

## **Public Sector Labor & Employment Law Fundamentals**

### **4. Collective Bargaining Under Comprehensive State Collective Bargaining Statute**

Today, union membership in the public sector substantially exceeds that found in the private sector. According to the most recent statistics (2006) released by the U.S. Bureau of Labor Statistics, the rate of union membership among the public sector is 36.2%. In the private sector, the rate of union membership is a mere 7.4%.

Although employees in the private sector were granted collective bargaining rights nearly 25 years before their public sector counterparts under the National Labor Relations Act (NLRA), which was passed in 1935, their numbers have been in decline since the early 1970s. At its height, more than one-third of the private sector workforce was represented by a union. At the same time the rate of unionization began to fall in the private sector, it began to rise in the public sector. The rise in union membership in the public sector is most often credited to the enactment of state collective bargaining laws covering state and/or local workers.

The first state to enact a public sector collective bargaining law was Wisconsin, in 1959. Most of the remaining states passed similar legislation in the 1960s and 1970s. Today, a majority of the states (40), in addition to the District of Columbia, have passed laws recognizing public employees' right to collectively bargain the terms and conditions of their employment. These laws follow no set pattern; some states broadly recognize the right of public employees to bargain collectively either through one or more laws (e.g., all state and/or local employees), while other states limit that right to only a select group of employees (e.g., teachers, police, fire fighters or mass transit workers). That may explain why the largest groups of unionized workers in the public sector fall into three categories, in the following descending order: teachers, police, and fire. States that extend collective bargaining rights to a large cross section of its public sector workforce include: Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, and Wisconsin.

Six states have not passed legislation addressing the right of governmental workers to collectively bargain: Alabama, Arizona, Arkansas, Mississippi, New Mexico (law lapsed), and Utah. Four states expressly prohibit governmental workers from engaging in collective bargaining either by law or via attorney general opinion. They include: North Carolina (law), South Carolina (atty gen. op.), Virginia (law), and West Virginia (atty gen. op.).

In many instances, state laws granting collective bargaining rights to its public sector workforce are more comprehensive than their federal counterpart, in that they cover matters not addressed in the NLRA, such as what procedures the parties must to follow in the event they reach impasse, identifying what are and are not mandatory subjects of bargaining, and expressly excluding subjects from the bargaining table.

## **5. Collective Bargaining in Absence of State Collective Bargaining Statute**

While in the absence of a state collective bargaining statute, public sector employees can still join a union, their right to demand that their employer negotiate over the terms and conditions of their employment are not protected unless, for example, a municipality has passed an ordinance (e.g., Phoenix, Baltimore), judicial rulings or attorney general opinions have recognized that public employees have collective bargaining rights.

## **6. Impasse Resolution**

Most states have established mandatory impasse resolution procedures. These procedures vary from state to state, and within a state often vary between job classifications. The reason why such procedures are commonly found in state collective bargaining statutes is because most public employees, unlike their private sector counterparts, do not have the right to strike. David A. Dilts & William J. Walsh, *Collective Bargaining and Impasse Resolution in the Public Sector* 75 (1988). While the first step in most state impasse resolution procedures typically involves mediation (use of a neutral to assist the parties in reaching an agreement), often followed by fact-finding and some form of binding or non-binding arbitration, the variety of methods utilized nearly equals the number of states with collective bargaining laws.

Studies have been conducted to determine whether state impasse procedures discourage parties from reaching an agreement on their own, without the assistance of a third party. Some believe that the availability of such procedures has a “narcotic effect” on the parties. That is, once contracting parties have reached impasse in their contract negotiations, they are more likely to reach impasse during subsequent contract negotiations. *Id.* at 177.

Because fact-finding and, more particularly, interest arbitration, are relatively unique to the public sector forum, our discussion focuses on these methods.

### **A. Fact-Finding**

Fact-finding is a quasi-judicial form, in that the fact-finder conducts a hearing to gather evidence and then issues an advisory opinion. The parties then either reject or accept the fact-finder’s report. Some have referred to the fact-finder’s advisory opinion or recommendations as “little more than formalized mediation, without any binding authority save persuasion. *Id.* at 82. Sometimes, the fact-finder’s advisory opinion is released to the public in an effort to push the parties into reaching a settlement. The authors Elkouri & Elkouri, in their treatise on arbitration, observed that the value in fact-finding “lies in the scrutiny brought to bear on the parties’ positions (by both the factfinder and the parties themselves), as well as in the public pressure to accept the neutral’s recommendations that result from the impartial evaluation and analysis of each party’s position.” Elkouri & Elkouri, *How Arbitration Works* 1366 (6<sup>th</sup> ed. 2003). In some instances, especially among teachers, fact-finding is the final legislated step following impasse.

During the 1980s, some efforts were made to analyze the effectiveness of states’ impasse procedures. New York and Florida were two states in which researchers scrutinized the effectiveness of fact-finding. In both New York (school employees) and Florida (most public employees), fact-finding is the final step after the parties reach impasse.

In New York, prior to 1991, one person was responsible for serving as both the mediator and the fact finder. In 1991, New York discontinued this practice in an effort to professionalize the role of the fact-finder. The Public Employment Relations Board (PERB) determined that “a more adjudicative approach was necessary to give more weight to the fact-finder recommendations”. Robert Hebdon, *Fact-Findings Effectiveness: Evidence from New York State*, 40 *Industrial Relations* 73, 74 (Jan. 2001). One author reviewing the effectiveness of New York’s fact-finding process concluded that it became more effective as it shifted from an accommodative (mediation style) to a more adjudicative function by separating the two processes (mediation and fact-finding). This author theorized that a “well-reasoned adjudicative fact-finding report has more potential to bring public pressure to bear on the extreme positions of the parties.” *Id.* at 81.

In Florida, the fact-finder is called a “special master.” In the event that either party rejects the recommendations of the special master, the matter ends up before the state legislature, which ultimately sets the terms of the contract as it “deems to be in the public interest, including the interest of the public employees involved.” During the mid 1980s, annually, 10% of all contract negotiations (approximately 100) ended up before a special master/fact-finder in Florida. In 1985-86, a group of researchers looked at the effectiveness of the fact-finding process in Florida and found that employers had a much more favorable view of the process than the unions did. Kenneth M. Jennings *et al.*, *Assessing the Effectiveness of Florida’s Impasse Resolution Procedures: A Survey of Public Sector Practitioners*, 17 *Public Personnel Management* 253, 255-57 (Fall 1988). When asked how effective they thought the process was, 51% of employers thought that the process was very to somewhat effective, while 53% of unions thought that the process was very ineffective. Both parties agreed that when the legislature was left to resolve the terms of the contract, the final determination was closer to the employer’s position. *Id.* This stark discrepancy in perception led the researchers to suggest that Florida’s impasse procedures could stand improvement, noting that for successful collective bargaining to occur, both parties need to “believe they have gained or ‘won’ something from the process.”

#### B. Interest Arbitration

Interest arbitration is typically the last step in a state’s impasse procedure arsenal, after the fact-finding process fails, and is most frequently utilized in connection with employees that do not have the right to strike, such as police and fire (safety) personnel, and mass transit workers. Most often interest arbitration is binding on the parties. Interest arbitration is like the fact-finding process in that there is a hearing and it is a quasi-judicial in nature. Where fact-finding and interest arbitration differ is that the arbitrator does not issue an advisory opinion or set of recommendations but issues a written award that is binding on the parties. If one party should refuse to acknowledge the award, the other party has the legal authority to go to court and ask the court to see that the award is enforced. Another feature of binding interest arbitration is that there is usually only a very limited right to appeal.

More than half the states with collective bargaining statutes mandate binding interest arbitration for some or all of their public employees. A few states (Connecticut, Delaware, Nebraska, Nevada, Ohio, Oklahoma, Pennsylvania and Wisconsin) expressly indicate what format the arbitration will take (usually final offer). Some state (California, D.C., Illinois) even specify which issues will be resolved during interest arbitration — usually economic issues.

Interest arbitration can be conducted by a single arbitrator, who is a neutral, or by a panel of three arbitrators (a tripartite panel), with one member of the panel selected by the employer, one selected by the union, and the third member serving as a neutral.

While some states allow the arbitrator a great deal of discretion in formulating a resolution to the unresolved contract issues — referred to as conventional arbitration — more often than not the arbitrator is limited to choosing the position of one party or the other, either on an issue-by-issue basis or as a total package basis. This method of resolving stalled contract negotiations is referred to as “final-offer” or “last best offer” arbitration. In final-offer arbitration, the arbitrator cannot fashion his or her own settlement or split the difference between each side’s positions.

“Night baseball” (NB) arbitration is a form of interest arbitration that has been used to resolve business disputes in the private sector. In NB arbitration, the parties do not submit specific contract proposals at the arbitration hearing, as would be the case in final-offer arbitration. Rather, the parties present evidence during the hearing that support their general position. The parties submit their final offers in a sealed envelope to the arbitrator. The arbitrator does not take a look at the parties’ final offers until s/he has written a nonbinding opinion based on the evidence submitted during the hearing. The party’s proposal that comes closest to the arbitrator’s nonbinding opinion will be the prevailing proposal. Thus, like final-offer arbitration, it is the party’s proposal, not the arbitrator’s personal opinion, that provides the resolution to the dispute. It is too early to tell whether the NB arbitration format will be utilized with any frequency in the public sector. William H. Ross, Ph.D., *Should “Night Baseball” Arbitration Be Used In Lieu of Public Sector Strikes? Psychological Considerations and Suggestions for Research*, 31 J. Collective Negotiations 45, 47 (2006).

Those that have studied the impact of interest arbitration on the behavior of negotiating parties find that final-offer arbitration provides a much greater incentive for parties to settle on their own than does conventional arbitration. Thus, in states that employ final offer arbitration instead of conventional arbitration, arbitration usage rates are significantly lower. In general, interest arbitration, unlike some of the other impasse procedures, does not have a “narcotic effect” on contracting parties. David B. Lipsky & Harry C. Katz, Ph.D., *Alternative Approaches to Interest Arbitration: Lessons from New York City*, 35 Public Personnel Management 265, 267 (Winter 2006). Another impact of final-offer arbitration is that it forces the parties to moderate their position in an effort to convince the arbitrator that their proposals are more reasonable than the other side’s.

### C. Right to Strike

As noted earlier, most states do not permit public employees to strike. At least ten states give some public employees the right to strike. They include: Alaska, Hawaii, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont and Wisconsin. Workers that are involved with public safety or essential services (e.g., police and fire, mass transit) typically do not have a right to lawfully strike in the event of an impasse. When such workers do engage in a wildcat strike, as the New York City mass transit workers did last year, the penalties imposed can be severe. The NYC mass transit workers strike, which lasted 60 hours, resulted in a \$2.5 million fine levied against the union, each striking worker lost two days’ pay for each day the worker was out on strike, the president of the union spent three and one-half days in jail, and the union lost its

automatic dues checkoff for a three-month period. Of the 38 states that have no-strike laws, 22 include penalty provisions for those violating the no-strike clause.