular, all parties agreed to be bound by the proceedings, the decision of the arbitrator is not repugnant to the purpose and policies of the Law, and the arbitrator's award disposes of issues that are substantially identical to those presented to the [agency].[167]

157. *Fraternal Order of Police*, 511 So.2d at 551.
158. *Id.* at 552.
159. *Id.* at 553 n.8.
160. *Id.* at 552.
161. *Id.* at 553 n.8.
162. Westfield Sch. Comm., Case No. MUP-2263, 2002 WL 34459859 (Mass. Labor Relations Comm'n 2002).
163. *Id.* at *1.
164. *Id.*
165. *Id.*
166. *Id.* at *2.
167. *Id.* at *1.

Thus, Massachusetts incorporates the three *Spielberg* factors and additionally requires that the arbitration award "dispose[] of" the unfair labor practice charge.[168]

Vermont's deferral practice does not stray far from those of Massachusetts, Florida, Delaware, or Iowa, but uses different language to express the requirement that the arbitration resolve the unfair labor practice issue. In *Burlington Area Public Employees Union v. Champlain Water District*,[169] the district discharged an employee, and the district sought to hear management's explanation of the dismissal without the grievant present.[170] The union filed an unfair labor practice charge alleging that the district had violated Section 1726(a)(1) of the Municipal Employee Relations Act.[171] Although the Supreme Court of Vermont acknowledged that, in the past, Vermont's labor agency had been guided by NLRB general principles, it described the agency's deferral process as a review of "whether the [grievance] proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities or [whether] the award was clearly repugnant to the purposes and policies of the Vermont Labor Relations Act for Teachers."[172]

A later Vermont Supreme Court decision elaborated on Vermont's deferral standard, stating: "The [agency] has decided that it will defer to an arbitrator's decision as also resolving the unfair labor practice charge if, among other requirements, the 'arbitrator has clearly decided the unfair labor practice issue.'"[173] Taking these two cases together, Vermont's labor agency considers "whether the proceedings were tainted by fraud, collusion, unfairness or serious procedural irregularities,"[174] whether "the award was clearly repugnant,"[175] and whether the "arbitrator has clearly decided the unfair labor practice issue."[176] Vermont's first two requirements resemble *Spielberg*'s "not clearly repugnant" and "fair and regular proceedings" requirements. Vermont's "clearly decided" factor likely demands the same requirements of Iowa, Delaware, and Florida that the arbitration resolved the statutory issue and Massachusetts' requirement that the arbitration disposed of the stat-

168. *Id.*

169. Burlington Area Pub. Emps. Union v. Champlain Water Dist. 594 A.2d 421 (Vt. 1991).

170. *Id.* at 422.

171. *Id.*; VT. STAT. ANN. tit. 21 § 1726(a)(1) (2016).

172. *Burlington Area*, 594 A.2d at 425 (internal quotations omitted). Although the Vermont Labor Relations Board's deferral policy "arose in the context of the Vermont Labor Relations Act for Teachers, the broad policies announced by the Board were not limited to cases arising under that act." *Id.* at 425 n.3.

173. Milton Educ. & Support Ass'n v. Milton Bd. of Sch. Trs., 2003 VT 42, ¶ 9, 175 Vt. 531, 824 A.2d 605 (internal quotations omitted).

174. *Burlington Area*, 594 A.2d at 425.

175. *Id.*

176. *Milton*, 2003 VT 42, ¶ 9, 175 Vt. 531, 824 A.2d 605 (internal quotations omitted).

utory issue. Therefore, it also requires a higher threshold for deferral than *Olin*'s actual consideration requirement.[177] As with the previous eleven states analyzed,[178] *Spielberg*/*Olin* also influences New Mexico's deferral standard. Yet, the similarities are not as close.

E. New Mexico's Deferral Standard

The New Mexico Public Employment Labor Relations Board described its deferral standard in the New Mexico Administrative Code. It states: "If in the opinion of the director, the issues raised by the prohibited practices complaint were fairly presented to and fairly considered by the arbitrator, and the award is both consistent with the act and sufficient to remedy any violation found, then the director shall dismiss the complaint."[179] New Mexico's deferral practice is unique, but not entirely distinct from *Spielberg*/*Olin* or other states' standards. While New Mexico's standard does not explicitly require that parties have agreed to be bound by arbitration or that the arbitration proceedings appear fair and regular, reference to fair presentation of issues and fair arbitral consideration may be equivalent mandates.[180] Furthermore, the "fairly presented to and fairly considered by" language resembles language in Connecticut's, Illinois's, and New Jersey's standards.[181] New Mexico further requires analysis of the arbitration award's consistency with its prohibited practices statute, similar to *Spielberg*/*Olin* and the majority of state policies analyzed here.[182]

Federal post-arbitration deferral standards have influenced fourteen states' standards.[183] However, most state standards are closer to the earlier NLRB decisions of *Spielberg* and *Olin* than to the Board's more recent *Babcock* decision.[184]

III. How Deferral Standards Affect Public Employees, Public Employers, and States

Deferral standards are established to resolve the tension between permitting employees to pursue relief for violations of individual statutory rights and encouraging parties to settle disputes efficiently in forums of their own design. In the private sector, *Babcock*[185] shifted the point of compromise toward greater protection for employees' statutory

177. *Compare Milton*, 2003 VT 42, ¶ 9, 175 Vt. 531, 824 A.2d 605, *with* Olin Corp., 268 N.L.R.B. 573, 574 (1984).

178. Vermont, Rhode Island, Connecticut, New Jersey, Maine, Ohio, Delaware, Illinois, Florida, and Massachusetts.

179. N.M. Code R. § 11.21.3.22(C) (LexisNexis 2005).

180. *Id.*

181. *See id.*

182. *See infra* Appendix.

183. *See infra* Appendix (excluding Nebraska, Minnesota, Montana, Washington, New Hampshire, Alaska, Hawaii, Kansas, and New York).

184. *See infra* Appendix.

185. *See supra* notes 17–37 and accompanying text.

rights.[186] Higher deferral thresholds result in more safeguards to protect employee access to a labor board and individual statutory rights.[187] Yet, higher thresholds and increased access to labor boards also reduce efficiency and increase public and private dispute resolution costs.

As most states' standards currently resemble *Spielberg/Olin*, the balance tips slightly toward favoring efficient dispute resolution over employees' access to labor agencies. States should consider reexamining their standards to determine whether employees have adequate access to labor agencies. This recommendation may mean developing standards that more closely parallel *Babcock*. The critical question for state labor boards is whether employees' individual rights are adequately balanced with employers' interests in finality and the state's interest in efficient resource allocation.

A. The Arbitration Grievance Process Contrasted with the Role of Labor Relations Agencies

The focus of grievance arbitration is on the CBA. The role of the arbitrator is to interpret the agreement rather than the unfair labor practice issue.[188] CBAs may contain very different protections for employees than unfair labor practice statutes as they are created by negotiations between employers and unions in which the union must balance varying employees' interests.[189] Although these agreements determine employees' rights, employees, as individuals, are not parties to the contract.[190] Furthermore, if an employer has more bargaining power than a union, the CBA may diminish individual employee rights. These factors demonstrate that employees' individual interests may be compromised in contract negotiations.[191]

In contrast to CBAs, unfair labor practice statutes are not products of negotiation between employers and unions. Rather, unfair labor practice statutes seek to protect employees against discrimination and unfair treatment for exercising individual and collective bargaining

186. *See* Babcock & Wilcox Constr. Co., 361 N.L.R.B. 1127, 1131 (2014) (NLRB increased requirements arbitration had to satisfy, thereby resulting in less deference to arbitration and greater opportunity for parties to seek statutory relief from the Board).

187. Gerald E. Berendt & David A. Youngerman, *The Continuing Controversy over Labor Board Deferral to Arbitration—An Alternative Approach*, 24 STETSON L. REV. 175, 178 (1994) (labor relations agencies balance protecting statutory rights with limited resources).

188. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960); Jonathan Reiner, *Preserving Workers' Statutory Rights: An Analysis of the NLRB General Counsel's Proposed Post-Arbitration Deferral Policy*, 28 ABA J. LAB. & EMP. L. 145, 150 (2012).

189. Sanford J. Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 MD. L. REV. 233, 234 (1964).

190. *Id.*

191. *Id.*

rights.[192] Recognition of the different scope of protections of CBAs and unfair labor practice statutes suggests limiting deferral.[193] Statutory labor rights may differ significantly from contractual rights and encompass policy objectives not protected by most CBAs.[194] The counterargument contends that employees waive their statutory rights by allowing unions to negotiate on their behalf.[195] The agreement thus replaces the statute as the source of employee rights.[196] This argument fails to consider that state labor relations agencies have an independent interest in enforcing their unfair labor practice statutes. It also fails to consider the potential unequal bargaining power between employers and unions. A weak union may be unable adequately to protect workers' statutory rights. Even if the contract sufficiently protects employee rights, the arbitrator may not.

An arbitrator, mutually selected by the parties, may lack legal training.[197] An arbitrator may also fail to consider the state's policy objectives in prohibiting employers from committing unfair labor practices.[198] A grievance procedure "is concerned more with the settlement of particular claims than with the statement of general rules and classifications, [thereby making it] 'particularly susceptible to abuse, for through it individuals or groups may be singled out . . . for arbitrary treatment.'"[199] An arbitrator's authority and responsibility are derived from the contracting union and employer, affording the arbitrator no general authority to administer community justice.[200] In fact, the Supreme Court held that, in the private sector, if an arbitrator relies on public law or general notions of justice to decide an issue, the award will be vacated.[201] Although this holding is not directly applicable to state courts, public sector arbitrators similarly have no responsibility to rely on legal principles or state policies.

In contrast to arbitrators, the role of a labor relations agency is "to protect statutory rights and resolve disputes while making the

192. *See, e.g.*, DEL. CODE ANN. tit. 19 § 1307 (2016); FLA. STAT. § 447.501 (2016); OHIO REV. CODE ANN. § 4117.11 (West 2016).

193. David A. Youngerman, *The Continuing Controversy over Labor Board Deferral to Arbitration—A Modest Contribution by the Illinois Educational Labor Relations Board*, 10 ILL. PUB. EMP'T REL. REP. 1, 2 (1993).

194. *Id.*

195. Michael C. Harper, *A New Board Policy on Deferral to Arbitration: Acknowledging and Delimiting Union Waiver of Employee Statutory Rights*, 5 FIU L. REV. 685, 689 (2010).

196. *See id.* at 691.

197. *See* Jeff J. Minckler, *So You Want to Be a Labor Arbitrator*, PERSP. ON WORK 80, 82 (2014).

198. *See* Reiner, *supra* note 188 (role of the arbitrator is limited).

199. Rosen, *supra* note 189, at 246.

200. United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960); *see also* Reiner, *supra* note 188, at 163–64.

201. *United Steelworkers*, 363 U.S. at 597.

most efficient use of the agency's limited financial resources."[202] Labor boards make statutes and regulations the central focus of their decisions, rather than narrow contract interpretations.[203] Administrative law doctrines preclude state labor relations agencies from adjudicating claims arbitrarily,[204] compelling them to decide cases consistently. Thus, states have broader interests than arbitrators in unfair labor practice disputes. As Florida's labor agency stated, "[D]eferral to arbitration is not a matter of right but a matter of policy committed to the sound discretion of the [agency]."[205] Hawaii, Kansas, and New York labor agencies have refrained from articulating definitive standards because they are hesitant to lose flexibility to determine on a case-by-case basis whether deferral would hinder individual statutory rights.[206] However, recognizing these state interests does not eliminate the states' competing interests in finality, efficiency, and resource conservation.

B. Interests in Finality and Resource Conservation

Olin relied in part on a national policy favoring arbitration of labor disputes.[207] Although *Babcock* diminished deferral, it nevertheless acknowledged this policy.[208] Arbitration is favored for generally being cheaper than administrative or judicial proceedings, as it is "more informal, usually quicker, and often without the benefit of a formal (verbatim) record, without discovery and lacking a procedure for formalized review."[209] The *Babcock* majority stated: "The second premise underlying our decision is the central role of arbitration in promoting industrial peace and stability."[210] State judicial systems also encourage the voluntary settlement of disputes because state labor relations agencies' time and resources are saved when parties settle. Another interest is dispute resolution finality.[211] Although an employee dissat-

202. Youngerman, *supra* note 193, at 178.

203. *See* Berendt & Youngerman, *supra* note 187, at 178 (obligation of labor agency is to "apply the statute").

204. *See, e.g.*, 37 PA. CODE 2D § 166:844 (2017); 40 N.J. PRAC. APP. PRAC. & PROCEDURE § 4.16 (2d ed. 2016).

205. Orange Cty. Classroom Teachers Ass'n v. Sch. Dist. of Orange Cty., No. CA-2013-030, 40 FPER ¶ 41 (Fl. Pub. Emps. Relations Comm'n 2013).

206. *See generally* Chenango Forks Cent. Sch. Dist. v. N.Y. State Pub. Emp't Relations Bd., 95 A.D.3d 1479 (N.Y. App. Div. 2012); United Pub. Workers, AFSCME, Local 646, Case No. CE-01-515, 2003 WL 25792393 (Haw. Labor Relations Bd. 2003); Int'l Ass'n of Firefighters v. City of Junction City, Case No. 75-CAE-4-1994, 1994 WL 16779813 (Kan. Pub. Emp. Relations Bd. 1994).

207. Olin Corp., 268 N.L.R.B. 573, 575 n.11 (1984) (citing NLRB v. Pincus Bros., 620 F.2d 367 (3d Cir. 1980) ("The national policy in favor of labor arbitration recognizes that the societal rewards of arbitration outweigh a need for uniformity of result or a correct resolution of the dispute in every case.")).

208. Babcock & Wilcox Constr. Co., 361 N.L.R.B. 1127, 1128 (2014).

209. Laconia Educ. Ass'n, NEA-N.H. v. Laconia Sch. Dist. Case No. T-0239-22, at 9 (Decision No. 2002-078) (N.H. Pub. Emp. Labor Relations Bd. 2002).

210. *Babcock*, 361 N.L.R.B. at 1129.

211. *Id.* at 1142 (Member Miscimarra, dissenting).

isfied with an arbitration award may seek access to a state labor relations board, an employer reasonably does not want to relitigate the same dispute. Employers desire finality.[212] In the absence of deferral, state and litigant resources would be diminished, and public policy interests in finality would be thwarted.[213]

Conclusion

In the public sector, as in the private sector, post-arbitration deferral standards significantly affect employees, employers, and labor relations agencies.[214] Under what circumstances is deferral appropriate? The answer requires balancing interests of employees, employers, and states. In the private sector, *Babcock & Wilcox Construction Co.*, as compared to the *Spielberg*/*Olin* standard, moved the balance toward employees' statutory interests.[215] In the public sector, most states' standards resemble *Spielberg*/*Olin*, although to varying degrees.[216] Thus, most state standards tip the balance in favor of employers' and states' interests in finality and resource conservation, as compared to *Babcock*.[217] In light of *Babcock*, states should reevaluate whether their standards reflect their interests in—and their labor statutes' protections of—individual statutory rights.

212. David L. Zwisler, *NLRB Eviscerates Standards for Deferral to Arbitration and Settlement*, Ogletree Deakins (Dec. 29, 2016), http://www.ogletreedeakins.com/shared-content/content/blog/2014/december/nlrb-eviscerates-standards-for-deferral-to-arbitration-and-settlement (showing employers are usually resisting deferral).

213. *Id.*

214. *See infra* Appendix.

215. *Compare Babcock*, 361 N.L.R.B. at 1131 (2014), *with* Spielberg Mfg. Co., 112 N.L.R.B. 1080, 1082 (1955), *and* Olin Corp., 268 N.L.R.B. 573, 574 (1984).

216. *See infra* Appendix.

217. *See infra* Appendix.