When the recession of 2008 and 2009 hit, it was not just the private sector that felt the impact, but state and local governments as well. Layoffs and cutbacks led to reduced tax revenue, and state and municipal budgets were stretched. As states tried to avoid budget cuts and find alternative ways to save, some states chose to reduce costs by limiting union rights. The question of whether or not collective bargaining rights should be restricted has become one of the most hotly debated issues of 2011. Is insufficient funds to meet state budgets the real issue? Alternatively, is this legislation being proposed as a veiled effort to limit union power? What are the risks involved in reducing collective bargaining? *The Impact of Limiting Collective Bargaining Rights* provides feedback from leading lawyers on the pros and cons of restricting collective bargaining rights, and how these measures will impact public employees. These experts discuss pending lawsuits to counter states' efforts in this area and offer insight on how attorneys are responding to proposed legislation. This report offers readers an on-the-spot look at this issue as it continues to unfold.

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ASPATORE SPECIAL REPORT

The Impact of Limiting Collective Bargaining Rights

An In-Depth Look at the Pros and Cons of State Efforts to Restrict Collective Bargaining Rights

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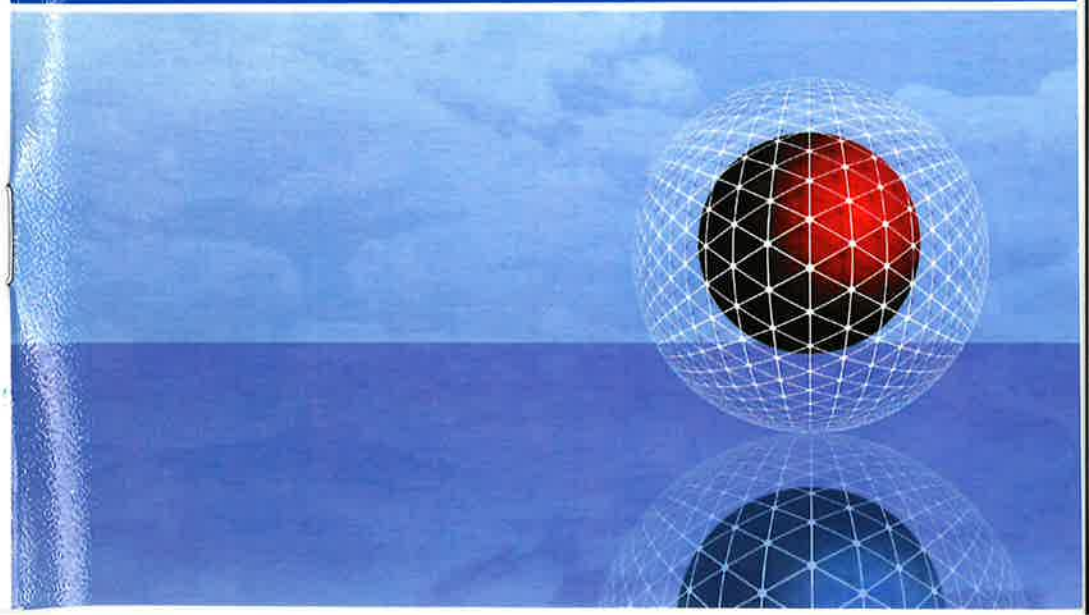

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Risks of Restricting Collective Bargaining for Public Employees

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Introduction

In many states, public sector unions are facing dramatic changes in the laws governing collective bargaining. The ongoing national economic malaise and state budget crises have created pressure on government officials to scale back spending on public sector employees. Legislation seeking to restrict and eliminate collective bargaining has been introduced in statehouses across the country, sparking large protests and a renewed debate about the merits of public sector unions. This legislative approach may rewrite labor law and raises the question of how best to control spiraling state labor costs.

Balancing Budgets and Priorities

As the Great Recession continues, governments at all levels have been scrambling to balance their budgets. With the economy struggling and unemployment levels in certain areas approaching record levels, the revenues generated through taxes has been dwindling. While on a federal level new currency can be issued, state and municipal governments do not have that "luxury." With labor costs for public employees making up a significant portion of local and state government budgets, many public sector executives have looked at the overall concept of collective bargaining as the culprit that has their balance sheets in disarray.

The Purported Benefits of Collective Bargaining

Collective bargaining is the process of negotiation between an employer and the representatives of a unit of employees, typically, the union. The goal is to reach an agreement over wages, hours, and other terms and conditions of employment. Implemented in the late nineteenth and early twentieth centuries during the development of American trade unions, collective bargaining has been utilized as a valuable negotiation tool between employers and employees for ages. Proponents of collective bargaining praise it for its purported ability to promote fair and consistent employment policies, which, those proponents would argue, yield high performance in the workplace. By providing a legally based bilateral relationship between the employer and the employee, collective bargaining ostensibly ensures that the rights of both parties are protected through binding agreements.

As the Fifth Circuit has noted, "collective bargaining agreements are central to American labor law and are the essential threads of its fabric . . . Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens." *Airline Pilots Ass'n, Int'l, v. Taca Int'l Airlines, S.A.*, 748 F.2d 965, 968 (5th Cir. 1984) (citations omitted).

In addition to the psychological benefit of collective bargaining for employee morale, proponents of the unions assert that collective bargaining also has fiscal benefits, as multiyear contracts help to provide predictability in salary and other compensation issues.

Deficiencies in Collective Bargaining

Despite the alleged benefits that collective bargaining provides workers and, arguably, employers, there are shortfalls in the process that, in practice, opponents argue make the system less than ideal. First, the negotiated rules that result from collective bargaining agreements can increase bureaucratization, which in turn can restrict management's freedom to run its business. Collective bargaining often necessitates that more time be spent on decision-making, and eliminates the ability of management to make unilateral changes in wages, hours, and other terms and conditions of employment.

Management is also often restricted in its ability to deal directly with individual employees, which can create significant polarization between employees and managers. Critics of collective bargaining argue that its procedure protects the status quo, which can in turn inhibit innovation and change. Critics also assert that the right of unionized public employees to negotiate their benefits often results in these employees receiving greater compensation, and more extensive benefits than employees in the private sector performing the same or similar jobs receive. While the existence of these superior benefits was deemed at one time a necessity to attract the workforce to public jobs, it can be argued that the balance has shifted too far toward the public worker.

A Labor Tradition under Fire

Recently, collective bargaining practices have come under fire as lawmakers face serious budgeting concerns and seek to cut government spending. At the forefront for many state legislators and chief executives is the move to cut government funding to public employees. Government officials in Wisconsin, Tennessee, Indiana, Ohio, and most recently, Massachusetts have proposed new legislation in an effort to mend severe revenue shortfalls, balance the state budget, and manage the future budget crises. These new bills are designed to reduce the collective bargaining powers of most state and local government employees, even working to eliminate collective bargaining powers altogether in some instances.

In early March 2011, Wisconsin's Republican governor, Scott Walker, proposed a controversial bill designed to attack that state's $3.6 billion deficit by curtailing collective bargaining rights for most public employees. Budget Repair Bill, 2011 Wisconsin Act 10 (2011). In addition to mandating that all employees of the Wisconsin Retirement System begin contributing significantly toward their own pensions, the proposed legislation would require state employees to pay at least 12.6 percent of the cost of their health insurance premiums, and set a wage cap for workers that could not be negotiated through collective bargaining. The bill exempted only police and fire fighters.

Walker's legislation generated local and national attention, drawing tens of thousands of demonstrators to the state capitol in Madison in protest of the bill, and dominating the headlines of newspapers throughout the country. Although Walker's bill was signed into action, Wisconsin County Circuit Judge MaryAnn Sumi soon thereafter issued a temporary order blocking the bill on the grounds that the Wisconsin legislature had violated the state's open meetings law by rushing its passage. *State of Wisconsin v. Fitzgerald*, 2011 WL 924048 (Wis.Cir.) (Mar. 18, 2011). In June 2011, the Wisconsin Supreme Court overruled Judge Sumi and affirmed the procedure used to pass the bill. *Wisconsin ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436, 440 (Wis. 2011). Although this clears the way for the bill to become law, its fate is still unclear because labor groups have filed suit in federal court challenging the law's constitutionality. *Wisconsin Educ. Ass'n Council v. Walker*, No. 3:11-cv-00428-wmc (W.D. Wis. filed June 26, 2011).

Walker's bill is but one of myriad proposed legislative measures from like-minded lawmakers seeking to reduce state budget deficits by limiting the collective bargaining process for government workers across the country. [One?] ne Walker supporter, Wisconsin Republican Bob Ziegelbauer, recently introduced a bill that proposes to eliminate collective bargaining rights for public safety employees regarding health care and pension contributions. Taking cues from Walker's legislation, Ziegelbauer's bill would prevent public safety employees from negotiating pension and health care, but would leave the remainder of bargaining rights for public employees intact.

In attempting to apply key parts of Walker's bill, Ziegelbauer's bill seeks to eliminate parts of the collective bargaining without "blowing up" the entire process. Similarly, in mid-February 2011, the Republican-dominated Tennessee Senate Education Committee voted to deny Tennessee public school teachers the right to negotiate their working conditions with boards of education throughout the state through collective bargaining. Likewise, in 2005, all Indiana state workers lost their collective bargaining rights. In both situations, the denial of collective bargaining rights was accompanied by worker protest.

The massive public outcry sparked by Governor Walker's reform, as well as smaller protests accompanying less sweeping reform, reflects the high level of national interest in the future of collective bargaining rights in the public sector. It comes as little surprise that measures taken by legislators to restrict the collective bargaining rights of unionized workers have been met with great interest by so many. New laws limiting negotiations between employees and employers directly affect many, and indirectly, most, if not all, government employees, and jeopardize many benefits that jobs in the public sector once guaranteed.

This, in turn, affects the voting patterns of unionized workers, as those who feel endangered by threats to collective bargaining rights tend to vote for candidates who are pro-union and pro-collective bargaining. On the other side of the table, state taxpayers who foot the bill for unionized government workers have a very direct and intense interest in the matter, as the success or failure of legislation to restrict collective bargaining invariably affects the amount they will be taxed by their state and local governments.

Pros and Cons of Limiting or Eliminating Collective Bargaining

There are strong arguments both for and against limiting collective bargaining rights. The upside of restricting collective bargaining, from the perspective of legislators in favor of such reform, is that states and municipalities will be able to save money by limiting what issues are negotiable between unions and employers. Under a restricted system, employers will have the ability to make quick, cost-conscious decisions regarding matters such as the health care, salaries, and overtime payment available to employees. Rather than providing all public employees with premium benefit plans, for instance, states will have the power to opt for adequate but less expensive alternatives, including those where the employees must contribute to their costs. Additionally, taxpayers will benefit through tax cuts resulting from lower government employee salaries and benefits.

The other side of this issue, however, is the sentiment that legislators cannot change the law regarding collective bargaining without stripping unionized workers of their fundamental rights. In certain states, such as Florida, the ability of unionized workers to engage in collective bargaining is a recognized constitutional right that cannot be taken away without violating state law. Similarly, for public sector employees, the right to recognize a property [proprietary?] interest in a job once the employee has passed a mandated probationary period creates a constitutional right that may not be taken away without violating due process. Finally, many believe that by limiting collective bargaining rights, the government deprives unionized employees of a chance to voice their opinions regarding the very factors that affect them the most, such as working conditions, working hours, and personal benefits. Supporters of collective bargaining fear that, if the government does not opt to protect the rights and voice of unionized employees, they will feel abused and workplace productivity will decline.

Alternatives to Limiting Collective Bargaining Rights

Given the current economic state of the nation, budget control should be prioritized. However, state and government officials may be taking the wrong approach by focusing on changing the *laws*, rather than changing

their *approach* to negotiating with the public sector unions. If the country's governors, mayors, and schools chiefs would have approached collective bargaining like many of their counterparts in the private sector, it is very possible, if not likely, that the fiscal woes and crises faced by states and municipalities would be tremendously lessened today. Rather than strip the laws and employees' rights, these chief executives need to learn to "say no" to public sector unions. However, if unions are not willing to give concessions to help the states and municipalities balance their budgets, layoffs should ensue as a means of urging unions to negotiate.

Conclusion

Attorneys Need to Prepare for a New Model

If the public sector collective bargaining laws change significantly, attorneys practicing in this area will need to familiarize themselves quickly. In many instances, attorneys will need to re-educate themselves on the entire body of transformed law. With the diminished clout of public sector unions, attorneys may be faced with individual employees having no recourse but to seek redress of real or perceived wrongs in the courts because they can no longer turn to the unions who were designed to protect them. This, in turn, will transform the practices of some attorneys from more traditional labor law to a greater emphasis on employment law.

Final Thoughts

Limiting the collective bargaining rights of unionized employees is only a temporary solution to a larger problem. Even if limited [limiting?] collective bargaining rights serves to "fix" or balance state budgets temporarily, there likely will be negative lingering effects. Specifically, without collective bargaining rights, many union employees will feel abandoned and unhappy, with the possible result being an unproductive workplace. For this reason, it is more practical for states to keep the laws that currently exist in place and to aggressively bargain with unions. In the event that unions do not take government demands seriously, unionized workers should be laid off.

Philip S. Mortensen is a partner at Barton Barton & Plotkin LLP and has been representing both private and public sector employers in labor and employment law matters for more than thirty years. Prior to joining BB&P, he was with Jackson Lewis and Kreitzman, Mortensen & Borden.

Mr. Mortensen's labor law practice has concentrated in the areas of union avoidance, collective bargaining, Nation Labor Relations Board litigation, and arbitration.

Mr. Mortensen's employment law experience extends from drafting employee handbooks to working closely with managers and training supervisors to ensure compliance with all applicable laws such as equal employment opportunity laws and wage/hour laws. He has conducted many on-site, in-depth "risk review" meetings with management in order to ensure an employer's compliance with federal and state anti-discrimination laws, to identify potential risks and exposures, and to recommend appropriate and lawful action in order to rectify those potential vulnerabilities. In both administrative proceedings as well as related court litigation, Mr. Mortensen has represented and defended management in numerous employment discrimination actions.

Mr. Mortensen is a member of the American Bar Association, the New York State Bar Association and The Florida Bar. He has authored various comments and articles regarding NLRB case law developments and recommended approaches to equal employment opportunity issues.

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