

2017

Five Myths About Public Sector Labor Law in Nevada

Ruben J. Garcia

University of Nevada, Las Vegas -- William S. Boyd School of Law

Follow this and additional works at: <http://scholars.law.unlv.edu/facpub>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Garcia, Ruben J., "Five Myths About Public Sector Labor Law in Nevada" (2017). *Scholarly Works*. 1026.
<http://scholars.law.unlv.edu/facpub/1026>

This Article is brought to you by the Scholarly Commons @ UNLV Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact david.mcclure@unlv.edu.

Five Myths About Public Sector Labor Law in Nevada

By Ruben J. Garcia *

Introduction

As the 79th Session of the Nevada Legislature draws to a close, now is a good time to reexamine the previous legislative session and some of the myths about public sector labor law that predominated two years ago. The 78th Session of the Nevada Legislature began February 2, 2015 with some hoping for long-awaited reform of collective bargaining laws. The Nevada Policy Research Institute (NPRI) published a ten-point wish list of public sector labor law reforms it hoped for in the session.¹ Although NPRI did not get everything it hoped for, several of its wishes were granted by the Republican-controlled legislature.²

The 2015 legislative session took place in a national political climate that was and continues to be increasingly hostile to public sector labor unions. Before dropping out of the Republican presidential primary race, New Jersey Governor Chris Christie was quoted as saying “the national teachers union” deserves a “punch in the face.”³ In the last four years, Midwestern states such as Indiana, Michigan and Wisconsin, which in years past formed the cradle of the labor movement, rolled back collective bargaining rights and made the public sector “right to work,” meaning that employees who are represented by a union have no duty to pay any dues to that union in return. Then, in June 2015, the United States Supreme Court agreed to hear *Friedrichs v. California Teachers Association*,⁴ which

* Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas.

¹ Geoffrey Lawrence, *Top 10 Labor Reforms for 2015: Steps to a Sustainable Prosperity*, NEVADA POLICY RESEARCH INSTITUTE (Nov. 25, 2014), <http://www.npri.org/issues/publication/top-10-labor-reforms-for-2015>.

² Kyle Roerink, *Battle Lines: Why Unions are Preparing for Assault*, LAS VEGAS SUN, <http://lasvegassun.com/news/2014/dec/17/battle-lines-why-unions-are-preparing-assault-legi/>.

³ Valerie Strauss, *Chris Christie Wants to Punch the Teachers Union in the Face*, WASH. POST (Aug. 3, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/08/03/chris-christie-wants-to-punch-the-teachers-union-in-the-face-but-he-isnt-the-only-candidate-attacking-educators>.

⁴ No 14-915, cert. granted (June 30, 2015).

challenged union security agreements as violations of the First Amendment rights of nonmembers. Oral argument in the case revealed an obviously polarized Court and the case could have made all states “right to work” as a matter of constitutional law.⁵ This would mean that no employee in either public or private sector who receives the benefits of collective bargaining would be obligated to pay any dues to the union. Following the unexpected death of Justice Antonin Scalia on February 13, 2016, the case ended in a tie, leaving in place agency-shop laws in the 25 states that have them.⁶

A different result in *Friedrichs* would have had no impact in Nevada, which has been a “right to work” state in both the public and private sectors since 1962. In Nevada, collective bargaining is available in the public sector only to those who work for local governments — state employees are prevented from collective bargaining.⁷ Although Nevada has one of the highest percentages of workers covered by collective bargaining agreements in the country (16.4 percent in 2014 compared to 6.7% nationally), its percentage of public sector workers covered by collective bargaining agreements is slightly below average (37.8 percent in 2014 compared to 39.4 percent nationally).⁸ This discrepancy must be due in part to the large number of state employees who cannot engage in protected collective bargaining.

As in all other states, public sector labor law in Nevada is wholly created by state law, as the National Labor Relations Act excludes any “state or political subdivision thereof” from the definition of “employer.”⁹ Like the federal National Labor Relations Board, Nevada’s Employee Management Relations Board may hear complaints “arising out of the the interpretation of, or performance under, the provisions of this chapter by any local government employer, local government employee, or employee organization.”¹⁰ The Nevada Employee Management Relations Act similarly applies only to employees of political subdivisions of the State, such as counties, cities, school districts, charter schools and hospital districts, but not to state employees. As with most public sector labor laws, local government employees forego the right to strike in favor of binding interest arbitration.¹¹

The forces of collective bargaining reform in the 78th Nevada Legislative Session primarily set about to: (1) make it *easier* for employees **not** to pay anything to the unions that are required to

⁵ *Friedrichs v. California Teachers Assn.*, official transcript (Jan. 11, 2016), https://www.supremecourt.gov/oral_arguments/argument_transcripts/14-915_e2p3.pdf.

⁶ *Friedrichs v. California Teachers Assn.*, No 14-915 slip op. (Mar. 29, 2016).

⁷ NEV. REV. STAT § 288.033 (2015)(defining “collective bargaining” as between “local government employers” and “employee organizations”).

⁸ Union Membership, Coverage, Density, and Employment by State and Sector, 1983-2015, UNION MEMBERSHIP AND COVERAGE DATABASE FROM THE CPS (2014), www.unionstats.com.

⁹ 29 U.S.C. § 152(2) (2016).

¹⁰ NEV. REV. STAT. § 288.110(2) (2015); See Bruce K. Snyder, *Nevada’s Special Discrimination Law for Local Government Employees*, 2 NEV. PRAC. J. LAB & EMP. L. 4 (2017).

¹¹ NEV. REV. STAT § 288.200 – § 220 (2015).

represent them in negotiations and grievance handling and (2) eliminate the kinds of agreements and practices that purportedly have caused financial turmoil to the state as it emerges from the depths of the Great Recession. Unfortunately, many of these “reforms” were based on misconceptions about the role and effects of public sector collective bargaining in Nevada and in American society generally. In this article, I describe five of these prevailing myths and show that they lack basis in the realities of collective bargaining and public sector unions today. I also describe the legislation that was enacted in the 78th session and its impact on public sector collective bargaining in Nevada. Then, I look ahead to the lessons that the last two years may hold for the 2017 legislative session.

Myth #1: Collective Bargaining Results in Overpaid Public Employees

The argument that collective bargaining leads to overpaid public workers is made in many states, but a cause and effect relationship is lacking between collective bargaining and government employee salaries. In states where there is virtually no collective bargaining at all in the public sector, personnel costs still make up the largest share of government expenses. A 2012 report by the Center for Budget and Policy Priorities pointed to the reason for this: “Because providing services is the primary business of states as well as school districts, cities, counties, and other local governments, labor costs — i.e., wages and benefits — make up a significant share of their annual spending.”¹²

The question of whether public sector collective bargaining exerts inordinate costs on local governments has been the subject of study by economists and legal scholars alike. Recently, Kenneth Dau-Schmidt and Mohamed Khan persuasively noted that the right to collectively bargain is limited in 34 states, and the right to strike is even more constricted. “It seems a gross exaggeration,” they argue, “to say that public sector unions in the United States establish a labor cartel that dictates wage and benefit increases.”¹³ Because government is a monopsony — the only provider in the market for government services — it has the power to dictate wages more than a private sector employer in a competitive labor market. Those who want to be police or firefighters, then, can work only for the local government; thus, employees’ bargaining power and power to exit is limited.¹⁴

The costs of collective bargaining on public employers have been examined primarily with national data. During the legislative session, however, professor Jeffrey Keefe of Rutgers University testified before the Assembly Committee on Commerce and Labor that Nevada public employees are

¹² Elizabeth MacNichol, *Some Basic Facts on State and Local Government Workers*, CENTER FOR BUDGET AND POLICY PRIORITIES REPORT, June 25, 2012, <http://www.cbpp.org/research/some-basic-facts-on-state-and-local-government-workers> at 3.

¹³ Kenneth Dau-Schmidt and Mohamed Khan, *Undermining or Promoting Democratic Government? An Economic and Empirical Analysis of Two Views of Public Sector Collective Bargaining in American Law*, 14 Nev. L.J. 414, 423 (2014).

¹⁴ Id.; see also Albert O. Hirschmann, *EXIT, VOICE AND LOYALTY* (1970) (where options for exit are limited, employees will more likely resort to voice mechanisms).

paid lower than the national average.¹⁵ Keefe said that Nevada local government employees earn 5% less in total compensation per hour than comparable full-time employees in the private sector. And Nevada local governments pay college-educated employees 22% less in annual compensation on average than private employers.

On the other side, James Sherk of the Heritage Foundation testified to the Assembly Committee on Government Affairs that mandatory collective bargaining unnecessarily inflates state and local spending by \$300 per resident, and that limiting collective bargaining enabled Wisconsin to close its budget deficit and reduce taxes at the same time.¹⁶ National data since the beginning of the Recession tells us that public sector employment decreased by about 27,000 jobs across the board.¹⁷ Again, these national examples, if accurate, tell us little about what the savings would be in Nevada if public sector collective bargaining were further curtailed.

With the goal of saving government funds, the Legislature eliminated so-called “evergreen clauses” in Senate Bill 241, which was approved and effective on June 1, 2015.¹⁸ First of all, the use of the term “evergreen contract” to describe what the bill was trying to reform is misconceived. Generally, when a labor contract expires, some provisions may be maintained in the interim between contracts, but pay increases in the agreement may not necessarily be one of them. The myth behind these clauses is that unions have an incentive to drag out negotiations and delay reaching a new agreement. No union, however, wants to work under an expired agreement indefinitely because many of the terms of the agreement do not continue with the expiration of the agreement, such as the requirement that the employer continue to deduct union dues. Delays are just as often because of the unwillingness of the employer to engage in negotiations, or the difficulty in scheduling a fact-finding hearing. Now, SB 241 prevents the “granting of any compensation” to employees when the collective bargaining agreement has expired. In contrast, the same action might be legally required in private sector collective bargaining. This includes even the operation of the regular step increases that are not cost of living adjustments at all. These are not the government giveaways that they were made out to

¹⁵ *Are Nevada Local Government Employees Over-Compensated?*: Hearing on AB 182 before A. Comm. on Commerce and Labor, 2015 Leg., 78th Session, Exhibit E (Nev. 2015)(statement of Jeffrey Keefe)

<https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1559/Exhibits>.

¹⁶ Testimony of James Sherk, *Hearing on AB 182 before A. Comm. on Government Affairs*, 2015 Leg., 78th Sess., 19-24 (Nev. 2015).

¹⁷ See David Lewin, *Effects of Deep Recession on Public Sector Pay, Benefits, and Employment*, in PUBLIC JOBS AND PUBLIC AGENDAS: THE PUBLIC SECTOR IN AN ERA OF ECONOMIC STRESS, 13-40 (Daniel J.B. Mitchell, ed. 2012); Steven Greenhouse, *More Workers Face Pay Cuts, Not Furloughs*, N.Y. TIMES, Aug. 4, 2010,

<http://www.nytimes.com/2010/08/04/business/economy/04paycuts.html>

¹⁸ S.B. 241, 2015 Leg., 78th Sess., (Nev. 2015), *codified at* NEV. REV. STAT. § 288.170

<https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1699/Overview>

be during the session. Their elimination will lead to more difficulties in negotiations, and less labor peace as has already been the case.¹⁹

Most of the examples of excessive compensation are for firefighters and law-enforcement employees—what most people consider to be essential public services. Those workers are paid higher salaries than other government workers, including copious amounts of overtime hours. In the wake of tragedies such as 9/11, emergency first responders occupy a celebrated position in popular culture. As Bob Dylan sang earlier in this century, however, “things have changed.”²⁰ In Nevada, recent scandals involving the abuse of sick pay by firefighters in Clark County made the public more critical of their pay and benefits.²¹

However, states that have no public sector collective bargaining were not spared the worst of the recession or the ensuing hit on state budgets. In fiscal year 2013, for example, North Carolina had the third highest budget deficit, though collective bargaining for public employees is banned by state law.²² Meanwhile, states with some of the highest levels of public sector collective bargaining – New York, California and Illinois – have enjoyed some of the highest levels of economic growth for the same period. Thus, low levels of collective bargaining do not automatically translate to economic prosperity. While it is hard to see the economic effect of public sector unionization on the private sector, several private business groups and chambers of commerce also testified in the legislature in favor of SB 241 and other attempts to change Nevada public sector labor law during the 2015 session.

Myth #2: Public Sector Unions Make It Difficult to Quit the Union or Withdraw from Political Activities

The U.S. Constitution and statutory labor laws provide several protections to those who would rather not be members of a union, even if those employees receive the benefits the union has negotiated. The most obvious statutory examples in the private sector are the 25 states, including Nevada, that are so-called “right to work” states. In these states, the union has a duty to fairly represent all workers in its bargaining unit even if they refuse to join the union or pay any fees for the services they receive. As in the private sector, Nevada local government employees cannot be required to be a member of the union that represents them or to pay any of the costs of representing them.

¹⁹ See Neal Morton, *Obstacles Slow CCSD Labor Talks*, LAS VEGAS REV.-J., July 5, 2015, at B1.

²⁰ Bob Dylan, “Things Have Changed,” from THE WONDER BOYS Original Motion Picture Soundtrack (Columbia Records, 2000).

²¹ See, e.g., Ben Botkin, *Firefighter Fired, Rehired in Clark County Sick Leave Probe Fights for Disability Pay*, LAS VEGAS REV.-J., Mar. 15, 2015; Jamie Munks, *Las Vegas Approves Three Year Contract with Firefighters*, LAS VEGAS REV.-J., Nov. 3, 2016 at B5.

²² Center on Budget and Policy Priorities, *Projected budget shortfalls of states in the U.S. for fiscal year 2013 (in million U.S. dollars)*, STATISTA, <http://www.statista.com/statistics/247323/budget-shortfalls-of-states-in-the-us/>.

In the 2015 Legislative Session, there were attempts to allow Nevada teachers and other government employees the ability to withdraw from the union at any time, instead of during the window period that is currently available for union members to renounce their membership. These window periods are common in labor law and they exist to give some stability to the bargaining relationship.

Fortunately for the public sector unions, these bills that would bring havoc to the system did not get very far in the session. It seems sensible to require employees to pay enough attention to know when they are able to resign the union. NPRI certainly does its best to remind teachers when the window period is, by creating a web site called "teacherfreedom.com," advertising the window period on billboards around Clark County, and e-mailing teachers individually with the bulk email address database that Nevada Supreme Court recently held was a public record that the School District was required to produce as a public record.²³

In many "at-will" states, represented employees may still be required to pay the costs of the benefits they receive from grievance administration and contract negotiation. In Nevada, there is already a free rider problem created by the right to work law. But there is no evidence that government employees' dues are being used for improper political purposes, because to do so would be a violation of federal election law, and there have been no reports of election misconduct by unions.

Myth #3: Public Sector Collective Bargaining Lacks Transparency

Many – but not all – government actions are freely available for the public to see, whether in public hearings or on the Internet.²⁴ Other meetings, such as disciplinary hearings, hiring meetings, interviews are closed to the public for good reasons. Government could not function if it had to send notice of all its actions, especially in personnel matters.

Groups such as NPRI have long advocated for greater transparency of union activities and collective bargaining negotiations. Union and local government negotiations are currently exempt from the open meeting requirements.²⁵ Transparency in negotiations is important, says NPRI, so the taxpayers can elect governments which do not give away too much in salaries and benefits to unions. Others have argued that for the political process to be responsive and reliable, citizens must have knowledge of the issues, their implications and alternative proposals.²⁶

²³ *Nevada Policy Research Inst., Inc. v. Clark Cty. Sch. Dist.*, No. 64040, 2015 WL 3489473 (Nev. May 29, 2015) (unpublished order).

²⁴ See, e.g. www.leg.state.nv.us.

²⁵ NEV. REV. STAT. § 288.220 (2015).

²⁶ See, e.g., Bruce Ackerman & James Fishkin, *WHEN THE PEOPLE SPEAK* (2004); James Fishkin, *DEMOCRACY AND DELIBERATION* (2001).

In fact, public sector negotiations are much more open than most private sector labor negotiations. Hardly a day goes by when the media in Las Vegas, particularly the *Las Vegas Review Journal*, does not run a story on union negotiations. Even before the legislative session, many stories were run about the drawn out negotiations between Clark County and members of Service Employees International Union Local 1107, perhaps in part because of the extended scrutiny that the negotiations receive. By contrast, private sector unions and employers can agree to news blackouts and gag orders during negotiations, essentially eliminating all transparency in the process.

In the 2015 legislative session, bills proposed to open up all government-labor negotiations to the public were not passed in favor of a requirement in SB 241 giving the public three-days notice of a pending vote on a collective bargaining agreement. While there seems little wrong with this requirement, it does not add much to the information that is already available to the public. We will have to see if this innovation leads to a more engaged citizenry over collective bargaining matters. Thus far, little seems to have changed. Even if the public was more involved, there would seem to be little incentive at that point to change the tentative agreement negotiated and very little time to try.

Myth #4: Collective Bargaining Hands Disproportionate Political Power to Public Sector Unions

An ongoing theme of attacks on collective bargaining is that reform is needed to “restore the balance of power” between unions, government and citizens.²⁷ But the case has not been made that there is an imbalance, and certainly that case is hard to make in Nevada. As discussed above, few public employees in Nevada even have collective bargaining. Public sector unions have been called the “special interest with the most power” over local governments.²⁸ It is certainly the case that personnel costs are the largest part of government expenses, but that is true for nearly all public sector employers.

Ironically, collective bargaining is itself the only thing that brings balance to the employer-employee relationship, because otherwise the government as employer would have unilateral power that no other employer has — to set terms and conditions of employment and the regulatory landscape in which the work is done. For example, if the Nevada legislature wanted to exclude all public employees from the coverage of state overtime laws, it could do so. Collective bargaining and political pressure are the employees’ only defense against such exemptions – provided that the collective bargaining by government employees is not abolished completely, as the states of North Carolina, South Carolina and Virginia have done.

²⁷ See, e.g., Victor Joecks, *Collective Bargaining Reforms Will Create a Better Balance of Power*, Mar. 25, 2015, <http://www.npri.org/issues/publication/collective-bargaining-reforms-will-create-a-better-balance-of-power>.

²⁸ Daniel Disalvo, *GOVERNMENT AGAINST SELF: PUBLIC UNION POWER AND ITS CONSEQUENCES* (2015).

The main concern in the 2015 Session involved release time — the time spent on union business that was negotiated in some agreements. This was seen as a way for union officials to spend time on political causes, even though it would be illegal for the union to do so. Instead, release time was used as a way to level the playing field between unions and management. If management can negotiate and administer collective bargaining agreements on the public dime, it seems unfair for unions not to be afforded that opportunity as well. Moreover, for every public labor contract provision that the public finds distasteful, there had to be agreement by the public entity to the provision. Perhaps the employer and the public got something valuable in return, but it would be very hard for the public to evaluate the whole agreement in three days.

Much of this has been about trying to clip the power of public-sector unions. But the need to do so assumes that they have disproportionate power. The legislative session itself showed that public sector unions were unable to stop much of the legislation that they opposed. While unions and their allies were able to stop some of the worst aspects of the collective bargaining bills, they had to support bills like SB 241 in lieu of something worse being passed – such as AB 182. AB 182 did much of the same things that were eventually passed in different bills, but would have also eliminated interest arbitration and prevented governments from agreeing to dues deductions. After several unions and community groups rallied at the legislature, AB 182 failed to make it out of committee.²⁹ Thus, the legislative endgame was more of a negotiated settlement than policy that was broadly favored. This is not the posture that a "special interest" with power to write its own legislation typically has to take.

Myth #5: Public Employee Unions Receive Special Treatment Compared to Other Private Organizations

Public employee unions *are* different than other private organizations. They have a statutory role that other private organizations do not have. In a 1983 First Amendment case, the United States Supreme Court recognized that the certified bargaining representative has special access to non-public forums (employee mailboxes, in that case) that other associations do not have.³⁰ The certified bargaining representative should also have the ability to deduct dues from the payroll checks of workers. Laws that purport to bar such voluntary deductions, while allowing other kinds of deductions, say for health care companies or the United Way, discriminate against and disfavor state sanctioned employee organizations.

Several bills aimed to prevent unions from using state funds to conduct union activities. These bills were based on a false division between public employees and taxpayers. There is no dispute that public employees are also taxpayers, but there is often a political benefit in framing issues as “us versus them.”

²⁹ <https://www.leg.state.nv.us/App/NELIS/REL/78th2015/Bill/1559/Overview>.

³⁰ *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983).

Since the session ended, it has been clear that the goals of the most radical legislation – making it harder for unions to collectively bargain and serve their members – have been met even with the compromises that were ultimately enacted. Recent news stories described one union president being ordered back to work until a new agreement is negotiated which has the union reimbursing the County for the union president's release time or providing for an equivalent amount of concessions in the contract.³¹ Or, in that same negotiation, there was a dispute about whether the contract has really expired and thus the employer is no longer required to pay scheduled salary increases.³² While groups like NPRI said that the session was a disappointment in terms of the "reform" that could have happened, SB 241 had much of their wish list realized if the goal was to make collective bargaining more difficult and perhaps to cause more employees to become disillusioned and withdraw from the union.

Conclusion

Unlike what happened in many states after Republicans took control of state legislatures and governor's offices, Nevada did not see the upheaval that took place in Wisconsin and Ohio when changes were made to public sector bargaining. This is because collective bargaining in Nevada was already limited more than in those other states. Perhaps some hoped that in the 2015 session the collective bargaining that does exist would be further minimized. Instead, the new law seemed to create more disputes and questions, rather than streamlining processes and minimize conflicts. Perhaps this confusion will continue to be litigated through the Nevada Employee Management Relations Board (EMRB) and the courts.

Disputes over the new law will likely lead to more labor unrest and probably more long-term costs to the government, whether through the litigation of complaints in the EMRB or in the courts. It is not clear how that will save state resources, but it will certainly tie up the unions involved when they could be organizing, bargaining or representing employees. To some, perhaps this was the point of the 2015 Nevada legislative session. The results of the November 2016 elections tell us much about the direction that labor policy will take in the next session. As with every law passed in 2015, the next legislative session in 2017 presents the opportunity to renew the purposes of public sector collective bargaining in Nevada – labor peace and fair working conditions – and based upon legitimate evidence and supportable assumptions.

³¹ Ben Botkin, *County Orders Union Boss to Work, Citing New Law*, LAS VEGAS REV.-J., Jun. 8, 2015, <http://www.reviewjournal.com/politics/government/county-orders-union-boss-work-citing-new-law>.

³² Ben Botkin, *EMRB Hands County Union a Win*, LAS VEGAS REV.-J., Nov. 18, 2015. The Court recently affirmed part of the Nevada Employee Management Relations Board order and remanded the case back to the EMRB. *See* <http://www.seiunv.org/seiu-nevada-wins-partial-victory-as-judge-restores-some-raises-withheld-by-clark-county/>.