

Federal Collective Bargaining Legislation

For State and Municipal Public Safety Personnel



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Several nearly identical pieces of proposed legislation introduced in Congress over the past several years (HR 413 and S 1611; previously S. 2123/H.R. 980; see also, S 3194) would require all state and local governments to collectively bargain with public safety officers, i.e., police officers, firefighters and emergency medical services personnel, excluding permanent supervisory or management employees.

During the opening days of the 111th Congress, Representatives Dale Kildee (D-MI) and John J. Duncan, Jr. (R-TN) introduced H.R. 413, the “Public Employer-Employee Cooperation Act.” In August 2009, Senators Judd Gregg (R-NH) and 26 co-sponsors, including Senator Edward M. Kennedy (D-MA), introduced the Senate companion bill, S. 1611. It was reportedly the last labor bill introduced by Senator Kennedy before his death. H.R. 413 was referred to the House Committee on Education and Labor. S. 1611 has been referred to the Committee on Health,

Education, Labor and Pensions (HELP).

While the House approved one version of the legislation on July 17, 2007 on a 314-97 vote, and approved H.R. 413 in July 2010 by adding it to the War Supplemental Appropriation bill, it has yet to pass the Senate even though it appears there may well be sufficient votes for approval. In fact, but for a scheduling issue involving certain candidates during the last presidential election, it probably would have passed. In any event, unless there is a change of heart following this fall's mid-term elections, the likelihood of a federal mandate on public safety collective bargaining remains high.

In May 2008, the Senate began consideration of what was then H.R. 980, and an attempt to filibuster it was made. Some Senators filed cloture on the motion to proceed to end the filibuster, which was successful. The 69-29 vote allowed the Senate to consider the bill, but opponents flooded the floor with hostile amendments and the bill was ultimately pulled from the floor. It was not reconsidered before the end of the 110th Congress.

What will the law require all states to provide?

The legislation would require all states to provide public safety personnel with the right to form and join a union, and to bargain collectively over wages, hours and terms of employment. Some contract impasse resolution procedure and several other provisions found in most collective bargaining laws would also be required. On its face, the legislation mandates a minimum threshold that would only apply in states that offer little or no bargaining rights at the present time. (A fear among other states is that future amendments might apply to the entire country.)

Under the new statute, every state's laws must at a minimum provide the following

bargaining rights to public safety employees:

- Grant public safety officers the right to form and join a labor organization that is or seeks to be recognized as the exclusive bargaining representative of the employees, excluding management and supervisory employees;
- Require public safety employers to recognize the employees' labor organization that has been chosen freely by a majority of employees and agree to bargain with the union and memorialize any agreements by putting them in a written contract or memorandum of understanding (MOU);
- Provide for bargaining over hours, wages and terms and conditions of employment;
- Make available an interest-impasse resolution mechanism, such as fact-finding, mediation, arbitration or comparable procedures; and
- Require enforcement through state courts of all rights, responsibilities and protections provided by state law and those enumerated in the federal legislation, including enforcing any written contract or memorandum of understanding.

How many states would be affected?

Approximately 38 states appear to offer sufficient bargaining rights to its public safety personnel (34 for police and fire; 4 for fire) that they should be exempt from the new federal mandate. The number of states that also cover EMS workers is

unclear.

Which states appear to satisfy minimum requirements?

Police and firefighter bargaining rights: Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Washington, and Wisconsin.

Police but not firefighter bargaining rights: Alabama, Georgia, Idaho, and Wyoming.

While most of these state laws cover both police officers and firefighters who are employed at both the state and local level, several are more limited in their coverage. The Nevada law, for example, only covers police officers and firefighters employed by units of local government and does not cover such employees who are employed by the State.

Among the states without collective bargaining laws covering either police officers or firefighters but which authorize public employers to grant recognition for purposes of collective bargaining and where such bargaining takes place are Arkansas, Colorado, Louisiana, New Mexico, and West Virginia.

Isn't this an Unconstitutional Incursion into "states' rights"?

Serious questions of the bills' constitutionality have been raised. In an effort to overcome such anticipated challenges, the bills contain "purpose" language

seeking to justify the incursion into what has been seen as an area of “state’s rights” by claiming the bill will:

- Foster greater cooperation between public safety employees and their employers;
- Uphold national interests, such as preventing, detecting and responding to terrorist attacks, natural disasters and other mass casualty incidents; and
- Protect life and property, preserve natural resources and protect national security.

Here is what the FOP says:

The legislation violate does not violate States’ rights because the Congress routinely sets minimum expectations and requirements that must be met by State laws when the Federal government has an identified interest or responsibility. The safety of the public is a compelling interest for the Federal government. Further, this legislation is constructed in such a way that it preserves and protects the authority of the State to maintain and administer its own collective bargaining law. The legislation merely establishes very basic collective bargaining principles which State laws must meet. The implementation and enforcement of those laws are left entirely to the States.

In fact, according to the FOP, the legislation has numerous built-in safeguards to protect existing State laws by including provisions which:

- presume that State laws are in compliance unless the FLRA affirmatively finds that they are not;
- limit the FLRA to evaluating State laws solely on the basis of the minimums provided for in this bill and prohibiting the creation of new requirements to be imposed on States; and

- require the FLRA to give “maximum weight” to an agreement between management and a labor organization that the State law complies with this legislation when reviewing existing State law.

Suffice it to say that constitutional scholars consulted by major management associations have reached an opposite conclusion.

Which federal law enforcement employees are exempt from bargaining?

It is interesting to note that presently under federal law public safety employees do not have the right to collectively bargain with their employers. If the primary justification for a uniform national collective bargaining requirement is the fostering of homeland security, one must wonder why all the debate over whether to grant bargaining rights to employees of the Transportation Security Administration.

If the rationale used in the proposed legislation were sincere, then one must wonder why Congress and every President since Jimmy Carter have decided to exempt untold numbers of federal employees who would be deemed to public safety officers under H.R. 980. Consider for example, the following:

- The Federal Bureau of Investigation (“FBI”), the Central Intelligence Agency (“CIA”), the National Security Agency (“NSA”), and the United States Secret Service, and the United States Secret Service Uniformed Division are totally exempt from coverage under the collective bargaining provisions of the Civil Service Reform Act of 1978 ("CRA") and, as a result, tens of thousands of employees employed by these agencies have no enforceable right to engage in collective bargaining. (5 U.S.C. § 7103(a)(3) (B), (C), (D), and (H).)

- The CRA also permits the President to issue an order suspending any provision of the CRA with respect to any federal agency or activity if "the President determines that the agency or subdivision has a primary function intelligence, counterintelligence, investigative, or national security work" and that the provisions of the CRA "cannot be applied to that agency or subdivisions in a manner consistent with national security requirements and considerations." 5 U.S.C. § 7103(b). In Executive Order 12171, President Carter excluded literally hundreds of federal agencies or subdivisions from being covered by the CRA. Significantly, Executive Order 12171 has been amended and extended by every subsequent President, including President Clinton, to exclude additional federal employees from coverage under the Federal Labor-Management program. (Executive Order 13039, 62 F.R. 12529 (Mar. 11, 1997).) For example, in Executive Order 12632, "... all domestic field offices and intelligence units of the Drug Enforcement Administration" were excluded. (Executive Order 12632, 53 F.R. 9852 (Mar. 23, 1988).)

Separate and apart from the two diametrically opposed standards for determining whether collective bargaining is appropriate for public safety employees, it also must be emphasized that the law enforcement officers and firefighters employed by the Federal government who are covered by the Civil Service Reform Act of 1978 have no right to negotiate over wages, pensions, and many other significant terms and conditions of employment. Rather, Congress has decided, and rightfully so, that certain issues ought to be decided by Congress itself and not be subject to collective bargaining. Thus, the CRA provides for negotiations over "conditions of employment," but it specifically excludes any matters like wages and pensions that "are specifically provided for by Federal statute." 5 U.S.C. § 7103 (14)(c). That being the case, one would think that the state

legislatures should be given the same discretion to make similar policy determinations. For federal employees covered by the Civil Service Reform Act of 1978 and postal employees covered by the National Labor Relations Act, unions are prohibited from negotiating union shop or fair share clauses, but under H.R. 980 the negotiation of such union security clauses would presumably be a mandatory subject of bargaining in states that do not have applicable right-to-work laws collective bargaining statutes must meet in order to remain in effect and not be preempted by the substantive provisions of H.R. 980.

It is more than ironic that the federal government's own collective bargaining statute would not even come close to meeting the standards specified in H.R. 980.

What is the enforcement Mechanism?

The legislation authorizes the Federal Labor Relations Authority (FLRA) to enforce the act by creating and enforcing collective bargaining regulations that provide state and local agency public safety employees with collective bargaining rights. The act requires the FLRA to consider whether each state's laws provide public safety employees with certain rights and responsibilities.

What about strikes and lockouts?

The legislation prohibits public safety employers, employees and labor organizations from engaging in lockouts or strikes.

What happens to existing bargaining agreements?

Under the various bills, existing collective bargaining units and agreements are not invalidated.

Will all public safety personnel be required to join a union?

No, the bills allow so-called “right to work” laws in states. Under such provisions, workers need not join a union, but often must pay a sum substantially equivalent to union dues for the benefits these workers get from the union’s bargaining efforts.

What happens if a state does not provide sufficient bargaining rights?

If the FLRA determines that a state does not "substantially provide" the bargaining rights expressly provided for in the bill, the FLRA will manage labor relations in the public safety sector arena within the state. Within one year of the law’s enactment, the FLRA must promulgate regulations establishing procedures for implementing the specified rights for public safety employees in states where the FLRA has determined they do not exist.

How much authority will the FLRA have over local bargaining?

The legislation specifically provides the FLRA with the authority to:

- Determine whether a bargaining unit is appropriate;
- Supervise and conduct elections to determine whether a labor organization has been selected as an exclusive representative by a

voting majority of the employees in an appropriate unit;

- Resolve issues relating to the duty to bargain in good faith;
- Conduct hearings and resolve complaints of unfair labor practices;
- Resolve exceptions to the awards of arbitrators;
- Protect the right of each employee to form, join or assist any labor organization or to refrain from such activity;
- Order any state that is not in compliance with the FLRA's regulations promulgated to enforce this act to comply with the federal law;
- Take other actions which are necessary to administer the new law, including issuing subpoenas, administering oaths, taking or ordering depositions, ordering responses to interrogatories and receiving and examining witnesses.

What will this cost states and municipalities?

The Congressional Budget Office (CBO) estimates that implementing this law would have cost the Federal Government about \$44 million over the 2002-2006 period, subject to appropriation of the necessary funds.

However, according to the FOP, the cost will be “nothing”! They claim that the legislation simply establishes a process for discussions between public safety officers and their employers. They say that it does not cost local governments any money and does not require local governments to agree to anything it does not want or cannot afford. Further, according to the FOP, there is nothing in this proposal to compel the employer to agree to anything. At the end of the day, the FOP assures skeptics that fiscal decisions remain firmly the prerogative of the employer. In fact, they note that language in the legislation specifically protects the local government’s respective legislative body’s authority to approve or disapprove funding for any negotiated accords.

There do not appear to be any estimates of the cost for each state to establish and maintain a labor relations agency with sufficient resources to satisfy the requirements of the new law.

Comment: Once the law is in place and assuming its Constitutionality upheld, nothing will prevent an amendment requiring binding arbitration without any local legislative override provision.

How long will states have to enact complying bargaining legislation?

If the FLRA determines that a State does not “substantially provide” for the rights and responsibilities enumerated above, than a State has two years (from the date of the law’s enactment) or “date of the end of the first regular session of the legislature of that State that begins after the date of the enactment of this Act” to comply or the FLRA will issue regulations which will provide for the aforementioned rights and responsibilities.

Any determination made by the FLRA will remain in effect until such time as a

subsequent determination is made. An employer or labor organization may submit a request for a subsequent determination on the basis of a material change in State law or its interpretation. If the FLRA determines that such a material change has taken place, a subsequent determination will be made not later than thirty (30) days after the request.

This bill and regulations issued by the FLRA under the authority of this legislation will not invalidate a certification, recognition, collective bargaining agreement, or memorandum of understanding which has been issued, approved, or ratified by any public employee relations board or commission or by any State or political subdivision or its agents (management officials) that is in effect on the day before the date of enactment, or the results of any election held before the date of enactment.

The bill would also not preempt any State law in effect on the date of enactment that substantially provides for the rights and responsibilities described above solely because:

- such State law permits an employee to appear in his or her own behalf with respect to his or her employment relations with the public safety agency involved;
- such State law excludes from its coverage employees of a state militia or national guard;
- such State law does not require bargaining with respect to pension and retirement benefits;
- such rights and responsibilities have not been extended to other categories of employees covered by this legislation, in which case the FLRA shall only exercise the authority granted it by this bill with respect to those categories of employees who have not been afforded the aforementioned rights and responsibilities;

- such laws or ordinances provide that a contract or memorandum of understanding between a public safety employer and a labor organization must be presented to a legislative body as part of the process for approving such contract or memorandum of understanding.

Further, if a State provides collective bargaining rights for some, but not all, public safety employees described in the bill, the FLRA will be required to specify those categories of employees to eliminate any confusion over which groups of employees would come under the FLRA regulations.

In addition, the bill would not permit parties subject to the National Labor Relations Act to negotiate provisions that would prohibit an employee from engaging in part-time employment or volunteer activities during off-duty hours or require a State to rescind or preempt laws or ordinances of any of its political subdivisions if such laws substantially provide rights and responsibilities for public safety officers that are comparable to or greater than the rights and responsibilities enumerated above.

Are even small municipalities included?

A state may exempt from its State law, or from the requirements established by this bill, a political subdivision of the State that has a population of less than 5,000 or that employs fewer than 25 full time employees.

Then why are so many employer organizations opposed?

The municipal leagues from the seven states in the nation's Northeast region published a 2010 Federal Issues Paper to the region's congressional delegation. It

included the following:

Northeast municipalities urge opposition to further federalization of labor issues.

The labor laws in the northeastern states are mature, expansive and vigorously enforced. Further federal intrusion into the employer-employee relationship should be rare and reserved for those issues that cannot effectively be handled at the state level and should only be enacted with broad bi-partisan support.

Enactment of this federal legislation poses three particularly serious problems for Northeast public employers. Both employee groups and employers have been effectively utilizing the services of the state-level labor relations boards such as the MLRB in Maine. The MLRB has overseen an average of 5-6 elections for representation in public safety units annually since 2002. The majority of elections resulted in the employees selecting union representation. There is no impediment in Maine for employees who wish to be represented from engaging in that process. The MLRB provides quick turn-around for meetings with parties in dispute and does so in a manner that strongly encourages the parties to work together to resolve their issues. Many times the parties are able to resolve their issues at this level without the use of outside counsel, which obviously helps keep the costs down for both parties. If they are in need of outside help, they can rely on local attorneys familiar with the MLRB and its procedures. In short, the process in place in Maine works well for both public employees and public employers.

Having to deal with a federal authority to resolve the same kinds of problems can only increase the time and costs required to accomplish what state-level labor relations boards do now. Both parties will have to

become familiar with an entirely new set of laws, rules and guidelines as they interact with the FLRA.

A second issue will be the potential requirement for employers to defend claims in multiple jurisdictions. Public employers know today that if they are unable to resolve a grievance or other dispute at the local level, they will be in front of a state board for resolution. Having a federal authority also overseeing state-level labor relations provides another forum for an aggrieved party to file their complaint, potentially requiring the employer to defend itself twice on the same issue. It is not clear whether the legislation in question will prevent this duplication.

Finally, this represents yet another federal intrusion into an area best left to the people of the states. There have been numerous attempts, some successful and some not, to change parts of the Maine Public Employees Labor Relations Act. Each time a change has been proposed, the State Legislature has considered the proposed changes and acted as it saw fit. The result is a broad statutory scheme governing public sector labor relations that the people of Maine, through their elected representatives, have selected. A federal agency overseeing public sector labor relations may certify Maine's existing statutory framework or it may not. If it does not, it will by design be imposing new requirements in the labor relations arena on the state of Maine that may not be compatible with the current wishes of Maine's citizens.

It may be understandable that employees in regions of the nation without our long history of state oversight of the public sector labor relations process desire a federal presence to establish their collective bargaining rights. Northeastern states have no such problem. We have comprehensive, detailed and successfully functioning labor relations environments and authorities. Subjecting both employee groups and

public employers to an entirely new level of labor relations oversight represents both a new and unnecessary burden.

Some argue that the northeastern states shouldn't worry about this law because they have robust labor laws and therefore will easily pass all federally-imposed standards. This argument should be rejected. First, the proposed legislation introduces great uncertainty as to which state laws are robust enough to satisfy the federal standard, and the federal standards will likely change over time. Second, and more importantly, there is no federal issue here and the federal government needs to respect the bounds of state authority and jurisdiction.

Are any states adopting bargaining rights in anticipation of the new law?

Such activity has been reportedly taking place in at least one of states that does not have a public sector collective bargaining law covering public safety officers—North Carolina. Thus, a “Public Safety Employer-Employee Cooperation Act,” with provisions remarkably similar to H.R. 980, has been introduced in the North Carolina Senate. (General Assembly of North Carolina, Session 2007, Senate Bill 970 entitled “Public Safety Employer-Employee Cooperation Act.”)

RECOMMENDATIONS

States without collective bargaining laws that are likely to satisfy the new federal standards should consider at least drafting a bill that will meet the minimum threshold. There are a number of protections that can be inserted into such laws that will preserve management rights and reduce as much as possible the effect of the federal incursion into an area that such states have traditionally considered “states’ rights.” It appears that states may have up to two years to enact such laws, but the initial inspection by the FLRA may come much sooner, with a check on what each state has in place on the day before the new federal law takes place.

Strongly worded provisions on each of the following will be helpful:

- management rights
 - assignment
 - hiring
 - promotions
 - transfers
 - performance evaluations
 - scheduling
 - fitness for duty
 - non-reappointment
- impasse resolution
 - no arbitration
 - mediation and fact-finding only
 - local legislative approval required
- right to work
 - no “agency fee” requirement
- drug and alcohol testing
 - no requirement for rehab

- uniforms, equipment and similar determinations
- polygraph testing
- non-supervisory bargaining units only
 - no civilian employees in police units
 - full-time only
- light duty at chief's option
- exclude discrimination or other statutory violations from grievance procedure
 - "one bite at the apple" only
- define grievance arbitration limits
 - can't override state or local laws, ordinances, rules, etc.
 - can't second-guess discipline
 - review facts only, not level of discipline
- limit "evergreen" clauses
 - assure right to terminate contract
- define mid-term bargaining
 - allow chief to handle discussions
 - limit duration to worthwhile good faith efforts to reach agreement
 - allow implementation on impasse