



A Fox Rothschild Podcast

Labor Law Lineup

Episode 15: Virginia Public Sector Collective Bargaining Developments

Featuring Mark Eskenazi of Fox Rothschild and Toby Lantham

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Mark: Welcome back everyone to the "Labor Law Lineup" podcast. Today we have a very special episode, we're here with a special guest, Toby Latham. Toby, welcome to the show.

Toby: Hi, Mark. Thanks for having me.

Mark: We are recording this on March 23, 2026. We'll be talking today about Virginia's public sector collective bargaining developments. And this is also a special episode because this is long form rather than our quick hit episodes of this, this podcast where we give quick updates. This is a longer form because we want to dive into Virginia's public sector collective bargaining developments, of which there's a lot to talk about.

Full disclosure, I am friends with Toby and we are former colleagues at the National Labor [00:01:00] Relations Board. I'm gonna give a quick intro on Toby and who he is and what he brings to the table. He is got a lot of experience in this area. Toby Latham is counsel at Vasseghi Law Group, where he advises and represents clients in labor, employment and disability rights matters.

He draws on more than a decade at the NLRB, the National Labor Relations Board, where again, we worked together. He handles complex workplace disputes, administrative investigations and litigation before administrative agencies and in state and federal court. Toby also has deep experience in disability rights advocacy and has provided direct support to individuals with disabilities and navigating various systems of supports and services.

He's served in multiple leadership roles with disability-related nonprofit organizations and has played critical roles in improving policies at the local, state and federal level. His work is dedicated to expanding equitable access and inclusive practices in the workplace and the public schools.

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Okay, so we're [00:02:00] gonna dive in. Like I said, there's a lot to cover. And really, we'll start with the history of Virginia's collective bargaining laws for the public sector. So I'll sketch out in maybe 10 seconds some broad outlines as I understand 'em. And then Toby, if you could fill in the gaps and add some more detail.

As I understand it, up until 2020 there was no collective bargaining for public sector workers permitted. In 2020, there was a law that was passed which we can shorthand as the "enabling act." It enabled localities-- town, cities counties, et cetera-- in Virginia to provide for collective bargaining if they wanted to. Some of those counties, towns, et cetera localities, did provide for ordinances that gave workers rights to form a union. Many did not. And then we had a bill, I think around 2023 that would've made those rights statewide, and the former governor vetoed [00:03:00] it. And now it's 2026, March 2026, and we have a new bill that's similar, I think, to the statewide bill that was vetoed, that's on the Virginia governor's desk that I understand seems likely to be signed. And that'll provide statewide public-sector collective bargaining rights more than this patchwork of laws that we currently have right now.

But Toby, can you talk about that, can you fill in the gaps? What's the history here? What does this county-by-county current rule do? In broad strokes what will the new bill, if it's passed, what will that do?

Toby: Well, the two big things from the new bill would be reaching a home care council and the public employee relations board. But to get to your, what I think you're asking is whether that's gonna affect these local ordinances and resolutions. And the answer to that question is one that people have been searching for ever since the Public Employee Relations Board and its bill looked poised to go through the general assembly.

But there are existing resolutions and ordinances [00:04:00] within counties, cities and towns. Some counties have multiple collective bargaining laws where the board of supervisors have adopted an ordinance and the school board has adopted a resolution, and they're different, and they're not the same from one county to the next. So we have this existing patchwork with different nuances, different benefits that some counties might not have. I mean, there's one county out there that allows for attorney's fees and costs to be paid out if they prevail in an unfair labor practice proceeding. There is one resolution where bargaining was allowed for wages, hours, benefits and other terms of conditions, you know, the language we see in the private sector. But bargaining on the first contract was limited to just one topic selected by each party.

So, no one has a clear answer on what's gonna happen to this patchwork and the contracts that have been negotiated and implemented under this patchwork once the public employee relations bill is signed by the governor. While the bill that's pending the governor's [00:05:00] signature or modifications is unclear on whether it'll affect the local resolutions ordinances, it is explicit that

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contracts that have been negotiated and executed under these ordinances are gonna be affected by the limitation of the spill.

Mark: Yeah, and I'd add that contracts won't be affected, any active negotiation it says under the bill, and also the existing certification of any union will not be impacted. So, that's an interesting piece.

Right now we have this patchwork where we have counties and localities that have the ability to provide for collective bargaining rights. They don't have to. And I understand that in one such case you worked on yourself, representing an employee, and in this case it appeared to have to do with alleged discrimination of the employee for trying to get rehired into a school position she previously worked for, but she was allegedly not [00:06:00] rehired by the school because of her union activities. Can you talk a little bit about that case?

Toby: Yeah, we're representing a client who is a former union officer. And the case involves what I think you and I might call some foundational labor law principles, but maybe some folks would differ.

So she's a former union president who, as president, was involved in decisions about how the union would spend members' dues and how records were kept and other operational aspects of running a union. And she was the president for five years. She grew the organization to be the largest local in the state. They have one of the most robust contracts in the state in that county. I've received calls from other counties and locals where they said, how did this particular county get this provision in this contract? Because they didn't think it was a possibility. So, by all measures, membership, growth, strength of the contract, this president was doing all the things correctly. But what happened is that she [00:07:00] got involved in some press about the union spending and some operational issues. And when she tried to return back to the employer they said that they weren't going to hire her because of the press and the media coverage of the union spending. And what we have alleged, and what we would call core union activity. I mean there in the private sector, an employer can't weigh in on how a union spends its money and how it operates without having undo influence on the collective bargaining agent that's representing its employees.

So, the complaint that we filed alleged as much, said that the refusal to hire was an unfair labor practice, and that the statements which they put in writing in rejecting her application were also coercive statements in that they would restrain and coerce employees in engaging in union activity as an officer, because you're gonna have to second guess every time you spend something on union swag or a luncheon or convention. And the arbitrator found in our favor. And [00:08:00] that's still pending, it's eligible for appeal and we'll see what the school division does with that.

Mark: So in this case, it sounds like the employee you represented-- fascinating case and issues, by the way --the employee you represented, engaged in what you alleged to be certainly union activities and the school at issue refused to rehire her on the basis of those activities.

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Like Toby said, in the private sector under the National Labor Relations Act, the NLRB, the National Labor Relations Board, regularly will investigate and then prosecute if they find merit cases where employers-- this is private sector, of course, that I'm talking about-- where they find that an employee engaged in union activities and then the employer fired them for that reason, refused to hire them for that reason, the type of union activities could vary. It depends on the case. And then the NLRB will make a judgment or a ruling. I'm shorthanding the whole process, of course, and we've talked about this in prior [00:09:00] podcasts, but the NLRB is the body that handles that. In this case, Toby, an arbitrator handled that not the NLRB or a state version of the NLRB. So the ordinance here at issue for this school and school district provided for a single arbitrator to hear the case. Is that right?

Toby: That's correct.

Mark: Okay. And then the arbitrator, in her decision did she apply the, like what type of rules, like in order to analyze whether there, there were the union activities were protected? This was a new law, this is all new law, these patchwork of local ordinances. How did she analyze the issues?

Toby: Well, backing up a little bit the parties were, our client and the school division were collaborative in framing some of the issues, and we were able to agree that decisions under the National Labor Relations Act would be persuasive. So we were following many of those principles in arguing for our respective clients.

The arbitrator did apply NLRB decisions and principles developed under the National [00:10:00] Labor Relations Act in deciding the issues in our case. Some of them are, again, foundational decisions going back to the forties and fifties in what it means to engage in union activity as an officer. It's my understanding that this is the first case involving an individual asserting their rights under any of the resolutions or ordinances. There have been some unfair labor practice proceedings involving bargaining, but I believe this is the first discrimination case. So it was an opportunity to argue all of the various tests that are out there under the National Labor Relations Act, including right line, which is the burden-shifting framework; FES, which is the burden-shifting framework for free to hire cases. We got into *Burnup & Sims*, which is misconduct when engaged in union activity. We also argued the loss of protection standards, which didn't really make an appearance in the arbitrator's decision. But the decision was over 70 pages, it was thorough, and I think it was appropriately thorough since this was, my understanding, a matter of first impression as far as Virginia ULPs go.

Mark: [00:11:00] Yeah. Okay. So that decision could potentially be appealed, as you noted, so we'll keep an eye out for that. And for everyone listening to just a gut check, again, this is zooming out, this is one specific school district that had one specific school ordinance that they opted into under the current law, which as of today, March 23, 2026, is the current law. The new law, which we'll

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transition to, or at least the new bill which is on Governor Spanberger's desk as we speak. We don't have to get into all the niceties at this point of whether it would wipe away the local resolutions or not. But at a minimum, it would provide much more universal rights for workers to engage in collective bargaining. It doesn't have to be county by county. So it would provide, if a particular group of workers at a certain school district decides to form a union, they could gather cards and they [00:12:00] could provide those cards to their public employer, the school district or another employer. And then the school district or whomever, employer, could accept the cards as majority support evidence for the union and accept the union on that basis and bargain and recognize that union, or there could be a secret ballot election for that union.

And the point is, of what I'm talking about is that workers and unions could do this regardless of whether there's a county resolution in place, a local county or school resolution in place. Do I have that right, Toby?

Toby: Absolutely correct. With some caveats on the types of employees who are covered.

Mark: So let's go into that. For employees who are covered or not covered-- you mentioned home care workers, I think you might have alluded to higher education workers at the top, there's also the supervisory status, which comes into play-- do you want to tackle a couple of those of your choosing?

Toby: Sure. In the higher [00:13:00] education workers it's a hot topic because a part of that got carved out. So the service employees in higher education are still in the bill. But other employees are gonna have to potentially wait for another day to gain their collective bargaining rights.

To back up a little bit and avoid this question for a second: The bill is still pending with the governor, so there is a possibility that she could send it back with revisions, putting the higher ed unit in place in its totality. Not seeming like that's a likely outcome, but it is a possibility. She also has the option of veto, which doesn't seem like a possibility. Or she can just sign it as presented. So we're all waiting to see what the governor does with it because the higher education employees have been organizing and have been boots-on-the-ground advocating for their right to engage in collective bargaining with their employer. So, we'll see what happens with the higher education folks.

But yeah, there are identified bargaining units within the bill. So we've got state employees and that breaks [00:14:00] it down into various categories, including administrative services, education and media services, engineering and technology. You've got fire and emergency workers. And it breaks it down in a way that is foreign to me --and maybe to some folks who do exclusively private sector work --because it doesn't allow certain employees to form a bargaining unit of their own choosing, that their put into a particular bargaining unit depending on which government agency they're with and which job categories they find themselves in.

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So, another example is that there's state controlled enterprises and independent political subdivisions. They can form separate bargaining units within that. So there's some leeway within that particular category. Again, the higher education workers who are covered have some room to form units. But in other parts of the government, it's a set, you're in a bargain unit that's already been predefined by statute.

Mark: Yeah. So in the [00:15:00] private sector, under the National Labor Relations Act, you mentioned there's, maybe one shorthand way to put it is there's more freedom to form various bargaining units, seems to be what you're saying? But you'll correct me, which is, I'll give an example. If we have a department store, there's a perfume department, there's a shoe sales department, there's a clothing department. Those workers in each department could potentially organize around each department so the perfume workers could file a petition and try to form a union in just the perfume department. There could be potentially a union that encompasses the perfume and shoe department or all departments in the department store. There's a number of different permutations that might be an appropriate bargaining unit.

And what you seem to be saying here in what's in the current legislation on the governor's desk is that there's already specific categories, so like firefighters or state police, or I think you mentioned engineering. Is that the nature of the difference that [00:16:00] some of them are already specifically designated under the legislation to unionize?

Toby: That's correct. And it's similar to what we see in the patchwork that's currently in place too. Some of the school divisions have three defined bargaining units, operational surprisingly to me, like supervisor bargaining units. And they're all defined, you're either in or out and there was no organizing from the employees' perspective. Employees didn't pick the bargaining unit. They were established within the language of the prospective ordinances and resolutions.

Mark: Toby, you represent employees and labor unions on these issues and you've worked on local ordinances. So if the new bill becomes law, what do you anticipate? Do you have any predictions for workers? You mentioned higher ed, you're familiar with some organizing. Is this like a floodgate thing, folks who are super interested in organizing, you think it'll happen? And do you have [00:18:00] any predictions on how this will play out?

Toby: I think there will be a lull. The bill requires the public employee relations board to be up and running by October. They'll have to have a period where they set up the regulations and then staff up and get really full steam. But as far as the floodgates, labor's been pushing for this bill for, I would dare say decades at this point. So I think they're ready to start collecting signatures, cards, requesting voluntary recognition, doing all of the things to get their folks recognized. I know personally that the home health care workers have been at the front of this thing for a long time. I have a personal connection to that sector of employees in Virginia in that I have a child with disabilities who relies on

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consumer-directed support services and I know that they've been organizing for a very long time now.

So, as soon as the public Employee Relations Board is up and running, I don't doubt that there'll be a flood of activity and organizing [00:19:00] elections, bargaining over contracts. And as you would expect with folks who are new to labor law, there's probably gonna be some unfair labor practices here and there, whether during the election cycle or during bargaining or after the contract's executed, I would expect to see some activity in unfair labor practices too.

Mark: Yeah, I think that's a super important flag, which is that especially for organizing campaigns, new organizing campaigns. And like Toby said, we could have a flood of new organizing campaigns because before the bill is signed, if it's gonna be signed most of the workers in the Commonwealth of Virginia have not had the right to organize. So if they start to do that, organizing sometimes is a ripe area for unfair labor practices in the private sector. There's a number of things under NLRB law that companies can say and cannot say that's well policed and enforced by the NLRB. And those statements and if there's adverse actions taken that are discriminatory against workers for their union [00:20:00] activities, for their organizing, they could be held liable. So a lot to look out for there.

And then, let's talk about some more of the nuts and bolts of what's in the legislation: strikes and lockouts. What is the current state of play in the bill that's on the governor's desk with respect to strikes and lockouts?

Toby: Strikes aren't permitted. And it makes sense in the public sector insofar as you've got a government that has to operate. There are other states and localities that allow their employees to strike. But in Virginia if this bill is assigned as-is there will not be a right to strike for the public sector employees.

Mark: Different from the NLRA, of course.

Toby: Yeah, I believe it's even a basis for termination if an employee does, yeah, so if an employee engages in a strike, it's a basis for termination of employment. Whereas in the private sector, it would depend on the circumstances of the strike, whether it's an unfair labor practice strike or economic strike.

But in the public sector in Virginia, it's gonna be any strike.

Mark: Yeah, that's really interesting that it's a basis for a [00:21:00] termination there in the legislation. And yeah, in the National Labor Relations Act, strikes and lockouts are generally permitted. Although as you mentioned, Toby whether it's illegal to fire someone because they

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engaged in a strike, it could break down between whether it's an economic strike or an unfair labor practice strike and things like that.

So, let's talk about protected concerted activity and activities that could happen without having a union. So maybe if you could explain what protected concerted activity is just to start?

Toby: Well let's start with the language. It's important for people to know that, I think the language, it's similar if not identical to what we have in the private sector. So employees under this bill are gonna have the right to engage in other concerted activities for purposes of collective bargaining, which is the union activity. And this is the part where we get to protect a concerted activity. So, concerted activities for mutual aid or protection -- and that I try to boil it down for my folks who aren't lawyers and who aren't labor [00:22:00] attorneys by saying that if two people get together and they have concerns or complaints about their terms and conditions of employment or their wages and benefits, they have a right to raise those concerns and complaints to their employer without fear of retaliation or discipline for doing so.

And I think this is probably gonna be the area where folks have a hard time adjusting. Because in the public sector there's, in my view, some heavy-handed management rights. But this is gonna be interesting to see how the employers react to employees bringing concerns to their employer in a concerted effort, even outside of an organized labor organization or their union.

Mark: I think that's a good point. Even in the private sector, Toby, like you alluded to, I know of companies who are totally unfamiliar with what protected concerted activity is. We're gonna do a whole episode in a few weeks in the Labor Law Lineup podcast here, just a four or five minute episode breaking down some of this, but I mean, in [00:23:00] short, you don't need a union for workers to engage in protected concerted activity. Like Toby said, it's two or more workers banding together to discuss or protest their working conditions.

A seminal Supreme Court case from the sixties in the private sector was multiple workers complaining about the heat conditions in their facility: it was too cold, they wanted more heat. And they went to the boss and the boss fired them. And the Supreme Court, there was no union, again, in the case on the scene. And the Supreme Court said, that's unlawful, because those workers were engaged in protected concerted activity, they were banding together to try to improve their working conditions, and you can't fire them for that. So, that's sometimes a tough concept because employers are either unaware of how to handle it or have not handled it before and don't know what it is. And here in the legislation we have words that are similar to the National Labor Relations Act and could provide for that right. So, I [00:24:00] think that's an important flag.

Toby: And just so that the listeners don't say that Mark and I misled them, a protected conserved activity can also include a single employee trying to organize their coworkers and get them to band

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together to raise concerns. And every employee that's approached could say, no, I'm not interested in joining you. But that's still under the National Labor Relations Act is just as protected as if that employee was successful in getting others to complain or raise their concerns with the management. So it'll be interesting to see how this develops in the public sector.

Mark: Yeah, Toby, and that's a good flag. I did say that I think you need multiple workers or two or more, that's an example I was giving. But they could be one employee. There's NLRB cases that say one employee, if that person brings group complaints or other protected activities like Toby talked about, that could be considered protected. So that's a good flag.

On the bargaining side, let's talk about and maybe compare the same way that we're doing this with the protected activity. So, [00:25:00] for collective bargaining in the private sector, National Labor Relations Act, parties can come up with whatever working conditions they want to in good faith bargaining. Generally, there's no required mediation under the law or required interest arbitration. Tell us about the legislation that's on the governor's desk. If parties reach an impasse, a deadlock in bargaining, what happens?

Toby: With most public sector collective bargaining legislation or whether it's state or local, there's a forced way to break an impasse and that's usually going to an arbitrator or neutral who will consider proposals from both sides and make a decision.

And the way in which the neutral decides how to break the impasse differs from one state to the next.

Mark: Let's move on to the PERB. So this is the Public Employee Relations Board to handle cases that come before it. Can you talk about what the legislation on the governor's desk would do? What would establish the PERB? What would the PERB [00:26:00] do?

Toby: The PERB will act much like the National Labor Relations Board in that it's an adjudicant body that will address unfair labor practice issues and representation issues. The composition is similar. I mean, it's actually identical to the board in that it has five members. It's different in that it designates specific seats explicitly in the legislation itself. As folks in the private sector know traditionally the five-member board at the NLRB, it's typically three members who are of the party of the president in the White House and the other two are in the minority. But the PERB in Virginia is gonna have two members who are gonna be representatives of management's interest, one member who's gonna be a representative of employee organizations, specific set of employee organizations. Another seat for a different set of employee organization representatives. And then one member who's a representative of the public interest and shall serve [00:27:00] as the chair. And the chair, I believe is supposed to be neutral. I think they might have taken that out.

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Mark: Yeah. I think the final version, prior legislation that was considered, I think added the neutral. I just saw, Toby, after we chatted that they removed, I think they removed from neutral, they said member of the public, representative of the public, right?

Toby: Yeah. That was a barrier. So that's good that they removed it. So yeah, it's one member shall be a representative of the public and shall serve as the chair. And the board's supposed to be set up, or initial appointments are expected October 1 of this year.

The board's gonna have authority to hold hearings, adopt regulations, sue and be sued. They'll be able to represent the agency in Virginia Courts to enforce the public employee relations and collective bargaining laws. So again, they're gonna have much of the same authority as the National Labor Relations Board has in the private sector.

Mark: Okay. Yeah, that's interesting. And I think you mentioned at the top, but if not, the governor will have the authority under this bill if it's passed [00:28:00] to appoint these five individuals to the PERB and then they have to be confirmed by the general assembly. I think that's in there, right?

Toby: Right.

Mark: Okay. And then as Toby mentioned the duties of the PERB in at least lots of ways will mirror what the NLRB does. So they'll decide on fair labor practice cases. They'll decide representation, election issues. They'll conduct the secret ballot elections for union representation.

For unfair labor practice cases, you mentioned at the top that you have one under this local patchwork. You recently had one where an arbitrator decided on the unfair labor practice issue, whether the union president was unlawfully refused to be rehired. In this legislation, is it a hearing officer that would take it out of an arbitrator's hand, it would put it in like a PERB hearing officer to initially hear the case? Is that right?

Toby: I think that's the end goal. I believe that the board itself can, just like the National Labor Relations Board, they can [00:29:00] hold hearings if they wish. That's long gone in the private sector, but has authority to hold hearings itself.

You mentioned the patchwork again and this is an issue that I think will be resolved by this bill when it's enacted. There are a lot of questions of procedure 'cause some of these resolutions are thin and didn't think about all of the scenarios. And I know that there is one unfair labor practice proceeding where an arbitrator issued subpoenas to a third party and the third party said, no, we're not gonna comply with the subpoena.

But the Public Employee Relations Board has the power to issue subpoenas and compel attendance. And if folks don't show up, they can go into the circuit court and get that subpoena enforced. So

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there's questions whether the subpoenas under the local resolutions and ordinances could be enforced. But it's crystal clear here that the PERB will have that authority.

Mark: Okay. And subpoena power is important, because the way that a decisionmaker,-- whether it's an arbitrator or otherwise-- gets the information and the parties are able to [00:30:00] try to get the information they need is often done through subpoena power. So that is an interesting element here.

And then judicial review, I believe like the National Labor Relations Act, orders can be reviewed by the federal court, the U.S. Court of Appeals, the circuit courts, the state Virginia Courts can review the validity of PERB orders. Is that right?

Toby: That's correct.

Mark: So there's a judicial review outlet here as well.

I want to get practical for some of these cases. You had the case before the arbitrator and then there could be these additional cases if the legislation is passed for unfair labor practice issues for employers, public employers, and I know you're on the employee side generally right now, but it might be helpful from your perspective, even for the employer side, 'cause see it from one side and maybe have input on the other side. How would you advise employers on training and getting prepared for this legislation? How to gear [00:31:00] up for these new rules that'll come into play potentially?

Toby: I would give employers the same advice I give anybody selecting any attorney and that's making sure that you find counsel who is experienced in the area that's at issue. And traditional labor law has its nuances and its wrinkles that only traditional labor law practitioners understand. So, given the similarity in the language with respect to rights and prohibitions, I would urge employers to find good counsel through folks who have experience in that.

The interest arbitration and some of the contract negotiation aspects are gonna be different. But I am already seeing, again, with the protected concerted activity folks falling into some questionable conduct. So I think it's important that employers in Virginia and the public sector get ahead of these issues and provide training so that they know what to expect and how to conduct themselves once [00:32:00] these rights are enacted.

Mark: Yeah I totally agree on having well-versed traditional labor council be able to guide folks in public employers, in public sector unions. You're right, wherever potential clients may come from and may have issues, it really is pretty universal that folks who know the area really well, it would be important for them to guide you.

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And Toby's right, the National Labor Relations Board has really specific rules on things like speech, what employers can say and what they are not permitted to say during organizing campaigns and other issues. What is good faith bargaining? What constitutes conferring in good faith to talk about working conditions with the union? There's a lot of rules on that and it's not just a shorthand bumper sticker, necessarily, the answer. It's very fact specific and there's a whole host of other rules that the NLRB has fleshed out with case law and that this Virginia statute might create. So I think that's really important to have really experienced counsel.

[00:33:00] Training could be important. Day to day, I think it's interesting --and Toby, I'd be curious what you think-- grievances, if there are unions that start organizing in force in the Commonwealth and then there's collective bargaining agreements. I think under the legislation there's a procedure where the grievances must go through an arbitration type system. In the private sector, most collective bargaining agreements go through a grievance structure and then through to arbitration. But it seems to me that grievances, just handling them, in my opinion, collaboratively, between employers and unions is really important, trying to work together to find common ground. Really listen, be transparent, be clear about the information one is seeking. I've said before, you get more with honey than vinegar. And if you can do collaborative labor relations between a union and an employer, that's better. There's always gonna be disagreements. There's disagreements in life. But if you can, try to be transparent and open, that's better.

I [00:34:00] mean, do you have any thoughts on day-to-day grievances, any thoughts on trying to take the high road and collaborating. I know I think you're a collaborative guy, as we've worked together. But I'm curious if you--

Toby: Appreciate that.

Mark: Yeah, if you have any thoughts on good grievance practices.

Toby: I think you're absolutely right. And most of the folks who have been in traditional labor law for a while know that collaboration is important. And they know when it's time to switch gears to be more argumentative. But as far as grievance processing, I would expect it to be not that much different than the private sector. They'll have their procedures set out.

But that does raise a point that, I think, just based on my conversations with folks in Virginia now -- and this is for the union folks out there-- the duty of fair representation and what that means in the grievance process, because I've had a lot of interesting conversations with the union members about what their union or bargaining rep is doing or not doing on their behalf. And I have to explain to them that the duty of fair [00:35:00] representation doesn't mean that a union has to take every single grievance that's presented and it doesn't have to take every grievance that is pursued, they don't have to take it to arbitration. There's a standard for that, at least under the National Labor

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Relations Act. So, I am interested in seeing how that develops under this public employee relations bill.

But yeah, collaboration and grievance processing is important. I've got a union client, we have a couple matters that are scheduled for arbitration. And in planning for arbitration, there are discussions about how can we possibly resolve this without getting to that date. So, I encourage any practitioner, whether you're in it or joining the traditional labor law in the field to always try to look for resolution before arbitration or litigation whenever possible 'cause it's in the best interest of your client, more often than not.

Mark: Yeah, I find with several clients, especially recently, we've had settlements where you may not get every single thing you want, but you get a little bit of what you want and maybe [00:36:00] you create some positive energy and momentum and synergies with the union that can help you resolve the next one more collaboratively and it sort of builds on each other. So I agree with that.

But it's a good flag about the duty of fair representation, Toby, and some of the prohibitions on labor unions that you mentioned, or some of the responsibilities at least, that they have under the National Labor Relations Act. And then apparently, or potentially under this legislation and just more generally under this legislation, I know that there's employers are prohibited from interfering or coercing the union and protected concerted activity rights that Toby and I talked about earlier. The public sector employers have a duty to bargain in good faith. I know on the union side, there's again, prohibitions for the unions to, or at least things they must follow, obligations, including that they must bargain in good faith as well. So, those are all important to note.

We touched on higher [00:37:00] education, and I think you talked about that, but some of the other groups, I mean the home care, I think is an important piece to this bill and I know you mentioned that and I think you mentioned it's near and dear to your heart. If you could talk about it a little more just in the context of, there's individual providers that go into homes now to help folks with health care and this Virginia Home Care Council that the bill would create would essentially be created for the purposes of collectively bargaining with those individual providers who go into homes. Is that, is my understanding correct and do you have any elaboration on how the home care aspects will work?

Toby: Yeah, that's correct. The Home Health Care Council will essentially be set up as a employer record exclusively for bargaining purposes. Families who rely on home health care workers are still gonna have control over hiring, discipline, training, all of those aspects.

Just for a little bit of background, these home health care [00:38:00] workers are folks who are typically supporting and providing support for people with disabilities or people who are aging and need direct support services provided through the state. So, they're not technically an employee of, a

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public sector employee, so that's the reason why this council has to be set up so that there is an employer through which a bargaining agent can engage in negotiations over contracts.

And I think it's an important sector of our workforce. It's been unfortunately ignored by many for too long. And there's a set wage for these folks, and acting collectively through a bargaining agent, I think will help improve their wages and other terms and conditions. Outside of Northern Virginia, these folks are making \$13.88 an hour, which is about \$28,000 a year. In Northern Virginia there's a different rate, but that's still \$17.97 which is \$37,000ish a year, which isn't a living [00:39:00] wage. Sometimes these home health care workers are folks who are working and supporting people with disabilities and aging family members themselves. So, to leave the home, to make that amount of money, one, shows that they're dedicated to their profession, and two, deserves more as far as pay and benefits are concerned. So I'm happy to see that they are gaining collective bargaining rights through this bill and excited to see what they do with that authority and power.

Mark: Yeah, I appreciate that. This is a super important segment of the workforce, I agree with that, and I think it'll be really important to see how this area develops. And this is folks who go in to help people who have certain needs and without them may have an extremely difficult time getting by.

As for an issue that's near and dear to my heart on this topic, my mom worked in public education and special education her whole career, and was represented by various labor unions. Her [00:40:00] public sector labor experience had an impact in my pursuit of a career in labor law. And so I think it's really important that we focus on the area and that's helpful.

Toby: Unrelated to the collective bargaining aspect of the council, there's two very important aspects of it that aren't gonna relate to collective bargaining and to folks who are in need of the support services. It's often hard to find individual providers and this council's gonna have to set up a registry and they're gonna have to identify potential individual providers allowing for folks like my family who need service providers to go to a central source instead of putting out ads and doing all these things that we have to do to try to find support services for our family members who need them. So those are exciting non-labor law aspects of this bill.

Mark: Yeah. And that's really all in the family of labor law and the podcast because really, even though we're, we focus on collective bargaining and what it means for employers and workers and unions, it's still a major workforce [00:41:00] issue right? If as you're saying, there's a dearth of folks in this segment of the workforce and there's a need to have them come into the workforce and help people, super important area for families across Virginia, and frankly, probably across the United States.

I think that's a good place to close. But Toby, do you have any parting words or do you have any thoughts that you wanted to add to anything?

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Toby: So there is at least one resolution, one local government that has a resolution that provides for attorney's fees and costs if an individual employee brings an unfair labor practice charge and is successful in that effort. And one of the aspects of the National Labor Relations Act. I mean, the NLRB is the only show in town, right? If you've got an unfair labor practice case in the private sector, you go to NLRB, they take your case or they don't. But in the public sector, there's some room to do things differently.

And one of the things that I would like to see down the road is reduced fees, provisions, for folks who wanna [00:42:00] pursue what the PERB might not think is an unfair labor practice. Let them test it somewhere else. 'Cause there are folks who aren't gonna be tied to a union or might be at odds with their bargaining representative who might wanna pursue something outside of that.

Mark: Okay. And I would say that attorney's fees are generally not available under the National Labor Relations Act for private sector employment situations. And they're not available under the bill that's on the governor's desk. I think that's right as well, right, Toby? They were removed from that?

Toby: Yeah, that's right. And the arbitrator in the case that I have noted that attorney's fees are extraordinary in the private sector and noted that in rejecting my request for other extraordinary remedies. So, it is definitely not common.

Mark: Okay. Okay. Well that's great. I think that's a wrap, but to recap briefly, if the governor signs this-- which all accounts seem to be that she will, in Virginia-- there's gonna be a lot of statewide changes. There's gonna be collective bargaining rights that workers have that they don't have now, [00:43:00] not just if a county or a town or locality wants to grant those rights through a local resolution. But statewide, workers anywhere in a public sector employer --except for the car vets we mentioned, and higher ed and some other areas --generally will have the right to join or form or organize a union. And so there's gonna be a lot of interesting and very important obligations for employers and labor unions to work with.

So, we're really excited to have you aboard and Toby thank you for being our guest and for enlightening us in this area. And to all the listeners out there, thanks so much for listening. We'll see you next time.

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