

H.R. 413/S. 1611, “The Public Safety Employer-Employee Cooperation Act”

Introduction

This legislation would use the power of the federal government to mandate unionism and collective bargaining in state and local public safety (police, fire and rescue) departments.

Specifically, they instruct the Federal Labor Relations Authority (FLRA) to promulgate regulations for unionism and collective bargaining in state and local police and fire departments in states that have not enacted laws giving unions these powers and privileges.

Wolf in Sheep’s Clothing

Every effort has been made to make this legislation seem less threatening. During House Committee hearing the author said that it would “enable public safety employees to discuss work conditions” without acknowledging that there is a tremendous difference between discussions and negotiations. Much has been made of the idea that the bill contains an exemption for political subdivisions with less than 5,000 population or less than 25 full time employees. It does not! It does permit state laws to have such an exemption but no such exemption is provided for in the requirements for federal regulations. It allows state laws to have impasse procedures ending short of binding arbitration but clearly intends that the federal regulations will include binding arbitration.

Beyond that, this bill is flawed because it is a massive unfunded federal mandate on state and local government, and it would tear the fabric of federalism by interfering in what is properly the prerogative of state government.

Background:

When Congress enacted the first National Labor Relations Act in 1935, all public employment was exempt from its provisions. Since then unsuccessful efforts have been made to impose federal control on state and local public employment.

Whether or not collective bargaining is appropriate to

employer-employee relations in the public sector is by no means a settled issue. (See “The Case Against Public Sector Unionism and Collective Bargaining.”) The first state law imposing unionism and collective bargaining on state and local government was enacted in Wisconsin in 1959. Since then many states have followed suit but many others have rejected such legislation.

Some states have separate laws covering either police or fire departments. Some comprehensive state laws have different provisions dealing with certain aspects of unionism in public safety departments, such as impasse resolution and management rights. In some states, the laws give local government the option of whether to be included under their coverage. In many states, in the absence of a state mandate, local governments have enacted ordinances making provision for union recognition in public safety departments.

In many states, however, the elected representatives of the people have decided that granting unions monopoly bargaining powers was not in the public interest. Some states have simply rejected proposed public sector unionism legislation while others have enacted laws prohibiting public sector collective bargaining.

This legislation will cause severe disruptions in existing public employer-employee relations in these states. In two states, North Carolina and Virginia, the legislatures have taken the additional step of making public sector collective bargaining illegal. This will cause constitutional problems in these states.

States with no law granting public sector unions collective bargaining powers:

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| Alabama | North Carolina |
| Arizona | North Dakota |
| Arkansas | South Carolina |
| Colorado | Tennessee |
| Indiana | Utah |
| Louisiana | Virginia |
| Mississippi | West Virginia |

In addition the following states have less than comprehensive statutes on public sector collective bargaining in public safety departments and would not qualify for exemption under the provisions of these bills.

Georgia - There is legislation authorizing collective bargaining in fire departments in cities with a population of 20,000 or more but no law dealing with unionism in police departments.

Idaho - There is legislation mandating collective bargaining in fire departments but no law dealing with unionism in police departments.

Kansas – The public sector collective bargaining law contains a provision allowing local governments to opt in. Very few local governments have done so.

Kentucky - There is legislation mandating bargaining in fire departments in cities of greater than 300,000 population. Local governments have an option for coverage under this law. There is no law on police union bargaining.

Maryland - There is legislation giving a local option on bargaining in fire departments but no legislation dealing with unionism in police departments.

Missouri - A state law mandates a “meet and confer” relationship in fire departments but not police departments.

Oklahoma – The police and fire collective bargaining law only applies to municipal governments.

Texas - A state law gives local option for unionism in both police and fire departments contingent on approval of a referendum by the voters.

Wyoming - There is legislation mandating collective bargaining in fire departments but no law dealing with unionism in police departments.

This legislation would alter the employer-employee relationship in public safety departments at one or more levels of government in twenty-six states.

A Bad Law:

This legislation betrays the flaw in its conception and purpose in its preamble. It declares it to be the policy of the United States that “Labor-management relationships and partnerships are based on trust, mutual respect, open communication, bilateral consensual problem solving and shared accountability.”

This is all well and good. The rest of the bill, rather than encouraging “bilateral consensual problem solving” creates a system under which states that have chosen not to mandate collective bargaining, are forced into a one-size-fits-all federal straightjacket. There is nothing consensual about an adversarial relationship in which you are forced to participate, nor would such a relationship further the goals of “trust, mutual respect and open communication.”

Ironically, this bill grants state and local police and fire unions powers that far exceed those granted by the federal government to unions representing comparable federal employees.

Even if the purpose of this legislation were admirable, which it certainly is not, these bills would be a bad way for Congress to approach this controversial issue. The legislation establishes conditions under which states may apply for exemption from its provisions and then directs the Federal Labor Relations Authority (FLRA) to issue and administer regulations implementing collective bargaining in states that do not qualify for the exemption.

This approach completely ignores the fact that in public sector labor relations law, just as in many other laws, the devil is in the details. Congress, by offering no direction at all, leaves these important details in the hands of unelected federal bureaucrats whose bias toward unionism and collective bargaining is undisputed.

This legislation goes to some length to proclaim that it will not interfere in existing union recognitions and collective bargaining agreements. This declaration is questionable under the terms of the legislation, particularly under the conditions set forth for qualification for an exemption from its coverage.

Three of the most controversial aspects of public sector bargaining law are supervisor bargaining,

management rights and impasse resolution.

Supervisor Bargaining

Whether or not supervisors are included in bargaining is one of the most difficult issues faced in crafting public sector bargaining legislation. This is not an issue in the private sector where the National Labor Relations Act, in order to preserve balance between the interests of labor and management, excludes all supervisors from coverage.

The issue of supervisor bargaining in the public sector is particularly acute in the area of public safety employment because of the way such relations have developed historically in different jurisdictions and even in different agencies within the same jurisdiction.

Some state public sector collective bargaining laws provide that supervisors may be included in bargaining units or that supervisors shall have separate bargaining units. A few exclude supervisors from coverage all together. Others include supervisors in bargaining units in fire departments but not in police departments.

To give some idea of just how difficult an issue this is and to demonstrate the importance of leaving such matters to state government, one need only look at Ohio's public sector bargaining law. The Ohio statute begins by defining supervisor in language almost identical to the below cited provision of the proposed federal law. It then goes on to say,

With respect to members of a police or fire department, no person shall be deemed a supervisor except the chief of the department or those individuals who, in the absence of the chief, are authorized to exercise the authority and perform the duties of the chief of the department. Where prior to June 1, 1982, a public employer pursuant to a judicial decision rendered in litigation to which the public employer was a party, has declined to engage in collective bargaining with members of a police or fire department on the basis that such members are supervisors, those members of a police or fire department do not have the rights specified in Ch. 4147 of the Revised Code for the purposes of future collective

bargaining. The state employment relations board shall decide all disputes concerning the application of this division.

The proposed federal legislation, in an effort to preserve union privilege where it has been granted by state legislatures and at the same time not to interfere with other existing mandatory bargaining laws creates a quagmire that would work great hardship on many public safety departments.

The bills begin by saying that the term "supervisory employee" has whatever meaning it is given under state laws existing at the time of its enactment and then goes on to say that, if a state doesn't have such a law it means an employee who:

(A) has the authority in the interest of the employer to hire, direct, assign, promote, reward, transfer, furlough, lay off, recall, suspend, discipline, or remove public safety officers, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment; and

(B) devotes a majority of time at work to exercising such authority.

The first part of the definition may suit many public safety departments but the second part will wreak havoc with the vast majority of small departments in which an employee has these responsibilities but, because of the size of the department, doesn't spend a "majority of time at work" exercising such authority.

To make matters worse, in Section 4(b) of the bill in outlining the factors the FLRA should consider in granting exemptions for existing state laws says that the laws "may exclude management and supervisory employees" but then in Section 5(a) it says that the FLRA "shall issue regulations in accordance with the rights and responsibilities described in section 4(b)."

In short, Congress in a legislative slight of hand is trying to give the impression of having addressed the issue but is in reality saying that the FLRA shall issue regulations imposing unionism and collective bargaining on state and local public safety departments that "may exclude management or

supervisory employees.”

This is legislative insanity. Congress would be turning over to a bureaucratic branch of government, appointed by the President of United States, the power to decide whether management and supervisory employees in public safety departments in states all across the nation are included in a union or not.

What do they imagine, that during Republican Administrations management won't be union but that during Democratic Administrations it will be? Can you imagine anything more disruptive of “mutual respect, open communications” etc.? These provisions, which are essential to the machinations of the bills' supporters, are another example of just how unwise and poorly conceived this legislation is.

Management Rights

Another very difficult issue in public sector collective bargaining is the scope of negotiations and management rights. Many state public sector collective bargaining laws have what are known as “management rights” provisions to ensure that the elected representatives of the people retain control of the size, cost, quality and direction of essential public services.

Some state collective bargaining laws have elaborate provisions to ensure management rights, others have no such provision.. Strong and explicit provisions for management rights in public sector collective bargaining laws are less likely in states with strong unions.

In California, for example, what might pass for the “management rights” clause in the Meyers-Milias-Brown Act, the public sector collective bargaining law covering local police and fire departments, says:

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including but not limited to, wages, hours, and other terms and conditions of employment, except, however that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

In short, under this law everything other than whether government will provide a service may be considered subject to negotiation. This leaves little in the way of “management rights.”

Contrast this to the “employer rights” provision in Maryland’s municipal bargaining law.

Notwithstanding any other provision contained herein it is the exclusive right of the employer to determine the mission of each of its constituent agencies, set standards of service to be offered to the public, and exercise control and direction over its organization and operations. It is also the right of the employer to direct its employees, to hire, promote, transfer, assign, or retain employees in positions within an agency and in that regard to establish reasonable work rules. It also retains the right to suspend, demote, discharge or take other appropriate disciplinary action against its employees for just cause, and in accordance with the provisions relating to civil service of employer’s charter and other applicable laws; or to relieve its employees from duty in the event of lack of work, funds, or for other legitimate reasons.

This proposed federal legislation is obviously intended to extend the ability of unions to dominate these decisions in states subject to federal regulation far beyond what they have been able to achieve through the state legislative process in many states that already have public sector collective bargaining laws on the books.

The first hint of this comes in the fact that the bill defines a “labor organization” as one that represents employees “concerning grievances, conditions of employment and related matters.” In defining “employer,” however, it makes no comment of the role of the employer, other than to employ.

Then in Section 4(b) it defines the obligation to bargain as related to “hours, wages, and terms and conditions of employment.” Experience with other collective bargaining laws has shown that without some statutory limitations, the definition of “terms and conditions of employment” can be extremely broad. It might include, for example, any or all of the

things mentioned in the Maryland law cited above. Apparently Congress intends to leave that very important determination up to the FLRA.

Impasse Resolution

The exemption provisions in Section 4(b) of these proposals also requires that state law must contain “an interest impasse resolution mechanism, such as fact-finding, mediation, arbitration or comparable procedure.” “Interest impasse” is a term of art in the public sector collective bargaining business.

There are two types of disputes, “interest” and “rights,” that might lead to an impasse -- a failure to reach agreement. “Interest” refers to disputes about contract provisions that are being negotiated. In other words, they are disputes about what terms should be in the contract. “Rights” disputes are about the interpretation of contract terms that have already been negotiated and approved.

“Fact finding” refers to a process by which a supposedly impartial person or board inquires into the facts of a dispute. Fact finding usually involves a report of the fact finders, which may be restricted to the parties involved in the dispute or made public as a means of putting pressure on the parties to reach an agreement.

Many states realized that mandating public sector collective bargaining really created more problems than it solved and that it created strife rather than reduced it. Because they wished to avoid the adverse consequences of strikes against vital public safety services, the laws provide for binding arbitration of police and fire labor disputes.

In arbitration a supposedly neutral third party considers the issues in dispute and makes a decision that is binding on both parties. This is completely destructive of control of government by democratically elected representatives of the people. Several prominent political figures have supported binding arbitration until they saw its consequences and then realized that it was worse than the strikes it was intended to prevent.

Binding arbitration is a “no lose” proposition for unions. They achieve all they can at the bargaining table and then force an impasse knowing that the

arbitrator will never award less than management has already conceded.

Again it must be noted that the loose wording of the provision of Section 4(b) related to impasse resolution is intended to accommodate union interest in preserving power where it has been achieved under state law, but that it leaves the door entirely open to the FLRA under Section 5(a) to issue regulations imposing binding arbitration of impasses on the states that don’t qualify for an exemption. There is a strong hint in the legislation that is the intention. The enumerated duties of the FLRA include resolving “exceptions to the awards of arbitrators.”

This is nothing short of legislative blackmail. This legislation says, in effect, to states without laws granting monopoly bargaining privileges to unions in public safety departments, “enact your own law now or what the federal government will do to you will be far worse than you can imagine.”

Strikes Against Vital Public Services

If truth in labeling laws applied to acts of Congress, calling this bill an “Employer-Employee Cooperation Act” would be illegal.

These proposals contain a provision prohibiting strikes and lockouts. They simply say “A public safety employer, employee, or labor organization may not engage in lockouts or strikes.” This may give some a false sense of security but it will accomplish absolutely nothing.

It is clear from the way the bill is written that no matter what it says about strikes being prohibited that is not the intent of the authors. The prohibition on strikes is in Section 6 of the bill, which says in its entirety, “A public safety employer, officer, or labor organization may not engage in a lockout or strike.”

All of the enforcement provisions of the bill are contained in Section 5(c) and they are limited to enforcing the provisions of “this section.” So while the bill appears to prohibit strikes there is no way to enforce the prohibition.

Beyond that, even if the enforcement mechanisms of Section 5 applied to the prohibition on strikes they would be ineffective. A study of all public sector

strikes between 1958 and 1980 clearly demonstrated that the enactment of state laws mandating unionism and collective bargaining correlated to a fourfold increase in strikes against vital public services.

The vast majority of these strikes have been illegal. The provision in this legislation prohibiting strikes is worthless, unless it is backed up by strong, mandatory penalties against illegal strikes, which it is not.

An Unfunded Federal Mandate on State and Local Government:

There is no doubt that the imposition of unionism and collective bargaining on public employment increases costs. A 1996 study by the Department of Fiscal Services of the Maryland General Assembly concluded that collective bargaining would add 1.5 percent per year to compensation costs.

A cursory analysis of the payroll costs of police officers and fire fighters in the states where there is presently no collective bargaining mandate indicates that they are in the neighborhood of \$10 billion a year. One and a half percent of this amount is \$150 million and that is an annualized cost.

In addition to the direct cost of compensation there is also the cost of the bargaining process. The Maryland study found that collective bargaining would cost between 1.3 and 1.4 million dollars in process costs for 12 bargaining units of state employees. This legislation would create an enormous number of new bargaining units at a process cost that is beyond our present ability to estimate. Needless to say, it would be very great.

Unconstitutional

This legislation is also of dubious constitutionality. A June 21, 2010 report by the Congressional Research Service raises serious questions as to whether the Commerce Clause in the U.S. Constitution “provides sufficient authority” to support this bill. In addition, the U.S. Supreme Court’s decision in Alden v. Maine on June 23, 1999, raised serious doubts as to whether Congress had the authority to impose federal labor law on state, and therefore local, government.

The Will of the People

Beyond the question of constitutionality there is growing evidence that giving public sector unions monopoly bargaining powers is contrary to the popular will. In recent years the question of whether to extend monopoly bargaining privileges to unions in public safety departments has been on the ballot in several cities and in at least one state. The voters have invariably rejected these proposals.

In addition, the issue of granting public sector unions monopoly bargaining privileges has been hotly debated in many states. In the states that would fall victim to this federal mandate the state legislatures have rejected such proposals.

Conclusion

Enactment of the “Public Safety Employer-Employee Cooperation Act” would tear the fabric of federalism in an essential area of public policy. It would be an enormous unfunded federal mandate on state and local government. It would result in a massive increase in public sector unionism and the resources available to the union movement in general. It would give encouragement to those who want the federal government to mandate unionism in every area of state and local employment.

Please contact your representatives in Congress urging them to oppose this dangerous legislation.

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Copies of “The Case Against Public Sector Unionism and Collective Bargaining” are available on request. For more information please contact:

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