STROOCK REPORTS – PUBLIC EMPLOYEE LAW

With America's Attention on Supreme Court Nomination, Congress Pushes Federal "Right-To-Work" Bill

An examination of intensifying efforts to pass federal and state "right-to-work" legislation amid a backdrop of judicial fair share fee challenges, and the potential consequences for public and private unions

Spring 2017

Overview

With all eyes on the pending consideration of Supreme Court nominee 10th Circuit Judge Neil Gorsuch, and the political spectacle of the "stolen seat," many have largely ignored this administration's most potent agent for change in the sphere of labor law – Congress. Most recently, congressional Republicans introduced two bills, H.R. 744, styled the "Truth in Employment Act of 2017," which would amend the National Labor Relations Act ("NLRA") to allow nonunion employer discrimination against potential employees on the basis of a candidate's perceived desire to advocate for unionization,[1] and H.R. 785, the "National Right-to-Work Act," which would amend the NLRA and the Railway Labor Act to prohibit the mandatory collection of "fair share fees" for nonunion employees.[2]

This is not to argue that the Supreme Court attention is unwarranted. Quite the opposite. There are myriad cases currently in circuit courts or pending appeal to the Supreme Court that have wide-reaching ramifications for issues of importance to organized labor and others, including immigration and gender discrimination. Of particular import in recent years have been the constitutional challenges to union fair share fees in the public sector.[3]

Fair share fees are dues collected from non-union members who are covered by, and benefit from, the collective bargaining agreements achieved by unions. These amounts often are less than full union membership dues, and generally may be utilized to fund an exclusive collective bargaining representative's non-political work. Thus far, recent court challenges to fair share fees have focused on the constitutionality of state-specific statutes. Most prominently, in *Friedrichs v. California Teachers Association*,[4] California-based public school teachers challenged mandatory fair share fee payments as violations of their First Amendment rights. The Ninth Circuit upheld the fees, and the *Friedrichs* plaintiffs appealed to the

ALSO IN THIS ISSUE

Co-Editors: Alan M. Klinger, co-managing partner, and Dina Kolker, special counsel in Stroock's Litigation and Government Relations Practice Groups. The Co-Editors wish to thank Beth A. Norton, special counsel, and David J. Kahne and Arthur J. Herskowitz, associates, in Stroock's Litigation and Government Relations Practice Groups.

Supreme Court. The Court's conservative majority was widely predicted to rule in favor of plaintiffs, potentially upending the status quo for public sector unions.

However, the death of Justice Scalia – an expected vote against fair share fees – resulted in a *per curiam* opinion by an equally divided Court, serving to affirm the Ninth Circuit's opinion.

Yet – as evidenced by the many states with right-to-work laws barring fair share fees – there is no constitutional mandate for laws authorizing fair share fee arrangements in either the public or the private sector. Rather, authorization for fair share fees is granted by federal and state legislation, making it subject to legislative change, which in certain places may be more easily and quickly achieved without resort to the Supreme Court or constitutional challenges.

This article looks at recent legislative developments at the state and federal level regarding right-to-work laws, and their potential impact for federal public employees, and discusses several high-profile cases involving challenges to right-to-work laws.

State Level Legislation and Constitutional Amendment Initiatives

At least 28 states have adopted right-to-work laws that typically impact public sector workers within those states. Missouri recently passed a right-to-work law on February 6, 2017,[5] but there are multiple efforts to combat the new legislation. Currently, there are state ballot initiatives that would amend the Missouri state constitution to allow fair share fees, thereby vitiating the recent law.[6] However, the National Right to Work Foundation is attempting to challenge these initiatives for vagueness.[7] In addition to these constitutional amendments, there is currently a referendum that would delay the law pending voter approval.[8]

A right-to-work bill recently passed the New Hampshire Senate, and was supported by the state's governor, Chris Sununu, but the bill was defeated in the State House of Representatives.[9]

Most recently, Iowa, one of the oldest right-to-work states in the country,[10] enacted further measures to restrict bargaining representatives' powers.[11] The law prohibits public sector unions from negotiating anything other than wages, thereby endangering workers' access to health insurance, safety and other workplace protections.[12] Iowa Council 61 of the American Federation of State, County and Municipal Employees has brought suit claiming that the law violates an Iowa constitutional provision requiring "uniform operation" of the law, since it affects some public employees while exempting police officers, firefighters, park rangers, and peace officers.[13] Another measure would reduce the minimum wage in four counties – currently at around $10 – to $7.25, the state minimum. Such measures not only restrict the actions of public sector unions, but also prevent local governments from exercising their powers of home rule to determine the best labor policy for the area.[14]

The trend, however, is not universal. Other states, like Ohio, are firmly against right-to-work laws. In 2011, Ohioans voted to repeal Senate Bill 5, which barred fair share fees.[15] Republican governor and former presidential candidate John Kasich has stated that he will not pursue further legislation on the topic.[16]

In New York, under current conditions, where public sector labor relations and fair share fees are a part of stable labor relations, it is unlikely that a state ban could succeed. Yet that was thought to

be the case in other states where changes did occur. Times change, and with the possibility of a constitutional convention, money may pour into New York with a decidedly anti-labor bent. New York should not be viewed as immune to nationwide efforts to erode unions in both sectors.

Enter Congress

Congress – that once-gridlocked branch of government – no longer presents a significant Democratic bulwark to a Republican agenda, and has begun introducing bills such as H.R. 744 and H.R. 785 with the capacity to change the labor landscape without any need for Supreme Court intervention. Although H.R. 744 is not the focus of this article, the bill signals a shift in the legislative zeitgeist with regards to discrimination on the basis of concerted activity. The bill is premised on the belief that some potential employees are actually "plants" from union shops, who wish to upend the status quo in workplaces with no collective bargaining representative. Should the bill become law, it might well become the focus of litigation challenging what some may see as a subjective grounds for denying an applicant.

Passage of H.R. 785, which claims "to preserve and protect the free choice of individual employees to form, join, or assist labor organizations, or to refrain from such activities,"[17] would prohibit employers from requiring that employees covered by a collective bargaining agreement either become members of the union or pay fair share fees.[18] It would have a significant impact on organized labor nationwide. Without fair share fees, a union may face economic constraints that could compromise its ability to procure healthcare benefits, higher wages, and various benefits for both member and nonmember employees under the purview of that collective bargaining unit.

Moreover, if H.R. 785 were passed, current union members might opt out of membership, as they would continue to receive the benefits of collective bargaining activity without the cost of fair share fees – the so-called "free rider" problem.[19] "Free riders" are not necessarily individuals with an anti-union bent; rather, any employee, including union supporters, might attempt to save money in these often-difficult economic times while still obtaining most of the benefits of collective bargaining representation.

Exacerbating the potential impact of the potential laws, neither bill's text appears to provide for a buffer period between enactment and the illegality of fair share fees. Pursuant to the proposal, a private union's agency provisions may be invalidated immediately upon enactment.

By amending the NLRA and RLA, both H.R. 744 and 785 would reach private sector collective bargaining in *every* state, as these federal laws generally preempt contrary state laws. Although public sector employer discrimination and fair share fee laws are unlikely to be directly affected, many such unions represent both public and private employees and/or are affiliated with larger organizations that encompass both private and public sector collective bargaining representatives. As such, even public sector unions may be affected by a private ban on fair share fee collection. Moreover, the changing federal landscape and overall labor relations climate heralded by such laws may spur additional support for state-level change to labor relations in the public sector as well.

Ongoing Litigation

On a parallel front, public sector fair share fees have continued to be the subject of multiple high-profile litigations since Justice Alito first expressed his critical view of fare share fees in *Harris v. Quinn*, which itself invited the challenge later narrowly avoided in *Friedrichs*.

As we discussed in our 2014 article "*Harris v. Quinn*: Abandoning Precedent and Undermining Union Shops in the Public Sector," available at http://www.stroock.com/siteFiles/Pub1542.pdf, the Supreme Court held in *Harris* that the fees could only be charged to "full-fledged" public employees, and ruled unconstitutional an Illinois law that considered certain personal assistants public employees for the purpose of collective bargaining and fair share fee payments.[20] The personal assistants were partially funded by the government, but were technically privately employed. Accordingly, they were neither public employees, nor subject to the NLRA and its rules on fair share fees.

The *Harris* Court's conservative majority took the opportunity to criticize *Abood v. Detroit Board of Education*[21], the seminal case authorizing fair share fees among public employees.[22] Prior to *Abood*, the Supreme Court had found that fair share fees combated the "free rider" problem and were permissible in the private sector, provided that the fees did not pay for a union's political activities.[23] Otherwise, the Court held, such a law would force nonmembers to associate with a political belief they personally objected to, in contravention of their First Amendment rights.

Abood extended this rationale to the public sector. There, the plaintiffs challenged a Michigan statute authorizing fair share fees for certain public employees. The Court stated that "[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller."[24]

Although *Harris* left *Abood* intact, its harsh criticism of the case helped lay the groundwork for an attack on public sector fair share fees in *Friedrichs*.[25] Subsequently, there has been a flurry of litigation attempting to succeed where the *Friedrichs* plaintiffs failed.[26] Anti-union plaintiffs are especially emboldened by the likely confirmation of a fifth conservative justice to the Court.

Many maintain that employees in right-to-work states suffer from lower wages and higher workplace fatality rates. Indeed, these ramifications are not mere conjecture. The Economic Policy Institute, utilizing Bureau of Labor Statistics data, has found that workers in right-to-work states make 3.1% less than their non-right-to-work counterparts, which amounts to $1,558 lower annual pay on average.[27] Additionally, right-to-work states have, on average, higher workplace fatality rates than non-right-to-work states.[28]

Looking Ahead

Although national right-to-work amendments to the NLRA and RLA are not expected to directly affect public sector fair share fees, multiple states look to NLRB precedent for guidance in state-specific labor matters (even though those decisions typically are not binding).[29]

Regardless, recent congressional action and the expected confirmation of a fifth conservative Supreme Court justice should be of great concern to organized labor in the public and private sector. Fair share fees continue to be under fire from every angle.

By Alan M. Klinger, co-managing partner, Dina Kolker, special counsel, and Arthur J. Herskowitz, associate, in the Litigation and Government Relations Practice Groups of Stroock & Stroock & Lavan LLP.

For More Information

Alan M. Klinger
212.806.5818
aklinger@stroock.com

Dina Kolker
212.806.5606
dkolker@stroock.com

[1] *See* H.R. 744, Congress.gov, *available at* https://www.congress.gov/bill/115th-congress/house-bill/744/text. One of the purposes of the bill is "to alleviate pressure on employers to hire individuals who seek or gain employment in order to disrupt the workplace of the employer or otherwise inflict economic harm designed to put the employer out of business." *See id.* The bill would amend Section 8(a) of the NLRA to include the paragraph, "Nothing in this subsection shall be construed as requiring an employer to employ any person who seeks or has sought employment with the employer in furtherance of other employment or agency status." *See id.*

[2] The text of the bill states that it would amend the NLRA as follows:

> (a) Section 7 of the National Labor Relations Act (the "Act") (29 U.S.C. 157) is amended by striking "except to" and all that follows through "authorized in section 8(a)(3)".
>
> (b) Section 8(a) of the Act (29 U.S.C. 158(a)) is amended by striking ": Provided, That" and all that follows through "retaining membership" in paragraph (3).
>
> (c) Section 8(b) of the Act (29 U.S.C. 158(b)) is amended by striking "or to discriminate" and all that follows through "retaining membership" in paragraph (2) and by striking "covered by an agreement authorized under subsection (a)(3) of this section" in paragraph (5).
>
> (d) Section 8(f) of the Act (29 U.S.C. 158(f)) is amended by striking clause (2) and by redesignating clauses (3) and (4) as (2) and (3), respectively.

It would also strike paragraph "Eleventh" of Section 2 of the RLA, which currently provides for union security agreements and dues check-offs. *See* 45 U.S.C. § 152.

[3] Also known as "agency fees" or "agency shop fees."

[4] 578 U.S. ___ (2016) (*per curiam*).

[5] *See* Reid Wilson, "Missouri governor signs right to work law," *The Hill* (Feb. 6, 2017), *available at* http://thehill.com/homenews/state-watch/318072-missouri-governor-signs-right-to-work-law. The text of the bill is *available at* http://www.senate.mo.gov/17info/bts_web/Bill.aspx?SessionType=R&BillID=57095277.

[6] *See* Celeste Bott, "Right-to-work advocates in Missouri file lawsuits against labor-backed ballot initiative," *Saint Louis Post-Dispatch* (Jan. 23, 2017), *available at* http://www.stltoday.com/news/local/crime-and-courts/right-to-work-advocates-in-missouri-file-lawsuits-against-labor/article_0c0513ab-90cf-50b5-b2ea-8c1574e826e7.html.

[7] *See id.* ("Backed by the National Right to Work Foundation, a Missouri nurse and two Kansas City police officers are now challenging the petitions on the grounds that their summaries are 'insufficient and unfair[.]'")

[8] *See* Kelly Moffitt, "Behind the Headlines: The legal implications of right-to-work in Missouri" (Feb. 10, 2017), *available at* http://news.stlpublicradio.org/post/behind-headlines-legal-implications-right-work-missouri.

[9] *See* Sean Higgins, "New Hampshire could be next state to go right-to-work" (Feb. 5, 2017), *available at* http://www.washingtonexaminer.com/new-hampshire-could-be-next-state-to-go-right-to-work/article/2613903; Kathleen Ronayne, "'Right-to-work' bill killed in New Hampshire," *Portland Press Herald* (Feb. 16, 2017), *available at* http://www.pressherald.com/2017/02/16/right-to-work-bill-killed-in-new-hampshire/.

[10] *See* Scott Cohn, "An American workplace war that's reached a tipping point," *CNBC* (May 29, 2015), *available at* http://www.cnbc.com/2015/05/29/the-right-to-work-battle-has-reached-a-tipping-point.html.

[11] *See* Editorial Board, "Iowa's G.O.P. Statehouse Shows the Locals Who's Boss," *The New York Times* (Feb. 21, 2017), *available at* https://www.nytimes.com/2017/02/21/opinion/iowas-gop-statehouse-shows-the-locals-whos-boss.html?_r=0.

[12] *See id*. *See also* Clay Masters, "Iowa Moves to Restrict Collective Bargaining for Public Sector Workers," *NPR* (Feb. 14, 2017), *available at* http://www.npr.org/2017/02/14/515242288/iowa-moves-to-restrict-collective-bargaining-for-public-sector-workers. For the text of the Iowa House and Senate bills, which are identical, *see* Iowa House Study Bill 84, *available at* https://www.legis.iowa.gov/legislation/BillBook?ba=HSB84&ga=87; Iowa Senate File 213, *available at* https://www.legis.iowa.gov/legislation/BillBook?ba=SF213.

[13] Richard Steier, "Iowa Public Employees Sue, Claim Cutback In Rights Unconstitutional," *The Chief* (Feb. 24, 2017), *available at* http://thechiefleader.com/iowa-public-employees-sue-claim-cutback-in-rights-unconstitutional/article_660f73f4-e257-11e6-8573-073233f0ca95.html.

[14] *See* Editorial Board, *supra*.

[15] *See* Jackie Borchardt, "'Right to work' won't be popular in Ohio, state lawmakers say," *Cleveland.com* (Feb. 1, 2017), *available at* http://www.cleveland.com/open/index.ssf/2017/02/right_to_work_not_popular_in_o.html.

[16] *See id*.

[17] *See* H.R.785, Congress.gov, *available at* https://www.congress.gov/bill/115th-congress/house-bill/785?r=9.

[18] *See* 29 U.S.C. 157. H.R. 785 would strike the clause allowing such conditions to employment.

[19] For more on the "free rider" problem, *see* Alan M. Klinger & Dina Kolker, "Abandoning Precedent and Undermining Union Shops in the Public Sector," *Stroock Reports – Public Employee Law*, at 2 (Fall 2014), *available at* http://www.stroock.com/siteFiles/Pub1542.pdf [hereinafter "*Abandoning Precedent*"].

[20] 573 U.S. ___, 134 S.Ct. 2618 (2014). For an in-depth analysis of *Harris*, *see* "Abandoning Precedent," *supra* n.5.

[21] 431 U.S. 209 (1977).

[22] *See Harris*, 573 U.S. at ___, 134 S.Ct. at 2632-2634 (criticizing *Abood*).

[23] *See International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (holding fair share fees constitutional in the private sector under the RLA provided that the fees do not pay for political activity). The Supreme Court later extended its ruling to employees under the NLRA in *Communication Workers of America v. Beck*, 487 U.S. 735 (1988).

[24] *See* 431 U.S. at 224.

[25] 578 U.S. ___ (2016) (*per curiam*).

[26] *See, e.g.*, *Janus v. AFSCME*, No. 16-3638 (7th Cir., March 21, 2017). The *Janus* plaintiffs contend that only the Supreme Court can grant them their sought relief, since all other courts are bound by *Abood*. The Seventh Circuit affirmed dismissal of the case, noting that the plaintiffs' claims are not only foreclosed by *Abood*, but also by claim preclusion, because one of the plaintiffs had brought a near-identical suit in state court. The plaintiffs have expressed their intent to appeal the ruling. If certiorari is granted, a ninth justice will likely have been appointed to the Court by the time *Janus* is heard.

[27] *See* Ross Eisenbrey, *So-called "right-to-work" laws will lower wages for union and nonunion workers in Missouri*, Economic Policy Institute (Jan. 19, 2017), *available at* http://www.epi.org/blog/so-called-right-to-work-laws-will-lower-wages-for-union-and-nonunion-workers-in-missouri/.

[28] *See* Bureau of Labor Statistics, *National Census of Fatal Occupational Injuries in 2015*, Dept. of Labor (Dec. 16, 2016), *available at* https://www.bls.gov/news.release/pdf/cfoi.pdf.

[29] For New York's position on NLRB precedent, *see, e.g.*, N.Y. Civ. Serv. § 209-a(6) ("Taylor Law") ("In applying this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent."); *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 50 (N.Y. 1974) ("So long as PERB's interpretation is legally permissible and so long as there is no breach of constitutional rights and protections, the courts have no power to substitute another interpretation on the strength of what the NLRB or the Federal courts might do in the same or a similar situation."); *Rosen v. PERB*, 125 A.D.2d 657, 660 (N.Y. 2d Dep't 1986) (noting not only similarities, but also "marked differences" between the NLRA and the Taylor Law, which preclude complete reliance on NLRB precedent in claims concerning state law), *aff'd* 526 N.E.2d 25 (N.Y. 1988). For New Jersey, *see, e.g.*, *Cooper v. Nutley Sun Printing Co.*, 175 A.2d 639, 645 (N.J. 1961) ("Though the decisions of the National Labor Relations Board may be helpful to the court in reaching a just result, they are in no way binding."). For Connecticut, *see, e.g.*, *Connecticut*

State Labor Relations Bd. v. Connecticut Yankee Greyhound Racing, Inc., 402 A.2d 777, 781 (Conn. 1978) ("While the interpretation of provisions of the federal act may be extremely helpful, however, neither the state board nor our courts are compelled to slavishly follow policies which have been adopted by the NLRB for the purpose of ensuring administrative efficiency at the federal level.").

Campaigning That Wasn't: *Heffernan v. City of Paterson*

The Supreme Court Addresses a Factual Wrinkle to First Amendment Speech and Public Employee Retaliation Cases

Spring 2017

In this politically charged post-election environment, the free speech rights of public employees take on added importance. In 2006, the Supreme Court provided a framework for public employee speech with its decision in *Garcetti v. Ceballos,*[1] holding there is no First Amendment protection for the speech of public employees on matters within the scope of their employment. The Court distinguished that from employee speech *outside* of their official duties on matters of "public concern."[2] The Supreme Court's decision in *Heffernan v. City of Paterson* this past term adds a factual wrinkle to the principles enunciated in the *Garcetti* body of jurisprudence.

This article examines the *Heffernan* decision and its implications for the protection of free speech for public employees.

The *Garcetti* Framework and First Amendment Public Employee Speech

Prior to *Garcetti*, under the longstanding *Pickering-Connick* test (from the Supreme Court cases *Pickering v. Board of Education*[3] and *Connick v. Myers*[4]), whether employee speech was entitled to First Amendment protection was subject to a balancing of interests analysis: the government could not discipline (or terminate) an employee based on an employee's speech if both of the following were true:

1. the speech was a matter of public concern; and
2. the damage, if any, to the efficiency of the workplace caused by the employee's speech was outweighed by the value of the speech to the employee and to the public.

Public employee whistleblowers, for example, were protected for statements made in good faith identifying misconduct or other legitimate issues of public concern within the government. *Garcetti*, as we noted at the time,[5] marked a substantial and potentially troublesome doctrinal shift.

In *Garcetti*, Richard Ceballos, an attorney employed in a supervisory role by the Los Angeles County District Attorney's Office, discovered what he believed to be material misrepresentations in a police officer's affidavit. Ceballos relayed his concerns to his supervisors (both orally and in two written memoranda), who seemingly disregarded Ceballos' reports of potential wrongdoing. Ceballos filed suit after he was demoted and transferred to a different office, claiming his demotion and transfer had occurred because of his speech.

Co-Editors: Alan M. Klinger, co-managing partner, and Dina Kolker, special counsel in Stroock's Litigation and Government Relations Practice Groups. The Co-Editors wish to thank Beth A. Norton, special counsel, and David J. Kahne and Arthur J. Herskowitz, associates, in Stroock's Litigation and Government Relations Practice Groups.

Instead of applying the *Pickering-Connick* balancing of interests analysis, the *Garcetti* Court put a thumb on the scale and drew a clear line between protected and unprotected speech, reasoning that the government's interest in providing efficient public services outweighs the First Amendment rights of public employees speaking in their official capacities. Because Ceballos was speaking in his official capacity as an employee, his speech was not protected.

Subsequent to *Garcetti*, the Court softened a bit in *Lane v. Franks*,[6] particularly on whistleblowers, holding that the First Amendment protected a government employee who testified truthfully pursuant to a subpoena about government corruption. But *Garcetti* fundamentally changed the focus of the First Amendment inquiry to the circumstances surrounding the speech in question, and particularly whether the speech is made in an employee's official capacity. In the years since *Garcetti*, lower courts typically have looked, as a threshold matter, to whether the content of the speech is the type made by an employee as a "citizen" on a matter of public concern or whether the speech was made in his or her capacity as a government employee.

Heffernan v. City of Paterson: Focus on Employer Motive?

In *Heffernan*, Detective Jeffrey Heffernan, a veteran police officer in Paterson, New Jersey, was supervised by an individual appointed by the mayor as well as by the chief of police, who was also appointed by the mayor. The mayor was running for re-election. During the campaign, Heffernan's bedridden mother asked him to pick up and deliver to her a campaign yard sign supporting the mayor's opponent. Heffernan was spotted holding the sign and speaking to staff at a distribution point for the opposing candidate; word spread that he was campaigning against the mayor, though he was not. He was demoted the next day for "overt involvement" in the opponent's campaign and thereafter brought suit alleging a violation of the First Amendment under 42 U.S.C. § 1983.

The key issue was whether Heffernan, a public employee, could maintain an action for constitutionally-protected political activity when he did not actually engage in that activity. Was the First Amendment right in this context one that focused on the actual activity, or a right that focused on the employer's motive?

Writing for a six-person majority, Justice Breyer concluded that the City's unconstitutional motive to retaliate was what mattered. As Justice Breyer explained: "Unlike, say, the Fourth Amendment, which begins by speaking of the 'right of the people to be secure in their persons, houses, papers and effects….,' the First Amendment [Congress shall make no law…abridging the freedom of speech] begins by focusing upon the activity of the Government." Moreover, a permissible discharge of Heffernan would have sent a signal to others that they engage in protected activity at their peril. Even if Heffernan had not actually engaged in the protected political activity, the demotion served to deter other employees from engaging in such protected behavior. Thus, the Court found, an employer's improper motive can violate the First Amendment, even when that improper motive is based on a factual mistake.

The dissent, by Justice Thomas and joined by Justice Alito, noted the anomalous result of the Court's attempting to protect political speech, when none actually occurred. The demotion may have been "misguided or wrong," but, to their mind, was not unconstitutional.

Does *Heffernan* Signal a Motive-Based Model for First Amendment Public Employee Cases?

It remains to be seen whether *Heffernan* is a factual anomaly or represents a shift in the *Garcetti* line of First Amendment public employee cases. The facts are rather unique. But the focus in *Heffernan*, unlike the focus in *Garcetti* and its progeny, is on the motivations of the government in taking its adverse action, rather than the content of the speech at issue. And motive alone in *Heffernan* was sufficient to show constitutional injury. Focusing on illicit intent, rather than the character of the speech, would suggest a more fact intensive inquiry and a step away from the bright-line test articulated in *Garcetti*. Yet, it remains to be seen whether lower courts will adopt a motive-based model for First Amendment public employee cases.

Indeed, the facts of *Heffernan* are not completely resolved. The Court assumed that Heffernan was demoted specifically because his supervisors believed he was speaking in support of the challenger in the election. But there was some evidence that he was demoted pursuant to a neutral office policy prohibiting all police officers from any overt involvement in any campaign. The Court expressed no view on whether there was such a policy, whether the City followed it in demoting Heffernan or whether it would be constitutionally valid. It remanded to the district court to answer those questions.

One additional point merits mention. The Hatch Act, which prohibits partisan political activities by federal civil service employees, has been upheld by the Supreme Court as constitutional in *Civil Service Commission v. Letter Carriers*.[7] But it is unclear (particularly since the decision is now over 30 years old) how broadly the contours of that decision reach and whether a blanket prohibition would still be permissible.

Post-*Garcetti* it is clear that at least certain speech by employees speaking as citizens is protected speech in the public employment context. And perhaps even more relevant to the Court's current docket and more specific to political speech, the agency-fee cases of *Knox v. SEIU*[8] and *Harris v. Quinn*[9] rely on the fundamental foundation that government employees have a First Amendment right *not* to engage in politics in the workplace.

Unless the Court reverses course on a *Friedrichs*-type case (*see* our article "With America's Attention on Supreme Court Nomination, Congress Pushes Federal 'Right-To-Work' Bill," in this issue of *Stroock Reports: Public Employee Law*) – a questionable eventuality with the new administration – there well could be doctrinal inconsistency in reading the Hatch Act to prohibit all political speech in the public employee workplace.

By Alan M. Klinger, co-managing partner, Dina Kolker, special counsel, and David J. Kahne, associate, in the Litigation and Government Relations Practice Groups of Stroock & Stroock & Lavan LLP.

For More Information

Alan M. Klinger
212.806.5818
aklinger@stroock.com

Dina Kolker
212.806.5606
dkolker@stroock.com

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1 547 U.S. 410, 418 (2006). *See* our discussion of the *Garcetti* decision in "*Garcetti v. Ceballos* Two Years Later: How Are Public Employees Faring?" *Stroock Reports: Public Employee Law*, May 2008, available at http://www.stroock.com/siteFiles/Pub611.pdf.

2 *Elrod v. Burns,* 427 U.S. 347 (1976).

3 391 U.S. 563 (1968).

4 461 U.S. 138 (138).

[5] *See* our discussion of the *Garcetti* decision in "*Garcetti v. Ceballos* Two Years Later: How Are Public Employees Faring?" *Stroock Reports: Public Employee Law*, May 2008, available at http://www.stroock.com/siteFiles/Pub611.pdf.

[6] 134 S. Ct. 2369 (2014).

[7] 413 U.S. 548 (1973).

[8] 567 U.S. 30 (2012).

[9] 134 S. Ct. 2618 (2014).

Protecting Contract Rights: Miami Police Officers Win Important Victory at the Florida Supreme Court

As public sector workers and their unions continue to litigate governmental attempts to reduce their contractually bargained-for rights, the Contracts Clause is proving to be a useful tool, ensuring that when a municipality enters a contract, it cannot simply walk away from it

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Defending Public Sector Contract Rights with the Contracts Clause

In the aftermath of the financial downturn that adversely impacted public employees (often times disproportionately), public sector workers and their unions continue to litigate governmental attempts to reduce unilaterally, or to eliminate altogether, contractually bargained-for rights. As reported in our Summer 2015 *Stroock Reports*,[1] in recent years, such attempts have been met with legal challenges across the country, typically premised on both state and federal constitutional grounds and often utilizing the Contracts Clause of state and federal constitutions.

The Contracts Clause is a useful tool in these challenging times. By ensuring that when a municipality enters a contract, it cannot simply walk away from it, the Contracts Clause safeguards the sanctity of all contractual obligations and promotes confidence in the continuing stability of contracts for public workers. This previously seldom-used constitutional provision ("No State shall…pass any Law…impairing the Obligation of Contracts") was meant to prevent legislative and other governmental retroactive interference in both public and private sector contracts.

A governmental body cannot refuse to meet its obligations under a collective bargaining agreement merely because it would prefer to spend money elsewhere, nor should it look to its labor contracts as a first corrective measure to cure a budgetary deficit or shortfall. After all, the bedrock of labor relations in New York (and in other jurisdictions) is the collective bargaining process. There would be little incentive for a union to negotiate the terms of a contract or re-open a contract to discuss potential concessions if its employer could gain what it sought and then unilaterally renege on its obligations.

Case in Point: *Headley et al. v. City of Miami*

A case decided last month in the Florida Supreme Court, *Headley, et al. v. City of Miami,*[2] reinforces the value of the Contracts Clause as a shield against one-sided governmental action and represents the latest success among public employee constitutional challenges to efforts to impair public employee contracts. In *Headley,* the

Co-Editors: Alan M. Klinger, co-managing partner, and Dina Kolker, special counsel in Stroock's Litigation and Government Relations Practice Groups. The Co-Editors wish to thank Beth A. Norton, special counsel, and David J. Kahne and Arthur J. Herskowitz, associates, in Stroock's Litigation and Government Relations Practice Groups.

City of Miami entered into a certified bargaining agreement with its police union, Miami Lodge No. 20, Fraternal Order of Police, covering the period October 1, 2007 to September 30, 2010. Towards the end of the contract, the City declared a "financial urgency," notified the Union that it intended to implement reductions to the officers' wages, pension benefits and other economic terms of employment, and passed legislation implementing such changes.[3]

A seldom invoked Florida state law allows administrators to re-open contracts without bargaining in cases of fiscal emergency. The Union filed an improper labor practice charge with the Florida Public Employee Labor Relations Commission (PERC) and at the hearing on the matter the City presented evidence of budgetary deficits and asserted that it had already implemented hiring freezes, layoffs, ceased procurement and eliminated jobs. It leaned, in particular, on the fact that labor costs comprised 80% of the City's expenses.

The Union, for its part, provided a menu of revenue-raising and expense-reducing alternatives the City could have at least explored before attempting to unilaterally change the CBA, including implementing millage tax rates, installing red light cameras and other, less draconian employment-related measures. PERC found for the City, focusing on whether "a reasonable person could reach the conclusion that funding was not available to meet the employer's financial obligations to its employees."[4] It also found that the City need not proceed through an impasse resolution process and could implement the changes unilaterally so long as it provided the Union notice and a reasonable opportunity to bargain.

The Union appealed to the Florida courts, arguing that the government's actions in breaching its CBA violated the members' constitutional rights. As such, a more searching and stringent constitutional analysis was required and the City could not simply sidestep the impasse process by providing notice to the Union of its intentions.

The Florida Supreme Court's Decision

After the First Appellate District affirmed the PERC decision, the Florida Supreme Court granted review, in light of another Florida appellate court, the Fourth Appellate District, had previously staked a conflicting position in *Hollywood Fire Fighters Local 1375 v. City of Hollywood*. In *Hollywood,* the Fourth Appellate District ruled that before impairing a CBA, an employer must, as a constitutional matter, demonstrate that there are "no other reasonable alternative means of preserving its contract with public employees" and show that funds are available from "no other possible source before unilaterally modifying a collective bargaining agreement."[5]

The Florida Supreme Court sided with the Fourth District – potentially costing the City of Miami millions in backpay – and ruled that its conclusions were "compelled by the Florida Constitution" and, specifically, its Contracts Clause.[6] To unilaterally breach an agreement regarding wages, hours or terms of conditions of employment reached during the collective bargaining process, there must be a compelling state interest (with the governmental action narrowly tailored to further that interest).

The Florida Supreme Court found that although a government entity has some leeway to respond to fiscal emergencies, the right to contract severely limits that ability. The "mere fact that it is politically more expedient" to eliminate raises or

certain other aspects of a CBA is not "a compelling reason" to justify abandoning its obligations.[7] Therefore, the Florida Supreme Court ruled that a government cannot abrogate public employee contracts unless it can demonstrate that there are "no other reasonable alternative means of preserving its contracts" and funds "are not available from any other possible reasonable source."[8] The court remanded the case for a determination consistent with the decision.

Looking Ahead

Though the case continues, the Florida Supreme Court decision underscores the increasing relevance of the Contracts Clause in protecting public employee contracts. As public employee contracts and pensions remain in the political cross-hairs nationwide, particularly in jurisdictions experiencing challenging budgetary environments, *Headley* is a reminder that to pass constitutional muster, government entities must first consider and exhaust all reasonable alternatives before vitiating the collectively bargained-for rights of public employees.[9]

By Alan M. Klinger, co-managing partner, Dina Kolker, special counsel, and David J. Kahne, associate, in the Litigation and Government Relations Practice Groups of Stroock & Stroock & Lavan LLP.

For More Information

Alan M. Klinger
212.806.5818
aklinger@stroock.com

Dina Kolker
212.806.5606
dkolker@stroock.com

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1 2015 *Stroock Reports: Public Employee Law*, *available at* http://www.stroock.com/siteFiles/Publications/StroockPublicEmployeeLawReport.pdf.

2 *Headley v. City of Miami*, -- So. 3d --, 2017 WL 819740 (Sup. Ct. Fla. March 2, 2017).

3 *Id.* at *1. Among other things, the law capped pensions at $100,000 and cut salaries by as much as 12 percent.

4 *Id.* at *2.

5 133 So. 3d 1042, 1045 (Fla. DCA 2014).

6 *Headley,* 2017 WL 819740, at *5.

7 *Id.* at *4.

8 *Id.*

9 Stroock is co-counsel to the Nassau County police officer unions in a case that similarly utilizes the Contracts Clause to challenge the unilateral suspension of wages and other economic terms contained in their collective bargaining agreements.

Matters of Interest

Spring 2017

Constitutional Amendment By Legislative Referral: How Public Pensions Could Be Affected

Overview

This coming November, New York voters will find a referendum on the ballot on whether there should be a Constitutional Convention to amend the New York State Constitution. Proponents of the Constitutional Convention often cite ethics reform for elected officials as a reason for a Convention. There is a less familiar avenue in New York for constitutional amendment – the Legislative Referral process, under which the Senate and Assembly may propose an amendment to the Constitution without the need for a convention, provided certain conditions are met. This article discusses how the Senate and the Assembly followed the Legislative Referral process during the 2016 Legislative Session, when each passed an amendment relating to public pensions of public officers, and the potential implications of that amendment for public employee unions in New York.

The Legislative Referral Process

Article XIX, Section 1 of the New York State Constitution provides that the Senate and Assembly may propose an amendment to the Constitution without need of a convention, provided certain conditions are met.

- First, the Attorney General must render an opinion, in writing, to the Legislature as to the effect the proposed amendment may have upon other provisions of the Constitution.
- If upon receiving this opinion, the majority of the members elected to each of the two houses agree to the amendment, as proposed, the vote shall be entered into their respective journals, the proposed amendment is published for three months and then referred to the next regular legislative session.
- If, in the following legislative session, the proposed amendment is agreed to by a majority of members of each house, then it "shall be the duty of the legislature to submit [the] proposed amendment…to the people for approval, in such manner and at such times as the legislature shall prescribe."[1]
- If the majority of those voting on the amendment ratify the amendment, it "shall become part of the constitution on the first day of January [following] such approval."[2]

Following that process, during the 2016 Legislative Session, the Senate and the Assembly each passed an amendment relating to public pensions of public officers. The proposed amendment defines "public officer" as

> (i) an official filling an elected office within the state; (ii) a holder of office filled by direct appointment by the governor of this state, either upon or without senate confirmation; (iii) a county, city, town or village administrator, manager or equivalent position;

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> (iv) the head or heads of any state or local government department, division, board, commission, bureau, public benefit corporation, or public authority of this state who are vested with authority, direction and control over such department, division, board, commission, bureau, public benefit corporation or public authority; (v) the chief fiscal officer or treasurer of any municipal corporation or political subdivision of the state; (vi) a judge or justice of the unified court system; and (vii) a legislative, executive or judicial employee of this state who directly assists in the formulation of legislation, rules, regulations, policy or judicial decision-making and who is designated as a policymaker as set forth in statute.[3]

This type of permissible impairment or revocation of public pensions would be an exception to the constitutional protection of public employees from diminution or impairment contained in Article V, Section 7 of the New York State Constitution, generally referred to as the Nonimpairment Clause. Although the iteration of the proposed amendment making the most progress is limited to higher-ranking officials and judicial officers, other bills have been introduced with broader applicability to public employees at every level of government.[4]

The proposed amendment provides that a public officer who is convicted of a felony that is directly and actually related to the performance of the public officer's duties, may have his or her pension reduced or revoked, following notice and a hearing by an appropriate court.[5] In making the determination to reduce or revoke the pension, the amendment would require that the court consider several factors, including the severity of the crime and whether the forfeiture, if any, would result in undue hardship or other inequity upon dependent children, spouse or other dependents.[6]

In accordance with the New York State Constitution, this same amendment has again been introduced and approved in both the Senate and Assembly during this current legislative session.[7] The Attorney General's opinion on the bill has been referred to the Judiciary Committee and could possibly be put to the voters for ratification as early as this coming November.

If the amendment makes its way on to the ballot in November, it will be presented to voters side-by-side with the ballot question on whether a Constitutional Convention should be convened. Although a similar amendment could be achieved through the convention process, once approved, a convention cannot be prospectively limited to topics such as ethics by those voting for it. The scope of any proposed changes would be determined by the delegates to the convention. Thus, the availability of this circumscribed potential constitutional ethics reform may show a way to undermine those who claim that a convention is necessary to address the ethical issues in Albany.

Paid Family Leave: Balancing Cost With Benefit

Consistent with the national trend towards expanding paid family leave for employees, Mayor de Blasio issued a Personnel Order in 2016 that provided six-weeks' paid parental leave for maternity, paternity, adoption or foster care to approximately 20,000 New York City non-unionized management employees.[8] In an effort to cover the costs of this new benefit (although some have questioned whether the costing was too high), with a goal of avoiding additional costs to taxpayers, Mayor de Blasio eliminated a 0.47% pay increase that was to become effective in July 2017 (pursuant to Personnel Orders 2015/1 and 2015/2) and capped vacation time at 25 days, effectively

reducing by two days the number of vacation days to which senior managers were previously entitled.[9]

Subsequently, a suit against Mayor de Blasio and other city officials by a group of senior managers alleged that the decision to eliminate the pay raise and two days of annual leave to cover a new paid parental leave program not only amounted to a breach of contract but also unconstitutionally impaired their pension benefits and amounted to discriminatory treatment on the basis of age.[10] *Wasyl Kinach, et al. v. Bill de Blasio, et al.*, was dismissed in November 2016. The court held that neither the Personnel Orders nor the Time and Leave Manuals created contractual rights preventing the City from modifying its policies. The court also held that there was no support for the petitioners' claims that the action violated either the equal protection clause or nonimpairment clauses of the state or federal constitutions. Petitioners have filed a notice of appeal.

Similarly, in April 2016, the New York State Legislature enacted the New York Paid Family Leave Act. The Act, which becomes effective on January 1, 2018, provides up to eight weeks of paid leave at 50% of pay (not to exceed 50% of the state's average weekly rate), gradually increasing to 12 weeks of paid leave at 67% of pay (not to exceed 67% of the state's average weekly rate) in 2021. Employers are not required to fund any portion of the family leave benefit. Rather, the benefit is paid through employee contributions via payroll deductions scheduled to begin on July 1, 2017. The maximum employee contribution will be set by the superintendent of financial services on or before June 1, 2017. It is expected to be a modest contribution, estimated at approximately $1.00 per week, a cost seemingly much lower than that charged by the City to its non-unionized management employees.

Although not automatically applicable to unions, the New York State Paid Family Leave Act provides that the State, any political subdivision of the State, a public authority or any other governmental agency or instrumentality *may* elect to become a covered employer and that a municipal union, as part of the collective bargaining process, *may* opt into the paid family leave benefit on behalf of those employees it represents. In negotiating inclusion in this benefit, unions are well advised to include a fair costing as part of the bargaining discussions. Whereas unrepresented management employees are subject to the one-sided calculation of their employer, unions negotiating on behalf of members can ensure the cost of the new benefit is appropriate for the benefit received and not unduly burdensome on any segment of their population.

Teaching Assistants Earn Right to Unionize

In *Trustees of Columbia University in the City of New York and Graduate Workers of Columbia-GWC, UAW*, the National Labor Relations Board ("NLRB") found that students who perform work at the direction of their university, for which they are compensated, are statutory employees and, therefore, protected by the National Labor Relations Act ("NLRA"), including in their right to organize around issues of workplace concern.[11] This Decision and Order overturned a 2004 determination, in which the NLRB found that graduate students cannot be statutory employees as they are "primarily students and have a primarily educational, not economic, relationship with their university."[12]

In reversing its earlier determination, the NLRB looked to the definition of "employee" under the NLRA, which includes "any employee" subject only to certain specified exceptions, none of which applied here.[13] Although the NLRA does not provide a more comprehensive definition of the term "employee," it is well established that when a statute does not define the term employee, courts are to look to the established meaning of the word, as in common-law agency.[14] Indeed, the Supreme Court has endorsed this approach by the NLRB, accepting an expansive reading of the language in the NLRA.[15]

The NLRB also looked to the goals of federal labor policy, namely to "encourag[e] the practice and procedure of collective bargaining" and to protect workers' "full freedom" to express a choice regarding representation.[16] Unlike the NLRB in *Brown*, here the NLRB found that permitting student assistants to bargain over wages, hours and other terms and conditions of employment in no way infringed upon traditional academic freedoms, which only invokes the content of speech in the classroom.[17] Again, the Supreme Court has implicitly endorsed this view by upholding the NLRB's authority to exercise jurisdiction over faculty at private universities.[18]

The NLRB's decision applies only to private colleges and universities. The right of student assistants, or other student "employees," in public colleges and universities to organize is determined by state labor laws. In New York, student employees at public colleges and universities already have this right.[19] The NLRB's decision in *Columbia University,* however, may shed more light on this right and may result in the ability of students at public colleges and universities in other states to exercise the same right.

By Beth A. Norton, special counsel in the Employment Law and Litigation Practice Groups of Stroock & Stroock & Lavan LLP.

For More Information

Alan M. Klinger
212.806.5818
aklinger@stroock.com

Dina Kolker
212.806.5606
dkolker@stroock.com

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1 New York State Constitution, Article XIX, Section 1.

2 ***Id***.

3 S-8163, Senate Reg. Sess. (2016); A.-10739, Assembly Reg. Sess. (2016).

4 *See, e.g.,* S-3147, Senate Reg. Sess. (2017)/A-3316, Assembly Reg. Sess. (2017) (providing that *any* elected official who is convicted of a felony offense against public administration that occurred during their time in office shall forfeit rights to their benefits earned while in such office); A-2885, Concurrent Resolution of Senate and Assembly (2017) (providing *any elected official or officer of the state or of a civil division* may be subject to impairment of his or her pension if the member is "convicted of any felony offenses as defined by state or federal law and when that offense was directly related to assigned duties…"); S-661, Concurrent Resolution of Senate and Assembly (2017) (providing *any* pension of *any* public official (term not defined) "shall be forfeited if he or she is convicted of, or pleads in any manner to, any crime or offense involving the breach of public trust.").

5 *Id*.

6 *Id*.

7 S-418, Senate Reg. Sess. (2017); A-1749, Assembly Reg. Sess. (2017).

8 Mayor's Personnel Order, 2016/1 (January 7, 2016), Section I.

9 Mayor's Personnel Order, Sections II and III.

10 *Wasyl Kinach, et al. v. Bill de Blasio, et al.*, Case No. 153833/16 (Sup. Ct. N.Y Cty.), Verified Petition ("Ver. Pet."), ¶¶ 22, 34, 39 and 41-46.

11 NLRB, Case 02-RC-143012 (August 23, 2016).

12 *Brown University,* 342 NLRB 483, 487 (2004).

13 *Columbia University,* Case 02-RC-143012, at 4.

14 *Id.,* at 5.

15 *See NLRB v. Town & Country Elec.*, 516 U.S. 85, at 94 (1995) (holding common law principles supported the NLRB's determination that paid union organizers were "employees" under the

NLRA); *Sure Tam, Inc. v. NLRB,* 467 U.S. 883, 892 (1984) (observing that extending coverage of the NLRA to undocumented aliens is consistent with the NLRA's purpose of encouraging and protecting the collective bargaining process).

16 *Columbia University,* Case 02-RC-143012, at 7.

17 *Id.*, at 7-8.

18 *NLRB v. Yeshiva University,* 444 US 672, at 690, fn 31 (1980) (observing that not all university faculty members will be managerial employees and that "professors may not be excluded [from statutory coverage] merely because they determine the content of their own courses, evaluate their own students and supervise their own research").

19 *See, e.g., Communication Workers of America/Graduate Student Employees Union, AFL-CIO v. State of New York (State University of New York),* 24 PERB 3035 (1991) (holding that graduate assistants and teaching assistants hold covered employment as they render services to the University that are the same or similar to those performed by covered employees).

New York
180 Maiden Lane
New York, NY 10038-4982
Tel: 212.806.5400
Fax: 212.806.6006

Los Angeles
2029 Century Park East
Los Angeles, CA 90067-3086
Tel: 310.556.5800
Fax: 310.556.5959

Miami
Southeast Financial Center
200 South Biscayne Boulevard, Suite 3100
Miami, FL 33131-5323
Tel: 305.789.9300
Fax: 305.789.9302

Washington, DC
1875 K Street NW, Suite 800
Washington, DC 20006-1253
Tel: 202.739.2800
Fax: 202.739.2895

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