

PUBLIC SECTOR LABOR RELATIONS LAW IN AMERICA

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Abstract

Prior to 1959, there were no laws in the U.S. legitimizing collective bargaining between public sector representative groups and governmental bodies. In that year, the State of Wisconsin passed a law allowing public sector representatives to bargain for pay and benefits with state and local governments for its members. While Federal legislation had allowed collective bargaining for almost all private sector employees since 1935, this privilege had not been legal for public sector workers. In the next few years, other states passed collective bargaining legislation for state and local employees and in 1961, President John F. Kennedy issued an Executive Order to allow limited bargaining rights for Federal Employee unions. Growth of public sector unions has accelerated rapidly since then until now the percentage public sector employees represented by unions far exceeds that of private sector unions.

Introduction

Prior to 1935 in the U.S. , no employee groups had a legal right to union representation, labor contracts, or collective bargaining rights. In that year, the National Labor Relations Act, commonly called the Wagner Act, was passed by the U.S. Congress with the blessing of President Franklin Roosevelt. The act allowed private sector workers to choose, by secret election, labor organizations to represent them and bargain for binding contracts. The act was enforced by a National Labor Relations Board (NLRB) appointed by the President. Challenges to the act's constitutionality arose quickly, and within two years were debated in the U.S. Supreme Court. The Court found, by a 5-4 decision in the case *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937) that the Wagner Act was constitutional and would be enforced throughout the private sector, but not in governmental organizations.

Government employee representatives complained to President Roosevelt that this application of the law to private sector workers only was unfair to government employees. Roosevelt responded "The process of collective bargaining as usually understood, cannot be transferred into the public services." His rationale was that government employees are different from private sector employees because their employer is not a single person, but the electorate that had chosen representatives to work for them to deliver the mail,

police the streets, put out fires, pick up the garbage, teach the children, etc. This ruling stood for 24 years preventing public sector employees from having legal protection of the privilege to have representatives bargain for their pay, hours of work, and other conditions of employment.

Private sector unionization

Private sector unionization had begun in the 19th century with the Knights of Labor (1869) and the American Federation of Labor (1876). These labor organizations primarily represented craft and industrial workers which would attempt to get their employers to give them good wages and conditions of employment. When labor was scarce, the employers would agree to give good wages and conditions, but if labor was plentiful, employers would discharge workers who tried to bargain with them and hire other workers. Workers might strike to force better conditions and labor agreements occurred primarily as a contest of strength between workers and employers. Governments stayed out of these industrial conflicts unless there was danger to the public.

Then in the midst of the 1930's depression, employers ruthlessly terminated workers who might make trouble for them. The New Deal followers of President Roosevelt saw compulsory unionization as a mechanism keep higher paid workers on the job and increase the payrolls coming into the population. The result was two pieces of legislation, the Norris LaGuardia Act of 1932, enacted before Roosevelt's election with little effect for workers, then the Wagner Act in 1935 which had a great effect on unionization and worker's rights.

The Wagner Act forced employers in the private sector to recognize labor organizations that had been chosen by a majority of workers and to bargain with them. It was enforced by the National Labor Relations Board (NLRB) using five Unfair Labor Practices that employers might use to avoid unionization. The Section 7 of the act was the heart of the act: "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through labor organizations of their choosing and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid and protection."

The unfair labor practices all were aimed against employers, to wit, "It shall be an unfair labor practice for any employer to

1. Interfere with, restrain, or coerce employees in their rights allowed under Section 7
2. Dominate or interfere with the formation or administration of any labor organization
3. Dominate employees to encourage or discourage acts of support for a labor organization

4. Discriminate against employees who file charges or testify against employers
5. Refuse to bargain collectively with the representatives of the employers employees

Violation of these unfair labor practices would result in a cease and desist order and a make whole remedy for the employees.

The U.S. Supreme Court ruled that the Wagner Act was legal because violations of the act would interfere with the Interstate Commerce Clause of the Constitution. Thus, if an employer was at all engaged in interstate commerce, the act would apply to regulate the labor relations in the enterprise. Some small private organizations engaged only in “intrastate” commerce, thus these enterprises were exempt from the Wagner Act.

Under the Wagner Act, unions found ways to gain unfair advantages over employers. An amendment to the Wagner Act in 1947, Labor-Management Relations Act, also called the Taft-Hartley Act, added six Unfair Labor Practices that unions might employ, thus rebalancing the power between labor and management. Under these conditions, private sector employers and workers representatives have coexisted with many conflicts decided by the NLRB, courts, or private arbitrators for settlement. Over time since the 1950’s workers have been treated with more fairness with or without unions and the percentage of private sector workers is now less than 8%.

Public sector labor relations

Government workers have had many benefits that private sector workers in the U.S. have never had. In 1883, the Pendleton Civil Service Reform Act was passed by Congress to protect civil servants from unfair treatment. It applied only to Federal workers, but with this initiative, many states passed similar legislation. The legislation provided fair conditions for most of the hiring done by the Federal government to prevent favoritism, cronyism, and nepotism. Job applicants were to be hired by a panel of neutral administrators. For high level positions, applicants were tested to determine which ones had the highest levels of skills and aptitudes for the jobs. At the highest level, politicians who had won elections were able to choose their supporters for the jobs, but the bulk of the jobs were awarded based on merit. Merit was also the criterion for promotions, transfers, demotions, and dismissal.

Under this system, workers were given job security so long as they were not guilty of engaging illegal acts, acts of moral turpitude, or incompetence. Such job security should have made the public workers satisfied, but it did not. They saw that their counterparts in the private sector bargained for pay and benefits and often were better rewarded than the public workers. Thus the drive for public sector unionization began.

Gradually, some jurisdictions starting with some cities did allow public employee representatives to bargain for employee rewards and benefits. Some of this happened in the early 1950's, and the State of Wisconsin passed a public employee bargaining law in 1959. A few other states followed suit, then President Kennedy issued Executive Order 10988 in 1962 allowing Federal employee representatives to bargain with Federal agencies for some benefits.

President Nixon passed a more complete executive order, E.O 11491 in 1969 that created Unfair Labor Practices and a regulatory board similar to the NLRB for Federal employees. The uniformed military was completely excluded from unionization and bargaining for pay for Federal workers was not allowed in either executive order. This made pay off limits for agency bargaining because Federal Pay is established by the Congress and thus is out of the hands of the agencies. The limitation continues to exist today in the Federal government, although it doesn't exist in some state and local government collective bargaining. Another limitation was the right to strike. Work stoppages by federal employers are illegal, but are allowed in some states.

Federal Air Traffic Controllers went on a strike in 1982 which caused most airline flights to be grounded. President Ronald Reagan acted quickly and gave the controllers 48 hours to return to work or be terminated. A vote taken by PATCO, the controller's union, was to continue the strike until the controllers were awarded their demands: a huge pay increase, \$10,000 per member, a 32 hour work week, and an earlier retirement year. Reagan refused to give in to these demands and fired all striking controllers. They were replaced with military air traffic controllers and retired controllers until new controllers could be hired. The striking controllers were banned from ever working as air traffic controllers again and kept from any other federal jobs for five years. This result prevented an ominous precedent from occurring in the Federal bureaucracy and few work stoppages have taken place by Federal workers since then.

In the aftermath of the Kennedy Executive Order many states had introduced collective bargaining legislation, but many did not. Seven states refuse to allow public sector collective bargaining, viewing it as an encroachment upon their right to govern their constituents.

One hold-out that refused to allow governmental bargaining with public employees was Virginia. Some of Virginia's counties right across the Potomac River from Washington D.C. was in competition with the District of Columbia, a Federal enclave subject to the Federal executive orders that gave federal employees bargaining rights. The jurisdictions of Arlington County, Fairfax County, and the City of Alexandria couldn't keep good workers from leaving their boundaries to work in Washington because the federal pay and benefits were better. These three jurisdictions made their own legislation to allow for collective bargaining with public sector unions such as the International

Association of Firefighters, the American Federation of State, County, and Municipal Employees, and police unions, so they could effectively increase their pay and benefits and keep their best employees. The State of Virginia claimed the agreements they made with public sector unions were illegal and forced those jurisdictions to void the contracts they had made with the unions.

In the case, *Commonwealth of Virginia v. Arlington County Board* 217 Va. 558 (1977) the labor agreements of Arlington County, Fairfax County, and Alexandria City were ruled to be null and void since they had not been sanctioned by the state government. Virginia adheres to a legal device called "The Dillon Rule" which states that subordinated levels of government may not establish contracts not approved by the state. The jurisdictions then began to create memoranda of agreement with labor organizations that didn't have the legal status of contracts, but usually help the jurisdictions in their quest to keep good employees.

Private sector collective bargaining grew in the 1950's to cover 35% of the work force. Over time, as the U.S. economy changed from a manufacturing economy to a service economy, the amount of unionization and collective bargaining in the private sector dwindled to about 8%, but unionization and collective bargaining in the public sector ballooned and has become the growth sector of unionization with 36% of the workforce represented by unions.

Pay and benefits for public employees in many states are now surpassing that of private sector employees. In the current depressed economy, the high amount of cost for these benefits has brought some states to the point of bankruptcy and forced state governments to try to reduce public employee pay and benefits. Usually, the public sector unions resist any attempt to give back any benefits or reduce pay by any amount even though it is endangering the continued employment of many workers. Some recent conflicts in U.S. states are worthy of note.

Governor Chris Christie of New Jersey was elected in 2009 to a state that was on the verge of Bankruptcy. Its unfunded liabilities for teachers' retirement plans plus the very generous medical and other fringe benefits were causing a huge debt to the state. Christie found an \$11 billion budget gap and very high taxes on New Jersey's citizens to keep paying the 400,000 public sector employees. The teacher's union was seeking pay increases. The new governor refused to negotiate with them and put a wage freeze in place and limited future benefits. He also forced the teachers, the largest employee group, to pay for a portion of their health care benefits. With these restrictions he has gotten the state into a better economic condition without raising taxes. He is very popular with his constituency (minus the Public sector employees).

A more exciting drama occurred in 2011 in Wisconsin, the first state to allow public sector bargaining. New Governor Scott Walker found a current

budget deficit of \$137 million and projected that the deficit would increase to \$3.7 billion in the next two years. Walker got his newly elected legislature to pass a bill requiring the public sector unions to have elections every year to determine if they still command a majority for collective bargaining. His private sector workers were complaining that the public sector workers including more than 10,000 teachers had better pay and benefits and much superior job security than they had. Under his new law, Walker would refuse to continue collective bargaining. The teacher's union was appalled. The legislation passed the Wisconsin Senate with 20 votes from his political party, and no votes from the opposing party which had sent all of its senators to a neighboring state to keep the law from being finalized. The opposition claimed that the law couldn't be finalized and signed until at least 21 senators voted. This tactic held up the laws finalization for about two weeks until a way was found to enact the law without the input of the 11 opposing senators. Since its enactment, the state has been running a surplus and is no longer in danger of bankruptcy.

An even more inclusive tactic was put into place by Ohio Governor John Kasich. Kasich had his legislature introduce a law that would limit collective bargaining for 350,000 employees. Where Walker had exempted police and fire fighters in his battle to save money, Kasich included all public sector unions. His rationale was that the legislation would help the cities save jobs which would otherwise be lost due to the heavy burden of unionized public workers. "Senate Bill 5 is an invaluable tool to local governments who are drowning in personnel costs," said Bob Nichols, a spokesman for Governor Kasich. The issue is being challenged in Ohio courts.

Summary and conclusions

In the U.S., public sector labor legislation allowing for unionization and collective bargaining has been a growing phenomenon since the late 1950's. American unionization in the private sector has diminished over the same time. Of America's approximately 150 million workers, about 15% are in the public sector. Only 8% of private sector workers are now represented by unions while more than 36% of the nation's teachers, police, firefighters, municipal workers, and Federal employees are represented by unions. The Federal workers are constrained from negotiating or striking for pay, while these restrictions are not present in most of the states where collective bargaining is allowed. This is a great advantage for public employees whose job security is protected by civil service commissions.

Looking at the international picture, the *Economist* reflects upon the great advantages British policemen, French railway workers, Greek civil servant, and teachers everywhere have over their countrymen in private sector employment. It claims, "People in the private sector are only just beginning to understand

how much of a banquet public-sector unions have been having at everyone else's expense."

Some American states are now taking on this "banquet" that is funded by the citizen taxpayers. The Economist calls it "The Battle Ahead."

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