



BOBROFF, HESSE, LINDMARK & MARTONE, P.C

PUBLIC SECTOR EMPLOYEE BARGAINING --
A WHOLE NEW BALL GAME

After the
Missouri Supreme Court's Decision
in

INDEPENDENCE-NATIONAL EDUCATION
ASSOCIATION, et al.
v. INDEPENDENCE SCHOOL DISTRICT

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INTRODUCTION

The Missouri Constitution has always stated that "employees shall have the right to organize and to bargain collectively through representatives of their own choosing." However, in 1947, the Missouri Supreme Court ruled that this constitutional right was not available to public sector employees. City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947). For the 60 years following the Missouri Supreme Court's decision, public sector employees have been denied the right to engage in "collective bargaining."

This all changed on Tuesday, May 31, 2007, when the Missouri Supreme Court reversed its position on this issue, overruled Springfield v. Clouse and held that all employees, including public sector employees, have the right to "bargain collectively through representatives of their own choosing."

This is undoubtedly the single biggest change to the law concerning public sector employees in more than 50 years. It will have a dramatic and immediate effect on every employer in the public sector, who can expect to face both increasing unionization and a greater emphasis on negotiating the terms and conditions of employment.

Because this is such a dramatic change in Missouri law, Bobroff, Hesse, Lindmark & Martone, P.C. has prepared the following FAQ to assist our clients in interpreting and applying the Missouri Supreme Court's Decision in Independence-National Education Association, et al. v. Independence School District:

FAQs:

- Q: How did the Missouri Supreme Court change the law for public sector employers?**

A: Before Tuesday, May 29, 2007, there was no obligation to bargain collectively with public sector employees, although many public sector employees did have a right to "meet, confer and discuss" the terms of their employment. In addition, contracts negotiated between public sector employers and their employees are now enforceable, where before they could be rescinded by the employer.

2. Q: Which public sector employees are affected by this change in the law?

A: All public sector employees are affected by this change in the law. While under Section 105.510 only certain public sector employees enjoyed a statutory right to "meet, confer and discuss" the terms of their employment, the Missouri Supreme Court has now held that all public sector employees have a right to collective bargaining, including categories of employees specifically excluded from Section 105.510.

3. Q: Will this change in the law give police officers, teachers and fire fighters the right to bargain collectively?

A: Yes.

4. Q: What does it mean to "bargain collectively"?

A: While the Constitution of the State of Missouri does not define the term "bargain collectively", Missouri Courts will probably look to federal case law for guidance. "Collective bargaining" includes the obligation to "meet at reasonable times and confer in good faith with respect to wages, hours and the other terms and conditions of employment. . . . execute a written contract incorporating any agreement reached . . . but does not compel either party to agree to a proposal that requires the making of a concession."

5. Q: Is the obligation to "bargain collectively" the same as the obligation to "meet, confer and discuss."?

A: Probably not. Missouri courts have never definitively considered this issue. However, under Federal law, the obligation to bargain collectively imposes a duty on the part of the employer to engage in good faith negotiations, which includes give and take at the bargaining table. This is a greater obligation than merely "meeting, conferring and discussing" proposals with employees.

6. Q: Are public sector employers free to reject written agreements with public sector employees?

A: No. Previously, a public sector employer was free to reject any written agreement it had reached with its employees concerning their wages, hours, and terms and conditions of employment. This is no longer the

case—the Missouri Supreme Court explicitly held that labor contracts with groups of public employees are now binding.

7. Q: Are public entities required to agree to proposals submitted by labor organizations representing their employees?

A: No.

8. Q: Can public sector employers automatically reject all employee proposals?

A: *No. While the law allows public sector employers to reject employee proposals, the obligation to bargain collectively requires employers to negotiate in good faith. While there is no applicable Missouri case law on this point, federal case law and case law from other states with public sector employee bargaining holds that if a public sector employer rejects employee proposals without legitimate reasons, it has failed to bargain in good faith and bargain collectively. The duty of good faith bargaining requires that a public sector employer come to the negotiating table with an open mind and a sincere desire to reach an agreement (and not just reject all of the labor organization's proposals).*

9. Q: Does the constitutional right to bargain "through representatives of their own choosing" give all public sectors the right to unionize?

A: Yes.

10. Q: What will happen next?

A: *There will be (and already has been) a scramble among the labor unions and employee associations that represent public sector employees (for example, AFSCME, the Fraternal Order of Police, the SEIU and the Firefighters' Union) to increase their organizing efforts and demand that public sector employers enter contract negotiations. While it is likely that the Missouri legislature will enact legislation to define the collective bargaining process and provide a framework for resolving disputes, the legislature cannot enact legislation reversing the Missouri Supreme Court's decision because the decision interprets the Constitution of the State of Missouri—the only way to change the law back to the way it was would be to amend the Missouri State Constitution, which is unlikely.*

11. Q: What should a public sector employer do next?

A. *Be informed and proactive--*

Public sector employers should:

1. *Take stock of all current agreements with employees, including memoranda, contracts, etc. and analyze the potential obligations under those agreements.*
2. *Prepare to begin contract negotiations with groups of employees already represented by a labor organization. Unions will quickly move forward to press their new found bargaining rights, and public sector employers need to be prepared to deal with the issues head on.*
3. *Typically the negotiation process involves evaluating current policies, practices and terms and conditions of employment, preparing written proposals, evaluating and negotiating over both side's proposals, and ultimately reaching a final, written collective bargaining agreement.*
4. *Evaluate the potential for and develop a game plan to deal with unionization for groups of employees not currently represented by a labor organization. This change in the law will lead to increasing unionization of public sector employees. To a certain extent, public sector employers are within their rights in attempting to persuade their employees not to join labor organizations. However, the law in this area is extremely complex and it is important for public sector employers to tread carefully and seek experienced legal assistance.*
5. *Train their department heads, supervisors and administrators in how to best deal with future unionization attempts and the obligation to bargain in good faith.*

If we can provide any additional clarification or assistance in this area, please do not hesitate to call. As you know, Bobroff, Hesse, Lindmark & Martone, P.C. is a labor and employment firm with combined experience of nearly a century in handling labor and employment issues with a substantial public sector practice (including several cities, counties, municipalities, police departments, fire departments and sheriffs' offices).

Please direct any questions to:

Andrew J. Martone
Daniel J. Doetzel

J. Christopher Hesse
Michael J. Bobroff

BOBROFF, HESSE, LINDMARK & MARTONE, P.C



BOBROFF, HESSE, LINDMARK & MARTONE, P.C. IS AN "AV" RATED LAW FIRM WITH A LABOR AND EMPLOYMENT PRACTICE BASED ON THE PRINCIPLES OF GOOD CLIENT SERVICE, COLLEGIALLY, QUALITY LAWYERING AND THE COLLABORATIVE PRACTICE OF LAW.

FIRM INFORMATION

PROVIDING EXCELLENT AND INNOVATIVE CLIENT SERVICES HAS BEEN THE DRIVING GOAL OF OUR PRACTICE SINCE OUR FIRM'S INCEPTION

We provide advice to employers (including many municipalities and other public employers) concerning every facet of labor relations and employment matters on a daily basis. Our labor law practice includes representing employers with respect to labor contract negotiations, arbitrations, union avoidance and union election campaigns.

We are proud to possess one of the strongest traditional labor practices in the Midwest. We provide prompt, accurate and practical labor advice to our clients on a daily basis and between them, Andy Martone (18 years of experience), Michael Bobroff (39 years of experience), Chris Hesse (15 years of experience) and Dan Doetzel (12 years of experience), negotiate numerous collective bargaining agreements each year.

Labor Law is a nationwide practice with a uniform body of law and common precedents, and we represent clients across the country not only in union contract negotiations, but also in the handling of grievances and arbitrations, union avoidance, the defense (and occasional filing) of unfair labor practice charges on behalf of employers, and labor strategies and tactics. We have credibility with and respect from the labor organizations with which we deal, who know us to be reasonable, straight shooters who will not back down from a fight. We are also extremely successful at assisting clients with union avoidance (both through preventive supervisory training and in opposing union election campaigns) and, when necessary, engaging in union decertification and deauthorization.

We pride ourselves on practicing law differently than many of the traditional "silk stocking" law firms. We strive to add value to our clients' businesses, to counsel our clients, to assist them in finding creative

solutions to their business problems and to be perceived by our clients as an asset, rather than as a necessary evil.

Responsiveness, creativity, experience and common sense are the keys to providing high quality, cost-effective legal services. Our commitment to being responsive to our clients is unmatched. We are individually available to our clients, 24 hours a day, 7 days a week. We maintain a sophisticated communications system that integrates cellular phones, e-mail, laptop computers and our paperless electronic document system to ensure that we are available when our clients need us and that we have the resources at our command to respond to any problem that may arise. Our goal is to help our clients meet their challenges and solve their problems on a timely basis, and we view effective legal representation as being more than the ability to recite the law. We recognize that we do well when our clients do well and we are driven to help them achieve this success.

LABOR RELATIONS PRACTICE GROUP FOR
PUBLIC SECTOR EMPLOYERS:

PRIMARY CONTACTS FOR
PUBLIC SECTOR LABOR LAW:

Andrew J. Martone, *Partner*
J. Christopher Hesse, *Partner*

LEAD ATTORNEYS:

Michael J. Bobroff, *Partner*
Daniel J. Doetzel, *Partner*

BOBROFF, HESSE, LINDMARK & MARTONE, P.C

ANDREW J. MARTONE

Andrew Martone is a Partner with the firm concentrating in the practice of labor and employment law, with a background in industry and human resources. **The Labor Relations Institute recently named Andy one of the Top 100 Labor Attorneys in America.** The award is based on an objective evaluation of case results, and places Andy in the top 1% of all labor attorneys nationwide. Andy regularly negotiates an average of 10 collective bargaining agreements per year, advises clients on labor relations issues on a day-to-day basis and arbitrates an average of 1 case per month.

Andy routinely handles matters before the National Labor Relations Board, the Occupational Safety and Health Administration, and regularly represents clients in employment-related litigation in federal and state courts throughout the country. He has defended and advised clients in labor and employment matters in 49 states, Canada, Mexico, Singapore, Japan and Puerto Rico and has extensive experience in opposing union organizing campaigns, union decertification, negotiating labor agreements and arbitrating contract grievances. Andy has acted as nationwide counsel for labor and employment matters for companies including APL Logistics, Bekins Distribution Services Co., Inc., Delmar Gardens Enterprises and GATX.

Andy represents many regional and national employers including full service hospitals, extended care facilities, marketing concerns, retailers, builders, construction companies, municipalities and not-for-profit care providers.

A substantial portion of Andy's practice consists of defending employers in federal and state discrimination/harassment cases (including cases based on race, gender, disability, religion, national origin, family and medical leave and veteran status), retaliatory discharge (including OSHA 11(c) retaliation cases, False Claims Act retaliation cases and federal and state public policy discharge cases). Andy also handles OFCCP audits, compliance and violation matters.

In his prior life, Andy worked on an automobile assembly line and within the human resources department for a Big Three automaker. Andy is a frequent speaker on such topics as human resources practice, affirmative action, union negotiating and avoidance, discipline and discharge, the Americans with Disabilities Act, the Occupational Safety and Health Act, Workers' Compensation and topics involving wrongful discharge.

EDUCATION:

BA., Industrial Relations, *Magna Cum Laude*, Rockhurst College (1986)

J.D., *Order of the Coif*, Washington University (1989)

PROFESSIONAL AFFILIATIONS
AND ACTIVITIES

Member, *The Missouri Bar*

Member, *The Illinois State Bar Association*

Member, *The Bar Association of Metropolitan St. Louis*

Member, *Trial Bar, Northern District of Illinois*

Admitted to practice before United States District Courts in Missouri (Eastern and Western Districts), Illinois (Northern, Central, and Southern Districts) and Wisconsin (Western District); before the United States Courts of Appeals for the Sixth, Seventh and Eighth Circuits.

Andy has received the highest possible rating ("AV") from Martindale – Hubbell.

J. CHRISTOPHER HESSE

Chris Hesse is a Partner with the firm, practicing in the areas of labor and employment law and employment litigation. He represents municipalities, police and fire departments and other governmental entities regarding employment and labor matters. Chris has negotiated labor agreements involving firefighters as well as other municipal employees.

Chris represents management exclusively in diverse matters including discrimination based on race, age, disability, gender, national origin and involving unlawful harassment, child labor, the Fair Labor Standards Act, the Equal Pay Act, the Family and Medical Leave Act, OSHA and WARN. Chris also assists our clients with union avoidance and election campaigns, and negotiates collective bargaining agreements.

Chris has extensive experience dealing with the Federal Bureau of Investigation, and various United States Attorneys' offices and police agencies. Chris practices

routinely before state and federal agencies, as well as litigating in various state and federal courts. Chris has practiced before agencies and in courts in over 30 states and has advised clients on international issues as well.

Chris also spends a significant amount of his time advising clients on a daily basis on all types of employment issues and regularly assists our clients in taking corrective and preventative measures with employees. These issues include assisting with our clients' administration of employee leaves of absence, hiring, discipline, termination, wage and hour, immigration, reductions-in-force, employee investigations, drug testing and employee privacy issues.

Chris lectures on issues regarding discrimination and sexual harassment, wage and hour, day-to-day handling of human resources issues and municipal labor and employment law.

EDUCATION:

B.A., History and Political Science, *with concentration in German, Duke University (1988)*
Graduate Studies in Evolution of Democracies, *East Asian Revolutions, Islam and German, Duke University*
Grundstufe curriculum, *Goethe Institute, Schwabish Hall, Germany*
J.D., *Order of the Woolsack, St. Louis University School of Law (1992)*

PROFESSIONAL AFFILIATIONS AND ACTIVITIES

Member, *The Missouri Bar*
Member, *The Illinois State Bar Association*
Member, *The Bar Association of Metropolitan St. Louis*
Admitted to practice before several United States District Courts and United States Courts of Appeals.
General Counsel, *World Aquarium*
Member, *Emerging Leaders Council, St. Louis Science Center*
Tactical Instructor, *P.O.S.T. Certified Law Enforcement Training*
Advisor, *Apex Response Training Systems*
Nationally Certified Instructor, *Filipino Martial Arts (Inosanto Method)*
Board Member, *Huangse' Gebei Xi'Tong Shaolin Lohan*

Chris has received the highest possible rating ("AV") from Martindale – Hubbell.

MICHAEL J. BOBROFF

Michael Bobroff is a Partner with the firm, and has practiced in the area of labor and employment law for more than 39 years. Michael's primary areas of practice include representing employers in proceedings before the National Labor Relations Board, Equal Employment Opportunity Commission, and other federal and state agencies; union avoidance; employment counseling; negotiation of collective bargaining agreements; labor and employment discrimination litigation; arbitration of union grievances; wage and hour matters and OSHA matters.

Michael previously served as a field attorney, a trial attorney and a supervisory attorney for the National Labor Relations Board. Since leaving the NLRB, Michael has exclusively represented employers in the field of labor and employment law throughout the country. He is a recognized authority on NLRB procedure and labor law, and is often consulted by other attorneys seeking both an insider's understanding of labor law and innovative solutions to difficult problems.

Michael has handled hundreds of union organizing campaigns for a wide variety of clients in different businesses and industries throughout the United States. He has also negotiated countless labor agreements in virtually all industries.

EDUCATION:

B.A., University of Pennsylvania (1963)

J.D., University of Michigan (1968)

PROFESSIONAL AFFILIATIONS
AND ACTIVITIES

Member, The Missouri Bar

Member, The Bar Association of Metropolitan St. Louis

Member, The American Bar Association

Admitted to practice before several United States District Courts and United States Courts of Appeals.

Michael has received the highest possible rating ("AV") from Martindale – Hubbell.

DANIEL J. DOETZEL

Dan Doetzel is a Partner with the firm. He practices in all areas of labor and employment law, representing management exclusively. In addition to negotiating collective bargaining agreements for various clients, Dan arbitrates grievances brought by employees pursuant to collective bargaining agreements. Dan also represents clients in all types of employment litigation, including claims brought under Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Missouri and Illinois Human Rights Acts and the Age Discrimination in Employment Act. He also represents clients in the defense of retaliatory discharge and other state law claims relating to employee matters. Dan handles administrative matters before the National Labor Relations Board, the Equal Employment Opportunity Commission, the Missouri Commission on Human Rights, the Illinois Department of Human Rights, and other state and federal administrative agencies. He has represented clients in administrative and litigation matters in Missouri, Illinois, Wisconsin, Kansas and Florida.

Dan's practice also involves a significant amount of client counseling relating to all types of personnel and human resources issues, including employee discipline and termination, wage and hour, employee investigations and administration of employee leaves of absence. He drafts employment contracts and policies, employee handbooks, and employee separation and severance agreements.

Dan provides management training to employers and speaks on many employment topics, including sexual harassment and employment sensitivity training, the business use of computers, internet and e-mail, compliance with the Family and Medical Leave Act, the Americans with Disabilities Act and other discrimination statutes, limiting liability in employment matters and proper documentation of employee discipline and discharge.

EDUCATION:

B.A., Political Science, *Truman State University (1991)*
J.D., *Cum Laude, St. Louis University School of Law (1995)*

PROFESSIONAL AFFILIATIONS AND ACTIVITIES

Member, *The Missouri Bar*

Member, *The Illinois State Bar Association*

Member, *The American Bar Association*

Admitted to practice before the United States District Court for the Eastern District of Missouri and the United States Courts of Appeals for the Eighth Circuit.