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The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits

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Perhaps the most striking political development in 2011 is the widespread and aggressive assault on public sector collective bargaining rights. While the most highly publicized and most significant changes have taken place in Wisconsin and Ohio, moves are afoot in a number of states. These changes represent the most radical revisions to labor law in the U.S. in decades, and they have set off a political firestorm.

This brief will argue that these attacks are deeply misguided. They serve no purpose beyond a partisan attempt to weaken a key supporter of the Democratic party and they do not address budget deficits. Instead, they take away a core right that has been recognized in the vast majority of the United States for up to half a century, a right that is considered fundamental in much of the industrialized world, a right that helps individual teachers, firefighters, police officers, and other public employees in their day-to-day lives at the workplace, a right that helps sustain a vital middle class, and a right that helps ensure talented and skilled people will find public service an attractive career option.

This Issue Brief will provide background on the development and functioning of public sector labor laws in the U.S., discuss the current political debates over such laws (including debates over whether public sector workers are “overpaid”), explain some of the most prominent recent legislation in this area (including, but not limited to, laws in Ohio and Wisconsin), and critique the proposed changes.

I. History and Background of Public Sector Unions and Public Sector Labor Law

A. Historical Underpinnings

Public sector labor law in the U.S. developed on a somewhat different track than private sector law. The National Labor Relations Act (NLRA) of 1935 gave private sector workers across the country the right to bargain collectively, but the NLRA excludes public sector workers. This was likely in large part due to constitutional concerns: back then, it appeared unclear whether Congress had the power under the Commerce Clause to pass the NLRA itself, and contemporary Tenth Amendment doctrine would have been a huge challenge to applying a national labor law to the states. Also, fear of strikes by public workers inhibited the development of public sector labor law.¹ The U.S. was unusual in this regard. Notably, in other western democracies, public sector workers and their unions have long had mostly the same rights as private sector workers.

Despite having no legal rights to bargain collectively before the 1960s, public sector unions organized and represented their members in a variety of ways. Unions of postal workers

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¹ For additional historical detail, see JOSEPH E. SLATER, PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962 (2004).

formed in the late 19th century. Some public sector unions that are prominent today, such as the American Federation of Teachers and the International Association of Firefighters, formed in the first two decades of the 20th century. AFSCME formed in the 1930s. Interestingly, the Building Service Employees Union (the BSEU, which today is the SEIU) has represented many public sector employees since as far back as the 1920s and 1930s.

These unions represented their members in a variety of ways, from lobbying for civil service laws which protected public workers from arbitrary discharge by political machines, to training and educating workers, to actual informal negotiations with public employers. Such negotiations, in the 1930s-50s, produced actual contract-like agreements in a number of cases, even though no law authorized collective bargaining.

The first public sector labor law was passed in Wisconsin in 1959. By that time, the reality of public sector union organizing and activity on the ground was starkly at odds with the lack of any legal rules granting public sector unions any rights. Significantly, the Wisconsin law as passed in 1959 and amended in 1962, dealt with the strike fear by barring strikes through the creation of alternative means to resolve bargaining impasses: mediation, fact-finding, and (this came a bit later) binding “interest” arbitration. By 1967, twenty-one states had adopted some type of public sector labor law authorizing collective bargaining, and soon the vast majority of states had adopted them.

B. Public Sector Unions and Modern Labor Law Rules

Public sector unions became one of the labor movement’s biggest success stories. For some time, the union density rate in the public sector has been around 40 percent, while the private sector rate is now less than 8 percent.² Indeed, as of 2009, there were more government employees than private sector employees who were union members.³

Public sector labor law is still generally set by state and local laws (the only federal public sector labor laws are those that apply to employees of the federal government), and these laws vary significantly. But the overwhelming majority approach is to grant collective bargaining rights. Today, thirty-one states and the District of Columbia allow public employees generally to bargain collectively; eleven permit some but not all categories of public employees to bargain collectively, and only eight states generally bar public workers from bargaining collectively.⁴

Beyond that, there is some variation in the different collective bargaining laws. For example, of the states that permit collective bargaining, only twelve permit any public employees to strike. Statutes that allow bargaining but not strikes (the most common approach) use varying processes for resolving bargaining impasses, including fact-finding, mediation, and usually

²In 2009, 36.8% of public employees were members of unions, and 40.7% were covered by union contracts. *See* BUREAU OF LABOR STAT., U.S. DEPT. OF LABOR, NEWS RELEASE USDL-11-0063, UNION MEMBERS – 2010, Table 3 (2010), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

³In 2009, 7.9 million public workers and 7.4 million private sector workers were union members. *See id.*

⁴*See* JON O. SHIMABUKURO, COLLECTIVE BARGAINING AND EMPLOYEES IN THE PUBLIC SECTOR, U.S. Congressional Research Service Report, at 3-4 (Mar. 30, 2011).

ending in some form of binding “interest arbitration.” Approximately thirty states use some form of interest arbitration.⁵ In this system a neutral arbitrator (or sometimes a tripartite board) holds a hearing, evaluates evidence, follows statutory criteria, and makes a binding decision as to the terms of the collective bargaining agreement. Significantly, statutes providing for binding interest arbitration almost always include specific criteria which the arbitrator must consider and evaluate in making the arbitration award. The employer’s ability to pay is a standard factor the arbitrator must consider, as are the pay and conditions of similar employees (often called “comparables”).⁶ Other legal rules vary across jurisdictions, notably on scope of bargaining (often somewhat narrower than in the private sector) and coverage of employees (some public sector laws cover supervisors).⁷

Binding interest arbitration is the “quid pro quo” for strike bans. It typically is used after both mediation and fact-finding. These processes for resolving collective bargaining impasses in the public sector have been a success. A recent, careful analysis by labor relations experts concluded that:

The dispute-resolution processes (mediation, fact-finding, and arbitration) put in place as substitutes for the right to strike have performed well in avoiding work stoppages and producing contract settlements that reflect the criteria included in state statutes Newer “interest-based” approaches for increasing the problem-solving potential of bargaining have been tried in a number of public (and private) sector settings, and offer opportunities for further improvements in negotiations and day-to-day contract administration.⁸

Interest arbitration has worked as intended during the recent economic downturn. Employers have successfully invoked “employer ability to pay” criteria in arbitrations across the country. For example, in a recent interest arbitration case from Minnesota, the arbitrator explained that “the vast majority of cities in the Employer’s comparison group are proposing 0% [wage increases] for 2010 Some cities and counties are settling at 0%”⁹

Further, considerable evidence shows that collective bargaining rights with binding interest arbitration reduces strikes. Studies have found that illegal strikes are most likely to occur

⁵ RICHARD KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 264-65 (3d ed. 2001).

⁶ See Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 FORDHAM L. REV. 153, 158-63 (1987).

⁷ See generally MARTIN H. MALIN, ANN C. HODGES & JOSEPH E. SLATER, PUBLIC SECTOR EMPLOYMENT: CASES AND MATERIALS (2d ed. 2010); KEARNEY, *supra* note 5.

⁸ David Lewin et al., *Getting it Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining 3* (Employment Pol’y Research Network, Labor and Employment Relations Ass’n, 2011), available at <http://ssrn.com/abstract=1792942>.

⁹ *City of West St. Paul v. Law Enforcement Labor Services, Inc., Local 72 (Police Officer Unit)*, BMS Case No. 09-PN-1062 (Jan. 19, 2010) (Miller, Arb.). Other interest arbitration cases citing the economic downturn in ruling for employers include *Ill. Dep’t of Central Mgmt. Serv. v. Int’l Bhd. of Teamsters, Local 726 (State Police - Master Sergeants Interest Arbitration)*, Case No. S-MA-08-262, Arb. Ref. 08.208 (Jan. 27, 2009) (Benn, Arb.); *Metro. Council, Metro Transit Police Dep’t & Law Enforcement Labor Services, Inc., Local No. 203 – Police Administration & Command Employees*, BMS Case No. 08-PN-1141 (Feb. 27, 2009) (Bognanno, Arb.).

in states with no collective bargaining rights, as opposed to states with bargaining rights.¹⁰ Notably, in Ohio, the number of strikes went down dramatically after Ohio passed its public sector labor law in the early 1980s, *even though the Ohio statute permitted most public employees to strike*. This is because the Ohio law, like almost all collective bargaining statutes, had effective mechanisms to settle impasses short of strikes (mediation and fact-finding), and the threat of strikes made both sides take these mechanisms seriously.¹¹

II. The 2010 Elections and Political Attacks on Public Sector Unions

Despite the data and realities described above, by early 2011 it became clear that some Republican politicians had targeted public sector unions, and thus began attacks unprecedented in modern times. The rhetoric suggested that public sector workers were not sharing the pain that private sector workers felt during the Great Recession that began in 2008. This crisis did, in fact, cause significant cuts in public employment. By the fall of 2010, the number of workers employed by local governments had dropped to the lowest level since October 2006, and the drop in local government employment from August to September 2010 was the biggest one-month decline since 1982.¹² Also, public employers have imposed involuntary furloughs (mandatory days off without pay) as well as staffing cuts, on employees, including unionized employees. Between 2007 and 2009, over half the states implemented mandatory furloughs. In 2010, California and New York ordered furloughs for a combined total of more than 250,000 state employees.¹³

Still, the recession provided an opportunity for some to argue not only that public workers are overcompensated, but also to blame various economic and budget woes on public sector unions and their right to bargain collectively. Thus, for example, a *Wall Street Journal* editorial last spring made the remarkable claim that “America’s most privileged class are public union workers.”¹⁴ The *New Republic* titled an article, “Why Public Employees are the New Welfare Queens.”¹⁵ Republican politicians began echoing these sentiments. “We have a new privileged class in America,” said Indiana Governor, Mitch Daniels, who rescinded state workers’ collective bargaining power on his first day in office in 2006. “We used to think of government workers as underpaid public servants. Now they are better paid than the people who pay their salaries.”¹⁶ Taking what in other times might have been considered a politically risky

¹⁰Lewin, et al., *supra* note 8 at 13-14.

¹¹Martin H. Malin, *Public Employees’ Right to Strike: Law and Experience*, 26 U. MICH. J.L. REFORM 313, 365 (1993) (finding that there “have been far fewer strikes in Ohio since they were legalized.”).

¹²Local governments employed 14.2 million, or 76,000 fewer people in September than August, the biggest one-month decline since July, 1982. Of the jobs cut, 50,000 were in education. Simone Baribeau & Ashley Lutz, *Local Government Employment in U.S. Falls to Lowest Since 2006*, BLOOMBERG (Oct. 8, 2010), available at <http://www.bloomberg.com/news/2010-10-08/local-government-employment-in-u-s-falls-to-lowest-since-2006.html>.

¹³Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 12 (2011), available at http://www.buffalolawreview.org/past_issues/59-1/Befort.pdf.

¹⁴Editorial, *The Government Pay Boom*, WALL ST. J., Mar. 26, 2010, at A18, available at <http://online.wsj.com/article/SB10001424052748704281204575003101210295246.html>.

¹⁵Jonathan Cohn, *Why Public Employees Are the New Welfare Queens*, THE NEW REPUBLIC, Aug. 8, 2010, available at <http://www.tnr.com/blog/jonathan-cohn/76884/why-your-fireman-has-better-pension-you>.

¹⁶Ben Smith & Maggie Haberman, *Pols Turn on Labor Unions*, POLITICO, June 10, 2010, available at <http://www.politico.com/news/stories/0610/38183.html>.

stance, Massachusetts governor Mitt Romney asked, “Why should taxpayers pay for health care for public employees that we don’t have ourselves?”¹⁷

A. Collective Bargaining Rights Are Not Correlated With State Deficits

Proponents often claim that because public workers are overcompensated, they are a significant cause of state deficits. But the correlation simply isn’t there. At a recent hearing on this issue, Rep. Mike Quigley observed that states that allow public sector collective bargaining on average have a 14 percent deficit relative to their budgets, while states that bar collective bargaining have 16.5 percent deficits.¹⁸ For example, Texas, which has essentially no public sector collective bargaining and very low levels of unionization, has one of the worst budget deficits in the nation. Nevada, which has no collective bargaining rights for state employees, has one of the largest state budget deficits in the country. In contrast, some states with strong public sector bargaining laws, including those at the center of these debates, have smaller than average deficits. Wisconsin was projected to have a deficit of 12.8 percent of its budget in FY 2010, Ohio 11 percent, and Iowa 3.5 percent.¹⁹ In contrast, North Carolina, which bars all public sector collective bargaining is running a projected deficit of 20 percent in 2012.²⁰ This is in large part because public employees are not, in fact, overcompensated.

B. Public Employees Are Not “Overcompensated”

While studies on this point do not all agree, the more careful studies show that, comparing similar workers with similar credentials in similar jobs, public employees are more often paid less than comparable private sector workers.

Studies that find public workers are overpaid tend to look at gross average pay or median pay but do not take into account the different types of jobs in the public sector and, sometimes, the different kinds of workers. Simply looking at aggregate data from the Bureau of Labor Statistics makes it seem as if public workers earn more on average than private workers, but the gap disappears completely when one compares similar workers (including age, experience, and education) in similar jobs.²¹ There are many more professional jobs in the public sector, and fewer unskilled service jobs. For example, the federal Office of Personnel Management recently concluded that two of the main studies purporting to show that federal employees were paid more than private sector workers (from the Heritage Foundation and the Cato Institute) were inaccurate. The figures on which Cato and Heritage relied, from the Bureau of Economic Analysis, “look only at gross averages, including retail and restaurant service workers and other entry-level positions that reduce private sector average pay in comparison to the Federal average,

¹⁷Jess Crosby, *Public Sector, Public Good*, AFL-CIO BLOG, Apr. 22, 2010, <http://blog.aflcio.org/2010/04/22/public-sector-public-good/#more-28473>.

¹⁸*House Panel Debates State Budget Problems, Whether Bargaining Rights Need to Be Cut*, 25 LABOR RELATIONS WEEKLY (BNA) 700 (2005).

¹⁹DAVID MADLAND & NICK BUNKER, CTR. FOR AMERICAN PROGRESS, STATE BUDGET DEFICITS ARE NOT AN EMPLOYEE COMPENSATION PROBLEM 4 (2011), <http://www.americanprogressaction.org/issues/2011/03/pdf/statebudgettissuebrief.pdf>.

²⁰Joseph McCartin, *Convenient Scapegoat, Public Workers under Assault*, DISSENT, Spring 2011, available at <http://www.dissentmagazine.org/article/?article=3825>.

²¹*See id.*

which does not include many of these categories in its workforce.” Also, the federal sector includes a significantly higher percentage of highly specialized and professional employees, who are actually paid less than their private sector counterparts.²²

Taking such factors into account, many studies have found that public workers are, on the whole, paid less than similar private sector workers doing similar jobs. A recent study from the National Institute on Retirement Security concluded:

Wages and salaries of state and local employees are lower than those for private sector workers with comparable earnings determinants (e.g., education). State employees typically earn 11 percent less; local workers earn 12 percent less Over the last 20 years, the earnings for state and local employees have generally declined relative to comparable private sector employees

Benefits (e.g., pensions) comprise a greater share of employee compensation in the public sector [Still] state and local employees have lower total compensation than their private sector counterparts. On average, total compensation is 6.8 percent lower for state employees and 7.4 percent lower for local workers, compared with comparable private sector employees.²³

Also, economists at the Center for Economic and Policy Research studied workers in New England, and found that while the average state or local government employee there earns higher wages than the average private-sector worker, that is because public workers are, on average, older and much better educated. Specifically, over half of state and local government employees in New England have a four-year college degree or more, and 30 percent have an advanced degree. Only 38 percent of private-sector workers have a four-year college degree or more, and only 13 percent have an advanced degree. Also, the typical state and local worker is about four years older than the typical private sector worker. After adjusting for these factors, public sector wages were generally lower than private sector wages. While the lowest paid public workers earned slightly more than their private sector counterparts, for engineers, professors, and others in the higher-paid professional jobs, the wage penalty for being a public worker was almost 13 percent.²⁴

Such studies have been done for states across the nation and for specific public employers. For example, a study from Georgia State University analyzing data from across the nation found that “[h]olding constant education, estimated work experience, occupation, location, race, and gender,” public employees “earned 4 to 6% less than comparable private

²²Laura D. Francis, *OPM, NETU Dispute Reports that Feds Paid Twice as Much as Public Sector*, 48 GOVERNMENT EMPLOYEE RELATIONS REPORTER (BNA) 994 (2010).

²³KEITH A. BENDER & JOHN S. HEYWOOD, NAT’L INST. ON RETIREMENT SECURITY, *OUT OF BALANCE: COMPARING PUBLIC AND PRIVATE COMPENSATION OVER 20 YEARS* 3 (2010), http://www.nirsonline.org/storage/nirs/documents/final_out_of_balance_report_april_2010.pdf.

²⁴Jeffrey Thompson & John Schmitt, *The Wage Penalty for State and Local Government Employees in New England* 8 (Ctr. for Econ. and Pol’y Research, Political Econ. Research Inst., U. Mass., Amherst, Working Paper Series, No. 232, 2010), available at <http://www.cepr.net/documents/publications/wage-penalty-2010-05.pdf>.

sector workers in 1990, 2000, and 2005-06.”²⁵ Focusing more narrowly, a study by the chief economist in the office of the New York City Comptroller found that employees in the New York City municipal workforce are paid 17 percent less on average than their private sector counterparts.²⁶

The Economic Policy Institute (EPI) has compared public and private sector compensation in a number of individual states, including Michigan, Ohio, and Wisconsin, states with relatively strong union presence and relatively robust public sector collective bargaining statutes. For Michigan, the study concluded that, after controlling for education, experience, organizational size, gender, race, ethnicity, citizenship, and disabilities, full-time state and local government workers are undercompensated by approximately 5.35% compared to the private sector (2.9% when annual hours worked are factored in).²⁷ For Wisconsin, the study found that public employees are undercompensated by 8.2% (4.8% when annual hours worked are factored in).²⁸ For Ohio, the study found public workers are undercompensated by 5.9% (3.5% when hours are factored in).²⁹

An EPI study made similar findings on a national scale. Looking at public and private workers nationwide, it found a slight undercompensation of public employees on a cost per hour basis, after controlling for education, experience, hours, employer size, gender, race, ethnicity, and disability. On average, full-time state and local employees are undercompensated by 3.7%, in comparison to similar private-sector workers.³⁰

A very recent overview, surveying the research on this issue, concluded:

The existing research, much of which is very current (completed within the past two years), shows that, if anything, public employees are underpaid relative to their private-sector counterparts. While public-sector benefits are higher than private sector counterparts, total compensation (including health care and retirement benefits) is lower than that of comparable private-sector employees. Erosion of public-sector pay and benefits will make it

²⁵Gregory B. Lewis & Chester S. Galloway, *A National Analysis of Public/Private Wage Differentials at the State and Local Levels by Race and Gender* 22 (Georgia St. U. Andrew Young School of Pol’y Studies, 2011), available at <http://ssrn.com/1768190>.

²⁶See John Herzfeld, *Municipal Pay Below Private Sector, New York City Comptroller Study Finds*, 46 DAILY LABOR REPORTER (BNA) A-10 (2011).

²⁷Jeffrey H. Keefe, *Are Michigan Public Employees Over-Compensated?* 9 (Econ. Pol’y Inst., Briefing Paper No. 293, 2011), available at http://epi.3cdn.net/ac5a7563f793ddf366_89m6b5vrv.pdf.

²⁸Jeffrey H. Keefe, *Are Wisconsin Public Employees Over-Compensated?* 9-10 (Econ. Pol’y Inst., Briefing Paper No. 290, 2011), available at http://epi.3cdn.net/9e237c56096a8e4904_rkm6b9hn1.pdf.

²⁹Jeffrey H. Keefe, *Are Ohio Public Employees Over-Compensated?* 8 (Econ. Pol’y Inst., Briefing Paper No. 296, 2011), available at http://epi.3cdn.net/6ddeb152266bf6714f_6xm6b9551.pdf.

³⁰The study found a smaller compensation penalty for local government employees (1.8 percent) than for state government workers (7.6 percent). Jeffrey H. Keefe, *Debunking the Myth of the Overpaid Public Employee*, 1 (Econ. Pol’y Inst., Briefing Paper No. 276, 2010), available at http://epi.3cdn.net/8808ae41b085032c0b_8um6bh5ty.pdf.

harder for public employers to attract, retain and motivate the workforce needed to provide public services.³¹

C. Pensions

Many of the real and perceived financial problems in public employee compensation involve pension plans. Notably, public sector pension benefits and rules in most states are *not* set through collective bargaining, but rather through statute and regulation.³² Also, while some state plans have significant underfunding problems, in the aggregate, public sector pension plans currently account for a total 3.8% of state and local spending, which does not seem obviously out of balance.³³

It is also crucial to note that while some states with robust collective bargaining laws have serious problems involving pension funding, so do states with essentially no public sector labor laws and very little presence by public sector unions: notably, Mississippi, Louisiana, Virginia and Kentucky.

Still, the problem is real, at least in a number of places. Causes range from stock market declines, to underfunding due to questionable actuarial assumptions and/or political pressure to divert funds to other projects, to some over-generous benefit formulas.

Certainly the stock market declines in recent years contributed to significant underfunding in a number of places. This, in turn, put additional strains on already-weakened public budgets. As *Politico* explained:

A recent study from the Pew Center on the States found that states are short \$1 trillion toward the \$3.35 trillion in pension, health care and other retirement benefits states have promised their current and retired workers, the product of a combination of political decisions and the recent recession.

But the immediate cause of the new spotlight on public sector unions is the collapse in tax revenues that came with the 2008 Wall Street crash, something that union leaders bitterly note is not their fault.³⁴

Further, in some cases, the problems have been exaggerated. A coalition of ten organizations representing state and local government employers issued a “fact sheet” on January 26, 2011 stating that state and local government pension funds on the whole “are not in crisis.” It concluded that “[m]ost state and local government employee retirement systems have

³¹Lewin, et al., *supra* note 8 at 2.

³²*See, e.g.*, HAW. REV. STAT. § 89-9(d) (2010); IOWA CODE § 20.9 (2009).

³³Alicia H. Munnell, Jean-Pierre Aubry & Laura Quinby, *The Impact of Public Pensions on State and Local Budgets* 1, (Ctr. for Retirement Research, Boston College, 2010), available at <http://www.policyarchive.org/handle/10207/bitstreams/95884.pdf>.

³⁴Smith & Haberman, *supra* note 16.

substantial assets to weather the economic crisis; those that are underfunded are taking steps to strengthen funding.”³⁵ Another independent study explains that:

the extent of public pension liabilities varies widely among the states and local governments. Some pension plans are fully funded, while others have seen their funding levels drop below 80 percent. In most cases, pension funding shortfalls are the result of the cyclical nature of the economy, which was particularly severe in the 2008–2009 period. In a minority of cases, unfunded liabilities can be directly traced to the failure of public officials to properly fund the pension system over a period of many years.³⁶

Also, states have cut back on their contributions to public employee pension plans; one study estimates this has increased the funding shortfall by \$80 billion. Public employers did not make all the necessary contributions to pension plans when the stock market was booming, relying on the politically-convenient assumption that these good times would continue.³⁷ One area for potential reform would be to tighten the rules on the actuarial assumptions that can be used in public sector pension financing. Notably, the law that governs private sector pensions on this and other issues, the Employment Retirement Income Security Act (ERISA), does not apply to the public sector.

Further, the benefit levels in many public sector pensions systems are far from overly-generous. State pensions in Massachusetts average less than \$26,000 a year.³⁸ Also, nearly a third of all state and local government employees do not earn Social Security retirement benefits. This is because public employment in some states is not covered by Social Security. One survey reported the following average pension benefits:

- California-- \$2,008 per month or \$24,097 per year;
- Colorado-- \$2,278 per month or \$27,339 per year (and no Social Security);
- Florida-- \$1,468 per month or \$17,617 per year; and
- Ohio-- \$1,961 per month or \$23,525 per year (and Ohio is one of the states where Social Security does not cover public employment).³⁹

To the extent real problems exist, they can and have been addressed independently of collective bargaining issues. In the period from January 2010 to September 2010 alone, nineteen states amended their public employee pension statutes. These laws increased employee contributions to retirement plans, reduced benefits, or did both. For example, Illinois passed a

³⁵*Public Pensions ‘Not in Crisis,’ Group Says, Pointing to ‘Substantial Assets’ for Long Run*, 49 GOVERNMENT EMPLOYEE RELATIONS REPORTER (BNA) 162, (2011).

³⁶CTR. FOR STATE AND LOCAL GOVERNMENT EXCELLENCE, STATE AND LOCAL PENSIONS: AN OVERVIEW OF FUNDING ISSUES AND CHALLENGES 2 (2011), available at <http://www.slge.org/vertical/Sites/%7BA260E1DF-5AEE-459D-84C4-876EFE1E4032%7D/uploads/%7BDE913A11-1C4F-475D-BF0E-1662B0C67612%7D.PDF>.

³⁷MADLAND & BUNKER, *supra* note 19 at 7.

³⁸Crosby, *supra* note 17.

³⁹National Institute of Retirement Security, *Pensionomics: Measuring the Economic Impact of State and Local Pension Plans*, (compiling state by state data on average state and local pension benefits), available at http://www.nirsonline.org/index.php?option=com_content&task=view&id=184&Itemid=88.

law in May 2010 altering benefits for all of the state's five pension systems, including raising the retirement age, limiting pension raises, capping maximum benefits, and ending public pensions for retirees who work another public job.⁴⁰ Georgia also made changes to its "re-employment after retirement" rules such that if a retiring employee has not reached normal retirement age on the date of retirement and returns to any paid service, the employee's application for retirement is nullified.⁴¹ In October 2010, California enacted changes to its pension plan for state employees. Under the new law, current employees will increase the amount they contribute toward their retirements, newly hired employees will have less generous pension benefits, and the pension will be calculated based on the average high three years of salary, not the single highest year. The law also contains transparency provisions that require the California Public Employees' Retirement System to submit specific information to the legislature, governor, and state treasurer regarding contribution rates, discount rates used to calculate liabilities, alternative discount rates, and various other assumptions.⁴²

III. The Laws and Proposed Laws at Issue

A. Wisconsin

Prior to the 2011 developments, Wisconsin had two fairly similar public sector labor statutes, one covering local and county government employees, and the other state employees. Ironically, the former was the nation's first state law permitting public sector collective bargaining in country, enacted in 1959. The bill recently passed and signed by Governor Scott Walker would make sweeping revisions to these laws (except for certain employees in "protective occupations," mainly police and fire). While the bill is currently enjoined, it would make the following changes, among others.

First, it would eliminate 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.

Second, it would generally limit collective bargaining to bargaining over a percentage of total base wages increase that is no greater than the percentage change in the consumer price index. No other issues could be negotiated.

Third, it would make Wisconsin a "right to work" jurisdiction, meaning that it would be illegal for unions and employers to agree to "fair share" union security clauses.⁴³ Further, the

⁴⁰Smith & Haberman, *supra* note 16; *see* 2009 Ill. Leg. Service, Public Act 96-525; *see e.g.*, 40 ILL. COMP. STAT. 5/14-103.12 2009 (final compensation).

⁴¹*See* Tripp Baltz, *Facing Long-Term Pension Problems, States Are Turning to Legislative Fixes*, 48 GOVERNMENT EMPLOYEE RELATIONS REPORTER (BNA) 1156 (2010).

⁴²S.B. X6 22, 2010 Ext. Sess. (Cal. 2010). *See* Laura Mahoney, *Governor to Sign Pact With Rollbacks of Pensions 100 Days Into Fiscal Year*, 195 DLR (BNA) A-18, (2010).

⁴³A "fair share" agreement is an agreement between a union and employer that members of a union bargaining unit will be required to pay either regular union dues or, for employees who object, that portion of their union dues which go to activities related to collective bargaining. The most significant activities related to collective bargaining are contract negotiations and grievance and arbitration handling. The most significant activity not related to collective bargaining is political activity.

law would make it illegal for an employer to agree to automatic dues deduction for employees who wish to pay dues.

The bill also makes some highly unusual changes. It would enact an unprecedented mandatory recertification system under which every union would face a recertification election every year. And the union would only be recertified if 51 percent of the employees in the collective bargaining unit – not merely those voting – voted for recertification. 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. The bill also limits the duration of collective bargaining agreements to one year, which is very unusual in labor law. Further, it requires that employees pay one half of all the required contributions to their retirement system. Previously, the amount of employee contributions was negotiable (*e.g.*, the employer could agree to pay part or all of the employee contributions).

As of this writing, the Wisconsin law has not yet gone into effect, as it was enjoined by Judge Maryann Sumi of the Dane County Circuit Court on March 18, 2011. The injunction was granted on the grounds that the Wisconsin state legislature passed the law in violation of a statutory requirement that 24 hours' notice must be given before passing such a law. The case is now pending before the Wisconsin Supreme Court. Other legal challenges are likely, some based on the process and some based on the substance of the law. Some unions and public employers are signing contracts in this period, as contracts in place as of the effective date of the law are not covered by the law. Setting the table for further complications later, defenders of the bill argue that if they prevail in the Wisconsin Supreme Court, the "effective date" of the law will be retroactive to March 25.

The law has prompted considerable political activity, from massive protests in Madison to recall efforts aimed at both Republicans (six currently pending) who voted for the bill and Democrats (three pending) who fled the state in an attempt to block the bill by preventing a legislative quorum. A recent state supreme court justice race between David Prosser and JoAnne Kloppenburg was obviously affected by the politics of this issue (as of this writing, Prosser has a small lead, but there will be a recount).

B. Ohio

Prior to recent amendments, Ohio had a public sector labor law applicable to most public employees. Enacted in the early 1980s, it even allowed most public workers to strike. The new bill recently signed into law, SB-5, was designed to profoundly alter this law. SB-5 may soon be on hold for a referendum process, as described further below. But as passed, it would do the following things, among others.

SB-5 eliminates collective bargaining rights entirely for certain employees, including at least most college/university faculty, lower level supervisors in police and fire departments, and employees of charter schools. It also limits the bargaining rights of some other employees: *e.g.*, regional council of government employees and certain members of the unclassified civil service could bargain only if the public employer elects to do so.

For employees who can bargain, SB-5 would eliminate both the right to strike for public employees who currently have that right (all public 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 could not strike under preexisting law. SB-5 provides stiff penalties (removal and loss of two days pay for each day striking) for striking or instigating a strike. Encouraging or condoning a strike is also forbidden.

Instead, the parties are left to mediation and fact-finding, and if these do not lead to an agreement, the governing legislative body can simply choose to adopt the employer's final offer. A majority of the union or the employer can reject a fact-finder's recommendations (previously, a two-thirds vote was required to reject). If either side rejects the recommendations, the parties' last best offers will be submitted to the legislative body of the public employer to make a selection. The law requires the public employer's last best offer to become the agreement if the legislative body fails to choose. For certain employers, if the legislative body selects the last best offer that costs more and the CFO of the legislative body cannot or refuses to determine whether sufficient funds exist to cover the agreement, the last best offers will be submitted to the voters. Unlike the previous law, in which parties could mutually agree to a wide range of procedures to resolve impasses, this is the only impasse procedure SB-5 allows.

SB-5 also bars "fair share" agreements. It also prohibits public employers from agreeing to provide payroll deductions for any contributions to a political action committee without written authorization from the individual employee.

Further, it restricts the scope of bargaining and expands the list of subjects that are inappropriate for collective bargaining. It specifies that the following are not bargainable: (1) employer-paid contributions to retirement systems; (2) health care benefits (except the amount of the premium the employer and employees pay, although the provision of health care benefits for which the employer is required to pay more than 85% of the costs is not negotiable); (3) privatization or contracting out of a public employer's work; and (4) the number of employees required to be on duty or employed. It also permits public employers to not bargain on any subject reserved to the management of the governmental unit, even if the subject affects wages, hours, and terms and conditions of employment. It bars collective bargaining agreements (CBAs) from providing for an hourly overtime payment rate that exceeds the overtime rate required by the Fair Labor Standards Act (FLSA). It also bars CBAs from containing provisions for certain types of leave to accrue above listed amounts or to pay out for sick leave at a rate higher than specified amounts. It bars grievances and arbitrations based on past practice of the parties.

SB-5 further restricts bargaining in education, including a bar on negotiating minimum number of personnel, anything restricting the employer's ability to assign personnel, and maximum number of students assigned to a class or teacher. Also, employers cannot agree to any restriction on the public employer's authority to acquire any products, programs, or services from educational service centers.

The bill also gives greater rights for a public employer in a state of fiscal emergency or under “fiscal watch” to terminate, modify, or negotiate the agreement.

The law appears to repeal the “contract bar” rule. And it repeals the provision requiring the public sector labor law to be liberally construed.

SB-5 is also facing challenges. Currently, a petition drive is underway to place repeal of the law on the ballot in November, 2011. If enough signatures are gathered, the law will be, essentially, put on hold until the referendum vote.

C. Other States

While Wisconsin and Ohio have gotten the most press, other states where Republicans control most or all of state government have also passed bills limiting the collective bargaining rights of public workers.

In Michigan, the recently enacted Local Government and School District Fiscal Accountability Act 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 CBAs with public sector unions. A pair of Detroit municipal pension funds have filed suit alleging that this violates the Contracts Clause of the Constitution. Also in Michigan, a proposed bill would provide even harsher penalties for striking teachers, including the sanction of suspending or revoking teaching licenses.

On March 30, 2011, the New Hampshire House approved legislation (H.B. 2) that would eliminate the negotiated terms of employment for public workers and make them “at-will” employees at the end of a CBA’s term. Also, on April 20, the New Hampshire Senate passed a “right to work” bill that would apply to both public and private sector unions. Both Houses passed the latter bill by margins exceeding those necessary to override a gubernatorial veto.

Alabama passed a statute making it a crime to arrange for public employee payments “by salary deduction or otherwise” to PACs or organizations including unions that use part of the money for “political activity.” That law has been enjoined by the U.S. District Court for the Northern District of Alabama, on the grounds that the statute is overbroad regarding activities the First Amendment protects and/or that it is too vague to provide adequate notice. The state is appealing.

Idaho has recently enacted a series of bills which curtail teachers’ collective bargaining rights. S.B. 1108 limits such bargaining to wages and benefits. It also eliminates teacher seniority protections during layoffs and replaces tenure-track contracts for new teachers with renewable agreements of one or two years. As in Ohio, this bill is facing a campaign for repeal via a referendum.

Indiana passed a statute significantly limiting the scope of bargaining for teachers, *e.g.*, by forbidding the parties to contractually agree to what were formally “permissive” topics of negotiation (those which unions and employers are legally allowed to agree to but are not

required to negotiate over unless both sides agree). It also appears to bar arbitration over contract grievances, and substitute fact-finding for arbitration in impasse resolution.

Oklahoma recently repealed a 2004 law requiring cities with populations of at least 35,000 to bargaining collectively with unions. As in Wisconsin, this change does not affect police and firefighters, who, in Oklahoma, are covered by a separate statute. However, a separate bill is pending that would affect the rights of police and fire to binding arbitration.

In all these states, the issues are highly partisan, with Republicans generally backing these moves, and Democrats opposing them. The political battles are not expected to end any time soon. Currently, public opinion seems to favor those opposed to stripping collective bargaining rights from public workers.⁴⁴

IV. Restricting Collective Bargaining Rights is Bad Public Policy

As shown above, considerable evidence strongly contradicts claims that these laws are necessary to deal with budget problems, or even that they would help with budget problems. Public workers are not “overpaid,” problems in pension underfunding that do exist are generally not related to collective bargaining rights, and there is no real correlation between collective bargaining rights and the levels of state deficits.

Further, many of the adopted rules on their face have no relation to state budgets or employee compensation; instead, they are meant to damage unions as institutions. First, “right to work rules” that bar “fair share” agreements have nothing to do with state budgets or employee compensation. Such rules only go to whether unions can require employees in a union bargaining unit to pay that portion of union dues which go to activities related to collective bargaining. Right to work rules have been criticized in that they permit “free riders,” as unions continue to have a duty to fairly represent employees in a union bargaining unit even if such employees are not paying any dues. But just as importantly, whether employees pay dues to a union or not has no impact on public budgets.

The Wisconsin statute features two additional rules which clearly do not relate to the state budget. First, the bill bars automatic dues deductions for employees who want to pay dues to the union, even if the employer would agree to it. Second, the bill’s onerous and unprecedented provisions for yearly recertification requiring a majority of the entire bargaining unit has no purpose other than to make it very difficult for a union to stay certified. Indeed, when pressed in a Congressional hearing recently, Wisconsin Governor, Scott Walker, could not justify this rule in terms of the state budget. In labor law generally, once a union has been certified, its status can be challenged if 30% of the members of the bargaining unit request an election to do so, and the union can be de-certified in the election if a majority of those voting choose that option. This

⁴⁴See, e.g., *More Americans Back Unions Than Governors in State Disputes*, GALLUP, Apr. 1, 2011 (reporting that 48% of respondents support the unions and 39% support the governors), available at <http://www.gallup.com/poll/146921/Americans-Back-Unions-Governors-State-Disputes.aspx>; *Have Republicans Lost the Public Relations War Over Public Sector Unions?* OUTSIDE THE BELTWAY, Mar. 3, 2011 (analyzing N.Y. Times-CBS, NBC-Wall Street Journal, and Rasmussen polls with similar results), available at <http://www.outsidethebeltway.com/have-republicans-lost-the-public-relations-war-over-public-sector-unions/>.

long-established rule in both the public and private sectors correctly balances the need for stability in labor relations with the concept that a union should not represent employees if a majority of the employees does not wish it.

The real impetus behind these bills is that some Republicans wish to damage unions institutionally because unions support Democrats more frequently than Republicans. For example, in a fundraising letter, Wisconsin State Senate Majority Leader, Scott L. Fitzgerald, explained that the goal of the Wisconsin legislation was “to break the power of unions . . . once and for all.” Further, in a Fox News interview, Fitzgerald said, “If we win this battle and the money is not there under the auspices of the unions, certainly what you’re going to find is President Obama is going to have a much more difficult time getting elected and winning the state of Wisconsin.”⁴⁵

Often, these bills are not even supported by actual public employers. For example, the executive director of the Wisconsin School Board Association wrote the Wisconsin legislature, while that state’s bill was pending, as follows:

Many [Wisconsin Association of School Board] members are gravely concerned that the changes in the . . . bill limiting the scope of collective bargaining would wipe away the ability of local school boards to use the bargaining process in ways that enhance local control by telling local school boards they are prohibited from deciding whether to enter into a contract on any item other than wages; and would immeasurably harm the collaborative relationships that exist between school boards and teachers and may lead to job actions and other disruptions of educational services that will harm the educational quality in our public schools.⁴⁶

Further, taking away collective bargaining rights is actively harmful. As a recent study by labor relations experts explained:

Challenges to the freedom of association and the right to bargain collectively places the United States out of sync with established international human-rights principles. Collective bargaining has historically served to increase consumer purchasing power, assure voice in the workplace, and provide checks and balances in society. Models for collective bargaining in the public sector have incorporated alternative dispute-resolution mechanisms to protect the public interest.⁴⁷

⁴⁵Michael Winship, *Labor Pains and the GOP*, SALON, Apr. 1, 2011, available at http://www.salon.com/news/politics/war_room/2011/04/01/labor_fights_republicans_sharia_law_michael_winship.

⁴⁶Lewin, et al., *supra* note 8 at 20.

⁴⁷*Id.* at 3.

As to the first point, Article 23 of the United Nations' Universal Declaration of Human Rights stresses the importance of collective bargaining rights for all workers, including public employees. So does the 1998 International Labor Organization Declaration on Fundamental Principles and Rights at Work (the U.S. is a signatory to this document). In the latter document, the U.S. pledged "to promote and to realize . . . the principles concerning the fundamental rights" defined in the Declaration, the first of which is, "freedom of association and the effective recognition of the right of collective bargaining." Human Rights Watch and Amnesty International have publically declared that at least some of the legislation described above violates international human rights standards. Human Right Watch has noted that the U.S. also is a party to and bound by its obligations under the International Covenant on Civil and Political Rights, which guarantees everyone the right to protect his or her interests through union activity, including collective bargaining.⁴⁸

Further, contrary to stereotypes, unions do not cause inefficiencies; in fact, they can improve efficiency. Data showing that unions have a positive effect come from sources that range from international surveys to analyses of specific types of employers. In 2002, the World Bank released a report based on more than 1,000 studies of the effects of unions and collective bargaining. This report found that countries with high unionization rates tend to have higher productivity, less pay inequality, and lower unemployment. It found that workers who belong to unions are generally better trained than their non-union counterparts and that unions also help retain workers. Also, having a large number of workers represented by unions tended to have a stabilizing and beneficial effect on a country's economy.⁴⁹ On a more specific level, there are studies of particular types of public sector unions in the U.S. For example, evidence shows that unionization of teachers correlates positively with higher student scores on standardized tests and higher graduation rates.⁵⁰

Freeman and Medoff's influential industrial relations book, *What Do Unions Do?*, found that giving workers voice through unions often helped productivity. The higher productivity is due in part to lower rates of turnover, improved managerial performance in response to unions, and cooperative labor-management relations at the plant level. Further, unions promote the ability of individual workers to speak freely, allow workers to deal with management efficiently with one collective voice, gain information for workers, monitor employer behavior, and equalize bargaining power.⁵¹

A survey of the literature on unions and efficiency concluded that there "is scant evidence that unions act to reduce productivity . . . while there is substantial evidence that unions act to improve productivity in many industries."⁵² While this view is not unanimous, the combined

⁴⁸Michelle Amber, *Human Rights Groups Say State Measures On Workers' Rights Violate International Law*, 49 GOVERNMENT EMPLOYEE RELATIONS REPORTER (BNA) 438 (2011).

⁴⁹TOKE AIDT & ZAFIRIS TZANNATOS, UNIONS AND COLLECTIVE BARGAINING: ECONOMIC EFFECTS IN A GLOBAL ENVIRONMENT (2003).

⁵⁰Robert M. Carini, Brian Powell & Lala Carr Steelman, *Do Teacher Unions Hinder Educational Performance? Lessons Learned from State SAT and ACT Scores*, 70 HARV. EDUC. REV. 437 (2000).

⁵¹RICHARD FREEMAN & JAMES MEDOFF, *WHAT DO UNIONS DO?* 94-110, 162-80 (1984).

⁵²Dale Belman & Richard Block, *The Impact of Collective Bargaining on Competitiveness and Employment: A Review of the Literature*, in BARGAINING FOR COMPETITIVENESS: LAW, RESEARCH AND CASE STUDIES 51 (Richard Block ed., 2003). Also, an overview paper explains that "analyses of the union effect on firms and the economy

teaching of most studies is that unions can increase productivity in many to most circumstances, and can decrease it in others. In either case, the effect is usually not great.⁵³ Further, in recent years, new problem-solving innovations in labor management negotiations have brought new efficiencies to union workplaces: keeping the efficiencies brought by worker voice and a highly-skilled workforce, while eliminating certain types of work rules that may be less appropriate to modern workplaces.⁵⁴

In troubled times such as these, unions can be part of the solution. When New York City was facing dire financial problems in the mid-1970s, unions helped save the city by agreeing to pay freezes, deferrals and cuts, giving back certain fringe benefits, negotiating productivity enhancement provisions in labor agreements, and investing in public employee pension funds. Indeed, the unions in Wisconsin were willing to agree to a series of significant cuts in pension and pay; the unions drew the line, properly, at the very right to bargain collectively.

Most broadly, since the 1930s, unions have been vital in bringing working class Americans into the middle class. It is no secret that the decline of the labor movement in the private sector in the past few decades has been accompanied by an unprecedented increase in wealth and income inequality in the U.S. Indeed, inequality levels in the U.S. today unfortunately much more resemble a third world country than other, first-world democracies. Without unions, workers are far more vulnerable to pressures of other powerful groups.

As professor Matthew Finkin recently explained, “a robust pluralist democracy requires the active participation of all of society’s stakeholders [T]he primary vehicle for the working class to participate in the political process is through organizations of their own choosing in which they actively participate, which means unions,” and “the weakening of unions . . . is unhealthy for American democracy.”⁵⁵ Policymakers, along with the American public, should reject such moves.

V. Conclusion

In conclusion, public sector labor law as it has existed for decades has worked well. State deficits are not caused by public sector bargaining rights. Multiple studies have shown that, after adjusting for type of worker and type of job, most public sector workers are underpaid compared to their private sector equivalents. While some public sector pension funds have real funding problems, these are not generally the fault of collective bargaining. This is true in part because in the vast majority of states, public sector unions (unlike private sector unions) are not legally permitted to negotiate over pension benefits. It is also true because other factors – notably the stock market crash of 2008 and some questionable actuarial assumptions – are the main causes of the funding problems. The radical and reactionary amendments to public sector statutes some

have generally found unions to be a positive force, improving the performance of firms and contributing to economic growth [citing studies].” Lawrence Mishel with Matthew Walters, *How Unions Help All Workers* 15 (Econ. Pol’y Inst., Briefing Paper 2003) available at <http://www.epi.org/page/-/old/briefingpapers/143/bp143.pdf>.

⁵³Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, in UNIONS AND ECONOMIC COMPETITIVENESS 156 (Larry Mishel & Paula Voos eds., 1992) (“The majority of studies find that union firms have higher productivity, but there are well-documented exceptions.”).

⁵⁴Lewin, et al., *supra* note 8 at 23-26.

⁵⁵*Id.* at 28.

states have adopted will thus not help budgets, but they will hurt working people and public services. And of course, when public workers are harmed, the general public is harmed; for instance, when a teacher is unable to bargain with respect to a reasonable student-teacher ratio, it is students who are harmed. The attacks on collective bargaining are best understood as partisan politics, and that is no justification for removing a longstanding, important right for working men and women.