POLICY report

Goldwater Institute

No. 255 | January 17, 2013

Airing Out the Smoke-filled Rooms: Bringing Transparency to Public Union Collective Bargaining

Nick Dranias, J.D., Director, Center for Constitutional Government, Goldwater Institute
Byron Schlomach, Ph.D., Director, Center for Economic Prosperity, Goldwater Institute
Stephen Slivinski, M.A., Senior Economist, Goldwater Institute

EXECUTIVE SUMMARY

Secret government union collective bargaining is the law in 11 states, specifically: Alaska, Connecticut, Illinois, Iowa, Kentucky, Maine, Nevada, New Hampshire, New Jersey, New Mexico, and Wisconsin. In Arizona, at least 2.5 million Arizonans—more than 40 percent of the state's population—live in cities and towns that keep collective bargaining with government unions secret. The secrecy imposed on those negotiations is often so all-encompassing that towns like Avondale, Chandler, and Maricopa even expressly prohibit anyone from sharing records of negotiations with elected officials and the news media.

When total secrecy in negotiations is combined with laws forcing government employers to engage in collective bargaining—often euphemistically called "meet and confer"—government unions are free to deploy maximum leverage in negotiations—consisting of political pressure and monopoly power—while hiding from any meaningful oversight. It is no wonder that the Bureau of Labor Statistics has most recently reported that state and local government employees make nearly 43 percent more per hour on average in total compensation than private sector workers. Even when controlling for similar occupations and skills, Arizona pays its employees average hourly total compensation that is nearly 20 percent more than what is paid to private sector workers.

To help prevent union strong-arming that fleeces taxpayers, we should know precisely what public union officials are demanding and what government employers are offering in any collective negotiation about employment terms and conditions. Although union groups and their political allies have opposed collective bargaining transparency as "union busting," it is difficult to see how shining a light on the bargaining table will "bust" unions unless they have something to hide. No principled policymaker could possibly argue that there is a public benefit to the secretive use of bare-knuckled political pressure and monopoly power by unions to extract above-market compensation. Requiring total transparency in collective bargaining is simply the right thing to do to ensure public accountability. Government employees, city managers, and elected officials work for the public; and the public is entitled to know what their employees are doing on their dime.

GOLDWATER INSTITUTE

Introduction

Secret government union collective bargaining is the law in Alaska, Connecticut, Illinois, Iowa, Kentucky, Maine, Nevada, New Hampshire, New Jersey, New Mexico, and Wisconsin. Like these 11 states, in Arizona, eight cities and towns keep collective bargaining with government unions secret. Avondale, Chandler, Gilbert, Glendale, Maricopa, Phoenix, Surprise, and Tempe skirt open meeting laws, which would otherwise require public meetings, or at least prior notice of action by executive session, by charging or authorizing their city managers to conduct confidential negotiations with union representatives. The secrecy imposed on those negotiations is so all-encompassing that cities like Avondale, Chandler, and Maricopa even expressly prohibit anyone from sharing records of negotiations with elected officials and the news media.

Although elected officials are ultimately responsible for approving the final version of the union contracts that are negotiated in secret, Arizona's system of secret collective bargaining typically renders approval by elected officials a rubberstamp because it tends to keep officials in the dark about what they need to know. Elected officials simply cannot meaningfully check and balance collective bargaining negotiations when they do not oversee them and the law keeps the media and the public blind, deaf, and dumb. Officials often have no more than a few days to review and deliberate over 100-plus-page contracts that refer back to years—even *decades*—of previous contracts, and which were negotiated over weeks and months. When these mountains of paper are accompanied by a recommendation of approval from the city manager, even crusaders for union reform have found themselves assuming the city got the best of the bargain, and voting to approve government union contracts that provide for abuses like release time—putting union officials on the city payroll to do nothing but union work.

The net result of collective bargaining secrecy laws is to impose upon taxpayers backroom deals that elected officials too often rubberstamp.

The net result of collective bargaining secrecy laws is to impose upon taxpayers backroom deals that elected officials too often rubberstamp. In Arizona, that's a population of at least 2.5 million—more than 40 percent of the state's population. It should be no wonder that the Goldwater Institute estimated that government union collective bargaining in Arizona increases the wages and benefits of government employees by $550 million per year.

Although following the lead of Virginia and banning collective bargaining in the government sector would clearly counteract the power of government unions to extract outsized wages and benefits, the next best alternative is a reform that has even been advocated by members of the American Bar Association—hardly known for its anti-union partisanship. It is transparency in collective bargaining: allowing the public, the media, and elected officials to know precisely what union officials are demanding and public officials are offering in any negotiation over employment terms and conditions. Such transparency would restore a more realistic, if still imperfect, political check on government union abuses. Moreover, it is simply the right thing to do to ensure public

accountability. After all, government employees, city managers, and elected officials work for the public; and the public is entitled to know what their employees are doing on their dime.

Mind the Pay Gap

Far more than a dime is at stake. According to the most recent report of the Bureau of Labor Statistics, state and local government employees make nearly 43 percent more per hour on average in total compensation than private sector workers.[1] Although use of this statistic to demonstrate a pay gap between government employees and private sector workers has been criticized because it does not control for differences in local job market conditions, educational attainment, occupations, and work skills, it is far from clear that studies which purport to control for such differences necessarily furnish a better picture of total employee compensation. All studies that purport to control for differences in local job market conditions, educational attainment, occupations, and work skills operate on more or less reasonable *subjective* assumptions made by the authors about the isolation of particular labor markets, the compensation value of particular degrees, and whether occupations involve similar work or skill. However reasonable these assumptions may be, such studies are not intrinsically superior to reports of aggregate national data. They entail their own risks.

State and local government employees make nearly 43 percent more per hour on average in total compensation than private sector workers.

For example, in early 2012, the Arizona-based Grand Canyon Institute declared that state and local employees in Arizona make 6 percent less on average than their private sector counterparts based on various purported controls.[2] The author, however, had been previously criticized by his peers for omitting paid leave from his estimate of government compensation in a similar study; and it is unclear whether he omitted paid leave from the Grand Canyon Institute's study.[3] Moreover, the Institute's study contained a number of dubious controls, including the controversial assumption that the bigger the governmental body, the more productive or valuable the governmental worker;[4] and the flawed assumption that all higher degrees of the same level should command the same compensation—e.g., that an education degree is worth as much in the job market in wages and benefits as an engineering degree.

The flaws in the subjective assumptions underpinning the Grand Canyon Institute's study reveal why policymakers should consider both objective reports of statistics *and* studies that purport to include various controls, which always involve subjective judgment calls. Both kinds of evidence are essential to constructing a mosaic that reasonably represents reality. From this vantage point, and regardless of its underlying motives or methodology, the Grand Canyon Institute study indisputably remains an outlier.

The national pay gap between state and local government employees and private sector workers reported by the Bureau of Labor Statistics cannot be explained away by

differences in local job markets, education, occupations, or work skills. A 2011 study by Bureau of Labor Statistics Research economists reported that "compensation for public sector workers in state government is 3 to 10 percent greater than for workers in the private sector; and local government has a compensation gap that is 10 to 19 percent greater than *for those with the same occupations and skill levels in the private sector*."[5] There is no reason to believe that this national rule is somehow inverted in Arizona as the Grand Canyon Institute claims.

A study commissioned by the City of Phoenix in 2011, which attempted to control for similar occupations and skills, found that general employees and public safety employees respectively earned 1 percent and 5 percent above the "competitive range," with the "competitive range" being defined as a range of 95 percent to 105 percent of the average market total compensation for comparable employees in Phoenix area.[6] Although most government executive occupations were found to be paid well above market rates, which warrants independent concern, this study also revealed that those occupations that are represented by government unions typically enjoy a substantial premium above market compensation rates. For example, the study reported that city-employed building maintenance workers and equipment operators, who are represented by government unions, make $71,061 and $75,612 on average respectively in total annual compensation, which is nearly $12,000 more per year than what private sector janitors receive.[7]

City-employed building maintenance workers and equipment operators, who are represented by government unions, make $71,061 and $75,612 on average respectively in total annual compensation, which is nearly $12,000 more per year than what private sector janitors receive.

However, this city-commissioned estimate of total annual compensation is somewhat misleading because it does not control for number of hours worked, despite the fact that government employees work fewer hours on average than private sector employees. A more recent study by John Dunham and Associates, which *did* control for hours worked, as well as similar occupations and skill sets, found that the State of Arizona pays an average hourly total compensation of $30.99 to state employees versus $25.95 for comparable workers in the private sector—a difference of $5.04 per hour, or nearly *20 percent* more per hour on average.[8] Because the Bureau of Labor Statistics reports the pay gap between local government employees and comparable private sector workers is typically more on average than the state employee pay gap, it is reasonable to conclude that city and county employees in Arizona enjoy an average hourly total pay that is *at least* 20 percent above comparable private sector workers.

Taken together, the best evidence available indicates that there is a substantial pay gap in wages and benefits between state and local government employees and private sector employees in Arizona and around the country. This pay gap is revealed regardless of whether one looks to studies that are based exclusively on objective data or studies that are based on reasonable subjective controls.

Union Clout Explains the Pay Gap

Government union power and collective bargaining likely explain much of the pay gap between public and private sector employees. We know this because in a recent report, we looked at factors that drive government sector compensation, including competition with private sector compensation, percentage of unionization, and education attainment.[9] Our statistical model demonstrated that these factors alone accounted for *76 percent* of whatever causes the amount of government compensation to be what it is. This was to a 95 percent level of confidence. Moreover, among the factors that might drive state and local government compensation, unionization was so significant a driver that we found for every 10 percent increase in unionization in the government workforce, there would be more than a $1,300 increase in government pay.[10] We then found that the strength of collective bargaining laws and percentage of unionization had a similar effect on government employee compensation. So our conclusion was that unionization was a proxy for the strength of collective bargaining laws in a given state and that, therefore, collective bargaining laws likely increase what government employees would otherwise make in their absence.

In short, we discovered that the presence of government unions and the strength of collective bargaining laws explain a large portion of the pay gap between state and local government employees and private sector employees. States across the nation could save $50 billion—and Arizona in particular could save $550 million—every year in excessive pay to public employees simply by banning government union collective bargaining.[11]

It should be no surprise that increases in the strength of government union collective bargaining laws or in the percentage of government unionization increase employee compensation—that's what unions and collective bargaining are for.

No contrary study has squarely addressed, much less refuted, these findings to this day. It is doubtful that anyone would really disagree with them in principle. After all, unions exist to monopolize labor and thereby increase what labor is paid through monopoly power. Collective bargaining laws, in turn, increase union leverage in monopolizing labor. It should be no surprise that increases in the strength of government union collective bargaining laws or in the percentage of government unionization increase employee compensation—that's what unions and collective bargaining are for. Indeed, one suspects it would be rather embarrassing to union officials if increased union membership or stronger collective bargaining laws did not measurably increase government employee compensation. Nevertheless, state and local government in Arizona should not make it their policy to grant an annual gift of $550 million to government employees for no other reason than that they have union clout.

This $550 million annual subsidy is manifested in a number of ways in Arizona cities and towns that conduct collective bargaining in secret—especially in the areas of sick leave accrual, use of sick pay, and cash out options upon retirement. In Phoenix, for example, city employees, on average, earn 15 days of sick pay a year, which rollover and can be "banked" year to year. When city employees retire, they have the option of cashing out a portion of that banked sick pay, essentially giving them a nice cash bonus, and using

the rest as a service credit towards retirement.[12] On average the payout is 25 percent of the employees' total banked hours.[13] Employees that leave and subsequently return to city employment can even earn back a portion of their previously banked sick days.[14] Employees that return to work for the city within five years are eligible to receive 20 percent of their previously banked sick days. This percentage increases to 100 percent if the employee left the city as a result of layoffs.[15] City of Phoenix policy also allows for salaried employees to take off up to half a day for a doctor's appointment without having to use a sick day—after the appointment, the employee does not have to return to work as long as they previously worked at least half a day.[16]

These examples show that when total secrecy in negotiations is combined with laws forcing governments to engage in collective bargaining—euphemistically called "meet and confer"—government unions are able to extract compensation not found in the private workforce. This is because government unions are free to deploy maximum leverage, including the promise of political support or retaliation, in negotiations while hiding from any meaningful oversight. Something must be done to reduce such unearned leverage because the money going to government unions does not grow on trees—it is extracted by force from hardworking taxpayers.

City of Phoenix policy also allows for salaried employees to take off up to half a day for a doctor's appointment without having to use a sick day—after the appointment, the employee does not have to return to work as long as they previously worked at least half a day.

Secrecy is a Component of Union Clout in Arizona and Eleven Other States

As discussed earlier, the most obvious source of government union clout in Arizona and elsewhere is the presence of collective bargaining laws that compel public employers to negotiate in "good faith" with unions over how much to pay government employees. Contrary to popular belief, collective bargaining in the form of "meet and confer" is widespread in right-to-work states, most often in local governments. In Arizona, for example, collective bargaining has been adopted by at least 44 state agencies, counties, cities, towns, school districts, and fire districts.[17] Whether collective bargaining is labeled honestly as such, or euphemistically as "meet and confer," the bottom line is that all of these laws give bargaining leverage to government unions.[18]

Unions use these laws not only to compel negotiations over increasing wages and benefits that might not otherwise take place, but also to threaten litigation to compel public employers to remain at the bargaining table under accusations of "unfair labor practices" until a nebulous standard of "good faith" is met.[19] As confirmed by the Goldwater Institute's study of the pay premium associated with government unionization, which correlates to the strength of collective bargaining laws, this additional leverage tends to cause governments to yield to union compensation demands more often than they would otherwise.[20] Consequently, there is little doubt that collective bargaining laws generate government union clout, which in turn contributes to the pay premium enjoyed by government employees over private sector workers. But union clout is enhanced by more than the legal leverage of collective bargaining

laws—it is also enhanced by the fact that collective bargaining laws are often accompanied by provisions that compel secrecy in negotiations.

Secret government union collective bargaining is the law in 11 states: Alaska, Connecticut, Illinois, Iowa, Kentucky, Maine, Nevada, New Hampshire, New Jersey, New Mexico, and Wisconsin.[21] In Arizona, nearly half the state's population lives in a city or town that not only requires collective bargaining with government unions, but also requires or authorizes the negotiations to be conducted behind closed doors. Avondale, Chandler, Gilbert, Glendale, Maricopa, Phoenix, Surprise, and Tempe, which collectively govern 2.5 million Arizonans,[22] all have local ordinances requiring or allowing so-called "meet and confer" bargaining sessions to be conducted without public participation. Phoenix, for example, bans "discussing with members of the City Council negotiation issues in dispute from the time the dispute is submitted to the fact-finding process and extending to the time that the fact-finder's report is made public."[23] Surprise unabashedly declares "any documents or other records created or prepared during or in furtherance of the meet and confer process be kept confidential and not subject to public disclosure until the completion of the meet and confer process." [24]

In some Arizona cities, the secrecy of collective bargaining is arbitrary. Cities like Tempe and Glendale require bargaining to be kept confidential but not from "others as designated by the city manager." [25] No standards govern the city manager's decision, allowing a single, unelected individual a free hand in deciding what the public can or cannot know. In other cities, the secrecy required for collective bargaining is draconian and exception-free. Chandler, for example, prohibits both unions and city officials from disclosing or discussing "any matters concerning the meet and confer proposal with City elected officials or the news media."[26] Chandler even forbids city managers from meeting more than once with elected officials to discuss and seek instruction on resolving areas of impasse. Similar explicit bans on revealing any information about collective bargaining to the news media and elected officials are found in Avondale and Maricopa.[27] Avondale's ordinance is a virtual soliloquy on ensuring collective bargaining never sees the light of day:

Union clout is enhanced by more than the legal leverage of collective bargaining laws—it is also enhanced by the fact that collective bargaining laws are often accompanied by provisions that compel secrecy in negotiations.

> During the discussion process employees and their representatives are prohibited from discussing with city elected officials or the news media any information, term(s), or issue(s) which are the subject of the discussions between the city and the employee group. (e) During the discussion process city elected officials and management employees are prohibited from discussing with employees or the news media any information, term(s) or issue(s) which are the subject of the discussion process between the city and the employee group. City elected officials and management employees are also prohibited from making any commitment or promise whatsoever to employees independent of the city manager or his/her designee with respect to any matter that is the subject of the discussion process.[28]

Other cities are less explicit, but no less opaque in practice. Gilbert, for example, does not make collective bargaining explicitly confidential, but does enforce whatever bargaining "ground rules" are set by the city manager and agreed upon by the local union bosses.[29] In practice, those ground rules have invariably involved keeping collective bargaining confidential and closed to public participation.

These ordinances skirt Arizona's open meetings law because the law requires only that the public receive notice and an opportunity to participate in meetings of a "public body," which involve participation by at least a quorum of its membership.[30] Even though the definition of "public body" includes "advisory committees," and the definition of "advisory committee" includes "any entity" that makes recommendations to a public body, it appears that Arizona cities operate under the assumption that their executive agents, such as their city manager, do not fall under these definitions. As a result, Arizona cities typically conduct collective bargaining without complying with the open proceeding and notice requirements of the Open Meetings Act.[31]

Arizona cities typically conduct collective bargaining without complying with the open proceeding and notice requirements of the Open Meetings Act.

But even in those cities that might concede that the foregoing definitions apply to collective bargaining meetings between union officials and their city manager, Arizona's open meetings law also specifically authorizes confidential executive sessions for general discussions of employment issues and also for "discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body."[32] This executive session authority ensures that cities can preserve the secrecy of collective bargaining—and any other public employment matter—if they so choose.[33]

Furthermore, although most local ordinances imply that records generated during collective bargaining will be disclosed to the public upon the termination of negotiations, Arizonans are currently at the mercy of the willingness of local officials and the court system in securing any degree of transparency in the collective bargaining process. This is because Arizona's public records law does not define "public records" and relies upon precedent to define the term. There is no case law in Arizona holding that preliminary collective bargaining records, which are used during secret negotiations, are "public records," which would be subject to inspection and copying by the public and the news media. Precedent arising in other states under similar laws has refused to compel disclosure of some or all documents generated during confidential collective bargaining.[34]

In practice, the public participation and transparency guaranteed by Arizona's public records and open meetings laws only become applicable once the city council is called into session to actually vote on approving or disapproving whatever union agreement is ultimately reached. By then, the deal is presented as a foregone conclusion and the public cannot have any hope of understanding its intricacies sufficiently to challenge it effectively. Likewise, elected officials who have been cut out of the bargaining process have little

meaningful opportunity to become familiar with contracts that are hundreds of pages long or that incorporate by reference and renew earlier contracts that go back years and even decades. At least one councilmember has acknowledged voting to approve union contracts for the City of Phoenix that contained provisions he opposed.[35] Despite being an opponent of release time and other union benefits, this councilmember simply did not have enough familiarity with the issues in negotiation to become aware of those provisions when the stack of contracts arrived on his desk for his approval.

However, nothing stops union officials who are privy to confidential ongoing negotiations from concurrently meeting separately with friendly elected officials to ensure that they represent their interests in any executive session with the city manager; and certainly during any ultimate public hearing on whether to approve the deal. Even if union officials do not divulge confidential information from the bargaining table in their separate talks with their allied elected officials, union officials will still have the benefit of knowing the status of confidential negotiations and will have an advantage over any member of the public who might try to counteract such influence from a position of total ignorance of the bargaining process. Keeping the bargaining process secret from the general public gives union officials an enhanced ability to influence both sides of the bargaining table relative to the general public. The secrecy of the bargaining process thus works in combination with the legal compulsion of collective bargaining laws to place a heavy hand on one side of the bargaining scale—the government union side.

Although union groups and their political allies have opposed the introduction of transparency legislation in Louisiana, Colorado, and elsewhere as "union busting," it is difficult to see how shining a light on collective bargaining will "bust" unions unless they have something to hide.

A Growing Consensus Favors Transparency in Collective Bargaining

In view of the imbalance of power created by secret collective bargaining, the American Legislative Exchange Council approved model standalone legislation aimed at requiring transparency in government union collective bargaining in 2008. Although union groups and their political allies have opposed the introduction of this model legislation in Louisiana, Colorado, and elsewhere as "union busting,"[36] it is difficult to see how shining a light on collective bargaining will "bust" unions unless they have something to hide. No principled policymaker could possibly argue that there is a public benefit to the secretive use of bare-knuckled political pressure and monopoly power by unions to extract above-market compensation at the bargaining table. Not surprisingly, the idea of transparent collective bargaining has become increasingly attractive to a broad ideological spectrum of policy experts.

For example, in 2009, a leading public administration textbook, *Labor Relations in the Public Sector*, discussed the fact that numerous states require some degree of transparency in government union collective bargaining.[37] There, Professor Richard C. Kearney observed,

> Although the alleged advantages and disadvantages of bargaining in the

> sunshine have not yet been systematically assessed across the states, it has become apparent particularly from the Florida experience (where substantial majorities of labor and management representatives have supported it) that many of the criticisms have been exaggerated . . . . It is clearly consistent with democratic process for citizens to have a formal third-party role in public sector collective bargaining . . . citizens have a fundamental right to hold officials accountable for how their tax dollars are being spent.[38]

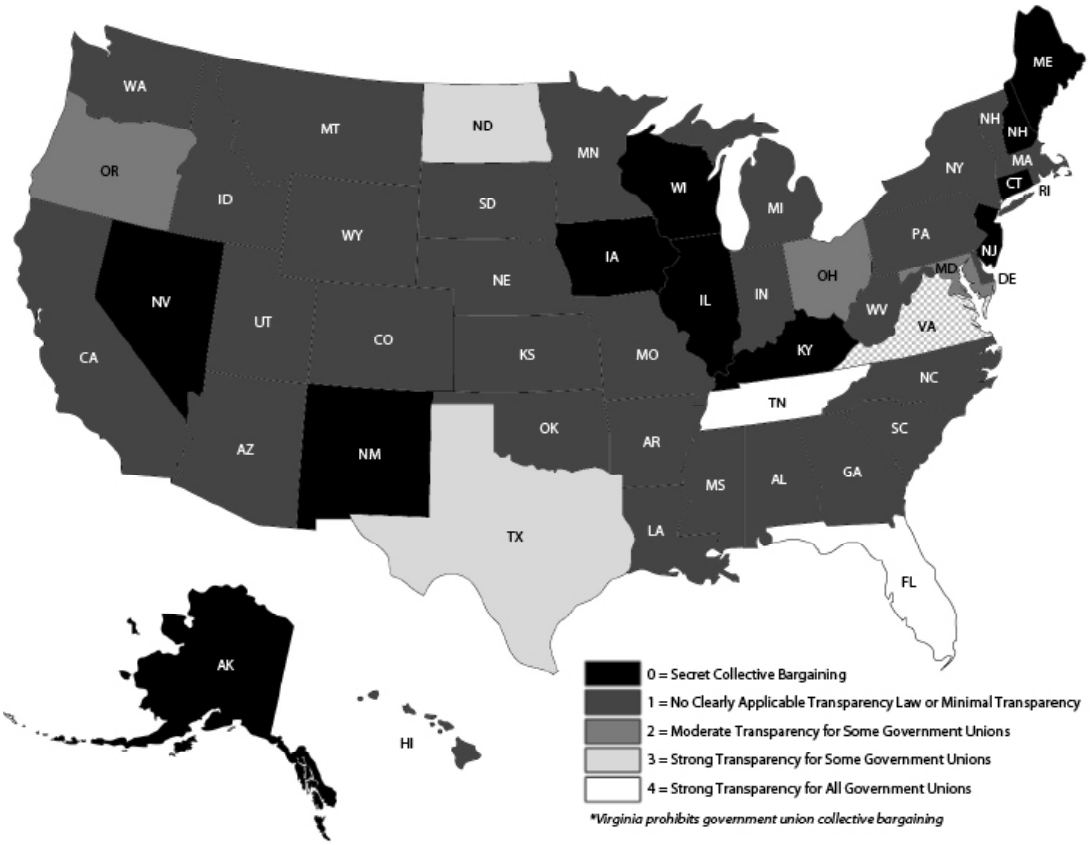
More recently, in September 2012, the American Bar Association's Labor and Employment Law Section distributed a white paper concluding, "perhaps the interests of the parties, their constituents, and society as a whole would be better served by shifting the balance toward greater public disclosure of all aspects of public sector collective bargaining."[39] These sentiments mirror a growing consensus that public sector collective bargaining should not be conducted entirely behind closed doors.

Seven states already require a meaningful degree of transparency in collective bargaining. However, rather than single out collective bargaining for transparency in a standalone reform like that of ALEC's model legislation, these states typically utilize their open meeting laws to provide a modicum of transparency by requiring some or all of collective bargaining proceedings to be conducted with public participation. However, meaningful transparency in collective bargaining is clearly the exception rather than the rule.

The American Bar Association's Labor and Employment Law Section distributed a white paper concluding, "perhaps the interests of the parties, their constituents, and society as a whole would be better served by shifting the balance toward greater public disclosure of all aspects of public sector collective bargaining.

Chart 1 assesses the relative strength of statewide transparency requirements for government sector collective bargaining in each of the 50 states on a scale of 0 to 4, with 4 designating the states with the strongest transparency requirements. A "0" applies to states that affirmatively maintain the statewide confidentiality of government union collective bargaining by law, much like Arizona's major cities and towns. These 11 secret collective bargaining states are Alaska, Connecticut, Illinois, Iowa, Kentucky, Maine, Nevada, New Hampshire, New Jersey, New Mexico, and Wisconsin.[40] A "1" refers to states that either have no explicit or minimal statewide transparency requirements, such as Arizona's current statewide transparency regime, which does not clearly preempt local collective bargaining secrecy laws or cover negotiations between non-elected executive agents, such as city managers, and union officials, and which is subject to uncertain public records requirements and broad executive session exceptions. These no or minimal transparency law states are Alabama, Arkansas, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.[41] A "2" refers to states that have open meetings or standalone transparency laws that apply to collective bargaining by *any* government employer representative and *only certain specified* government unions, but which provide for confidentiality that can be invoked and applied broadly to all such

Chart 1. Collective Bargaining Transparency by State



bargaining through executive session or otherwise. These moderate transparency states with partial union coverage are Maryland, Ohio, and Oregon.[42] A "3" refers to states that have open meetings or standalone transparency laws that apply to collective bargaining by any government employer representative *only certain specified* government unions, but provide for confidential employer-side discussions of negotiating authority, strategies, and tactics. Texas and North Dakota are the sole strong transparency states with only partial union coverage.[43] Finally, a "4" refers to states that have open meetings or standalone transparency laws that apply to collective bargaining by any government employer representative and *all* government unions, but provide for confidential employer-side discussions of negotiating authority, strategies, and tactics. Only Florida and Tennessee are strong transparency states with universal union coverage.[44]

As shown previously, 41 states are like Arizona in that they either affirmatively impose secrecy on collective bargaining or they fail to impose meaningful transparency requirements. Even among the seven states that furnish more transparency in collective bargaining than Arizona, such as by ensuring that meetings between union officials and executive agents are subject to open meetings laws, three of those states give elected

Even among the seven states that furnish more transparency in collective bargaining than Arizona, such as by ensuring that meetings between union officials and executive agents are subject to open meetings laws, three of those states give elected officials the option of holding broad confidential "executive session" type meetings relating to collective bargaining. This exception could easily swallow the rule.

officials the option of holding broad confidential "executive session" type meetings relating to collective bargaining. This exception could easily swallow the rule. The remaining four states have relatively strong transparency requirements; however, Texas and North Dakota only apply such strong transparency to specified government unions. And even in Florida and Tennessee, which apply strong open meetings laws to collective bargaining between any agent of a public body and union officials, both still maintain the confidentiality of employer-side discussions of government employer bargaining tactics and strategy discussions. Neither requires those confidential sessions to be recorded verbatim by a court reporter or preserved by video or audio recording. Finally, it does not appear that any state requires records of confidential communications to be subsequently released for public scrutiny pursuant to their public records laws, even after a deal is struck. The problem with these exceptions is that they can be abused and public accountability can be frustrated even in strong transparency states like Florida. Porous transparency laws may even lead to a complacent belief among the public and news media that collective bargaining is transparent when, in practical reality, it is not. For these and other reasons, a better job of tailoring the law needs to be done to ensure that collective bargaining is conducted in the maximum degree of sunshine.

Will Transparency Reduce Union Clout and Save Taxpayers Money?

Unlike in the private sector, it is very easy for unions to assess the government's finances and ability to pay. For better or worse, this unavoidably places government employers at a huge structural disadvantage in negotiations with unions, and no amount of secrecy in bargaining can erase that disadvantage.

Ironically, during the 1970s, government unions and employees often sought to require collective bargaining to be transparent and subject to open meetings laws. This was a time when government unions were relatively new and not firmly ensconced in the state and local political establishment. In response to these efforts by unions and their members to demand transparent collective bargaining, courts commonly ruled that such transparency would unfairly favor the union side in negotiations and disrupt the tactics that could be successfully deployed by government employers in negotiations to reach resolutions of labor disputes.[45] For example, the Florida Supreme Court ruled in 1972 that an imbalance in bargaining power would be created if unions could gain access to government bargaining strategies and positions through open government laws while government employers could not gain access to the private strategy sessions of government unions.[46] The court also referenced the experience of negotiators and mediators in private sector collective bargaining as crucially requiring secrecy and privacy to avoid grandstanding that would prevent the flexibility needed to resolve labor disputes.[47]

But the premised analogy between government and private sector collective bargaining, which underlies the court's analysis, is flawed. Most obviously, at least in a country that believes in open government, secrecy in bargaining does not and cannot have the same value in government sector negotiations as in private sector negotiations. After all, the ability to assess an employer's finances and ability to pay is perhaps the most important factor in determining the outcome of negotiations over compensation.[48] Unlike the

books of a private corporation, which can remain closed or selectively disclosed as tactics and strategies dictate during private sector collective bargaining, the most basic requirements of transparency in government require an open set of books. Thus, unlike in the private sector, it is very easy for unions to assess the government's finances and ability to pay. For better or worse, this unavoidably places government employers at a huge structural disadvantage in negotiations with unions, and no amount of secrecy in bargaining can erase that disadvantage—unless secrecy in collective bargaining is also expanded to allow government employers to hide their finances, which no one suggests.

Given this fact, secrecy in collective bargaining only really affords government employers one significant "benefit:" by maintaining secrecy in bargaining, government officials can avoid immediate political accountability for their positions and strategies. Without such secrecy, government officials might feel pressured by the general citizenry to strike a different pose, perhaps one that might even be characterized as grandstanding. But grandstanding in private sector collective bargaining is problematic because employers are supposed to be concerned primarily with the bottom line, which typically has more to do with quickly resolving labor disputes than with assuming a popular public stance. Government is supposed to be different. Government is fundamentally not about the bottom line or resolving labor disputes. Public employers—city managers included—should be striking the bargaining pose that reflects consideration of being accountable to and held accountable by the general public—even at the risk of frustrating what agreements might otherwise be reached quickly in backroom deal making with union bosses.

Secrecy in collective bargaining gives unions a double political advantage in securing a favorable outcome; first, they get the backroom and friendly elected officials to themselves without any competing interests during the bargaining session; and second, they get to apply their disproportionate political influence when the deal is finally put up for a public vote.

The argument that government unions would dominate the resulting political dynamic if collective bargaining were made public is likewise flawed. It is true that unions would likely apply more political pressure in absolute terms than the general public during open and transparent collective bargaining because union membership—typically also constituents of the government employer—would have the most to gain or lose from collective bargaining. But the opportunity to apply that pressure if collective bargaining were transparent cannot possibly be more advantageous than the opportunity of being the only interest group in the backroom—as is the case when bargaining is conducted secretly between unions and city managers without oversight by the public, the news media, or even elected officials. This is especially true given that nothing stops union members from separately meeting with friendly elected officials to plot strategy for the negotiations and the ultimate public vote.

Of course, the real choice is not between political grandstanding and secretly reaching deals that best serve the bottom line. The reality is that when collective bargaining is kept secret, unions compound the negotiating advantage of assessing what an open government can afford to pay and monopolizing the bargaining table, with the legal advantage of being able to compel the government to remain at the bargaining table indefinitely, and with the further informational advantage of knowing more about the ultimate deal than the general public (or taxpayer-friendly elected officials) could ever

know when the deal is ultimately presented for approval at a public hearing. All of these advantages structure the ultimate outcome of collective bargaining to maximize total compensation for government employees.

In reality, secrecy in collective bargaining gives unions a double political advantage in securing a favorable outcome; first, they get the backroom and friendly elected officials to themselves without any competing interests during the bargaining session; and second, they get to apply their disproportionate political influence when the deal is finally put up for a public vote. Transparent collective bargaining would collapse this double advantage into a single advantage, but with the general public and their elected allies at least having the opportunity to have the same informational footing as government unions and their elected friends.

In fact, by integrating the transparency rankings in Chart 1 into the statistical analysis in the previous Goldwater Institute report, *Save Taxpayers Tens of Billions of Dollars*, which produced the original estimate of how unionization and collective bargaining laws influence government employee compensation, we have discovered that a state's transparency score is negatively correlated in a statistically significant way (at or above a 95 percent confidence level) with the percentage of government unionization in a given state. For this reason, and the others previously discussed, we can say with confidence that transparent collective bargaining does not increase union clout and likely decreases it. This means that transparency in collective bargaining is not a "make work" good government reform. It will likely save taxpayer money by diminishing the monopoly power and political pressure that public unions can bring to the bargaining table.

Negotiating strategy sessions should be transcribed verbatim and/or recorded by audiovisual means and all preliminary records of negotiation authority should be preserved for disclosure either as soon as a memorandum of understanding is reached between the public employer and any government union; and certainly no later than soon after final approval of any ultimate deal is reached.

How to Tailor the Law for Maximum Transparency

Arizona and other states should follow Florida's lead and ensure that all collective bargaining is held at open meetings regardless of whether the public employer negotiates directly through elected officials, the committees they appoint, or through an executive agent, such as a city manager. Additionally, all documentation generated in the course of such collective bargaining—preliminary or otherwise—should be clearly classified as public records for immediate or eventual disclosure. But Arizona should not stop there.

Florida, the state known for the most sweeping collective bargaining transparency laws in the nation, requires attorney-client communications conducted during executive session to be transcribed by a court reporter, but it does not apply this requirement to secret collective bargaining strategy meetings or communications. In effect, Florida and other states, including Arizona, bury any trace of closed door discussions between public employers and their negotiating team. But it is well-established that government unions try to control both sides of the bargaining table through political influence.[49] As collective bargaining is ongoing,

government union officials and members will meet with elected officials and try to use their political clout to influence them to take friendlier positions. Without a measure of transparency in strategy sessions or communications, union-friendly elected officials will be free to influence the process to advocate the narrow interests of government unions without meaningful public accountability.[50] Cynical politicians may even be able to secretly structure the negotiations to favor an outcome that they later publicly vote against to avoid public accountability.

For these reasons, negotiating strategy sessions should be transcribed verbatim and/or recorded by audiovisual means and all preliminary records of negotiation authority should be preserved for disclosure either as soon as a memorandum of understanding is reached between the public employer and any government union, or certainly no later than soon after final approval of any ultimate deal is reached. Whenever elected officials are consulted for strategic and tactical guidance during negotiations, there must be a way for the public to hold elected officials accountable for the stances they take behind closed-door strategy sessions, which undoubtedly influence the ultimate outcome of collective bargaining. Finally, to the extent that these discussions take place through otherwise confidential correspondence or communication, such documentation should not remain outside of the public domain forever. An example of model legislation modifications that should be made to typical open government laws is included in the Appendix.

Conclusion

It is no wonder that government unions and their political allies oppose efforts to bring transparency to collective bargaining—even going so far as to call ALEC's model transparency legislation an effort at union busting. Today, they have everything to gain and nothing to lose from secret negotiations. But this opposition is ironic because, historically, when government unions were just getting their sea legs and were fighting a political class that opposed their very existence, it was often unions that sought to apply open meetings laws to the collective bargaining process. Now that government unions are firmly entrenched in the political establishment, they want the secrecy in government they once fought. Of course, apart from highlighting such hypocrisy, this switch in position underscores that transparency in collective bargaining would likely curtail union clout that contributes to the pay gap between government employees and private sector workers. For that reason, policymakers in Arizona and elsewhere should join the growing consensus and lift the veil of secrecy that contributes to the fleecing of taxpayers by government unions and their political allies.

Appendix: Model Legislation

Exemplar Amendments to Arizona's Open Government Laws

AN ACT

AMENDING TITLE ___, CHAPTER _____, ARTICLE _____, _____ REVISED STATUTES, BY ADDING SECTION _____; RELATING TO PUBLIC EMPLOYEES.

***

Be it enacted by the Legislature of the State of Arizona, Ariz. Rev. Statutes 38-431, 38-431.01, 38-431.03, and 39-121 are amended as follows:

§ 38-431. Definitions

In this article, unless the context otherwise requires:

1. "Advisory committee" or "subcommittee" means any entity, however designated, whether comprised of one or more individuals, that is officially established, on motion and order of a public body or by the presiding officer of the public body, or otherwise by the public body's charter, bylaws, regulations or laws, and whose member or members have been appointed for the specific purpose of making a recommendation concerning a decision to be made or considered or a course of conduct to be taken or considered by the public body.
2. "Executive session" means a gathering of a quorum of members of a public body from which the public is excluded for one or more of the reasons prescribed in section 38-431.03. In addition to the members of the public body, officers, appointees and employees as provided in section 38-431.03 and the auditor general as provided in section 41-1279.04, only individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities may attend the executive session.
3. "Legal action" means a collective decision, commitment or promise made by a public body pursuant to the constitution, the public body's charter, bylaws or specified scope of appointment and the laws of this state.
4. "Meeting" means the gathering, in person or through technological devices, of a quorum of members of a public body at which they discuss, propose or take legal action, including any deliberations by a quorum with respect to such action, and any meeting of one or more agents, representatives, or officers of a public body with any agent or officer of any employee association involving negotiations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body, or any other employment related matter.
5. "Political subdivision" means all political subdivisions of this state, including without limitation all counties, cities and towns, school districts and special districts.
6. 6. "Public body" means the legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of this state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by this state or political subdivision. Public body includes all quasi-judicial bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body. Public body includes all commissions and other public entities established by the Arizona constitution or by way of ballot initiative, including the independent redistricting commission, and this article applies except and only

to the extent that specific constitutional provisions supersede this article.

7. 7. "Quasi-judicial body" means a public body, other than a court of law, possessing the power to hold hearings on disputed matters between a private person and a public agency and to make decisions in the general manner of a court regarding such disputed claims.

§ 38-431.01. Meetings shall be open to the public

A. All meetings of any public body shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. All legal action of public bodies shall occur during a public meeting.

B. All public bodies shall provide for the taking of written minutes or a recording of all their meetings, including executive sessions. <u>For any meeting involving one or more agents or officers of a public body with any agent or officer of any employee association, the meeting shall be recorded by audiovisual means.</u> For meetings other than executive sessions, such minutes or recording shall include, but not be limited to:

1. The date, time and place of the meeting.
2. The members of the public body recorded as either present or absent.
3. A general description of the matters considered.
4. An accurate description of all legal actions proposed, discussed or taken, and the names of members who propose each motion. The minutes shall also include the names of the persons, as given, making statements or presenting material to the public body and a reference to the legal action about which they made statements or presented material.

C. Minutes of executive sessions shall include items set forth in subsection B, paragraphs 1, 2 and 3 of this section, an accurate description of all instructions given pursuant to section 38-431.03, subsection A, paragraphs 4, 5 and 7 and such other matters as may be deemed appropriate by the public body.

D. The minutes or a recording of a meeting shall be available for public inspection three working days after the meeting except as otherwise specifically provided by this article.

E. A public body of a city or town with a population of more than two thousand five hundred persons shall:

1. Within three working days after a meeting, except for subcommittees and advisory committees, post on its website, if applicable, either:

   (a) A statement describing the legal actions taken by the public body of the city or town during the meeting.

   (b) Any recording of the meeting.

2. Within two working days following approval of the minutes, post approved minutes of city or town council meetings on its website, if applicable, except as otherwise specifically provided by this article.
3. Within ten working days after a subcommittee or advisory committee meeting, post on its website, if applicable, either:

   (a) A statement describing legal action, if any.

   (b) A recording of the meeting.

F. All or any part of a public meeting of a public body may be recorded by any person in attendance by means of a tape recorder or camera or any other means of sonic reproduction, provided that there is no active interference with the conduct of the meeting.

G. The secretary of state for state public bodies, the city or town clerk for municipal public bodies and the county clerk for all other local public bodies shall conspicuously post open meeting law materials prepared and approved by the attorney general on their website. A person elected or appointed to a public body shall review the open meeting law materials at least one day before the day that person takes office.

H. A public body may make an open call to the public during a public meeting, subject to reasonable time, place and manner restrictions, to allow individuals to address the public body on any issue within the jurisdiction of the public body. At the conclusion of an open call to the public, individual members of the public body may respond to criticism made by those who have addressed the public body, may ask staff to review a matter or may ask that a matter be put on a future agenda. However, members of the public body shall not discuss or take legal action on matters raised during an open call to the public unless the matters are properly noticed for discussion and legal action.

I. A member of a public body shall not knowingly direct any staff member to communicate in violation of this article.

J. Any posting required by subsection E of this section must remain on the applicable website for at least one year after the date of the posting.

§ 38-431.03. Executive session

A. Upon a public majority vote of the members constituting a quorum, a public body may hold an executive session but only for the following purposes:

1. Discussion or consideration of employment, assignment, appointment, promotion, demotion, dismissal,

salaries, disciplining or resignation of a public officer, appointee or employee of any public body, except that, with the exception of salary discussions, an officer, appointee or employee may demand that the discussion or consideration occur at a public meeting. This provision does not apply to any meeting involving one or more agents or officers of a public body with any agent or officer of any employee association. The public body shall provide the officer, appointee or employee with written notice of the executive session as is appropriate but not less than twenty-four hours for the officer, appointee or employee to determine whether the discussion or consideration should occur at a public meeting.

2. Discussion or consideration of records exempt by law from public inspection, including the receipt and discussion of information or testimony that is specifically required to be maintained as confidential by state or federal law.
3. Discussion or consultation for legal advice with the attorney or attorneys of the public body.
4. Discussion or consultation with the attorneys of the public body in order to consider its position and instruct its attorneys regarding the public body's position regarding contracts that are the subject of negotiations, in pending or contemplated litigation or in settlement discussions conducted in order to avoid or resolve litigation.
5. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations with employee organizations regarding the salaries, salary schedules or compensation paid in the form of fringe benefits of employees of the public body, provided that the session is recorded by audiovisual means for public distribution within twenty-four (24) hours after the negotiations have been concluded.
6. Discussion, consultation or consideration for international and interstate negotiations or for negotiations by a city or town, or its designated representatives, with members of a tribal council, or its designated representatives, of an Indian reservation located within or adjacent to the city or town.
7. Discussions or consultations with designated representatives of the public body in order to consider its position and instruct its representatives regarding negotiations for the purchase, sale or lease of real property.

B. Except as provided in subsection A, paragraph 5 of this section, minutes of and discussions made at executive sessions shall be kept confidential except from:

1. Members of the public body which met in executive session.
2. Officers, appointees or employees who were the subject of discussion or consideration pursuant to subsection A, paragraph 1 of this section.
3. The auditor general on a request made in connection with an audit authorized as provided by law.
4. A county attorney or the attorney general when investigating alleged violations of this article.

C. Except as provided in subsection A, paragraph 5 of this section, the public body shall instruct persons who are present at the executive session regarding the confidentiality requirements of this article.

D. Legal action involving a final vote or decision shall not be taken at an executive session, except that the public body may instruct its attorneys or representatives as provided in subsection A, paragraphs 4, 5 and 7 of this section. A public vote shall be taken before any legal action binds the public body.

E. Except as provided in section 38-431.02, subsections I and J, a public body shall not discuss any matter in an executive session which is not described in the notice of the executive session.

F. Except as provided in subsection A, paragraph 5 of this section, disclosure of executive session information pursuant to this section or section 38-431.06 does not constitute a waiver of any privilege, including the attorney-client privilege. Any person receiving executive session information pursuant to this section or section 38-431.06 shall not disclose that information except to the attorney general or county attorney, by agreement with the public body or to a court in camera for purposes of enforcing this article. Any court that reviews executive session information shall take appropriate action to protect privileged information.

§ 39-121. Inspection of public records

Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours. Public records include, but are not limited to, all physical or electronic records of communications, discussions or consultations between any representative, agent or officer of a public body and any representative, agent or officer of any employee organization.

Endnotes

1 Bureau of Labor Statistics, Employer Costs for Employee Compensation (June 2012), available at http://bls.gov/news.release/ecec.nr0.htm.

2 Jeffrey H. Keefe, *Are Arizona Public Employees Over Compensated*? Grand Canyon Institute Research Report (April 2, 2012).

3 Maury Gittleman and Brooks Pierce, *Compensation for State and Local Government Workers, Journal of Economic Perspectives*, Volume 26, Number 1, Winter 2011, 234, available at http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.26.1.217.

4 *Id.* at 232

5 John Dunham and Associates, *Public Servants or Privileged Class: How State Government Employees are Paid Better than Their Private-Sector Counterparts*, Citizens Against Government Waste Issue Brief No. 5, 7 (2012) (citing Gittleman et al, *Compensation for State and Local Government Workers*, 217–242) (emphasis added).

6 Segal Company, Inc., City of Phoenix 2011 Total Compensation Study Final Report 5, 40, 42, 10A-1 (January 18, 2012), available at http://phoenix.gov/webcms/groups/internet/@inter/@emp/@jobs/documents/web_content/070008.pdf.

7 *Id.* at 10A-2.

8 Dunham and Associates, *Public Servants or Privileged Class*, 17.

9 Nick Dranias, Byron Schlomach, Steve Slivinski, *Save Taxpayers Tens of Billions of Dollars: End Government Sector Collective Bargaining*, Goldwater Institute Policy Report No. 12-01, 35-37 (January 24, 2012).

10 *Id.* at 14.

11 *Id.* at 17-19.

12 City of Phoenix Administrative Regulation 2.441 (effective July 2012) Obtained by law clerk Joshua B. Turner on 11/07/12. Eligible employees will be able to cash out 25% of the hours, not including the first 250 "base hours." For example an employee that accrues 2,500 sick pay hours would have 2250 eligible hours once the initial 250 base hours are factored out. At that point 25% of the hours are able to be cashed out at the employees hourly pay rate. In this scenario that would give the employee 562.5 hours at an hourly rate of 20.00. This would result in an $11,250.00 bonus upon retirement. The remaining hours would then be used to calculate the total service credit towards retirement.

13 *Id.*

14 City of Phoenix Personal Rule 15 (c) (1), obtained from City of Phoenix June 2012.

15 *Id.*

16 City of Phoenix Administrative Regulation 2.30 (effective July 2009). Obtained from City of Phoenix June 2012.

17 *Meet and Confer: Get the Facts*, available at http://www.meetandconferfacts.org/pages/agencies.html (identifying the Arizona Department of Corrections, Arizona Department of Public Safety, Phoenix, Tempe, Gilbert, Chandler, Mesa, Mayer, Maricopa, Peoria, Glendale, Lake Havasu, Bisbee, South Tucson, Tucson, Surprise, Avondale School District, Higley School District, Chandler Public Schools, Dysart School District, Gilbert School District, Kyrene School District, Paradise Valley School District, Scottsdale School District, Tempe Elementary School District, Apache Junction School District, Deer Valley School District, Fountain Hills School district, Glendale Union School district, Phoenix Union School District, Roosevelt School District, Sunnyside School District, Tempe Secondary Schools, Mesa Public Schools, Tucson School District, Central Yavapai Fire District, AVRA Valley Fire District, Buckeye Valley Fire District, Sedona Fire District, and Daisy Mountain Fire District) (last visited October 30, 2012); *see also* Pima Employer / Employee Relations-Meeting and Conferring, §2.77 (2000) (amended in 2001 and 2002); Prescott Valley, Meet and Confer Act, Art. 3.06, (2001); County Meet and Confer Process, Pima County Ordinances, Chapter 2.20 (2009); Pinal County Ordinances, Ordinance No. 121008-MC (2008); Pima County, Meet and Confer Memorandum of Understanding with Service Employees International Union (SEIU) for Fiscal Year 2011-2012 (approved August 15, 2011).

18 *Am. Fedn. & Mun. Emples., AFL-CIO, Local 2384 v. City of Phoenix*, 213 Ariz. 358, 360 (Ct. App. 2006) ("an MOU is a collective bargaining agreement between the City and a union").

19 *See, e.g.*, *id.* at 360-61 ("the unions jointly filed an Unfair Labor Practice ("ULP") charge, Case No. CA-180, with the City of Phoenix Employment Relations Board ("PERB"), arguing that the negotiations leading to the MOU constituted a violation of P.C.C. § 2-220(A)(5) (refusing to meet and confer). The unions sought a determination that "fair share" is a mandatory subject of bargaining under P.C.C. § 2-215(A) 10 of the City's "meet and confer" ordinance, and further sought an order from the PERB directing the City to "meet and confer" and bargain in good faith with the unions on that issue").

20 Dranias et al, *Save Taxpayers Tens of Billions of Dollars*, at 14.

21 Alaska Stat. § 44.62.210 (Lexis 2012); Conn. Gen. Stat. Ann. §14-1-225 (2012); Ill. Comp. Stat .§5-315-1 (2012); Iowa Code §1-20-17 (2012); Ky. Rev. Stat. Ann §61.810 (2012); Me. Rev. Stat. Ann. §13-405 (2012); Nev. Rev. Stat.

§241.010 (2012); N.H. Rev. Stat. Ann. § 5-91-A:2 (2012); N.J. Stat. Ann. §10:4 (2012); N.M. Stat. Ann. §10-15-1 (2012); Wis. Stat. Ann. 19.81 (2012).

22 2011 U.S. Census, available at http://quickfacts.census.gov/qfd/states/04/0455000.html.

23 Phoenix Muni. Code, § 2-220 ("Discussing with members of the City Council negotiation issues in dispute from the time the dispute is submitted to the fact-finding process and extending to the time that the fact-finder's report is made public.")

24 Surprise Muni. Code, § 3-76(a)(7) and (c) ("The city council hereby declares it to be in the best interest of the City of Surprise, and to assure productive negotiations and maintain cooperation between the parties, that any documents or other records created or prepared during or in furtherance of the meet and confer process be kept confidential and not subject to public disclosure until the completion of the meet and confer process. The meet and confer process shall be complete when all items contained in an employee association proposal are resolved by agreement or action by city council").

25 Tempe Muni. Code, § 2-426 ("Unless otherwise provided in this article, during negotiations, proposals shall remain confidential except that they shall be available to the city manager, the employee organization representatives, the employees within the employee group, and others as designated by the city manager"); Glendale §2-85 ("(d) Unless otherwise provided in this division, during the meet and confer process, all proposals submitted by the employee organization and all counter-proposals submitted by the city manager will remain confidential except that they will be available to the city manager, the employee organization representatives, the employees within the employee group, and others designated by the city manager").

26 Chandler Muni. Code, § 2-13.10(A)(7) and (B)(8) ("Except as permitted under section 2-13.8.D.5(b), disclose or discuss any matters concerning the meet and confer proposal with City elected officials or the news media from the date negotiations commence until the date and time of the hearing before the City Council on the mutually agreed upon proposed memorandum of understanding or until the date and time of a hearing before the City Council on the areas of dispute").

27 Maricopa Muni. Code., §§ 3-281(a)(6) and (b)(8) ("shall not disclose or discuss any matters concerning the meet and confer proposal with City elected officials or the news media from the date negotiations commence until the date and time set for hearing before the city council on the mutually agreed upon proposed memorandum of understanding or until the date and time set for a hearing

before the city council on the areas of dispute").

28 Avondale Muni. Code, §§ 2-61(d), (e), 2-65 ((j).

29 Gilbert Muni. Code, §2-62(f)(2)(b).

30 A.R.S. §§ 38-431; 38-431.01.

31 On November 1, 2012, Law Clerk Joshua Turner spoke with the City Manager's Office for the following cities; Phoenix, Glendale, Tempe, Chandler, Avondale, Maricopa, Gilbert, and Surprise. Each city was asked whether they consider documents received or generated during the collective bargaining process to be public record once negotiations are complete and the contract approved. Phoenix, Glendale, and Tempe all stated that they do not consider any draft proposals to be part of the public record; however the final approved draft is considered part of the public record. The city of Gilbert stated that any draft proposals that are not ultimately approved are destroyed once the negotiations are over. The City of Chandler stated that any notes generated during negotiations would be considered public records, subject to appropriate reviews by the City Attorney prior to release. The Chandler City Manager's Office was unsure whether draft proposals would be public records. The cities of Avondale, Surprise, and Maricopa did not return messages left via voicemail.

32 A.R.S. § 38-431.03(A)(1), (5).

33 *See, e.g., McCown v. Patagonia Union High School District*, 129 Ariz. 127, 128 (Ct. App. 1981)

34 *See, e.g., American Civil Liberties Union of Washington v. City of Seattle*, 121 Wash. App. 544, 547-48 (Sup. Ct. 2004); *Traverse City Record Eagle v. Traverse City Area Public Schools*, 184 Mich. App. 609, 611-12 (Ct. App. 1990).

35 Mark Flatten, "Money for Nothing: Phoenix Taxpayers Foot the Bill for Union," Goldwater Institute Investigative Report, September 21, 2011, available at http://goldwaterinstitute.org/article/money-nothing-phoenix-taxpayers-foot-bill-union-work.

36 Center for Media and Democracy, http://alecexposed.org/w/images/5/5f/1R7-Public_Employee_Bargaining_Transparency_Act_Exposed.pdf (last visited October 30, 2012).

37 Richard Kearney, *Labor Relations in the Public Sector* 108-09 (4th ed. 2009).

38 *Id.*

39 David R. Fernstrum and Daniel J. Broxup, *Including the Public in Public Sector*

Labor Relations: the Boon or Bane of Government Transparency, ABA Section of Labor & Employment Law, 6th Annual CLE Conference - Atlanta, Georgia.

40 Alaska Stat. § 44.62.210 (Lexis 2012); Conn. Gen. Stat. Ann. §14-1-225 (2012); Ill. Comp. Stat .§5-315-1 (2012); Iowa Code §1-20-17 (2012); Ky. Rev. Stat. Ann §61.810 (2012); Me. Rev. Stat. Ann. §13-405 (2012); Nev. Rev. Stat. §241.010 (2012). N.H. Rev. Stat. Ann. § 5-91-A:2 (2012); N.J. Stat. Ann. §10:4 (2012); N.M. Stat. Ann. §10-15-1 (2012); Wis. Stat. Ann. 19.81 (2012).

41 Ala. Code §36-25A-7 (2012); Ark. Code Ann. § 25-19-106 (Lexis 2012); Ga. Code Ann. § 50.14.1 (2012); Miss. Code Ann. §25-41-1 (2012); Mont. Ann. Code §2-3-203 (2012); Wash. Rev. Code §42.30.10 (2012); W. Va. Code § 6-9A1 (2012); Cal. Govt Code. Ann. §§3512-3524 (Bancroft-Whitney 2012). Colo. Rev. Stat. 24-6-402 (2012); Haw. Rev. Stat §92-5 (2012); Kan. Stat. Ann. §75-4319 (2012); La. Stat. Ann § 42:6.1 (2012); Mich. Comp. Laws. §15-268 (2012); N.Y. Open Meeting Laws (Consol.) §§100-111 (2012); N.C. Gen. Stat. §143-318.11 (2012); Okla. Stat. §25-307 (2012); 65 Pa. Consol. Stat. §708 (2012); R. I. Gen. Laws §42-46-5 (2012); S.C. Code Ann. §30-4-70 (2012); Idaho Code §§67-2341– 2346. (2012); S.D. Codified Laws §1-25-2 (2012); Minn. Stat. 13D.01 (2012); Vt. Stat. Ann § 1-313 (2012). Ind. Code §5-14-1.5-6.1 (2012); Del. Code Ann. §10001 (2012); Mass. Gen. Laws §§30 A 18-25 (2012); Utah Code Ann. 52-4-205 (2012); Mo. Rev. Stat. §610.021 (2012); Neb. Rev. Stat. §84-1410); Wyo. State Ann. § 16-4-405 (2012).

42 Md. Code Ann. § 10-501 (2012); Ohio Rev. Code Ann. § 121.22 (2012); Or. Rev. Stat. § 192.660 (2012).

43 Tex. Local Govt. Code Ann. 174.108 (2012); N.D. Cent. Code §44-04-19.1 (2012). On its face, the North Dakota Open Meetings Law as it pertains to collective bargaining is ambiguous. However, North Dakota Case Law states: "All school board meetings at which teacher contract offers and school board offers and counteroffers are considered are required to be open to the public. In addition, all school board and teacher contract negotiating sessions, regardless of negotiating committee composition, are open to the public. In this case, a committee represented the school board in the negotiations." *Dickinson Education Association v. Dickinson Public School District*, 252 N.W.2d 205 (N.D. 1977).

44 Fla. Stat. Ann. §447.605 (2012); Tenn. Code Ann. § 8-44-201 (2012 On its face the Florida Statute regarding collective bargaining appears to be ambiguous. However, Florida case law has clarified the law in part, making collective bargaining more transparent. Florida case law applies the open meetings law to staff when "the staff member ceases to function in a staff capacity and

is appointed to a committee which is given policy based decision -making function." *See Wood v. Marston*, 442 So. 2d 934, 938 (Fla. 1983). Additionally, while strategy sessions are exempt from the Florida open meetings law, actual negotiations must be conducted in compliance with the law. *See City of Fort Myers v. News-Press Publishing Company, Inc.*, 514 So. 2d 408, 412 (Fla. Ct. App. 1987).

45 George W. Cassidy, *An Analysis of Pressure Group Activities in the Context of Open Meeting and Public Employer Relations Laws*, J. Collective Negotiations, Vol. 9(1), 8-9 (Baywood Publishing Co., Inc. 1979)

46 *Bassett v. Dade County Classroom Teachers' Association, Inc.*, 262 So. 2d 425 (Fla. Sup. Ct. 1972).

47 *Id.* at 427-29.

48 *See, e.g.*, Selections from the SEIU Contract Campaign Manual, American Labor Education Center, available at http://cgeu.org/wiki/upload/6/6f/UW_Bargaining_Techniques_and_Mechanics.pdf.

49 Dranias et al, *Save Taxpayers Tens of Billions of Dollars*, at 29.

50 In a conversation with Florida-based James Madison Institute Policy Director, Robert Sanchez, on October 30, 2012, Author Nick Dranias was informed that elected officials use these confidential strategy meetings to ensure union interests are protected during negotiations.

The Goldwater Institute

The Goldwater Institute was established in 1988 as an independent, non-partisan public policy research organization. Through policy studies and community outreach, the Goldwater Institute broadens public policy discussions to allow consideration of policies consistent with the founding principles Senator Barry Goldwater championed—limited government, economic freedom, and individual responsibility. Consistent with a belief in limited government, the Goldwater Institute is supported entirely by the generosity of its members.

Guaranteed Research

The Goldwater Institute is committed to accurate research. The Institute guarantees that all original factual data are true and correct to the best of our knowledge and that information attributed to other sources is accurately represented. If the accuracy of any material fact or reference to an independent source is questioned and brought to the Institute's attention with supporting evidence, the Institute will respond in writing. If an error exists, it will be noted on the Goldwater Institute website and in all subsequent distribution of the publication, which constitutes the complete and final remedy under this guarantee.

GOLDWATER
INSTITUTE
Where freedom wins.

500 East Coronado Rd., Phoenix, AZ 85004 | Phone (602) 462-5000 | Fax (602) 256-7045 | www.goldwaterinstitute.org