Essentials of Labor Relations

An Introduction to Collective Bargaining and Labor Relations in Montana Public Employment

A Very Brief History of Labor Relations in the U.S.

1935 – Passage of the Wagner Act

- Also known as the National Labor Relations Act
- Recognized workers' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."
- Established employer unfair labor practices
- Only applied to private sector employers & employees
- Established the National Labor Relations Board to enforce the Act. (The president appoints the five board members and their general counsel, with the consent of the senate. Each board member serves a five-year term. The general counsel has a four-year term.)

Under the NLRA, employers may not…

- Interfere with
- Restrain, or
- Coerce employees

- Organize
- Bargain collectively
- Engage in concerted activities

1973

Montana Legislature passes a collective bargaining law for public employees.

Montana Public Employee Collective Bargaining Act

- Articulates a labor relations policy
- Recognizes self-organization and the concept of exclusive representation
- Creates process to resolve representation issues
- Establishes duty to bargain and management rights
- Provides for adjudication of unfair labor practices
- Sets forth dispute resolution processes (mediation, fact-finding and arbitration)
- Modeled after the National Labor Relations Act, with a few exceptions (see next slide)

Montana's collective bargaining law versus the National Labor Relations Act

A Few of the Differences

- Management rights (in Montana law only – will cover later on)
- Prohibition on secondary boycotts (in NLRA only)
- Prosecutorial function of the NLRB & general counsel

Montana's Statutory Policy on Labor-Management Relations

(for Montana public employers & employees)

"**39-31-101. Policy.** In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the state of Montana to **encourage** the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees (emphasis supplied)."

Compare Montana's Labor Relations Policy to the Language in the NLRA

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by **encouraging** the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection*."

NLRA and Montana Law

NLRA: Sec. 7. [§ 157.] Employees shall have the **right to self-organization**, to form, join, or assist labor organizations, to **bargain collectively** through **representatives of their own choosing**, and to **engage in other concerted activities** for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

MT Law: 39-31-201. Public employees protected in right of self-organization. Public employees shall have and shall be protected in the exercise of the **right of self-organization**, to form, join, or assist any labor organization, to **bargain collectively** through **representatives of their own choosing** on questions of wages, hours, fringe benefits, and other conditions of employment, and to **engage in other concerted activities** for the purpose of collective bargaining or **other mutual aid or protection** free from interference, restraint, or coercion.

Because of the similarity in these two laws, Montana courts and BOPA look to NLRB and federal court precedent in deciding Montana cases:

The Montana Supreme Court and the Board of Personnel Appeals follow appropriate federal court and NLRB precedent to interpret the Montana Act. *State ex rel. BOPA v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *Teamsters Local No. 45 v. State ex rel. BOPA* (1981), 195 Mont. 272, 635 P.2d 1310; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

Administration and Enforcement

- The Montana collective bargaining law is administered and enforced by the State of Montana Board of Personnel Appeals (BOPA).
- Structure (two labor, two management and a neutral board chair – appointed by the Governor) and procedures of the board are ***similar*** to the National Labor Relations Board (NLRB).
- BOPA is administratively attached to the Montana Department of Labor and Industry.
- BOPA hearings officers' decisions can be appealed to the full Board of Personnel Appeals, Montana District Courts and ultimately the Montana Supreme Court.

LABOR RELATIONS FUNDAMENTALS

I. Union Organizing

II. The Bargaining Process

I. Union Organizing

- Who's included in a potential bargaining unit?
- Who's excluded?
- Who decides?
- What process is used?
  - Petition is filed (see next slide)
  - Employer answers the petition
  - Contested case hearing resolves related disputes (i.e., "appropriate" unit, community of interest, supervisory exclusions, vocational and organizational issues)
  - Election is held
  - Bargaining unit is certified by the board

Unit Determination (UD) Petition

24.26.612 PETITIONS FOR NEW UNIT DETERMINATION AND ELECTION

(1) A petition for new unit determination and election may be filed with the board by a labor organization or a group of employees.

(2) The original petition shall be signed by the petitioner(s) or their authorized representative.

(3) The original petition and three copies of the petition shall be filed with the board.

(4) The petition shall contain:

(a) a description of the unit to be determined specifying inclusions and exclusions;

(b) a statement as to whether there is any known disagreement between the employer and the petitioner as to the nature and scope of the proposed unit and the reasons for the disagreement;

(c) the names of all labor organizations known to the petitioner who claim to represent employees in the proposed unit;

(d) the expiration dates and brief description of any contracts covering any employees in the proposed unit;

(e) the approximate number of employees in the proposed unit; and

(f) any other relevant facts.

(5) The petition shall be accompanied by proof, consisting of authorization cards, or copies thereof, from 30% of the employees in the proposed unit, which have been individually signed and dated within 6 months of the date of the filing of the petition. The cards shall indicate that the signatories desire to be represented for collective bargaining purposes by the petitioner.

(6) The board shall serve a copy of the petition upon the public employer.

Bargaining Unit Inclusions and Exclusions (39-31-103, MCA)

Inclusions:

9) (a) "Public employee" means:

(i) except as provided in subsection (9)(b), a person employed by a public employer in any capacity; and

(ii) an individual whose work has ceased as a consequence of or in connection with any unfair labor practice or concerted employee action.

Exclusions:

(9)(b) Public employee does not mean:

(i) an elected official;

(ii) a person directly appointed by the governor;

(iii) a supervisory employee, as defined in subsection (11);

(iv) a management official, as defined in subsection (7);

(v) a confidential employee, as defined in subsection (3);

(vi) a member of any state board or commission who serves the state intermittently;

(vii) a school district clerk;

(viii) a school administrator;

(ix) a registered professional nurse performing service for a health care facility;

(x) a professional engineer; or

(xi) an engineer intern.

Is it an “appropriate” bargaining unit?

24.26.611 APPROPRIATE UNIT – (As defined under BOPA Administrative Rules)

(1) In considering whether a bargaining unit is appropriate, the board shall consider such factors as:

(a) community of interest;
(b) wages;
(c) hours;
(d) fringe benefits and other working conditions;
(e) the history of collective bargaining;
(f) common supervision;
(g) common personnel policies;
(h) extent of integration of work functions and interchange among employees affected; and,
(i) desires of the employees.

Unit Clarification (UC) Petition

24.26.630 PETITION FOR UNIT CLARIFICATION OF BARGAINING UNIT

(1) A petition for clarification of bargaining unit may be filed with the board by an exclusive representative of the bargaining unit in question or by the public employer only if:

(a) there is no question concerning representation;

(b) the parties to the agreement are neither engaged in negotiations nor within 120 days of the expiration date of the agreement, unless there is mutual agreement by the parties to permit the petition;

(c) a petition for clarification has not been filed with the board concerning substantially the same unit within the past 12 months immediately preceding the filing of the petition; and

(d) no election has been held in substantially the same unit within the past 12 months immediately preceding the filing of the petition.

(2) A copy of the petition shall be served by the board upon the bargaining representative if filed by a public employer and upon the employer if filed by a bargaining representative.

(3) A petition for clarification of an existing bargaining unit shall contain the following:

(a) the name and address of the bargaining representative involved;

(b) the name and address of the public employer involved;

(c) the identification and description of the existing bargaining unit;

(d) a description of the proposed clarification of the unit;

(e) the job classification(s) of employees as to whom the clarification issue is raised, and the number of employees on each such classification;

(f) a statement setting forth the reason why petitioner desires a clarification of the unit;

(g) a statement that no other employee organization is certified to represent any of the employees who would be directly affected by the proposed clarification;

(h) a brief and concise statement of any other relevant facts; and

(i) the name, affiliation, if any, and the address of petitioner.

Decertification Petitions

24.26.643 PETITION FOR DECERTIFICATION

(1) A petition for decertification of an exclusive representative may be filed by an employee, a group of employees, or a labor organization, provided that 12 months have elapsed since the last election.

(2) The petition must be filed during the 30 day window period which starts on the 90th day and ends on the 60th day prior to the termination date of the collective bargaining agreement, or after the terminal date thereof.

(3) A petition seeking decertification of a bargaining unit comprised of employees of school districts, units of the Montana university system, or of a community college may only be filed during January of the year the existing collective bargaining agreement is scheduled to terminate, or after the termination of the existing collective bargaining agreement.

(4) The original petition shall be signed by the petitioner(s) or their authorized representative.

(5) The original petition and three copies of the petition shall be filed with the board.

(6) The petition shall contain:

(a) the name and address of petitioner(s);

(b) a statement that the labor organization that has been certified or is currently being recognized by the employer as bargaining representative no longer represents the interests of the majority of the employees in the unit;

(c) the name of the labor organization, if any, which claims to be the majority representative;

(d) a description of the bargaining unit involved and the approximate number of employees; and

(e) any other relevant facts.

(7) The petition shall be accompanied by proof that 30 percent of the employees in the unit do not desire to be represented by the existing exclusive representative. Proof shall consist of authorization cards, or copies thereof, which have been individually signed and dated within six months of the date of the filing of the petition. The card shall indicate that the signatories do not desire to be represented for collective bargaining purposes by the board-certified or employer-recognized exclusive representative, or that they desire to be represented by the petitioner.

(8) The board shall serve a copy of the petition upon the labor organization(s) concerned, and upon the public employer.

What is a “supervisor?”

39-31-103(11)(a) "Supervisory employee" means **an individual having the authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.**

(b) The authority described in subsection (11)(a) is the only criteria that may be used to determine if an employee is a supervisory employee. The use of any other criteria, including any secondary test developed or applied by the national labor relations board or the Montana board of personnel appeals, may not be used to determine if an employee is a supervisory employee under this section.

II. The Bargaining Process

"**39-31-305. Duty to bargain collectively -- good faith.** (1) The public employer and the exclusive representative, through appropriate officials or their representatives, have the authority and the duty to bargain collectively. This duty extends to the obligation to bargain collectively in good faith as set forth in subsection (2).

(2) For the purpose of this chapter, to bargain collectively is the performance of the mutual obligation of the public employer or the public employer's designated representatives and the representatives of the exclusive representative to **meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits, and other conditions of employment or the negotiation of an agreement or any question arising under an agreement and the execution of a written contract incorporating any agreement reached.** The obligation does not compel either party to agree to a proposal or require the making of a concession."

The "Exclusive Representative"

39-31-208. Representation election at direction of board. (5) A labor organization which receives the majority of the votes cast in an election shall be certified by the board as the ***exclusive representative***.

Some practical implications…

*"**I** know what the employees **really** want."*

The Employer's Representative

Sec. 39-31-301, MCA. Representative of public employer.

"The chief executive officer of the state, the governing body of a political subdivision, the commissioner of higher education, whether elected or appointed, or the ***designated authorized representative*** shall represent the public employer in collective bargaining with an exclusive representative."

Mandatory Subjects of Bargaining

1. wages,
2. hours,
3. fringe benefits, and
4. other conditions of employment

Permissive subjects of bargaining:

- Lawful topics not included in wages, hours, fringe benefits and working conditions, such as:
  - ❑ interest arbitration,
  - ❑ bargaining unit composition,
  - ❑ dues amounts or
  - ❑ other internal union matters
- Neither party is required to negotiate over a permissive subject
- Conditioning a settlement, bargaining to impasse or engaging in concerted activity over a permissive subject is an unfair labor practice.

Prohibited or Illegal Subjects:

Topics forbidden by law, such as:

- Provisions giving preferential treatment to union members, specific gender, race or creed
- Discrimination based upon those illegal factors
- “Closed shop” clauses (a provision that all employee are union members before being hired - made illegal under the 1947 Taft-Hartley provisions)

These items may NOT be included in the contract, even if the parties agree

Employer Unfair Labor Practices

39-31-401. Unfair labor practices of public employer. It is an unfair labor practice for a public employer to:

(1) interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in 39-31-201;

(2) dominate, interfere, or assist in the formation or administration of any labor organization. However, subject to rules adopted by the board under 39-31-104, an employer is not prohibited from permitting employees to confer with the employer during working hours without loss of time or pay.

(3) discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in any labor organization. However, nothing in this chapter or in any other statute of this state precludes a public employer from making an agreement with an exclusive representative to require, as a condition of employment, that an employee who is not or does not become a union member must have an amount equal to the union initiation fee and monthly dues deducted from the employee's wages in the same manner as checkoff of union dues.

(4) discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter; or

(5) refuse to bargain collectively in good faith with an exclusive representative.

Union Unfair Labor Practices

39-31-402. Unfair labor practices of labor organization. It is an unfair labor practice for a labor organization or its agents to:

(1) restrain or coerce:

(a) employees in the exercise of the right guaranteed in 39-31-201; or

(b) a public employer in the selection of a representative for the purpose of collective bargaining or the adjustment of grievances;

(2) refuse to bargain collectively in good faith with a public employer if it has been designated as the exclusive representative of employees;

(3) use agency shop fees for contributions to political candidates or parties at state or local levels.

‘Per Se’ Violations of the Duty to Bargain:

- Unilateral changes
- Direct dealing
- Refusal to execute an agreement
- Refusal to meet at reasonable times
- Insisting on non-mandatory subjects of bargaining

What if the parties can't reach an agreement?

- Mediation – BOPA or FMCS
- Fact-Finding – BOPA
- Arbitration (grievance vs. interest)
- Concerted Activity or Lockout

Under 39-31-305(3), MCA: "The failure to reach a negotiated settlement for submission is NOT, by itself, prima facie evidence of a failure to negotiate in good faith."

AND

Under 39-31-305, MCA: "The obligation [to bargain in good faith] does not compel either party to agree to a proposal or require the making of a concession."

Some Common Contract Provisions:

- ✓ Management Rights (See Next Slide)
- ✓ Employee Rights
- ✓ Union Security
- ✓ Recognition
- ✓ Seniority
- ✓ Hours of Work and Overtime
- ✓ Grievance and Arbitration
- ✓ No Strike/No Lockout
- ✓ Compensation
- ✓ Discipline & Discharge

Management Rights Under Montana Law

39-31-303. Management rights of public employers. Public employees and their representatives shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:

(1) direct employees;

(2) hire, promote, transfer, assign, and retain employees;

(3) relieve employees from duties because of lack of work or funds or under conditions where continuation of such work be inefficient and nonproductive;

(4) maintain the efficiency of government operations;

(5) determine the methods, means, job classifications, and personnel by which government operations are to be conducted;

(6) take whatever actions may be necessary to carry out the missions of the agency in situations of emergency;

(7) establish the methods and processes by which work is performed.

Disputes over Contract Language

- Grievance arbitration versus interest arbitration.
- Grievance mediation.
- Arbitration is "final and biding" except under VERY narrow conditions (See Uniform Arbitration Act – Next Slide).

The Uniform Arbitration Act

27-5-312. Vacating an award. (1) Upon the application of a party, the district court shall vacate an award if:

(a) the award was procured by corruption, fraud, or other undue means;

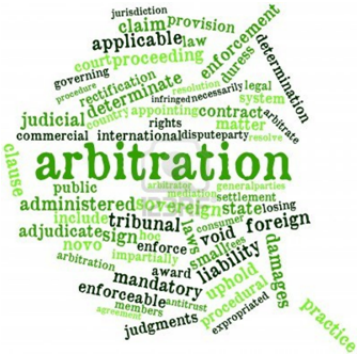
(b) there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(c) the arbitrators exceeded their powers;

(d) the arbitrators refused to postpone the hearing upon sufficient cause being shown or refused to hear evidence material to the controversy or otherwise conducted the hearing, contrary to the provisions of 27-5-213, in a manner that substantially prejudiced the rights of a party;

(e) there was no arbitration agreement and the issue was not adversely determined in proceedings under 27-5-115 and the party did not participate in the arbitration hearing without raising the objection; or

(f) a neutral arbitrator failed to make a material disclosure required by 27-5-116. An award may be vacated because of a material noncompliance with 27-5-116 no later than 90 days following discovery of the failure to disclose.



Uniform Arbitration Act (continued)

27-5-313. Modification or correction of award by court. (1) Upon application made within 90 days after delivery of a copy of the award to the applicant, the district court shall modify or correct the award if:

(a) there was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

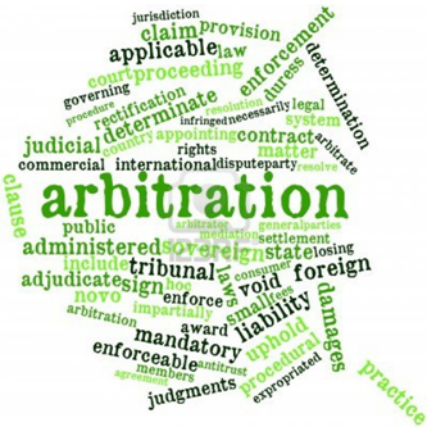
(b) the arbitrators awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(c) the award is imperfect in a matter of form not affecting the merits of the controversy.

(2) If the application is granted, the court shall modify and correct the award to effect its intent and shall confirm the award as modified and corrected. Otherwise, the court shall confirm the award as made.

(3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

History: En. Sec. 16, Ch. 684, L. 1985.



Just Cause: "The Seven Tests"

"1. **NOTICE**: Did the Employer give the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?

2. **REASONABLE RULE OR ORDER**: Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?

3. **INVESTIGATION**: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. **FAIR INVESTIGATION**: Was the Employer's investigation conducted fairly and objectively?

5. **PROOF**: At the investigation did the company 'judge' obtain substantial evidence or proof that the employee was guilty as charged?

6. **EQUAL TREATMENT**: Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?

7. **PENALTY**: Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the Employer?"

Source: Arbitrator Carroll Daugherty - *Enterprise Wire Co.*, 46 LA 359 (1966)

Steve Johnson's "Four Tests of Just Cause"*

Notice

Did the employee know, or should the employee have known, that engaging in the behavior at issue could or would lead to disciplinary consequences?

Proof

Did the employer have sufficient proof that the employee engaged in the alleged behavior?

Penalty

Is the penalty reasonably commensurate with the severity of the employee's behavior? Have other similarly-situated employees been treated substantially differently?

Due Process

Did the employee have a reasonable opportunity to respond to the employer's concerns or allegations behavior before the Employer made a final decision on disciplinary action?

*Not necessarily recognized by any competent arbitrator.

Other Miscellaneous Topics

- Duty of Fair Representation

In *Vaca v. Sipes* (1967), 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, the United States Supreme Court stated the controlling test for breach of the union duty of fair representation: "A breach of the statutory duty of fair representation occurs only when a union's conduct . . . is **arbitrary, discriminatory, or in bad faith**." - Id. at 190, 87 S.Ct. at 916, 17 L.Ed.2d at 857.

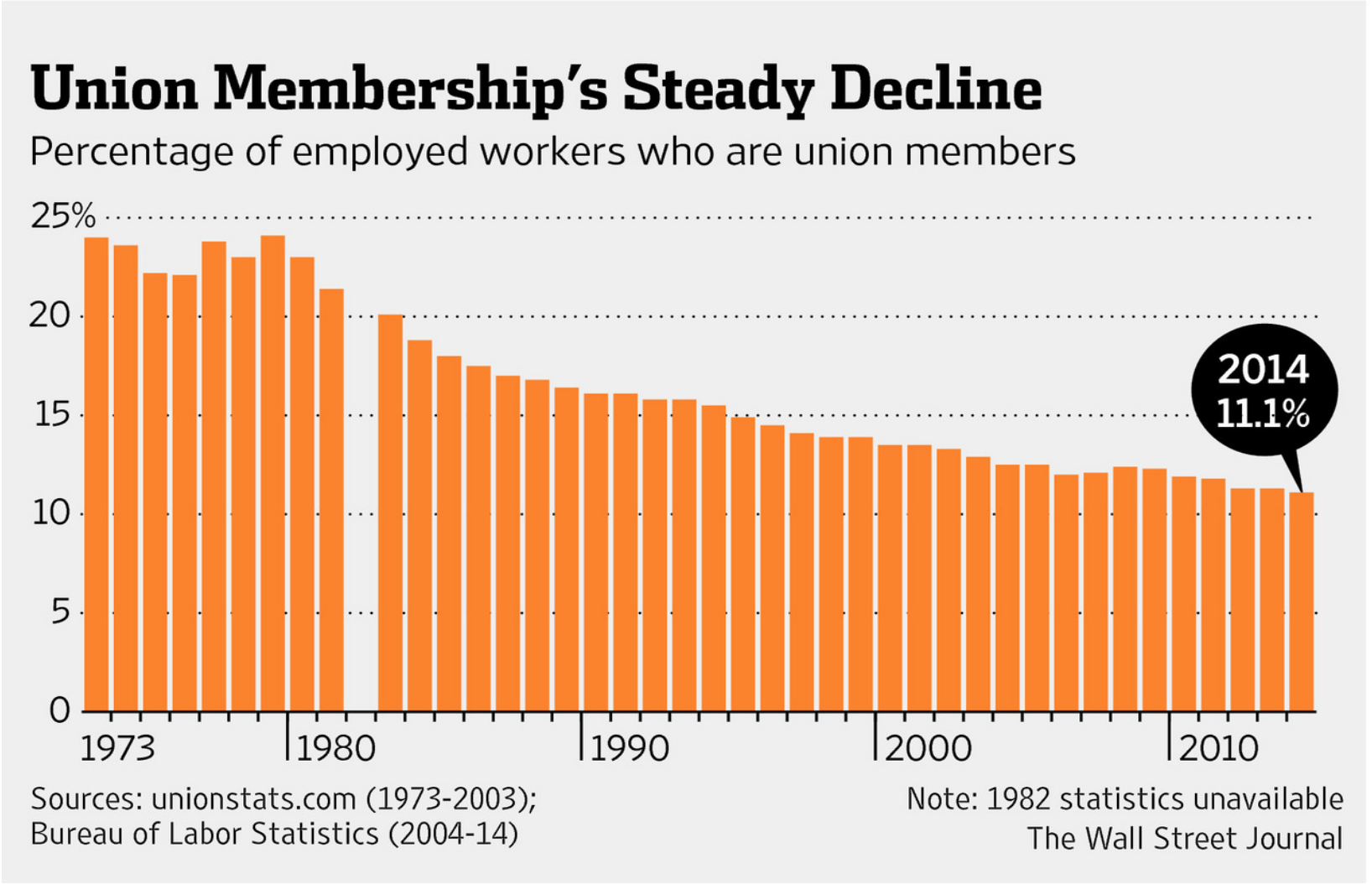
Other Miscellaneous Topics

What is a "Right to Work" Law?

"A **right-to-work law** is a statute in the United States that prohibits union security agreements, or agreements between labor unions and employers, that govern the extent to which an established union can require employees' membership, payment of union dues, or fees as a condition of employment, either before or after hiring."

http://en.wikipedia.org/wiki/Right-to-work_law

Other Miscellaneous Topics



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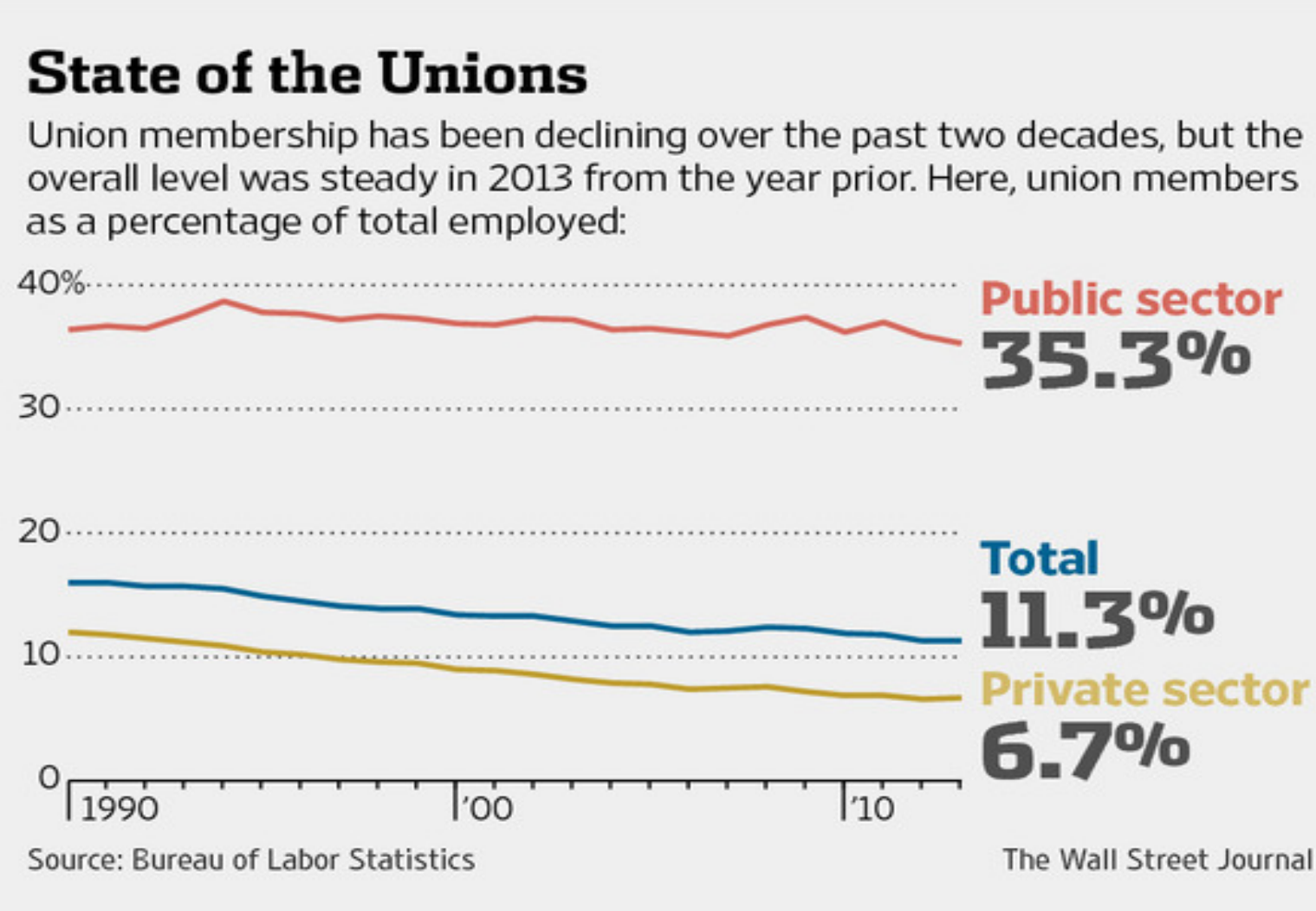


That's All Folks