

Chicago-Kent College of Law

From the Selected Works of Martin H. Malin

2012

The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements

Martin H Malin, *Chicago-Kent College of Law*

The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements

Martin H. Malin*

I. Introduction

During the winter and spring of 2011, the nation's eyes were on Wisconsin as newly-elected Governor Scott Walker introduced a "budget repair bill" that largely eliminated collective bargaining for all public employees in the state except law enforcement and fire protection personnel.¹ Senate Democrats fled to Illinois, denying the supermajority quorum needed under state law to consider fiscal legislation. While the Democrats were still out of the state, the Republicans stripped out provisions that they believed required the super quorum and enacted the bill. The controversy produced public demonstrations on a scale Madison had not seen since the Vietnam War. The Dane County Circuit Court enjoined the enactment on the ground that the legislature violated the state's open meetings law, but in a party-line four-to-three vote, the Wisconsin Supreme Court reversed,² and Act 10 took effect. Before the court's decision, incumbent Republican David Prosser won a bitterly close election to retain his seat on the court.³ The controversy also led to the recall of nine senators, six Republicans and three Democrats, and the ouster of two of the Republicans.⁴ As this article goes to press, the governor and four additional Republican state senators have been recalled, with primaries scheduled for May 8, 2012, and the final recall election scheduled for June 5, 2012.⁵

*Professor and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology. The author gratefully acknowledges superb research assistance from Amanda Clark, Chicago-Kent class of 2012, and financial support from the Marshall-Ewell Research Fund at Chicago-Kent College of Law.

1. 2011 Wis. Act 10. Subsequently, the biannual budget enactment exempted municipal transit employees from Act 10. 2011 Wis. Act. 32.

2. *State ex rel. Ozanne v. Fitzgerald*, 798 N.W.2d 436 (Wis. 2011).

3. See Editorial, *Time to Move Past Court Flap: Recount Shows Prosser Beat Klop-ppenbergh, Who Shouldn't Drag Her Defeat to the Courts*, WIS. ST. J., May 24, 2011, at A13, available at 2011 WLNR 10397020.

4. See Tom Tolan et al., *Democrats Sweep Final Two Recall Elections in Wisconsin*, MILWAUKEE J. SENTINEL, Aug. 17, 2011, available at 2011 WLNR 16253442.

5. *Recall Election Information*, WIS. GOV. ACCOUNTABILITY BD., <http://gab.wi.gov/elections-voting/recall> (last visited Apr. 3, 2012).

Ohio also saw sizeable demonstrations as the legislature enacted major changes to the state's public employee collective bargaining statute.⁶ In reaction to the enactment, opponents garnered 1,298,301 signatures to place the enactment on the November 8, 2011 ballot, more than five times the 231,147 valid signatures required under state law.⁷ On November 8, 2011, Ohio voters rejected the enactment 61.59% to 38.41%.⁸

The upheaval in public-sector labor law, however, was not confined to Ohio and Wisconsin. More than a dozen states amended their public employee collective bargaining statutes. Some changes were relatively minor tweaks; some were radical overhauls. In this article, I review the changes enacted in twelve states: Idaho, Illinois, Indiana, Massachusetts, Michigan, Nebraska, Nevada, New Jersey, Ohio, Oklahoma, Tennessee, and Wisconsin. Although space limitations preclude a detailed normative evaluation of these changes, I take the first steps, placing the twelve states' actions in the context of the ongoing policy debates over public employee collective bargaining, and identifying common elements within the upheaval. Detailed normative analysis must await a subsequent article.

II. The Upheaval in Context

Although private-sector workers have had statutorily protected rights to organize and bargain collectively for more than three-quarters of a century,⁹ comparable rights for public employees have always been controversial. As late as 1963, the Michigan Supreme Court upheld a city's prohibition on its police officers joining a labor union that admitted to membership any person who was not a member of the police department.¹⁰ Although such prohibitions today would clearly be unconstitutional infringements on workers' freedom of association protected by the First Amendment,¹¹ North Carolina and Virginia continue to prohibit by statute public employee collective bargaining.¹²

Recent decades have seen major swings in the pendulum concerning public employee collective bargaining rights. The 1990s were char-

6. S.B. 5, 29th Gen. Assemb. (Ohio 2011).

7. See Laura A. Bischoff, *Senate Bill 5 Repeal Effort May Set Record*, DAYTON DAILY NEWS, June 30, 2011, at A1, available at 2011 WLNR 13032687.

8. The official vote tally is available at: <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/2011results/201108Issue2.aspx> (last visited Mar. 28, 2012).

9. National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449, 452 (codified as amended at 29 U.S.C. §§ 151-69 (2006)).

10. Local No. 201, *AFSCME v. City of Muskegon*, 120 N.W.2d 197, 203 (Mich. 1963).

11. See, e.g., *AFSCME v. Woodward*, 406 F.2d 137, 139 (8th Cir. 1969); *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1075 (W.D.N.C. 1969) (three-judge district court).

12. N.C. GEN. STAT. § 95-98 (2011); VA. CODE ANN. § 40.1-57.2 (2011); see also TEX. LOC. GOV'T CODE ANN. § 174.023 (West 2011) (prohibiting collective bargaining for local government employees except by local option for police and firefighters).

acterized by considerable backlash against public employee collective bargaining, particularly in public education. In 1994, Michigan, where John Engler was twice elected governor in part by demonizing the Michigan Education Association, prohibited bargaining on: the identity of a school district's group insurance carrier; the starting day of the school term; the amount of required pupil contact time; and several other matters impacting employee working conditions.¹³ Michigan also greatly strengthened its prohibition of public employee strikes.¹⁴ Oregon amended its public employee collective bargaining statute to exclude from mandatory bargaining such subjects as class size, the school calendar, and teacher evaluation criteria.¹⁵

In 1993, Wisconsin enacted the qualified economic offer (QEO), which essentially preempted bargaining over school employee wages as long as the school district's wage offer met a prescribed formula.¹⁶ Ohio prohibited bargaining on state university faculty workloads.¹⁷

The Chicago School Reform Act of 1995 prohibited decision and impact bargaining in the Chicago Public Schools and the City Colleges of Chicago on numerous matters that had previously been negotiated, including: subcontracting; layoffs and reductions in force; and class size, staffing, and assignment.¹⁸ Pennsylvania adopted Act 46 in 1998, which provided that whenever the Philadelphia school system was found to be in financial distress, it would not be required to bargain over, among other matters, subcontracting, reductions in force, the school calendar, and teacher preparation time.¹⁹ The entire New Mexico Public Employee Labor Relations Act sunset in 1999 when a Republican governor vetoed its extension.²⁰

The first decade of the new century saw the pendulum swing in the opposite direction. Illinois amended the Chicago School Reform Act to change the prohibited subjects of bargaining to permissive subjects.²¹

13. 1994 Mich. Pub. Acts No. 112 (codified at MICH. COMP. LAWS ANN. § 423.215 (West 2011)).

14. *Id.* (codified at MICH. COMP. LAWS ANN. § 423.202 (West 2011)).

15. 1995 Or. Laws ch. 286, S.B. 750 (codified at OR. REV. STAT. ANN. § 243.650(7)(e) (West 2011)).

16. 1993 Wis. Act. 16 (codified at WIS. STAT. ANN. § 111.70(1)(nc)). In 2009, Wisconsin repealed the QEO in 2009 Wis. Act 28 (2009 A.B. 75). The text of the Act is available at: <https://docs.legis.wisconsin.gov/2009/related/acts/28.pdf>.

17. 1993 Ohio Laws file 30, H.B. 152 (codified at OHIO REV. CODE ANN. § 3345.45 (West 2011)); see *Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124 (1999) (upholding constitutionality of the prohibition).

18. Ill. Pub. Act 89-15 § 10 (codified at 115 ILL. COMP. STAT. ANN. 5/4.5 (West 2011)).

19. See David J. Strom & Stephanie S. Baxter, *From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 J. L. & EDUC. 275, 295 (2001).

20. See Michael Coleman, *Union Suit Against Gov. Rejected*, ALBUQUERQUE J., July 1, 1999, at A1, available at 1999 WLNR 2354044.

21. Ill. Pub. Act 93-3 § 10 (codified at 115 ILL. COMP. STAT. ANN. 5/4.5 (West 2011)). This change became effective April 16, 2003.

Illinois also imposed first-contract interest arbitration for bargaining units of thirty-five or fewer employees.²² Wisconsin repealed the QEO, granted collective bargaining rights to state university faculty and research assistants, made teacher preparation time and changes to teacher evaluation plans mandatory subjects of bargaining, and mandated that grievance arbitration continue during contract hiatus periods.²³ Illinois, New Jersey, Oregon, New Hampshire, California, and Massachusetts mandated “card check” recognition.²⁴ Numerous states extended collective bargaining rights to home health care aides and in-home daycare providers by designating the state as employer of record for collective bargaining purposes; otherwise, they would be considered independent contractors.²⁵ In 2003, New Mexico enacted a public employee collective bargaining statute that was stronger than the one that had sunset four years earlier.²⁶ In 2004, Oklahoma extended collective bargaining rights to employees of municipalities with populations of 35,000 or more.²⁷ But the pendulum reversed directions again following the 2010 elections.²⁸

22. Ill. Pub. Act 96-598 (codified at 5 ILL. COMP. STAT. ANN. § 315/7 (West 2011)).

23. 2009 Wis. Act 28 (2009 A.B. 75). The text of the Act is available at: <https://docs.legis.wisconsin.gov/2009/related/acts/28.pdf>.

24. 5 ILL. COMP. STAT. ANN. § 315/9(a-5) (West 2011); N.J. STAT. ANN. § 34:13A-5.1 (West 2011); OR. REV. STAT. ANN. § 243.682 (West 2011); S.B. 216, 160th Sess. (N.H. 2007) (enacted), *repealed* by S.B. 589, 162d Sess. (N.H. 2011); CAL. GOV'T CODE § 71636.3 (West 2011); MASS. GEN. LAWS ch. 150A, §§ 2, 5 (West 2011).

25. See generally Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390 (2008).

26. 2003 N.M. Laws, H.B. 508 (codified at N.M. STAT. ANN. § 10-7E-1 to -26 (West 2011)).

27. S.B. 1529, 49th Sess. (Okla. 2004), 2004 Okla. Sess. Laws 62 (codified at OKLA. STAT. §§ 51-200 to 51-220 (West 2011)). Oklahoma repealed these rights in H.B. 1593, 53d Leg., 1st Sess. (Okla. 2011).

28. Interestingly, the pendulum for federal employee collective bargaining has seemed to go in the opposite direction from state and local government employee bargaining during much of this same period. President Clinton issued Executive Order 12871, which provided for the creation of labor-management partnerships and for executive branch agencies to negotiate permissive subjects of bargaining. Shortly after taking office, President Bush revoked Executive Order 12871. President Bush also issued Executive Order 13252, which stripped employees of five sections of the Department of Justice of collective bargaining rights on national security grounds. The Bush administration also forbade collective bargaining for airport screeners employed by the Transportation Security Administration and promulgated regulations severely restricting collective bargaining for employees of the Departments of Homeland Security and Defense. See *Nat'l Treasury Emps. Union v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006) (invalidating DHS regs); *Am. Fed'n of Gov't Emps. v. Gates*, 486 F.3d 1316 (D.C. Cir. 2007) (upholding DoD regs). President Obama has issued Executive Order 13522, which created labor-management forums similar to the Clinton labor-management partnerships and called for demonstration projects where agencies would elect to bargain permissive subjects. He has also restored collective bargaining rights for airport screeners, who have voted to be represented by the American Federation of Government Employees. See Press Release, Fed. Lab. Relations Auth., FLRA Office of General Counsel Announces Results of TSA Runoff Election (June 23, 2011), http://www.flra.gov/webfm_send1502. Of course, the pendulum could swing again depending on the outcome of the 2012 elections.

The arguments against public employee collective bargaining have not changed much over the decades. In a March 10, 2011 opinion column in the *Wall Street Journal*, Wisconsin Governor Walker attacked collective bargaining agreements for their wage rates, health insurance and pension provisions, and use of seniority. He compared public employee health and pension benefits to those of the private sector. He argued that his budget repair bill would give public employers “the tools to reward productive workers and improve their operations. Most crucially, our reforms confront the barriers of collective bargaining that currently block innovation and reform.”²⁹

Governor Walker’s arguments against public employee collective bargaining can be traced at least as far back as the Boston police strike in 1919, which resulted in lawlessness for two days in downtown Boston and “became synonymous with the evils of public sector unionism.”³⁰ Critics maintain that public-sector collective bargaining distorts democracy by giving one interest group—public employees and their unions—an avenue of access to government decisionmakers that no other group enjoys.³¹ They further argue that collective bargaining is not conducted at arm’s length because public officials desire the campaign support of the unions sitting across the bargaining table. This, critics contend, results in bloated salaries and benefits, excessive staffing levels, inefficient work rules, job security for poor performers, the absence of merit in employment decisions, and the stifling of innovation in the delivery of public services.³² These criticisms fueled the backlash against public employee collective bargaining in the 1990s and the upheaval of 2011.

III. Searching the Upheaval for Common Elements

This section focuses on changes made by twelve states to public employee collective bargaining statutes as of August 15, 2011. It includes Ohio, even though that state’s enactment never took effect, because the article’s purpose is to identify common elements in the legislative upheaval resulting from the 2010 elections. Some changes

29. Scott Walker, Op-Ed., *Why I’m Fighting in Wisconsin*, WALL. ST. J., Mar. 10, 2011, at A17, available at 2010 WLNR 4819853.

30. MARTIN H. MALIN ET AL., PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS 216 (2d ed. 2011).

31. See, e.g., Daniel DiSalvo, *The Trouble with Public Sector Unions*, NAT’L AFF., Fall 2010, at 3, 13; Robert S. Summers, *Public Sector Collective Bargaining Substantially Diminishes Democracy*, GOV’T UNION REV., Winter 1980, at 5; see also HARRY H. WELLINGTON & RALPH K. WINTER JR., THE UNIONS AND THE CITIES 30 (1971) (“[A] full transplant of collective bargaining ... would, in many cases, institutionalize the power of public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage.”).

32. See, e.g., DiSalvo, *supra* note 31; Leo Troy, *Are Municipal Collective Bargaining and Municipal Governance Compatible?*, 5 U. PA. J. LAB. & EMP. L. 453 (2003); (*Government Workers of the World Unite!*, ECONOMIST, Jan. 8, 2011, at 21.

resulted from bruising partisan battles. Others resulted from negotiations among interested parties and were adopted unanimously or with near unanimity, with proponents contrasting the process with the highly-visible partisan fight in Wisconsin.³³ Rather than go through the changes state-by-state, this section looks at common elements found in multiple state legislative changes.

A. *Repeal of the Right to Bargain*

Two states, Oklahoma and Tennessee, repealed statutes that provided public employees with collective bargaining rights. On April 29, 2011, Oklahoma Governor Mary Fallin signed House Bill 1593 repealing the Oklahoma Municipal Employee Collective Bargaining Act, which had guaranteed the rights to organize and bargain collectively to employees of municipalities with populations above 35,000.³⁴ The repeal leaves the decision to bargain to the municipalities' discretion. The repeal's sponsors argued that it was necessary to restore local control over the decision to bargain collectively.³⁵ The governor maintained that it would control costs.³⁶

Tennessee repealed the Education Professional Negotiations Act, which had provided teachers with the right to organize and bargain collectively since 1978, and replaced it with the Professional Educators Collaborative Conferencing Act of 2011.³⁷ The Tennessee Senate voted to repeal the collective bargaining law, but the state House of Representatives voted to limit the scope of bargaining rather than repeal it.³⁸ The following day, a conference committee voted for the repeal, which passed later that day in both houses.³⁹

33. See Tara Malone, *Quinn Signs Education Overhaul Package*, CHI. TRIB., June 13, 2011, <http://www.chicagotribune.com/news/local/breaking/chibrknews-quinn-to-sign-education-overhaul-package-20110613,0,4441949.story> (Illinois); Noah Bierman, *Patrick, Leaders Strike Deal on Unions*, BOS. GLOBE, July 9, 2011, at 1, available at 2011 WLNR 13584108 (Massachusetts); Kevin O'Hanlon, *Overhaul on Verge of Passage*, LINCOLN J. STAR, May 21, 2011, at B, available at 2011 WLNR 10259125 (Nebraska).

34. H.B. 1593, 53d Leg., 1st Sess. (Okla. 2011), www.oklegislature.gov/BillInfo.aspx?Bill=HB1593&Tab=0.

35. See Barbara Hoberock, *Fallin Signs Collective-Bargaining Bill*, TULSA WORLD, Apr. 29, 2011, available at 2011 WLNR 8420196 (quoting co-sponsor Representative Steve Martin); Sean Murphy, *Oklahoma Senate Approves Anti-Union Rights Bill*, TULSA WORLD, Apr. 19, 2011, http://www.tulsaworld.com/news/article.aspx?subjectid=336&articleid=20110419_336_0_OKLAHO385498 (quoting co-sponsor Senator Cliff Aldridge).

36. Hoberock, *supra* note 35. Interestingly, the Oklahoma House defeated another bill, H.B. 1576, which would have amended Oklahoma's police and firefighter collective bargaining statute by giving municipalities the option of accepting the award of an interest arbitrator or rejecting it and returning to negotiations. The text of the bill is available at: <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1576>.

37. Tenn. Pub. Acts Ch. No. 378 (codified at TENN. CODE ANN. § 49-5-601 (2011)).

38. See Richard Locker, *Teacher Bargaining Hinges on GOP*, MEMPHIS COM. APPEAL, May 20, 2011, at B1, available at 2011 WLNR 10114880.

39. See Richard Locker, *Teachers Rights to Negotiate Repealed—Late House Vote Kills Collective Bargaining by Teachers*, MEMPHIS COM. APPEAL, May 21, 2011, at A1, available at 2011 WLNR 10275968. Critics of the repeal charged that it was Republican

Under the Collaborative Conferencing Act (CCA), between October 1 and November 1, employees may file with the school district a petition for collaborative conferencing supported by a fifteen percent showing of interest.⁴⁰ If this showing is met, the school board must appoint a committee with equal representation of board members and employees to conduct an election whereby employees vote whether to engage in collaborative conferencing and if so, who shall represent them. The choices for representation must include “unaffiliated.”⁴¹ If a majority votes for collaborative conferencing, the school board appoints a team of between seven and eleven management personnel. The employees are entitled to an equal number of representatives on the committee. Each employee representative option that received at least fifteen percent of the vote is entitled to proportional representation.⁴² The committee that conducted the election selects the representatives of the unaffiliated employees, if fifteen percent or more of the employees selected that option.⁴³ The collaborative conferencing committee remains in effect for three years, after which the election process is repeated.⁴⁴

The CCA defines collaborative conferencing as “the process by which [the parties] meet at reasonable times to confer, consult and discuss and to exchange information, opinions and proposals on matters relating to the terms and conditions of professional employee service, using the principles and techniques of interest-based collaborative problem-solving.”⁴⁵ The CCA prohibits refusing or failing to participate in collaborative conferencing.⁴⁶ It requires the parties jointly to prepare a written memorandum of understanding of any agreement reached, but conditions portions of an agreement requiring funding on the appropriation of such funding by the relevant authority.⁴⁷ Further, it expressly declares that the parties are not required to reach agreement; if no agreement is reached, the school board sets employee terms and conditions of employment by board policy.⁴⁸ The CCA also appears to authorize the director of schools to bypass the employees’

retaliation against the Tennessee Education Association for supporting more Democrats than Republicans in the 2010 elections, noting that Representative Glen Casada, chair of the Republican caucus, had asked the union prior to the elections to increase its campaign contributions to Republicans to equal what it was giving to Democrats. Locker, *supra* note 38.

40. Tenn. Pub. Acts Ch. No. 378 (codified at TENN. CODE ANN. § 49-5-605(b)(1) (2011)).

41. *Id.* § 49-5-605(b)(1), (2).

42. *Id.* § 49-5-605(b)(4).

43. *Id.* § 49-5-605(b)(5).

44. *Id.* § 49-5-605(b)(6)(A).

45. *Id.* § 49-5-602(2).

46. *Id.* § 49-5-606(a)(3), (b)(2).

47. *Id.* § 49-5-609(b).

48. *Id.* § 49-5-609(d).

representatives and deal directly with individual employees.⁴⁹ Beyond these provisions, the CCA is silent as to the content of the duty to engage in collaborative conferencing. Because Tennessee does not have a labor relations board to administer the CCA, it presumably will be up to the Tennessee courts to determine the content of the duty and the extent to which the generally well-defined duty to bargain will be applied to the duty to engage in collaborative conferencing.

The Tennessee statute mandates collaborative conferencing with respect to salaries, grievance procedures, insurance, fringe benefits other than retirement benefits, working conditions, leave, and payroll deductions.⁵⁰ It expressly prohibits collaborative conferencing with respect to differential pay plans, incentive compensation, expenditure of grants or awards, evaluations, staffing decisions, personnel decisions concerning assignment of professional employees, and payroll deductions for political activities.⁵¹

Several states, while not repealing their public employee collective bargaining statutes, amended them to deny collective bargaining rights to certain groups of employees. Nevada took bargaining rights away from doctors, lawyers, and some supervisors.⁵² Had voters not rejected it, the Ohio enactment would have taken bargaining rights away from university faculty who participate in faculty governance and certain police and firefighter supervisors.⁵³

Wisconsin Act 10 took away collective bargaining rights from state university faculty, all employees of the University of Wisconsin Hospitals and Clinics, and day care and home health care providers.⁵⁴ Although Act 10 did not repeal the Municipal Employee Relations Act or the State Employee Relations Act, it effectively abolished collective bargaining for all public employees except most law enforcement and fire protection personnel and municipal transit employees if denial of collective bargaining rights to those transit employees would result in the municipality losing federal funds.⁵⁵ It prohibits bargaining on any

49. *See id.* § 49-5-608(c).

50. *Id.* § 49-5-608(a).

51. *Id.* § 49-5-608(b).

52. S.B. 98, §§ 5, 6, 76th Leg. (Nev. 2011) (codified at NEV. REV. STAT. § 288.140 (2011)).

53. S.B. 5, 29th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. CODE ANN. §§ 4117.01(K); (C)(10); (F)(2).

54. 2011 Wis. Act 10 §§ 265 (state university faculty); 279 (U.W. Hospitals and Clinics), 280 (day and home health care providers).

55. While Act 10 permits “public safety officers” to bargain collectively, its definition of “public safety officer” excludes certain law enforcement officers. For example, under Act 10, officers employed by the Wisconsin State Capital Police and University of Wisconsin–Madison Police Department are not considered public safety officers, making them subject to Act 10. *See State Agents, DNR Wardens Not Exempt From Walker Cuts*, MILWAUKEE J. SENTINEL (Feb. 18, 2011), <http://www.jsonline.com/news/statepolitics/116502363.html> (noting distinction between certain classes of law enforcement officers).

subject other than “base wages,” which expressly excludes overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions.⁵⁶ Furthermore, base wages may not increase more than the increase in the consumer price index (CPI) as of 180 days before the expiration of the collective bargaining agreement.⁵⁷ In many respects, Oklahoma employees have more collective bargaining protection than Wisconsin employees. Although Oklahoma repealed its statute that mandated collective bargaining rights in mid-sized municipalities, it allows collective bargaining at the option of the employer. In contrast, Wisconsin prohibits collective bargaining even if the employer is willing to engage in it.⁵⁸ It is not surprising that Wisconsin Act 10 repealed the declarations in the Municipal and State Employee Relations Acts that had found public employee collective bargaining to be in the public interest.⁵⁹

B. Limiting the Scope of Bargaining

By far, the most numerous changes made in the upheaval of 2011 concerned the scope of bargaining. Perhaps responding to Wisconsin Governor Walker’s call to give government managers the tools they need to improve operations, spur innovation, and control costs,⁶⁰ legislatures have removed, and in many cases prohibited, bargaining over a wide range of subjects. Some subjects removed from the bargaining table are directly related to compensation while others deal with working conditions. Regardless, the legislatures are giving public-sector employers the tools of command, control, and unilateral imposition.

Health care is the item of compensation most frequently removed from the bargaining table. Although law enforcement and fire protection personnel were exempted from Act 10’s prohibition on bargaining for anything other than base wages, the state’s regular biannual budget act prohibited bargaining over law enforcement and firefighter

56. 2011 Wis. Act 10 § 314.

57. *Id.* On March 30, 2012, the United States District Court for the Western District of Wisconsin upheld the constitutionality of the restricted scope of bargaining against attacks by a coalition of unions. The unions argued that Act 10’s disparate treatment of most public employees, on the one hand, and security employees on the other, lacked a rational basis in violation of the Equal Protection Clause of the Fourteenth Amendment and distinguished between employees whose unions had supported Governor Walker in the 2010 election and those who opposed him, in violation of the First Amendment. The court did find two other provisions of Act 10 unconstitutional. The court found that provisions of Act 10 which prohibited voluntary payroll deduction of union dues for all employees except security employees lacked a rational basis and, thus, violated the Equal Protection Clause and the requirement that unions representing bargaining units other than security employees submit to annual recertification elections violated those unions’ and their members’ Equal Protection and Free Speech rights. *Wis. Educ. Ass’n Council v. Walker*, No. 11-cv-428-wmc, 2012 WL 1068790, at *1 (W.D. Wis. Mar. 30, 2012).

58. 2011 Wis. Act 10 § 169(1m).

59. *Id.* § 261.

60. *See supra* note 29 and accompanying text.

health insurance.⁶¹ Ohio's enactment deemed "not appropriate" for bargaining, inter alia, health care benefits, except that the parties may agree that the employer will pay up to eighty-five percent of the premiums.⁶²

New Jersey suspended bargaining over health care benefits for four years while a new statute is phased in. The statute sets a sliding scale according to salary of mandatory employee contributions to health care premiums and provides for health care plans to be designed by two state committees, one for education and one for the rest of the public sector.⁶³

Massachusetts enacted a new method for local governments to make changes in health insurance. The governing body may adopt changes in accordance with estimated cost savings and proof of the savings. It gives notice to each bargaining unit and a retiree representative. The retiree representative and the bargaining unit representatives form a public employee committee that negotiates with the employer for up to thirty days. After thirty days, the matter is submitted to a tri-partite committee, which, within ten days, can approve the employer's proposed changes, reject them, or remand for additional information. The committee's decision is final.⁶⁴

Idaho limited negotiations for teachers to "compensation," which it defined as salary and benefits, including insurance, leave time, and sick leave.⁶⁵ Previously, bargaining subjects were determined by an agreement between the parties. The Idaho enactment also limited collective bargaining agreements to one fiscal year, July 1 through June 30, and prohibited evergreen clauses or other provisions that allow a contract to continue until a new one is reached.⁶⁶

Similar to Idaho, Indiana limited collective bargaining for teachers to wages and salary and wage-related fringe benefits including insurance, retirement benefits, and paid time off.⁶⁷ The statute permits collective bargaining agreements to have grievance procedures, but deletes the prior law's express authorization for a grievance procedure

61. 2011 Wis. Act 32 § 2409cy.

62. S.B. 5, 29th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. CODE ANN. § 4117.08(B)(2), (E).

63. 2011 N.J. Laws ch. 78.

64. 2011 Mass. Acts, ch. 69. Media reports suggested that in April when the Massachusetts House passed more restrictive legislation, President Obama's Director of Intergovernmental Affairs telephoned Massachusetts Governor Deval Patrick with concerns about the bill, which had been strongly opposed by organized labor. The governor negotiated changes with labor leaders whose attitude changed from a vow to fight the legislation "to the bitter end" to support and congratulations to the governor for "listening to labor's concerns." See Michael Levenson, *National Scrutiny for Mass. Labor Law*, BOS. GLOBE, July 12, 2011, available at 2011 WLNR 13742434.

65. S.B. 1108 § 17, 61st Leg. (Idaho 2011).

66. *Id.* § 22.

67. Senate Enrolled Act No. 575 § 14, 117th Gen. Assemb. (Ind. 2011).

culminating in binding arbitration.⁶⁸ The new statute prohibits bargaining on everything else, including express prohibitions on bargaining about the school calendar, teacher dismissal procedures and criteria, restructuring options, and contracting with an educational entity that provides post-secondary credits to students.⁶⁹ It also prohibits any contract that would place a school district in a budgetary deficit⁷⁰ and prohibits collective bargaining agreements from extending beyond the end of the state budget biennium.⁷¹ The new law repeals a prior provision that authorized parties to agree to arbitrate teacher dismissals.⁷²

The Indiana enactment provides that the parties shall discuss: curriculum development and revision; textbook selection; teaching methods; hiring; evaluation; promotion; demotion; transfer; assignment; retention; student discipline, expulsion, or supervision of students; pupil/teacher ratio; class size or budget appropriations; safety issues; and hours.⁷³ However, any agreements reached in such discussions apparently may not be included in the contract.

In addition to health care benefits, the Ohio enactment deemed the following inappropriate for collective bargaining: restricting contracting out or providing severance pay to employees whose jobs are contracted out; granting more than six weeks of vacation, more than twelve holidays, or more than three personal days; employer contributions to retirement systems; minimum staffing provisions, class size and restrictions on school district authority to assign personnel; reductions in force of educational employees; and seniority as the sole factor in reductions in force.⁷⁴

Michigan added to its list of prohibited subjects of bargaining for educational personnel. Decision and impact bargaining are now prohibited with respect to: placement of teachers; reductions in force and recalls; performance evaluation systems; the development, content, standards, procedures, adoption and implementation of a policy regarding employee discharge or discipline; the format, timing and number of classroom visits; the development, content, standards, procedures,

68. *Id.* § 17.

69. *Id.* § 15.

70. *Id.* § 13.

71. *Id.* § 16.

72. *Id.* § 6.

73. *Id.* § 18.

74. S.B. 5, 29th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. STAT. ANN. §§ 4117.08(B)(4) (contracting out); 4117.105(B) (severance pay to employees whose jobs have been contracted out); 4117.108(A)(1) (vacation); 4117.108(A)(2)–(3) (holiday and personal time); 4117.08(B)(3) (employer contribution to the public employees retirement system); 4117.08(B)(5) (staffing); 4117.081(B)(1) (school district authority to assign); 4117.081(B)(3) (class size); 4117.081(B)(4) (RIF-educational employees); 306.04(B) (seniority-transit); 709.012 (seniority-firefighters); 3316.07(A)(11) (seniority-nonteaching school employees).

adoption and implementation of the method of employee compensation; decisions about how an employee performance evaluation is used to determine performance-based compensation; and the development, format, content and procedures of notice to parents and legal guardians of pupils taught by a teacher who has been rated as ineffective.⁷⁵

Illinois amended its Educational Labor Relations Act to provide that, in the Chicago Public Schools, the length of the school day and the length of the school year are permissive, rather than mandatory, subjects of bargaining.⁷⁶ The amendment responded to calls from the Mayor of Chicago to authorize his appointed school board and management team to increase the school day unilaterally in light of the Chicago Teachers Union's previous refusal to agree to such increases.⁷⁷

C. *Impasse Resolution*

Several jurisdictions made major changes to their impasse procedures, significantly increasing employer control over the final terms of employment. Wisconsin prohibited interest arbitration for all employees except law enforcement and firefighters.⁷⁸ Wisconsin now has no impasse procedures for most public employees. Of course, with bargaining limited to base wages, and further limited to changes in the CPI, there may not be much need for impasse resolution.

Idaho repealed its requirement of factfinding.⁷⁹ Under the new Idaho statute, the parties are authorized, but not required, to mediate if they have not reached agreement by May 10.⁸⁰ If they do not reach agreement by June 10, the school board must unilaterally set the terms and conditions of employment for the coming school year by June 22.⁸¹ The statute does not expressly restrict the school board's actions, thereby leaving open the possibility that the school board could establish terms never discussed with the union. With evergreen clauses prohibited, Idaho school boards may be tempted to surface bargain, run out the clock, and unilaterally set terms. It remains to be seen how closely Idaho courts—Idaho does not have a labor relations board—will scrutinize employer behavior at the bargaining table. There is authority in other jurisdictions to deviate from the National Labor Relations Act's relatively laissez-faire approach to policing good faith bargaining.⁸² Interestingly, the Idaho Supreme Court has held

75. 2011 Mich. Pub. Act 103.

76. S.B. 7 § 10, 97th Gen. Assemb. (Ill. 2011).

77. See Kristen Mack & Noreen Ahmed-Ullah, *Chicago Teachers Union Takes a Jab at Emanuel*, CHI. TRIB., Apr. 15, 2011, available at 2011 WLNR 7363260.

78. 2011 Wis. Act 10 § 233.

79. S.B. 1108 § 22, 61st Leg. (Idaho 2011).

80. *Id.* § 20.

81. *Id.*

82. See, e.g., *Mun. of Metro. Seattle v. Pub. Emp't Relations Comm'n*, 826 P.2d 158, 166 (Wash. 1992) (upholding authority of PERC to impose interest arbitration as a remedy for surface bargaining, distinguishing precedent under NLRA on ground that

that teacher strikes are not automatically enjoined, with injunction actions subject to a defense of unclean hands due to bad faith by the school board in the negotiations process.⁸³ The court assumed, but did not decide, that teacher strikes were illegal; however, one concurring justice opined that teacher strikes were lawful because they were not expressly prohibited.⁸⁴

Since 1984, Ohio has recognized a right to strike for most public employees and a right to interest arbitration for the others. Ohio voters rejected the legislative enactment which would have prohibited strikes by all public employees and enforced the prohibition with fines for strikers of two days' pay for each day on strike, discipline or discharge of strikers, loss of dues checkoff for striking unions, and strike injunctions.⁸⁵ The Ohio enactment also would have prohibited interest arbitration.

In place of strikes and interest arbitration, the Ohio enactment mandated factfinding if no agreement was reached forty-five days before scheduled expiration of an existing contract. The enactment required that the factfinder's primary consideration be the public interest and welfare and the employer's ability to pay. It limited the factfinder to considering the employer's financial status as of the time period surrounding negotiations, precluding consideration of potential increases in employer revenue or employer ability to sell assets. The enactment allowed either party by majority vote within fifteen days following the factfinder's recommendations to reject them. It required the Ohio State Employment Relations Board to publicize the rejected recommendations. Absent agreement within five days after publication, the parties were to submit their last best offers to the employer's legislative body whose chief financial officer would certify which offer cost more and hold a public hearing. Within fifteen days following contract expiration, the legislative body was to pick one party's final offer, with the employer's offer governing if no selection were made.⁸⁶

New Jersey and Nevada made significant changes to their interest arbitration statutes. New Jersey amended its police and firefighter interest arbitration provisions to eliminate party selection of the arbitrator. Now the Public Employment Relations Commission (PERC) randomly selects the arbitrator from a special panel. Additionally, the parties must present written estimates of the financial impact of their

Washington statute did not provide for a right-to-strike or for a terminal impasse procedure).

83. Sch. Dist. No. 351 Oneida Cnty. v. Oneida Educ. Ass'n, 567 P.2d 830, 835 (Idaho 1977).

84. *Id.* at 836 (Bakes, J., concurring in the judgment and dissenting in part).

85. S.B. 5, 29th Gen. Assemb. (Ohio 2011), amending OHIO REV. STAT. ANN. § 4117.12(B)(4).

86. *Id.* § 4117.14(D)(2).

final offers, and the award must issue within forty-five days of arbitrator appointment (prior law allowed 120 days). The award must address all statutory criteria and certify that the arbitrator took statutory limitations imposed by the local levy cap into account. The award may be appealed to PERC, which must: decide the appeal within thirty days; address all statutory factors; and certify that it took the levy cap into account. The statute caps arbitrator fees at \$1,000 per day and \$7,500 total, and it caps cancellation fees at \$500; it fines arbitrators \$1,000 per day for being late. The award may not increase base salary items by more than two percent of the aggregate amount expended by the employer in the twelve months immediately preceding expiration of the prior contract and may not include base salary items and other economic issues that were not included in prior contract. The cap on base salaries sunsets on April 1, 2014.⁸⁷

In Nebraska, the Commission of Industrial Relations (CIR) performs interest arbitration. The new Nebraska Act provides detailed criteria for selecting an array of comparable communities and specifies the number of comparable communities to be selected. It mandates that if the employer pays compensation that is between 98% and 102% of the average of the comparables, including fringe benefits, the CIR must leave compensation unchanged. If the employer's compensation is below 98% of the average, the CIR is to raise it to 98%, and if it is above 102%, the CIR is to lower it to 102%. The targets are reduced to 95–100% during periods of recession, defined as two consecutive quarters in which the state's net sales, use taxes, and individual and corporate income tax receipts are below those of the prior year.⁸⁸

Michigan amended its police and firefighter interest arbitration statute to provide for final offer issue-by-issue arbitration on economic issues, with traditional arbitration on other issues. The Michigan enactment requires the arbitrator to make the employer's financial ability to pay the primary factor.⁸⁹

Indiana amended its teacher bargaining impasse procedures in a manner that is most confusing. The Indiana statute provides that after at least sixty days of bargaining, if impasse is declared, the Indiana Educational Employment Relations Board (IEERB) appoints a mediator who must conduct not more than three mediation sessions resulting in either an agreement or each party's last best offer and fiscal rationale.⁹⁰ If there is no agreement fifteen days after mediation has ended, the parties proceed to factfinding. One section states that factfinding must culminate in the factfinder imposing terms,⁹¹ but

87. 2010 N.J. Laws ch. 105.

88. L.B. 397, 102d Leg. (Neb. 2011).

89. H.B. 4522, 96th Leg. (Mich. 2011).

90. Senate Enrolled Act No. 575 § 22, 117th Gen. Assemb. (Ind. 2011).

91. *Id.* § 23.

another section states that the factfinder issues a report and recommendations to the IEERB, which can add to the recommendations.⁹² This apparent inconsistency calls out for IEERB clarification.

Illinois modified its law governing strikes in public education. For school districts other than the Chicago Public Schools, if there is no agreement within forty-five days of the start of the school year, the Illinois Educational Labor Relations Board must invoke mediation. After fifteen days of mediation, either party may declare impasse. Seven days later, each party submits its final offer and cost summary. Seven days thereafter, the final offers are made public.⁹³ No strike is allowed until at least fourteen days after publication of final offers.⁹⁴

For the Chicago Public Schools, if no agreement is reached after a reasonable period of mediation, the dispute is submitted to factfinding, upon demand of either party. Factfinding is tri-partite unless the parties agree otherwise. If there is no settlement within seventy-five days, the factfinder issues a private report with recommendations, which the parties have fifteen days to reject. If rejected, the recommendations are made public.⁹⁵ There may be no strike for thirty days following publication and no strike unless authorized by seventy-five percent of the bargaining unit members.⁹⁶

D. Financial Distress

Three states addressed governments experiencing financial distress. Nevada required contracts to provide for reopening in times of fiscal emergency.⁹⁷ The voter-rejected Ohio enactment provided for modification or termination of contracts if the state placed a local government on fiscal watch or fiscal emergency.⁹⁸ The most far-reaching enactment was the Michigan Local Government and School District Fiscal Accountability Act of 2011.⁹⁹ It specifies procedures that can lead to a finding by the state of financial emergency. Upon such a finding, the governor appoints an emergency manager who, among other things, has the power to reject all or part of a contract upon finding that: the financial emergency has created a circumstance making it reasonable and necessary for the state to intervene; the rejection is reasonable and necessary to deal with a broad, generalized economic problem; rejection is directly related to and designed to address the

92. *Id.* § 25.

93. S.B. 7 § 12(a-5), 97th Gen. Assemb. (Ill. 2011).

94. *Id.* § 13(b)(2).

95. *Id.* § 12(a-10).

96. *Id.* § 13(b)(2.10).

97. S.B. 98, § 7(2)(w), 76th Leg. (Nev. 2011).

98. S.B. 5, 29th Gen. Assemb. (Ohio 2011), *amending* OHIO REV. CODE ANN. § 4117.104(A).

99. 2011 Mich. Pub. Act. No. 4.

financial emergency; and rejection is temporary and does not target specific classes of employees.¹⁰⁰

IV. The Future

The future of public-sector collective bargaining laws largely depends on the voters. Whether the Ohio vote marks the start of another reversal of the pendulum will be tested in Wisconsin where Governor Walker and four additional Republican Senators now face recall elections.¹⁰¹ Ultimately, the 2012 elections will likely determine the direction in which the pendulum will swing.

100. *Id.*

101. *See supra* note 5.