Labor relations at critical juncture in face of accelerating movement to restrict collective bargaining rights, legal scholars warn

If the outpouring of protest against the Wisconsin Legislature’s controversial approval of a bill – signed into law earlier this month – that sharply curtails the collective bargaining rights of most of the state’s public sector employees is any indication, there may be a battle of epic proportions underfoot in U.S. labor relations. As many as 100,000 protestors flooded the state capital the day after the Governor signed the bill into law, according to media reports. Amid a mounting flurry of legislative initiatives to constrain public sector bargaining rights, similar bills introduced in Indiana, Ohio and Iowa have also drawn substantial protest.

“We are at one of the most critical points in our history with respect to the rights of private sector workers in general and the continued viability of unions in particular,” observes Charles Craver, Freda H. Alverson Professor of Law, George Washington University Law School.

Initially offered by the state’s governor as part of a plan to fix the state’s budget crisis, the Wisconsin legislation divests public employees, except for those in public safety classifications such as police officers and firefighters, of most of their collective bargaining rights, although they will still be allowed to collectively bargain over wages. Unless authorized by referendum, however, bargaining for wage increases is limited to a rate that does not exceed the rate of any increase in the consumer price index. The bill also forces public employees to make substantial benefits concessions. Prior to the new law, state and municipal employees in Wisconsin had the right to bargain collectively over wages, hours and conditions of employment.

Developing trend to constrain bargaining rights

In five or six states, according to Craver, politicians are pointing to unions and bargaining laws for the economic circumstances they face. “What they fail to appreciate is the fact that the generous health care and pension rights enjoyed by government employees were granted by their predecessors at the bargaining table,” Craver said. This is especially true in states such as Wisconsin and California, where Democrats “were willing to do almost anything to get union monetary support,” he added. However, it isn’t the bargaining laws that need to be changed, Craver opined, but rather, the way in which governments negotiate with their employees. “They need to demand that their employees contribute more to health care premiums, accept higher deductibles and copayments, and contribute more to pension plans, or move from defined benefit plans to the defined contribution plans enjoyed by most private sector workers,” he advised.

Are restrictions on bargaining rights of public employees lawful? According to Craver, if states do cut back on bargaining rights for government workers, the move should be entirely lawful, because prior court decisions held that there is no fundamental right for public employees to engage in collective bargaining – they merely enjoy a First Amendment right to join labor organizations but no constitutional right for those entities to demand bargaining.

However, “to the extent that states or cities try to cancel the contractual rights of their employees, this would certainly constitute a breach of contract,” Craver observed. These government entities could be sued and held liable for their actions.
Craver noted that municipal governments could seek to negate contractual obligations through bankruptcy proceedings, but states currently lack this avenue of relief. He thinks it will be interesting to see if Congress amends the bankruptcy statute to permit states to use bankruptcy proceedings to cancel outstanding contractual obligations.

**Undemocratic, if not unlawful?** Even if states’ efforts to sharply curtail the collective bargaining rights of public employees are lawful, such actions raise questions in the eyes of some about the way democracies should function. Paul Secunda, Associate Professor of Law, Marquette University Law School, offered five reasons why he believes Wisconsin Governor Scott Walker’s attack on unions is undemocratic:

1. Unions are democratic organizations that provide workers a collective voice in society and in the workplace. They are a countervailing power to employers, employer organizations and governments that promote business interests at the expense of working people and fair social values.

2. European societies function quite well with a much more extensive and robust public (and private) sector union voice. Despite the current problems in the European Union, they still seem to compete well globally while providing comparable if not superior wages, benefits and working conditions.

3. Unions provide protections on the job beyond wages and benefits, most notably “just cause” and procedures for due process protections on the job. These are democratic principles.

4. Unions helped build and sustain the middle class. Governor Walker’s proposals amount to “class warfare” in two ways: (1) fomenting intra-class warfare while (2) supporting the growth of income and wealth disparities favoring the elites in society. Note that the firefighters and police officers are excluded. This is a classic “divide and conquer” management strategy.

5. Civilized societies recognize worker rights (collective bargaining) as a human right.

In short, urged Secunda, this is not about the right to have a say on “benefits,” as some in the media have portrayed it — it’s about securing for workers basic human rights that international law has recognized.

**What’s behind the trend?** Craver believes that the effort of some state leaders to eliminate bargaining laws is driven by wealthy supporters who think that such actions would significantly undermine the entire labor movement.

**Private sector unions in decline.** In the late 1950s, 35 percent of private sector workers were union members, he pointed out. Since then, union membership has shrunk dramatically to 6.9 percent as of the end of 2010. Craver attributed much of this decline to globalization as jobs have been sent abroad and automation that has enabled manufacturers to generate final products with far fewer workers. The U.S. economy has also shifted significantly, transforming from a production economy to a white-collar and service economy, he added. “Unions had their greatest strength in manufacturing and have not been nearly as successful with firms like Wal-Mart,” Craver observed.

**Public sector unions more robust.** Public sector developments have been just the opposite, according to Craver. In the late 1950s, he noted, almost no government workers were in unions, and there were no federal or state bargaining rights. “After the federal government and many state governments extended bargaining rights to their employees, union membership grew rapidly to just over 36 percent today,” Craver advised. He cited two major factors in this growth: the lack of strong employer opposition to unionization due to the lack of profit motive for public employers, and the willingness of liberal politicians to cater to union bargaining demands in return for large financial contributions.

**Reducing overall union strength.** Today, a substantial amount of union support comes from public sector unions. If public sector union membership could be reduced to 20 percent, 15 percent, or even 10 percent, overall union strength would be undermined, Craver explained. “This would help politicians balance their budgets and help private sector leaders continue their efforts to eliminate the meaningful impact of private sector labor organizations,” Craver pointed out. But, he cautioned, American workers would suffer greatly, because individual workers have no bargaining power.

Craver observed that many private sector employees are unsympathetic toward the bargaining rights of their public sector counterparts. Private sector employees feel very threatened with job losses due to the current economic downturn, and they envy government workers, who appear to enjoy far greater job security (although this may change soon). Private sector employees also believe that public sector employees have far greater health care coverage and more generous pension rights. For these reasons, media pundits have been able to convince some private sector workers that government employees are substantially overpaid compared to their private sector counterparts, Craver said.

**State initiatives requiring secret ballot elections**

On another front in the assault against collective bargaining, several states have passed, or are expected to pass, constitutional amendments to require or guarantee the use of secret ballot elections in all union elections, both public and private. But Lafe Solomon, the Acting General Counsel of the National Labor Relations Board (NLRB), has warned the Attorneys General of Arizona, South Carolina, South Dakota, and Utah that the National Labor Relations Act (NLRA) preempts these provisions.

**What’s fueling the movement to do away with voluntary recognition?** According to Craver, politicians in the states
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Charles Craver

that are trying to require secret ballot elections before unions can be recognized are simply catering to their management supporters. “It is entirely clear that voluntary card check recognition is lawful under the NLRA, and thus, state efforts to modify this approach would be preempted by the NLRA,” Craver said. But management leaders seem to believe that private sector unions are about to be eliminated as significant factors, and they would like to do whatever they can to bring this about, he asserted.

Historical context. Over the past 50 years, Craver observed, CEO compensation has risen rapidly, while worker wages have remained quite stagnant. “We have seen a huge redistribution of wealth with the top 1 to 5 percent of wage earners claiming a far greater share of earnings than at any time since the late 1890s and 1920s,” Craver noted, adding that “the robber barons are undoubtedly smiling as they see a return to the circumstances they enjoyed a hundred years ago.”

Craver pointed out that for several decades, labor organizations were able to generate middle class wages and benefits for millions of blue collar workers. “Top managers no longer wish to share firm gains with their workers — or even their shareholders in many cases,” Craver explained. “The declining economic circumstances for so many private sector workers may generate the conditions which led to the enactment of the NLRA in 1935 and the collectivization of employees who have not been traditional union supporters,” he added.

National Labor Relations Board Developments

Proposed notice posting rule. The first of several recent developments at the NLRB that Craver thinks significant is a proposed rule that would require employers to post notices for all employees to apprise them of the rights they have under the NLRA. He believes such a notice requirement is long overdue and likens it to the notice requirements under the Fair Labor Standards Act, the civil rights laws, and the Calif. Knife & Saw decision, in which the Labor Board required labor organizations to notify unit members each year of their right to be only financial core members instead of full members under union security clauses and the right of members to object to the manner in which dues money is being spent. “The vast majority of private sector employees have no idea what their rights are under the NLRA,” Craver said. “They should be specifically informed of those rights — and of the conduct which constitutes unfair labor practices by both employers and labor organizations.”

Overturning Dana Corp. Craver also thinks that the statements of current Board Members have made it “quite clear” that when they have the chance, they will overturn the Dana Corp. decision, which provides employees with the right to file certification petitions for up to 45 days after employers have agreed to extend voluntary recognition to labor organizations that have majority support.

“The Bush Labor Board was totally opposed to employer neutrality and card check agreements, despite the fact that such agreements are entirely lawful under the NLRA and have been used many times over the past 75 years,” Craver observed. “There was absolutely no need for such a 45-day period, because if the recognized union did not actually have majority support, the employer’s recognition would violate Section 8(a)(2) and the union’s acceptance of recognition would violate Section 8(b)(1)(A),” he said. “Any questions regarding a recognized union’s majority support could thus be resolved through unfair labor practice proceedings,” he pointed out. The 45-day window, according to Craver, simply created an impediment to effective bargaining over an initial contract and weakened the momentum achieved by the recognized union. If Dana Corp. is eliminated, Craver anticipates that it will be easier for newly recognized unions to obtain initial agreements.

Appointment of Craig Becker. Another significant development identified by Craver is President Obama’s re-nomination of Craig Becker to serve as a member of the NRB. Becker currently serves on the Board under a recess appointment. Although employer representatives have argued that Becker’s confirmation would lead to certification by card checks instead of secret ballot elections, Craver dismissed this claim as being entirely without merit because the NLRA would have to be amended by Congress to alter the rule requiring secret ballot elections. Craver added: “I do find it ironic that the business executives who argue so forcefully in favor of secret ballot elections change their view immediately when people like me suggest that corporate shareholders should be given secret ballot votes each year on executive compensation packages!”

Preemptive discharge for anticipated concerted activity. Craver also found significant the Board’s recent decision in Parlexel Int’l., 356 NLRB No. 82 (2011), finding that an unfair labor practice occurs when an employer discharges an employee who indicates that he plans to engage in concerted activity, even though he has not done so yet. While Craver thinks the decision will probably generate significant employer opposition, he characterized it as “a modest holding that is entirely consistent with the Act.” He noted that the Labor Board usually asks whether certain employer conduct would be likely to deter the exercise of protected activity by reasonable em-
ployees. “If employers could preemptively fire workers as soon as they learned they might engage in future concerted activity, the rights set forth in Section 7 would be greatly undermined,” he explained. “This is an important decision designed to protect the rights of employees who are contemplating concerted action, but who have not yet acted,” he said.

Full complement of members lacking. Due to Republican opposition to President Obama’s nominations, Craver expects that the Labor Board will continue to lack a full complement of members. “This will undermine the ability of the Board to resolve cases expeditiously and even cause a lack of respect for the Labor Board as a government institution,” Craver admonished. “It is clear that persons like Craig Becker tend to be pro-union, but no more than several Bush members were pro-employer,” he observed. While Craver suggested that it might be nice to return to the days of many years ago when Board members did not come from firms that represented labor or management, he doesn’t see this taking place any time soon. “I would hope that President Obama would work with Senate Republican leaders to come up with the names of four or five persons — three Democrats and two Republicans — who would obtain Senate confirmation,” he said, noting that this would enable the Board to return to full strength.

What are the most important issues currently pending before the Board? Craver identified the two most important issues confronting the Board today. The first concerns the legality of neutrality/card check agreements. “The Bush Board was clearly opposed to such arrangements, despite their clear legality under the Act,” Craver explained. “If labor organizations were to coerce such agreements from unwilling employers, Section 8(b)(1)(A) charges should be processed,” he said. “On the other hand, where employers voluntarily enter into such agreements, as many firms that already have unions at other facilities often do, they should be completely honored,” according to Craver. He pointed out that nothing in the NLRA requires employers to oppose unionization. Individual employees who do not wish to be represented can conduct their own anti-union campaigns, he observed, and any action taken to thwart such efforts would be clearly unlawful whether undertaken by employers or unions. Craver thinks the current Board will accept such agreements.

The second issue that the current Board may be required to resolve concerns the right of non-majority unions to bargain for employees on a members-only basis, as is being asserted by labor law scholar Charles Morris. Craver at first found it difficult to imagine that members-only bargaining would be required instead of simply permitted but later began to think that Morris has made the most cogent argument in favor of mandatory members-only bargaining. “Such a rule could be highly beneficial for labor organizations that currently lack majority support but hope to generate greater support through members-only agreements,” Craver urged. “If such unions could enhance the rights of their members, nonmembers might decide to seek full bargaining rights,” he explained. But what Craver doesn’t know is how employers could negotiate members-only benefits without extending similar benefits to nonunion employees to avoid Section 8(a)(3) discrimination claims by the individuals not receiving similar benefits. “I don’t know whether the current Labor Board will accept such a belated interpretation of the Act, but I think that appellate courts will not uphold such rules if adopted by the Board,” he concluded.

The state of labor relations

What is the current state of U.S. labor relations? Placing it in historical context, Craver described the current state of labor relations as being at one of the most critical points in our nation’s history.

Push for more wealth. For many years, according to Craver, business leaders were pleased with generous compensation packages and were willing to share their business gains with employees. But as financial sector leaders and high-tech entrepreneurs began to earn billions of dollars, executives began to feel the need to become equally wealthy, in Craver’s view. “I even hear young persons talk about how they don’t simply hope to become millionaires but want to become billionaires!” he said. He also cited the same phenomenon among law firm partners who have greatly increased their partnership distribution packages, as the Legal Times and other publications have demonstrated how much partners are actually earning.

“When I was in practice many years ago, partners made good salaries but not obscene salaries,” Craver explained. “They now want to be millionaires and are willing to threaten the continued economic viability of their firms to accomplish this objective,” he said.

Individualistic culture, middle class elimination. Moreover, the United States is a highly individualistic culture, Craver observed. “We determine our position in the professional world by how much WE have earned,” he noted. Craver finds it ironic that wealthy persons work together in the form of corporations, and big businesses are all in large associations, such as those for chemical manufacturers, pharmaceutical firms, the Chamber of Commerce, the AMA and the ABA. “The only group with no collective voice is the individual worker who possesses no bargaining power,” he pointed out. “If we continue to eliminate the middle class, with 5 to 10 percent of Americans claiming almost all compensation and holding almost all of the wealth, we may witness a significant backlash as the other 90 to 95 percent finally revolt,” he cautioned. “We have seen such developments in many nations where wealth inequality has developed in a similar manner,” he said.

Moreover, as we elect more conservative state and federal politicians, state bargaining laws may be eliminated or curtailed, and private sector workers will continue to see their economic situations decline, according to Craver. “If this trend continues, we may return to the circumstances that caused workers to demand bargaining rights during the Great Depression,” he warned, expressing hope that we do not go down this path.