



Collective Bargaining and Employees in the Public Sector

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Summary

Faced with distressed state budgets and lower revenue, many governors and state legislatures have focused on the collective bargaining rights of public employees as a way to control expenses. Legislation that would limit such rights has reportedly been introduced in at least 22 states. In general, the sponsors of such legislation contend that unionized state and local employees enjoy unsustainable salaries and benefits as a result of collective bargaining.

According to the Bureau of Labor Statistics, 26.8% of all federal employees are members of a union. A slightly higher percentage of state employees—31.1%—are union members. At the local government level, 42.3% of employees are union members. Although all of these employees engage in some form of collective bargaining through their unions, the scope of such bargaining is generally different for federal and state and local workers. In addition, because the collective bargaining rights of state and local employees are defined by state law, other variations in bargaining may exist among these workers. Subjects that are negotiable in one state, for example, may not be negotiable in another state.

This report examines the collective bargaining rights of federal, state, and local workers. The report also discusses the constitutional concerns that may be raised by state legislation that attempts to invalidate existing collective bargaining agreements. In Michigan, the Local Government and School District Fiscal Accountability Act (“Fiscal Accountability Act”) was adopted on March 16, 2011. Under the Fiscal Accountability Act, the governor may appoint an emergency manager if he determines that a local government financial emergency exists. The emergency manager would have broad powers to rectify the financial emergency, including the ability to reject, modify, or terminate one or more terms and conditions of an existing collective bargaining agreement. If the emergency manager were to reject, modify, or terminate one or more terms and conditions of an existing agreement, constitutional concerns would likely be raised under the Contract Clause of the U.S. Constitution, which prohibits a state from passing any law “impairing the Obligation of Contracts.”

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Faced with distressed state budgets and lower revenue, many governors and state legislatures have focused on the collective bargaining rights of public employees as a way to control expenses. Legislation that would limit such rights has reportedly been introduced in at least 22 states.¹ In general, the sponsors of such legislation contend that unionized state and local employees enjoy unsustainable salaries and benefits as a result of collective bargaining. This report examines the collective bargaining rights of federal, state, and local workers, and discusses the constitutional concerns that may be raised by state legislation that attempts to invalidate existing collective bargaining agreements.

Federal Employees

According to the Bureau of Labor Statistics, 26.8% of all federal employees are members of a union.² A slightly higher percentage of state employees—31.1%—are union members.³ While all of these employees engage in some form of collective bargaining through their unions, the scope of such bargaining is generally different for federal and state and local workers. In addition, because the collective bargaining rights of state and local employees are defined by state law, other variations in bargaining may exist among these workers. Subjects that are negotiable in one state, for example, may not be negotiable in another state.

Federal employees first obtained the right to engage in collective bargaining in 1962. Under Executive Order 10988, federal employees were permitted to “form, join and assist any employee organization or to refrain from such activity.”⁴ Once recognized as the exclusive representative of employees in an appropriate bargaining unit, an employee organization could negotiate an agreement that would cover all employees in that unit. Executive Order 11491, issued by President Nixon in 1969, further developed the framework for federal labor-management relations by establishing the Federal Labor Relations Council, a predecessor to the Federal Labor Relations Authority (FLRA), and the Federal Service Impasses Panel.⁵ Executive Order 11491 also identified unfair labor practices that were prohibited for management and labor organizations.

In 1978, the right to engage in collective bargaining became recognized in statute. Title VII of the Civil Service Reform Act of 1978, commonly referred to as the “Federal Service Labor-Management Relations Statute” (FSLMRS), codified many of the concepts included in Executive Order 11491.⁶ In addition to providing for the right to engage in collective bargaining, the FSLMRS also established the FLRA, which, among other duties, supervises union elections and resolves unfair labor practice complaints.

The FSLMRS states that “[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal,

¹ Ryan Haggerty et al., *State of the Unions: After Defeat in Wisconsin, Battle Lines Drawn Across Nation*, Chi. Trib., Mar. 11, 2011, at 1.

² See News Release, Bureau of Lab. Stat., *Union Members – 2010* (Jan. 21, 2011), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

³ *Id.* The Bureau of Labor Statistics further reports that 42.3% of local government employees are union members.

⁴ Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962).

⁵ Exec. Order No. 11491, 34 Fed. Reg. 17,605 (Oct. 29, 1969).

⁶ P.L. 95-454, tit. VII, 92 Stat. 1111, 1191-1218 (1978).

and each employee shall be protected in the exercise of such right.”⁷ The right recognized by the FSLMRS includes the ability “to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees.”⁸ The FSLMRS further defines the phrase “conditions of employment” to include personnel policies, practices, and matters that affect working conditions.⁹ The term does not include, however, policies, practices, and matters “to the extent such matters are specifically provided for by Federal statute.”¹⁰ Thus, to the extent federal law provides for pay, health coverage, retirement benefits, and other items, such subjects are not negotiable.¹¹

In addition, the FSLMRS identifies management rights that are generally not negotiable, except with regard to the procedures that will be used to implement an agency’s proposals. Section 7106(a) of Title 5, U.S. Code, states, in relevant part:

[N]othing in this chapter shall affect the authority of any management official of any agency

–

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws –

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from –

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

⁷ 5 U.S.C. § 7102.

⁸ 5 U.S.C. § 7102(2).

⁹ 5 U.S.C. § 7103(a)(14).

¹⁰ 5 U.S.C. § 7103(a)(14)(C).

¹¹ See, e.g., 5 U.S.C. § 5332(a)(1) (“The General Schedule, the symbol for which is ‘GS’, is the basic pay schedule for positions to which this subchapter applies. Each employee to whom this subchapter applies is entitled to basic pay in accordance with the General Schedule.”). The employees of at least seven agencies, however, are believed to have the ability to negotiate over pay. According to the U.S. Office of Personnel Management, employees of the Bonneville Power Administration, the Federal Aviation Administration, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Securities Exchange Commission, and the National Credit Union Administration may negotiate over wages. In addition, employees of the Department of Defense Domestic Dependent Elementary and Secondary Schools and white collar non-appropriated fund employees of the Department of Defense are also believed to have the ability to negotiate over pay. This authority appears to have been provided either by statute or by judicial or administrative decision. See U.S. Off. of Personnel Mgmt., Executive Branch Agencies With Bargaining Units That Have Authority to Negotiate Pay as of 01/05/2011 (on file with author).

Courts have noted that Section 7106 ensures that the collective bargaining system established by the FSLMRS does not “undermine the effectiveness of government through unwarranted intrusion on management prerogatives.”¹² At the same time, however, the FSLMRS and Section 7106 “establish a balance between the nonnegotiable substantive rights of management and the negotiable procedures to be followed when management exercises its substantive rights.”¹³

State and Local Employees

Legislation authorizing collective bargaining for state and local government employees was first adopted during the 1950s. In 1959, Wisconsin became the first state to enact legislation granting organizational, representation, and bargaining rights to municipal employees.¹⁴ By the end of 1967, legislation authorizing some form of collective bargaining for state and/or local employees had been adopted in 21 states.¹⁵ State laws governing collective bargaining for state and local workers are generally not identical. Rather, they exist on a continuum, with some prohibiting bargaining altogether and others providing comprehensive collective bargaining rights for various employees.

In two states, North Carolina and Virginia, the execution of a collective bargaining agreement is prohibited. Under North Carolina law, any agreement between a public employer and a labor organization acting as a bargaining agent for public employees is “declared to be against public policy of the State, illegal, unlawful, void and of no effect.”¹⁶ Under Virginia law, a public employer is prohibited from recognizing any labor organization as a bargaining agent of any public employees and may not “collectively bargain or enter into any collective bargaining contract” with such an organization.¹⁷

In at least 31 states, public employees appear to have the right to engage in some form of collective bargaining.¹⁸ In general, this right includes the ability to negotiate wages, hours, and other conditions of employment. In at least five states, however, the negotiation of retirement or health benefits appears to be limited by state law. In Hawaii, for example, “[e]xcluded from the subjects of negotiations are ... benefits of but not contributions to the Hawaii employer-union health benefits trust fund ... and retirement benefits except as provided in [the optional retirement system of the University of Hawaii].”¹⁹ Similarly, under Iowa law, all “retirement systems” are excluded from the scope of negotiations.²⁰

¹² U.S. Dept. of Health and Human Services v. FLRA, 844 F.2d 1087, 1090 (4th Cir. 1988). See also Navy Charleston Naval Shipyard, Charleston, S.C. v. FLRA, 885 F.2d 185 (4th Cir. 1989).

¹³ Veterans Admin. Med. Center. v. FLRA, 675 F.2d 260, 262 (11th Cir. 1982).

¹⁴ See Joseph R. Grodin et al., *Public Sector Employment: Cases and Materials* 81 (2004).

¹⁵ *Id.*

¹⁶ N.C. Gen. Stat. § 95-98.

¹⁷ Va. Code Ann. § 40.1-57.2.

¹⁸ See Bureau of Nat'l Aff., *Public Sector Bargaining – State Laws*, available at http://laborandemploymentlaw.bna.com/lerc/2445/split_display.adp?fedfid=1480271&vname=lecbnlaw&fcn=1&wsn=501128000&fn=1480271&split=0 (last visited Mar. 18, 2011).

¹⁹ Haw. Rev. Stat. § 89-9(d).

²⁰ Iowa Code § 20.9.

Apart from the 31 aforementioned states, 11 additional states seem to provide a right to engage in collective bargaining, but limit that right to only certain specified employees.²¹ In Wyoming, for example, only firefighters appear to have the right to engage in collective bargaining: “The firefighters in any city, town or county shall have the right to bargain collectively with their respective cities, towns or counties and to be represented by a bargaining agent in such collective bargaining as to wages, rates of pay, working conditions and all other terms and conditions of employment.”²²

Recent Collective Bargaining Legislation

On March 11, 2011, Wisconsin Governor Scott Walker signed Senate Bill/Assembly Bill 11, the so-called “Budget Repair Bill.” The Budget Repair Bill amends the state’s Municipal Employment Relations Act and State Employment Relations Act to permit only the negotiation of total base wages for general municipal and state employees.²³ With the measure’s enactment, only public safety employees will be permitted to negotiate over wages, hours, and working conditions.²⁴

While the enactment of the Budget Repair Bill received widespread attention, similar measures have also been introduced and approved by other state legislatures. In Michigan, for example, the Local Government and School District Fiscal Accountability Act (“Fiscal Accountability Act”) was adopted on March 16, 2011.²⁵ Under the Fiscal Accountability Act, the governor may appoint an emergency manager if he determines that a local government financial emergency exists.²⁶ The emergency manager would have broad powers to rectify the financial emergency, including the ability to reject, modify, or terminate one or more terms and conditions of an existing collective bargaining agreement. Section 19(1)(k) of the Fiscal Accountability Act states, in relevant part,

An emergency manager may take 1 or more of the following additional actions with respect to a local government which is in receivership, notwithstanding any charter provision to the contrary: ... After meeting and conferring with the appropriate bargaining representative and, if in the emergency manager’s sole discretion and judgment, a prompt and satisfactory resolution is unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement.

If the emergency manager were to reject, modify, or terminate one or more terms and conditions of an existing agreement, constitutional concerns would likely be raised under the Contract Clause of the U.S. Constitution.²⁷ The Contract Clause states, “No State shall ... pass any ... Law impairing the Obligation of Contracts.” The U.S. Supreme Court has maintained that the Contract Clause “limits the power of the States to modify their own contracts as well as to regulate those between private parties.”²⁸ At the same time, however, the Court has indicated that the Contract

²¹ See Bureau of Nat’l Aff., *supra* note 18.

²² Wyo. Stat. Ann. § 27-10-102.

²³ See SB/AB 11, §§ 245, 314 (2011).

²⁴ See SB/AB 11, §§ 210, 262 (2011) (defining the term “collective bargaining”).

²⁵ 2011 Mich. Pub. Act No. 4.

²⁶ 2011 Mich. Pub. Act No. 4, § 15(4).

²⁷ U.S. Const. art. I, § 10.

²⁸ U.S. Trust Company of New York v. New Jersey, 431 U.S. 1, 17 (1977).

Clause “does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects.”²⁹

The Supreme Court has identified three factors that must be considered to determine whether a state law violates the Contract Clause.³⁰ The threshold inquiry is whether the state law has substantially impaired the contractual relationship.³¹ While what constitutes a “substantial” contract impairment is not entirely certain, it appears that an impairment is substantial if “the right abridged was one that induced the parties to contract in the first place ... or ... was one on which there had been reasonable and especial reliance.”³² The Court has indicated that it is not necessary to have a “total destruction” of contractual expectations to find a substantial impairment.³³

If it is determined that a state law constitutes a substantial impairment, a reviewing court will likely next consider whether the state has a significant and legitimate public purpose for the law.³⁴ In *Energy Reserves Group v. Kansas Power and Light Co.*, a 1983 case involving the Contract Clause and the Kansas Natural Gas Price Protection Act, the Court observed that “remedying ... a broad and general social or economic problem” can be a significant and legitimate public purpose.³⁵ The Court in *Energy Reserves Group* also indicated that the public purpose does not have to be associated with an emergency or temporary situation.³⁶

In *U.S. Trust Company of New York v. New Jersey*, a 1977 case involving a New Jersey statute that repealed a statutory bond covenant that limited the ability of the Port Authority of New York and New Jersey to subsidize rail passenger transportation, the Court found mass transportation, energy conservation, and environmental protection to be goals “that are important and of legitimate public concern.”³⁷

The final factor that would be considered as part of a Contract Clause analysis, as established by the Court, is whether the state law is reasonable and necessary to serve the public purpose.³⁸ To determine whether a state law is “reasonable,” a reviewing court will likely consider the circumstances surrounding the law. If circumstances have changed significantly since a contract was first executed, a court is probably more likely to find the state law to be reasonable. In *U.S. Trust*, the Court concluded that the New Jersey law was not reasonable in light of the surrounding circumstances. The Court maintained that the bond covenant was adopted with full knowledge of the concerns that would later lead to the enactment of the state law. The Court observed,

[T]hese concerns were not unknown in 1962, and the subsequent changes were of degree and not of kind. We cannot say that these changes caused the covenant to have a substantially

²⁹ *Id.*

³⁰ See *Energy Reserves Group v. Kansas Power and Light Co.*, 459 U.S. 400, 411-13 (1983); *U.S. Trust*, 431 U.S. at 17-23.

³¹ See *Energy Reserves Group*, 459 U.S. at 411.

³² See *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1017 (4th Cir. 1993).

³³ *U.S. Trust*, 431 U.S. at 26-27.

³⁴ See *Energy Reserves Group*, 459 U.S. at 411-12.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *U.S. Trust*, 431 U.S. at 28.

³⁸ See *Energy Reserves Group*, 459 U.S. at 411-12. See also *U.S. Trust*, 431 U.S. at 22.

different impact in 1974 than when it was adopted in 1962. And we cannot conclude that the repeal was reasonable in the light of changed circumstances.³⁹

With regard to whether a state law is “necessary,” the Court in *U.S. Trust* explained that a determination should be based on two considerations. First, whether a less drastic modification of a contract could accomplish the state’s purpose.⁴⁰ And, second, whether a state could achieve its goal by adopting alternative means, without contract modification.⁴¹

It is not entirely clear whether the Fiscal Accountability Act or a similar measure would satisfy all of the factors identified by the Court. The Fiscal Accountability Act does appear, however, to have been drafted with the factors in mind. Section 19(1)(k) of the Michigan law states, in relevant part,

The rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement under this subdivision is a legitimate exercise of the state’s sovereign powers if the emergency manager and state treasurer determine that all of the following conditions are satisfied:

(i) The financial emergency in the local government has created a circumstance in which it is reasonable and necessary for the state to intercede to serve a legitimate public purpose.

(ii) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem.

(iii) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is directly related to and designed to address the financial emergency for the benefit of the public as a whole.

(iv) Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is temporary and does not target specific classes of employees.

At the outset, it seems possible that a rejection, modification, or termination of at least some of the provisions of an existing collective bargaining agreement would be viewed as a substantial impairment. In *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, a 1993 case involving a salary reduction plan that was implemented in response to budget shortfalls in Baltimore City, the U.S. Court of Appeals for the Fourth Circuit observed, “In the employment context, there likely is no right both more central to the contract’s inducement and on the existence of which the parties more especially rely, than the right to compensation at the contractually specified level.”⁴² Ultimately, whether the Fiscal Accountability Act survives a possible challenge under the Contract Clause may not be known until an emergency manager identifies the terms and conditions to be rejected, modified, or terminated, and it becomes clear that no alternatives were available to accomplish the state’s purpose.

³⁹ *U.S. Trust*, 431 U.S. at 32.

⁴⁰ *U.S. Trust*, 431 U.S. at 29-30.

⁴¹ *Id.*

⁴² *Baltimore Teachers Union*, 6 F.3d at 1018.

As states continue to explore legislative solutions to resolve their budget issues, the Contract Clause may act to forestall measures that repudiate a state's contractual obligations. Indeed, the facts involved with a particular law, such as the nature of a state's fiscal crisis and the existence of alternative solutions, will most likely inform whether there is a violation of the Contract Clause. The Supreme Court's willingness, however, to find remedying a broad and general economic problem as constituting a significant and legitimate public purpose may suggest to states facing economic hardship that a carefully considered state law could survive constitutional challenge.

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