

The Diversity of Public Sector Labor Law Regimes

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Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, [18 Cornell J. L. & Pub. Pol'y 735](#) (2009).

The importance of the public sector in traditional labor law and collective bargaining increases every year. Whereas union density is down to about 7.5% in the private sector, it continues to hover close to 40% in the public sector. A majority of union members now work for units of government. The most heavily unionized sectors of the economy are education, police, and fire protection. Yet, most traditional labor law scholarship continues to focus on the private sector generally and the National Labor Relations Act (NLRA) in particular. Scholars' obsession with the NLRA continues even though the legal regimes governing public sector labor relations are highly diverse and therefore provide considerable fruit for scholarly analysis.

Ann Hodges' article is refreshing and important and goes a long way to filling the vacuum in labor law scholarship. Hodges compares Illinois, whose legal regime she characterizes as one of the most union-friendly, with Virginia whose regime is one of the most union-hostile. She catalogues the reasons behind those characterizations, showing the numerous ways in which Illinois law is more favorable to unions than the NLRA and than most other states' public sector labor laws, and relating how Virginia, which has never had a public sector collective bargaining statute, went from allowing public sector collective bargaining at the employer's option, to prohibiting it by Virginia Supreme Court decision, to codifying the prohibition in state statute. She further relates how Illinois law in general is more worker-protective, whereas Virginia law and policy are focused on maintaining a favorable business climate.

Hodges demonstrates the dramatic impact of the legal regime on union strength. She observes that prior to enacting its public sector collective bargaining statutes in 1983, Illinois had extensive public sector unionization, a factor that she believes contributed to the statutes' enactment. However, enactment of the statutes substantially increased union density in the Illinois public sector, particularly outside urban areas. Today, union density in the Illinois public sector exceeds 50%. In contrast, union density in the Virginia public sector stood at 38.5% in 1972 but just six years later, one year after the Virginia Supreme Court decision outlawing collective bargaining, it had dropped to 19.5% and today is around 10%. Union strength in the Virginia public sector tends to be concentrated in urban areas and among teachers and firefighters. Moreover, Hodges points out, union strength or weakness and the legal climate reinforce each other. Strong unions are able to push for an even more favorable legal regime while weak unions are not.

Hodges goes further and shows how the legal regime affects how unions organize and represent their members. She characterizes the dominant approach to organizing and representation among Illinois public sector unions as contract-based. Unions gain exclusive bargaining representative status and negotiate contracts with grievance and arbitration procedures, union security provisions and dues or agency fee check-offs, provisions that tend to institutionalize the union in the particular workplace. In contrast, Virginia public sector unions have no enforceable contracts to rely on to solidify their existence. They must constantly organize, persuading employees to join, renew their memberships, and pay dues. Furthermore, they "must also work continually to sustain relationships with employers and legislative bodies that control the terms and conditions of employment." (P. 752.) Hodges shows

how Virginia public sector unions have succeeded in obtaining memoranda of agreement with employers which, although not legally binding, are generally followed. But, she laments, these positive labor relationships resulting from creative methods of worker representation are present only for a small segment of the Virginia public sector workforce and are notably absent in state government and outside urban areas.

Hodges suggests another positive effect of the Virginia labor relations regime that has evolved in response to a hostile legal climate. She finds that the Virginia legal regime may lead to cooperative relationships where employers are willing to work with unions representing their employees. She observes that there is anecdotal evidence that employers are more willing to work out agreements with unions where the agreements are not legally binding, even though the agreements are followed. She observes that in this climate, “[a]greements can be quietly negotiated and compliance may proceed under the radar of public scrutiny, unlike the situation where negotiations are public and contracts require legislative approval.” (P. 772.) Furthermore, she suggests that freed from the constraints of traditional labor law doctrine, parties may find it easier to address issues of mutual concern that jurisdictions with traditional collective bargaining laws would hold to not be mandatorily negotiable. This may lead to greater labor-management cooperation. Hodges cites as an example, the cooperative efforts of the Norfolk Federation of Teachers and Norfolk School System that won the Broad Prize for being the top urban school system in 2005.

Hodges does not ignore the private sector. Rather, she suggests that private sector unions and worker advocates, who currently operate in a legal environment that is not union-friendly but is not as hostile as the legal climate in Virginia’s public sector, can learn from the Virginia public sector experience. While she recognizes significant differences between public and private employment, she draws analogies to the tactics used by Virginia public sector unions and those used by private sector worker centers to successfully organize and represent workers in spite of the law. She notes that although Virginia public sector unions operate in a more hostile legal environment than private sector unions generally, the union density rate in the Virginia public sector exceeds that of the private sector.

Hodges has presented many thought-provoking insights into the relationship between the law and the reality of how likely it is that employees will have collective representation, the forms that such representation will take, how the representative will go about doing its job, and the nature of the relationship between the collective representative and the employer. Just as importantly, she has demonstrated why labor law scholars should expand their horizons beyond the private sector and the NLRA.

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