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# DEFINING APPROPRIATE CRITERIA FOR THE PUBLIC EMPLOYEE STRIKE INJUNCTION IN MONTANA

Matthew B. Thiel\*

## I. INTRODUCTION

The right to strike—organized workers' effort to exert economic pressure on their employer as a last resort in the negotiations process—is perhaps the most misunderstood principle of labor relations.<sup>1</sup> However, organized labor's right to strike, though sparingly used, historically has been the best guarantee that the negotiation process remains effective.<sup>2</sup> One early union activist expressed the importance of the strike: "[T]he workers have come to the conclusion that any betterment of their conditions will be secured only through their own economic power, through industrial strikes and other means which they are beginning to employ to attain their desired results."<sup>3</sup> Today, Montana public employee union leaders continue to stress the importance of the strike in bargaining with the state.<sup>4</sup> Just as the strike has been vital to the success of organized labor throughout Montana's history, the injunction<sup>5</sup> has been employers' most effective legal means to counter the strike. Employers have long relied on labor injunctions as an effective means for preventing the economic damage caused by strikes.<sup>6</sup> Once granted almost summarily by courts,<sup>7</sup> injunctions

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1. This comment focuses on economic strikes by public employees—strikes to bring economic pressure on employers to make gains in collective bargaining. Unfair labor practice ("ULP") strikes are called in response to an alleged unfair practice engaged in by the employer. Sympathy strikes result from employees' refusal to cross another union's picket line or from one union calling a strike against the same employer in support of another union. Both ULP and sympathy strikes are addressed only briefly in this comment.

2. See, e.g., FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION*, 29-30 (1930).

3. Letter from George Tompkins to U.S. Congresswoman Jeannette Rankin (Oct. 22, 1917), reprinted in JERRY W. CALVERT, *THE GIBRALTAR. SOCIALISM AND LABOR IN BUTTE, MONTANA. 1895-1920*, at 111 (1988) (remarks of George Tompkins concerning the Metal Mine Workers' strike of 1917).

4. See Tad Brooks, *State Union Readies for Strike*, *THE BILLINGS GAZETTE*, Mar. 2, 1989, at A5.

5. MONT. CODE ANN. § 27-19-101 (1991) states: "An injunction is an order requiring a person to refrain from a particular act. The order may be granted by the court in which the action is brought or by a judge thereof and, when made by a judge, be enforced as the order of the court." The term "labor injunction" generally refers to an injunction used to postpone or prevent a strike.

6. See, e.g., FRANKFURTER & GREENE, *supra* note 2, at 21.

essentially eliminated organized labor's only means to force employers to negotiate in good faith and opened the door for more aggressive means of breaking striking unions.<sup>8</sup> As the legal acceptance of unions grew, and the notion that unions were illegal conspiracies lost merit, injunctions against picketing and strikes became less routine.<sup>9</sup> Declaring that the right to strike was essential to the balance of power in the negotiations process, Congress passed the Norris-LaGuardia Act in 1932, limiting private sector employers' ability to obtain federal court injunctions against strikes.<sup>10</sup> Since then, several states also have passed little Norris-LaGuardia Acts limiting the granting of injunctions against private sector strikes except in situations of violence.<sup>11</sup> These little Norris-LaGuardia Acts generally do not apply to public employee strikes.<sup>12</sup>

The modern-day strike in Montana is just as likely to involve employees of state, county, or city governments ("public employees")<sup>13</sup> as employees in the private sector. Montana's largest unions are now organizations of public employees.<sup>14</sup> The modern-day

7. See, e.g., *id.* at 21-23.

8. See, e.g., *id.* at 17-18.

9. See, e.g., *Lindsay & Co. v. Montana Fed'n of Labor*, 37 Mont. 264, 275-77, 96 P. 127, 130-31 (1908).

10. Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1988)).

11. See, e.g., IDAHO CODE §§ 44-701 to -713 (1977); ILL. ANN. STAT. ch. 48, para. 2(a) (Smith-Hurd 1986); MINN. STAT. ANN. §§ 185.01 to .20 (West 1966 & Supp. 1992); N.M. STAT. ANN. §§ 50-3-1 to -2 (Michie 1988); N.D. CENT. CODE §§ 34-08-01 to -14 (Michie 1987); OR. REV. STAT. §§ 662.010 to .130 (1989); UTAH CODE ANN. §§ 34-19-1 to -13 (1988); WASH. REV. CODE ANN. §§ 49.32.011 to .110 (West 1990); WIS. STAT. ANN. §§ 103.51 to .62 (West 1988); WYO. STAT. §§ 27-7-101 to -107 (1991).

12. See *School Dist. No. 351 v. Oneida Educ. Ass'n*, 567 P.2d 830, 833 (Idaho 1977); *City of Pana v. Crowe*, 316 N.E.2d 513, 513 (Ill. 1974); *School Comm'n v. Easton Teachers Ass'n*, 398 A.2d 1220, 1223 (Me. 1979); *City of Albuquerque v. Campos*, 525 P.2d 848, 853 (N.M. 1974); *City of Minot v. General Drivers & Helpers Union No. 74*, 142 N.W.2d 612, 617 (N.D. 1966); *Port of Seattle v. International Longshoremen & Warehousemen's Union*, 324 P.2d 1099, 1102 (Wash. 1958); *Joint School Dist. No. 1 v. Wisconsin Rapids Educ. Ass'n*, 234 N.W.2d 289, 298 (Wis. 1976); *Retail Clerks Local 187 v. University of Wyo.*, 531 P.2d 884, 888 (Wyo. 1975). *But see Board of Educ. v. Public School Employees' Union Local No. 63*, 45 N.W.2d 797, 802 (Minn. 1951) (holding that Minnesota's little Norris-LaGuardia Act applies to public employees generally).

13. The term "public employee" in this comment refers to an employee of a state government or an employee of a political subdivision of a state government, such as a county, city, or school board. This comment does not address issues relevant to federal government employees. Federal government employees and their unions are prohibited from participating in any kind of work slow down or strike. 5 U.S.C. §§ 7116(b)(7)(A)-(B), 7311(3) (1988). See, e.g., *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 576 (D.C. Cir. 1982).

14. The Montana Education Association is affiliated with the National Education Association and represents public school teachers and school support staff. The Montana Public Employees Association is an independent state-wide organization and represents employ-

strike in Montana commonly involves either teachers<sup>15</sup> or state employees.<sup>16</sup> While the Montana Supreme Court has interpreted the Montana Public Employees Collective Bargaining Act to grant public employees a right to strike,<sup>17</sup> the parameters of this right are largely undefined.

This comment provides an overview of public employees' right to strike in general and, more specifically, the source and scope of this right in Montana. The approach to the strike injunction taken in other states that recognize at least a limited right of public employees to strike is also discussed. Given this background, this comment then attempts to define the appropriate parameters for enjoining a public employee strike within Montana's statutory context.

## II. OVERVIEW OF PUBLIC EMPLOYEES' RIGHT TO STRIKE

Unlike private sector employees, public employees are not covered by a uniform body of labor relations legislation.<sup>18</sup> Public employees are specifically excluded from coverage under the National Labor Relations Act ("NLRA").<sup>19</sup> Consequently, public employees' rights to form unions, negotiate with their employers over conditions of employment, and engage in strikes are left up to the legislative and common law approaches of the individual states. At common law, public employees generally have no inherent right to participate in negotiations with government employers over any terms or conditions of employment.<sup>20</sup> Additionally, employees do

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ees of state, county, and municipal governments and school and university support staff. The Montana Federation of Teachers/Federation of State Employees is affiliated with the American Federation of Teachers and the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO") and represents public school teachers, university faculty, school support staff, and state employees. Additionally, traditional private sector unions, such as the Teamsters, AFL-CIO, and the Operating Engineers, AFL-CIO, now represent public employees in Montana.

15. See, e.g., Steve Shirley, *Few Teachers Cross Lines as Strike Begins*, GREAT FALLS TRIBUNE, Aug. 29, 1989, at A1.

16. See, e.g., *Montana State Workers Strike Spreads as More Guard Troops Are Sent In*, N.Y. TIMES, Apr. 27, 1991, § 1, at 12.

17. *Department of Highways v. Public Employees Craft Council*, 165 Mont. 349, 354, 529 P.2d 785, 788 (1974).

18. The National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169 (1988), and the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-197 (1988), cover most private sector employees for the purpose of forming unions and collective bargaining with employers.

19. See 29 U.S.C. §§ 152(2)-(3) (1988).

20. See *United Steelworkers v. University of Ala.*, 430 F. Supp. 996, 1004 (N.D. Ala. 1977); *Beauboeuf v. Delgado College*, 303 F. Supp. 861, 864 (E.D. La. 1969), *aff'd per curiam*, 428 F.2d 470 (5th Cir. 1970); *New Jersey Turnpike Auth. v. American Fed'n of State, County and Mun. Employees*, 200 A.2d 134, 138-39 (N.J. Super. Ct. Ch. Div. 1964).

not have a constitutional right to strike.<sup>21</sup> Further, the United States Supreme Court finds no merit in the argument that an employee's lack of power to withhold services for employment reasons amounts to involuntary servitude.<sup>22</sup> State courts also consistently uphold restrictions on public employees' right to strike.<sup>23</sup> Absent specific state legislation, therefore, public employees and public employee unions generally lack authority to demand the right to bargain or exercise the right to strike.<sup>24</sup> Courts, however, have upheld as constitutional state legislation granting public employees the right to strike.<sup>25</sup>

The traditional reason for prohibiting strikes by public employees is that the state refuses to relinquish its sovereign power and duty to determine the conditions of employment for its employees.<sup>26</sup> This argument concludes that allowing public employees

21. *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926) ("Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike."); *United Steelworkers*, 430 F. Supp. at 1001 (holding that restrictions on the right to strike neither limit the First Amendment rights of speech or association nor deny equal protection of the law); *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 882 (D.D.C. 1971) ("At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers."), *aff'd*, 404 U.S. 802 (1971). Congress specifically granted private sector employees the right to engage in "concerted activities," including strikes, under sections 7 and 13 of the NLRA. 29 U.S.C. §§ 157, 163 (1988).

22. *International Union, Local 232 v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 251 (1949) (holding a Wisconsin statute which prohibited strikes does not violate the Thirteenth Amendment prohibition of involuntary servitude).

23. See *City of New York v. De Lury*, 243 N.E.2d 128, 131, 133 (N.Y. 1968) (neither the First nor Fourteenth Amendment grants the right to strike, and equal protection arguments are also not valid). See also *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 210 P.2d 305, 308 (Cal. Dist. Ct. App. 1949); *Board of Trustees of Univ. of Ky. v. Public Employee Council No. 51*, 571 S.W.2d 616, 619 (Ky. 1978); *City of Detroit v. Division 26 of Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees*, 51 N.W.2d 228, 232 (Mich. 1952); *City of Manchester v. Manchester Teachers Guild*, 131 A.2d 59, 61 (N.H. 1957); *Passaic Township Bd. of Educ. v. Passaic Township Educ. Ass'n*, 536 A.2d 1276, 1278 (N.J. Super. App. Div. 1987); *School Comm. v. Westerly Teachers Ass'n*, 299 A.2d 441, 443 (R.I. 1973).

24. Nevertheless, public employees generally have the right to join or form unions regardless of state authorization, based on freedom of association under the First and Fourteenth Amendments. See *American Fed'n of State, County, & Mun. Employees v. Woodward*, 406 F.2d 137, 139-40 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287, 288-89 (4th Cir. 1968). *But cf.* *Wilton v. Mayor of Baltimore*, 772 F.2d 88, 91 (4th Cir. 1985) (holding the right of association may be limited by the legitimate government interest in minimizing potential conflicts of interest in certain areas of public employment, like law enforcement or fire protection). See generally Paul G. Reiter, Annotation, *Right of Public Employees to Form or Join a Labor Organization Affiliated With a Federation of Trade Unions or Which Includes Private Employees*, 40 A.L.R.3d 728 (1971 & Supp. 1991).

25. See *Los Angeles Metro. Transit Auth. v. Brotherhood of R.R. Trainmen*, 355 P.2d 905, 909 (Cal. 1960).

26. See *Norwalk Teachers' Ass'n v. Board of Educ.*, 83 A.2d 482, 485 (Conn. 1951); *City of Manchester*, 131 A.2d at 61-62; *New Jersey Turnpike Auth. v. American Fed'n of State, County, & Mun. Employees*, 200 A.2d 134, 138 (N.J. Super. Ct. Ch. Div. 1964); *City of*

the right to strike wrests control of political and public policy decisions away from legislatures and elected public officials, thereby resulting in a threat to the public welfare.<sup>27</sup> More recently, some authors and courts have argued that the public sector, unlike the private sector, provides services for the public benefit rather than for profit. Because these services are not generally available through private competition, consumers risk losing publicly provided services in the face of a strike.<sup>28</sup> Because public employers and managers do not face the threat of traditional market pressures, such as risk of losing business to competitors during a strike, public sector strikes fail to encourage settlement between the parties.<sup>29</sup>

Nevertheless, diverse opinion exists concerning the propriety of public employee strikes. Proponents of allowing public employees the right to strike argue that without the ability to strike, public employee unions lack not only their most effective tool to keep the negotiation process meaningful, but negotiation disputes actually become more difficult to resolve.<sup>30</sup> The California Supreme Court denounced as “factually insupportable” the typical arguments that public employee strikes result in improper delegation of legislative authority and always encompass essential public services.<sup>31</sup> In addition, one author points out that no real correlation exists between states providing the right to strike and an increased number of public employee strikes.<sup>32</sup> In fact, public employee strikes still occur most often in those states where they are expressly prohibited.<sup>33</sup> This remains true even in the face of stiff sanctions for supporters of illegal strikes.<sup>34</sup>

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*Alcoa v. International Bhd. of Elec. Workers Local 760*, 308 S.W.2d 476, 479-80 (Tenn. 1964).

27. See *Norwalk Teachers' Ass'n*, 83 A.2d at 485; Robert E. Doherty, *Public Policy and the Right to Strike*, in *THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT* 283-84 (Jerome Lefkowitz ed., 1985).

28. See *City of Rockford v. Local 413, Int'l Ass'n of Firefighters*, 240 N.E.2d 705, 706 (Ill. App. Ct. 1968); Arvid Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 956-60 (1969).

29. See Doherty, *supra* note 27, at 283.

30. *County Sanitation Dist. No. 2 v. Los Angeles County Employees Ass'n*, 699 P.2d 835, 847-49 (Cal. 1985); Theodore W. Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 941-42 (1969).

31. *County Sanitation Dist. No. 2*, 699 P.2d at 844-45.

32. Doherty, *supra* note 27, at 289.

33. See *County Sanitation Dist. No. 2*, 699 P.2d at 846-47; Doherty, *supra* note 27, at 289.

34. See, e.g., *Rankin v. Shanker*, 242 N.E.2d 802 (N.Y. 1968); *In Re Contempt of White*, 395 N.E.2d 499 (Ohio Ct. App. 1978) (case decided prior to passage of the Ohio public employee collective bargaining act which now grants a right to strike).

It is impossible to generalize the structure or scope of the state statutes that establish public employee collective bargaining and, in many cases, grant or deny the right to strike. Each state public employee collective bargaining act differs as to employees covered, scope of bargaining, and methods for resolving impasse<sup>35</sup> in the negotiation process. In 1959, Wisconsin became the first state to enact legislation providing for collective bargaining for public employees.<sup>36</sup> Since then forty states have enacted legislation allowing some form of collective bargaining for certain groups of public employees.<sup>37</sup> Twelve of these states—Alaska, California, Hawaii, Idaho, Illinois, Minnesota, Montana, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin—grant various groups of public employees at least a limited right to strike under state collective bargaining laws.<sup>38</sup> While no state grants public employees an unlimited right to strike, public employees in Alaska and Montana have perhaps the broadest right to strike.<sup>39</sup> The remaining states that have public employee collective bargaining statutes specifically prohibit strikes, providing instead for some form of alternative dispute resolution, such as mediation or binding arbitration.<sup>40</sup> Alabama, Arizona, Arkansas, Colorado, Mississippi, North Carolina, South Carolina, Utah, Virginia, and West Virginia do not have collective bargaining statutes for any group of public employees.

### III. THE MONTANA PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT AND THE RIGHT TO STRIKE

#### A. *The Montana Public Employees Collective Bargaining Act and Impasse Resolution*

The Montana Legislature enacted the Montana Public Em-

35. "Impasse" is used throughout the Montana Public Employees Collective Bargaining Act ("Montana Act") and describes the situation in collective bargaining where both management and labor are deadlocked and unable to resolve one or more issues. See Walter J. Gershenfeld, *Public Employee Unionization—An Overview*, in *THE EVOLVING PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT* 16-17 (Jerome Lefkowitz ed., 1985).

36. Wisconsin Municipal Employment Relations Act, 1959 Wis. Laws 509, § 1.

37. See generally 1 Pub. Employee Bargaining (CCH) ¶¶ 401-451 (1990).

38. See *infra* note 134. The California public employees' right to strike is not granted by statute. The California Supreme Court has granted public employees the right to strike, rejecting the traditional common law rule that public employee strikes are illegal. See *County Sanitation Dist. No. 2*, 699 P.2d at 849-50.

39. Doherty, *supra* note 27, at 283. See also *infra*, notes 122, 135, and accompanying text.

40. See, e.g., KAN. STAT. ANN. § 75-4333(c)(5) (1989) (prohibiting strikes); KAN. STAT. ANN. § 75-4332 (1989) (providing mediation, fact-finding, and binding arbitration for all bargaining disputes); WASH. REV. CODE ANN. § 41.56.120 (West 1991) (prohibiting strikes); WASH. REV. CODE ANN. § 41.56.125 (West 1991) (providing arbitration of bargaining disputes).

ployees Collective Bargaining Act<sup>41</sup> (“Montana Act”) in 1974. The Montana Act is patterned after the NLRA. One author notes that the Montana Act contains more provisions similar to the NLRA than any other public employee collective bargaining act.<sup>42</sup> The Montana Act was amended to include the university system in 1974 and public schools in 1975.<sup>43</sup>

The Montana Act is now comprehensive in its coverage of public employees, including those employed by “the state of Montana or any political subdivision thereof, including but not limited to any town, city, county, district, school board, board of regents, public and quasi-public corporation, housing authority or other authority established by law . . . .”<sup>44</sup> The only employees excluded from the Montana Act are elected officials and governor appointees; supervisory, managerial, or confidential personnel; state board or commission members; school district clerks and administrators; registered professional nurses employed at health care facilities; and professional engineers or engineers-in-training.<sup>45</sup>

The Montana Act provides a comprehensive structure for establishing the collective bargaining process, providing impasse resolution procedures, and recognizing union rights as well as employer rights. Additionally, the Montana Act provides the Board of Personnel Appeals<sup>46</sup> (“BPA”) with authority to adopt rules to administer the Act.<sup>47</sup> The BPA also has primary jurisdiction to enforce the Act.<sup>48</sup> If necessary, orders of the BPA are enforceable in district court.<sup>49</sup>

The stated policy of the Montana Act is “to promote public business by removing certain recognized sources of strife and unrest, [and to] encourage the practice and procedure of collective

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41. MONT. CODE ANN. §§ 39-31-101 to -409 (1991).

42. Rona Pietrzak, *Some Reflections on Mackay's Application to Legal Economic Strikes in the Public Sector: An Analysis of State Collective Bargaining Statutes*, 68 OR. L. REV. 87, 131, n.258 (1989).

43. The following articles contain detailed discussions of the background of the Montana Act: William L. Corbett, *Determining the Scope of Public Sector Collective Bargaining: A New Look Via a Balancing Formula*, 40 MONT. L. REV. 231 (1979); Emilie Loring, *Labor Relations Law in Montana*, 39 MONT. L. REV. 33 (1978); Candace C. Fetscher, Comment, *Negotiating with the Public: Montana's Public Employee Collective Bargaining Act*, 36 MONT. L. REV. 80 (1975).

44. MONT. CODE ANN. § 39-31-103(1) (1991).

45. MONT. CODE ANN. § 39-31-103(2)(b) (1991). Nurses employed at health care facilities are granted collective bargaining rights under the Collective Bargaining Act for Nurses. MONT. CODE ANN. §§ 39-32-101 to -114 (1991).

46. MONT. CODE ANN. § 2-15-1705 (1991).

47. MONT. CODE ANN. § 39-31-104 (1991).

48. See MONT. CODE ANN. § 39-31-403 (1991).

49. See MONT. CODE ANN. § 39-31-409 (1991).



bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.”<sup>50</sup> Public employees covered by the Montana Act are granted broad rights to engage in concerted activities similar to those granted to private sector employees under the NLRA.<sup>51</sup> “If, after a reasonable period of negotiation” between the employer and union, the negotiations stall, or if the parties cannot reach agreement prior to the existing agreement’s expiration date, the Montana Act requires the parties to submit the dispute to non-binding mediation.<sup>52</sup> As an additional step in resolving collective bargaining disputes, the parties may voluntarily submit the dispute to non-binding fact-finding.<sup>53</sup> The Montana Act is supplemented by the Arbitration for Firefighters Act (“Firefighters Act”) covering firefighters employed by a public employer.<sup>54</sup> The Montana Act does not provide any further guidance for resolving potential strike situations once impasse is reached and fact-finding is concluded.

*B. Defining the Right to Strike: Department of Highways v. Public Employees Craft Council*

In 1974, the Montana Supreme Court interpreted the right of public employees to engage in “concerted activities” under the Montana Act when the Montana Department of Highways (“Department”) sought to enjoin a scheduled strike by its maintenance employees.<sup>55</sup> The Department sought and received a temporary re-

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50. MONT. CODE ANN. § 39-31-101 (1991).

51. MONT. CODE ANN. § 39-31-201 (1991) states:

*Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.*

The italicized language is identical to that of section 7 of the NLRA. 29 U.S.C. § 157 (1988).

52. MONT. CODE ANN. § 39-31-307 (1991). Mediation involves a staff member of the BPA acting as a neutral go-between to work with the parties to reach a mutually agreeable solution to the dispute. See Gershenfeld, *supra* note 35, at 16-17. In practice, the parties seek mediation at the point in negotiations where it serves the best strategic purpose. Rarely is mediation sought when the existing collective bargaining agreement expires. Seeking mediation is frequently a matter of mutual agreement between the parties and is typically requested only after serious negotiation difficulties, even though the language of the statute states otherwise.

53. MONT. CODE ANN. §§ 39-31-308, -309 (1991). Fact-finding involves a neutral party, named by the BPA, who holds a hearing to receive evidence on the dispute and then issues a report which is released to the public if the parties cannot resolve the dispute. See Gershenfeld, *supra* note 35, at 16-17.

54. MONT. CODE ANN. §§ 39-34-101 to -106 (1991).

55. Department of Highways v. Public Employees Craft Council, 165 Mont. 349, 351,

straining order in district court preventing the strike. However, the district court granted the union's motion to dismiss after a show cause hearing two months later.<sup>56</sup> On appeal, the supreme court affirmed the lower court's order dismissing the request for an injunction and dissolving the temporary restraining order.<sup>57</sup> The supreme court considered the language of the Montana Act that grants the right to engage in "concerted activities"<sup>58</sup> with regard to federal cases interpreting the NLRA because the language in both acts is nearly identical.<sup>59</sup> Reasoning that "concerted activities" has consistently included the right to strike since the term was first used in 1932, the court concluded that the legislature intended that the Montana Act be similarly interpreted.<sup>60</sup> The court thus determined that the Montana Act grants public employees the right to strike.<sup>61</sup> Such a judicial interpretation of legislative action concerning the right of public employees to strike is not unique to Montana.<sup>62</sup>

The Montana Supreme Court did not address the Department's arguments that the strike by highway employees would in-

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529 P.2d 785, 786 (1974).

56. *Id.* at 351, 529 P.2d at 786.

57. *Id.* at 355, 529 P.2d at 788.

58. MONT. CODE ANN. § 39-31-201 (1991) (formerly codified at REV. CODES MONT. § 59-1603(1) (Supp. 1977)). See *supra* note 51 and accompanying text.

59. *Department of Highways*, 165 Mont. at 351-52, 529 P.2d at 786. The Montana Supreme Court has consistently looked to NLRB and federal court interpretations of the NLRA for guidance in interpreting the Montana Act. See *City of Great Falls v. Young*, 211 Mont. 13, 17, 686 P.2d 185, 187 (1984); *Small v. McRae*, 200 Mont. 497, 502, 651 P.2d 982, 985 (1982); *Teamsters Local 45 v. State ex rel. Bd. of Personnel Appeals*, 195 Mont. 272, 276, 635 P.2d 1310, 1312 (1981); *State ex rel. Bd. of Personnel Appeals v. District Court*, 183 Mont. 223, 225, 598 P.2d 1117, 1118 (1979).

60. *Department of Highways*, 165 Mont. at 352-54, 529 P.2d at 786-87. See also *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383, 389 (1951) (the right to strike is an example of "concerted activities"); *Los Angeles Metro. Transit Auth. v. Brotherhood of R.R. Trainmen*, 355 P.2d 905, 906-07 (Cal. 1960) ("concerted activities" has commonly meant the right to engage in peaceful strikes to give force to union demands concerning working conditions).

61. *Department of Highways*, 165 Mont. at 354, 529 P.2d at 786-87. One author incorrectly characterizes the *Department of Highways* decision as creating a common law public employee right to strike. See Tim Schooley, Comment, *The Reinstatement Rights of Striking Public Employees*, 9 INDUS. REL. L.J. 283, 290-91 (1987).

62. See *Los Angeles Metro. Transit Auth.*, 355 P.2d at 906-10 (construing statute which granted transit employees right to engage in concerted activities as granting the right to strike); *Local 1494, Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 586 P.2d 1346, 1355-56 (Idaho 1978) (construing the collective bargaining act for firefighters to grant the right to strike once collective bargaining agreement expires); *Board of Educ. v. Public School Employees' Union*, 45 N.W.2d 797, 801-02 (Minn. 1951) (construing Minnesota's little Norris-LaGuardia Act to prevent enjoining strikes by public employees in general because it specifically excluded other public employees—police, firefighters, or any public officials charged with duties involved with public safety—from its coverage).

jure the health, safety, and welfare of the public,<sup>63</sup> the most commonly recognized ground for enjoining otherwise legal strikes by public employees.<sup>64</sup> The court simply ruled that the strike was legal and, therefore, not enjoined.<sup>65</sup> The Montana Supreme Court has not directly ruled on whether an otherwise legal strike by public employees may be enjoined.

### C. *Limits to the Public Employee Right to Strike Under Montana Law*

The Montana public employees' right to strike is limited, both in terms of the type of public employee involved and in terms of other self-imposed limits via the collective bargaining process. Montana law specifically limits firefighters' and nurses' right to strike. Firefighters are covered by the Montana Act and the Firefighters Act.<sup>66</sup> The Firefighters Act provides for final and binding arbitration to resolve all bargaining disputes that reach impasse<sup>67</sup> and specifically limits strikes by firefighters.<sup>68</sup> In effect, the Firefighters Act prescribes binding arbitration for all disputes that cannot be resolved through any other means, such as mediation or fact finding, provided for under the Montana Act<sup>69</sup> and prohibits all strikes by firefighters.<sup>70</sup>

Registered nurses and licensed practical nurses employed at private<sup>71</sup> or public health care facilities<sup>72</sup> are covered by the Collective Bargaining for Nurses Act ("Nurses Act").<sup>73</sup> Like the Montana Act, the Nurses Act provides for collective bargaining and employee and employer rights. The Nurses Act, however, clearly defines<sup>74</sup> and limits<sup>75</sup> strikes. The Montana Act leaves these issues

63. *Department of Highways*, 165 Mont. at 351, 529 P.2d at 786.

64. *See infra* note 138.

65. *Department of Highways*, 165 Mont. at 355, 529 P.2d at 788.

66. MONT. CODE ANN. §§ 39-34-101 to -106 (1991).

67. MONT. CODE ANN. § 39-34-101 (1991).

68. MONT. CODE ANN. § 39-34-105 (1991) states: "Strikes are prohibited during the term of any contract and the negotiations or arbitration of that contract."

69. *See supra* notes 52-53.

70. Notwithstanding the language of MONT. CODE ANN. § 39-34-105 (1991), which states that strikes are limited, the statute actually prohibits strikes during all possible phases of bargaining and impasse in which they could occur.

71. The Nurses Act regulation of private sector nurses is preempted by the NLRA. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

72. *See* MONT. CODE ANN. §§ 39-32-102(3), (4) (1991).

73. MONT. CODE ANN. §§ 39-32-101 to -114 (1991).

74. MONT. CODE ANN. § 39-32-102(5) (1991) defines a strike as "any work stoppage caused by the employees of a health care facility . . . that interferes with the operation of the health care facility or affects the care of patients . . . ."

75. MONT. CODE ANN. § 39-32-110 (1991) states:

open to interpretation. While recognizing the right of nurses to strike, the Nurses Act requires that a union send written notice to a health care facility thirty days prior to any strike.<sup>76</sup> Additionally, the Nurses Act prohibits a strike if another strike is in progress within a 150-mile radius of that health care facility.<sup>77</sup> The balancing of interests between employees' rights and public welfare is reflected in the Nurses Act's purpose of ensuring "uninterrupted continuation of sufficient competent nursing care of the ill and infirm in the state . . . ."<sup>78</sup> In addition to the statutory controls on firefighters' and nurses' right to strike, three other limits can be applied to all public employees' right to strike through the collective bargaining process.

### 1. *The Notice Provision*

The first possible limit on the right to strike is a notice provision in the collective bargaining agreement between the public employer and the union. The notice provision is binding and enforceable as part of the collective bargaining agreement.<sup>79</sup> A notice provision appears in the contract between the State of Montana and employees of the women's prison.<sup>80</sup> The purpose behind a notice provision is to ensure adequate time to replace the vital services that are lost during a strike.<sup>81</sup> As such, the contractual notice provision has the same effect as the mandatory notice required under the Nurses Act. If a union chose to strike without giving the required notice, the strike would be in violation of the collective

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It shall be unlawful for any employee of a health care facility . . . to participate in a strike if there is another strike in effect at another health care facility within a radius of 150 miles. Employees of a health care facility . . . or their duly elected representative must give the health care facility 30 days' written notice of any strike by them and must specify in the notice the day the strike is to begin.

76. MONT. CODE ANN. § 39-32-110 (1991).

77. MONT. CODE ANN. § 39-32-110 (1991).

78. MONT. CODE ANN. § 39-32-101 (1991).

79. See MONT. CODE ANN. §§ 39-31-306(3), -406, -409 (1991).

80. The notice provision in the contract for employees at the Women's Correctional Center states: "The Federation shall give the employer advance notice of not less than 24 hours before any concerted action may begin." Women's Correctional Center Collective Bargaining Agreement between the Department of Corrections and Human Services and Montana Federation of State Employees (1991-93), art. 19, § 2 at 20.

81. Historically, the Montana National Guard has been used at the state prison and state hospitals to replace the services of striking workers. See, e.g., *Montana State Workers Strike Spreads as More Guard Troops Are Sent In*, N.Y. TIMES, Apr. 27, 1991, § 1, at 12 (reporting that 700 Montana National Guard troops were ready to replace workers at state institutions in the event of a strike); *Strike Permeates Life in Montana*, N.Y. TIMES, Apr. 29, 1991, at A10 ("National Guardsmen were called to work in the state's prisons and some institutions for the elderly or handicapped.").

bargaining agreement, constituting an unfair labor practice enjoined by the BPA under the Act.<sup>82</sup>

### 2. *The No-Strike Clause*

The second voluntary limit on the ability to strike is the "no-strike clause" that, if included in the collective bargaining agreement, is enforceable as part of the collective bargaining agreement. No-strike clause language varies, but is generally an agreement between the employer and the union not to engage in any work stoppage during the term of the agreement.<sup>83</sup> The rationale behind the no-strike clause is that because labor and management have mutually agreed on a collective bargaining agreement for a specific term that provides for binding arbitration to resolve grievance disputes, no need to strike exists because the contract is enforceable through the arbitration procedure.<sup>84</sup> The no-strike clause is generally regarded as management's *quid pro quo* for agreeing to submit grievances to binding arbitration.<sup>85</sup> No-strike clauses are common in public employee collective bargaining agreements. An economic strike during the term of a contract containing a no-strike clause and grievance arbitration is generally illegal and enjoined.<sup>86</sup>

### 3. *Interest-Arbitration*

The third possible limit on the public employee strike, voluntary interest-arbitration,<sup>87</sup> is a complete alternative to the strike. The Montana Act provides that nothing contained in the dispute

82. See MONT. CODE ANN. §§ 39-31-306(3), -406, -409 (1991). See also *Savage Public Schools v. Savage Educ. Ass'n*, 199 Mont. 39, 43-44, 647 P.2d 833, 835 (1982) (refusal to comply with provision in collective bargaining agreement requiring arbitration constitutes both a breach of the contract and an unfair labor practice).

83. An example of a no-strike provision in a state collective bargaining agreement states: "There shall be no strikes, slowdowns or work stoppages of any kind for any reason on the part of [the] union or employees during the term of this agreement, nor shall there be any lockout of employees during the term of this agreement." Collective Bargaining Agreement between Montana Board of Regents of Higher Education and the Vocational Technical Educators of Montana 4610, MFT, AFL-CIO (1991-93), art. 11.8 at 28.

84. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970).

85. *Id.* at 248. The inclusion of an arbitration provision in the collective bargaining agreement implies a waiver of the right to strike over matters which the parties have agreed to submit to arbitration—even where a no-strike clause is not included in the collective bargaining agreement. See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104-05 (1962).

86. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279-84 (1956); *Arlan's Dep't Store of Michigan Inc.*, 133 N.L.R.B. 802, 808 (1961). See also *supra* note 82.

87. Interest-arbitration involves submitting the collective bargaining dispute to an arbitrator who makes a final and binding decision resolving the dispute. See *Gershenfeld*, *supra* note 35, at 17-18.

resolution provisions prohibits the parties from agreeing to final and binding arbitration to resolve bargaining disputes that reach impasse.<sup>88</sup> Any interest-arbitration agreement between the public employer and the union supersedes the fact-finding step of the Montana Act<sup>89</sup> and is enforceable under the Act.<sup>90</sup> Binding interest-arbitration for collective bargaining disputes is an issue of great controversy in Montana among labor organizations and management associations.<sup>91</sup> Nevertheless, on several different occasions, the Montana Legislature has rejected amendments to the Montana Act that would require mandatory binding interest-arbitration of unresolved collective bargaining disputes in lieu of a right to strike for certain groups of employees.<sup>92</sup> Unions and public employers are free to include final and binding interest-arbitration provisions in collective bargaining agreements. A strike in violation of a contract provision requiring final and binding interest-arbitration of collective bargaining disputes, like those where notice requirements and no-strike clauses are in effect, would be an unfair labor practice under the Montana Act and enjoined.<sup>93</sup> Any public employee strike in violation of the Montana Act may be enjoined under the Montana Act.

#### IV. SEEKING THE LABOR INJUNCTION UNDER THE MONTANA INJUNCTION STATUTES

Montana does not have a little Norris-LaGuardia Act covering labor injunctions,<sup>94</sup> nor does the Montana Act specifically provide

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88. MONT. CODE ANN. § 39-31-310 (1991).

89. MONT. CODE ANN. § 39-31-310 (1991). The court has interpreted section 39-31-310 as neither requiring nor prohibiting public employers from agreeing to submit negotiation disputes to final and binding arbitration. *Young v. City of Great Falls*, 198 Mont. 349, 354, 646 P.2d 512, 515 (1982).

90. *See supra* note 79.

91. The Montana AFL-CIO, the Montana Federation of Teachers, and the Montana School Boards Association are opposed to amending the Montana Act to provide for mandatory and binding arbitration of collective bargaining disputes. *See Transcript of Hearings on H.B. 619 Before the House Education and Cultural Resources Committee*, 52d Leg. (Feb. 20, 1991) at 10. On the other hand, the Montana Education Association advocates adding a final and binding arbitration provision for school employees to the Montana Act. *See id.* at 9.

92. *See* H.B. 619, 52d Leg., 1991 House and Senate Journal Index at 2348 (arbitration for school employees); S.B. 343, 51st Leg., 1989 House and Senate Journal Index at 70 (arbitration for municipal police officers); S.B. 343, 50th Leg., 1987 House and Senate Journal Index at 66 (arbitration for school district employees); H.B. 503, 49th Leg., 1985 House and Senate Journal Index at 197 (arbitration for school district employees); S.B. 92, 48th Leg., 1983 House and Senate Journal Index at 16 (arbitration for strikes endangering public services).

93. *See supra* note 82.

94. *See supra* notes 10-11 and accompanying text.

for the granting of injunctions to prevent otherwise legal public employee strikes. Therefore, a public employer seeking to enjoin a public employee strike not in violation of the Montana Act must do so under Montana's general injunction statutes.<sup>95</sup> The Montana injunction statutes apply when the public employer seeks to enjoin a strike because the strike violates some other right even though it is legal under the Montana Act.<sup>96</sup>

An employer seeking to enjoin a strike must first file a complaint and motion for temporary restraining order in state district court.<sup>97</sup> The district court can then issue a temporary restraining order and an order to show cause why a preliminary injunction should not be issued.<sup>98</sup> After the hearing to show cause, the district court either will issue or dissolve the temporary restraining order, depending on the court's findings under section 27-19-201—the heart of the injunction statutes.<sup>99</sup>

The only reference to the labor injunction under the injunction statutes is found in section 27-19-103(8), which states that a court may not issue an injunction in a labor dispute under different circumstances than it would if the injunction involved a dispute of a different nature.<sup>100</sup> In 1917, the Montana Supreme Court

95. MONT. CODE ANN. §§ 27-19-101 to -406 (1991).

96. The possibility of courts granting labor injunctions under section 27-19-201 has serious implications for Montana public employees' established legal right to strike. This is clear given the protection of the right to strike under the Montana Act and the importance public employee unions place on the right to strike. The granting of labor injunctions traditionally involves a careful weighing of the rights at stake and clear evidence that the strike involves some illegal activity before injunctive relief is granted. See *infra* note 173 and accompanying text (criteria for injunction under the Norris-LaGuardia Act).

97. See MONT. CODE ANN. § 27-19-314 (1991).

98. See MONT. CODE ANN. § 27-19-301 (1991).

99. MONT. CODE ANN. § 27-19-201 (1991) (modeled after CAL. CIV. PROC. CODE § 526) states:

An injunction order may be granted in the following cases:

(1) when it shall appear that the applicant is entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(2) when it shall appear that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;

(3) when it shall appear during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

(4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or dispose of his property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition;

(5) when it appears the applicant has suffered or may suffer physical abuse under the provisions of 40-4-121.

100. MONT. CODE ANN. § 27-19-103(8) (1991) (modeled after CAL. CIV. CODE § 3423;

recognized this section as a legislative response to the tendency of courts to grant injunctions against labor unions when the requirements for an injunction clearly were not met.<sup>101</sup> However, the court also noted that the provision adds nothing substantive to the law because all injunctions under the statute must meet the same criteria.<sup>102</sup>

Additionally, section 27-19-103(4) states that an injunction may not be granted "to prevent the execution of a public statute by officers of the law for the public benefit."<sup>103</sup> To overcome section 27-19-103(4)'s prohibition against issuing an injunction to prevent the execution of a public law, the complainant must show either irreparable injury or violation of a constitutional right.<sup>104</sup> In the case of a public employee economic strike, the employer is seeking to enjoin the union from engaging in a legal activity, protected by the Montana Act. The court, therefore, must determine whether some other substantial right outweighs the public employees' legislatively granted right to strike.<sup>105</sup>

A 1991 proposed amendment to section 27-19-103 would have added a new subsection stating that an injunction may not be granted:

to restrain union members on strike from participating in an activity protected by the Constitution of the United States of America or the Constitution of the state of Montana unless a court makes a finding and establishes, pursuant to 27-19-201, that the injunction is necessary to prevent violence or irreparable injury to property.<sup>106</sup>

Even though the amendment failed to pass,<sup>107</sup> the proposed change merely states well-settled law.<sup>108</sup> Like subsection (8), the proposed

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however, subsection (8) is unique to the Montana statute).

101. *Empire Theater Co. v. Cloke*, 53 Mont. 183, 194, 163 P. 107, 110 (1917).

102. *Id.*

103. MONT. CODE ANN. § 27-19-103(4) (1991).

104. *See New Club Carlin, Inc. v. City of Billings*, 237 Mont. 194, 196, 772 P.2d 303, 305 (1989).

105. *See Agricultural Labor Relations Bd. v. Superior Court of Tulare County*, 546 P.2d 687, 692-93 (Cal. 1976) (Agricultural Labor Relations Act authorized administrative regulations that granted union organizers qualified access to growers' property for the purpose of assisting employees in exercising their rights of concerted activities under the act). In construing a statute identical to section 27-19-103(4), the California Supreme Court held that employers were not entitled to an injunction to prevent enforcement of the valid regulation, regardless of their assertion that the regulation infringed on their property rights. *Agricultural Labor Relations Bd.*, 546 P.2d at 692-93.

106. S.B. 75, 52d Leg., 1991.

107. *See* S.B. 75, 52d Leg., 1991 House and Senate Journal Index at 2153.

108. *See Great Northern Ry. Co. v. Local of Great Falls Lodge of Int'l Ass'n of Machinists No. 287*, 283 F. 557, 563-64 (D.C. Mont. 1922); *Empire Theater Co.*, 53 Mont. 183,



language was intended to emphasize the traditional protection for peaceful union concerted activities.<sup>109</sup>

Under section 27-19-201, a court considering a labor injunction would likely focus on whether: (1) the applicant is entitled to the relief,<sup>110</sup> (2) the continuation or commission of the act of the adverse party (the strike) would produce a great or irreparable injury to the applicant,<sup>111</sup> or (3) the act (the strike) is or would be in violation of the applicant's rights.<sup>112</sup> The individual subsections of section 27-19-201 are disjunctive; therefore, the moving party need only make a showing of any one subsection to have sufficient grounds for an injunction.<sup>113</sup> Nevertheless, the bare claim that a party may suffer irreparable injury must be accompanied by some substantial right to relief by injunction, since injunctive relief is not an absolute right.<sup>114</sup> In addition, where money damages are sufficient to compensate for the asserted injury, there is no irreparable injury.<sup>115</sup> As discussed below in Part VI, Section B4, the most probable use for the Montana injunction statutes is enjoining illegal activities, such as violence or mass picketing, that may accompany an otherwise legal strike.<sup>116</sup>

## V. COMPARISON OF THE MONTANA PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT WITH OTHER STATES' ACTS

Each of the eleven state collective bargaining acts that provide various classifications of public employees a right to strike under certain circumstances is fairly unique. However, these acts share important traits which illustrate a common concern—providing for the right to strike while balancing the interest of effectively delivering public services.<sup>117</sup>

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191-92, 163 P. 107, 109-10; *Lindsay & Co. v. Montana Fed'n of Labor*, 37 Mont. 264, 275, 96 P. 127, 130-31 (1908).

109. Interview with Thomas Towe, State Senator from Billings, in Missoula, Mont. (May 1, 1992).

110. MONT. CODE ANN. § 27-19-201(1) (1991).

111. MONT. CODE ANN. § 27-19-201(2) (1991).

112. MONT. CODE ANN. § 27-19-201(3) (1991).

113. *Stark v. Borner*, 226 Mont. 356, 359-60, 735 P.2d 314, 317 (1987).

114. See *Intermountain Deaconess Home for Children v. Montana Dep't of Labor & Indus.*, 191 Mont. 309, 314, 623 P.2d 1384, 1387 (1981); *Holtz v. Babcock*, 143 Mont. 341, 356, 389 P.2d 869, 876 (1964).

115. *New Club Carlin, Inc.*, 237 Mont. at 196-97, 772 P.2d at 305.

116. See *infra* notes 211-12 and accompanying text.

117. The following articles offer detailed comparative analyses of the 11 state collective bargaining acts that grant public employees a right to strike: Rona Pietrzak, *Some Reflections on Mackay's Application to Legal Economic Strikes in the Public Sector: An Analysis of State Collective Bargaining Statutes*, 68 OR. L. REV. 87 (1989); Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National*

Each state's collective bargaining act differs as to the public employees covered and the rights each classification of employee is granted. The acts of Hawaii, Minnesota, Montana, Ohio, Oregon, and Pennsylvania are the most comprehensive in the number of classifications of public employees covered under one collective bargaining act.<sup>118</sup> The common theme among the eleven state acts is that certain groups of employees provide services the state considers so essential that these employees are expressly denied the right to strike under any circumstances.<sup>119</sup> However, no general agreement among the states exists as to which classifications of employees fit into this category. For example, some of the eleven states prohibit strikes by firefighters, law enforcement employees, teachers, and state employees; conversely, other states grant these same groups the right to strike.<sup>120</sup> The Ohio Public Employees Collective Bargaining Act identifies the greatest number of employees as providing services that are too important to be allowed the right

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*Labor Relations Act Been a Good Model?*, 38 STAN. L. REV. 1097 (1986).

118. These state acts cover most state and municipal employees and university and school district employees. See HAW. REV. STAT. §§ 89-2, 89-6 (1985 & Supp. 1991); MINN. STAT. ANN. §§ 179A.03(14)-(15) (West Supp. 1992); MONT. CODE ANN. §§ 39-31-103(1)-(2) (1991); OHIO REV. CODE ANN. §§ 4117.01(B)-(C) (Baldwin 1988); OR. REV. STAT. §§ 243.650(17)-(18) (1991); PA. STAT. ANN. tit. 43, §§ 1101.301(1)-(2) (1991). The Alaska Employment Relations Act covers most of that state's employees with the exception of public school teachers and employees. ALASKA STAT. §§ 23.40.250(6)-(7) (1990). Similarly, the Illinois Public Labor Relations Act covers most Illinois public employees, ILL. ANN. STAT. ch. 48, para. 1603(n)-(o) (Smith-Hurd Supp. 1992), except public school employees covered by the Illinois Educational Labor Relations Act. ILL. ANN. STAT. ch. 48, para. 1702(b) (Smith-Hurd Supp. 1992).

119. Many state acts define essential employees. See ALASKA STAT. § 23.40.200(a)(1) (1990); HAW. REV. STAT. § 89-2 (1985); ILL. ANN. STAT. ch. 48 para. 1603(e) (Smith-Hurd Supp. 1992); MINN. STAT. ANN. § 179A.03 subd. 7 (West Supp. 1992).

120. Alaska grants most state employees, except firefighters and law enforcement personnel, the right to strike. ALASKA STAT. §§ 23.40.200(b)-(d) (1990). Teachers are excluded under the Alaska Public Employee Collective Bargaining Act and are denied the right to strike. See Anchorage Educ. Ass'n v. Anchorage School Dist., 648 P.2d 993, 996 (Alaska 1982). Idaho grants firefighters the right to strike under the Idaho Employment of Firefighters Act. See Local 1494, Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 586 P.2d 1346, 1358 (Idaho 1978) (construing IDAHO CODE § 44-1811 (1977)). However, teachers are not granted the right to strike in Idaho. See School Dist. No. 351 v. Oneida Educ. Ass'n, 567 P.2d 830, 833 (Idaho 1977). Minnesota grants state employees and teachers the right to strike, MINN. STAT. ANN. § 179A.18 (West Supp. 1992), but not firefighters or police, MINN. STAT. ANN. § 179A.18 subd. 1 (West Supp. 1992). Montana grants state employees, teachers, and police the right to engage in "concerted activities" which includes the right to strike under MONT. CODE ANN. § 39-31-201 (1991); however, firefighter strikes are prohibited, MONT. CODE ANN. § 39-34-105 (1991). Vermont grants municipal employees, VT. STAT. ANN. tit. 21, § 1730 (1987), and teachers, VT. STAT. ANN. tit. 16, § 2010 (1989), the right to strike, but not state employees, VT. STAT. ANN. tit. 3, § 962(5) (1985). Wisconsin provides municipal employees an opportunity to strike, WIS. STAT. ANN. § 111.70(4)(cm)(5), (6)(c) (West 1988), but not state employees, WIS. STAT. ANN. § 111.84(2)(e) (West 1988).

to strike.<sup>121</sup> The Alaska Public Employment Relations Act ("Alaska Act") divides all employees covered by the Act into three classifications, depending on the relative importance of the services the employees provide.<sup>122</sup>

Like the Montana Act, the other ten state acts provide a system for assisting the negotiation process and resolving bargaining disputes. These procedures are designed to prevent impasses that may lead to strikes and to regulate those strikes that do occur. Mediation is common in most of the states, and is usually required at some point prior to impasse.<sup>123</sup> The inclusion of some form of fact-finding to help resolve bargaining disputes if mediation does not work is also common.<sup>124</sup> The majority of the states requires both parties to participate in either mediation or fact-finding procedures as a prerequisite to a legal strike.<sup>125</sup> The Montana Act differs in this respect in that it does not specifically state that a strike cannot be called until the parties comply with the mediation and fact-finding procedures in the Act.<sup>126</sup> This is probably not a significant distinction, however, because unions and public employers generally work through all available procedures in an attempt to resolve disputes. As a practical matter, a union calls a strike only

121. OHIO REV. CODE ANN. § 4117.14(D)(1) (Baldwin 1990) (including police, firefighters, highway patrol, sheriff, emergency medical, and correctional facility employees).

122. See ALASKA STAT. § 23.40.200(a)-(c) (1990) ("[P]olice and fire protection employees, jail, prison, and other correctional institution employees, and hospital employees" provide "services which may not be given up for even the shortest period of time" and are prohibited from engaging in strikes. "[P]ublic utility, snow removal, sanitation, and public school and other educational institution employees" provide "services which may be interrupted for a limited period but not for an indefinite period of time" and a strike may be enjoined if it begins "to threaten the health, safety, or welfare of the public." The third class of employees includes all other public employees who are considered to provide "services in which work stoppages may be sustained for extended periods without serious effects on the public.").

123. See ALASKA STAT. § 23.40.190 (1990); HAW. REV. STAT. § 89-11(b)(1) (1985); ILL. ANN. STAT. ch. 48, para. 1612 (Smith-Hurd 1986); MINN. STAT. ANN. § 179A.18(1)(b) (West Supp. 1992); MONT. CODE ANN. § 39-31-307 (1991); OHIO REV. CODE ANN. § 4117.14(c)(2) (Baldwin 1990); OR. REV. STAT. § 243.712(1) (1991); PA. STAT. ANN. tit. 43, § 1101.801 (1991); VT. STAT. ANN. tit. 21, § 1731 (1987); VT. STAT. ANN. tit. 16, § 2006 (1989); WIS. STAT. ANN. § 111.70(4)(cm)(3) (West 1988).

124. HAW. REV. STAT. § 89-11(b)(2) (1985); IDAHO CODE § 44-1805 (1977); ILL. ANN. STAT. ch. 48, para. 1613 (Smith-Hurd Supp. 1992); MONT. CODE ANN. § 39-31-308 (1991); OHIO REV. CODE ANN. § 4117.14(C)(3) (Baldwin 1990); OR. REV. STAT. § 243.722 (1991); PA. STAT. ANN. tit. 43, § 1101.802; VT. STAT. ANN. tit. 21, § 1732 (1987); VT. STAT. ANN. tit. 16, § 2007 (1989).

125. ALASKA STAT. § 23.40.200(c) (1990); HAW. REV. STAT. § 89-12(b)(1) (1985); IDAHO CODE § 44-1805 (1977); ILL. ANN. STAT. ch. 48, para. 1617(a)(4) (Smith-Hurd Supp. 1992); MINN. STAT. ANN. § 179A.18(1)(b) (West Supp. 1992); OR. REV. STAT. § 243.726(2)(a) (1991); PA. STAT. ANN. tit. 43, § 1101.1003 (1991); VT. STAT. ANN. tit. 21, § 1730(1) (1987); WIS. STAT. ANN. § 111.70(4)(cm)(6) (West 1988).

126. See *supra* note 52 and accompanying text.

after exhausting all other available means to settle a dispute.<sup>127</sup>

Other common provisions in the state collective bargaining acts that grant the right to strike are those requiring that a union give a certain amount of notice to the public employer prior to engaging in a strike.<sup>128</sup> The Montana Act does not require a union to give notice prior to a strike.<sup>129</sup> Montana public employers, however, may negotiate notice provisions in collective bargaining agreements providing the same effect as the statutory provisions.<sup>130</sup>

Voluntary arbitration procedures are also common among the eleven state collective bargaining acts.<sup>131</sup> These procedures allow the parties to voluntarily agree to submit negotiation disputes to binding arbitration in lieu of striking. Once this method of dispute resolution is selected, the right to strike is effectively waived.<sup>132</sup> Mandatory arbitration provisions are also uniformly present in the collective bargaining acts for those employees under each act who are specifically prohibited from striking.<sup>133</sup> Finally, once the varied mediation, fact-finding, or notice provisions are complied with, public employees not specifically prohibited from striking may exercise their right to strike under each of the eleven state acts.<sup>134</sup>

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127. Interview with Mike Dahlem, Staff Attorney, Montana Federation of Teachers/Federation of State Employees, AFT, AFL-CIO, in Helena, Mont. (Mar. 27, 1992).

128. HAW. REV. STAT. § 89-12(b)(4) (1985); ILL. ANN. STAT. ch. 48, para. 1617(a)(5) (Smith-Hurd Supp. 1992); MINN. STAT. ANN. § 179A.18 subd. 3 (West Supp. 1992); OR. REV. STAT. § 243.726(2)(c) (1991); WIS. STAT. ANN. § 111.70(4)(cm)(6)(c) (West 1988).

129. The Nurses' Act, however, does require a union to give advance notice of a strike. See *supra* note 75.

130. See *supra* note 80 and accompanying text.

131. HAW. REV. STAT. § 89-11(b)(3) (1985); ILL. ANN. STAT. ch. 48, para. 1617(3) (Smith-Hurd Supp. 1992); MINN. STAT. ANN. § 179A.16 subd. 1 (West Supp. 1992); MONT. CODE ANN. § 39-31-310 (1991); OHIO REV. CODE ANN. § 4117.14(E) (Baldwin 1990); OR. REV. STAT. § 243.712(c) (1991); PA. STAT. ANN. tit. 43, § 1101.804 (1991); VT. STAT. ANN. tit. 21, § 1733 (1987); WIS. STAT. ANN. § 111.70(4)(cm)(6) (West 1988).

132. The tradeoff between the right to strike and the right to submit collective bargaining disputes to binding interest-arbitration is well recognized. See, e.g., *Alaska Pub. Employees Ass'n v. City of Fairbanks*, 753 P.2d 725, 727 (Alaska 1988) (holding that a union cannot demand that a public employer proceed to binding arbitration; only those classifications of employees which are denied the right to strike have a right to binding arbitration); *St. Paul Professional Employees Ass'n v. City of St. Paul*, 226 N.W.2d 311, 313 (Minn. 1975) (under collective bargaining act for public employees, nonessential employees who are allowed to strike may request the employer to submit to interest-arbitration; however, essential employees who are prohibited from striking may invoke interest-arbitration).

133. ALASKA STAT. § 23.40.200(b) (1990); HAW. REV. STAT. § 89-11(d) (1985); ILL. ANN. STAT. ch. 48, para. 1614 (Smith-Hurd Supp. 1992); MINN. STAT. ANN. § 179A.16 subd. 2 (West Supp. 1992); MONT. CODE ANN. § 39-34-101(2) (1991); OHIO REV. CODE ANN. § 4117.14(D)(1) (Baldwin 1990); OR. REV. STAT. § 243.7242 (1991); PA. STAT. ANN. tit. 43, § 1101.805 (1991); WIS. STAT. ANN. § 111.77(3) (West 1988 & Supp. 1991).

134. ALASKA STAT. § 23.40.200(c)-(d) (1990); HAW. REV. STAT. § 89-12(b) (1985); IDAHO CODE § 44-1811 (1977) (firefighters) (construed to grant the right to strike in *Local 1494 of International Ass'n of Firefighters v. City of Coeur d'Alene*, 586 P.2d 1346, 1358 (Idaho

Nevertheless, the state collective bargaining acts, except those of Alaska, Idaho, and Montana,<sup>136</sup> state specifically that an otherwise legal strike<sup>136</sup> may be enjoined under certain circumstances. While specific procedures vary,<sup>137</sup> the nine state acts that provide for enjoining otherwise legal strikes uniformly state that the public employer may seek an injunction by showing that the strike is a clear and present danger to public health or safety.<sup>138</sup> It is essential, however, to note that the interpretations of what constitutes an imminent threat to public health or safety vary among the states.<sup>139</sup>

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1978)); ILL. ANN. STAT. ch. 48, para. 1617 (Smith-Hurd Supp. 1992) (public employees); ILL. ANN. STAT. ch. 48, para. 1713 (Smith-Hurd 1986) (public school employees); MINN. STAT. ANN. § 179A.18 (West Supp. 1992); MONT. CODE ANN. § 39-31-201 (1991); OHIO REV. CODE ANN. § 4117.14(D)(2) (Baldwin 1990); OR. REV. STAT. § 243.726 (1991); PA. STAT. ANN. tit. 43, § 1101.1003 (1991); VT. STAT. ANN. tit. 16, § 2010 (1989) (teachers); VT. STAT. ANN. tit. 21, § 1730 (1987) (municipal employees); WIS. STAT. ANN. § 111.70(4)(cm)(5), (6)(c) (West 1988) (municipal employees).

135. The Idaho Employment of Firefighters Act and the Montana Act are silent on when an otherwise legal strike may be enjoined. While the Alaska Act provides that strikes by class one and class two employees may be enjoined, ALASKA STAT. § 23.40.200(b)-(c) (1990), the act specifically states that strikes by class three employees are permitted for an indefinite period of time. See ALASKA STAT. § 23.40.200(a)(3) (1990).

136. An otherwise legal strike (1) is not in violation of the contract, (2) is called after the contract term has expired, and (3) is called after compliance with all provisions of the state act, such as dispute resolution and notice.

137. The nine state acts differ as to when an injunction may be sought. See, e.g., ALASKA STAT. § 23.40.200(c) (1990) (injunction may be sought when a strike begins to threaten public health or safety); ILL. ANN. STAT. ch. 48, para. 1618 (Smith-Hurd 1986) (injunction may be sought when strike is about to occur or is in progress). The state acts also differ as to what body may grant an injunction. See, e.g., OR. REV. STAT. § 243.726 (1991) (employer applies to court for injunction); HAW. REV. STAT. § 89-12 (c)(1) (1985) (employer applies to labor relations board for injunction). The Wisconsin Municipal Employment Relations Act is unique in that it allows "any citizen directly affected by such strike" to petition for an injunction. WIS. STAT. ANN. § 111.70(7m) (West 1988).

138. ALASKA STAT. § 23.40.200(c) (1990); HAW. REV. STAT. § 89-12(c)(1) (1985); ILL. ANN. STAT. ch. 48, para. 1618(a) (Smith-Hurd 1986); ILL. ANN. STAT. ch. 48, para. 1713 (Smith-Hurd 1986); OHIO REV. CODE ANN. § 4117.16 (Baldwin 1990); OR. REV. STAT. § 243.726(3)(a) (1991); PA. STAT. ANN. tit. 43, § 1101.1003 (1991); VT. STAT. ANN. tit. 21, § 1730(3) (1987), tit. 16, § 2010 (1989); WIS. STAT. ANN. § 111.70(7m)(b) (West 1988).

139. Each state court interprets the standard of clear and present danger to public health or safety according to the legislative direction in the respective collective bargaining acts. Pennsylvania defines the criteria quite broadly. See *Jersey Shore Area School Dist. v. Jersey Shore Educ. Ass'n*, 548 A.2d 1202, 1204 (Penn. 1988) (the potential adverse effect on student learning due to loss of school days during a teachers' strike is sufficient to meet the clear and present danger standard under the Pennsylvania Act). See also David T. Fisfis, Comment, *Enjoining a Teachers' Strike: The Difficulties in Defining the Clear and Present Danger Standard*, 27 DUQ. L. REV. 583 (1989). The Oregon Public Employee Collective Bargaining Act specifically states that a threat to public health and safety "does not include an economic or financial inconvenience to the public or the public employer that is normally incident to a strike . . ." OR. REV. STAT. § 243.726(6) (1991). The Ohio Public Employee Collective Bargaining Act limits to 60 days the length of any injunction granted to prevent a strike that constitutes an imminent threat to the public safety. OHIO REV. CODE ANN.

The significant structural theme throughout the nine state acts that provide for enjoining an otherwise legal strike is providing for continued dispute resolution rather than simply stopping the strike. In these acts, the same authority that grants the injunction is required to order the parties to participate in good faith negotiations or negotiations with the assistance of a mediator or to submit the dispute to binding arbitration.<sup>140</sup> These provisions recognize that the injunction effectively puts the union in a weakened bargaining position at a time when both sides are at impasse. Thus, these provisions attempt to equalize the process by requiring some form of continued dispute resolution in lieu of the strike.<sup>141</sup> A significant distinction between the Alaska, Montana, and Idaho acts and the other state acts is the lack of provisions mandating alternative dispute resolution when otherwise legal strikes are enjoined.

The Idaho Supreme Court considered whether an otherwise legal strike may be enjoined under the Idaho Employment of Firefighters Act ("Idaho Act") in 1978.<sup>142</sup> In *Local 1494, International Ass'n of Firefighters v. City of Coeur d'Alene*, the court initially considered whether a strike by firefighters employed by the City of Coeur d'Alene was illegal under the Idaho Act.<sup>143</sup> The firefighters' existing contract expired on December 31, 1976, and they continued to work without a contract while negotiations with the city were in progress.<sup>144</sup> The negotiations broke down, and the parties reached an impasse on January 5, 1977. At this point, the parties submitted the unresolved negotiation issues to fact-finding as required by the Idaho Act.<sup>145</sup> On May 6, 1977, after the fact-finding procedures proved inconclusive, the firefighters went on strike, and the city discharged them for participating in an illegal strike.<sup>146</sup>

In reversing the district court's holding that the strike was

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§ 4117.16(A) (Baldwin 1990).

140. See Alaska Stat. § 23.40.200(c) (1990); HAW. REV. STAT. § 89-12(c)(1) (1985); ILL. ANN. STAT. ch. 48, para. 1618(a) (Smith-Hurd 1986); OHIO REV. CODE ANN. § 4117.16(B) (Baldwin 1990); OR. REV. STAT. § 243.726(3)(c) (1991); WIS. STAT. ANN. § 111.70(7m)(b) (West 1988).

141. See, e.g., *Alaska Pub. Employees Ass'n v. City of Fairbanks*, 753 P.2d 725, 727 (Alaska 1988).

142. *Local 1494, Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 586 P.2d 1346 (Idaho 1978).

143. *Id.* at 1354.

144. *Id.* at 1347.

145. *Id.* at 1348.

146. *Id.*

prohibited under the Idaho Act,<sup>147</sup> the Idaho Supreme Court reasoned that the legislature intended, by its construction of section 44-1811 of the Act, either to recognize a right to strike after contracts had expired or, at a minimum, to leave open the possibility for the parties to negotiate a contract that permits a strike after expiration.<sup>148</sup> The supreme court considered the legislature's refusal to include an absolute ban on strikes in the statute,<sup>149</sup> as well as the fact that the city negotiated a contract with the union that contained a no-strike clause which specifically prohibited strikes during the term of the contract.<sup>150</sup> The supreme court reasoned that if firefighters could not strike once the contract expired and they complied with the Idaho Act, in effect, firefighters would be without any right to strike under the Idaho Act. The court reasoned that the legislature clearly did not intend this result.<sup>151</sup> The supreme court concluded that an otherwise legal strike is not enjoinable under the Idaho Act, given the structure of the Act as a whole and the way the State implemented the Act through negotiations.<sup>152</sup>

## VI. ANALYZING APPROPRIATE CRITERIA FOR THE PUBLIC EMPLOYEE STRIKE INJUNCTION IN MONTANA

### A. *The 1991 State Employee Strike Injunction*

As the 52nd Session of the Montana Legislature came to a close in the Spring of 1991, the State of Montana faced the toughest negotiations in recent years with the unions representing a majority of the state's 14,000 employees. Five thousand state employees were preparing to walk off their jobs in what would be the largest public employee strike in the state's history.<sup>153</sup> Among

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147. *Id.* at 1354.

148. *Id.* at 1356-57.

149. *Id.* at 1356. IDAHO CODE § 44-1811 (1977) states: "Strikes prohibited during contract. Upon consummation and during the term of the written contract or agreement, no firefighter shall strike or recognize a picket line of any labor organization while in performance of his official duties."

150. *Local 1494, Int'l Ass'n of Firefighters*, 580 P.2d at 1357-58.

151. *Id.* at 1358.

152. *Id.* at 1357-58. While the supreme court did recognize that the strike involved in the case was an ULP strike which involves somewhat broader protection than an economic strike, the supreme court did not limit its holding to ULP strikes, but rather any strike after the contract had expired. This usually means an economic strike. *See id.* at 1354-57. "In that period of time after the old contract expires and before the new one is consummated, [strikes] are not prohibited and the parties are free to negotiate one way or another depending on their relative economic strengths." *Id.* at 1357.

153. *See Montana State Worker Strike Spreads as More Guard Troops Are Sent In*, N.Y. TIMES, Apr. 27, 1991, § 1, at 12.

those readying for the strike were employees of the Department of Institutions at the state mental hospital at Warm Springs; the state prison at Deer Lodge; the women's prison at Warm Springs; the Montana Developmental Center, the home for the mentally retarded at Boulder; and the Montana Highway Patrol.<sup>154</sup> The strike was set for 5:00 p.m. on April 22, 1991.<sup>155</sup>

On April 22, the State petitioned the Lewis and Clark County District Court for a temporary restraining order to prevent employees from striking at the state prisons, the state hospital at Warm Springs, and the Montana Developmental Center.<sup>156</sup> The State did not seek to enjoin the Highway Patrol from striking.<sup>157</sup> The State argued that the impending strike would cause irreparable injury to the patients and inmates of the institutions and would prevent the State from meeting its statutory obligations.<sup>158</sup> In its memorandum in support of the motion for injunction, the State characterized the strike as the confrontation between the legislatively granted right to strike and the overriding constitutional rights of the patients and inmates in the institutions.<sup>159</sup> The district court granted the State's motion and entered a temporary restraining order on April 22, setting a hearing to show cause for April 24.<sup>160</sup>

The district court dissolved the temporary restraining order and denied the State's motion for a preliminary injunction of the impending strike of Department of Institutions employees on April 24, 1991.<sup>161</sup> The court first recognized that the legislature placed no restrictions on the right of these employees to strike under the Montana Act, even though the legislature had done so for firefighters and nurses.<sup>162</sup> Second, the court noted that the State entered into collective bargaining agreements with the unions that contem-

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154. See Greg McCracken, *Unions Fear a Strike if Pay Raise Bill Fails*, BILLINGS GAZETTE, Mar. 27, 1991, at A1.

155. Complaint and Motion for Temporary Restraining Order at 6, *State v. Montana Fed'n of State Employees* (Mont. Dist. Ct. Lewis & Clark County 1991) (No. CDV 91-681) [hereinafter Complaint].

156. Complaint, *supra* note 155, at 1-4.

157. Memorandum in Support of Temporary Restraining Order and Order to Show Cause at 9-10, *State v. Montana Fed'n of State Employees* (Mont. Dist. Ct. Lewis & Clark County 1991) (No. CDV 91- 681) [hereinafter Memorandum].

158. Complaint, *supra* note 155, at 7.

159. *Id.* at 2-3.

160. Temporary Restraining Order and Order to Show Cause at 1, *State v. Montana Fed'n of State Employees* (Mont. Dist. Ct. Lewis & Clark County 1991) (No. CDV 91-681).

161. Partial Transcript of Court Proceedings Before Thomas C. Honzel at 4, *State v. Montana Fed'n of State Employees* (Mont. Dist. Ct. Lewis & Clark County 1991) (No. CDV 91-681) [hereinafter Court Transcript].

162. Court Transcript, *supra* note 161, at 2.



plated strikes after the expiration of the agreements.<sup>163</sup> Recognizing the well-established right of Montana public employees to strike, the court found no ground to enjoin the strike.<sup>164</sup>

Nevertheless, the court expressed concern that the basic needs of the patients be met at Warm Springs and the Montana Developmental Center. Stating that it was relying "more on humanitarian grounds than on legal grounds," the district court allowed the temporary restraining order to run an additional day to give the State time to make arrangements for replacements.<sup>165</sup> This case illustrates the difficulty courts and employers may have in determining the possible limits to public employees' right to strike.

### *B. Appropriate Injunction Criteria*

Defining appropriate limits to Montana public employees' right to strike is difficult because of the lack of guidance provided by the Montana Act. In considering the appropriateness of a strike injunction, a court must consider the importance of the respective rights at stake. The Montana Act places a fundamental importance on public employees' right to engage in concerted activities such as strikes, but does not indicate what limits may be imposed on this right. Nevertheless, various well-established limits serve as a basis for defining appropriate criteria for enjoining a public employee strike. Analyzing judicial approaches to the labor injunction in other jurisdictions is helpful; however, the labor injunction must be viewed in the specific context of the Montana Act because of the differing approaches of the several states in establishing and prioritizing the collective bargaining rights of public employees. In addition, criteria such as "imminent danger to the public health or safety" are ambiguous given the varied degrees of importance the different states place on certain public services. If the criteria are not carefully defined, the Montana public employees' right to engage in legal strikes could be limited beyond the intent of the Montana Act in situations where public sentiment or political pressure is strongly opposed to a strike.

The appropriate criteria for enjoining a public employee strike under the Montana Act may be found in: (1) the treatment of injunctions under the NLRA, (2) the historical development of public sector bargaining in Montana and public employers' implementation of the Act, (3) the structure of the Montana Act itself, and

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163. *Id.* at 5.

164. *Id.* at 4, 6.

165. *Id.* at 4.

(4) situations of violence or threats of violence that would meet the test of irreparable harm under the Montana injunction statute.

### 1. *The NLRA as a Model for Regulating Montana Public Employee Strikes*

The NLRA has not been an influential model for regulating strikes in public sector collective bargaining acts.<sup>166</sup> Despite the many similarities between the Montana Act and the NLRA, the Montana Act is silent on matters concerning the regulation of public employee strikes. Nevertheless, the structure of the Montana Act, like that of the NLRA,<sup>167</sup> contemplates allowing a broad right to engage in economic strikes as part of the negotiation process. In addition, the Montana Supreme Court has consistently relied on federal court and NLRB interpretations of the NLRA for guidance in interpreting the Montana Act,<sup>168</sup> specifically with regard to the right to strike.<sup>169</sup> Therefore, Montana courts should look to the NLRA and its body of case law for guidance, within the limits set by the Montana Act, when determining limits to the Montana public employee strike.

Under the NLRA, a union is generally free to engage in economic strikes after complying with the notice and cooling off provisions in section 8(d) of the Act.<sup>170</sup> Absent some illegal activity<sup>171</sup> or breach of the collective bargaining agreement,<sup>172</sup> economic strikes will not be enjoined. Under the Norris-LaGuardia Act, a federal court may enjoin a strike only if certain specific criteria are met. In pertinent part, the Norris-LaGuardia Act requires that there be a threatened or actual illegal act that will result in substantial and

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166. Benjamin Aaron, *Unfair Labor Practices and the Right to Strike in the Public Sector: Has the National Labor Relations Act Been a Good Model?*, 38 STAN. L. REV. 1097, 1118 (1986).

167. See, e.g., *Amstar Corp. v. Amalgamated Meat Cutters & Butcher Workmen*, 468 F.2d 1372, 1373-74 (5th Cir. 1972); *Martin Hageland, Inc. v. United States Dist. Court*, 460 F.2d 789, 791 (9th Cir. 1972).

168. See *supra* note 59 and accompanying text.

169. *Department of Highways v. Public Employees Craft Council*, 165 Mont. 349, 529 P.2d 785 (1974).

170. See 29 U.S.C. § 158(d)(4) (1988).

171. See, e.g., 29 U.S.C. § 158(8)(b)(4) (1988) (strikes that have a secondary purpose or strikes aimed at influencing jurisdictional or work assignment disputes are illegal under § 8(b)(4) of the NLRA). Under § 10(l) of the NLRA, the NLRB must petition the federal district court for an injunction pending a final determination if the NLRB finds reasonable grounds to believe a strike is in violation of § 8(b)(4)(A), (B), (C), or (D). See 29 U.S.C. § 160(l) (1988).

172. See, e.g., *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 254 (1970) (strike over disputes the parties are contractually bound to submit to arbitration may be enjoined in federal district court).

irreparable injury to the complainant's property, that the complainant will be damaged more by denial of the relief than the defendant will be by granting the relief, that no adequate remedy at law exists, and that the public officers charged with the duty to protect the complainant's property are unable or unwilling to furnish adequate protection.<sup>173</sup> Regardless of the strong protection for exercising the right to strike, the NLRA has never protected strike activities that involve seizing property or acts of violence.<sup>174</sup>

Finally, under section 208 of the Labor Management Relations Act ("LMRA"), a federal court may enjoin a strike if the strike would affect the entire, or a substantial part of, an industry and would "imperil the national health or safety."<sup>175</sup> In any event, an injunction granted under section 208 may not last longer than eighty days.<sup>176</sup> Section 208 has been a more influential model for limiting strikes under state collective bargaining acts than any other NLRA provisions.<sup>177</sup> The nine states that specifically provide for enjoining an otherwise legal strike under their collective bargaining acts use criteria similar to that of section 208.<sup>178</sup> The LMRA, however, contemplates strike situations that encompass more serious situations than, for example, the loss of school days due to a teachers' strike.<sup>179</sup> Further, the individual state courts must define what constitutes an imminent threat to the public health or safety under their respective state collective bargaining acts. As previously discussed, no general agreement exists as to what strike situations create a clear and present danger to the pub-

173. 29 U.S.C. § 107 (1988). See generally *United Parcel Serv., Inc. v. Local 25, Int'l Bhd. of Teamsters*, 421 F. Supp. 452 (D. Mass. 1976) (good example of how a federal district court will review the evidence and apply the facts to the Norris-LaGuardia Act to determine if an injunction is appropriate). Under the Norris-LaGuardia Act, illegal acts must be committed or threatened as the threshold requirement. Illegal acts are not a general reference to anything considered illegal but, rather, violence, threats, intimidation, vandalism, breaches of the peace, or other criminal acts. See *Marine Transport Lines, Inc. v. International Org. of Masters*, 770 F.2d 1526, 1530 (11th Cir. 1985); *Brotherhood of R.R. Trainmen, Local Lodge No. 721 v. Central Georgia Ry. Co.*, 229 F.2d 901, 903 (5th Cir. 1956).

174. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255-56 (1939).

175. 29 U.S.C. § 178 (1988). See also 29 U.S.C. § 176-180 (1988).

176. See *Seafarers Int'l Union v. United States*, 304 F.2d 437, 444-45 (9th Cir.), cert. denied, 370 U.S. 924 (1962).

177. See Aaron, *supra* note 166, at 1109.

178. The collective bargaining acts in Alaska, Hawaii, Illinois, Minnesota, Ohio, Oregon, Pennsylvania, Vermont, and Wisconsin state that an otherwise legal strike may be enjoined if the strike poses a clear and present danger to the public health or safety. See *supra* note 138.

179. See *United Steelworkers v. United States*, 361 U.S. 39, 40-42 (1959) (affirming injunction of industry-wide steel workers' strike as a threat to national safety because of impacts on the defense industry).

lic health or safety.<sup>180</sup> Because the Montana Act lacks a provision similar to section 208 of the LMRA, this part of the federal labor law does not provide much guidance for limiting the public employee strike in Montana. The NLRA as a whole, however, and specifically section 7, after which the Montana Act is patterned, grants employees strong protection for the right to engage in unlimited strikes.<sup>181</sup>

## 2. *Montana Public Employers' Recognition of a Broad Right to Strike*

Montana's rich labor history cannot be disregarded in analyzing the importance and general acceptance of the strike as an economic weapon of labor. Certainly this backdrop was present while the legislature considered the Montana Act. The Montana Act does not stand alone in illustrating the general understanding in Montana that the possibility of a strike is a necessary part of the bargaining process between employees and employers.<sup>182</sup>

Montana was not only the home of early private sector unionism,<sup>183</sup> but also the home of some of the nation's earliest public employee efforts to organize or negotiate contracts with their public employers. Both the Butte Teachers' Union<sup>184</sup> and the University Teachers' Union in Missoula<sup>185</sup> were active in organizing public employees long before any legislative authorization. In 1935, the Butte Teachers' Union negotiated its first contract, which contained a salary schedule and recognition of the union.<sup>186</sup> In so doing, the Butte Teachers' Union became one of the first teachers' groups in the nation to negotiate a collective bargaining agreement.<sup>187</sup> These historical developments in public employee collective bargaining most certainly set the stage for early acceptance of

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180. See *supra* note 139 and accompanying text.

181. See *supra* note 51. Section 13 of the NLRA, 29 U.S.C. § 163 (1988) states: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

182. See MONT. CODE ANN. §§ 39-33-201 to -205 (1991) (regulating the use of professional strike breakers); MONT. CODE ANN. § 44-1-1002 (1991) (forbidding Montana Highway Patrol from intervening in labor disputes, strikes, or boycotts).

183. See CALVERT, *supra* note 3, at 4.

184. John Astle, BUTTE TEACHERS' UNION. FIRST 50 YEARS, 1934-1984, at 2 (1984).

185. *Id.* at 18 (University Teachers' Union Local 119 at the University of Montana was first organized in 1919, becoming one of the first university locals in the American Federation of Teachers, AFL-CIO).

186. *Id.* at 7-9.

187. *Id.* at 14.

unions and the possibility of strikes in Montana's public sector.<sup>188</sup> The Montana Legislature recognized that several collective bargaining agreements covering public employees pre-dated the Montana Act and included a grandfather clause that specifically protects these collective bargaining agreements.<sup>189</sup>

Today, Montana public employers actively recognize the right of public employees to engage in unlimited economic strikes through the negotiation process. Since passage of the Montana Act, public employers have negotiated contracts with public employee unions that include various no-strike and notice provisions aimed at regulating possible economic strikes.<sup>190</sup> These agreements, entered into under authority of the Montana Act, clearly acknowledge that the Act establishes a broad right to strike once the contract has expired and the parties reach impasse.<sup>191</sup> In the case of those state employee unions that rely on legislative appropriations to fund negotiated agreements, many collective bargaining agreements specifically allow economic strikes during the term of the agreement.<sup>192</sup> In some instances, public employers even recognize the right of employees to engage in sympathy strikes.<sup>193</sup> Montana public employers clearly understand the Montana Act provides Montana public employees the right to engage in economic strikes, limited only by the employees' desires and ability to sustain the strike.

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188. Pre-1973 Montana Supreme Court decisions also illustrate the early acceptance of unions in the public sector prior to passage of the Montana Act. See *Benson v. School Dist. No. 1*, 136 Mont. 77, 344 P.2d 117 (1959) (holding that union security clause in Butte Teachers' Union contract was void for lack of legislative authority to enter into such agreement, although not addressing the question of authority to bargain with a public employer); *City of Billings v. Billings Firefighters Local No. 521*, 200 Mont. 421, 425, 651 P.2d 627, 629 (1982) (court notes that beginning in 1968, the city continuously recognized the firefighters' union in negotiations).

189. See MONT. CODE ANN. § 39-31-109 (1991).

190. See *supra* notes 80 and 83.

191. Any other reasoning dilutes the meaning of notice and no-strike provisions. See *Local 1494, Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 586 P.2d 1346, 1357-58 (Idaho 1978).

192. The contract covering Montana State Prison employees states: "The Federation shall have the right to engage in concerted activity after December 31, 1992, for matters pertaining to wages and benefits in the [fiscal year] 94-95 biennium." Collective Bargaining Agreement between the State of Montana and the Federation of Montana State Prison Employees, Local 4700, MFSE, AFL-CIO (1991-93), art. 15, § 3 at 29.

193. The contract covering most employees at the Montana State Hospital states: "Nothing in the above section will be construed to mean that an individual employee or group of employees shall be compelled to cross a legally established picket line authorized in accordance with the constitutions and by-laws of a recognized bargaining unit at Montana State Hospital at Warm Springs." Agreement between the State of Montana and the Warm Springs Independent Union, Local 5070, MFSE, AFL-CIO, Montana State Hospital (1991-93), art. 5 at 3.

### 3. *Structure of the Montana Act as an Indication of the Scope of the Public Employees' Right to Strike*

The overall structure of the Montana Act is probably the best indication that the legislature intended to grant public employees a broad right to engage in economic strikes once collective bargaining agreements expire. First, strikes that constitute a violation of the Montana Act are clearly enjoinable,<sup>194</sup> just as illegal strikes under section 10 of the NLRA are enjoinable.<sup>195</sup> In addition, the Montana Legislature specifically limited the strike rights of two specific classifications of employees (nurses and firefighters) that the legislature regarded as delivering essential public services. Other state acts similarly designate certain public employees as essential.<sup>196</sup> Under the Firefighters Act, all strikes are prohibited for firefighters, and collective bargaining disputes that reach impasse are settled through binding arbitration.<sup>197</sup> Additionally, the Nurses Act, while granting the right to strike, carefully regulates this right in order to prevent the loss of essential health care services through a sudden strike or through more than one strike occurring within a small geographic area.<sup>198</sup> Indeed, the legislature has identified those services it considers essential and in need of regulation to prevent or mitigate the effects of a strike.

The legislature is aware of the possibility of limiting the scope of or preventing otherwise legal strikes. Nevertheless, the legislature leaves the final dispute resolution process up to the parties, depending on their relative strengths and desires, once the dispute resolution provisions in the Montana Act have failed. While this approach is more akin to the private sector model under the NLRA,<sup>199</sup> Alaska<sup>200</sup> and Idaho<sup>201</sup> take similar approaches for certain public employees. The Ohio Public Employees Collective Bargaining Act also contemplates letting the process play out, depending on the desires and strengths of the respective parties.<sup>202</sup>

In the nineteen years since adoption of the Montana Act, the legislature has not perceived the need to change the structure of the Act. This is perhaps most evident with respect to Montana

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194. See *supra* notes 82, 86, 93, and accompanying text.

195. 29 U.S.C. § 160(l) (1988). See *supra* note 171.

196. See *supra* note 119.

197. MONT. CODE ANN. §§ 39-34-101(2), -105 (1991).

198. MONT. CODE ANN. § 39-32-110 (1991).

199. See *supra* note 167.

200. See *supra* note 135 and accompanying text.

201. See *supra* note 152 and accompanying text.

202. OHIO REV. CODE ANN. § 4117.16(A) (Baldwin 1990) (providing that an injunction of an otherwise legal strike can only stand for 60 days).

public employees' right to strike. On several different occasions, the legislature considered and rejected changing the character of the Act by replacing the right to strike with provisions that require mandatory interest-arbitration to resolve bargaining impasses for certain classifications of employees.<sup>203</sup> Most notably, the legislature, even after the Montana Supreme Court decision in *Department of Highways v. Public Employees Craft Council* and subsequent experiences with several public employee strikes, rejected proposals that would have expressly prohibited public employee strikes under the Montana Act.<sup>204</sup>

A court that reads into the Montana Act and the Montana injunction statutes grounds to enjoin an otherwise legal public employee strike where no special circumstances exist (discussed below in subpart 4) runs the risk of contravening legislative policy. For example, the nine state acts that specifically provide for enjoining an otherwise legal strike provide some direction concerning the circumstances under which an otherwise legal strike may be enjoined<sup>205</sup> and what the court or administrative board granting the injunction is required to do to equalize the situation once a strike is enjoined.<sup>206</sup> The complete lack of these provisions in the Montana Act indicates the legislature did not foresee enjoining otherwise legal economic strikes.

In support of an injunction, public employers may point to court decisions of other states where the established bargaining context is different and ask the court to enjoin a legal strike based on this criteria.<sup>207</sup> The problem with this reasoning is that the Montana Act does not contain provisions similar to these state variations. Under the Montana Act, arguments that a legal economic strike may create a clear and present danger to the public health or safety based on the interpretations of another state are irrelevant.

The Montana Act is silent on limiting an otherwise legal strike for employees other than firefighters or nurses in health care facilities. Had the legislature intended to set limits on otherwise legal

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203. See *supra* note 92 and accompanying text.

204. S.B. 198, 47th Leg., 1981 House and Senate Journal Index at 35; H.B. 632, 46th Leg., 1979 House and Senate Journal Index at 214.

205. See *supra* notes 138-39 and accompanying text.

206. See *supra* note 140 and accompanying text.

207. In its Memorandum in Support of Injunction, the State of Montana argued that the district court should consider the criteria of states such as Pennsylvania for granting an injunction of the impending state employee strike of 1991. Memorandum in Support of Injunction at 3, *State v. Montana Fed'n of State Employees* (Mont. Dist. Ct. Lewis & Clark County 1991) (No. CDV 91-681).

strikes, the legislature could have expanded the number of employees it considered essential, and further regulated their right to strike. Additionally, the legislature could have adopted provisions to specifically limit otherwise legal strikes for all public employees where the strike poses a clear and present danger to the public health or safety, as several other states have done. A district court should not interpret the Montana Act's silence as an opportunity to enjoin otherwise legal strikes free of some extraordinary circumstances. The legislature intended to grant public employees a broad right to engage in economic strikes, fully understanding that these strikes would be allowed to run their course depending on the employees' economic strength and desires. The legislature has had numerous opportunities to change the character of the Act but has held to the original structure providing most employees with the right to engage in unrestrained legal economic strikes.

#### *4. Irreparable Injury as a Criterion for Enjoining a Public Employee Strike*

The outer limits of the Montana public employees' right to strike should be those situations where strike activity creates irreparable injury under the Montana injunction statutes. Situations that meet the test of irreparable injury will be few, however, given that the legislature has granted public employees a broad right to strike. Even though any strike in the public sector will cause some harm or inconvenience to the public, the legislature did not foresee enjoining an otherwise legal strike under the Montana Act. Therefore, the injunction statutes are useful only for those situations where the legal rights of some other party outweigh the public employees' right to strike. For example, an otherwise legal economic strike that becomes violent, creates property damage, or involves mass picketing blocking a right-of-way or creating a hazard will be enjoined.<sup>208</sup> Even in these situations, only the illegal activity, such as the trespass or the mass picketing, will be enjoined.<sup>209</sup> The strike itself remains lawful.

A year after the Montana Supreme Court's decision in *Department of Highways v. Public Employees Craft Council*,<sup>210</sup> the court, in considering a lawful teachers' strike and the school

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208. See, e.g., *United Parcel Serv., Inc. v. Local 25, Int'l Bhd. of Teamsters*, 421 F. Supp. 452, 459-60 (D. Mass. 1976); *J.B. Michael & Co. v. Iron Workers Local No. 782*, 173 F. Supp. 319, 326 (W.D. Ky. 1957); *Lake Charles Stevedores v. Mayo*, 20 F. Supp. 698, 702-03 (W.D. La. 1935).

209. See *Wilson & Co. v. Birl*, 105 F.2d 948, 951 (3rd Cir. 1939).

210. 165 Mont. 349, 529 P.2d 785 (1974).



board's violation of the Montana Act for attempting to restrain that right, noted, "Union activities that become violent and threaten the public safety are not protected by the constitutional right to free speech or provisions for collective bargaining."<sup>211</sup> When strikes involve violence, threats of violence, or damage to property, public employers will have grounds to seek an injunction of the illegal activity under the Montana injunction statutes.<sup>212</sup>

When a lawful strike does not involve any illegal act, the strike should not initially be enjoined under the Montana injunction statutes.<sup>213</sup> In 1991, the State argued that Department of Institutions' patients' constitutional right to essential care outweighed the public employees' right to strike.<sup>214</sup> This argument overlooks the State's ability to use National Guard troops to replace the striking workers, including nurses, or to hire replacements from the job market. In other words, the State is correct in arguing that the constitutional rights of patients in state institutions take precedence over the legislatively granted right to strike; however, reasonable alternatives exist during a strike to provide for the patients' essential needs.<sup>215</sup> Enjoining a legal strike is not a prerequisite to providing for these needs.

The Lewis and Clark County District Court correctly determined that no grounds existed to enjoin the threatened state employee strike in 1991.<sup>216</sup> The district court intimated, however, that at some point grounds might exist to enjoin the strike if the strike became protracted.<sup>217</sup> It is difficult to imagine what circumstances might create grounds to enjoin a legal strike involving no illegal activity,<sup>218</sup> because a legal strike that becomes protracted should not be enjoined on these grounds alone.<sup>219</sup>

## VII. CONCLUSION

### The Montana Supreme Court's holding in *Department of*

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211. Board of Trustees v. State ex rel. Bd. of Personnel Appeals, 185 Mont. 104, 109, 604 P.2d 778, 781 (1979) (citing Great Northern Ry. Co. v. Local Great Falls Lodge of Int'l Ass'n of Machinists No. 287, 283 F. 557 (D. Mont. 1922)).

212. See MONT. CODE ANN. § 27-19-201(2) (1991).

213. See *supra* notes 104-05 and accompanying text.

214. See Memorandum, *supra* note 157, at 9-10.

215. See *supra* note 81.

216. Court Transcript, *supra* note 161, at 4-5.

217. *Id.* at 4-5.

218. This situation conceivably could be created if circumstances, such as a prison riot or a natural disaster, combine with a protracted strike to cause a significant threat to public safety.

219. Under the NLRA, for example, a strike does not become an illegal activity simply because it becomes protracted. See *supra* note 173 and accompanying text.

*Highways v. Public Employees' Craft Council* that a strike by public highway employees could not be enjoined is not an anomaly. The public employees' right to strike, although an exception to the longstanding common law rule, is well supported by Montana legislative and administrative action, as well as by federal court and NLRB interpretations of the NLRA.

The Montana public employees' right to strike can be characterized as a broad right to engage in economic strikes. The other ten state collective bargaining acts, with the exception of the Idaho Employment of Firefighters Act and the Alaska Public Employment Relations Act, grant a more limited right to strike. Nevertheless, several clear limits to the Montana public employees' right to strike exist, including those that apply to firefighters and nurses which the legislature has treated separately because of the essential services these employees provide. A strike by any public employee union may be enjoined under the Montana Public Employees Collective Bargaining Act if it: (1) occurs during the term of an agreement containing a no-strike clause, (2) is called in violation of a notice provision in the collective bargaining agreement, or (3) violates an agreement to submit all bargaining disputes to final and binding arbitration. Finally, strikes that involve or threaten violence or property damage (illegal activities) will meet the irreparable injury criteria under the Montana injunction statutes.

The Montana Act does not provide, as do nine other state collective bargaining acts, for enjoining a legal public employee strike by a finding that the strike is a clear and present danger to the public health or welfare. The Montana Act is similar to the National Labor Relations Act in that it grants employees a broad right to strike, limited in most cases only by illegal activities and the parties' desires and economic strength. A public employee strike after impasse resolution has failed and the existing contract has expired should not be enjoined given the statutory structure Montana has adopted and followed. The granting of injunctions based on criteria not contemplated or provided for under the Montana Act can effectively emasculate the Montana public employees' well-established right to engage in economic strikes.

