the other hand, we read, and this may not be so far off, that some of the impetus for these legislative changes has to do with the political support of public sector unions for Democratic candidates. Whatever the course may be, it's not over, and there will be plenty to watch going forward.

II. Attacks on Public Sector Collective Bargaining Rights, 2011 to Early 2012

Joseph Slater[9]

This paper describes laws that a number of states passed in 2011 and early 2012 that limit the rights of public sector unions to engage in collective bargaining. The paper lists Wisconsin and Ohio first, since they passed the most radical bills. It then discusses a number of other states in alphabetical order, attempting to focus on the most interesting and controversial areas of the law.

The paper is limited to laws on collective bargaining rights. It does not discuss laws that cut pension benefits for public workers, although it is worth noting that from 2010 to 2011, 41 states enacted significant changes to their public sector pension statutes.

This paper is descriptive, not normative. I have written elsewhere that the arguments in favor of radically reducing collective bargaining rights of public workers are unconvincing.[10] In short, contrary to claims by politicians and pundits supporting these laws, public employees are not overpaid compared to comparable private sector employees, and no statistically significant relationship exists between public sector collective bargaining rights and state budgets.[11] Within academia, arguments have focused on whether the old thesis from Wellington and Winter's *The Union and the Cities*[12]—that collective bargaining for public workers gives such

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[9]Eugene N. Balk Professor of Law and Values, University of Toledo College of Law, Toledo, OH.

[10]*See* Joseph E. Slater, *Public Sector Labor in the Age of Obama*, 87 Ind. L. J. 189 (2011); Joseph E. Slater, *The Rise and Fall of SB-5 in Political and Historical Context*, 43 U. Toledo L. Rev. 473 (2012); Joseph E. Slater, *The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits*, American Constitution Society for Law and Policy Issue Brief (June 2011), *available at* http://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf; 5 Advance (The Journal of the American Constitution Society Issue Groups) 58 (2011).

[11]*See supra* note 10.

[12]Harry Wellington & Ralph Winter, The Unions and the Cities (1971).

workers too much power through "two bites of the apple" (bargaining and lobbying)—deserves exhuming. I have also argued against that notion. In short, the scope of bargaining rules that limit the subjects over which unions can permissibly bargain, and the wide range of powerful political forces arrayed against unions in general and on specific topics in particular, have avoided the problems Wellington and Winter predicted.[13]

This paper, however, is an attempt to catalogue and summarize the many recent bills affecting public sector labor law.

Wisconsin

Before 2011, Wisconsin had two fairly similar public sector labor statutes, one covering local and county government employees,[14] and the other, state employees.[15] The former was the first state law in the country permitting public sector collective bargaining, enacted in 1959.[16]

The Budget Repair Bill, Act 10, signed by Governor Scott Walker in 2011, made huge changes to these laws except for certain employees in "protective occupations": mainly police and fire. These employees were exempted from Act 10's provisions.

Act 10, §§265, 279, and 280, eliminated collective bargaining rights entirely for some employees: University of Wisconsin (UW) system employees, employees of the UW Hospitals and Clinics Authority, and certain home care and child care providers.

Section 315 of the Act limits the scope of bargaining to bargaining over a percentage of total "base wages" increase to no greater than the percentage change in the consumer price index. The Act expressly excludes overtime, premium pay, merit pay, performance pay, supplemental pay, and pay progressions. No other issues may be negotiated. Section 169 of the Act bars collective bargaining on any other topic even if the employer is willing to engage in it.

Further, Section 234 of the law bars interest arbitration for all public employees (again, except for the public safety employees

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[13] *See, e.g.*, John McGinnis & Max Schanzenbach, *The Case Against Public Sector Unions*, POLICY REVIEW (Hoover Institution) No. 162 (Aug. 1, 2010), *available at* http://www.hoover.org/publications/policy-review/article/43266. The author offers some thoughts on this in Slater, *The Rise and Fall of SB-5 in Political and Historical Context, supra* note 10.

[14] WISC. STAT. ANN. §111.70 *et seq.*

[15] WISC. STAT. ANN. §111.81 *et seq.*

[16] *See* JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900–1962 (2004).

who are generally excluded from the new statute's provisions). The law does not provide a specific replacement procedure to resolve bargaining impasses.

The law also makes Wisconsin a "right to work" jurisdiction by making union security clauses in collective bargaining agreements illegal (except for public safety workers).[17] It also limits the duration of collective bargaining agreements to one year.[18]

Notably, two provisions of the new Wisconsin law have, as of this writing, been enjoined. On March 31, 2012, a federal district court, in *Wisconsin Education Ass'n Council v. Walker* (*WEAC*),[19] upheld most of Act 10, but the court struck down the law's unprecedented mandatory re-certification system and its bar on dues check-off.

The mandatory recertification system the court enjoined provides that every union must face a recertification election every year. Also, the union would be recertified only if 51 percent of the employees in the collective bargaining unit—not merely those voting—voted for recertification.[20] So, if a bargaining unit had 400 members and the recertification vote was 201 favoring union representation and 100 against, the union would be decertified (because 201 is less than 51 percent of 400).[21] The court also enjoined a provision of Act 10 that made it illegal for an employer and union to agree to automatic dues deduction—even for employees who voluntarily wished to pay dues.[22]

WEAC upheld most of Act 10 as against an equal protection challenge. For most provisions of the law, the court held that the state had a rational basis to distinguish non–public safety employees from public safety officials: concerns that public safety employees would be needed if the other public employees went out on strike (even though such strikes would be illegal under Wisconsin law).

But, in a victory for the union side, the court found that the Walker administration's concerns did not justify treating these two groups of public employees differently for the purposes of recertification and dues check-off. There was no rational basis—at least none that did not offend the First Amendment—for distinguishing among public employees with these rules. Indeed, the court at

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[17] *See* Act §219.
[18] Wis. Stat. Ann. §111.70(4)(cm)(8m).
[19] 824 F. Supp. 2d 856 (W.D. Wis. 2012).
[20] Wis. Stat. Ann. §111.70(4)(d)(2)(a).
[21] Wis. Stat. Ann. §111.70(4)(cm)(8m).
[22] Act §227.

least strongly implied that the Walker administration passed these provisions as political payback for those public safety unions that supported Walker in the 2010 election.[23]

On April 9, the attorney general of Wisconsin, J.B. Van Hollen, filed with the Seventh Circuit an appeal of the substance and a motion to stay the injunction pending the appeal.[24]

Ohio

In the early 1980s, Ohio enacted a public sector labor law applicable to most public employees; it even allowed most public workers to strike.[25] In 2011, Governor John Kasich signed SB 5, which was designed to profoundly alter this law.

This law never went into effect, however. Ohio law permits recently enacted legislation to be put "on hold" pending a voter referendum if enough signatures are gathered requesting this. Pursuant to this procedure, SB 5 was put on hold pending a voter referendum in November 2011, and in that referendum, the voters rejected SB 5 (the vote was approximately 61 percent to 39 percent).

Notably, SB 5 was nearly as radical as Wisconsin's Act 10. Among other things, SB 5 would have eliminated collective bargaining rights for certain employees, including at least most college and university faculty, lower-level supervisors in police and fire departments, and employees of charter schools.

For employees who could bargain, SB 5 would have eliminated both the right to strike for those who have that right (all covered employees with the exception of police, fire, and a few other small categories), and the right to binding interest arbitration at impasse for employees who cannot strike. Instead, the parties would have been left to mediation and fact-finding, and if those did not lead to an agreement, the governing legislative body could have, essentially, simply chosen to adopt the employer's final offer.

SB 5 also would have imposed "right to work" rules and barred public employers from agreeing to provide payroll deductions for any contributions to a political action committee without written authorization from the individual employee. It also would have

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[23] *See* Michael Bologna, *Judge Tosses Key Portions of Wisconsin Law Cutting Workers' Collective Bargaining Rights*, 26 Lab. Rel. Wk. (BNA) 621 (Apr. 4, 2012).

[24] Michael Bologna, *Wisconsin Attorney General Seeks Halt to Ruling for Collective Bargaining Rights*, 50 Gov't Empl. Rel. Rptr. (BNA) 476 (Apr. 17, 2012).

[25] OHIO REV. CODE Ch. 4117.1-24.

greatly restricted the scope of bargaining and made a number of other changes restricting or eliminating union rights.

Idaho

Idaho enacted SB 1108, which limits collective bargaining by teachers to "compensation" (defined, in Section 17, essentially as wages and benefits, including insurance, leave time, and sick leave).

Section 22 limits collective bargaining agreements to one year and prohibits "evergreen" clauses.[26] Section 22 also eliminates mandatory fact-finding. Now only mediation remains, and even this is limited.

Under Section 20, if the parties have not reached agreement, they are permitted but not required to enter into mediation. Section 20 further provides that if the parties have not reached an agreement by June 10, the school board will unilaterally set the terms of employment for the coming school year.

Illinois

In Senate Bill 7, §10, Illinois amended its Educational Labor Relations Act such that in the Chicago Public Schools the length of the school day and school year are permissive, not mandatory, subjects of bargaining.

This law also made minor adjustments to the right to strike for most public education employees and imposed more significant restrictions on that right for employees of Chicago public schools.

Under Section 13(b)(2), for schools other than Chicago public schools, if the parties have not agreed within 45 days of the start of the school year, the Illinois Educational Labor Relations Board must invoke mediation. After 15 days of mediation, either party is allowed to declare an impasse. Seven days after that, each party must submit its final offer. Seven days later, the offers are made public. No strike is allowed until at least 14 days after publication of the final offer.

Under Section 13(b)(2.10), for Chicago public schools, if mediation fails to produce an agreement after a reasonable period of time, either party has a right to fact-finding. If this does not

[26]An "evergreen" clause requires that after a contract expires, its terms will remain in effect until it is renegotiated.

produce a settlement within 75 days, the fact-finder will issue a private report with recommendations. The parties have up to 15 days to accept or reject the recommendations. If the recommendations are rejected, then they are made public. The union cannot strike until 30 days after the publication of the recommendations and even then cannot strike unless at least 75 percent of the bargaining unit authorizes the strike.

Indiana

Indiana Senate Enrolled Act No. 575 limits the scope of bargaining for teachers to wages and benefits. Section 14 limits collective bargaining to salary, wages, and certain fringe benefits. The law explicitly bars negotiating over practically all other subjects. For example, Section 15 expressly bars negotiations over a wide variety of subjects, including the school calendar and criteria for teacher evaluation and dismissal.

Even as to wages and benefits, Section 13 forbids contracts that would put a school district in a deficit. While the bill does state that the parties shall discuss issues such as curriculum, textbooks, evaluations, promotions, demotions, student discipline, and class size, Section 18 explicitly adds that collective bargaining agreements cannot contain any agreements on any of these topics.

Further, while the new statute allows union contracts to have grievance procedures, Section 17 eliminates the authorization in the previous law for binding arbitration as part of the grievance procedure. Section 6 also repeals the provision in the previous law that authorized parties to arbitrate teacher dismissals.

In 2012, Indiana enacted a "right to work law" (making all forms of union security clauses illegal) that applies to the public sector.[27]

Massachusetts

Chapter 69 of Massachusetts Acts of 2011 makes it easier for local government employers in Massachusetts to make changes in health insurance. Under the new law, the governing body lists its proposed changes along with estimated cost savings and proof of the savings. It then notifies each bargaining unit and a retiree

[27]Mary Beth Schneider & Chris Sikich, *Indiana Becomes Rust Belt's First Right to Work State*, USA TODAY, Feb. 20, 2012, *available at* http://www.usatoday.com/news/nation/story/2012-02-01/indiana-right-to-work-bill/52916356/1.

representative. The retiree representative and the bargaining unit representatives form a public employee committee that negotiates with the employer for up to 30 days. After 30 days, the matter is submitted to a tripartite committee that, within 10 days, can approve the employer's proposed changes, reject them, or remand for additional information. The committee's decision is final.

Michigan

In 2011, Michigan enacted Act No. 4, the Local Government and School District Fiscal Accountability Act, which allows the governor to appoint an "emergency manager" for local governments experiencing a "financial emergency." The manager can reject, modify, or terminate any terms of contracts with public sector unions.

A separate law, Michigan Public Act No. 103, limits the scope of bargaining for teachers. Among other things, under this law, educational employers and employees cannot bargain over placement of teachers, reductions in force and recalls, performance evaluation systems, the content and implementation of policies regarding employee discharge or discipline, and how performance evaluation is used to determine employee compensation.

In March 2012, Michigan enacted a law providing that union dues for teachers and other public school employees in Michigan can no longer be collected through payroll deductions.[28]

The law also requires unions to file independent audits of expenditures for collective bargaining, contract administration, and grievance adjustment with the Michigan Employment Relations Commission, which must publish the audits on its Web site.

Also in March 2012, in a separate bill, Michigan barred organizing by graduate assistants at Michigan public universities.[29] This law passed both Houses of the Michigan legislature on party lines. However, on April 2, a judge in Michigan issued a temporary injunction against the bill barring graduate assistants from organizing—and several other bills. The court objected to a legislative maneuver state House Republicans had used to pass more than 500 bills, including the bar on graduate assistant organizing. The bills all have a provision that they take effect as soon as

[28]HB 4929, now PA 53.
[29]HB 4246, now PA 45.

the governor signs them. State House Democrats sued, claiming that the Republican leadership ignored their requests for votes to delay implementation of the bills, and that this improperly cut off the right of the people to petition for a referendum to stop the law from taking effect. Also, the state constitution states that a roll call "shall" be conducted whenever requested by one-fifth of the House members, but Republicans have repeatedly not recognized roll call motions from the Democrats.

This law prompted some litigation. First, Ingham County Circuit Court Judge Clinton Canady granted a temporary injunction blocking implementation of three bills, already signed into law by Governor Snyder, including the law barring graduate student unions from bargaining. Canady issued a temporary restraining order compelling House Republicans to hold recorded roll call votes when at least 22 Democrats request one until a lawsuit is settled.[30] However, on April 9, a court of appeals stayed the injunction pending an appeal.[31]

On April 10, 2012, Michigan passed SB 1018 (PA 76), which blocks home-based caregivers from representation by public sector unions. Specifically, the law changes the definition of a "public employee" to exclude anyone who receives a government subsidy for private employment. It was designed to end dues collection by the Service Employees International Union (SEIU), the bargaining representative for home health aides who care for individuals receiving Medicaid benefits. The workers, who are paid by the Michigan Department of Community Health, have been represented by SEIU Healthcare Michigan since 2006.[32]

Nebraska

Legislative Bill 397 changed Nebraska's interest arbitration rules to be more favorable to public employers. Notably, in Nebraska, interest arbitration is performed by the Commission of Industrial Relations (CIR). The new Nebraska law provides detailed criteria

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[30]Chad Livengood & Kim Kozlowski, *Ruling Halts Unionizing Ban for Grad Student Lab Aides,* DETROIT NEWS, Apr. 3, 2012, *available at* http://www.detroitnews.com/article/20120403/POLITICS02/204030357.

[31]Associated Press, *State House Republicans Win Round in Court Over Their Use of "Immediate Effect"* (Apr. 9, 2012), *available at* http://michiganradio.org/post/state-house-republicans-win-round-court-over-their-use-immediate-effect.

[32]Nora Macaluso, *Michigan Governor Signs Bill Ending Union Representation for Home Caregivers*, 69 Daily Lab. Rep. (BNA) A-10 (Apr. 10, 2012).

for selecting the group of "comparable" communities for interest arbitrations. Also, it mandates that if the employer pays compensation between 98 and 102 percent of the average of the comparables, then the CIR must leave compensation as it is. If the employer's compensation is below 98 percent of the average, then the CIR must order it raised to 98 percent, and if it is above 102 percent, the CIR must order it lowered to 102 percent. The targets are reduced to 95–100 percent during periods of recession (defined as two consecutive quarters in which the state's net sales and use taxes, and individual and corporate income tax receipts, are below those of the prior year).

Nevada

Nevada enacted SB 98. Sections 5 and 6 of this law reduce the number of public employee supervisors eligible for collective bargaining and eliminates collective bargaining rights for doctors and lawyers. Also, Section 7(2)(w) of this law mandates that labor contracts contain clauses that would reopen such contracts during fiscal emergencies. This law applies to local governments only, as state employees in Nevada do not have collective bargaining rights.

New Hampshire

New Hampshire enacted SB 1, which eliminates the requirement that the terms of a collective bargaining agreement automatically continue if an impasse is not resolved at the time the agreement expires.

It also enacted HB 589, which repeals a 2007 law that provided for mandatory card-check recognition (i.e., mandatory certification when a majority of the employees in a bargaining unit sign cards indicating they want a specific union to represent them).

New Jersey

In late December 2010, New Jersey adopted Chapter 105, New Jersey Public Laws of 2010, which caps wage increases at 2 percent for New Jersey police and firefighter arbitration awards for contracts expiring between January 1, 2011, and April 1, 2014. This cap on base salaries expires on April 1, 2014.

Further, this law places serious restrictions on interest arbitrators. Arbitrators will now be randomly selected (as opposed to the previous process of mutual selection); arbitrator compensation is limited to $1,000 per day and $7,500 per case; arbitrators must issue awards within 45 days of a request for interest arbitration (prior law allowed 120 days); and arbitrators will be penalized $1,000 per day for failing to issue an award. Also, the arbitrator's award may be appealed to the state public employment agency, the Public Employment Relations Commission (PERC), and PERC must decide the appeal within 30 days.

In 2011, in Chapter 78, New Jersey Public Laws of 2011, the state suspended bargaining over health care benefits for four years while a new statute, which will control the issue, is phased in. The new law sets a sliding scale of mandatory employee contributions to health care plans, and it calls for a state committee to design two public sector health care plans: one for education employees and one for other public employees.

Oklahoma

In HB 1593, Oklahoma repealed the Oklahoma Municipal Employees Collective Bargaining Act, a 2004 law that had required cities with populations of at least 35,000 to bargain collectively with unions. The repeal leaves the decision of whether or not to bargain with a union to the discretion of individual cities. But as in Wisconsin, this change does not affect police and firefighters, who, in Oklahoma, are covered by a separate statute.

Tennessee

In the Professional Educators Collaborative Conferencing Act of 2011, Tennessee repealed the Educational Professional Negotiations Act, a 1974 law that had authorized collective bargaining for public school teachers.

Under the new Act, teachers are now permitted only "collaborative conferencing." Under Section 49-5-605(b)(1), (2), and (4) of this law, teachers now will be represented by groups that receive 15 percent or more of the votes in a confidential poll rather than by a particular union. Section 49-5-608(a) mandates such conferencing on issues including salaries, benefits other than retirement benefits, working conditions, grievance procedures, leave, and payroll deductions. However, Section 49-5-609(d) also states that

the parties are not required to reach agreement on any of these issues, and adds that if no agreement is reached, the school board will set terms and conditions of employment through school board policy.

Further, Section 49-5-608(b) of the law specifically prohibits collaborative conferencing on a number of issues: differential pay plans, incentive compensation, expenditure of grants or awards, evaluations, staffing and assignment decisions, and payroll deductions for political activities.

Washington

In a small but rare victory for public employees, on March 30, 2012, Washington enacted SB 6486, which grants collective bargaining rights for post-doctoral researchers and clinical employees at the University of Washington (UW) and Washington State University (WSU). Collective bargaining may now begin under the provisions of the Public Employees' Collective Bargaining Act. Post-doctoral employees at UW and WSU conduct research funded by external grants and contracts, most of which come from federal agencies, such as the National Science Foundation and the National Institutes of Health. Before this law, post-doctoral and clinical employees, who hold PhDs or other graduate degrees, could not engage in collective bargaining even though most could do so while they were graduate students.[33]

Conclusion

Literally the day before I presented this paper, Wisconsin Governor Scott Walker survived a recall election.[34] The question on everyone's mind was: Will this result lead to more of the types of laws described above? In my view, this result will embolden opponents of public sector collective bargaining rights and opponents of unions generally. We may well see more efforts to pass laws like those described above. On the other hand, public sector labor law is a creature of state politics, and states vary widely. Laws greatly

[33]SB 6486. *See* Postdoctoral and Clinical Employees Have Collective Bargaining Rights Under New Law, *available at* http://web2.westlaw.com/Find/Default.wl?bhcp=1&DB=ALLNEWSPLUS&DocName=UUID%28I5600b5407bf011e19f28b0efdedca28a%29&FindType=l&MT=Westlaw&rs=dfa1%2E0&ssl=y&strRecreate=no&sv=Split&vr=2%2E0.

[34]*See* Bob Secter & Rick Pearson, *Wisconsin Elections Slaps Labor and Democrats, But Not Necessarily Obama*, Chicago Tribune, June 7, 2012, *available at* http://www.chicagotribune.com/news/local/ct-met-wisconsin-governor-0607-20120607,0,4843883.story.

limiting the rights of public sector unions are usually possible only where motivated Republicans control all branches of the state government. In this regard, the low-hanging fruit has already been plucked.

Also, the example of Ohio shows that such laws can provoke a serious and effective backlash. Comparing Wisconsin and Ohio also highlights important differences between a state that allows recalls but not referenda on specific bills (Wisconsin) and a state that does not allow recalls but does allow referenda on specific bills (Ohio). At the margins, unions are likely better positioned in the Ohio model. After all, one could vote against the recall of Governor Walker because of issues unrelated to labor rights, or because one was skeptical of recalls in general.

In short, it is not easy to make predictions about what more may come. From the point of view of unions and their advocates, though, the last year or so has brought far more than enough.