Virginia Collective Bargaining: Recommendations and models for local collective bargaining in Virginia

By F. Vincent Vernuccio

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Thomas Jefferson Institute for Public Policy
7011 Dreams Way Court
Alexandria, VA 22315

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Forward

Those of us who grew up in a state like New York, where I was required to be a member of the Civil Service Employees Association, are intimately familiar with the power of public employee unions … derived from collective bargaining agreements made with local governments officials.

Those public sector unions had the capability to negotiate with the employer but simultaneously leveraging their political power to influence the decision of the employer – a board of elected officials.

Those in Virginia are unfamiliar with the techniques and patterns of public sector bargaining – from the rules of operation to the means by which they are enforced. The government worker unions now advocating for collective bargaining are backed by a national network including the National Education Association (NEA), the Service Employees International Union (SEIU), the American Federation of State, County, and Municipal Employees (AFSCME), and others – all of which have decades of experience bargaining and have been preparing for their opportunity in Virginia for years.

Local elected officials, on the other hand, are largely on their own.

That is why the Thomas Jefferson Institute for Public Policy is making this "Collective Bargaining Toolkit" available to local elected officials. Its author, F. Vincent Vernuccio, is a seasoned labor analyst who has dedicated his career to ensure that local elected officials understand the impact of expansive negotiating subjects, card check, the need for union democracy and the importance of transparency and protection of employee rights.

We hope local elected officials will find this document useful in the months and years ahead.

Christian N. Braunlich
President
Thomas Jefferson Institute for Public Policy
June, 2021

Executive Summary

In 2020 the Virginia Assembly changed a decades-old law and allowed local governments to collectively bargain with most public employees. The law went into effect on May 1, 2021 and gives "a county, city, or town… [which includes] any local school board" the ability to adopt a local ordinance or resolution to allow them to bargain with government unions.[1]

It should be strongly noted that while the law allows public employees to petition a local government and force elected officials to vote on an ordinance or resolution "within 120 days of receiving certification from a majority of public employees,"[2] that nothing in the law requires the local government to vote yes. In other words, nothing in state law *requires* local governments to allow collective bargaining. Local elected officials have the freedom and power to vote no and continue to work directly with their public employees.

With the *caveat* that local officials can vote no, this toolkit is designed to give a background on collective bargaining and propose alternative options for local officials who feel the need to pass an ordinance or resolution to allow collective bargaining.

This toolkit is broken into four sections which will detail the following:

1. what the law says and what it does not,

2. the type of infrastructure needed to implement collective bargaining,

3. recommended policies which should be included in an ordinance or resolution and

4. options that should be prohibited in an ordinance and excluded from collective bargaining. This last section will also include some possible conflicts with other parts of state law.

In addition, an appendix is included with examples of collective bargaining laws from other states as well as model policy recommendations borrowed from the Better Cities Project, and the Mackinac Center for Public Policy.

Finally, as of this writing, the City of Alexandria is the only locality to pass a collective bargaining ordinance, limiting the scope of ordinance examples to that city.

[1] § 40.1-57.2. Collective bargaining. http://law.lis.virginia.gov/vacode/40.1-57.2
[2] Ibid

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Section 1
Virginia's collective bargaining law

On April 22, 2020 Gov. Ralph Northam approved SB 939, giving Virginia local governments the option to collectively bargain with many public employees. Public sector collective bargaining in Virginia was previously illegal since the 1970s. In 1977 the Supreme Court of Virginia said that local governments did not have the power to collectively bargain.[3] In 1993 the first elected African American governor in the country, Virginia Governor L. Douglas Wilder, a Democrat, signed HB1872 and SB 962 which legislatively banned public sector collective bargaining. The bills passed with bipartisan support though the Democratic-controlled House 78 to 21 and the Senate 36 to 3.[4]

That long-standing precedent changed in 2020 when the legislature passed SB 939 on a straight party-line vote. The new law went into effect on May 1, 2021 and allows counties, cities, towns, and local school boards to pass an ordinance or resolution allowing for public sector collective bargaining.

The ordinance applies to employees of counties, cities, towns, and local school boards but any "officer elected pursuant to Article VII, Section 4 of the Constitution of Virginia" (treasurers, sheriffs, attorneys for the Commonwealth, clerks of deeds, commissioners of revenue, or their employees) are specifically excluded.

The General Assembly also did not include its own employees as well as any other commonwealth employee after receiving a Fiscal Impact Statement from the Virginia Department of Planning and Budget (DPB), which estimated that the cost of additional personnel in each of 32 bargaining units would range from $615,378 for a small agency to $923,068 for a large agency. DPB also estimated that the cost of a one percent salary increase would be $31,437,664 from the commonwealth's General Fund and $45,089,897 from the Non-General Fund.[5]

The new law allows "a majority of public employees in a unit considered by such employees to be appropriate for the purposes of collective bargaining" to petition a local government and force a vote within 120 days to allow the employees to bargain.[6] A bargaining unit is a group of

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[3] https://law.justia.com/cases/virginia/supreme-court/1977/761421-1.html

[4] https://www.nationalreview.com/corner/virginia-opposition-public-sector-collective-bargaining-bipartisan-barbara-comstock/

[5] https://lis.virginia.gov/cgi-bin/legp604.exe?201+oth+SB939FH1122+PDF

[6] § 40.1-57.2. Collective bargaining. http://law.lis.virginia.gov/vacode/40.1-57.2

employees which can be grouped together for the purpose of collective bargaining— all teachers in a school or school division, for example.

The law does not require local elected officials to approve such a petition, meaning that while the local government must vote, it can still vote no. As noted in the statute, "Nothing in this subsection shall require any governing body to adopt an ordinance or resolution authorizing collective bargaining."[7]

The bill was also specific that worker strikes in Virginia are still illegal.

Besides the provisions of illegal strikes, forced voting of elected officials, and allowing local government to bargain if it passes an ordinance, the legislation requires the governing body to provide procedures to form or withdraw a union but gives no other guidance or framework.

The vagueness of the law is in stark contrast to other states that have entire sections of code dedicated to public sector collective bargaining. Instead, localities which approve bargaining will have to create their own legal framework over how elections will be conducted, who will be able to bargain, how contract disputes will be resolved, which subjects can be bargained over, and which subjects will be prohibited.

The law also does not put any limits on the number of times a local government would be forced to vote on collective bargaining. This may end up in litigation but there is an open question if groups of public employees can consistently petition, forcing elected officials to repeatedly respond to the same group of public employees. While there is a 120-day window to vote, there is nothing in the law stopping the group of public employees from submitting a petition shortly after the vote to ask for another vote in four months. Add in multiple groups of employee petitions for votes and meetings could be bogged down with consistently having to respond.

Further, the law's "unit considered by such employees to be appropriate" language gives no clear guidelines on what is considered a unit.

Conceivably unions could use the language in the new statute to push for hyper-specific units, creating a multitude of smaller units and forcing a plethora of repeated votes.

Already local governments and unions are disagreeing on what will constitute a unit.[8]

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[7] Ibid

[8] In an early proposal on collective bargaining the City of Alexandria suggested having four units made up of Fire, police, labor and trades, and general government. By contrast one union asked for double the amount of units broken down into fire, police, labor and trades, library, service and maintenance, clerical and administrative, professional, and Department of Community and Human Services Professional and Technical. See https://alexandria.legistar.com/LegislationDetail.aspx?ID=4775842&GUID=2BE7FFCF-33C7-4B5F-AEA5-FCAD4F80A701&FullText=1 . The City eventually settled on five units: police, fire and emergency medical services, labor and trades, professional, and administrative and technical. https://alexandria.legistar.com/LegislationDetail.aspx?ID=4910340&GUID=B7F6740A-1D80-4383-AD70-535F4A4ED3F1&FullText=1

While it is unclear if a local government can pass a resolution simply saying they will not bargain (they can always vote no), there is nothing within the law saying that an ordinance or resolution cannot be narrowly construed to only allow a very limited number of bargaining subjects. This will be addressed in section 4 below.

Section 2
Infrastructure, union elections, and contract negotiations

Collective bargaining does not take place in a vacuum. Procedures and infrastructure need to be put in place to facilitate the process. As mentioned previously, most of these procedures and the infrastructure necessary to execute public sector collective bargaining are generally created at a state level in other states that have public sector collective bargaining. However, Virginia's new law does not give any guidelines here nor does it set up any statewide infrastructure, instead leaving it up to local towns, cities, counties or even school boards to create and manage the process.

This section will outline policy recommendations to ensure that public employees, voters, and taxpayers are protected.

First the locality will need to determine if it is going to create a labor board, appoint a labor relations administrator, or create another type of additional agency. If the locality chooses to bargain, they will need some way to administer union elections, resolve impasses during contract negotiations, and adjudicate violations of the local collective bargaining ordinance or resolution, known as unfair labor practices.

The City of Alexandria estimated administrative costs alone associated with collective bargaining will range between $500,000 and $1 million per year for the city.[9] The City agreed to permit a wider scope of bargaining subjects than originally recommended by the City Manager and the number of subjects will conceivably be at the higher end of that spectrum.

Fairfax County is forecasting $1.6 million for administrative costs surrounding collective bargaining.[10]

These costs are for the process of bargaining and not for any added benefits to employees or additional services to the public.

Virginia localities will also need to determine how unions are formed. This section will focus on how a union will become the exclusive representative of workers as well as the process of negotiating contracts.

• Recommendation: Secret ballot protection in union organizing elections with in-person paper ballots.

Certification and decertification procedures are required by the state collective bargaining law and will be necessary in any ordinance or resolution that allows collective bargaining.[11]

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[9] https://alexandria.legistar.com/LegislationDetail.aspx?ID=4775842&GUID=2BE7FFCF-33C7-4B5F-AEA5-FCAD4F80A701&FullText=1

[10] https://www.fairfaxcounty.gov/boardofsupervisors/sites/boardofsupervisors/files/assets/meeting-materials/2020/nov24-budget-fy2022budgetforecast.pdf

[11] § 40.1-57.2. http://law.lis.virginia.gov/vacode/40.1-57.2

Specifically the state law reads, "[a]ny such ordinance or resolution shall provide for procedures for the certification and decertification of exclusive bargaining representatives, including reasonable public notice and opportunity for labor organizations to intervene in the process for designating an exclusive representative of a bargaining unit."[12]

Virginia' secret ballot protection act is clear that Virginian employees are entitled to a secret ballot vote when deciding if they want to be represented by a union or not. § 40.1-54.3 requires that "in any procedure providing for the designation, selection, or authorization of a labor organization to represent employees, the right of an individual employee to vote by secret ballot in such a procedure is a fundamental right that shall be guaranteed from infringement."[13]

Union organizing via an open petition process or through a card check scheme can lead to intimidation, coercion, or deception of employees and should be avoided.[14]

Card check is a way unions remove the protections of a secret ballot election from employees deciding if they want a union to organize them. Instead, unions can bargain for all the employees in a unit by getting a majority of the employees to sign cards or a petition for unionization.

The City of Alexandria recently attempted to include card check in their ordinance allowing collective bargaining but removed the provision at the last minute— this could be because of the conflict with the state secret ballot protection act.[15]

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[12] § 40.1-57.2. http://law.lis.virginia.gov/vacode/40.1-57.2

[13] https://law.lis.virginia.gov/vacode/title40.1/chapter4/section40.1-54.3/

[14] https://www.mackinac.org/26957 see also *Dana Corp.*, 351 NLRB 434, 438-39 (2007) https://www.nlrb.gov/sites/default/files/attachments/pages/node-201/351-28.pdf "For a number of reasons, authorization cards are 'admittedly inferior to the election process.' First, unlike votes cast in privacy by secret Board election ballots, card signings are public actions, susceptible to group pressure exerted at the moment of choice. .... 'Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back,'… Second, union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options…. Third, like a political election, a Board election presents a clear picture of employee voter preference at a single moment. On the other hand, card signings take place over a protracted period of time. … [s]tatistics showed a significant disparity between union card showings of support and ensuing Board election results. In particular, unions with a 50- to 70-percent majority card showing won only 48 percent of elections. Even unions with more than a 70-percent card showing won only 74 percent of elections… Finally, although critics of the Board election process claim that an employer opposed to union representation has a one-sided advantage to exert pressure on its employees throughout each workday of an election campaign, the fact remains that the Board will invalidate elections affected by improper electioneering tactics, and an employee's expression of choice is exercised by casting a ballot in private. There are no guarantees of comparable safeguards in the voluntary recognition process." The language above is to illustrate the problems with card check and not to show binding authority. The Dana decision is an ongoing debate in the NLRB.

[15] https://alexandria.legistar.com/LegislationDetail.aspx?ID=4910340&GUID=B7F6740A-1D80-4383-AD70-535F4A4ED3F1&FullText=1

However, the National Labor Relations Act for private sector employees as well as many other state laws for public employees require a "showing of interest" from 30 percent of the employees in a bargaining unit. This is generally demonstrated through a petition or union cards.[16]

The petition process would be the first step to trigger an election but not the final determination of a union becoming an exclusive representative and having a monopoly to represent all employees.

Additionally, as Virginia's state collective bargaining law requires, other unions need to be given an opportunity to intervene in the process. This may be accomplished by publicly announcing a union has provided a showing of interest and allowing for a certain amount of time for other unions to gather support. However, the support may be lower, such as ten percent, to allow a second union to "intervene" and be listed on a union election ballot.

In any election considering allowing a union to gain exclusive representation, a choice of "no union" should be on the ballot. The City of Alexandria Ordinance is written in such a way that if two unions are on an initial ballot with the choice of "no union" and both unions receive more votes than the "no union" choice, a subsequent ballot will only have the choice between two unions. [17]

Runoff elections should always include the choice of "no union." However, as detailed below, the preferred method is if a union does not receive votes from a majority of all workers, the worksite should not be organized.

In addition to the ordinance prescribing a secret ballot election, the ordinance should specify that these elections take place at the worksite or in a place mutually agreed upon by the union or unions and the employer. To safeguard against fraud or undue coercion, remote voting by mail, phone, or electronic means should not be allowed. If employees do not report to a centralized location, polling stations can be staggered between different workplaces at different times. Staggering will help keep costs down for administering the election.

Finally, a process should be outlined where the public employer, employee, or a union may call certain ballots into question or "challenge" them if there is a doubt of their accuracy. The labor board or administrator should have processes in place to adjudicate the challenges ensuring all parties are heard and the election count is accurate.[18]

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[16] "Conduct Elections" National Labor Relations Board website https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections as access 4/5/2021

[17] https://alexandria.legistar.com/LegislationDetail.aspx?ID=4910340&GUID=B7F6740A-1D80-4383-AD70-535F4A4ED3F1&FullText=1

[18] https://www.thecentersquare.com/virginia/alexandria-collective-bargaining-proposal-would-not-allow-employees-to-challenge-vote-determination/article_bf97ef06-7ad2-11eb-802e-d38b3b157c9c.html

• Recommendation: Unions must win a majority of those they wish to represent to bargain on their behalf.

If unions win the ability to represent workers on a job, they have what is known as exclusive representation, meaning they represent all workers whether those workers are members of the union or not and regardless of whether the worker wants union representation or not.

Since unions will be petitioning for the ability to be the exclusive representative, they should have the support of a majority of all employees in a unit. Therefore, an ordinance creating a secret ballot election should specify that to win, the union needs to get "yes" votes from a majority of all the employees within the unit, not just those voting. This should be the case whether there is only one union on the ballot or if additional unions intervene.

• Recommendation: Standardized units of full-time, non-managerial, non-supervisory, or non-confidential employees.

To facilitate the economy of negotiating and allow similarly situated employees to be in the same unit, larger units are recommended. For example, all police officers should have their own union as well as all clerical workers, or educators. They should not be separated into smaller, more specific units. However, this may be open to interpretation with the statute and may need to be litigated as the state bargaining statute allows employees to determine their own units for the purposes of petitioning a locality to pass an ordinance or resolution.

Ordinances can specify who can bargain. Bargaining should be limited to non-supervisory employees as well as employees who are not managers or do not handle sensitive information. Confidential employees such as attorneys or human relations specialists should be excluded as many of them may have a conflict of interest.

Similarly, bargaining should be limited to full-time regular employees -- contract, student, part-time, and seasonal employees should not be included in a collective bargaining unit.

• Recommendation: Employees are entitled to hear both sides of unionization and should be given ample time to make an informed decision.

Just like in a political election, public employees should be given information on both sides of an issue before being asked to decide. Any ordinance or resolution allowing collective bargaining should ensure there is ample time for both the union and the employer or other groups to make their cases for or against collective bargaining.

An employee's right to hear both sides should be protected and any effort to prohibit either the employer or outside groups from speaking to employees about their right not to unionize should be prohibited.

Over the last few years there has been a back and forth between Democrat and Republican Presidential administrations in private sector bargaining regarding "ambush elections" or shortened timeframes where unions are able to campaign for months or longer gaining signatures and making their case to employees before an employer even learns of the effort.[19] Before the Obama administration, the average private sector union election was just under 40 days[20] and this is a good rule of thumb to consider when laying out a time frame for the election.

The time frame starts after a local government votes for an ordinance and when a union gives a public employer a petition saying its employees want to organize. The employer and union will then go before the local labor board or administrator and negotiate the size of the unit and which employees are included. The employer will also need to provide the union with a list of the employees in the proposed unit, but with specific protections which are outlined later in this Toolkit. The governing board will also determine if they have jurisdiction to administer the election. The main question the board will ask will be, "Are these public employees who can bargain per any passed ordinance or is there any existing union already that is the exclusive bargaining agent?" The employer would then post a notice informing employees about the election. [21]

• Recommendation: Ensure employee communication while protecting privacy.

As stated, above employees are entitled to hear both sides of the issue of unionization. Therefore, employers or other groups have a right to communicate with public employees. However, this communication should be done at work.

A public employer should be forbidden from giving any third-party group, including a union or the union trying to organize employees, any private information on the employee. This includes home address, personal phone numbers and cell phone, personal email address, or any non-work information.

Employees should also be given the right to opt-out of communications from the union and any request not to share their work information with the union should be honored.

• Recommendation: Union 'showing of interest' cards should fully disclose legal obligation, be revokable and be contemporaneous.

Petitions or cards for showing that employees want a union to represent them should have a valid signature on paper from an employee with contact information to verify the signature and other information to confirm the employee such as an employee identification number. The form should contain a disclaimer in not less than 14-point font informing employees that they are

[19] https://www.washingtonexaminer.com/unions-get-speedier-elections-but-not-more-wins-under-new-rule ; see also https://www.fisherphillips.com/news-insights/balance-restored-the-nlrb-curtails-quickie-election-rule.html
[20] https://news.bloomberglaw.com/daily-labor-report/union-elections-took-longer-in-2020-but-virus-not-only-factor
[21] https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections

authorizing the union to petition to represent them with their employer and they have a right not to sign the form. These forms should be revokable at the will of the signer and the signatures should expire after 180 days.

• Recommendation: Elected officials should retain final say over any contract. Impasses should be resolved by mediation, not arbitration, and when contracts expire their provisions should end.

The state law that was passed in 2020 clearly specified that elected officials retain the final say over budgets and funding. Specifically, the law stated: "[n]o ordinance or resolution adopted pursuant to subsection A shall include provisions that restrict the governing body's authority to establish the budget or appropriate funds."[22]

The authority of the people's representatives should be paramount. All provisions of a proposed collective bargaining agreement ─ funding, policy implications, work rules or other issues─ should go before the local elected council or board which would need to vote to ratify the agreement before it takes effect. Until approved by the governing body, bargained agreements should be seen as a memorandum of understanding and not something that is fully implemented.

Union members should have the opportunity to vote on the contract before the union agrees to a collective bargaining agreement that will eventually go before the elected body. Without a positive vote from the membership, the union should not be allowed to agree to a contract. Member ratification of contracts is standard practice in most collective bargaining contexts.[23] However, this will not infringe on the ability of the elected board or council to reject or amend the final agreement before it takes effect.

Collective bargaining agreements, specifically sections applying to financial issues, should be limited to the length of budgetary authority of the elected board or council. Local counsel should be consulted to see if any state or local laws further limit the length the appropriate budget making authority may agree to a contract. For example, § 22.1-304 D. of Virginia Code prescribes that once a school budget is approved, the school board will provide teachers with a statement confirming their continued employment, where they are assigned, and their salary. However, the code also notes that "[n]othing in the continuing contract shall be construed to authorize the school board to contract for any financial obligation beyond the period for which funds have been made available with which to meet such obligation."[24]

Even in the City Alexandria's ordinance, the City Council retains final say over collective bargaining agreements and any financial obligation requires a fiscal note.[25]

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[22] § 40.1-57.2. http://law.lis.virginia.gov/vacode/40.1-57.2

[23] https://hr.uw.edu/labor/about-labor-relations/glossary-of-terms

[24] § 22.1-304 https://law.lis.virginia.gov/vacode/title22.1/chapter15/section22.1-304/

[25] https://alexandria.legistar.com/LegislationDetail.aspx?ID=4910340&GUID=B7F6740A-1D80-4383-AD70-535F4A4ED3F1&FullText=1

Similarly, when the agreement expires, the provisions should no longer continue without a new or continued agreement ratified by the elected council or board.

New York has an evergreen clause called the Triborough Amendment which allows some provisions superficial wage increases in union contracts to extend past the collective bargain agreement's expiration date.[26]

E.J. McMahon describes the problems with evergreen clauses in an Empire Center Report:

> *The Triborough Amendment gives public employees an incentive to hold out when management is seeking contract concessions. … Triborough's toll on New York taxpayers is significant. For the state government alone, pay hikes guaranteed by the Triborough Amendment have cost $140 million a year, even after Governor Andrew Cuomo negotiated a wage "freeze" with state unions. Similar increases for teachers cost New York City $150 million a year and added $93 million to school budgets elsewhere in the state.*[27]

The Alexandria Ordinance included an evergreen clause which said the city and the union would negotiate "an agreement of no shorter duration than three (3) years and remaining in effect until superseded by a new agreement."[28] Again, these types of provisions should be avoided.

Finally, the elected representatives should be entitled to make changes to a collective bargaining agreement in the event of a financial or other type of emergency.

While not directly addressing the need for an emergency alternation clause in a collective bargaining agreement, the City Manager of Alexandria recently warned against collective bargaining agreements slowing down the responsiveness, creativity, and flexibility the government needs in the event of an emergency. In a memo to the mayor and city council, the City Manager warned that:

> *The recent COVID-19 pandemic is a large-scale macrocosmic example of how the City government needs to respond to crises and needs large and small, often immediately. … Decisions to protect the public needed to be made in some instances immediately. If there had been collective bargaining agreements in place that covered work rules and work conditions, moving with alacrity and being able to be responsive to immediate threats would have been likely impaired.*

The eventual ordinance did include a clause allowing flexibility in an emergency even though the City Council went against the City Manager's initial recommendations and allowed unions to bargain over an almost unlimited number of subjects instead of just wages and benefits.[29]

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[26] https://www.city-journal.org/html/union-power-comes-many-forms-13381.html
[27] https://www.empirecenter.org/publications/triborough-trouble/
[28] City of Alexandria Ordinance
[29] City of Alexandria Ordinance

• Recommendation: Union democracy should be protected.

Public employees should have the right to regularly vote on the union that represents them at the workplace. For this reason, every two years workers should have the right to vote to keep the union that is the exclusive representative at their job, to remove it, or change to another union. Several states have passed laws protecting the right of public employees to regularly recertify the union at their workplace.[30]

When a union is up for recertification, the same election procedures as outlined previously in this section should be followed. The union would need affirmative votes from a majority of all employees in the unit (not just union members) and the election should be conducted by secret ballot; however, for recertification elections the votes may be electronic, by phone, or other means that protect the secrecy and accuracy of the election.

Union recertification empowers public employees to choose the representation at their workplace and prevents unions from becoming an heirloom, where employees vote once and the union stays for a generation or longer. In other states with older public sector collective bargaining laws but without union recertification, the vast majority of public employees were hired without ever having a say about which union represents them.[31]

The cost for the electronic elections is also economical, according to a 2015 study by John Wright, a former labor policy researcher at the Show Me Institute in Missouri. Wisconsin's annual recertification process averages just $1.50 per vote and the cost is paid mostly by union filing fees.[32]

Recertification should also not prohibit the ability of employees to petition to remove the union at their workplace. Again, both certification and decertification procedures are required by the state collective bargaining law and will be necessary in any ordinance or resolution.[33] Decertification should follow the same guidelines as initial certification where 30 percent of employees sign a showing of interest petition to remove a union and there is a secret ballot vote. Employers should also be allowed to instigate a decertification election if they have a good faith belief that a union's membership has dropped below 50 percent. This can be accomplished by calculating the number of employees having dues deducted from their paychecks, as determined by financial forms submitted by the union or other means.

• Recommendation: Transparency in contract negotiations and union finances

§ 2.2-3707 of Virginia code already mandates that "all meetings of public bodies shall be open."[34] There are several exemptions to the bill which pertain to individual employees and

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[30] https://www.jamesmadison.org/wp-content/uploads/2020/10/Journal_09_Fall2020.pdf
[31] https://www.mackinac.org/26153
[32] https://showmeinstitute.org/publication/government-unions/the-low-cost-of-labor-reform
[33] § 40.1-57.2. http://law.lis.virginia.gov/vacode/40.1-57.2
[34] § 2.2-3707 https://law.lis.virginia.gov/vacode/2.2-3707/

confidential subjects.[35] but Virginia's local meetings act may apply to collective bargaining sessions and local counsel should be consulted to ensure the bargaining committee is complying with the law.

First a fiscal impact statement should be included and made public with any proposed collective bargaining agreement. As noted above, this is already the case with the City of Alexandria's ordinance.

However, an ordinance or resolution should specifically require that collective bargaining sessions be open to the public with adequate notice and maintain the ability for public input.

Several states and localities have enacted measures to incorporate public employee bargaining into state open meetings laws.[36] Idaho's 2015 law passed unanimously with bipartisan support.[37]

If a negotiation committee or public body feels that having people in the room during these sessions could be a distraction, they should be able to arrange other means allowing for the public to view the meeting remotely. § 2.2-3708.2 already allows for meetings to be held through electronic communication if a member of a public body cannot attend for various reasons.[38]Overall, public meetings in Virginia must be held in person. Virginia law does provide exceptions to this rule during a disaster.[39] Many localities passed ordinances allowing for electronic public meetings during the COVID pandemic, for example.[40]

Similarly, union members and the public have a right to know how government unions are raising and spending their dues money.

To safeguard unionized employees and help root out corruption, federal law mandates that unions provide financial information to the U.S. Department of Labor. These forms include details on individual transactions, details on union spending including officer and employee salaries, spending on organizing and political actives, as well as other overhead. The forms also give a clear picture of union finances by requiring receipt and investment disclosure as well as details on the union assets.[41] However, these requirements only apply to unions with private sector members.[42]

In order for Virginia localities to guarantee the same protections to their public employees that their private sector brother and sisters enjoy, any ordinance or resolution would need to include

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[35] § 2.2-3711 https://law.lis.virginia.gov/vacode/2.2-3711/

[36] https://better-cities.org/clean-open-fair-government/collective-bargaining-transparency/ see also https://www.washingtonpolicy.org/library/doclib/Shannon-Transparency-in-public-employee-collective-bargaining.pdf

[37] https://legislature.idaho.gov/sessioninfo/2015/legislation/H0167/

[38] § 2.2-3708.2 https://law.lis.virginia.gov/vacode/2.2-3708.2/

[39] Virginia Code § 15.2-1413

[40] https://www.loudoun.gov/DocumentCenter/View/164609/Item-03-Proposed-Ordinance-Extending-Effective-Date-of-the-Continuity-of-Govt-Operations

[41] https://www.dol.gov/agencies/olms/reports/forms/lm-1-lm-2-lm-3-lm-4#:~:text=The%20Form%20LM%2D2%20is,annual%20receipts%20of%20less%20than

[42] https://spn.org/landing_page/government-union-transparency/

these requirements either specifically or by incorporation of the federal legislation, the Labor-Management Reporting and Disclosure Act and its subsequent regulations.

Section 3
Provisions that should be included in a collective bargaining ordinance

Individual public employees, taxpayers, and the authority of citizen-elected representatives should be a priority when considering collective bargaining. This section will highlight ways the interests of these groups can be safeguarded by making specific recommendations outside the traditional infrastructure needs of setting up a labor board and administering union elections and contract negotiations.

This section can also be juxtaposed with the final section of this toolkit which gives an array of options that can be off limits, known as prohibited subjects of bargaining.

The below recommendations piggyback off the example of Wisconsin limiting bargaining to wages, subject to inflation. However, except for prohibiting strikes and setting up procedures to form or remove a union, nothing in state law requires specific provisions to be included in a collective bargaining ordinance. While the Wisconsin model is recommended, legally a local government could pass an ordinance or resolution limiting collective bargaining to one or two other issues such as parking spaces and still be in compliance with the state law.

If local governments would rather set out a list of prohibited subjects, those will be detailed in the next section. Local governments could also issue a combination of permissive subjects that can be bargained over and prohibited subjects that are forbidden.

• Recommendation: Collective bargaining should be limited to wages only and limited to inflation unless a governing body affirmatively votes to consider exceeding inflation.

As with any other private citizen or group, public employees and unions can petition their elected representatives on any issues. This is codified in state law and has been on the books in its current form since 2006.[43]

Collective bargaining is different; it establishes legal requirements of those elected officials to respond and "negotiate in good faith" with unions, therefore giving government unions a privilege that is not afforded to other citizens and voters.

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[43] § 15.2-1512.4 https://law.lis.virginia.gov/vacode/title15.2/chapter15/section15.2-1512.4/
"Rights of local employees to contact elected officials.
Nothing in this chapter shall be construed to prohibit or otherwise restrict the right of any local employee to express opinions to state or local elected officials on matters of public concern, nor shall a local employee be subject to acts of retaliation because the employee has expressed such opinions.

For the purposes of this section, "matters of public concern" means those matters of interest to the community as a whole, whether for social, political, or other reasons, and shall include discussions that disclose any (i) evidence of corruption, impropriety, or other malfeasance on the part of government officials; (ii) violations of law; or (iii) incidence of fraud, abuse, or gross mismanagement."

This is one of the reasons that Act 10 in Wisconsin limited public sector collective bargaining to wages only for most public employees. The limitation was also subject to inflation via the consumer price index.[44] To increase the pay of public employers beyond inflation, Wisconsin requires a voter referendum.[45] Wisconsin law specifies using a dataset from the Consumer Price Index to determine the rate of inflation.[46]

It should be noted that Virginia does not have provisions for voting by referendum as does Wisconsin. Therefore, a locality should require a vote of the governing body for any and all salary increases that exceed inflation.

Specifically, Wisconsin's state statute provides:

> Prohibited subjects of bargaining; general municipal employees. The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following:
>
> > *1. Any factor or condition of employment except wages (which includes only total base wages and excludes any other compensation), which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions.*
> > *2. Except as provided in [the sections of code allowing for raises above inflation by referendum], whichever is applicable, any proposal that does any of the following:*
> >
> > > *a. If there is an increase in the consumer price index change, provides for total base wages for authorized positions in the proposed collective bargaining agreement that exceeds the total base wages for authorized positions 180 days before the expiration of the previous collective bargaining agreement by a greater percentage than the consumer price index change.*
> > > *b. If there is a decrease or no change in the consumer price index change, provides for any change in total base wages for authorized positions in the proposed collective bargaining agreement from the total base wages for authorized positions 180 days before the expiration of the previous collective bargaining agreement.*[47]

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[44] WI Stat § 111.70 (2019) https://law.justia.com/codes/wisconsin/2019/chapter-111/section-111-70/

[45] WI Stat § 66.0506 (2019) https://law.justia.com/codes/wisconsin/2019/chapter-66/section-66-0506/ see also WI Stat § 118.245 (2015) https://law.justia.com/codes/wisconsin/2015/chapter-118/section-118.245/

[46] https://www.bls.gov/cpi/ The United State Bureau of Labor Statistics defines the Consumer Price Index as the "measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services. Indexes are available for the U.S. and various geographic areas. Average price data for select utility, automotive fuel, and food items are also available."

[47] WI Stat § 111.70 (2019) https://law.justia.com/codes/wisconsin/2019/chapter-111/section-111-70/

Wisconsin instituted these reforms with Governor Scott Walker's 2011 Budget Repair Bill (Act 10.)[48] The collective bargaining limitations along with other reforms ─ such as public employees paying half of their pension contribution and 12.6 percent of their health insurance premiums─ helped the state patch a $3.6 billion state budget shortfall and yielded almost $14 billion in taxpayer savings over 10 years according to Wisconsin's MacIver Institute.[49]

It also helped public employees by allowing them to be rewarded for excellent work performance in the form of merit pay. Before Act 10 many public employees under collective bargaining agreements were given raises based primarily on how long they had been on the job due to a seniority system established by collective bargaining agreements and not based on how productive they were. [50]

Former Governor Scott Walker wrote in the Wall Street Journal in February 2021 "that the only way to survive a big loss of state aid [resulting from the budget shortfall] was to give schools and other local governments more tools to manage. That meant changing collective bargaining."

The Governor continued, "the concept of the budget-repair bill was simple: Take power out of the hands of the special interests and put it into the hands of taxpayers and the people they elected to run the government. Now, schools can staff based on merit and pay based on performance. That means that they can put the best and the brightest in the classroom."[51]

Act 10 had other benefits including prohibiting unions from bargaining to require union-owned insurance companies by public employers and allowing for competitive bidding.

According to Christian Schneider, a senior fellow with the Wisconsin Policy Research Institute writing in the City Journal, "[w]hen the Appleton School District put its health-insurance contract up for bid, for instance, [Wisconsin Education Association] Trust suddenly lowered its rates and promised to match any competitor's price. Appleton will save $3 million during the current school year."[52]

Schneider then cites a MacIver Institute report which showed that "the Baraboo School District saved approximately $660,000 by switching their coverage from WEA Trust to Dean Health Care. Hartford saved over $535,000 by changing carriers. The Kimberly School District saved even more, eliminating $821,000 in costs by dropping WEA Trust."[53]

MacIver's "study showed that Wisconsin's schools stood to save approximately $100 per staff member by shopping around for coverage just once every six years, according to statewide trends between 2004-2010."[54]

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[48] https://docs.legis.wisconsin.gov/2011/related/acts/10
[49] https://www.maciverinstitute.com/2021/02/act-10-at-10-total-taxpayer-savings-hits-13-9-billion/
[50] https://www.maciverinstitute.com/2013/12/merit-raises-mark-a-change-for-wisconsin-public-employees/
[51] https://www.wsj.com/articles/wisconsins-capitol-siege-10-years-on-11612980118
[52] https://www.city-journal.org/html/it%E2%80%99s-working-walker%E2%80%99s-wisconsin-13445.html
[53] https://www.city-journal.org/html/it%E2%80%99s-working-walker%E2%80%99s-wisconsin-13445.html
[54] Ibid.

• Recommendation: Limit collective bargaining to wages and benefits only with added protection of prohibited subjects of bargaining. (less strong option)

In a memo on his initial draft of an ordinance recommendation to the City of Alexandria's Mayor and City Council, the City Manager warned that:

> *The expansion of collective bargaining to all conditions of employment could also potentially undermine current internal organizational improvement efforts aimed at fostering collaboration and teamwork among City employees within and across departments in that collective bargaining that encompasses all conditions of employment can create an adversarial environment rather than a process that produces collaboration. All conditions of employment would also mean the ability of the City to contract for services would also be subject to collective bargaining.*[55]

The Manager said his staff recommended "limiting the scope of bargaining at this new and fledgling stage of the City's experience with collective bargaining to matters of wages and benefits (as defined in the draft ordinance to include paid and unpaid leave, holidays, insurance plans, and applicable retirement provisions)."[56]

Unfortunately, as previously noted, the City Council did not heed this recommendation and allowed almost an unlimited scope of bargaining.

Local elected officials should note that before an ordinance allows bargaining over retirement or other benefits, local counsel should be consulted to prevent conflict with state laws.[57]

• Recommendation: Protect Public Employees First Amendment Rights and paychecks

Public Employees in Virginia have both a statutory right to choose to pay union fees or not through the state's right to work law[58] and, like all public employees across the country, a First Amendment Right thanks to the Supreme Court's decision in *Janus v. AFSCME*.[59]

Right-to-work simply means that a union cannot get a worker fired for not paying them. Further, *Janus* held that everything government unions do is political, and because of that, public employees have a First Amendment Right to choose to pay union dues or fees or not.[60]

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[55] https://alexandria.legistar.com/LegislationDetail.aspx?ID=4775842&GUID=2BE7FFCF-33C7-4B5F-AEA5-FCAD4F80A701&FullText=1

[56] Ibid

[57] See § 51.1-144. Member contributions https://law.lis.virginia.gov/vacode/title51.1/chapter1/section51.1-144/ as an example of a state law that may prevent a locality from reducing employee contributions to under 5 percent.

[58] § 40.1-58 - § 40.1-69 https://law.lis.virginia.gov/vacodefull/title40.1/chapter4/article3/#:~:text=%C2%A7%2040.1%2D58.&text=It%20is%20hereby%20declared%20to,labor%20union%20or%20labor%20organization.

[59] https://www.supremecourt.gov/opinions/17pdf/16-1466_2b3j.pdf

[60] Ibid

First and foremost, any ordinance or resolution should explicitly state that public employees do not need to join or pay a union as a condition of employment.

Second, elected officials should decide if they want to allow unions to have dues deducted from the paychecks of public employees. In Michigan, for example, the state prohibits dues from being deducted from teachers' paychecks.[61]

If the ordinance will allow (or is silent and does not forbid) payroll deductions for union dues, it should ensure that public employees' choices are protected.

The ordinance should require public employers to inform public employees about their First Amendment right to choose to pay dues and should ensure proper bookkeeping by having the public employee opt-in to paying dues directly to their employer and not allow unions to submit dues deduction authorization cards or a list of employees to the employer. To prevent fraud or misunderstanding, the employer should affirm the wish of the employee by confirming with the employee through email or other means that he or she wishes to have dues taken out of his paycheck.

On the West Coast there are multiple examples of unions forging workers' signatures on dues authorization forms. The Freedom Foundation of Washington has several lawsuits challenging these forms.[62]

This will help prevent fraud or the forging of signatures on dues authorization cards which is the subject of several West Coast lawsuits.[63]

To make sure that public employees wish to continue this deduction, it should be renewed annually but public employees should not be limited to when they can opt-out of the union and opt-out of paying dues or fees. The ordinance should be specific that employees can opt-out of the union at any time without incurring any more debt.

Indiana recently passed legislation to this effect for school employees throughout the state.[64] The Indiana legislation included the following disclaimer to be included in future dues authorization forms:

> *I am aware that I have a First Amendment right, as recognized by the United States Supreme Court, to refrain from joining and paying dues to a union … I further realize that membership and payment of dues are voluntary and that I may not be discriminated against for my refusal to join or financially support a union. I authorize my employer to*

[61] MCL § 423.210 "(b) … A public school employer's use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization." http://legislature.mi.gov/doc.aspx?mcl-423-210

[62] https://www.freedomfoundation.com/press-release/freedom-foundation-appeals-three-union-forgery-rulings-in-one-week/

[63] https://www.wsj.com/articles/woman-versus-the-union-machine-11617834458?mod=opinion_lead_pos4 see also https://www.freedomfoundation.com/press-release/odot-employee-sues-union-invokes-racketeering-provisions/

[64] Indiana Senate Bill 251 (2021) http://184.175.130.101/legislative/2021/bills/senate/251

deduct union dues from my salary in the amounts specified in accordance with my union's bylaws. I understand that I may revoke this authorization at any time.[65]

• Recommendation: Public employee and public employer rights sections

It is typical to include in a collective bargaining statute a section spelling out certain rights afforded to employees and also to the employer.

For employees this usually includes the ability to self-organize, form, or join unions, negotiate with their employer though a union, engage in other activities for collective bargaining or "other mutual aid or protection" as long as the activities are not illegal or against provisions set out in a collective bargaining law.[73] These laws are also specific that public employees have a right to refrain from these activities and have a right to not participate in a union. [74]

Collective bargaining laws also contain a management or employer rights section. They reserve to public employers the right to set policy, decide who to hire, promote, assign work, layoff, or discharge, set the budget, and other provisions to carry out the mission of the public employer.[75]

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[72] § 15.2-1508. https://law.lis.virginia.gov/vacode/title15.2/chapter15/section15.2-1508/ "Bonuses for employees of local governments.
Notwithstanding any contrary provision of law, general or special, the governing body of any locality may provide for payment of monetary bonuses to its officers and employees. The payment of a bonus shall be authorized by ordinance."

[73] IA Code § 20.8 (2017) https://law.justia.com/codes/iowa/2017/title-i/chapter-20/section-20.8/

[74] Ibid.

[75] See 5 U.S. Code § 7106 for federal public employer management rights https://www.flra.gov/resources-training/resources/statute-and-regulations/statute/statute-subchapter-i-general-5 "(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--
(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and (2) in accordance with applicable laws-- (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted; (C) with respect to filling positions, to make selections for appointments from-- (i) among properly ranked and certified candidates for promotion; or (ii) any other appropriate source; and (D) to take whatever actions may be necessary to carry out the agency mission during emergencies. (b) Nothing in this section shall preclude any agency and any labor organization from negotiating-(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work; (2) procedures which management officials of the agency will observe in exercising any authority under this

These are common even in states that have strong public sector collective bargaining. For example, the labor code of Illinois reads, "Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees."[76]

section; or (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials."

See also WI Stat § 111.90 (2016) https://law.justia.com/codes/wisconsin/2016/chapter-111/section-111.90/ 111.90 "Management rights. Nothing in this subchapter shall interfere with the right of the employer, in accordance with this subchapter to: … (1) Carry out the statutory mandate and goals assigned to a state agency by the most appropriate and efficient methods and means and utilize personnel in the most appropriate and efficient manner possible. ... (2) Manage the employees of a state agency; hire, promote, transfer, assign or retain employees in positions within the agency; and in that regard establish reasonable work rules. ... (3) Suspend, demote, discharge or take other appropriate disciplinary action against the employee for just cause; or to lay off employees in the event of lack of work or funds or under conditions where continuation of such work would be inefficient and nonproductive."

[76] 5 ILCS 315/4 https://law.justia.com/codes/illinois/2019/chapter-5/act-5-ilcs-315/

Section 4
Prohibited subjects and limits on collective bargaining

States that allow collective bargaining for public employees put limits on what unions can negotiate over with public employers. Generally, these are broken into two lists ─ one is covered in the previous section of this tool kit which spells out what public employees can bargain over and the other details specific provisions which government unions are prohibited from bargaining over.

This section will cover those prohibited subjects. However, they are not subjects that are off limits to public employees. For example, while local elected officials can prohibit bargaining over merit pay, preventing unions from prohibiting higher performing employees from making more in exchange for a seniority system (more details below), they can still offer merit pay to their employees.

Statutory examples focus on Virginia's education code with additional examples from state code covering other local government employees. Local counsel should be consulted to ensure any ordinance does not run afoul of state law. The policy recommendations transcend employee classification and should be considered for any public body considering a resolution or ordinance allowing for collective bargaining.

Here is a list of recommended issues which should be prohibited in a collective bargaining ordinance or resolution:

• Collective bargained wages should not be a ceiling– Productive public employees should be rewarded for how hard they work. Many collective bargaining agreements only allow for raises based on how many years an employee has been on the job. Any ordinance or resolution should specify that public employees can get increased pay outside the confines of a collective bargaining agreement.[77]

• Staffing, and other personnel decisions – Personnel decisions should be left to the employer. This includes who to hire, in what capacity, and the number of new hires. Assignments of personnel should also be left to the discretion of the employer and in some instances, this is required by state law. For example, § 22.1-297 of Virginia's education code requires:

> *A division superintendent shall have authority to assign to their respective positions in the school wherein they have been placed by the school board all teachers, principals and assistant principals. If the school board adopts a resolution authorizing the division superintendent to reassign such teachers, principals and assistant principals, the division superintendent may reassign any such teacher, principal, or assistant principal for that school year to any school within such division, provided no change or reassignment*

[77] https://www.city-journal.org/html/why-merit-pay-will-improve-teaching-12176.html

during a school year shall affect the salary of such teacher, principal or assistant principal for that school year.[78]

• Layoffs and last in first out prohibitions- Similarly, the employer needs discretion on layoffs during economic downturns or budget shortfalls. This discretion should include policies on who to lay off, which should consider more than just seniority. High performing public employees should not be first on the list of layoffs simply because they do not have seniority. In other states without last in first out prohibitions and public sector collective bargaining, there have been instances where the teacher of the year was laid off because he or she did not have enough seniority.[79]

Thankfully for education employees last in first out is prohibited by Virginia state law. Specifically, § 22.1-304 states, "If a school board implements a reduction in workforce pursuant to this section, such reduction shall not be made solely on the basis of seniority but must include consideration of, among other things, the performance evaluations of the teachers potentially affected by the reduction in workforce."[80]

• School calendars and the minimum amount of time for teacher contracts – Again state code prescribes these minimums which should either serve as a base in a collective bargaining agreement or simply be prohibited. Specifically, § 22.1-302 requires a "standard 10-month contract [which] shall include 200 days, including (i) a minimum of 180 teaching days or 990 instructional hours and (ii) up to 20 days for activities such as teaching, participating in professional development, planning, evaluating, completing records and reports, participating on committees or in conferences, or such other activities as may be assigned or approved by the local school board."[81]

• Discipline and grievance procedures – At a minimum, the ordinance or resolution needs to comply with Virginia state code. For example, § 22.1-308 prescribes the grievance procedure for education employees.[82] § 22.1-309 prescribes procedures for teacher dismissal[83], § 22.1-313 of Virginia code also is clear that "[t]he school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals and suspensions… A teacher may be dismissed or suspended by a majority of a quorum of the school board."[84]

Similarly, § 15.2-1503 of Virginia code applies to local officers and employees. It states "…Any officer or employee of a locality employed …may be suspended or removed in accordance with procedure established by special act or by the governing body, if any…"[85]

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[78] § 22.1-297 https://law.lis.virginia.gov/vacode/title22.1/chapter15/section22.1-297/

[79] https://www.minnpost.com/education/2017/06/lifo-surprise-contentious-last-first-out-suddenly-gone-statute-where-are-teacher-l/

[80] § 22.1-304 https://law.lis.virginia.gov/vacode/title22.1/chapter15/section22.1-304/

[81] § 22.1-302 https://law.lis.virginia.gov/vacode/title22.1/chapter15/section22.1-302/

[82] § 22.1-308 https://law.lis.virginia.gov/vacode/22.1-308/

[83] § 22.1-309 https://law.lis.virginia.gov/vacode/title22.1/chapter15/section22.1-309/

[84] § 22.1-313 https://law.lis.virginia.gov/vacode/title22.1/chapter15/section22.1-313/

[85] § 15.2-1512. https://law.lis.virginia.gov/vacode/title15.2/chapter15/section15.2-1512.4/

Further, § 15.2-1506 of Virginia law already establishes that localities with more than 15 employees set up a "grievance procedure, personnel system and uniform pay plan for employees."[86]

• **Release time prohibition** – Release time is the practice of public employees who are also union officials getting paid their taxpayer funded salary to do union work while on the job. Employees who need to do union work during business hours should be given time off that is either unpaid or is counted toward their vacation hours.

A Yankee Institute study by Trey Kovacs reported that in Connecticut "taxpayers subsidized state employee unions with 121,000 hours of paid time off [in FY 2015], costing $4.1 million"[87]

• **Unions to pay fair market value for office space and supplies** – If unions are using employer office space or supplies, they should be charged the fair market value of such space and the office equipment they use.

• **Dues deductions prohibitions** – Public employers should not be the bill collectors for union dues. States such as Michigan prohibit union dues from being deducted from some public employees' paychecks.[88] However if an ordinance or resolution does not prohibit dues deductions, it should at least ensure employees are informed of their right to not pay union fees and allow an annual renewal option as outlined in the previous section.

• **Prohibit captive audience meetings –** Some states require public employees to sit through a union sales pitch shortly after being hired.[89] This should be prohibited. Unions are free to make their case to potential members during breaks, job fairs, or other events but public employees should not be required to sit through a union orientation as a condition of starting their job.

• **Who will provide insurance and other benefits –** In some states, unions offering services (particularly health insurance) have written into bargaining agreements a commitment to purchase insurance or other products from a subsidiary of the union. This can artificially increase costs, harming competitive bidding and taxpayers. Public employers should be free to choose the best services for the best prices for their employees without having undue pressure from a collective bargaining agreement, and such services should be awarded based on a competitive bid.

• **Use of volunteers –** Nonprofit groups and volunteers should be able to give back to their communities without fear of running afoul of a collective bargaining agreement. Some unions

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[86] § 15.2-1506 https://law.lis.virginia.gov/vacode/title15.2/chapter15/section15.2-1506/
[87] https://yankeeinstitute.org/uniontime/
[88] MCL 423.215 http://www.legislature.mi.gov/(S(iasd5t5yhzvzgkwd0o3ckglx))/mileg.aspx?page=GetObject&objectname=mcl-423-215
[89] https://www.freedomfoundation.com/labor/guide-explains-how-unions-indoctrinate-employees-into-joining/

have protested groups such as the local Boy Scouts cleaning parks because it was the job of their members.[90]

• **Pensions** – Contribution levels and the type of pension and retirement benefits public employees receive should be left to elected representatives.

Local counsel should be consulted before allowing bargaining over pensions as some provisions have the potential to violate state law. For example, § 51.1-144 of Virginia code prescribes that members of the Virginia Retirement System "shall contribute five percent of his creditable compensation for each pay period for which he receives compensation" among other provisions.

• **Performance evaluations –** Performance evaluation ensure that public employers can maximize employee productivity, reward good employees, and give remedial actions to employees that are not performing up to par. These evaluations should not be impinged upon or limited by collective bargaining agreements.

• **Curriculum for schools** – School curriculum should be set by the people's representatives and should not be a subject of bargaining.

These are just some examples of what should be in a collective bargaining ordinance and what should be prohibited by it. While the list is large it is by no means exhaustive. As previously noted, most states have entire sections of code dedicated to public sector collective bargaining. Because of the law state legislators passed last year, it is up to each individual locality in Virginia to decide if it wants to bargain, then create the scope and necessary infrastructure to implement it.

Localities still have the freedom to say no and not allow a union to come in between them and their public employees. This is still the best course of action. However, if a locality feels the need to pass such an ordinance, the Wisconsin model is the next best example of limiting bargain to wages, subject to inflation.

[90] https://townhall.com/columnists/michellemalkin/2009/11/20/when-big-labor-bullies-and-volunteers-collide-n758081

Appendix
Virginia Collective Bargaining Toolkit

Wisconsin Law

Limitation on Bargaining

WI Stat § 111.70 (2019) https://law.justia.com/codes/wisconsin/2019/chapter-111/section-111-70/

111.70 Municipal employment. – Limitation on bargaining
(mb) Prohibited subjects of bargaining; general municipal employees. The municipal employer is prohibited from bargaining collectively with a collective bargaining unit containing a general municipal employee with respect to any of the following:

1. Any factor or condition of employment except wages, which includes only total base wages and excludes any other compensation, which includes, but is not limited to, overtime, premium pay, merit pay, performance pay, supplemental compensation, pay schedules, and automatic pay progressions.

2. Except as provided in s. 66.0506 or 118.245, whichever is applicable, any proposal that does any of the following:

a. If there is an increase in the consumer price index change, provides for total base wages for authorized positions in the proposed collective bargaining agreement that exceeds the total base wages for authorized positions 180 days before the expiration of the previous collective bargaining agreement by a greater percentage than the consumer price index change.

b. If there is a decrease or no change in the consumer price index change, provides for any change in total base wages for authorized positions in the proposed collective bargaining agreement from the total base wages for authorized positions 180 days before the expiration of the previous collective bargaining agreement.

(mbb) Consumer price index change. For purposes of determining compliance with par. (mb), the commission shall provide, upon request, to a municipal employer or to any representative of a collective bargaining unit containing a general municipal employee, the consumer price index change during any 12-month period. The commission may get the information from the department of revenue.

Wage Deduction Prohibition

WI Stat § 111.845 (2019) https://law.justia.com/codes/wisconsin/2019/chapter-111/section-111-845/

111.845 Wage deduction prohibition. The employer may not deduct labor organization dues from a general employee's earnings.

Union Recertification

WI Stat § 111.70 (2019)

111.70 Municipal employment. – Union recertification
3. a. Whenever, in a particular case, a question arises concerning representation or appropriate unit, calling for a vote, the commission shall certify the results in writing to the municipal employer and the labor organization involved and to any other interested parties.

b. Annually, the commission shall conduct an election to certify the representative of the collective bargaining unit that contains a general municipal employee. The election shall occur no later than December 1 for a collective bargaining unit containing school district employees and no later than May 1 for a collective bargaining unit containing general municipal employees who are not school district employees. The commission shall certify any representative that receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit. If no representative receives at least 51 percent of the votes of all of the general municipal employees in the collective bargaining unit, at the expiration of the collective bargaining agreement, the commission shall decertify the current representative and the general municipal employees shall be nonrepresented. Notwithstanding sub. (2), if a representative is decertified …., the affected general municipal employees may not be included in a substantially similar collective bargaining unit for 12 months from the date of decertification. The commission shall assess and collect a certification fee for each election conducted under this subd. 3. b. Fees collected under this subd. 3. b. shall be credited to the appropriation account ….

c. Any ballot used in a representation proceeding under this subdivision shall include the names of all persons having an interest in representing or the results. The ballot should be so designed as to permit a vote against representation by any candidate named on the ballot. The findings of the commission, on which a certification is based, shall be conclusive unless reviewed…

Iowa Law

Retention and Recertification

Iowa Recertification: **IA Code § 20.15 (2019)** https://law.justia.com/codes/iowa/2019/title-i/chapter-20/section-20-15/

2. Retention and recertification elections.

a. The board shall conduct an election to retain and recertify the bargaining representative of a bargaining unit prior to the expiration of the bargaining unit's collective bargaining agreement. The question on the ballot shall be whether the bargaining representative of the public employees in the bargaining unit shall be retained and recertified as the bargaining representative of the public employees in the bargaining unit. For collective bargaining agreements with a June 30 expiration date, the election shall occur between June 1 and November 1, both dates included, in the year prior to that expiration date. For collective bargaining agreements with a different

expiration date, the election shall occur between three hundred sixty-five and two hundred seventy days prior to the expiration date.

b. (1) If a majority of the public employees in the bargaining unit vote to retain and recertify the representative, the board shall retain and recertify the bargaining representative and the bargaining representative shall continue to represent the public employees in the bargaining unit.

(2) If a majority of the public employees in the bargaining unit do not vote to retain and recertify the representative, the board, after the period for filing written objections pursuant to subsection 4 has elapsed, shall immediately decertify the representative and the public employees shall not be represented by an employee organization except pursuant to the filing of a subsequent petition for certification of an employee organization … and an election conducted pursuant to such petition. Such written objections and decertifications shall be subject to applicable administrative and judicial review.

Indiana Law

Assuring *Janus* Rights

Indiana SENATE ENROLLED ACT No. 251 – Janus rights
http://in-proxy.openstates.org/2021/bills/SB0251/versions/SB0251.04.ENRH

Sec. 6. (a) Subject to subsection (c), the school employer shall, on receipt of the written authorization of a school employee:

(1) deduct from the pay of the employee any dues designated or certified by the appropriate officer of a school employee organization that is an exclusive representative of any employees of the school employer; and

(2) remit the dues described in subdivision (1) to the school employee organization.

….

(c) After June 30, 2021, the following apply to a deduction authorization by a school employee under subsection (a) or when a school employer agrees with a school employee organization to deduct school organization dues from a school employee's pay:

(1) A school employee has the right to resign from, and end any financial obligation to, a school employee organization at any time. The right described in this subdivision may not be waived by the school employee.

(2) The authorization for withholding form shall include the school employee's full name, position, school employee organization, and signature and shall be submitted directly to the school employer by the school employee. After receiving the authorization for withholding form, the school employer shall confirm the authorization by sending an electronic mail message to the

school employee at the school employee's school provided work electronic mail address and shall wait for confirmation of the authorization before starting any deduction. If the school employee does not possess a school provided work electronic mail address, the school employer may use other means it deems appropriate to confirm the authorization.

(3) An authorization for school employee organization dues to be deducted from school employee pay shall be on a form prescribed by the attorney general, in consultation with the board, and shall contain a statement in 14 point type boldface font reading:

"I am aware that I have a First Amendment right, as recognized by the United States Supreme Court, to refrain from joining and paying dues to a union (school employee organization). I further realize that membership and payment of dues are voluntary and that I may not be discriminated against for my refusal to join or financially support a union. I authorize my employer to deduct union dues from my salary in the amounts specified in accordance with my union's bylaws. I understand that I may revoke this authorization at any time.".

(4) Authorizations by a school employee for the withholding of school employee organization dues from the school employee's pay shall not exceed one (1) year in duration and shall be subject to annual renewal. Any authorization submitted by a school employee to the school employer before July 1, 2021, expires on July 1, 2021, and must be resubmitted in accordance with this subsection.

(5) Upon the submission of a written or electronic mail request to a school employer, a school employee shall have the right to cease the withholding of school employee organization dues from their pay. Upon receipt of a request, the school employer shall:

(A) cease the withholding of school employee organization dues from the school employee's pay beginning on the first day of the employee's next pay period; and

(B) provide written or electronic mail notification of the school employee's decision to the school employee organization.

The notification in clause (B) must occur within a reasonable time to ensure that the school employee is not required to have dues withheld during the school employee's next pay period or any subsequent pay period.

(6) A school employer shall annually provide, at a time the school employer prescribes, written or electronic mail notification to its school employees of their right to cease payment of school employee organization dues and to withdraw from that organization. The notification must also include the following:

(A) The authorization form described in subsection (c)(3).

(B) The amount of dues that the school employee will be liable to pay to the school organization during the duration of the authorization, if the employee does not revoke the authorization before it expires.

(d) On or before July 1, 2021, and not later than July 30 of each year thereafter, the attorney general, in consultation with the board and the department, must notify all school employers of the provisions described in subsection (c). This notice must include the authorization form described in subsection (c)(3).

Michigan Law

Prohibited subjects of bargaining for teachers

MCL 423.215
http://www.legislature.mi.gov/(S(iasd5t5yhzvzgkwd0o3ckglx))/mileg.aspx?page=GetObject&objectname=mcl-423-215

Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:

(a) Who is or will be the policyholder of an employee group insurance benefit. This subdivision does not affect the duty to bargain with respect to types and levels of benefits and coverages for employee group insurance. A change or proposed change in a type or to a level of benefit, policy specification, or coverage for employee group insurance shall be bargained by the public school employer and the bargaining representative before the change may take effect.

(b) Establishment of the starting day for the school year and of the amount of pupil contact time required to receive full state school aid …

(c) The composition of school improvement committees…

(d) The decision of whether or not to provide or allow interdistrict or intradistrict open enrollment opportunity in a school district or the selection of grade levels or schools in which to allow an open enrollment opportunity.

(e) The decision of whether or not to act as an authorizing body to grant a contract to organize and operate 1 or more public school academies under the revised school code, …

(f) The decision of whether or not to contract with a third party for 1 or more noninstructional support services; or the procedures for obtaining the contract for noninstructional support services other than bidding described in this subdivision; or the identity of the third party; or the impact of the contract for noninstructional support services on individual employees or the bargaining unit. However, this subdivision applies only if the bargaining unit that is providing the noninstructional support services is given an opportunity to bid on the contract for the noninstructional support services on an equal basis as other bidders.

(g) The use of volunteers in providing services at its schools.

(h) Decisions concerning use and staffing of experimental or pilot programs and decisions concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.

(i) Any compensation or additional work assignment intended to reimburse an employee for or allow an employee to recover any monetary penalty imposed under this act.

(j) Any decision made by the public school employer regarding teacher placement, or the impact of that decision on an individual employee or the bargaining unit.

(k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a staffing or program reduction or any other personnel determination resulting in the elimination of a position, when conducting a recall from a staffing or program reduction or any other personnel determination resulting in the elimination of a position, or in hiring after a staffing or program reduction or any other personnel determination resulting in the elimination of a position, …any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit.

(l) Decisions about the development, content, standards, procedures, adoption, and implementation of a public school employer's performance evaluation system … decisions concerning the content of a performance evaluation of an employee under those provisions of law, or the impact of those decisions on an individual employee or the bargaining unit.

(m) … decisions about the development, content, standards, procedures, adoption, and implementation of a policy regarding discharge or discipline of an employee, decisions concerning the discharge or discipline of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit. … a public school employer shall not adopt, implement, or maintain a policy for discharge or discipline of an employee that includes a standard for discharge or discipline that is different than the arbitrary and capricious standard …

(n) Decisions about the format, timing, or number of classroom observations conducted …, decisions concerning the classroom observation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

(o) Decisions about the development, content, standards, procedures, adoption, and implementation of the method of compensation required …decisions about how an employee performance evaluation is used to determine performance-based compensation under section … decisions concerning the performance-based compensation of an individual employee, or the impact of those decisions on an individual employee or the bargaining unit.

(p) Decisions about the development, format, content, and procedures of the notification to parents and legal guardians …

(q) Any requirement that would violate section 10(3).

(4) Except as otherwise provided in subsection (3)(f), the matters described in subsection (3) are prohibited subjects of bargaining between a public school employer and a bargaining representative of its employees, and, for the purposes of this act, are within the sole authority of the public school employer to decide.

Better Cities Project

Union transparency

https://better-cities.org/clean-open-fair-government/collective-bargaining-transparency/

Declaration of Findings, Purposes and Policy
The right of public employees to know how labor organizations are collecting and spending their dues and the right of taxpayers to the process and content of collective bargaining agreements is paramount to [state or locality].

The federal Labor-Management Reporting and Disclosure Act provides that the finances of labor organizations with private-sector members to be open to public inspection. However, that disclosure does not extend to labor organization with only public-sector members in [state or locality.].

Further, the [state or local open meeting act] allows the public to observe how their tax dollars are spent and how policies are set forth by public officials. However, the [state or local open meetings act] does not extend this same transparency to the collective bargaining process, which is an extension of the people's business and one in which taxpayers have a vested interest.

[State or locality] puts the utmost importance on transparency and protecting the rights of its public employees and taxpayers. Therefore, the legislature expands [state or local open meetings act and freedom of information act] to include collective bargaining sessions between a labor organization and a public employer, including posting draft and final collective bargaining agreements, and requires labor organizations to publicly disclose their finances.

Sec. 1. As used in this act:

(A) "Public Employer" means the [state or locality] or any of its political subdivisions, any government agency, instrumentality, special district or school board or district, that employs one or more employees in any capacity.

(B) "Public employee" means an employee of a public employer, public employees will not include those employees covered by the Federal National Labor Relations Act, the Railway Labor Act or the Federal Service Labor-Management Relations Statute. [include state employees if in a locality]

(C) “Labor organization” means any organization, agency, or public employee representation committee or plan, in which public employees participate and that exists for the purpose, in whole or in part, of dealing with a public employer concerning collective bargaining, grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

(D) “Department” means [state or local Department of Labor or another agency].

(E) “Collective bargaining” for the purpose of this act only, means the duty of a public employer and a labor organization to meet and bargain in good faith or meet and confer in an effort to finalize a written agreement or contract with respect to wages, hours, working conditions or other terms and conditions of employment for public employees.

Sec. 2 Labor organization financial transparency

(A) Labor organization representing public employees shall maintain financial records substantially similar to and no less comprehensive than the records required to be maintained under 29 U.S.C. sec 431(b) and regulations pertaining thereto or any successor statute or regulation.

(B) Labor organization shall annually provide records required under subsection (A) in a searchable, electronic format to the Department and to the employees it represents.

(C) The labor organization shall keep records and the data or summary by which the records can be verified, explained, or clarified for a period of not less than five (5) years.

(D) The Department shall post the records required under subsection (A) and (B) to their website in a searchable electronic format.

Sec 3. Labor organization contract transparency

(A) Before a public employer may vote or in any other way ratify a collective bargaining agreement [or contract], amendment or memorandum of understanding agreed to during negotiations between the public employer or their representatives and a labor organization or their representatives, the tentative collective bargaining agreement [or contract] amendment or memorandum of understanding, shall be posted publicly on the website of the Department for not less than 14 days with the ability of the public to comment.

(i) In an emergency, as provided for under [state or local Open Meetings Act] an amendment to a current collective bargaining agreement [or contract] or memorandum of understanding between a public employer and labor organization may be entered into immediately but must be posted publicly within 24 hours of agreement and will expire at the end of the emergency unless ratified again under the provisions of this section.

(B) The notice of such collective bargaining agreement [or contract] shall include:

(i) The full text of the agreement in electronic searchable format.

(ii) The current number of labor organization members in the bargaining unit covered by the agreement

(iii) The current total number of public employees covered by the agreement

(iv) A fiscal note on the cost estimate of the
agreement including other post-employment benefits (OPEB) liabilities both current and projected for at least 5 years in the future.

(C) Once ratified, the Department shall publicly post the collective bargaining agreement including all provisions in subsection (B) for a period of 5 years past the expiration of the agreement. At least annually, the labor organization shall provide the Department with any updates to subsection (B) and the Department shall post any updates on their website.

Sec. 4 Collective bargaining transparency

(A) Collective bargaining negotiations between a public employer and a labor organization to reach a collective bargaining agreement shall be subject to [state or local open meetings act].

(B) The requirement of sub-section (A) applies to negotiations between the public employer's representatives and representatives of the labor organization. This requirement shall also apply to meetings with any labor negotiation arbitrators, fact finders, mediators or similar labor dispute meeting facilitators when meeting with both parties to the negotiation at the same time. Provided, however, a public employer or its designated representatives may hold an executive session for the specific purpose of:

(i) Deliberating on a collective bargaining agreement offer or to formulate a counteroffer; or

(ii) Receiving information about a specific employee, when the information has a direct bearing on the issues being negotiated and a reasonable person would conclude that the release of that information would violate that employee's right to privacy.

(C) For this section, only the public employer may physically close the collective bargaining session required by sub section (A) and the requirements of [state or local open meetings act] may be satisfied if the public employer publicly broadcasts the negotiation session on their website or other widely accessible means.

(D) All documentation exchanged between the parties during negotiations, including all offers, counteroffers and meeting minutes, shall be subject to [state or local freedom of information act.]

(E) The public employer shall post notice of all negotiation sessions at the earliest possible time practicable but not less than 48 hours in advance except for an emergency as provided in [state or local open meetings act]. This shall be done by the public employer by posting notice of the negotiation session on the front page of its official website. The public employer shall also post notice within 48 hours at its regular meeting physical posting locations.

(F) Public testimony, if any, shall be posted as an agenda item.

(G) The public employer shall post a notice on their website of the availability by the Department of any tentative collective bargaining agreement reached under section 3 of this act not less than 24 hours after reaching such a tentative collective bargaining agreement.
Sec. 5 Penalties

(A) Any person who willfully violates this Act shall be fined not more than [x] and shall be paid to [state or local agency].

(B) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report or other information required under the Act shall be fined not more than $[x].

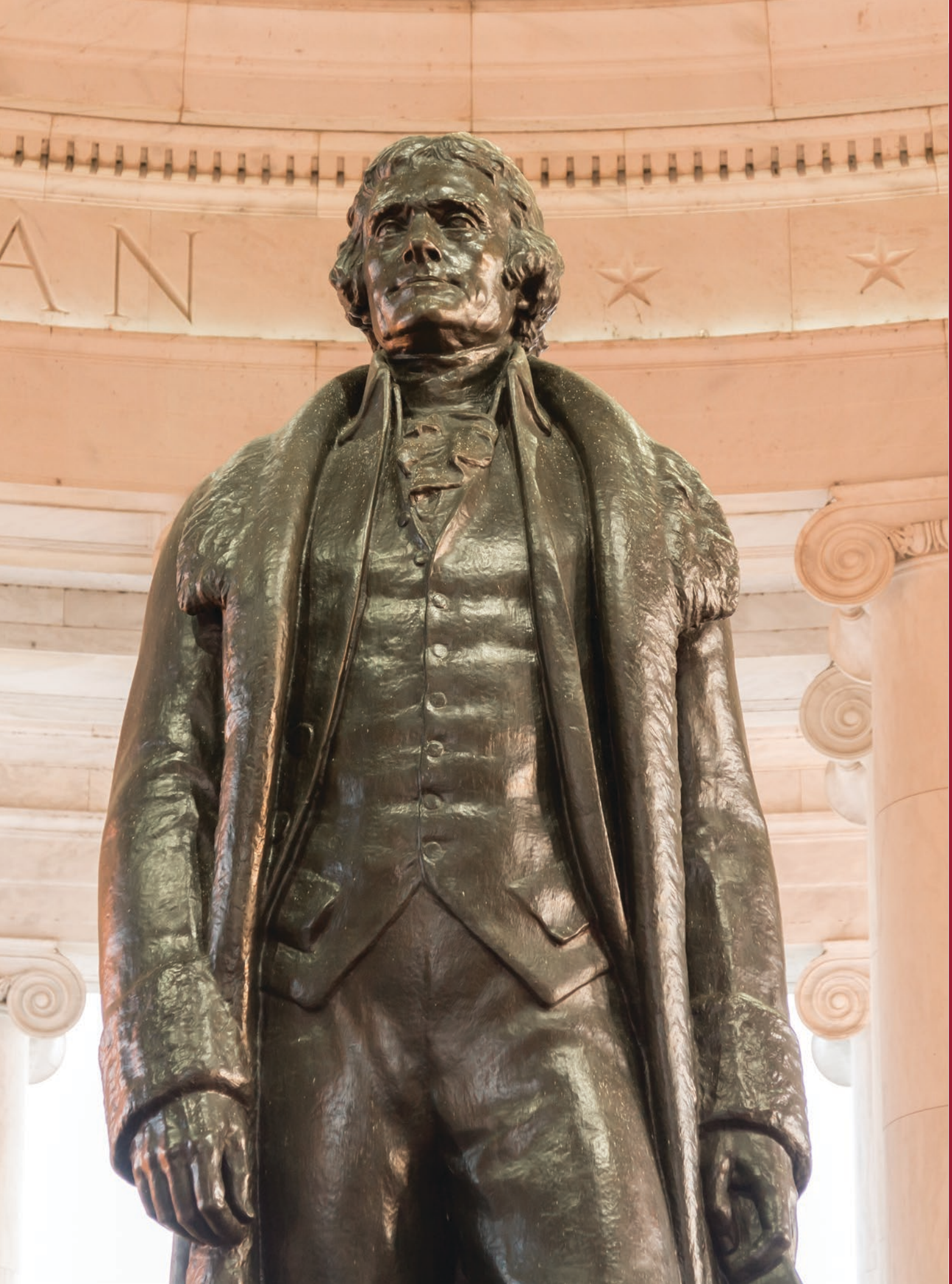
(C) Any person who willfully makes a false entry in or willfully conceals, withholds or destroys any books, records, reports or statements required to be kept by any provision of this Act shall be fined not more than $[x] and shall be paid to [state or local agency].

(D) Each individual required to sign reports under Section 2 shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

(E) Whenever it shall appear that any person has violated or is about to violate any of the provisions of this Act, the [insert public official responsible here] may bring a civil action for such relief (including injunctions) as may be appropriate. Any such action may be brought in the [state or local court] where the violation occurred.

Sec. 6 Severability

If any provision, section, subsection, sentence, phrase or word, of this Act or its application is held unconstitutional, in violation of federal law, [include state law if in a locality] or invalid in any way the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected and shall remain in effect to the maximum extent provided by law.



About the Author

F. Vincent Vernuccio

F. Vincent Vernuccio is a Senior Fellow with Virginia Works and a Visiting Fellow with the Thomas Jefferson Institute for Public Policy. He brings over a decade of expertise in labor law and policy and is regarded as one of the leading experts in the field. As a labor policy consultant, he has advised a multitude of policy and grassroots organizations throughout the country. Vernuccio is President of Institute for the American Worker and holds advisory positions with several organizations including senior fellow with the Mackinac Center and others. He is a graduate of the Ave Maria School of Law.

Vernuccio served on the U.S. Department of Labor transition team for the Trump Administration and as a member of the Federal Service Impasses Panel. Under former President George W. Bush he served as special assistant to the assistant secretary for administration and management in the Department of Labor. Currently, he is a well-respected and sought-after voice on labor policy panels throughout the country and in Washington, D.C. He has advised congressmen and state legislators on labor-related issues, and has testified before the U.S. House of Representatives Subcommittee on Federal Workforce, Postal Service and Labor Policy.

About the Thomas Jefferson Institute for Public Policy

The Thomas Jefferson Institute for Public Policy is a 501(c)(3) organization that crafts and promotes public policy solutions that advance prosperity and opportunity for all Virginians. We envision a Commonwealth of Virginia with a thriving economy where Virginians have the opportunity to succeed because economic and regulatory barriers are low, individuals and parents are empowered to make informed choices for themselves and their families, and the primary role of government is protecting citizens from each other and from the overreach of government itself.

Thomas Jefferson Institute
for Public Policy
7011 Dreams Way Court
Alexandria, VA 22315