Chapter 3: Criminal Law and Procedure

David Rossman
CHAPTER 2

Labor Law

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A. FEDERAL LEGISLATION

§2.1. National Labor Relations Act. During the Survey year the National Labor Relations Act1 (NLRA) was amended, inter alia, to extend its protection to employees of nonprofit hospitals2 and to establish special procedures for handling certain labor disputes in all "health care institutions."3

The special procedures for handling certain labor disputes at health care institutions are designed to minimize the possibility that a strike will occur as the result of the failure of the employer and union to successfully negotiate a collective bargaining agreement. To this end, the amendments extend the time period presently required by the NLRA4 for giving notice of termination or modification of the contract.5 The party desiring to terminate or modify a bargaining agreement must serve written notice of such intent on the other party at least 90 days before the expiration of the agreement,6 and must give notice to the Federal Mediation and Conciliation Service (FMCS) 60 days prior to the agreement's expiration date.7 In the case of initial contract negotiations, at least 30 days' notice of a bargaining impasse must be given to the FMCS.8 Upon receiving any such notice, the FMCS is required to contact the parties in an effort to achieve a set-

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3 Pub. L. No. 93-360, § 1(b), 88 Stat. 395 (July 26, 1974), adding 29 U.S.C. § 152(14). The term "health care institution" includes "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person." Id.
6 Id.
7 Id.
8 Id.
The Fair Labor Standards Act was amended in 1974 so as to increase the minimum wage rates, broaden the minimum wage and overtime coverage of the Act, and modify and eliminate various minimum wage and overtime exemptions while creating certain new exemptions. The amendments provide a minimum wage level of $2.30 per hour for all covered workers. However, workers will reach the $2.30 level at different times depending on when their particular job was first covered by the Act. The amendments also extend the coverage of the
Act. First, the Act now covers all nonsupervisory employees of federal, state and local governments. Secondly, the Act now requires that domestic service employees in private households be paid the minimum wage so long as they are employed in one or more homes for a total of more than eight hours in any workweek, or if they earn "wages" as that term is used in the Social Security Act. Domestics who do not live in the household must be paid overtime compensation as well as the minimum wage.

The amendments include special overtime standards for public law enforcement employees and firemen. The amendments will also gradually eliminate the prior exemption from the minimum wage and overtime provisions of the Act of employees of retail and service establishments grossing less than $250,000 annually that are part of an enterprise grossing in excess of $250,000. The 1974 amendments repealed the prior minimum wage exemption for certain employees in


9 Effective January 1, 1975, time and a half payment is required for hours worked by law enforcement and fire protection employees in excess of those determined by the following statutory formula: for employees with a work period of 28 consecutive days, overtime must be paid for all hours of duty in excess of 240 hours; if they have a work period which runs from 7 to 28 consecutive days, overtime must be paid for the excess number of hours based on a proportion of the 240 hour figure. Id. Simply stated, for tours of duty less than 28 consecutive days (or 4 consecutive weeks), the statute would use 60 hours per week as the hourly standard. For example, a policeman working 67 hours in a regular seven day period must receive seven hours overtime pay.

The maximum number of straight time hours and the figure upon which the proportionate number of hours is based will be reduced to 232 hours effective January 1, 1976, and 216 hours effective January 1, 1977. Pub. L. No. 93-259, §§ 6(c)(1)(B)-(C), 88 Stat. 60 (April 8, 1974), amending the newly enacted 29 U.S.C. § 207(k).

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the following categories: movie theaters,\(^\text{10}\) small logging businesses,\(^\text{11}\) and shade grown tobacco processing.\(^\text{12}\) The amendments modify or repeal the prior overtime exemption for certain workers employed in seasonal industries;\(^\text{13}\) seafood canning and processing;\(^\text{14}\) local transit;\(^\text{15}\) nursing homes;\(^\text{16}\) hotels, motels and restaurants;\(^\text{17}\) and cotton\(^\text{18}\) and sugar processing.\(^\text{19}\) The amendments also modified section 14 of the Act dealing with the employment of students at subminimum wages by retail or service establishments, farms, and institutions of higher education.\(^\text{20}\)

The 1974 amendments also expanded coverage of the Age Discrimination in Employment Act of 1967.\(^\text{21}\) That law prohibits discrimination by certain employers against employees and applicants age 40 to 65 years. The number of employees necessary for a person to meet the definition of "employer" under that law was reduced from 25 to 20 by the amendments.\(^\text{22}\) The amendments also extended the protection of the Age Discrimination in Employment Act to employees of federal,\(^\text{23}\) state, and local governments.\(^\text{24}\)

§2.3. Pension Reform Act. The Employee Retirement Income


Security Act of 1974 was signed into law during the Survey year. This landmark enactment is tremendously broad in scope and will have a dramatic impact on virtually all pension plans. Since an extensive review of this legislation is beyond the scope of this Survey and because its technical nature makes it extremely difficult to even effectively summarize, only the highlights of the Act will be noted.

Generally, the substantive provisions of the Pension Reform Act apply to plan years beginning after the date of enactment, September 2, 1974. However, for plans already in existence on January 1, 1974, the new rules are not applicable until the first plan year beginning after December 31, 1975. The Act applies to virtually all employee benefit plans established by an employer regardless of the size of the plan or its tax qualification status. Generally, a new employee over age 25 cannot be required to wait more than one year to participate in the plan. Once an employee begins participation in the plan, benefits from employer contributions must be vested in accordance with one of the following vesting schedules adopted at the option of the employer:

1. A five-to-fifteen year graduated schedule under which an employee's accrued benefit will be 25 percent vested after five years' covered service, 50 percent vested after ten years of service, and 100 percent vested after 15 years' service;
2. A ten-year schedule under which an employee's accrued benefit will be 100 percent vested after ten years' service;
3. A schedule under which an employee must be 50 percent vested if the employee has five years of service and the sum of his age and service equals 45; another ten percentage points will vest in each of the subsequent five years.

The Act also provides a very detailed contribution requirement by employers to insure that vested benefits will be adequately funded. In addition, in order to further assure the payment of vested benefits, the Act requires the purchase of plan termination insurance to protect

3 See authorities cited in note 2 supra.
participants and beneficiaries against loss of benefits arising from a complete or partial termination of the plan. The termination insurance provisions of the Act are to be administered by the Pension Benefit Guaranty Corporation, a new office within the Department of Labor.

B. United States Supreme Court Decisions

§2.4. Unfair labor practices. In *Golden State Bottling Co. v. NLRB*, the Supreme Court unanimously held that a bona fide purchaser who acquires and continues a business with knowledge that the predecessor has committed an unfair labor practice in the discharge of an employee may be ordered by the National Labor Relations Board to reinstate the employee with back pay. The Court rejected the employer's argument that the Board had no authority to impose responsibility for remedying unfair labor practices on persons who had not engaged in the practices. The Court noted that it had previously recognized in *Southport Petroleum Co. v. NLRB* and *Regal Knitwear Co. v. NLRB* that the Board's remedial powers under the National Labor Relations Act are not limited to the person or persons responsible for the actual perpetration of the unfair labor practice.

The Court also rejected the employer's contention that enforcement of the Board's order was barred under Rule 65(d) of the Federal Rules of Civil Procedure, which provides that injunctions and orders shall be "binding only upon the parties to the action, their officers, agents, servants, employees and attorneys . . . ." The Court noted that Rule 65(d) is derived from the common law doctrine that an injunction binds not only the parties but also those in privity with them. The Court observed that a bona fide purchaser who acquires a business with the knowledge that the predecessor's wrong remains unremedied may be considered in privity with its predecessor for purposes of Rule 65(d).

§2.5. Union's waiver of initiation fees. The Supreme Court in

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§2.4. 414 U.S. 168 (1973).
2 Id. at 180.
3 Id. at 176-77.
4 315 U.S. 100 (1942).
5 324 U.S. 9 (1945).
6 414 U.S. at 176-77.
8 414 U.S. at 179.
9 Id. at 180.
NLRB v. Savair Manufacturing Co.\(^1\) held that a union’s offer to waive initiation fees for employees who signed cards authorizing the union to be their bargaining representative was a sufficient ground on which to overturn a representation election won by the union. The Court reversed a decision of the Board\(^2\) ordering the employer to bargain with the union because, in the majority’s opinion, the policy of fair elections prescribed by the National Labor Relations Act does not permit endorsements, whether for or against the union, to be bought and sold.\(^3\) While the Court noted that an employee who signs a union authorization card is not legally bound to vote for the union, it concluded that some employees would feel obligated to carry through on their stated intention to support the union.\(^4\)

Mr. Justice White dissented, joined by Justices Brennan and Blackmun, arguing that the Board has a wide degree of discretion in conducting representation elections, and that the waiver of the initiation fees was not “so clearly coercive” that the Board could be said to have abused its discretion.\(^5\)

\(\S 2.6.\) Preemption. In *William E. Arnold Co. v. Carpenters District Council*,\(^1\) a unanimous Supreme Court held that a state court has jurisdiction under section 301 of the Taft-Hartley Act\(^2\) to enjoin a strike called in violation of the no-strike clause of a collective bargaining agreement containing a binding arbitration clause, even though the strike was arguably an unfair labor practice under the National Labor Relations Act.\(^3\) In so doing, the Court refused to extend to section 301 suits the doctrine enunciated in *Building Trades Council v. Garmon*\(^4\) that courts must defer to the exclusive competence of the Board when an activity is arguably an unfair labor practice.\(^5\)

\(\S 2.7.\) Managerial employees. In *NLRB v. Bell Aerospace Co.*,\(^1\) the Supreme Court in a five to four decision\(^2\) rejected the position of the National Labor Relations Board that “managerial employees”\(^3\) are

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\(^1\) 414 U.S. 270 (1973).
\(^3\) 414 U.S. at 277-78.
\(^4\) Id.
\(^5\) Id. at 282.

\(^8\) 417 U.S. at 15-16.
\(^10\) 417 U.S. at 16.

\(^7\) 416 U.S. 267 (1974).
\(^1\) Justices White, Brennan, Stewart, and Marshall dissented. Id. at 295.
\(^3\) The term “managerial employee” is not defined in the National Labor Relations Act. However, the Board through a number of its decisions has in effect defined the term to encompass executive employees who are in a position to formulate, determine, and effectuate management policies. See, e.g., Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946).
protected by the National Labor Relations Act. The Court, considering the previous Board practice of excluding managerial employees from the scope of the Act, the apparent approval by Congress of this policy during debates on the Taft-Hartley amendments, and the reliance by Congress on this policy in not amending the National Labor Relations Act to exclude managerial employees, concluded that managerial employees are not, as a matter of law, covered by the Act.

§2.8. Arbitration. In Gateway Coal Co. v. UMW, the Supreme Court held that the presumption of arbitrability announced in its Steelworkers Trilogy applies to safety disputes. As a result, the Court concluded that since the parties' collective bargaining agreement contained a provision for final and binding arbitration which appeared sufficiently broad to encompass the safety dispute, the union was contractually obligated to submit the issue to an arbitrator. Having resolved this threshold question, the Court considered the issue of whether the district court had the authority to enjoin the union's strike in light of the Norris-LaGuardia Act. In concluding that the district court had properly enjoined the strike, the Court noted that the facts of the instant case fell within the exception of the Norris-LaGuardia Act announced in Boys Markets, Inc. v. Retail Clerks Union Local 770.

In Boys Markets the Court considered the proper accommodation between the provisions of the Norris-LaGuardia Act and the subsequently enacted provisions of section 301(a) of the Labor Management Relations Act. In order to accommodate those statutes, the Court in Boys Markets concluded that, in certain situations, section 301(a) empowers a federal court to enjoin violations of a contractual duty not to strike. In applying the Boys Markets exception to the Gateway facts, the Court concluded that notwithstanding the fact that the parties' collective bargaining agreement did not contain an express no-strike prohibition, the strike was properly enjoined since the scope of the collective bargaining agreement's arbitration provision was sufficiently broad to imply a no-strike agreement on the part of the union.

In a second decision concerning arbitration, a unanimous Court in

6 416 U.S. at 289.

3 414 U.S. at 379-80.
7 398 U.S. at 251.
8 414 U.S. at 381-87.
Alexander v. Gardner-Denver Co.\textsuperscript{9} held that the rejection of an employee's claim of discrimination in employment by an arbitrator did not preclude the employee from exercising his right to a trial de novo under Title VII of the Civil Rights Act of 1964.\textsuperscript{10} The Court concluded that Title VII was designed to supplement, rather than supplant, existing laws and procedures relating to employment discrimination.\textsuperscript{11}

In a third decision involving arbitration, the Court held in Howard Johnson Co. v. Detroit Local Joint Executive Board\textsuperscript{12} that petitioner, which purchased a restaurant and motor lodge and hired only a small number of the seller's employees, could not be required to arbitrate the extent of its obligations under the seller's collective bargaining agreement with the former employees' union since there was no substantial continuity of identity in the work force hired by the petitioner and no express or implied assumption of the agreement to arbitrate.\textsuperscript{13}

§2.9. Waiver of employee rights. In NLRB v. Magnavox Co.,\textsuperscript{1} the Supreme Court held that an incumbent union may not legally waive the rights of employees to distribute literature to co-workers in non-working areas during nonworking time or to engage in in-plant solicitation on nonworking time.\textsuperscript{2} The employer, initially with the sanction of the union, promulgated a rule forbidding distribution of literature in nonworking areas during nonworking time. Eventually, the union sought to have the rule changed. When the company refused, the union brought unfair labor practice charges. The Board sustained the charges, relying on Gale Products,\textsuperscript{3} which upheld the right of employees, under section 7 of the National Labor Relations Act,\textsuperscript{4} to distribute literature.\textsuperscript{5} The Sixth Circuit refused to enforce the Board's order on the ground that the union had the authority to waive and did waive the employees' distribution rights.\textsuperscript{6} The Supreme Court reversed, reasoning that while a union has the legal authority to waive certain employment benefits as the quid pro quo for an employer's acceptance of other terms, the waiver of employee distribution rights so contravenes the section 7 rights of employees that it cannot be bargained away.\textsuperscript{7}

§2.10. Equal Pay Act. The Supreme Court in Corning Glass Works

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\item \textsuperscript{9} 415 U.S. 36 (1974).
\item \textsuperscript{10} 42 U.S.C. §§ 2000e et seq. (1970).
\item \textsuperscript{11} 415 U.S. at 48-49.
\item \textsuperscript{12} 417 U.S. 249 (1974).
\item \textsuperscript{13} Id. at 264-65.
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\item §2.9. \textsuperscript{1} 415 U.S. 322 (1974).
\item \textsuperscript{2} Id. at 324.
\item \textsuperscript{3} 142 N.L.R.B. 1246 (1963), enforcement denied, 337 F.2d 390 (7th Cir. 1964).
\item \textsuperscript{5} Magnavox Co., 195 N.L.R.B. 265 (1972).
\item \textsuperscript{6} Magnavox Co. v. NLRB, 474 F.2d 1269 (6th Cir. 1973).
\item \textsuperscript{7} 415 U.S. at 325-26.
\end{itemize}
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v. Brennan\(^1\) provided an excellent analysis of the standard of proof required in cases arising under the Equal Pay Act of 1963.\(^2\) The issue before the Court was whether the company violated the Equal Pay Act by paying a higher base wage to male night shift inspectors than it paid to female inspectors performing the same tasks on the day shift. The higher wage was paid in addition to a separate night shift differential paid to all employees for night work.

The Court initially noted that in order to make out a prima facie case, the plaintiff must prove that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions . . . ."\(^3\) If these facts are proven, the burden shifts to the employer to show that the differential is based on one of the following statutory exemptions: a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any factor other than sex.\(^4\) In applying this test to the facts presented, the Court found that the work of the female day shift employees and the male night shift employees was equal since the phrase "similar working conditions" as used in the Act relates to physical working conditions and not to the time of day.\(^5\) The Court also concluded that the higher wage rate was sex-based and not intended to compensate for the extra burdens of night work since the evidence showed that in fact it was paid to men because they would not work for the lower wages for which women would work.\(^6\)

C. FEDERAL COURTS IN MASSACHUSETTS

§2.11. Arbitration awards. In Electronics Corp. v. Local 272, IUMW,\(^1\) the Court of Appeals for the First Circuit held that an award cannot stand where the central fact underlying an arbitrator's decision is erroneous.\(^2\) The company appealed from the district court's dismissal of its suit to vacate an arbitrator's order to reinstate a discharged employee. Although the arbitrator found that the discharged employee had been "incredibly lax" in the performance of his job, he concluded that the discharge was improper because industrial due process normally requires that an employee be suspended before he

\(^{4}\) Id. at 196, citing 29 U.S.C. § 206(d)(1).
\(^{5}\) Id. at 202.
\(^{6}\) Id. at 205.

§2.11. 492 F.2d 1255 (1st Cir. 1974).
\(^{1}\) Id. at 1257.

http://lawdigitalcommons.bc.edu/asml/vol1974/iss1/6
may be discharged. The arbitrator found that the company had neglected to suspend the employee despite evidence presented at the arbitration proceeding which showed that the employee had in fact been suspended three months prior to his discharge. It was solely on this basis that the arbitrator ordered reinstatement.

In vacating the arbitration award and ordering a new hearing before a different arbitrator, the court emphasized that its decision was limited to those situations where the sole articulated basis for the arbitrator's award is concededly a non-fact and where the parties involved in the arbitration cannot fairly be charged with this misapprehension.

D. Massachusetts Legislation

§2.12. Public employee collective bargaining. History. In 1958, the General Court enacted the first specific statutory provision recognizing the right of all public employees, except police officers, to form and join labor organizations and to "present proposals" relative to their salaries and conditions of employment. In 1964, the initial grant of collective rights was broadened by legislation requiring state agencies to recognize employee organizations and authorizing those agencies to enter into agreements with employee organizations relative to certain conditions of employment. A year later, the first statute granting extensive collective bargaining rights to public employees was enacted. This statute applied to all county, city, town, or district employees, except elected officers, board and commission members, executive officers, and police.

The Massachusetts Labor Relations Commission was charged with administering the 1965 statute and was given general responsibility for protecting the rights granted municipal employees to organize, engage in concerted activities, and to bargain collectively through an employee organization on questions of wages, hours and other conditions of employment. The Commission was also given the responsibil-

\[\text{Rossman: Chapter 3: Criminal Law and Procedure}\]

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ity of investigating prohibited practice complaints and remedying such practices if found to exist. 6

The 1965 statute specifically provided that it was unlawful for any municipal employee to engage in, induce, or encourage any strike, work stoppage, slowdown or withholding of services by such employees. 7 Having denied municipal employees their most important bargaining lever, the General Court, in an effort to help ensure the peaceful resolution of negotiations, provided a procedure for mediation, conciliation and fact-finding. 8

The law governing public employee collective bargaining in the Commonwealth remained basically unchanged until 1973. During this eight year period there was a good deal of dissatisfaction among both public employees and employers with the collective bargaining statutes. Public employees wanted either the right to strike or the right to submit unresolved bargaining issues to a third party for final and binding arbitration. State employees wanted the right to bargain about their wages and hours, subjects previously excluded from the bargaining process. Public employers, on the other hand, were anxious to narrow the areas about which employees could negotiate. They were also anxious to remove supervisors and other managerial personnel from the scope of the collective bargaining law. All of these efforts culminated in the insertion of new chapter 150E in the General Laws, through the enactment of chapter 1078 of the Acts of 1973. 9

Scope of chapter 150E. Chapter 150E is applicable to all public employees of the Commonwealth and its political subdivisions except elected and appointed officials, members of any board or commission, heads, directors and administrative officers of departments, and other managerial or confidential employees, and members of the militia.

6 Id. This chapter prohibited a municipal employer from interfering with or adversely treating an employee for exercising rights guaranteed by that statute. Additionally, municipal employers were prohibited from refusing to bargain in good faith with an employee organization or refusing to discuss grievances with designated employee representatives. Employee organizations were prohibited from restraining or coercing a municipal employer in the selection of its representatives for purposes of collective bargaining or the adjustment of grievances, and from refusing to bargain collectively with a municipal employer. Id.

7 Id.

8 Id.

9 Acts of 1973, c. 1078, § 2. Although the new law took effect on July 1, 1974, id. § 7, the terms of collective bargaining agreements in effect prior to that date remain in effect until the expiration of such agreements. Id. § 5. In addition to inserting chapter 150E in the General Laws, chapter 1078 repealed G.L. c. 149, §§ 178D, F, N, and amended G.L. c. 23, § 9R; c. 7, § 28; c. 180, §§ 17A, G.

10 G.L. c. 150E, § 1 provides:

Employees shall be designated as managerial employees only if they: (a) participate in formulating or determining policy, or (b) are reasonably required, on behalf of a public employer, to assist directly in the preparation for or conduct of collective bargaining, or (c) have a substantial responsibility, involving the exercise of independent judgment of an appellate responsibility not initially in effect, in the administration of a collective bargaining agreement or in personnel administration.

11 Employees “shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from” the coverage of chapter 150E. G.L. c. 150E, § 1.
or national guard and employees of the Labor Relations Commission. All employees covered by the new statute have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively on questions of wages, hours and other terms and conditions of employment. Covered employees are also given the right to engage in, or to refrain from engaging in, lawful concerted activities free from interference, restraint, or coercion.

Recognition of representatives. The Labor Relations Commission, as under the prior law, has the responsibility for determining the composition of employee units appropriate for collective bargaining, for conducting secret ballot elections to determine whether or not an employee organization represents a majority of the employees in an appropriate unit, and for certifying employee organizations as the exclusive representatives of all employees. The Commission is empowered to prescribe rules and regulations and to establish procedures for the determination of appropriate bargaining units, giving due regard to community of interest, efficiency of operations, and protection of the rights of employees to effective representation. However, professional employees cannot be put into a unit of non-professional employees unless a majority of the professional employees vote for inclusion. In addition, no employee excluded from the coverage of chapter 150E may be included in a unit of employees subject to its protection.

Prohibited practices. Under the new law, public employers are prohibited from engaging in six specific practices: (1) interfering with, restraining, or coercing any employee in the exercise of any right guaranteed by chapter 150E; (2) dominating, interfering, or assisting in the formation, existence, or administration of any employee organization; (3) treating any employee or prospective employee so as to encourage or discourage membership in any employee organization; (4) adversely treating any employee because that employee filed a prohibited practice charge, gave testimony in a proceeding under chapter 150E, or belongs to or is represented by an employee organization; (5) refusing to bargain in good faith with the exclusive rep-
resentative of the employees; and (6) refusing to participate in good faith in the mediation, fact-finding, or arbitration procedures set forth in chapter 150E.\(^{19}\)

On the other hand, employee organizations and their agents are now prohibited from: (1) interfering with, restraining, or coercing any employer or employee in the exercise of any right guaranteed under chapter 150E; (2) refusing to bargain collectively in good faith with a public employer; or (3) refusing to participate in good faith in the mediation, fact-finding, or arbitration procedures set forth in chapter 150E.\(^{20}\)

The Labor Relations Commission is empowered to investigate complaints of prohibited practices, to hold formal hearings, and, if the charge is substantiated, to order the charged party to cease and desist from the prohibited practice, and to take necessary affirmative action to rectify the violation. In the case of a refusal to bargain in good faith involving a dispute as to the appropriateness of the bargaining unit, the Commission may issue an interim order requiring the parties to bargain pending a resolution of the dispute.\(^{21}\)

**Negotiation procedure.** The duty of both the public employer and the exclusive representative to bargain collectively in good faith requires the parties to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, standards of productivity and performance, and any other terms and conditions of employment.\(^{22}\) However, section 6 of chapter 150E clearly states that the duty of good faith bargaining does not compel either party to agree to a proposal or to make a concession.\(^{23}\)

Bargaining agreements reached by the public employer and the exclusive employee representative may not exceed a term of three years and must be reduced to writing, executed by the parties, and filed.\(^{24}\) The public employer is required to submit to the appropriate legislative body, within 30 days after the execution of the collective bargaining agreement, a request for an appropriation necessary to fund the

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\(^{19}\) Id. § 10(a).

\(^{20}\) Id. § 10(b), as amended by Acts of 1974, c. 589, § 2.

\(^{21}\) Id. § 11.

\(^{22}\) Id. § 6. The requirement of negotiations regarding standards of productivity and performance is a new concept in collective bargaining statutes. While the scope of this phrase is far from clear, it appears that it was intended to clearly require school committees to bargain in areas such as pupil-teacher ratios and class size, which many school committees considered to be non-negotiable management prerogatives.

It is interesting to observe that while standards of productivity and performance are made a mandatory subject of bargaining in section 6 of chapter 150E, that phrase is absent in section 2, in which the bargaining rights of the employee organization are enumerated. There would seem to be no reason other than inadvertence for this omission.

\(^{23}\) G.L. c. 150E, § 6.

\(^{24}\) Id. § 7.
negotiated cost items. If the legislative body rejects the request for the appropriation, the parties are required to resume negotiations on such cost items.\textsuperscript{25}

Section 7 of chapter 150E provides that a public employee collective bargaining agreement prevails over any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to General Laws, chapter 41, section 97A; the regulations of a fire chief or a fire department pursuant to General Laws, chapter 48, and certain specifically enumerated statutory provisions.\textsuperscript{26}

Under the 1965 statute the terms of a public employee collective bargaining agreement were subordinate to municipal ordinances, by-laws, rules, regulations, and statutes.\textsuperscript{27} The status given collective bargaining agreements in the new law should result in more meaningful negotiations from the point of view of the employee organization. However, it should be noted that since collective bargaining is a two-edged sword, the public employees covered by a collective bargaining agreement could have certain benefits previously guaranteed by statute, by-law, or ordinance negotiated away by the employee organization.

\textit{Impasse procedure.} The predecessor collective bargaining statute provided for mediation and fact-finding under the aegis of the Massachusetts Board of Conciliation and Arbitration as an aid in resolving bargaining impasses.\textsuperscript{28} Chapter 150E, section 9 generally continues this procedure by providing that after a reasonable period of negotiations, either party alone, or the parties jointly, may petition the Board for a determination of the existence of an impasse. Upon receipt of such a petition, the Board is required to forthwith commence an investigation and determine within a period of 10 days if the parties have negotiated for a reasonable period of time and if an impasse exists. If so, the Board must appoint a mediator within five days unless the parties jointly agree on an individual to mediate the dispute. If the impasse is not resolved within 20 days after the appointment of the mediator, either party or the parties jointly may petition the Board to initiate fact-finding. The fact-finder has the power to mediate the dispute and to make non-binding recommendations for the resolution of the impasse in the form of a written report. If an impasse continues ten days after the issuance of the report, the report is made public and the dispute is returned to the parties for further bargaining. The parties may elect to have the impasse submitted to a third party for a final and binding resolution of the dispute provided both parties and the appropriate legislative body so agree.\textsuperscript{29}

\textsuperscript{25} Id. This requirement is not applicable to agreements reached by school committees in cities and towns to which the provisions of G.L. c. 71, § 34 are operative since such school committees, in effect, have fiscal autonomy. Id.
\textsuperscript{26} Id.
\textsuperscript{27} Acts of 1965, c. 763.
\textsuperscript{28} Id.
\textsuperscript{29} G.L. c. 150E, § 9.
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A special impasse procedure is provided in the new law for firefighters and police officers. If an impasse persists 30 days after the publication of the report of the fact-finder and any previously filed prohibited practice charges have been procedurally exhausted, the Mediation and Conciliation Board must immediately notify both sides that the matter will be resolved by a three-member arbitration panel composed of a member chosen by each side and a third member chosen by the two already selected; the Board has the power to appoint the third member if the initial two cannot agree on who the third is to be. This panel, which is given broad investigatory powers, holds hearings on the issues in dispute; at the conclusion of the hearings, each party submits a written statement containing its "last and best offer." Within 10 days, the majority of the panel selects one of the two offers as the settlement, and this settlement is binding on the parties and the appropriate legislative body. If necessary, the finding of the panel can be enforced in the superior court, provided it is supported by "material and substantial evidence on the whole record.

Strikes. Under the 1965 statute, it was unlawful for any employee "to engage in, induce, or encourage any strike, work stoppage, slowdown, or withholding of services." The new law, in section 9A(a) of chapter 150E, provides that "[n]o public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage, or condone any strike, work stoppage, slowdown or withholding of service by such public employees." In view of the fact that the definition of "strike" in the new law is limited to the concerted refusal to perform the duties of employment as established under an existing or recently expired collective bargaining agreement or, in the absence of such agreements, the refusal to perform duties required under written personnel policies in effect at least one year prior to the alleged strike, it could be argued that chapter 150E legalizes certain kinds of strikes.

32 Id. In police matters, the scope of the arbitration cannot cover the right to appoint, promote, assign, or transfer employees. Id.
33 The new law sets forth ten general factors to which the panel should, along with other factors, give weight in arriving at its decision. Id.
34 Id.
35 Acts of 1965, c. 763.
36 G.L. c. 150E, § 9A(a).
37 G.L. c. 150E, § 1 defines a "strike" as: a public employee's refusal, in concerted action with others, to report for duty, or his willful absence from his position, or his stoppage of work, or his abstinence in whole or in part from the performance of the duties of employment as established by an existing collective bargaining agreement or in a collective bargaining agreement expiring immediately preceding the alleged strike, or in the absence of any such agreement, by written personnel policies in effect at least one year prior to the alleged strike . . . .
However, such an interpretation is not necessarily mandated since section 9A forbids not only a "strike," as defined in section 1, but also a "work stoppage, slowdown, or withholding of services by such public employees." Since the term "strike" is expressly defined, it would seem that a work stoppage, slowdown, or withholding of services is separate and distinct from a strike as that term is used in chapter 150E, and would thus be violative of section 9A even if the withholding of services related to the performance of duties not established in an existing or expired collective bargaining agreement or by written personnel policies.

Employees who engage in a strike are subject to discipline and discharge proceedings by the public employer. Also, the new law provides that no compensation shall be paid to a public employee who strikes, nor shall that employee be eligible to such compensation at a later date in the event the employee is required to work additional days to fulfill the provisions of a collective bargaining agreement.

Section 9A(b) of chapter 150E provides that the public employer must petition the Labor Relations Commission whenever a strike occurs or is about to occur. The Commission is required to investigate and determine if section 9A(a) has been or is about to be violated. If an actual or potential violation is found, the Commission is required to "immediately set requirements that must be complied with, including, but not limited to, instituting appropriate proceedings in the superior court . . . ."

While it is clear that the public employer must petition the Labor Relations Commission in the case of a strike, it is not clear whether this procedure is exclusive, or whether the public employer would be allowed to avail itself of traditional procedures for stopping illegal public employee strikes.

Agency fee. Section 12 of chapter 150E authorizes the inclusion of a provision in a public employee collective bargaining agreement requiring unit employees to pay an agency service fee to the exclusive representative as a condition of employment. This payment could be required of all employees during the life of the bargaining agreement on the later of the thirtieth day following the beginning of such employment or the effective date of the bargaining agreement. The amount of this fee must be proportionately commensurate with the cost of collective bargaining and control administration.

Pursuant to General Laws, chapter 180, section 17G, the deduction of union dues or the agency service fee by the public employer is permitted, provided such deduction is authorized by the employee.

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28 G.L. c. 150E, § 9A(a).
29 Id. § 15.
30 Id.
41 G.L. c. 150E, § 9A(b).
43 G.L. c. 150E, § 12.
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Any such authorization may be withdrawn by the employee by giving at least 60 days' notice in writing to the public employer and by filing a copy of that notice with the treasurer of the employee organization.44

Registration and financial reports. The new law requires all employee organizations to file registration statements setting forth the names and addresses of all officers, the aims and objectives of the organization, the scale of dues, initiation fees, fines and assessments to be charged to members, and the annual salaries paid to the officers.45 The employee organization must also prepare a detailed financial report in the form of a balance sheet for each fiscal year and file a copy of that report with the Labor Relations Commission.46

Resolution of grievances. Section 8 of chapter 150E mandates the final and binding arbitration of unresolved grievances involving the interpretation or application of a collective bargaining agreement. The parties may elect to include in their bargaining agreement a written grievance procedure culminating in final and binding arbitration. In the absence of such a procedure, binding arbitration may be ordered by the Labor Relations Commission at the request of either party.

Where arbitration is elected by an employee as the method of grievance resolution, the decision rendered in the arbitration in cases involving suspension, dismissal, removal or termination is exclusive, notwithstanding civil service job protection, retirement system appeal procedures and tenure procedures set forth in chapters 31, 32, or 71 of the General Laws.47

§2.13. Minimum wage rate. The minimum wage rate in the Commonwealth was increased to $2.00 per hour.1 Effective January 1, 1975, the minimum wage will be increased to $2.10 per hour.2

E. MASSACHUSETTS DECISIONS

§2.14. Agency fee. In Karchmar v. Worcester,1 the Supreme Judicial Court held that employees protected by civil service status who were represented by an exclusive bargaining agent could legally be required to pay an agency service fee to that bargaining agent.2

The employees in question worked for the city of Worcester and were covered by a collective bargaining agreement containing a provi-

44 G.L. c. 180, § 17G.
45 G.L. c. 150E, § 14.
46 Id.
47 Id. § 8.

2 Id.

2 Id. at 1235, 301 N.E.2d at 578.
sion requiring the payment of an agency service fee as a condition of employment.\(^3\) Notwithstanding this fact, the city contended that the legislature did not intend to make civil service employees subject to discharge for nonpayment of an agency fee and, in the alternative, that the governing statutes were unconstitutional if so construed.\(^4\) Justice Quirico, speaking for a unanimous court, rejected both of the city's arguments. After an extensive review of the history of Massachusetts statutes relative to the payment of an agency fee, he concluded that "by enacting the detailed provisions of G.L. c. 31, relating to civil service employees, the Legislature did not thereby exhaust its entire power with reference to such employees."\(^5\) Justice Quirico then found that the agency fee statutes were intended to apply to all municipal employees, including those protected by the civil service statutes.\(^6\)

In *Massachusetts Nurses Association v. Lynn Hospital*,\(^7\) the Supreme Judicial Court held that the issue of a proposed agency service fee is a mandatory subject of bargaining under Massachusetts law and that Lynn Hospital thus had a legal duty to negotiate about it with the exclusive bargaining representative of its nurses.\(^8\) The Court then ruled that the question of an agency service fee was properly submitted to mandatory arbitration after the negotiations failed to produce an agreement.\(^9\) Accordingly, the Court confirmed the arbitrator's award requiring that the parties' new collective bargaining agreement contain a provision which, if accepted by a vote of the members of the bargaining unit, would require all subsequently hired nurses who did not join the union to pay an agency service fee to the union.\(^10\)

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3 This provision was properly negotiated under the then applicable statutes. G.L. c. 180, § 17G, as amended by Acts of 1970, c. 463, permitted deductions from the salaries of county or municipal employees for the payment of agency service fees to the employee organization duly recognized by the employer. The Worcester City Council had accepted the provisions of that statute. 1973 Mass. Adv. Sh. at 1227, 301 N.E.2d at 573-74.


6 Id. at 1230-32, 301 N.E.2d at 575-76. G.L. c. 180, § 17G was amended by Acts of 1973, c. 1078, § 3, and, *inter alia*, was extended to include state employees. It does not appear that the 1973 revisions in any way vitiated the *Karchmar* decision.


8 Id. at 35, 306 N.E.2d at 269. The applicable Massachusetts statute is G.L. c. 150A, §§ 4(3), 4(5), 5(a). Id.

9 Id. G.L. c. 150A, § 9A provides that if there is a grievance or dispute between a health care facility and the collective bargaining agent for the nurse employees that has not been settled by collective bargaining, the grievance or dispute must be submitted to final and binding arbitration under the provisions of that statute unless the parties' bargaining agreement provides for a resolution of the dispute by arbitration.

10 1974 Mass. Adv. Sh. at 35, 306 N.E.2d at 269. Subsequently hired nurses who did not join the union would pay $2.10 a month for their "pro rata share of the actual cost . . . of conducting collective bargaining," compared to regular monthly union dues of approximately $4.77. Id. at 29-30, 306 N.E.2d at 266.
§2.15. Enjoining of labor disputes. The Supreme Judicial Court in the companion cases of Jones v. Demoulas Super Markets, Inc. and Jones v. DSM Realty, Inc.1 rendered what are likely to become the leading Massachusetts decisions on the enjoining of labor disputes.

Demoulas Super Markets, Inc. (the Company) and certain other entities which owned the shopping centers in which the Company's supermarkets were located instituted these actions to enjoin the United Farm Workers (UFW) from picketing and handbilling the supermarkets.2 The alleged object of the union's activity was to induce customers to stop patronizing these stores because they sold lettuce and grapes produced by firms employing agricultural workers not represented by the UFW.3 In each case, a judge of the superior court, without hearing or testimony and without making any findings of fact, entered an interlocutory decree enjoining the complained of activity. Subsequently, the Appeals Court certified the cases for direct review by the Supreme Judicial Court and maintained the injunction pending the high court's review.4

The applicable injunction statute5 provides in part that no court shall have jurisdiction to issue an injunction in any case involving or growing out of a "labor dispute" as defined in section 20C of chapter 149 of the General Laws unless certain procedural safeguards are afforded,7 including the convening of a three-judge panel to hear the

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2 The second bill of complaint was filed by DSM Realty, Inc., and an individual, Demoulas, as trustee of certain realty trusts, owners of the shopping centers in which ten of the supermarkets were located. 1974 Mass. Adv. Sh. at 278, 308 N.E.2d at 514.
3 Id. at 278-79, 308 N.E.2d at 514.
4 Id. at 280-81, 308 N.E.2d at 515.
5 At the time the Demoulas case arose, the applicable injunction statute was G.L. c. 214, § 9A(1). Chapter 214 was recently amended by Acts of 1973, c. 1114, § 62. The substance of G.L. c. 214, § 9A(1) is now set forth in the newly enacted G.L. c. 214, § 6, which took effect on July 1, 1974.
6 G.L. c. 149, § 20C provides in relevant part:
   (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; ... or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined). ... 
   (c) The term "labor dispute", when used in the sections hereinbefore referred to, includes any controversy arising out of any demand of any character whatsoever concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange, terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee. [Emphasis added.]
7 If Acts of 1973, c. 1114, § 6 were applicable to the facts presented in Demoulas, an injunction could be granted only after testimony in open court in support of a verified petition, with opportunity for cross-examination, and only on findings of fact by the court that unlawful acts are threatened or have been committed and will be committed, or continued, unless restrained; that substantial and irreparable injury to plaintiff's
case. In view of the fact that none of the procedural safeguards were complied with, the critical inquiry was whether the UFW activity that was enjoined by the lower court involved or grew out of a labor dispute within the meaning of section 20C.

The Court, with Justice Braucher concurring and Chief Justice Tauro dissenting, concluded that the enjoined activity of the UFW did "involve" or "grow out of a labor dispute." Accordingly, the Court annulled the preliminary injunction. In so holding, Justice Kaplan, speaking for the majority, initially noted that the UFW was not in an employer-employee relation with the plaintiffs because the controversy arose out of demands made by the UFW upon the growers and producers of certain products sold by Demoulas Super Markets, Inc. Thus, the Court concluded that the UFW was engaged in a secondary boycott. Notwithstanding this fact, the Court held that the activity of the UFW could be classified as a "labor dispute" since it involved a controversy covered by chapter 149, section 20C(c) and because the "regardless" clause of that subsection does not require the existence of an employer-employee relationship. The Court then found that the activity of the UFW "involved" or "grew out of a labor dispute" since Demoulas was "engaged in the same industry" as the UFW and that it involved "conflicting or competing interests" in a labor dispute of "persons participating or interested therein." The Court also noted that the Massachusetts law relating to the enjoining of labor disputes was very similar to the Norris-LaGuardia Act, and that that Act was designed to preclude injunctions in fact situations similar to those in Demoulas unless the required procedural safeguards were afforded.

property will follow, that greater injury will be inflicted on the plaintiff by denying relief than will be inflicted on the defendant by granting it; that the police are unwilling or unable to furnish adequate protection; and that the plaintiff has no adequate remedy at law. Acts of 1973, c. 1114, § 62.

8 G.L. c. 212, § 30.
10 Id. at 283, 308 N.E.2d at 517.
11 Id.
12 Id. at 282-84, 308 N.E.2d at 516-17.
13 See 1974 Mass. Adv. Sh. at 284-86, 308 N.E.2d at 517-18. G.L. c. 149, § 20C(b) defines a "person" to be:

Participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.