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CHAPTER 1

Public Sector Labor Law: An Update

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Law governing collective bargaining rights of state and local government employees continues to be a crazy-quilt patchwork of state and local laws, regulations, executive orders, court decisions, and attorney general opinions. This patchwork is far from static. For labor relations practitioners, academics, and policymakers alike, there is an ongoing need to update the status of these laws. That is the objective of this chapter.

To develop this update, a LEXIS® search of state and federal court cases, laws, legislative proposals, and attorney general opinions for each state was conducted from 1987 (the year the last IRRA research volume on the public sector was published) through 1994. Additionally, several CD-ROM literature databases, including a legal periodicals database as well as the BNA *Government Employment Relations Reporter*, were searched.

This chapter begins with a review of significant state legislative changes as well as selected court decisions, executive orders, and attorney general opinions since 1987 which affected collective bargaining rights in the public sector. We then summarize current legal provisions (the duty to bargain, terminal resolution procedures, and strike penalties) by state and sector (police and fire, state workers, etc.). Finally, we review and analyze two key post-1987 trends: (1) legislative and constitutional limitations on the finality of collective bargaining agreements or interest arbitration awards and (2) procedures for handling nonmember objections to agency shop fees in light of *Hudson*, 475 US 292, 121 LRRM 2793 (1986) and *Lehnert*, 111 S.Ct 1950, 137 LRRM 2321 (1991).

Major Changes since 1987

Major State Legislative Changes

The seven-year period from 1987 to 1994 witnessed a relatively low level of legislative activity with only 11 states enacting laws.[1] Only one state (New Mexico) passed a comprehensive law granting bargaining rights to public employees where no previous bargaining law existed. Nebraska's new law extends bargaining rights to state workers, and Texas law gives localities the option of providing bargaining rights to police and firefighters. The remaining eight states amended existing bargaining laws at the margins, and most (six) of these covered educational employees only.

Given the low level and limited nature of changes in state collective bargaining legislation, it might be tempting to conclude that the legal framework in the public sector is quite stable. However, as Hebdon (this volume) points out, this apparent stability is largely an artifact of the fragmented structure of public sector bargaining law. Our later discussion of limitations on the finality of collective bargaining agreements and "binding" arbitration awards through judicial decisions and fiscal control measures demonstrates that a great deal of flux exists beneath the stable veneer.

Table 1 summarizes these laws. Changes in administrative regulations and proposed legislation are not included. Significant court decisions interpreting *existing* law or regulations, executive orders, and attorney general opinions are reported later.

Significant Court Decisions Affecting Bargaining Rights

Since it is not possible to report *all* significant court decisions here, priority is given to decisions which affected the duty to bargain, terminal resolution steps, the right to strike, and the finality of collective bargaining agreements and arbitration awards. Thirteen significant state court decisions regarding public sector bargaining are reported in Table 2. Five concern the finality of ratified collective bargaining agreements or interest arbitration awards. These are discussed at some length in a separate section on the finality issue. Three decisions relate to the legal status of public employee strikes and are discussed in the summary of current state law provisions. Finally, two decisions concern the legal status of interest arbitration, and the remaining three deal with miscellaneous issues.

Significant Attorney General Opinions and Executive Orders

Perhaps the most significant attorney general opinion since 1987 involves the prohibition of public employee strikes in West Virginia.

TABLE 1
New or Amended State Bargaining Laws since 1987

State	Coverage	Summary of Change
Alaska (1992)	Public school teachers	Allows public school teachers the right to strike after submitting to advisory arbitration. (A 1982 Alaska Supreme Court decision had ruled that teacher strikes were illegal under the old law.)
Delaware (1994)	State, county & municipal, excluding teachers, police & firefighters	Expands mandatory subjects of bargaining to include wages and benefits.
Illinois (1995)	Public school employees, Chicago only	Expands the list of prohibited bargaining subjects (e.g., subcontracting, layoffs and their impact), prohibits teacher strikes for 18 months, exempts educational employers from requirement to submit to binding dispute resolution process, gives principals sole authority to suspend and discipline teachers, position vacancies to be filled by principal without regard to seniority.
Iowa (1991)	Public school teachers	Eliminates fact-finding from available impasse procedures. If mediation fails, dispute goes directly to final offer arbitration.
Michigan (1994)*	Public school employees	Imposes fines on employees and unions for striking, prohibits unfair labor practice strikes, requires courts to enjoin strikes and lockouts without finding of irreparable harm, prohibits labor organizations from vetoing contracts, prohibits requiring association ratification, expands the list of prohibited bargaining subjects.
Nebraska (1987)	State workers, excluding university and college employees	Twelve statewide bargaining units defined, contracts must expire with end of biennial budget cycle, all negotiations must be completed by March 15. If no agreement by January 15, parties submit to binding arbitration (special master) who must rule by February 15. Arbitration decisions are appealable to the Public Employment Relations Commission. No right to strike. Also see Appendix.
New Mexico (1992)	All public employees	State workers are automatically covered by the Public Employment Labor Relations Board (PELRB), but nonstate jurisdictions may create a parallel structure which is at least as effective as PELRB. State workers contracts, if not settled by November 15 go to fact-finding, with recommendations

TABLE 1 (*Continued*)
New or Amended State Bargaining Laws since 1987

State	Coverage	Summary of Change
		due by December 10. If no agreement by December 15, unresolved issues are resolved by the appropriations process. Nonstate worker units may develop alternative terminal resolution procedures. Striking unions may be decertified for one year.
Pennsylvania (1992)	Educational employees	Parties negotiate a terminal resolution arbitration procedure which selects from either union, employer, or factfinder final offers or recommendations, either issue by issue, economic and noneconomic packages, or total package. If fact-finding recommendations not totally accepted by both parties, the terminal resolution procedure takes effect, and parties give notification of their intent to proceed to arbitration which is binding unless either party rejects it. If either party refuses to select arbitration, a strike or lockout may occur outside of a ten-day notice period. Rejection of the arbitration award frees them to legally strike or lockout. Strikes are not permitted from the time fact-finding is requested until the report is made. Strikes must cease when the parties agree to arbitration. Selective strikes are illegal, and strikes which prohibit the school board from providing the required number of days in the school year may be enjoined. There are restrictions on the use of outside strikebreakers.
Texas (1993)	Police and firefighters only	Enabling legislation requires cities to adopt the law by referendum. Non-binding arbitration available. Strike penalties include union fines, forfeiture of dues checkoff, and for striking employees, two years probation and no compensation increase for one year after strike.
Utah (1993)	Certificated school employees only	Mediation available after 90 days of negotiations and if impasse occurs. If no mediated settlement within 15 days, parties may submit to a state hearings officer for fact-finding.
Wisconsin (1993)	Certified teaching personnel	A revenue control measure adopted in 1993 (S.B. 16) amended the Municipal Employment Relations Act (MERA) to require that, between 7/1/93 to 6/30/96, if a school district employer offered a "qualified economic offer" to a union representing school district professional employees,

TABLE 1 (*Continued*)
New or Amended State Bargaining Laws since 1987

State	Coverage	Summary of Change
		the parties would be precluded from arbitrating economic issues. A "qualified economic offer" (QEO) applies only to teachers union and must maintain the percentage contribution toward employees' existing fringe benefits and maintain those fringe benefit costs which existed 90 days prior to contract expiration (provided that the costs of doing so are plus or minus 1.7% of total compensation costs during the previous 12 months) and total wage cost increases, including length of service and education increments do not exceed 2.1% of total compensation costs during the previous twelve months.

[a] The circuit court has ordered a stay of implementation of the Michigan law, declaring two sections to be unconstitutional (automatic fine of union for strike without determining union authorization and requirement of automatic issuance of injunctions against strikes). At this time, the case is on appeal.

This state currently lacks any legislation establishing the right of public employees to bargain collectively. A 1962 state attorney general opinion advised "public employees may join unions and government officials may discuss wages and hours with such unions, but the final determination . . . rests with the governmental authorities and cannot be delegated away" (BNA SLL 1994, 59:220). A 1990 attorney general opinion to the state superintendent of schools further advised, "[T]here is no right to strike against the state . . , any strike or concerted work stoppage by public teachers in this state is illegal." The attorney general stated that in the absence of state laws, "[I]t is axiomatic that a strike by public employees for any purpose is illegal under common law." In response to the ongoing teachers strike, the opinion further advised that teacher contracts expressly prohibited strikes; any teacher who participates in one is subject to disqualification for one year, may be suspended and forfeits all due process protection (Attorney General opinion, March 8, 1990). The attorney general opinion conformed to a state Supreme Court decision in *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W.Va. 15 (1990), which similarly found the same teachers strike was illegal.

Perhaps the most significant executive order during this period was issued by Governor Bayh of Indiana in 1990. Although the governor had

TABLE 2

Significant Court Decisions Affecting Public Sector Bargaining Laws since 1987

State	Citation	Summary of Decision
Alaska	*Public Employees Local 71 v. State*, Supreme Court of Alaska, 775 P.2d 1062 (1989)	The legislature is free to choose not to fund the monetary terms of a collective bargaining agreement signed by the state, but then the parties may resume negotiations.
Colorado	*Martin v. Montezuma-Cortez School Dist.*, Supreme Court of Colorado, 841 P.2d 237 (1992)	Applies the Industrial Relations Act (initially passed in 1915) to public employees and grants all public employees the right to strike. Under the act, labor disputes are subject to the authority of the director of the division of labor, who "may render a final order settling the dispute." In *Donlon v. Denver Classroom Teachers Assoc.*, Denver Dist. Ct. No. 94 CV 5055 (1994), the district court applied Martin to the Denver teachers strike, ruling that teachers have the right to strike and that the Commissioner of Labor surrendered jurisdiction when he presented a compromise contract which he sought to impose and the union rejected.
Florida	*State v. Florida Police Benevolent Assn.*, Supreme Court of Florida, 613 So. 2d 415 (1992)	Public employee unions requested judicial review of the legislature's unilateral changes in leave policy in a collective bargaining agreement. The court ruled that the legislature is free to underfund an agreement (due to separation of powers) and, in so doing, is then free to unilaterally change any monetary item in the contract. The court rejected the unions' request for renegotiation as being "administratively untenable."
Iowa	*AFSCME/Iowa Council 61 v. State*, Supreme Court of Iowa, 484 N.W. 2d 390 (1992)	Unions brought action to enforce an arbitration award after the governor vetoed an appropriations bill funding the award. The legislature failed to override the veto. The state contended that it could not fund the awards due to budget constraints, and that it was not bound by the award because it is subordinate to the appropriations process (due to separation of powers and the constitutional prohibition against undue delegation of duties). In ordering the state to pay, the court ruled that by passing PERA, the state made itself bound by its labor contracts. The claimed shortage of funds "can be ascribed to discretionary funding choices."

TABLE 2 (*Continued*)

Significant Court Decisions Affecting Public Sector Bargaining Laws since 1987

State	Citation	Summary of Decision
Louisiana	*Davis v. Henry*, Supreme Court of Louisiana, 555 So. 2d 457 (1990)	The court ruled that public sector employees are covered by the state's "Little Norris LaGuardia Act" which protects "all employees in the exercise of their right to engage in concerted activities." The court rejected the school board's argument that public employee strikes are illegal under common law (since Louisiana is not a common law state) and found that the state constitution gives public employees "the same right to engage in collective bargaining as held by their counterparts in the private sector." Except for police strikes which by their nature endanger the public, public employee strikes are legal and not enjoinable absent factual findings of danger to public health and safety.
Michigan	*MEA v. Engler*, Wayne County Circ. Ct., 94-423581-CL	Unions challenged the constitutionality of five provisions of new amendments to PERA dealing with public school employees. The court found two provisions unconstitutional: (1) automatic fines against the union without determination of union knowledge/support or authorization, and (2) requirement of courts to enjoin school strikes without finding of irreparable harm. The circuit court issued a stay of the entire law's implementation. Currently on appeal.
Nebraska	*Nebraska v. Nebr. Assn. of Public Employees Local 61*, Supreme Court of Nebraska 239 Neb. 653 (1991)	This case arose not out of the bargaining law but the state's Uniform Arbitration Act. The union's contract with the state required final and binding arbitration regarding terms and conditions of employment; a similar clause required binding arbitration of grievances. The state supreme court found final and binding arbitration of *both* contracts and grievances to be unconstitutional, because it ousts the courts of jurisdiction.
New Hampshire	*Furlough*, Supreme Court of New Hampshire, 135 NH 625 (1992)	The N.H. Supreme Court was requested by the state House of Representatives to determine whether a pending bill, HB 1058-FN, which would require state employees to take unpaid leaves of absence in response to a state fiscal crisis, would violate the state employee collective bargaining agreement. The court found the proposed law *did* impair the collective bargaining agreements despite the state's assertion that no minimum amount of work was guaranteed. The court also rejected the state's argument that such

TABLE 2 (*Continued*)

Significant Court Decisions Affecting Public Sector Bargaining Laws since 1987

State	Citation	Summary of Decision
		a decision to furlough was within the purview of management rights and finally that this action was within the "emergency" provisions of the contract. The N.H. Supreme Court also rejected the proposed bill on constitutional grounds.
New Jersey	*Hillsdale*, 622 A.2d 872 (N.J. Super, A.D. 1993)	Two police arbitration awards were challenged by two cities on the theory that the arbitrators did not adequately address all eight statutory criteria governing awards (34:13A-16g). The New Jersey Supreme Court vacated both decisions (see below).
Oklahoma	*Del City v. Fraternal Order of Police Local 114*, Supreme Court of Oklahoma, 869 P.2d 309 (1993)	Oklahoma's Supreme Court invalidated Sections 51-65 of the Police and Fire Law which provided for an "evergreen" clause allowing negotiated settlements to "roll over" for an additional year if no contract settlement was reached. The city argued that to continue to pay negotiated salaries and benefits from the previous fiscal year would create a budget deficit which would violate a state constitutional provision requiring a three-fifths referendum to increase indebtedness above revenues. The Oklahoma Supreme Court agreed.
Pennsylvania	*Masloff v. Port Authority*, Pennsylvania Supreme Court, 531 Pa. 416 (1992)	Port Authority transit workers in Pittsburgh struck in 1992, and the *city* of Pittsburgh (not a party to the dispute) obtained an injunction citing a "clear and present danger" to public health and safety. Two issues were involved in the appeal: (1) did the city have standing to file for the injunction; and (2) was a clear and present danger established? The court ruled that the city *did* have standing to file. Relying upon rulings under the PERA, the court found that although "[O]rdinary inconveniences resulting from a strike don't by themselves establish a clear and present danger," there was one in this case. The court ordered the union and the Port Authority into court-supervised negotiations only because binding arbitration had been removed by a 1986 amendment to the Port Authority law.
South Dakota	*Rapid City*, Supreme Court of S. Dakota 522 N.W.2d 494 (1994)	Under §3-18-8.1 of the South Dakota law, school boards may implement their last offer eleven days after impasse is reached, unless state intervention is requested. Following impasse, Rapid City's board of education implemented its final

TABLE 2 (*Continued*)

Significant Court Decisions Affecting Public Sector Bargaining Laws since 1987

State	Citation	Summary of Decision
		offer. A union's unfair labor practice charge alleged one implemented provision of the school board's final offer was even more restrictive than state law. The state supreme court held this action was not an unfair labor practice.
Texas	*Beaumont*, Texas Court of Appeals, 763 S.W.2d 57 (1992)	A city ordinance which originally authorized binding interest arbitration was subsequently repealed by the voters. The union brought suit claiming the repealing ordinance conflicted with state law by removing the provision for binding arbitration. The court of appeals found no conflict, since binding arbitration is not required by the act.

promised to pursue legislation providing collective bargaining rights to state workers, a bill to do so, as well as two other bills (one relating to all public employees and one to police and firefighters only), all failed passage. The state workers' bargaining bill was withdrawn from consideration in the senate, after passing the house, on the grounds that it might necessitate a statewide tax increase. Although the governor lacked the jurisdiction to mandate bargaining rights, the executive order grants state workers the right to elect union representation. An election will be scheduled following a showing of sufficient interest. The order prohibits strikes, strikers are subject to dismissal, and participating unions lose recognition by the state (*Government Employment Relations Reporter*, June 4, 1990, p. 699). Despite the lack of a bargaining duty and the absence of terminal resolution procedures, at least three contracts covering state workers have been negotiated since the order was issued (GERR, June 13, 1992, p. 968).

Current State Collective Bargaining Law Provisions

The Appendix summarizes the variations in state requirements with respect to the duty to bargain, terminal resolution procedures, and strike penalties affecting different public employee groups. Here we present summary tabulations of the prevalence of those legislative provisions. Table 3 reports the prevalence among states of laws which mandate a bargaining duty (as defined in Sec. 8(d) of the LMRA) by sector. Eleven states continue to have no legislation granting public employees bargaining rights, while twenty-three states and the District of Columbia grant

bargaining rights to all public employees, and sixteen states grant bargaining rights to only some public employees.

TABLE 3

Number of States[a] with Legislative Bargaining Duty, 1994

Employee Group	Number of States
All public employees	24
All but state employees	3
Police, firefighters, and education	2
Education and municipal	2
Education only	5
Police and firefighters only	4
None	11

[a] Includes the District of Columbia.

The top panel of Table 4 summarizes strike policies governing public employees by sector. Sixteen states have legislation that explicitly prohibits strikes by all public employees, and all but four of these specify one or more penalties for striking. Not surprisingly, police and firefighters are most frequently subject to strike prohibitions (31 states and D.C.). State, education, and municipal employees are fairly equally subject to strike prohibitions (20, 23, and 21 jurisdictions, respectively). Police and firefighter strike prohibitions are most likely to have specified penalties attached (22 jurisdictions), with educational strikes close behind (19 jurisdictions). On the other hand, ten states now permit strikes by all public employees except police and fire with no or minor restrictions.[2] One state (Colorado) permits strikes by all public employees. Three of the states which permit strikes have laws which are silent on the issue (in fact, two lack enabling legislation entirely), but their state supreme courts have ruled that public employee strikes are legal (*County Sanitation Dist. No. 2 of L.A. County v. L.A. County Employees Assoc.*, 699 P.2d 835, 838 [1985], in California; *Davis v. Henry*, 555 So. 2d 457 [1990], in Louisiana; and *Martin v. Montezuma-Cortez School Dist.*, 841 P.2d 237 [1992], in Colorado).

The type of terminal resolution procedure is summarized in the lower panel of Table 4 for each state and sector. (See Appendix for additional detail.) The designations in Table 4 reflect the *mandatory*, explicit, and final step of the statutory bargaining dispute resolution procedure; the format of the terminal step (e.g., what type of arbitration) is not specified here. Unless the statute clearly indicates that the terminal step is mandatory, the next lower and mandatory step (e.g., fact-finding or mediation) is

TABLE 4

Number of States[a] with Various Strike Policies and Terminal Resolution Procedures

	Police & Firefighters	State	Education	Municipal
Number of States with Various Strike Policies[b]				
Allowed without restriction	2	3	3	3
Allowed with minor restrictions	1	8	9[c]	9
Prohibited, no penalty specified	10	6	4	7
Prohibited, with penalties specified	22	14	19	14
Total states with strike policy	35	31	35	33
Number of States by Terminal Resolution Procedure				
Silent	17	23	15	21
Mediation	5	9	9	9
Fact-finding	6	13	19	15
Interest arbitration	22	5	8	6

Notes:

[a] Includes the District of Columbia.

[b] The number of states with a strike policy does not equal the number with a legislated bargaining duty because: (1) some laws are silent on strike policy, and (2) some states which lack a bargaining law have strike policies established via judicial decisions.

[c] A new law in Illinois covering only Chicago schools prohibits strikes for 18 months but is being challenged in the courts. Illinois is still coded as allowing strikes in education with minor restrictions.

reported. In some cases, the law authorizes the parties to jointly agree to a terminal resolution procedure but does not clearly indicate what would happen if the parties fail to reach agreement on a terminal step. In these cases, the next lower mandatory terminal step is reported in this table.

A second definitional problem occurs in determining whether the terminal step is binding. Clearly mediation and fact-finding, by definition, are nonbinding. Interest arbitration is presumed to be binding, but in several states, the legislature or governing body has the ability to override portions of an arbitration award or portions of the award are nonbinding. (For example, in Rhode Island the award is advisory only on all economic issues and is binding on noneconomic issues only if a majority of the arbitration panel concurs.) Rather than seek to resolve

this definitional problem, the lower panel of Table 4 indicates whether arbitration is mandatory but not whether the arbitration award is binding. The diversity of arbitration provisions among states prevents adequately capturing such detail in a summary table. The Appendix provides such detail.

As the lower panel of Table 4 indicates, public sector bargaining laws are often silent on the terminal dispute resolution procedure, with that "silence" being most prevalent for state employees and then for municipal employees. When the terminal procedure is specified, it is most often fact-finding, followed by interest arbitration, and then mediation. Mandatory interest arbitration is by far the most common terminal resolution procedure for police and firefighters (22 jurisdictions), whereas fact-finding is the most common procedure for teachers (19 jurisdictions). "Silence" is most common for state and municipal workers, although if a terminal resolution procedure is specified for them, fact-finding is most common for both groups. Interest arbitration is the least common resolution procedure for state, education, and municipal employees.

Finality of Collective Bargaining Agreements and Interest Arbitration Awards: Legislative Overrides and Imperatives

In a period of tightening government budgets and broad public opposition to tax increases, an issue of increasing importance in public sector bargaining is whether and under what conditions the monetary terms of a collective bargaining agreement or an arbitration award are binding on the employer. Presently there is no clear trend among states on this issue. We first review recent court cases and attorney general opinions dealing with the question of whether the legislative body can override voluntary bargaining settlements or arbitration awards. We then examine recent legislation which significantly alters terminal resolution procedures.

Four state courts have found that collective bargaining contracts ratified by the state or arbitration awards do not constitute binding obligations on the state and its legislature, and four state courts and an attorney general's opinion have found that ratified and funded collective bargaining contracts or arbitration awards do bind the state, at least under the fact situations presented in the cases. Since states have different collective bargaining statutes and state constitutions, it is difficult to generalize beyond these cases.

Among the cases in which courts (or the attorney general) found that collective bargaining agreements *are* binding obligations, four are based on the contract clause of the U.S. Constitution. *Association of*

Surrogates v. State of New York, 588 N.E.2d 51 (N.Y. 1992), dealt with a challenge to a new law that would withhold five days' pay from both unionized and nonunionized personnel, to be paid as lump sums when employees quit or retired, in order to offset a state budget shortfall. The court found that this legislation violated the contract clause of the U.S. Constitution, which prohibits states from passing any law impairing the obligation of contracts (U.S. Const., Art. I, sec. 10, cl.[1]). Specifically, the court found that the impairment created by the "payroll lag" was substantial, inasmuch as the payment deferral could be for many years, and that such a measure was not reasonable or necessary to accomplish an important state purpose because the state had many alternative ways to raise or save revenue.

In *Carlstrom v. State of Washington*, 694 P.2d 1 (Wash. 1985), the state legislature initially appropriated sufficient money to fund its collective bargaining agreements, then later canceled the wage increases contained therein after declaring an economic emergency. The *Carlstrom* court found that this law unconstitutionally impaired the collective bargaining agreements. The impairment was unreasonable given that the state was aware of financial problems before entering into the contracts and these problems changed in degree but not in kind during this period. "An economic emergency may be properly considered, but it is just another factor subsumed in the overall determination of reasonableness" (694 P.2d 1, 5). Additionally, the *Carlstrom* court reasoned that the state could have, but failed to, include a clause in the contracts which specifically made wage increases contingent on legislative approval (although the contracts did state that the agreements are subject to all present and future acts of the legislature).

In *Furlough*, 135 N.H. 625, 609 A.2d 1204 (1992), the New Hampshire Supreme Court issued an opinion in response to the legislature's inquiry as to the constitutionality of a proposed law which would have required all state employees, including those covered by collective bargaining agreements, to take unpaid leaves of absence. The New Hampshire court also found that the U.S. Constitution's contract clause prohibits states from enacting such a law since the law does constitute a substantial impairment, unless it is reasonable and necessary to serve an important public purpose. The *Furlough* opinion concluded that such a law was neither reasonable nor necessary, since many alternative means of dealing with the fiscal problem were available (though perhaps less politically feasible), and because a state cannot consider impairing its contract obligations on par with other policy alternatives.

In 1989 the Connecticut attorney general (Conn. AG LEXIS 5) was asked by the senate president and speaker of the house whether a law to decrease or delay COLA adjustments of state employees "notwithstanding existing contracts or pending contract negotiations" would violate state or federal law. The attorney general advised that such an enactment would violate the U.S. Constitution's contract clause unless the state could show severe financial emergency (i.e., an important public purpose), that the emergency was not foreseeable when the contract was agreed to, and that no alternative methods of meeting the fiscal crisis would have less impact on contractual obligations. These four decisions and the attorney general's opinion suggest that, in the absence of specific language in state public sector bargaining laws which conditions monetary items of ratified contracts on sufficient legislative appropriations, the contract clause of the U.S. Constitution provides some protection against abrogation of contractual wage increases and payments for which appropriations had been made during the term of the agreement.

The important role of state public sector bargaining statutory provisions is highlighted by *AFSCME/Iowa Council 61 v. State of Iowa*, 484 N.W.2d 390 (Iowa 1992). This case involved interest arbitration awards for state employees which the legislature funded. The governor line-item vetoed the appropriation funding the awards. The legislature did not override his veto. The unions then petitioned the court for enforcement of the arbitration awards. The state argued it was not bound by the awards because they are subordinate to the appropriations process. Because of the governor's successful veto, the appropriation was never made. The state further argued that the constitutional requirement for separation of powers prevents arbitrators, as members of the judiciary, from spending public money. In rejecting these arguments, the Iowa Supreme Court ruled that when the legislature passed the Public Employment Relations Act (PERA) in 1974, it expressly made itself bound by its contracts. There is no provision in the Iowa law, as there is in other states, which expressly makes the monetary terms of a collective bargaining agreement subject to funding through legislative appropriations. Sec. 20.17(6) of PERA states:

> No collective bargaining agreement or arbitrator's decision shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the employer's funds, spending or budget or would substantially impair or limit the performance of any statutory duty by the public employer.

The court rejected the state's claim that Sec. 20.17(6) made the contracts unenforceable, given the budget difficulties the state was facing. The court found that all limitations or impairments suggested by the state were under the control of the state, "[T]he shortage of funds, at least to the extent of liability on these contracts, can be ascribed to discretionary funding choices" (484 N.W.2d 390, 395). Although the governor had the power to veto the appropriations bill, this veto did not erase the state's obligation.

Alliance v. Secretary of Administration, 597 N.E.2d 1012 (Mass. 1992), closely parallelled the fact situation in *AFSCME* but yielded an opposite result. Five collective bargaining agreements were signed by the state secretary of administration; the legislature appropriated sufficient funds to finance the cost items of the agreement, but the governor vetoed the appropriations bill. His veto was not overridden. The Massachusetts Supreme Court found that, in the absence of the governor's signature, no valid appropriation was made, so the contracts were not binding on the state. There are, however, critical statutory and contractual differences between *AFSCME* and *Alliance*. Unlike the Iowa law, Sec. 6 of the Massachusetts bargaining law provides, "[I]f the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining." All contracts also stated that the cost items would not become effective unless sufficient appropriations were enacted.

In *State of Nebraska v. Nebraska Assoc. of Public Employees Local 61* (Neb. 1991), the Nebraska Supreme Court declared the state's Uniform Arbitration Act unconstitutional. The law authorized binding arbitration of future disputes and contract clauses providing for binding arbitration. The court found that these provisions violated Article 1, Sec. 13 of the Nebraska Constitution, which states that "[a]ll courts shall be open, and every person, for any injury done to him in his lands, goods, person or reputation, shall have a remedy by due course of law." The court cited a long history of cases indicating the Nebraska judiciary's zealous guarding of their jurisdiction. It is unlikely that other states would be influenced by this holding.

Two cases in Florida and Pennsylvania which found that collective bargaining contracts did not bind the public employer have potentially far-reaching implications for public sector collective bargaining in those states. In *State v. Florida Police Benevolent Assoc.*, 613 So.2d 415 (Fla., 1992), the Florida Supreme Court ruled that public employee collective bargaining agreements are subject to legislative appropriations. Further,

if the legislature fails to appropriate sufficient monies to fund the monetary items of an agreement, it can unilaterally alter any monetary contract provisions without a requirement to return the issues to the parties. The court said that requiring further negotiations would be "administratively untenable." The *Florida PBA* court effectively skirted the fact that public workers also have a constitutional right to bargain collectively in Florida. Art. 1, sec. 6 of the Florida Constitution states: "[T]he right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged." The court reasoned that allowing the legislature to unilaterally change contract terms does not abridge collective bargaining rights but instead reflects "an inherent limitation due to the nature of public bargaining itself," given the separation of powers doctrine (613 So.2d 415, 419).

Florida PBA arguably represents a major departure from Florida precedent. In *Dade County Classroom Teachers Assoc. v. Legislature of Florida*, 269 So.2d 684, 685 (Fla. 1972), the Florida Supreme Court held that, except for the right to strike, public employees have the same right to collective bargaining as do private employees. Furthermore, the *Dade County CTA* court "threatened to impose judicial guidelines if the legislature failed to pass" enabling legislation. Thus, historically, the Florida Supreme Court had actively encouraged public sector employee bargaining rights. Dissenting in the *Florida PBA* case, Justice Kogan noted that the court previously ruled that a refusal of a public employer to honor contractual provisions involving money *was* an abridgement of the constitutional right to collective bargaining and, thus, required a showing of compelling state interest to be sustained (*Hillsborough County Governmental Employees Assoc. v. Hillsborough County*, 522 So.2d 358 (Fla. 1988). No such showing was required in this case. However, *Florida PBA* did not explicitly overturn *Hillsborough*, reasoning that *Hillsborough* was inapplicable because the legislative exercise of appropriations power is not an abridgement but an inherent limitation of public sector bargaining. Justice Kogan stated,

> I would hold that Article I, section 6 imposes upon the legislature, at a minimum, a duty to seek renewed negotiations with unions whenever the legislature decides to ignore the governor's negotiated agreement with those unions. . . . To say otherwise would render Article I, section 6 meaningless for public employees (613 So.2d 415, 424).

At least three states have used fiscal control measures to impair the finality of collective bargaining agreements or interest arbitration awards

or to block access to interest arbitration. In *Wilkinsburg Police Officers Assoc. v. Commonwealth*, 636 A.2d 134 (Pa. 1993), unions challenged the constitutionality of the Pennsylvania Financially Distressed Municipalities Act, which requires a city so designated to develop a recovery plan which may include changes to existing collective bargaining agreements. The law further prohibits future collective bargaining agreements which violate a recovery plan's provisions. The law does not mention any contracts, other than collective bargaining agreements, in its provisions. The Pennsylvania Supreme Court ruled that this law is constitutional, despite Art. 3, sec. 32(7) of the Pennsylvania Constitution which reads: "The General Assembly shall pass no local or special law. . . . Regulating *labor*, trade, mining or manufacturing" [emphasis added]. The *Wilkinsburg* court ruled that this prohibition simply requires that a statutory classification have a rational relationship to a proper state purpose. It found that the purpose of the law is to "ensure fiscal integrity of municipalities" and that the classification is rationally related to that purpose because only municipalities in poor financial condition are subject to the act. The court justified the selective inclusion of collective bargaining contracts by noting that by passing the Public Employment Relations Act (PERA), the state already regulates labor contracts to the exclusion of nonlabor contracts. Justice Papadakos dissented, noting that the law "effectively permits municipalities to adopt recovery plans which unilaterally determine the limits of future collective bargaining agreements and awards (including the reduction in salaries or benefits) without any meaningful input by the employee organization" (636 A.2d 134, 140). He further suggested the law regulates collective bargaining agreements to the exclusion of any other contracts and should be declared unconstitutional: "[T]he Act effectively suspends collective bargaining and places all union employees in the category of nonunion, at-will employees of the municipality" (636 A.2d 134, 141).

In *Hillsdale PBA Local 207 v. Bourough of Hillsdale*, 622 A.2d 872 (N.J. Super. A.D. 1993), the court found that compulsory public sector interest arbitration will not pass constitutional muster unless arbitrators confine themselves to a very strict reading of all eight arbitral decision-making criteria in the statute. The unions argued that the statute gives arbitrators considerable discretion, as it states that the arbitrator's award must be "based on a reasonable determination of the issues, giving due weight to those factors listed in N.J.S.A. 34:13A–16(g) which are *judged relevant* for the resolution of the specific dispute" (622 A.2d 872, 880) (emphasis added). The court rejected the unions' argument:

> Without proper consideration of the legislative standards, public interest arbitration may very well be an undue delegation of legislative authority. It may be that in public sector interest arbitrations the parties fail to present evidence on some factors. . . . However, the public interests at stake in public sector arbitration are and must be paramount and demand more attention to the statutory factors than an unsupported passing reference . . . the interest arbitrators must detail in their opinions the specific reasons why an enumerated factor is not "judged relevant" (622 A.2d 872, 883–884).

The *Hillsdale* court took particular aim at the arbitrators' heavy weighting of comparability and minimal weighting of the Local Government Cap Law (which prohibits cities from increasing appropriations by more than 5% over the previous year). "Indeed, an arbitrator's consideration of a town's Cap situation is mandated by the Constitutional proscription against undue delegation of legislative authority to individuals" (622 A.2d 287, 881). As displeasure with the fiscal impact of interest arbitration awards grows, more states may turn to the courts to impose a stricter adherence to all statutory arbitral criteria, and/or pass revenue control laws that directly constrain interest arbitration awards and collective bargaining agreements.

To our knowledge, to date only Wisconsin has enacted legislation which significantly reduces access to existing arbitration procedures. Initiated temporarily by Wisconsin Act 16 and made permanent by the state budget bill in 1995, school boards can avoid interest arbitration on economic issues for professional school employees by offering a "qualified economic offer" (QEO). An offer is a QEO if it contains combined salary and benefit cost increases 3.8% above the previous year. Step increases must be included in calculating the cost increase. The statute requires the parties to use forms developed by the Wisconsin Employment Relations Commission (WERC) to determine wage and benefit cost increases. This law also put a cap on the amount of increase in school spending, thus, significantly limiting school boards' ability to pay, even in the absence of QEO limits. The 1993 law also contained a sunset provision which would have eliminated interest arbitration for all municipal employees except police departments of large cities, fire departments, and city and county law enforcement agencies. Fact-finding would then become the only terminal resolution procedure. Despite significant sentiment in the legislature and by the governor to allow the interest arbitration provision to sunset, the 1995 budget bill ostensibly

removed the sunset provision, thus restoring interest arbitration in those sectors. The bill's final language is so unclear that it can be interpreted as repealing interest arbitration for all municipal employees except teachers, although this was clearly not the intent. Seizing the opportunity, three counties supported by the Wisconsin Association of Counties have filed declaratory judgment actions seeking a judicial determination that the compulsory interest arbitration provision of the Municipal Employment Relations Act no longer applies to any employees except school district professional employees (e.g., *Juneau County v. Courthouse Employees Local 1312 AFSCME, Highway Dept. Employees Local 569 AFSCME, and Professional Employees AFSCME*, Juneau County Circ. Ct., 95 CV 214). While these cases are pending (at this writing), several counties are refusing to submit interest disputes to arbitration. Should the court rule in the counties' favor, it is conceivable that the legislature would refrain from reversing the ruling legislatively.

Agency Shop Fees

Case Law

Unions in the public sector, like their private sector counterparts, have sought to further their financial and institutional stability through union security provisions. Whether referred to as "fair share" or "agency shop," these provisions, once negotiated into a collective bargaining agreement, require individuals to join the union or remain a nonmember but pay some agency fee or fee for service, which generally approximates union dues. While agency shop and fair share clauses have become more prevalent in public sector contracts, at least in jurisdictions which do not outlaw such forms of union security (e.g., the so-called "right-to-work" states), so too have legal challenges from objecting nonmembers who have been required to pay fair share dues.

In this section, the legal framework for challenges by objecting fair share payers is briefly reviewed. Two central issues emerge from these legal challenges: (1) exactly what union expenses beyond the core functions of collective bargaining and representation are "chargeable" to objecting fair share payers, and (2) what procedural safeguards must be established by the union to allow objecting fair share payers to receive the nonchargeable fees and/or to challenge the reasonableness of the union's determination of what is chargeable. We begin with a brief discussion of these substantive and procedural issues through several U.S. Supreme Court decisions. We then review several lower and state court

decisions which have applied these precedents to different fact situations. Concurrent with the development of case law, at least eight states have codified many or all of the substantive and procedural requirements developed by the U.S. Supreme Court. It seems likely that such codification will continue as substantive and procedural issues become settled law.

For workers in the *public* sector, the Supreme Court confirmed the constitutionality of agency shop or fair share fee provisions in *Abood v. Detroit Board of Education*, 431 US 209, 95 LRRM 2411 (1977), where several nonmember fair share payers objected that the agency shop provision interfered with their freedom of association rights under the First and Fourteenth Amendments. Relying upon a series of Railway Labor Act cases, the Court held that any such interference was constitutionally justified, as the "desirability of labor peace is no less important in the public sector, nor is the risk of free riders any smaller in the public sector" (431 US 209, 224). However, the *Abood* Court limited the *use* of such fair share fees.

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates or toward the advancement of other ideological causes not germane to its duties as collective bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so *against their will* . . . (431 US 209, 235–36). (Emphasis added.)

The *Abood* Court noted the dividing line between chargeable and nonchargeable activities was "somewhat hazier" in the public sector than in the private sector but declined to draw any distinction between the two types of activities given the lack of evidentiary record. In a later Railway Labor Act case, *Ellis v. Railway Clerks*, 466 US 435, 116 LRRM 2001 (1984), the Court developed and applied two tests to determine whether expense categories were chargeable to objecting fair share payers: (1) Were the expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" (466 US 435, 448), and (2) Did they "involve additional interference with the First Amendment interest of objecting employees, and if so, were they adequately supported by government interest" (466 US 435, 456).

The U.S. Supreme Court, in *Chicago Teachers Local 1 v. Hudson*, 475 US 292, 121 LRRM 2793 (1986), then further developed *procedural* safeguards to prevent agency fees being used to subsidize ideological and political activities by objecting nonmembers. In *Hudson* the union automatically rebated to *all* nonmember employees 5% of total dues paid as *nonchargeable* expenses. The union also established an appeals procedure whereby nonmembers could appeal the *amount* or percentage used to determine nonchargeable expenses. The *Hudson* Court held:

> The constitutional requirements for union collection of agency fees include: (1) an adequate explanation of the basis for the fee; (2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker; and (3) an escrow for the amounts reasonably in dispute while such challenges are pending.

The *Hudson* Court clearly stated that the burden is on the objecting nonmember to challenge the determination of what is chargeable. However, before this objection can be made, the union must first provide adequate information enabling the nonmember to make an intelligent objection.

In *Lehnert v. Ferris Faculty Association*, 111 S. Ct. 1950, 137 LRRM 2321 (1991), the Supreme Court revisited the chargeability determination left open in *Abood* (and partially answered in *Ellis*): What is the dividing line between chargeable and nonchargeable expenses? The majority set forth the following three requirements: (1) the expense must be germane to collective bargaining, (2) the expense must be justified by a policy interest in labor peace and avoidance of free riders, and (3) it must not significantly add to the burdening of free speech that is inherent in the agency or union shop.

Lower Court Cases

A number of federal and state court cases since 1986 have applied *Hudson* and *Lehnert* to applicable state law and collective bargaining situations. In a procedural case, *Mitchell v. L.A. Unified School District*, 140 LRRM 2121 (CA 9, 1992), the Ninth Circuit held that *affirmative* consent of nonmember agency fee payers is not required to protect their First Amendment rights; these rights are adequately protected as long as they are given the opportunity to object to such deductions. The court cited with approval the California Supreme Court's decision in *Cumero v. Public Employment Relations Board*, 132 LRRM 2575, 49 Cal.3d 575 (1989), which stated that it was the objecting nonmember's

obligation to object. "It must be affirmatively asserted or else it is waived" (140 LRRM 2121, 2124). In other words, rebates are given *only* to those fair share payers who object.

The *Mitchell* court held the union's notice procedures adequately protected First Amendment rights. The union sent two notices to nonmember agency fee payers advising them that they were obligated to pay the full fee unless they objected in writing within thirty days to paying for nonrepresentational union activities and that the cost of union representational activities accounted for 84.6% of the agency fee.

In *Albro v. Indianapolis Education Association*, 140 LRRM 2406 (1992), the Indiana Court of Appeals dealt with the substantive issue, finding that the teachers union failed to meet its burden of proving the proportion of expenses which were chargeable. The union's method of establishing chargeable expenses did not provide adequate information to enable the objecting nonmember to intelligently challenge the determination, thus improperly shifting the burden to the objecting nonmember. The *Albro* court also made detailed delineations among the types of expenses which are chargeable, relying on *Lehnert*. Lobbying expenses unrelated to collective bargaining are not chargeable, nor are political and charitable contributions, even if they are de minimis in amount. Public relations expenses were also found not chargeable, despite the union's contention that it may charge for internal public relations relating to activities within the bargaining unit. Expenses incurred by state and national affiliates for litigation not brought on behalf of the bargaining unit are not chargeable. "Defensive" organizing also failed to survive *Lehnert's* three-part chargeability standard, as the *Albro* court found no free rider problem associated with defensive organizing and charging for activities to convince members to remain part of the union adds significantly to the burden on free speech. The expenses for providing benefits to union members only are not chargeable, and expenses for affiliation with state and national bodies are chargeable only if these concern activities that the local can prove are otherwise chargeable and will ultimately benefit nonmembers of the union. The court in *Albro* also ruled that *Lehnert* must be applied retroactively.

A hybrid procedural and substantive case was presented in *Browne v. WERC*, 140 LRRM 2647 (1982), where the Wisconsin Supreme Court considered an appeal challenging the Wisconsin Employment Relations Commission's (WERC) finding of an unfair labor practice against several unions for deducting fair share fees without first providing all the procedural safeguards required under *Hudson*. On the substantive issue, the

union's notice to nonmembers disaggregated intermediate-level union expenses into 38 separate categories, indicating those which were chargeable and those which were not. The audited statement of the *intermediate* union body was used to derive a percentage of chargeable to total expenses, which was then applied to the *local* union's expenditures. On the procedural question, the notice to nonmembers stated that objecting nonmembers had thirty days following its posting each year to object to the use of fair share funds for the payment of nonchargeable expenses. The objector would receive advance rebate of this amount. Once such an objection was made, 100% of the challenger's fair share payments were put in an escrow account. All challenges were consolidated into a single hearing before an impartial arbitrator. The union paid the cost of arbitration and bore the burden of proof for the accuracy of the chargeability determination. Escrowed amounts were disbursed pursuant to the arbitrator's decision.

Both the nonunion objectors and the union appealed a myriad of procedural and substantive questions. Objectors challenged the determination of the chargeability of certain categories of expenses in light of *Lehnert*. They also challenged the adequacy of procedural safeguards (the notice to members, fairness of the hearing, the escrow account) and the legality of the *employer* deducting the full amount of fair share fees without ascertaining that the union's procedure incorporates the requisite safeguards.

On the (substantive) chargeability issues, the *Browne* court held that public relations expenses, which involved "public advertising of positions on the negotiation of or provisions in the bargaining agreement and representation matters," were chargeable. Lobbying for collective bargaining legislation and regulations was chargeable, but lobbying for other political, charitable and ideological matters was not. Extra-unit litigation dealing with jurisdictional disputes, impasse resolution and concerted activity, and collective bargaining was not chargeable based on Justice Blackmun's reasoning that such activities are more akin to lobbying than bargaining unless they are "germane" to the affected bargaining unit. The *Browne* court also found organizing expenses to be nonchargeable.

The *Browne* court then turned to the procedural issues under *Hudson*. The court did not find any constitutional defect in the union's challenge procedure. But it did take exception with the chargeability determination, particularly the automatic application of the chargeability percentage of the intermediate body to the local union's expenses. The court agreed that a random sampling of expenses by an auditor

would be sufficient to create a presumption for the percentage; a full-blown audit would therefore not be necessary to make this determination for the local union. The court also found fault that the escrow for the challengers' fair share fees was totally controlled by the union, ruling that a more independent escrow was required. Finally, the court ruled that the employers did not commit an unfair labor practice by automatically deducting the fair share fees and that the facts of the situation warranted a retroactive application of *Lehnert*.

In *Gwirtz v. Ohio Education Association*, 887 F.2d 678, 132 LRRM 2650 (CA 6, 1989), six nonmember teachers claimed the union's procedure was not constitutionally sound because it failed to provide sufficiently detailed financial information supporting the chargeability of expense categories. The appellants argued that the notice, which contained the Audited Basic Statement and Audited Supplemental Schedule of the intermediate and national bodies showing chargeable expenditures, was insufficient, and that the "highest" available level of auditing service was required by *Hudson*. The Sixth Circuit disagreed, arguing that *Hudson* did *not* require "absolute precision in the calculation of the charge to nonmembers" and that the union "need not provide members with an exhaustive and detailed list of all its expenditures." Rather, adequate disclosure in such cases requires only "the inclusion of major categories of expenses, as well as verification by an independent auditor" (475 US at 307).

The Kentucky Supreme Court in *Housing Authority of Louisville v. Service Employees Local 557*, 93–SC–397–DG, 1994 Ky. LEXIS 119 (1994), let stand an arbitrator's ruling that the employer violated the contract by failing to withhold the full dues amount from nonmembers without specific written authorization from the nonmember. Relying upon *Hudson*, the Kentucky court held that it is the objecting nonmember (and not the public employer) who is responsible for challenging union disclosure regarding chargeable and nonchargeable expenses and that the adoption of such procedural safeguards is a matter between the union and the nonmember employees, not the employer and the union. Indeed, the "concerns expressed by HAL [the employer] about the constitutional rights of its nonunion employees may be well intentioned but lack the legal authority required of standing to bring a lawsuit on that basis alone" (1994 Ky. LEXIS 119 at *4–5). Moreover, the court stated that the record did not establish any indication that the union engaged in any "extraneous political or ideological activity of any sort."

Two central issues have been addressed in this section: (1) what union expenses are chargeable to the objecting fair share payer's dues, and (2) what procedural safeguards must be instituted by the union for objectors. Chargeability challenges will now be resolved by applying a specific fact situation to the three basic principles set forth in *Lehnert*: (1) the expense must be *germane* to collective bargaining, (2) it must be *justified* in terms of labor peace and avoidance of free riders, and (3) it must not *significantly* impair free speech. As can be seen from the Wisconsin and Indiana cases, sometimes the same type of expense is found to be chargeable by one court yet not by another. Clearly, the determination of what is chargeable will turn on the facts in evidence in each case, applying the three-part test of *Lehnert*.

The procedural safeguards required for objectors appear relatively clear. The union must give adequate written notice to all nonmembers, with sufficiently detailed information to make an intelligent decision whether to challenge the chargeability percentage. However, this information need not be the most detailed that is available. Estimates of chargeability from one level of the union applied to another will not meet the standard if *Browne* is applied. Rather, a same-level audit is required. Further, the challenged funds must be escrowed by a third party, a hearing must be held in which the evidence is considered, and a neutral third party must make a ruling. Any awards will probably be applied retroactively. Finally, the employer need not assess the adequacy of the procedural safeguards or the chargeability determination.

State Laws Dealing with Agency Shop Objectors

At least eight states have already codified procedures for how agency fee objectors will recover rebates for nonchargeable expenses under *Lehnert* and *Hudson*. These provisions appear to incorporate the substantive and procedural principles elaborated in the decisions reviewed above, with some variation. Pennsylvania's law, which became effective in June 1993 requires that as

> a precondition to the collection of fair share fees, the exclusive representative shall establish and maintain a full and fair procedure, consistent with constitutional requirements, that provides nonmembers, by way of annual notice, with sufficient information to gauge the propriety of the fee and that responds to challenges by non members to the amount of the fee. The procedure shall provide for an impartial hearing before an arbitrator to resolve disputes regarding the amount of the

> chargeable fee. A public employer shall not refuse to carry out its obligations on the grounds that the exclusive representative has not satisfied its obligation under this subsection.

If a challenge is filed, the union must pay for the arbitration, which will be conducted pursuant to American Arbitration Association rules. Moreover, use of this procedure does not preclude constitutional challenge. Finally, the law requires that all materials and reports filed pursuant to it are public records, and violations of these provisions are subject to a fine of not more than $2,000.

Under New Jersey law, the representation fee for nonmembers covered by an agency shop provision cannot exceed "85% of the regular membership dues, fees and assessments." The law further establishes a "demand and receive" provision whereby any objecting nonmember can demand

> a return of any part of that fee paid by him or her which represents the employee's additional pro rata share of expenditures by the majority representative that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of any other benefits available only to members of the majority representative. The pro rata share subject to refund shall not reflect however the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours and other conditions of employment in addition to those secured through collective negotiations.

The demand and receive system provides that nonmember objectors may obtain review of the chargeable and nonchargeable amounts by a three-member review board whose members are appointed by the governor. The burden of proof falls on the union.

In Ohio, under §4117.09(c) of the public sector bargaining statute passed in 1983, all public sector labor organizations representing public sector employees *must* develop an internal procedure to determine the rebate which conforms to federal law and where a timely demand is made by the member. This section further provides that objecting nonmembers not satisfied with the determination may appeal it within thirty days to the State Employment Relations Board which will rule whether the determination was arbitrary or capricious.

California's Dills Act, Section 3515.8 protects the right of an objecting fair share payer to demand and receive any part of the fee "used for

partisan politics or ideology incidentally related to terms or conditions of employment." Costs of lobbying to promote policy goals or to secure improvements in wages, hours, and working conditions, in addition to those which are negotiated, are not subject to refund, according to the law.

In Delaware, Section 4019 of the Public School Employment Relations Act gives school districts authority to deduct fair share fees from noncertified personnel. It requires an "adequate explanation" of the basis for the fee, an opportunity to challenge the fee amount before an impartial decisionmaker, and further requires that an escrow account be used to deposit amounts in dispute.

Hawaii's law permits payroll deductions of nonmember fees only if the union has a procedure for determining the amount of rebate based on the pro rata share of expenditures of a political or ideological nature. The law provides a right to petition to object to the amount refunded.

Section 115 of the Illinois Education Labor Relations Act provides that fair share fees must exclude fees used for political purposes. When an employee objects, the fair share amount must be placed in an escrow account.

Finally, Massachusetts requires unions to establish a rebate procedure based on: (1) the pro rata share of expenditures on political contributions; (2) lobbying on legislation not directly related to the bargaining unit; (3) charitable, religious or ideological contributions; and (4) benefits not germane to governance or duties as the bargaining agent.

At least eight states have sought to codify to some extent the procedural safeguards set out in case law. Additionally, some states have explicitly identified what expenses are chargeable (Illinois, New Jersey, and California); some utilize more general guidelines, and others contain no guidelines at all. The development of procedural safeguards in state law appears to mirror developments in the case law, including notice requirements and development of internal union procedures. The development of state law and administrative regulations help unions bring their own internal procedures into line with case law. While it is difficult to predict the future, it is likely that several other states will follow suit, either through administrative rules or legislation.

Summary and Conclusions

Only eleven states have enacted new legislation governing public sector bargaining since 1987, and most laws have applied to only one or two sectors. Seven of these laws can be characterized as enhancing collective bargaining rights. Only one state (New Mexico) passed enabling

legislation covering all public sector employees during this period. Education has received the most legislative attention: Six laws relate solely to education, and five focus on terminal resolution procedures for teachers. Currently 39 states have enabling legislation for at least one sector, and 23 states and the District of Columbia have laws covering all public employees. Education is most likely to have enabling legislation (36 jurisdictions), followed by police and fire (33), municipal (29), and finally state employees (24). Forecasting future legislative developments is always hazardous. *If* the pattern of activity over the last decade were to continue, we would see primarily marginal increases in coverage, expanding to previously uncovered sectors. Such expansion of coverage is likely to encounter obstacles, as in Nevada, where the governor vetoed enabling legislation for state workers, and in Indiana, where the governor issued an executive order providing less than full bargaining rights when he was unable to get enabling legislation adopted for state workers. Indeed, coverage is likely to continue to lag most for state workers as it is the sector in which the old obstacle of nondelegation of authority continues to exert the most influence.

There is no discernible trend in the legal treatment of strikes in the public sector. Indeed, since 1987 the right of public employees to strike has been enhanced in at least three states (legislatively in Alaska and judicially in Colorado and Louisiana) and prohibited in three (legislatively in New Mexico and Texas and judicially in West Virginia). The judicial activity is particularly intriguing in this area. Absent enabling legislation, the Colorado and Louisiana Supreme Courts have granted a very broad right to strike to public employees by extending laws previously thought to apply only to the private sector (the Industrial Relations Act in Colorado and the "Little Norris-LaGuardia Act" in Louisiana) to the public sector. Equally interesting is the absence of legislative initiatives in these states to reverse these decisions. In stark contrast, the West Virginia Supreme Court found no public employee right to strike, in the absence of enabling legislation, through the application of common law. It is particularly difficult to predict future trends in this area, given such widely opposing developments.

Twenty-one states and the District of Columbia now have mandatory arbitration for firefighters, and twenty have it for police. There is considerable diversity in the type and choice of terminal resolution procedures used. For example, choice of arbitration methods is a feature of the laws in Ohio and Pennsylvania, among others, and several states now permit the parties to include the fact-finder recommendations as one

package of three from which the arbitrator may choose. There has been relatively little legislative action on interest arbitration.

The status of the finality of ratified collective bargaining agreements and arbitration awards appears to be one area with a great potential for change. While the contract clause of the U.S. Constitution appears to provide at least some protection against the abrogation of ratified and funded collective bargaining agreements, there appears to be little or no legal safety net for ratified contracts or even arbitration awards before they are funded through the appropriations process (the Iowa case being a notable exception). The right of the legislature to refuse to fund economic items in ratified contracts or "binding" arbitration awards is legislatively established in a number of states, including Alaska, Connecticut, Florida, and Rhode Island. But the Florida case which allows the legislature to unilaterally change economic items in ratified agreements which they underfund suggests even greater vulnerability for collective bargaining itself, should other state courts choose to adopt it as precedent. Binding interest arbitration may also come under increasing assault, both legislatively and judicially. Wisconsin's new law limits access of teachers to the arbitration process by effectively imposing a specified rate of increase (through its definition of a "qualified economic offer"). The law's confusing language has opened the doors to a legal challenge to interest arbitration for all nonteacher employees. Judicially, the New Jersey case, which requires a rigidly strict adherence to all arbitral criteria in the statute as well as the Local Government Cap Law, also provides a potential precedent which other state courts could adopt in order to limit the latitude and, thus, the fiscal impact of interest arbitration awards. A number of states have passed fiscal control measures which single out collective bargaining agreements. The Pennsylvania court upheld such a law which restricted both current and future collective bargaining agreements.

A number of federal and state court cases decided since *Lehnert* and *Hudson* have addressed a myriad of fact situations dealing with procedural and substantive issues involved in dues rebates for objecting fair share payers. A significant number of states have passed laws governing this process, and so far, these laws have been applied without significant legal challenge. It appears that litigation over rebate amounts and procedures will diminish as more states pass such laws.

Education has been the focus of legislative changes over the last seven years, presumably because the direct impact of educational spending on property taxes has generated the strongest fiscal pressures

in that sector. The impact of impending federal budget cuts and the simultaneous devolution of responsibility for the administration of welfare-related programs to the states with less federal money will surely increase the fiscal pressures on states. Thus it is reasonable to predict that legislative attention will turn increasingly to the state sector. It is also likely that fiscal control measures focused on the local level which single out collective bargaining agreements (such as those in Pennsylvania and New Jersey) will become more common in the future.

Endnotes

[1] Virginia passed a law in 1993 which expressly prohibits public employee bargaining despite the law's redundancy with a 1977 Virginia Supreme Court decision that local governing bodies could not negotiate in the absence of express statutory authority (Partridge, in press). Since this law does not enable bargaining, it is not included in the above count of new statutes or their summary below.

[2] Minor restrictions include requiring a notice period before striking and the possibility of an injunction in cases of clear and present danger to public health and safety.

APPENDIX

Definitions for Appendix Table

Sector:	
Police and firefighters	Primarily sworn and/or uniformed officers, excluding state police and nonsworn police and fire employees such as dispatchers.
State employees	All employees of the state, except employees of a higher education and/or community college system.
Primary and secondary school teaching and nonteaching personnel	Noted where nonteaching personnel are excluded from coverage.
Municipal employees	Employees of municipal and county government, excluding police and fire employees.
Duty to bargain:	This is an either/or proposition as to whether the law provides for a bargaining duty at least as extensive as that under Section 8(d) of the Labor-Management Act of 1947, as amended. Does the law impose the duty to meet and confer at reasonable times over wages, hours, and other conditions of employment and a good faith duty to bargain? If any of these elements are missing, this sector was listed as "no."

Terminal resolution procedures[a]:

0 =	No provision explicitly mentioned.
1 =	Mediation.
2 =	Voluntary fact-finding.
3 =	Mandatory fact-finding.
4 =	Fact-finding with review/override by legislative body.
5 =	Final-offer interest arbitration—total package.
6 =	Final-offer interest arbitration—economic and non-economic packages.
7 =	Final-offer interest arbitration—issue by issue.
8 =	Interest arbitration—other format.
9 =	Interest arbitration—choice of procedures.
10 =	Parties determine terminal resolution procedure.
11 =	Final resolution by legislative body.
12 =	Other method.
13 =	Voluntary arbitration.

Strike penalties:

0 =	No provision explicitly mentioned.
1 =	Strikes allowed without restriction.
2 =	Strikes allowed following notice period.
3 =	Strikes allowed but with the possibility of injunctions where clear and present danger to public health and safety exists.
4 =	Strikes prohibited with no explicit penalties.
5 =	Strikes prohibited with injunctions specifically mentioned.
6 =	Strikes prohibited with employee fines.
7 =	Strikes prohibited with employee discipline.
8 =	Strikes prohibited with fines against union.
9 =	Strikes are possible unfair labor practices.
10 =	Union loses payroll deduction if illegal strike.
11 =	Bargaining duty suspended if union engages in illegal strike.
12 =	Union decertified if illegal strike.
13 =	Other.

[a] To the extent possible, this is the single code which best characterizes the present state of the law

APPENDIX TABLE

Summary of Current Features of State Public Sector Bargaining Laws, by Sector

	Police & Firefighters			State Employees			P/S Education			Municipal		
State	BD[a]	TRP[b]	SP[c]	BD[a]	TRP[b]	SP[c]	BD[a]	TRP[b]	SP[c]	BD[a]	TRP[b]	SP[c]
AL	No[1]	0	7	No	N/A	N\A	No	N/A	N/A	No[1]	N/A	4
AK	Yes	8	5	Yes	13	1[2]	Yes	13	1[3]	Yes	13	1[2]
AZ	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A
AR	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A
CA	No[1]	0	4	No[1]	1	3[4]	Yes	2	3[4]	No[5]	1	3[4]
CO	No	N/A	1[6]	No	N/A	1[6]	No	N/A	1[6]	No	N/A	1[6]
CT	Yes	7	4	Yes	7[7]	4	Yes	7	5	Yes	7	4
DE	Yes	2	5,6,8	Yes	2	5,6,8	Yes	2	5,6,8	Yes	2	5,6,8
DC	Yes	5[8],7[9]	5,9	—	—	—	Yes	5[8],7[9]	5,9	Yes	5[8],7[9]	5,9
FL	Yes[10,11]	3,11	5,6,7,8, 9,10,12	Yes[11]	3,11	5,6,7,8, 9,10,12	Yes[11]	3,11	5,6,7,8, 9,10,12	Yes[11]	3,11	5,6,7,8, 9,10,12
GA	Yes[12]	12[13]	4	No	N/A	7[14]	No	N/A	N/A	No	N/A	N/A
HI	Yes	8	5	Yes	3,13	2,3	Yes	3,13	2,3	Yes	3,13	2,3
ID	Yes[12]	3	1[15]	No	N/A	N/A	Yes[16]	2	4[17]	No	N/A	N/A
IL	Yes	7	4	Yes	2	2,3	Yes	2,13	2,3	Yes	2	2,3
IN	No[18]	N/A	N/A	No[19]	0	7,12	Yes[20]	3	10	No[18]	N/A	N/A
IA	Yes	3,7	5,6,7,8, 9,10,12	Yes	3,7	5,6,7,8, 9,10,12	Yes	7	5,6,7,8, 9,10,12	Yes	3,7	5,6,7,8, 9,10,12

[a]BD = bargaining duty, [b]TRP = terminal resolution procedure, [c]SP = strike penalties

APPENDIX TABLE (*Continued*)

Summary of Current Features of State Public Sector Bargaining Laws, by Sector

State	Police & Firefighters			State Employees			P/S Education			Municipal		
	BD	TRP	SP	BD	TRP	SP	BD	TRP	SP	BD	TRP	SP
KS	No[1,21]	3,11	5,9	No[1]	3,11	5,9	Yes[22]	3,11	5,9	No[1,21]	3,11	5,9
KY	Yes[12]	2	4	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A
LA	No	N/A	4	No	N/A	3[6]	No	N/A	3[6]	No	N/A	3[6]
ME	Yes	2,13[23]	9	Yes	2,13[23]	9	Yes	2,13[23]	9	Yes	2,13[23]	9
MD	No[12,24]	0	0	No	N/A	N/A	Yes	2	10,12	Yes[25]	3	10,12
MA	Yes	9	5	Yes	3,13	5	Yes	3,13	5	Yes	3,13	5
MI	Yes	7[8]	4	Yes	1	4	Yes	1	4	Yes	1	4
MN	Yes	9,13	9	Yes	9,13	2[26]	Yes	9,13	2[26]	Yes	9,13	2[26]
MS	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A
MO	No	N/A	N/A	No[1]	N/A	4	No	N/A	N/A	No[1]	N/A	4
MT	Yes	8	0	Yes	3,13	0	Yes	3,13	0	Yes	3,13	0
NE	Yes	1,2[27]	4	Yes	1[27]	4	Yes	1,2[27]	4	Yes	1,2[27]	4
NV	Yes	8	6,7,8	No	N/A	N/A	Yes	8	6,7,8	Yes	3	6,7,8
NH	Yes	4	4,9	Yes	4	4,9	Yes	4	4,9	Yes	4	4,9
NJ	Yes	9,10	0	Yes	3	1	Yes	3	1	Yes	3	1
NM	Yes	3	5,12	Yes	4	5,12	Yes	4	5,12	Yes	4	5,12
NY	Yes	8	6,8,10	Yes	4	6,8,10	Yes	4	6,8,10	Yes[28]	4	6,8,10
NC	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A
ND	No	N/A	N/A	No	N/A	N/A	Yes[29]	3	6	No	N/A	N/A

APPENDIX TABLE (*Continued*)

Summary of Current Features of State Public Sector Bargaining Laws, by Sector

	Police & Firefighters			State Employees			P/S Education			Municipal		
State	BD	TRP	SP	BD	TRP	SP	BD	TRP	SP	BD	TRP	SP
OH	Yes	7	5	Yes	3,10	2,3	Yes	3,10	2,3	Yes	3,10	2,3
OK	Yes	5[30]	6	No	N/A	N/A	Yes	3	6,11	No	N/A	N/A
OR	Yes	8	4	Yes	3,13	2,3	Yes	3,13	2,3	Yes	3,13	2,3
PA	Yes	8	0	Yes	3,13	3	Yes	9,10	3	Yes	3,13	3
RI	Yes	8	4	Yes	8[31]	4	Yes	8[31]	4	Yes	8[31]	4
SC	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A
SD	Yes	1	5,6,8	No	1	5,6,8	Yes	1,11	5,6,8	Yes	1	5,6,8
TN	No	N/A	N/A	No	N/A	N/A	Yes[32]	3	5,9	No	N/A	N/A
TX	Yes[33]	8	6,8,10	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A
UT	No	N/A	N/A	No	N/A	N/A	Yes	3	0	No[34]	N/A	N/A
VT	Yes	3,13	3,9	Yes	5	9	Yes	4	3	Yes	3,13	3,9
VA	No[35]	N/A	N/A	No[35]	N/A	N/A	No[35]	N/A	N/A	No[35]	N/A	N/A
WA	Yes	8	5,8	No[36]	4	4	Yes	3,13	0	Yes	3,4	4
WV	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A
WI	Yes	9	5,6,8,10	Yes	3	6,9	Yes[37]	5	5,6,8,10	Yes	5	5,6,8,10
WY	Yes[12]	8	0	No	N/A	N/A	No	N/A	N/A	No	N/A	N/A

Notes:

[1] Right to present proposals/meet and confer.

[2] Excludes snow removal, public utility and sanitation workers, jail, prison and hospital employees.

[3] Requires majority vote plus submission to advisory arbitration before a strike.

[4] The laws are silent on the right to strike, but a 1985 Cal. Sup. Court decision ruled that public employee strikes (other than firefighters and law enforcement personnel) are not unlawful at common law unless or until a substantial and imminent threat to health and safety is clearly demonstrated. (*County Sanitation Dist. No. 2 v. L.A. County Employees Assoc.*, 1985).

[5] Although the Meyes-Milias-Brown Act states that Memoranda of Agreement (MOUs) are not binding, the Cal. Sup. Ct. ruled in 1975 that a city council's ratification of an MOU bound the city to grant the wage increases contained in the MOU (*City Employees Assoc. v. City of Glendale*, 1975). However, a 1991 AG opinion cites a 1978 Cal. Sup. Ct. case as stating that the meet and confer "process is not binding" (*L.A. County Civil Service Comm. v. Superior Court*, 1985).

[6] In 1992 the Colorado Supreme Court ruled, in *Martin v. Montezuma-Cortez*, that public employees have the right to strike. In 1990 the Louisiana Supreme Court ruled in *Davis v. Henry* that public employees have the right to strike.

[7] Connecticut State Employees Relations Act provides for interest arbitration awards, which can be rejected by the legislature if it finds insufficient funds. The parties then resume negotiations.

[8] Economic items.

[9] Noneconomic items.

[10] Police and firefighters may be determined by PERC to be managerial employees exempted from coverage.

[11] The right of public employees to bargain collectively is a constitutional as well as a statutory right.

[12] Firefighters only.

[13] Called mediation but like fact-finding.

[14] While there is no law conferring the right of state employees to bargain, there is a law which specifically prohibits state employees from striking.

[15] The Idaho Supreme Court ruled that, while strikes during the contract are specifically prohibited by law, firefighters have a "residual right" to strike after the expiration of a contract (*Firefighters v. City of Coeur d'Alene*, 100 LRRM 2079, Id. Sup. Ct., 1978).

[16] Covers certificated professional employees only.

[17] No mention in law regarding strikes, but a 1977 Idaho Supreme Court decision ruled that strikes are illegal under the law, though such illegality does not automatically require issuance of an injunction (*Oneida School Dist. v. Education Assn.*, 95 LRRM 3244, Id. Sup. Ct., 1977).

[18] Indiana's Public Employees Collective Bargaining Act was declared unconstitutional in 1977 because it prohibited judicial review of IERB's bargaining unit determinations. It was formally repealed in 1982.

[19] Governor Bayh issued an executive order on May 20, 1990 granting state employees the right to elect union representation.

[20] Only salary, wages, hours, and wage-related fringe benefits are mandatory subjects of bargaining. Other working conditions are permissive.

[21] Contains a "local option" provision. Political subdivisions (other than the state) must elect to be bound by the provisions of PERA.

[22] Though the law says "meet and confer," the state supreme court ruled the law requires negotiation and, that once a contract is ratified, the parties are bound by it (*NEA v. Shawnee Mission Board of Ed.*, 84 LRRM 2223, Kan. Sup. Ct. 1973).

[23] Arbitrator's award regarding economic issues is advisory; if majority of arbitrators on panel agree to the award on noneconomic issues, it is binding.

[24] Permits voluntary collective bargaining.

[25] Covers city of Baltimore only.

[26] Minnesota: Other conditions for lawful strikes include prior participation in mediation and neither party has requested interest arbitration. State employees may also strike if the legislature rejects or fails to ratify a negotiated agreement or arbitration decision.

[27] Nebraska: The Nebraska State Supreme Court has ruled that contractually based and statutory binding arbitration—both interest and rights types—under the State Uniform Arbitration Act, are an unconstitutional intrusion into the authority of the courts (see *AFSCME Local 61 infra.*).

[28] New York: New York City has its own ordinance which allows submittal of impasse items to final and binding arbitration.

[29] North Dakota: Applies to teachers only. A binding interest arbitration referendum was defeated in 1992.

[30] Oklahoma: If the city's final offer is not accepted by the factfinder, the city may submit its last best offer to the voters in a referendum.

[31] Rhode Island: All interest arbitration awards are advisory only on wages.

[32] Tennessee: Applies to certificated school employees only.

[33] Texas: Each municipality must first enact an ordinance authorizing police and firefighter bargaining. This ordinance may include final and binding interest arbitration.

[34] Utah: While there is no law authorizing municipal employee bargaining, Salt Lake City does have a local employee bargaining ordinance.

[35] Virginia: The law provides, "No state, county, municipal or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment or service."

In 1993, a section was added to permit the formation of employee associations "for the purpose of promoting their interest before the employing agency." Teachers and public employees have a grievance procedure established by statute.

[36] Washington: State employees cannot negotiate wages. There is also a separate law for marine employees covering employees of the Washington State Ferry System which has its own Marine Employees Board which provides research, grievance administration and fact-finding assistance.

[37] Wisconsin: In 1993 the law was amended to cap the total economic package that could be accepted by an arbitrator at 3.8% per year (see Table 1).

References

Partridge, Dane M. Forthcoming. "Virginia's New Ban on Public Employee Bargaining: A Case Study of Unions, Business, and Political Competition." *Employee Responsibilities and Rights Journal.*