Chapter 12

PUBLIC SECTOR COLLECTIVE BARGAINING

I. Public Sector Collective Bargaining in the New World

During the past 18 months, we have witnessed a firestorm of state legislation curtailing public sector collective bargaining rights. While the measures enacted in Wisconsin and almost enacted in Ohio garnered the most attention, significant legislative changes also have occurred in more than 10 other jurisdictions. This session examined these developments from a variety of perspectives. Professor Joseph Slater first provided an overview of these legislative measures from the perspective of a law school expert on public sector labor relations who also happened to have a front row seat for the Ohio legislation and referendum. Employer and union advocates from Wisconsin then discussed the dramatic turn of events that unfolded in that state. Finally, a neutral state labor board commissioner from Minnesota discussed the actual and potential fallout in a state that has not yet experienced any direct legal retrenchment.

Moderator: **Stephen F. Befort,** National Academy of Arbitrators, Minneapolis, MN

Panelists: **Union: Timothy Hawks,** Hawks Quindel, Milwaukee, WI

Academic: Joseph Slater, College of Law, University of Toledo, Toledo, OH

Public Sector/Neutral: Josh Tilsen, Commissioner, Minnesota Bureau of Mediation Services, St. Paul, MN

Management: Steve Weld, Weld Riley Prenn & Ricci, Eau Claire, WI

Stephen Befort: Good morning, everyone. My name is Steve Befort. I'm an arbitrator and law professor from Minnesota. We're going to talk about public sector developments in the new world, a timely topic.

We know that during the past 18 months there's been a host of legislative developments throughout the country. Wisconsin and Ohio developments have received the bulk of the attention, but there have been about a dozen other states that have also enacted significant legislative changes. All of these legislative changes have one thing in common: They have reduced the rights and privileges of public sector unions.

These developments have taken place in a very dramatic fashion. Sarah Palin famously said during the last presidential campaign that from her vantage point in Alaska, she could see Russia. From right here in the Twin Cities we can almost see Wisconsin and the St. Croix River, where things have unfolded dramatically from clandestine meetings to run-away legislators, to massive public protests, to a referendum in Ohio, and now a recall election in Wisconsin. We'll hear about all of that.

These are extremely important developments for those of us who are working in the field of labor management dispute resolution. And it raises some serious questions. For decades, labor arbitration has been touted as a beacon of industrial democracy and fairness. It definitely causes some consternation to see and hear criticisms of what we do as being an anti-democratic shell game for privileged public sector employees. All of this turmoil, all of these changes, leads us to ask some important questions. What's happened? Why has it happened? And what's likely to happen next?

We have four panelists who have excellent vantage points for commenting on these and related questions. Our first speaker is Joe Slater. He is a professor of law at the University of Toledo in Ohio. He is a specialist in the field of public sector labor relations. Along with NAA member Marty Malin, Joe is one of the co-authors of the leading casebook on public sector employment in the United States.[1] We are fortunate to have him because he has written and presented extensively throughout the country on these public sector legislative developments.

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[1] *See* MARTIN H. MALIN, ANN C. HODGES, & JOSEPH E. SLATER, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS (2nd ed. 2010).

Turning to Wisconsin, we have two speakers. We first will hear from Steve Weld, who is a managing partner in the firm of Weld Riley Prenn & Ricci in Eau Claire, Wisconsin. As a leading management-side advocate in the State of Wisconsin, he is in an excellent position to tell us what he sees as the causes of and changes that result from the Wisconsin law. I'm particularly interested in hearing what's happening in dispute resolution processes now that public sector arbitration is no longer permitted in that state.

Tim Hawks, from the Hawks Quindell firm in Milwaukee, will provide us a counterpoint perspective. Tim has represented unions for more than 30 years and, along with counsel for five other state-wide labor organizations has litigated the constitutional challenge to Act 10. He'll tell us about the recent decision and what's happening in that vote.

Finally, we've got Josh Tilsen, the Commissioner of the Bureau of Mediation Services here in Minnesota. Minnesota is a state that has not experienced, at least as of yet, any legislative changes. But, that doesn't mean that what's happened in other states hasn't had an impact here and in other states without legislative changes. Josh is uniquely positioned to provide us some input from the neutral perspective.

With that, I want to turn the microphone over to Joe.

Joseph Slater: Thanks, Steve, for that kind introduction. I am very honored to be here. Before I went into academia, I was a practicing labor attorney in Washington, D.C., for more than a decade. My experience there has caused me to tell my labor students every year that the arbitration process is the least dysfunctional part of all of labor law, the part that works best.

I am going to do a quick overview of all of the changes in all of the states. Although Wisconsin and Ohio are the most famous, there were significant changes to all sorts of public sector collective bargaining rights in about a dozen states this year. I will cover Wisconsin fairly lightly because we have two experts on the panel, and a little bit of Ohio, because they had the two most dramatic laws, and then other states in alphabetical order. I'm not discussing laws here that restricted pension and other sorts of benefits or that amended statutes governing pension benefits formulas; I'm only going to be talking laws affecting collective bargaining rights.

Wisconsin, ironically, was the first state in the union to pass a collective bargaining law for a public sector worker in 1959, when it covered municipal employees, county employees. It later added a separate statute to govern state employees. In 2011, the Budget

Repair Bill, Act 10, signed by the recently reelected governor, Scott Walker, made huge changes to these laws. It eliminated collective bargaining rights entirely for some groups of employees. University of Wisconsin employees, for example, are drastically limited by the scope of bargaining to bargaining over a percentage of total base wages, which are not to exceed increases in the consumer price index. It bars interest arbitration for all public employees. This law does not apply to public safety employees, typically police and firefighters, who are excluded from all these provisions I'm going to discuss. But for everyone else, interest arbitration is barred.

The law also requires an unprecedented and fairly bizarre mandatory recertification system in which every public sector union is forced to undergo a recertification election every year, whether anyone requests it or not, and the union is recertified only if a majority 51 percent of the employees in the bargaining unit vote to recertify the union. So you can imagine a bargaining unit with 400 employees, a mandatory recertification election even though no one has asked for it, and the vote in the election is 201 in favor of keeping the union and 100 to decertify the union. The union is decertified because 201 is less than 51 percent of 400. The law also makes Wisconsin a right-to-work jurisdiction and contains a lot of other things that unions don't like, which other speakers will address.

There are a few updates about Wisconsin. First, on March 31, 2012, a federal district court struck down two parts of Act 10 while upholding the rest of it. The recertification provision was struck down as was a bar on dues check-off, both on equal protection and First Amendment grounds. In short, the court found that there was no rational basis, or at least no basis that did not offend the First Amendment, for distinguishing between public safety workers and other types of public employees in this regard. That will be appealed. Since then, there's been a recall election that failed with Governor Walker a couple of days ago.

Ohio passed its first public sector law in the early 1980s. It was a fairly broad law that even provided for the right to strike. In 2011, Governor John Kasich signed Bill SB 5 into law, which was designed to profoundly alter the earlier law. This law never went into effect, however, because Ohio, unlike Wisconsin, has a procedure for a referendum that, if you get enough signatures you can put a bill on hold pending a vote in the fall. The bill was voted down resoundingly. But for awhile, all those of us in Ohio were

quite concerned. The bill was nearly as radical as the bill in Wisconsin. It looked like it was going to be in effect for a while. We had big protests, too. But somehow the national media never paid as much attention to us as it did to Wisconsin.

As with the Act 10, SB 5 would have eliminated collective bargaining rights for wide swaths of employees, including people in most college and university facilities. It would have eliminated the right to strike for the bulk of Ohio employees who had that right. For the employees who didn't have that right—public and safety employees—it would have eliminated the right of interest arbitration. Instead, the parties would have been left with mediation and fact-finding. And if that did not produce a result, to make a long story short, the employer could have essentially simply chosen its final offer, a type of impasse dispute resolution that I think is more analogous to the way a parent treats an eight-year-old child rather than the way unions and employers relate. It would have also greatly restricted the scope of bargaining and made a number of other changes. But, again, that was voted down in November. So Ohio still has the same law that we always had. Practitioners in the field spent a lot of time last summer reading a 400-page law and trying to figure it out—and now they give papers and talks at conferences like this.

Idaho enacted SB 1108, which limits collective bargaining by teachers to compensation only. It also limits collective bargaining agreements' duration to one year, and it prohibits evergreen clauses. It also eliminates mandatory fact-finding. Now there is only mediation, if the parties agree to it. If this process does not produce an agreement, the school board employer can set the terms of employment at the end of a certain time period.

Illinois amended its Educational Labor Relations Act such that in the Chicago public schools, the length of the school day and the school year are permissive, and not mandatory, subjects of bargaining. The law also made minor adjustments to the right to strike for most public education employees. Also, it made it significantly more difficult for employees of the Chicago public schools specifically to go on strike. For Chicago 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 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 Senate Enrolled Act No. 575 limits the scope of bargaining for teachers to wages and benefits. Even as to wages and benefits, the law bars contracts that would put a school district in a deficit. It forbids any agreements that would put a school district in a deficit. It eliminates the authorization in previous laws for a binding arbitration as part of a grievance procedure. It repeals the provision in the previous law that authorized parties to arbitrate teacher dismissals. Also, and more recently in 2012, Indiana enacted a right-to-work law, making all forms of union security agreements illegal. That applies to the public sector as well.

Massachusetts passed a law that makes it easier for local government employers in Massachusetts to make changes in health insurance.

Michigan has been pretty active. Michigan enacted the Local Government and School District Financial Accountability Act, which allows the governor to appoint an emergency financial manager over areas that are in a certain amount of fiscal distress. That manager has, among other powers, the power to void terms in a collective bargaining agreement with the public sector union.

A separate law, Michigan Public Act 103, limits the scope of bargaining to teachers even more than it was already limited. Michigan had previously limited the scope of bargaining with the teachers in a law in 1994. It does so even further in this new Act. Now, school employees can't bargain over placement of teachers, reductions in force, recalls, performance evaluations systems, employee discharge or discipline systems, or how performance systems are used to evaluate employees.

In March 2012, Michigan enacted another law that prohibits school employees from using payroll deductions. In a separate bill in 2012, Michigan barred graduate student assistants from organizing. There are graduate assistant unions, for example, at the University of Michigan and Michigan State. However, on April 2, a judge in Michigan issued a temporary injunction against the bill barring graduate assistants from organizing, basically on procedural grounds and not related to the substance of the law per se.[2] Then on April 9th, a court of appeals stayed that injunction

[2]For further discussion of this issue, see Part II of this chapter, "Attacks on Public Sector Collective Bargaining Rights, 2011 to Early 2012," at nn. 30–32.

pending appeal. So we still don't know exactly whether the law on graduate assistants will go into effect.

On April 10th, Michigan passed yet another law, which bars home-based caregivers from being represented by public sector unions. Michigan, like some other states, had a passed a law that allowed public sector unions to organize those who are giving care in homes when they are ultimately being financed by the state. The Service Employees International Union (SEIU) was representing many of these people in Michigan, and that authorization was taken away.

Nebraska may be of special interest to you folks who do interest arbitration in Nebraska. Bill 397 changed Nebraska's interest arbitration rules to be more favorable to public employers. Generally, interest arbitration in Nebraska is performed by the Commission of Industrial Relations, so probably not as much by private employers. Essentially, it gives a much more detailed description of who comparable employees can and can't be in ways that are favorable to employers. It also limits the potential raise in salary to a range of 98 percent to 102 percent of the average of these comparable employees. In periods of recession, it can be in a range from only 95 percent to 100 percent of these comparable employees.

Nevada enacted SB 98, which reduces the number of public employees by eliminating supervisors, who had been covered by the public sector law. It also eliminates collective bargaining rights for doctors and lawyers in the public sector. It mandates that all public sector contracts have clauses that permit reopening during fiscal emergencies.

New Hampshire enacted SB 1, which essentially eliminates evergreen[3] clauses and contracts. It also enacted SB 589, which repeals a 2007 law that provided for mandatory card-check certification, where if a majority of people in the appropriate bargaining unit signed cards authorizing the union to represent them, the employer must represent them. Although this was rejected in the private sector, seven states had this mandatory card-check certification procedure in the public sector, and New Hampshire was one of them. New Hampshire has now repealed that.

New Jersey passed a law in late 2010 that caps wage increases at 2 percent for New Jersey police and firefighter arbitration awards for contracts expiring through April 1, 2014. Perhaps

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

of more interest to this audience, the law places serious restrictions on interest arbitrators. Arbitrators in New Jersey public sector proceedings will now be randomly selected as opposed to the previous process of neutral selection. Arbitrator compensation is limited to $1,000 a day and $7,500 per case. Arbitrators must issue awards within 45 days of a request for interest arbitration. Prior law allowed 120 days. Arbitrators will be penalized $1,000 a day for failure to issue a timely award. I have heard through the grapevine that this has been a bit of a disincentive for people to take cases in New Jersey. Shockingly! In 2011, the state suspended bargaining over health care benefits for four years while a new statute, which will control the issue, is phased in.

Oklahoma's HB 1593 repealed the 2004 Municipal Employees Collective Bargaining Act, which had required cities of populations of at least 35,000 to bargain collectively with unions. Now these cities can bargain with unions only within their discretion. As in Wisconsin, however, this bill does not apply to police and firefighters.

Tennessee passed one of the more interesting laws. In what is called the Professional Educators Collaborative Conference Act, it repealed the 1974 law that had provided for collective bargaining rights for teachers. Under the new law, teachers no longer engage in collective bargaining. They engage in what is called "collaborative conferencing"; and it essentially eliminates the exclusive majority representation rule. Under the new Tennessee law, any union or any organization that gets at least a 15 percent vote of a group of teachers will have a seat at the table in this collective conferencing. So you can imagine multiple unions and employee organizations represented, which might be kind of a fun experiment. That's the way they do it some European countries. However, this law also greatly restricts the scope of bargaining. The parties are not required to reach agreement on a series of issues. And it specifically prohibits collaborative conferencing on a variety of pay, compensation, evaluation, and assignment plans. So they don't have a whole lot to talk about. Also, there is no impasse dispute resolution for this process.

Now, I'd have to say in closing that Steve said that all these laws have been constricting the rights of public sector employees. However, I have two contrary examples. One: in 2012, Washington State enacted a law that grants collective bargaining rights for postdoctoral researchers and clinical employees at the University of Washington and Washington State University, a great victory

for the working class there. Two: somewhat more significantly and another small victory for the union's side, in 2011, employees of the Transportation Safety Administration got a right to bargain collectively, albeit a fairly limited one last summer, and they have been organized by the American Federation of Government Employees.

This, of course, has been only a description of the changes without any opinions. Please read the following paper for context and details.[4]

Steve Weld: Thank you. I'm Steve Weld. I am a management advocate, and you would think that I would be one of the beneficiaries of the law. In fact, my practice has changed to the negative. We don't do a lot of bargaining anymore in Wisconsin, so I'm doing a lot more employment law and a lot less labor law, particularly in the public sector. But I don't think I'm going to get a lot of sympathy from you.

As Joe indicated, we have had a long history of progressive labor relations in Wisconsin. But to understand the more recent changes, we have to go back to 2002 when we elected a Democratic governor, Governor Doyle. We had 16 years of Republican governors before that. And, in the vast majority of the 40 or 50 years that we have had public sector collective bargaining in Wisconsin, the supervising entity, the Wisconsin Employment Relations Commission (WERC), has always had a professional neutral as its leader—Morrie Slavney for a long time, then Herman Torosian, and then others.

Toward the end of the Republican regime and then in the Democratic regime, we politicized, NLRB-ized, the WERC. From a management advocate's standpoint, that was not a good thing substantively. It was not a good thing for the advocates on the union side either because all advocates simply want to know how to advise their clients. What is the law? I do a fair amount of private sector work as well and it is very difficult to advise people, for example, as to whether *Weingarten* rights[5] extend to nonunion employees because the NLRB keeps switching back and forth.

With the change of the leadership in the WERC, it became very difficult to advise clients as to what the law is. I'm told that staff

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[4]See Part II of this chapter, "Attacks on Public Sector Collective Bargaining Rights, 2011 to Early 2012."

[5]NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975).

people chose to not accept unfair labor practice or prohibited practice cases for fear that they would get reversed by the Commission.

In any event, in 2008, two things happened. The first was the recession, which caused a lot of private sector employees in their 50s to lose their jobs. Those unemployed or underemployed employees were jealous of public sector employees. They would look across the street at a retired teacher or a police officer or firefighter who retired with fully-paid health insurance and a pension at age 53 or 55 or 57. They questioned, "Why am I being laid off, why am I losing my house, why am I trying to get by with a reduced income, and that person has paid health insurance coverage through his or her local early retirement incentives, as well as state retirement benefits, Medicare, and Social Security?"

The second thing that happened in 2008 was the Obama landslide. In Wisconsin, that meant a Democratic governor with Democratic control of both legislative houses. They changed the law. The Qualified Economic Offer (QEO) Law, which allowed school districts to avoid going to interest arbitration by offering a minimum wage and benefit package, was repealed. A number of other legislative changes, which benefitted public sector unions, strong supporters of President Obama and Governor Doyle, were also implemented.

In 2010, things changed again. Republican Governor Walker was elected. He faced a $3.6 billion budget shortfall. It seems paltry compared to what is going on in California where, as I understand it, Governor Moonbeam has a $16 billion shortfall and to what Governor Cuomo is facing in the State of New York, which is somewhere in-between. States don't have money for a variety of reasons, including reduced tax income and increased federal mandates, particularly in the health care area.

Second, Governor Walker faced a general dissatisfaction with the quality of public education, particularly in Milwaukee. I believe "No Child Left Behind"[6] is the Republican answer to dissatisfaction with public education's failure to get rid of substandard teachers. "Race to the Top"[7] funding is the Democratic answer to the same problem. So both parties share the dissatisfaction and recognize the problem.

We, in this room, the advocates and the arbitrators, may have had something to do with that by making just cause too high a

[6]No Child Left Behind Act of 2001, Pub. L. No. 107-110.
[7]American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5.

standard in cases of performance-based terminations. *The Rubber Room,* the article in *The New Yorker* by Steve Brill,[8] was about how teachers who faced termination for performance problems were not allowed to teach but who had to show up for work, sometimes for years, while the termination was processed through to grievance arbitration.

As an advocate on behalf of school districts, when our clients ask, "Do we have a chance to terminate?" we respond, "It's a very difficult standard, it is going to be expensive, and the chances of success are limited." Guess what? The smart superintendent doesn't go down that road. The ones who do often end up spending six figures in legal fees and still have the potential of back pay and reinstatement, resulting in a political and public relations problem for everybody.

So what we saw in 2010 was a general dissatisfaction with the quality of education plus a jealousy and disdain for public employees, especially teachers.

In that context, we speculate that Governor Walker called the American Legislative Exchange Council (ALEC), and ALEC wrote Act 10. In Act 10, Governor Walker dealt with high health insurance costs. Negotiating with interest arbitration as the impasse resolution procedure made it difficult to negotiate increased employee premium contributions. Some municipal employees contributed 10 percent of their premium, but most had a 0 to 5 percent employee premium contribution, far less than what private sector employees were paying for significantly worse coverage. Act 10 changed that. For those public sector employers with group coverage under the state plan, there was a mandatory 12 percent employee contribution.

The Wisconsin Retirement System (WRS) is a very good pension system for Wisconsin public sector employees and, dating back to the Nixon Wage and Price Freeze, most municipal employers paid both the employer- and employee-required contributions obligation to it. Approximately 11 percent of income is contributed to WRS; more for public safety employees. It is a very well-funded program and the fund can't be raided. So we don't have the problem with our pension's funding that other states have. Act 10 required general municipal employees to pay the employee

[8]Steven Brill, *The Rubber Room: The Battle Over New York City's Worst Teachers,* The New Yorker (Aug. 31, 2009), *available at* http://www.newyorker.com/reporting/2009/08/31/090831fa_fact_brill.

contribution (one-half). That, too, was a money saver, but it was a 6 percent cost for all public sector employees.

In addition to dealing with the economics, Act 10 has anti-union provisions. In the 2010 congressional election races, the American Federation of State, County and Municipal Employees (AFSCME) contributed somewhere around $90 million, mostly to unsuccessful Democrats. What did a newly elected Republican Governor do? He cut their money supply, their funding. Joe talked about Act 10's prohibition on municipal employers from making payroll deductions for union dues. This is it.

Also, an annual recertification of union status is required so unions are required to focus their time, money, and energy on their recertification elections, not politics.

The legislation also gave municipalities flexibility, read that "no duty to bargain," with regard to benefits and other terms and conditions of employment. The duty to bargain is limited to "base wages." That is a new term. Neither Tim nor I ever used or heard that term in our 40 years of practice, at least my 40 years of practice. Nobody knows yet what base wages are. Do base wages include seniority? Steps? Longevity payments? Credit and degrees payments to teachers? Overtime? Premium pays? We are trying to figure out our bargaining obligations. But the fact of the matter is, municipalities were given absolute discretion to unilaterally set everything other than base wages—supplemental pay, including merit or performance pay; discipline standards; layoff criteria; the existence of the right to be recalled; whether there is sick leave, vision insurance, disability insurance premium contributions—are all the municipal employer's prerogative.

The Budget Repair Bill (Act 10) was followed by the Budget Bill for 2011 (Act 32). Act 32 dealt with public safety employees. If you watch MSNBC, you've seen the film clip of Governor Walker talking about dividing (and conquering) Wisconsin's general municipal and its public safety employees. Public safety employees' bargaining rights and benefits were not addressed in Act 10. They were addressed in Act 32. New public safety employees, that is, public safety employees hired after July 2011, are required to contribute the general municipal employee's contribution to WRS. Firefighters and cops hired before July 1, 2011, don't have to.

In addition, health insurance plan design became a nonnegotiable issue. But what is plan design? Premium contributions are not, but is the network of providers? The drug formulary list? Deductibles? Employer contribution to the deductible? Co-pays?

Co-insurance provisions? All of those things are now being litigated before both the WERC and state courts.

So what does all this mean to an advocate for employers? First, what we have tried to do is make it clear to our clients that, while this is anti-union legislation, it doesn't have to be anti-employee legislation. In drafting employee handbooks, we are trying to take advantage of the flexibility that the legislation has given us to keep our costs down. The state is clearly balancing its budget on the backs of its municipalities and, therefore, its municipal employees. While giving municipalities reduced state aids, it also has given them tools to reduce costs.

What we have also been telling our clients to do is focus on the top and bottom. Reward your superstars and address the substandard employees. This legislation gives us flexibility to do both. We really did not address the substandard performers, the "rubber room" end of the spectrum. We didn't in the past. When we've tried to do it, you've made it very difficult for us. "Just cause" is a tough standard. But now we don't have to have "just cause" to terminate.

So our advice to clients has been to focus on the two ends of the spectrum and not mess with the 60–80 percent of staff who are doing their jobs and doing them well. Don't mess with their terms and conditions of employment. Don't reduce their benefits. If you do, you are going to have a backlash.

We are also working with the supervisors. My experience is that almost invariably the supervisors are the cause of unions—either because they are lousy supervisors or because they think they can make more money if the employees they supervise do, so they push the rank and file to organize.

I fear that our front-line supervisors are going to suck. They don't know how to manage. They don't know how to supervise. They don't know how to evaluate. They haven't had to supervise; they simply relied on the contract. So they are going to have a hard time actually supervising. We are focusing efforts on educating and training them.

Finally, Steve Befort asked us to touch on the grievance procedure. A grievance procedure is required in the areas of employee disciplines and terminations, as well as employee safety. Municipal grievance procedures must include two steps. One, the ultimate decision maker must be the elected body—the board of education, the city council, or the county board. However, before the electeds get involved, an impartial hearing officer (IHO) conducts

a hearing. In the context of a statute that was written sub rosa, without any legislative history, who can/should serve as the IHO? Who pays? How formal a process should there be?

Our firm advocates that our nonunion, private sector clients adopt a grievance procedure. We think it's an argument against organizing. This is the same—it provides procedural, but not substantive, due process.

We are seeing retired judges, attorneys (I got interviewed last week to serve as an IHO), retired human resources directors, and arbitrators lining up to serve as IHOs. And one of the things that the WERC is pushing, seeing its staff is not all that busy these days, is to have them serve as IHOs. And, frankly, it is a fairly low-cost alternative and gives the process some credibility. The question to you is: Would you be willing to serve as an IHO, recognizing that your decision isn't final, as it has to go back to the electeds and the electeds may reverse you? It's a total reverse of what we had in place pre-Act 10—an elected body's decision reviewed de novo by an arbitrator.

So those are the kinds of issues that we are dealing with under Act 10.

Timothy Hawks: Well, Steve and I have opposed one another in cases spanning nearly 30 years. But this is the first time I've had the opportunity to address a group immediately after he has spoken. I do want to respond to couple of his remarks just now.

I had heard previously the complaint that the WERC as appointed by Jim Doyle had an untowardly labor bias. I do not believe that criticism is fair, and I believe it necessary to respond.

Jim Doyle appointed three commissioners to the WERC. The Chair was Judith Newman. Chair Newman had previously served on the Massachusetts Labor Relations Commission for more than a decade. She had previously in her career served as Counsel for the Massachusetts Education Association. I believe the criticism of her role on the WERC is based upon that prior experience. Susan Bauman, appointed by Jim Doyle to be a Commissioner of the WERC, had served as the Mayor of the City of Madison, and brought a strong management point of view to the WERC and its decision-making process. Paul Gordon, who I believe is with us today, came from private practice in the Chippewa Falls area and has served on the Chippewa Falls school board. In sum, the Commission did move somewhat from a management bias to a somewhat labor leaning decision-making process. But it was neither as dramatic nor as striking as the criticism might suggest.

I would add to that, though, that the problem is one that is relative in nature. In the previous 16 years, during the Tommy Thompson administration, the Commission had just the opposite reputation. It was so decidedly management-biased in its decision making that, at least for about 8 years during that administration, we advised our clients to avoid the WERC in prohibited practice complaints if at all possible, because we did not have confidence of success in bringing those claims. It's also because in Wisconsin, particularly under the Municipal Employment Relations Act, plaintiffs or complainants have an election to make. They can either file with the WERC or they can file with the circuit courts. Clearly, in Dade County or in Milwaukee County, there were substantial advantages to bringing their unfair labor practice claim to the courts and not the WERC.

So part of the problem with the Commission and the criticisms, generally, is not by the absolute status of the decisions the Commission issued for eight years that Jim Doyle was in office but rather the contrast between the two—the Thompson administration appointees versus the Doyle administration appointees.

Steve also had a concern about the Wisconsin public education system, which appears to be exaggerated. Perhaps one of the best objective pieces of evidence of the quality of the Wisconsin public education system is its students' performance on the ACT scores. Wisconsin students regularly are ranked one, two, or three in the performance on ACT scores in the country, along with Minnesota, Iowa, and North Dakota.

Finally, Steve commented that one of the public perceptions, and the reality, was that certain public employees, particularly the school teachers, had better quality health care and health insurance programs. They do. Teachers had better health insurance coverage than private sector employees and even some other public sector employees. That is not an accident. And it should not come as a surprise and the forces behind that should be understood. In 1994, when Tommy Thompson limited collective bargaining for school teachers and adopted the Qualified Economic Offer (QEO) procedure, which basically prohibited interest arbitration of impasses in labor relations negotiations between teachers' unions and school districts if the employer provided to the union an offer of 3.8 percent But the regulations to determine the cost of a QEO required the parties to include the increased cost of fringe benefits, including health insurance, and the cost of lane and step movement, but excluded savings realized by the

employer as a result of staff turnover. On the average, the actual salary increase amounted to about 2 percent. But that same law, passed by Governor Thompson, imposed an obligation on employers to hold fringe benefits constant if they wanted to take advantage of the QEO to avoid interest arbitration.

Indeed, that's what happened. School districts that sought to avoid interest arbitration and to limit the teachers' salary increases to approximately 2 percent froze the terms of health insurance coverage and the employer contribution to the premiums. Now, that was initiated in 1994, and it continued without limitation until 2009. So that period of approximately 15 years saw substantial regression in health care programs for other employees, and for most public employees, but not in Wisconsin for teachers. This was so precisely because the Republican administration had imposed this limitation on collective bargaining.

Steve also talked a bit about changes in the law with regard to public safety employee collective bargaining. Those changes are minuscule compared to those that have affected the general employees in this state. The primary issue relates to "the health insurance plan design," which Act 32, the state's budget bill, declared to be a prohibited subject of bargaining. We're engaged in litigation in Green Bay where we represent the Green Bay Firefighters as to the scope of the prohibition. The Milwaukee Police Association successfully obtained an injunction against the City of Milwaukee, prohibiting it from making unilateral changes in the health insurance coverage for the city's police. [*Editor's Note:* The Wisconsin Court of Appeals, First District, reversed the trial court on April 16, 2013.] The WERC has issued a declaratory ruling prohibiting the Eau Claire Deputy Sheriff's Association from bargaining over whether the employer, as opposed to the employees, will be obligated to pick up part of the cost of increased medical expenses that result from an increase in the deductible. That's now being reviewed by the Dane County Circuit Court. [*Editor's Note:* The Dane County Circuit Court reversed the WERC's declaratory ruling on October 24, 2012.] The litigation over this issue will continue into the courts of appeal before it's finally resolved.

Returning to Act 10, one example of the reform's peculiar, if not bizarre, structure is its limitation of the scope of "collective bargaining" for general employees to matters involving "total base wages," which is further defined to expressly exclude "any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental com-

pensation, pay schedules, and automatic pay progressions." All matters other than "total base wages," including matters relating to hours and conditions of employment, are now prohibited subjects of bargaining, such that even if an employer agreed to such terms with a union, the agreement would be illegal. The WERC decided that it was important to provide guidance to the parties, labor organizations, and employers with regard to the definition of "total base wages." It initially took the position that total base wages for the first round of bargaining would include essentially all current income. Subsequent to that initial post–Act 10 contract, negotiating additional educational supplements would be prohibited. Essentially, that meant if you went to the bargaining table on June 30th, 2012, the amount of money necessary to cover your members' total income, for your salaries and wages, would be subject to collective bargaining up to the CPI limit, which is 3.16 percent.

A not well-known fact, or not well-publicized fact, was that one of the other reforms that the legislature adopted in association with the budget repair special session that passed Act 10 was a change in the Administrative Procedures Act in Wisconsin. Pursuant to that reform an agency's issuance of any emergency rule or other administrative rule required review by the governor's office, was subject to revision, and could not be promulgated until that review was complete. In this case, the WERC's initial definition of total base wages adopted in February 2012 was reviewed by the governor's office and held up by another two and a half months before the governor's office responded. And the response was to say that definition of total base wages must exclude the educational supplementary income that teachers received, for example.

Now, as a practical matter, if you moved every teacher who's on the salary schedule all the way to the left, assuming the salary schedule is lined up in rows with the left-hand column being the salary for a teacher who possessed a bachelor's degree but no greater education, and then calculated the total of that sum, you would have the "total base wage" subject to bargaining. And you would discover that that is about 80 percent of what's needed to cover current salaries for teachers.

Under that definition, then, what the teacher's union is left to bargain is something that amounts to 80 percent of the amount of money necessary to cover their members' current salaries, which is obviously bargaining about nothing. There's no obligation by

the employer to thereafter provide any income in excess of that 80 percent. That's up to the discretion of the employer.

So when we talk about the elimination of collective bargaining rights, at least from my perspective, you should know that we're talking about the total elimination of collective bargaining rights for general employees in the state of Wisconsin. Public safety employees, on the other hand, are nearly completely protected by Act 10 from its ravages and continue to have very robust collective bargaining rights.

The development of the joint union approach to challenging Act 10 began on February 13th, 2011, with the Wisconsin American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) calling a meeting of its affiliates' counsel. On the preceding Friday, two days earlier, Act 10 had been published. The group divided to perform several tasks, one of which was to determine if Act 10 could be attacked on a constitutional basis. General counsel for the international unions joined state affiliate counsel, as did outside counsel for the National Education Association.

The plaintiffs attacked Act 10 in three areas based on the distinction the Act makes between general employees, on the one hand, and public safety employees, on the other. The three areas of attack were these: (1) the diminution of collective bargaining rights for general employees as compared to public safety employees; (2) the Act's provision for an annual recertification election, which has no comparison and has no precedent in labor relations, public or private sector, anywhere in the country—a point ultimately very persuasive to Judge Conley, who cited in his decision Professor Slater's declaration to that effect; and (3) the law's prohibition of payroll deduction for the purpose of collecting dues for the members of the union. Let me make that point: It's payroll deduction that's under attack, not fair share.

The joint union plaintiffs asserted an equal protection challenge, arguing that there's no rational basis for the distinction between public safety employees and general employees with regard to any of those three issues. Additionally, the union plaintiffs alleged that the prohibition of dues deduction for some but not all public employees amounted to view-point discrimination in violation of the First Amendment. The Act's discrimination in favor of public safety employees was justified by the state with regard to the difference in the scope of the collective bargaining on the ground that the public safety unions might strike illegally in Wisconsin if they were to be included under the law.

The state did not offer a clear rational basis for the distinction between public safety employees and general employees with regard to the annual recertification elections. And let me make a point on that, too. There is a fee required of unions that engage in the recertification elections that approximates $1 per capita. So, for example, sooner or later the Wisconsin Education Association Council (WEAC), which represents bargaining units that include nearly 90,000 employees, would have to run recertification elections in all of its bargaining units and would be required to spend nearly $90,000 a year just in filing fees for annual recertification of its right to represent its members.

In the declarations provided to Judge Conley in follow-up litigation to clarify and enforce his order, we had submitted a declaration by WEAC's executive director reporting that the cost for it to mount a meaningful campaign in just the first recertification elections, which were run in November 2011, was in excess of $2 million. That was to run recertification elections for 20,000 employees who had contracts that expired on June 30th, 2011, including the cost of organizing staff and related expenses.

And we'll have another 25,000 employees who WEAC represents in bargaining units in school districts whose contracts expire on June 30 of this year, and then the balance on June 30th, 2013. If the annual recertification elections are to be conducted, WEAC will have to incur the cost of organizing and running those elections every year for all of the 90,000 teachers employed in school districts in the state of Wisconsin.

The third area of attack was on the dues deduction prohibition. As I said, that included a First Amendment claim. As time is running out, the court concluded that the equal protection attack on the matter of the diminution of collective bargaining rights failed and that the state's concern of the strike by the public safety employees was rational. The court found that the state could not articulate any rational basis for the annual recertification requirement and struck that down. The court also found that the state could not articulate a rational basis to justify the prohibition of dues deduction for general employees as compared to public safety employees. It reasoned that the prohibition entangled the state in prohibited activity. Particularly the court noted that among state employee public safety classifications, the term "public safety employee" as defined by Act 10 included only the State Highway Patrol, the troopers. It, oddly, does not include the University of Wisconsin police, the Capitol police, or firefighters employed

by the state in the definition of "public safety employee," even though in the municipal level, those are defined to be public safety employees.

The distinction among public safety employees at the state level corresponds to the employees' labor organization endorsement of Governor Walker in his last electoral campaign. It excludes from that definition those employees whose labor organizations did not support the governor in his last campaign. But there were five public sector labor organizations that endorsed Governor Walker in the campaign, and all five are protected by the definition of "public safety" in Act 10. Judge Conley ruled, looking at these facts, that the state adopted a payroll dues deduction system that would have the consequence of entangling the state, and particularly the current administration, in political matters as a function of this classification scheme and Act 10. So the ruling also struck down that aspect of Act 10 on First Amendment grounds. [*Editor's Note:* A divided panel of the Seventh Circuit reversed the decision of the District Court on January 18, 2013, ruling that Act 10 was constitutional in its entirety.]

Josh Tilsen: Hi. I'm Josh Tilsen, the Commissioner of the Minnesota Bureau of Mediation Services. That was genuinely a great discussion. Minnesota is a wonderful place in spite of some of the things you might have heard about our nasty weather. I hope you'll enjoy our wonderful cultural activities, our sports teams—they aren't necessarily all that successful, but they try hard. We're very proud of our natural resources, and we're extremely proud of the labor relations system that we have. This is truly the state "where all the men are good looking and all the children are above average."

My scholarly colleagues have ably described the recent law changes and related events in the public sector bargaining throughout the rest of the country. I am flattered and challenged to have the opportunity to respond to their work. To keep it short, the headline for what I want to say is that in Minnesota, as Steve said, we look across the river and feel very lucky, because in Minnesota collective bargaining is still working. Public employers and public employees still engage in real collective bargaining and resolve nearly all of their contracts without the resort to impasse procedures. Here, there remains a reasonable balance between the right and need of citizens for an efficient and effective delivery of public services, the requirement that pubic employers be able to run government enterprises in pursuit of those goals, and

access by public employees to a meaningful voice in their terms and conditions of employment.

So the question is, why is this true in Minnesota? Also, why is it so different in so many other places? Certainly one of the biggest reasons is that my boss, Mark Dayton, the governor of the State of Minnesota, has vetoed legislation very similar to that which has been adopted in Wisconsin. Another, and this is the more long-term systemic reason, is the wisdom and far-sightedness of earlier Minnesota leaders, particularly the 1971 and the 1980 legislators that established the system that we have today. In enacting our bargaining law, they trusted the governor and public employers with a fair, democratic, and robust system of collective bargaining. They enshrined in the state law some of the best practices and theories of the time about how to structure collective bargaining.

They drew upon the National Labor Relations Act (NRLA) and NLRB interpretations of that law. They also benefited from the experience of other states. These leaders crafted a Minnesota law that empowers nearly every person appointed or employed by a public employer with the right to collective bargaining through an exclusive representative. This includes all the public safety services, most supervisors, and even confidential employees. They also adopted a provision that permits even nonunion employees access to independent arbitrators, or at least the right to a hearing through a neutral, disinterested person who is independent of the employer's authority.

When there's a debate about what the rights of employees should be and who should make the decisions, the biggest concern of employees and neutral, disinterested people is that someone other than the boss have the final say over whether or not the employee was treated fairly. That is one of the fundamental reasons that people want collective bargaining.

Because public employees in Minnesota have access to strong impasse procedures, most have the right to strike while essential employees have a system of binding interest arbitration; it's been effective. These rights have been exercised responsibly in Minnesota. In the 25 years that I've been involved in Minnesota public sector collective bargaining, we've had 35 strikes. There have been about 300 interest arbitrations. At the same time, we have resolved thousands and thousands of disputes without use of impasse procedures. During this time, Minnesota has been and remains a recognized national leader in the efficient and effective delivery of government services.

Past leaders have trusted our government and their workers with the right to collective bargaining. They knew it wouldn't be a perfect system, but they seemed to understand that dignity and the sense of participating in the outcome, as well having a meaningful say in working conditions, would create a more efficient and stable government workforce.

These earlier state leaders also demonstrated good judgment in what they refused to delegate to the collective bargaining system: setting public pensions to collective bargaining. In Minnesota, pensions are not bargained, they are established by law. The men and women who crafted our state law seem to have understood that pensions don't belong at the bargaining table, that retirement benefits from which people would not realize value for many years in the future would not fare well at the bargaining table when they were weighed against current wages and benefits. As a consequence, they prohibited bargaining over pensions. They left it to the legislature to make these decisions. In its wisdom, since the inception of the pension system the legislature has required that public employees share 50/50 with the public employers in contributions to their pension plans. In this way each participant in the system had a personal stake all along. Many states pensions that are collectively bargained have suffered from insufficient funding.

So Minnesota owes its current public sector labor relations stability to the wisdom of the voters in the 2010 election by electing Mark Dayton, and to the far-sighted lawmakers from 30 and 40 years ago.

Of course we have problems. One observation is that contracts are taking a lot longer to settle. In the past, union members expected to be better off when the contract was settled, so they were in a hurry to get settled, while the employers, who expected to have to write a bigger check when the contract settled, were not. Guess what? The shoe's on the other foot now. Union members often expect to be worse off when the contract settles, and the employers to be better off. As a consequence, the employers want to get the contracts settled and the unions are not in so much of a hurry. This, of course, is affecting the entire atmosphere of collective bargaining in our state.

The political atmosphere for labor relations remains troubled in Minnesota as it is across the nation. It's not as rough as it is across the river to the east, but our system is under more scrutiny. There have been proposals to adopt laws similar to Wisconsin, and some have passed our legislature and been vetoed by the

governor. Thus, Minnesota public sector collective bargaining, although under scrutiny, remains stable.

Stephen Befort: Well, thanks all. We've eaten up much of our time for questions, but I want to throw one out that is on the minds of many of us here. Two days ago, the recall election took place in Wisconsin and Scott Walker was reelected. Media saturation is being given to what this means for the future. We know we had a contrary vote, and it was on the merits of collective bargaining rather than on a candidate in Ohio, that Joe talked about. But I'd like to ask our panelists, what you think next year or the year after is likely to bring to public sector collective bargaining?

Steve Weld: Because Tuesday's recall election was in Wisconsin, the question is probably addressed to Tim and me. Tim and I golfed yesterday, so we had a chance to talk. My assessment is that there were three groups of voters in Wisconsin on Tuesday: the pro-Walker people, the anti-Walker people, and the anti-recall people. Frankly, Democratic candidate Barrett, Milwaukee's mayor, who has been a gubernatorial candidate before, really was a nonplayer. When you read the polls, people were either for or against Walker or against the recall process. That's how people voted. So I don't see the recall election as being indicative of what's going to happen in November. In November, we will not have the anti-recall factor.

Whatever the presidential election results are, we are potentially going to have gridlock in Wisconsin. Governor Walker will still be there. If the legislature goes Democratic, we will have gridlock; sometimes gridlock isn't such a bad thing.

Timothy Hawks: I shared with Steve yesterday that it was very perspicacious for the organizers of this event to invite a representative of the Wisconsin union movement to speak about its remarkable success in reversing the Republican control of the state senate.

The first answer to the question, though, is to say, frankly, in terms of the future of collective bargaining in Wisconsin, winning or losing this election or the recall is not particularly significant in the sense that Act 10 is law in Wisconsin, and it will remain law in Wisconsin until both houses of the legislature and the governor agree to amend it. The Assembly of Wisconsin currently has a 20-seat margin in favor of the Republican party. Had Mayor Barrett won the election, it is extremely unlikely that Act 10 would have been modified in any way that improved it from the union side's point of view.

Even the strategy had Barrett been elected was of doubtful use. It was to drive a budget impasse until collective bargaining concessions might be leveraged when the next budget comes up. But the experience here in Minnesota last summer suggests that's not a particularly successful strategy. From the Assembly majority's point of view, the reaction would likely have been, "Make our day."

So, I was not confident that that particular strategy was going to be effective in accomplishing significant reform to Act 10 either. Now, in terms of the election, it has broad political significance. But with regard to the collective bargaining bill as it stands or collective bargaining law as it stands in Wisconsin, not so much.

Joseph Slater: Nationally, I would anticipate that this would somewhat embolden, at the margins, opponents of union collective bargaining rights. Having said that, there are structural limits. There are only so many states that have the Republican governors and Republican legislatures, and most of them, as I described, have already kind of maxed out on what they can do. But I would guess that you would see more attempts to pass right-to-work legislation. There are certainly rumors of that in Ohio and limits on the production.

Josh Tilsen: To reiterate what Tim said, this is driven by much larger national and really world economic trends. The changes in collective bargaining systems are driven by very large trends that are not going to be changed by the election response one way or the other. There are huge economic shifts taking place, and the public attitude toward what our standards of living should be and how they should be set has been changing. That's just reflective of what happened in Wisconsin.

Timothy Hawks: On that point, I had the opportunity to speak in Australia, to the Queensland Chapter of the Australian Labor and Employment Association, and I was surprised to hear that two years earlier the Australian government had removed employees' right to use payroll deduction to remit their union dues. Truly, these are issues that are not just occurring in Wisconsin but worldwide.

Stephen Befort: We're going to hear a lot more about public sector collective bargaining in the years to come. The conceptual challenge that we hear to public sector collective bargaining is that it skews the democratic process by amplifying the union voice at the bargaining table while quieting the voice of others in the democratic process. That's the challenge that some conservatives make to the legitimacy of public sector collective bargaining. On

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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[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).