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## Mandatory Public Safety Employee Collective Bargaining Bill (PSEECA)

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# Mandatory Public Safety Employee Collective Bargaining Bill (PSEECA)

## I. Introduction

The U.S. House of Representatives recently has passed the Public Safety Employer-Employee Cooperation Act (PSEECA). PSEECA, if enacted, would require that states grant collective bargaining rights to all state and local “public safety officers,” regardless of whether a state or its voters (as opposed to the union-backed federal legislators) deem it appropriate. Thus, the PSEECA will have a significant financial and administrative impact on state and local governments all over the country. According to Capitol Hill insiders, the bill has bipartisan support in the Senate and may pass by summer’s end. However, the constitutionality of the PSEECA is in doubt. Opponents of the bill consider it an unprecedented usurping of a state’s right to determine how it will conduct its employee relations.

Under the PSEECA public safety officers include all law enforcement officers, firefighters and emergency medical services personnel (“First Responders”). Should a state fail to adopt or maintain legislation that grants collective bargaining rights to First Responders, the state would be subject to the rules and regulations established by the *Federal* Labor Relations Authority (FLRA).<sup>1</sup>

All 50 states would be affected by the passage of PSEECA. For those states that currently do not grant collective bargaining rights to their First Responders, PSEECA would represent a dramatic change. The impact likely will be felt just as dramatically at the local level (e.g., counties, cities, towns and villages), where collective bargaining and contract administration will increase significantly the cost of providing essential services. Other states might need to amend existing laws and procedures to comply with PSEECA. Finally, even states that currently engage in collective bargaining with their First Responders will need to demonstrate that they “substantially comply” with the mandates of PSEECA.

### A. Legislative History

PSEECA has been introduced in each Congress since 1995, but, thus far, has failed to pass the Senate. It came close to being passed in 2007 when it was in a strong position to be approved by the Senate after passing in the House. However, due to a threatened veto from President George W. Bush and the illness of PSEECA’s primary sponsor (the late Senator Edward Kennedy), the bill stalled. In 2009, the legislation was proposed again in the House and Senate. On May 24, 2010, Senate Majority Leader Harry Reid (D-NV) proposed an amendment to a supplemental appropriations bill for defense funding that included the full text of PSEECA. Due to a timing issue, however, Senator Reid withdrew the amendment before the appropriations bill ultimately passed. The 2009 version of the bill, however, remained pending before both houses of Congress.

The House of Representatives passed PSEECA by a vote of 239 to 182 on July 1, 2010, and the Senate is expected to take up the bill in the coming weeks. Harold Schaitberger, general president of the International Association of Fire Fighters, stated, “For the first time in eight years, we have a president who

<sup>1</sup> The FLRA is the federal administrative agency that ensures certain non-postal federal employees have the right to organize, bargain collectively, and to participate through labor organizations of their choice in decisions affecting their working lives.

has indicated he is going to sign [PSEECA]. We have the leadership in both houses who have committed to put it on the floor. And we have the votes to pass it.”

## **B. Constitutional Concerns**

Commentators have questioned whether the federal government has the constitutional authority to mandate how state governments conduct personnel relations with their employees. Proponents of the bill argue that the “health,” “well-being,” and “morale” of public safety employees “can affect interstate and intrastate commerce.”<sup>2</sup> They argue that PSEECA would affect interstate commerce by improving the effectiveness of public safety employers and employees and minimizing costs associated with the regional and national economic impact of terrorism and natural disasters.<sup>3</sup>

Detractors of the bill argue that PSEECA represents an unconstitutional seizure of state and local regulatory processes in violation of the Tenth Amendment of the U.S. Constitution, which reserves to the states powers not delegated to the federal government. In essence, PSEECA presents states with an apparent Hobson’s choice: pass legislation that forces them to bargain with public safety officers and their unions or be subjected to federal rules and regulations enforced by a federal agency.

## **II. Details of the Statute**

PSEECA would mandate that every state either recognize the right of First Responders to bargain collectively, up to the level set forth in the statute, or be subjected to the authority, rules and procedures of the FLRA – despite the fact that the First Responders are state and local employees.

### **A. Rights Provided**

PSEECA sets a “floor” for collective bargaining rights and requires that each state grant rights and assume responsibilities equal to or greater than the following:

1. Granting every public safety officer the right to form and join a labor organization that seeks to be or is recognized as their exclusive bargaining representative;
2. Requiring public safety employers (state and local governments) to recognize a labor organization once it is selected by a majority of employees;
3. Committing to bargaining over hours, wages, and terms and conditions of employment,<sup>4</sup> and to reduce any resulting agreement to writing;
4. Providing an “interest impasse resolution mechanism such as fact finding, mediation, arbitration, or comparable procedures;” and
5. Requiring the enforcement of all rights, responsibilities and protections enumerated in PSEECA and provided by a relevant state law through a state administrative agency, if the state so chooses, and the state courts.

<sup>2</sup> See Section 2(5) of the PSEECA.

<sup>3</sup> H.Rept. 110-232, at 18-19 (2007).

<sup>4</sup> As of now, PSEECA does not require bargaining over pension, retirement, or health benefits.

Notably, PSEECA provides the enumerated rights to First Responder *employees*, and, consistent with traditional labor law, it excludes “supervisors” from coverage. The bill, however, contains a more restrictive definition of “supervisor” than found in conventional labor law (under the National Labor Relations Act), and, to an extent, a more restrictive definition than found in the union-sponsored bill, Re-Empowerment of Skilled and Professional Employees and Construction Trades Workers (RESPECT) Act.

Specifically, PSEECA defines the term “supervisory employee” as follows:

The term “supervisory employee” has the meaning given such term under applicable State law in effect on the date of enactment of this Act. If no such State law is in effect, the term means an individual, employed by a public safety employer, who—

(A) has the authority in the interest of the employer to hire, direct, assign, promote, reward, transfer, furlough, lay off, recall, suspend, discipline, or remove public safety officers, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority not merely routine or clerical in nature but requires the consistent exercise of independent judgment; and

(B) devotes a majority of time at work to exercising such authority.

Therefore, to be excluded from coverage, First Responder “supervisors” must actually devote a *majority* of their work time *performing* statutorily defined supervisory tasks. This standard is unrealistic and inefficient as most supervisors simply do not and cannot spend a majority of their time engaged in directing employees as outlined in the bill. The PSEECA essentially eliminates the “working supervisor” and thus the public employer’s ability to manage employees will be strained.

At least among First Responders in the public sector, PSEECA may accomplish organized labor’s long-awaited goal to toughen the standard for supervisory status to maximize the number of potential union members and to minimize managerial oversight.

## **B. FLRA Determinations**

Under PSEECA, the initial role of the FLRA will be to make state-by-state compliance “determinations.” Within 180 days of the bill’s enactment, the federal agency will make a “determination” as to whether each state “substantially provides” the required rights. If the FLRA determines a state does not substantially comply, the state will be subject to federal jurisdiction, rules and procedures.<sup>5</sup> Following the initial determination, a party may seek a subsequent determination upon establishing that there has been a material change in state law. Any party aggrieved by a decision of the FLRA has 60 days from a determination to petition any U.S. Court of Appeals in the circuit in which the person resides or in the District of Columbia circuit for judicial review.

## **C. Failure to Meet PSEECA’s Requirements**

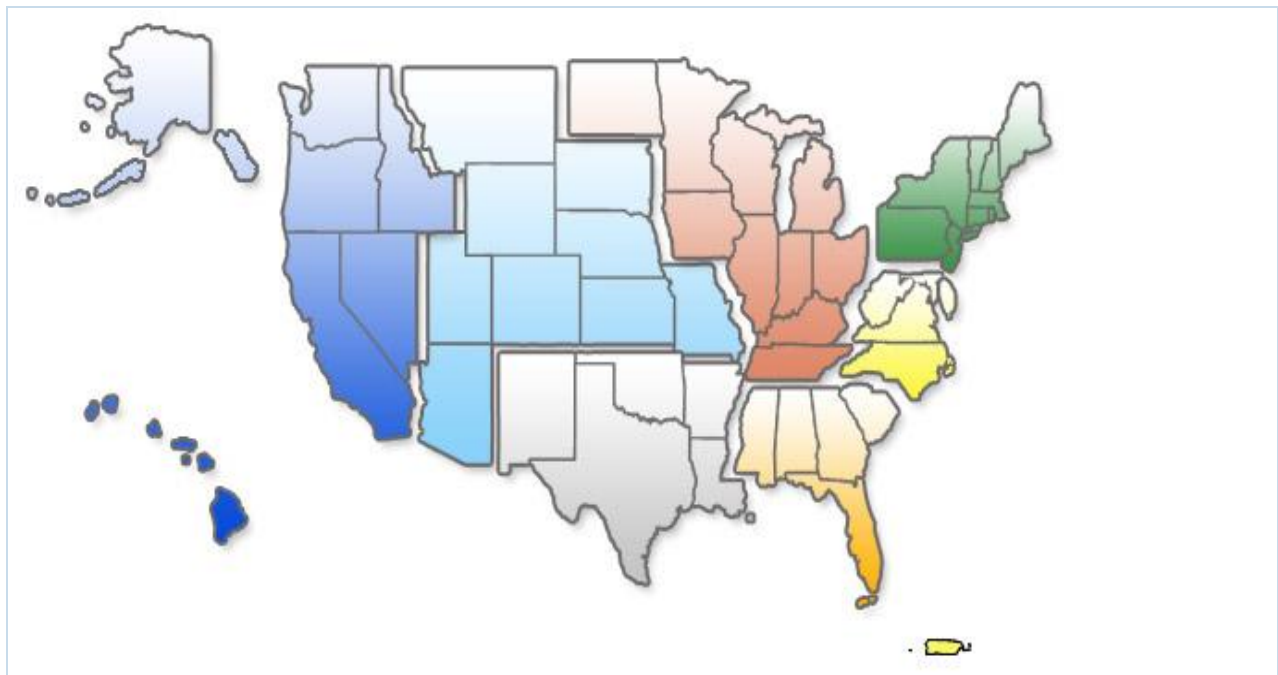
If the FLRA makes a determination that a State does not “substantially provide” the required rights and responsibilities and the state does not cure its non-compliance in a subsequent determination, *the state will be subject to the authority of the FLRA*. The FLRA will be vested with the following powers:

<sup>5</sup> A state does not “substantially comply” if it does not pass PSEECA-compliant legislation within two years of the bill’s passage or by the end of the first regular session of the state’s legislature that begins following PSEECA’s passage (whichever date is later).

1. Determining the appropriateness of bargaining units for labor organization representation;
2. Supervising and conduct elections to determine whether a labor organization has been selected by a voting majority of employees in an appropriate unit;
3. Resolving issues relating to the duty to bargain in good faith;
4. Conducting hearings and resolve complaints of unfair labor practices;
5. Resolving exceptions to the awards of arbitrators;
6. Protecting the right of each employee to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal; and
7. Taking other actions as are “necessary and appropriate to effectively administer” PSEECA.

In addition, the FLRA will issue regulations, not later than one year after the passage of PSEECA, establishing collective bargaining procedures for employers and public safety officers in states which it has determined do not substantially provide for the rights and responsibilities enumerated in the law.

Unlike the ubiquitous NLRB, the FLRA’s Office of the General Counsel, which would be responsible for handling many PSEECA tasks for the FLRA, is currently divided into just seven regional offices covering the regions indicated in the map below. The FLRA maintains offices in Atlanta, Boston, Chicago, Dallas, Denver, San Francisco, and Washington DC.



#### **D. Strikes and Lockouts Prohibited**

With regard to strikes and lockouts, PSEECA states the following:

[without preempting any State law with respect to strikes by public safety officers], an employer, public safety officer, or labor organization may not engage in a lockout, sickout, work slowdown, strike, or any other organized job action that will measurably disrupt the delivery of emergency services and is designed to compel an employer, public safety officer, or labor organization to agree to the terms of a proposed contract.

This provision is notable because, unlike the provisions which set forth the specific First Responder collective bargaining rights to be guaranteed, this section if interpreted literally would apply to **all** states, regardless of whether they maintain laws which substantially comply with PSEECA.

Significantly, the bill specifically describes the *type* of strike prohibited: those that would “measurably disrupt” operations *and* are “designed to compel” agreement to contract terms. Arguably, strikes called to protest alleged unfair labor practices (unrelated to contract negotiations) will not be prohibited.

#### **E. Interest Impasse Resolution Mechanisms**

The PSEECA would require states provide an “interest impasse resolution mechanism,” such as fact finding, mediation, arbitration, or “comparable procedures.” With little guidance as to acceptable forms of conciliation, we can only speculate as to the meaning of this mandate (at least until the FLRA issues its regulations). While the bill specifically references traditionally non-binding processes, such as fact finding and mediation, it also references the binding arbitration process.

Some jurisdictions allow (or require) parties to present their contract claims to an arbitrator and empower the arbitrator to determine the terms of the collective bargaining agreement, and thus to impose those terms on the parties. This is called *interest arbitration* and is one of the major components of the stalled card-check legislation, the Employee Free Choice Act (EFCA). Often cited as a prime cause of runaway costs associated with public sector contracts, interest arbitration takes control of labor costs *away* from the public employer. Other non-binding means of resolution – fact finding or mediation, for example – would still allow the employer to make the ultimate decision; however, PSEECA is ambiguous in this regard. This would appear to be another instance of having to “pass the bill to find out what’s in it.”

#### **F. Enforcement Actions**

Similar to the NLRB’s authority under section 10(j) of the National Labor Relations Act, under the PSEECA, the FLRA would have the authority to petition any United States Court of Appeals with jurisdiction over the parties, or the United States Court of Appeals for the District of Columbia, to enforce any final orders under PSEECA, and for appropriate temporary relief or a restraining order. Further, unless the FLRA has filed a petition for enforcement, any party may file suit in an appropriate district court of the United States to enforce compliance with the regulations or to enforce an order issued by the FLRA.

#### **G. Effect on State Laws**

With the possible exception of the “No Strike” provision, it appears that the PSEECA will not affect the law of any state which provides greater or comparable rights and responsibilities than those guaranteed by PSEECA. However, Jackson Lewis research shows that *at least* 25 states would need to dramatically modify their laws because they either do not allow any form of First Responder collective bargaining, or the rights

now granted clearly do not meet the mandates of PSEECA.<sup>6</sup> These states would be required to draft or amend laws compliant with PSEECA within 180 days of its enactment or will be subject to the authority of the FLRA.

### III. What *State* Governments Should Do Now

We recommend that all state governments immediately communicate concerns regarding PSEECA to their Senators and House representatives. Further, we recommend that state governments rapidly and aggressively mobilize their legal and lobbying resources to safeguard their rights being threatened by this bill and consider whether to mount legal challenges.

As a preventive measure states that currently do not have laws that grant First Responders collective bargaining rights should be prepared to draft legislation. The legislation should be considered carefully to ensure that it maximizes rights retained under PSEECA. The failure to pass sound legislation will put the state at the mercy the FLRA.

States with laws that grant First Responders collective bargaining rights should promptly review their laws to ensure compliance with PSEECA.<sup>7</sup> If the legislation does not comply with PSEECA, then that state should be prepared to quickly draft, propose, and enact an amended version of its law that is PSEECA compliant. States should also be prepared to advocate their interests in what will be a fast-track federal rule-making process, to ensure that their voices are heard and their rights protected.

Finally, states should be prepared to create a substantive and detailed position paper to convince the FLRA that their legislation complies with PSEECA.

### IV. What *Local* Governments Should Do Now

Unfortunately, the impact of PSEECA may be greatest at the local level, where bargaining, potential interest arbitration, and union representation is likely to increase the cost of providing essential emergency services, straining already stressed local budgets.<sup>8</sup> An ancillary concern for local governments, and perhaps not an unintended consequence of PSEECA, would be the increasing demand by *other* public sector employees for collective bargaining rights, no matter what the state's current experience has been with public sector unions. The Service Employees International Union (SEIU) is actively supporting this legislation even though

<sup>6</sup> As of now, our research indicates the following states either do **not** have laws in place which guarantee collective bargaining rights to all First Responders, or have statutes that explicitly prohibit such rights: Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Moreover, while Florida recognizes collective bargaining rights for all public employees, its statute does not provide recourse through the courts, making it clearly non-compliant with PSEECA. Finally, while Rhode Island recognizes collective bargaining rights for state and local police and firefighters, as well as state employees, it is unclear whether all First Responders (e.g., municipal emergency medical services personnel) are afforded such rights.

<sup>7</sup> The mere existence a law granting First Responders collective bargaining rights does *not*, per se, mean that such law is PSEECA compliant. Since the FLRA will make its initial determinations within 180 days of PSEECA's passage, states should immediately determine whether their current laws granting First Responders with collective bargaining rights are PSEECA compliant. However, once the FLRA issues its interpretive regulations (which it is required to do within one year of PSEECA's passage), states should reevaluate their laws, to ensure continued compliance. For assistance in determining whether a particular statute is PSEECA compliant, please contact Jeffrey Corradino at (973) 538-6890, or Tom Walsh at (914) 514-6129.

<sup>8</sup> The bill contains an exemption for political subdivisions with a population of fewer than 5,000 or those that employ fewer than 25 full-time employees.

they are not likely to represent police or firefighters. The SEIU views public employees as a rich source of new members and political clout.

## V. Constitutionality Explored

Significant questions as to whether PSEECA is a constitutionally permissible exercise of federal authority make the bill ripe for challenge. Some legal experts have opined that PSEECA goes well beyond the federal government’s limited ability to control traditional state functions. Even the National Labor Relations Act, the federal statute governing labor relations in the private sector, specifically excludes state and local governments from its coverage and recognizes the decades-old concept that federal labor relations laws should not be imposed upon state and local governments.

Although supporters of PSEECA rely on the U.S. Constitution's Commerce Clause for the authority to enact the measure, the Congressional Research Service (CRS) – Congress’ own research organization, stated that it “may not be entirely certain” that the Commerce Clause supports enactment.<sup>9</sup> Despite this admission, however, the CRS concluded, that PSEECA does not present significant constitutional concerns.

It also appears that CRS has no issue with the federal government commandeering the state and local regulatory processes in violation of the Tenth Amendment, which reserves to the states powers not delegated to the federal government. CRS stated: “[T]he PSEECA would not seem to direct states to legislate collective bargaining for public safety officers. Instead, states would be given the option of either enacting legislation that satisfies the federal standards or becoming subject to the [Federal Labor Relations Authority's] regulations. ... [A] federal collective bargaining scheme for public safety officers would be implemented by the FLRA only if a state chose not to enact a program of its own.”<sup>10</sup> Ultimately, the Hobson’s choice may not pass legal scrutiny by the United States Supreme Court despite CRS’s conclusion.

Opponents, however, claim that PSEECA would represent an unconstitutional attempt to exercise federal authority. In a recent letter to U.S. Senator John Cornyn (R-Texas), Texas Attorney General Greg Abbot identified multiple “constitutional defects” with the bill. Claiming that PSEECA violates both the Tenth and Eleventh Amendments, Attorney General Abbot wrote:

The federal government is attempting to intrude upon our state's authority to independently manage relations with our public employees ... . This law would force the State of Texas into federally mandated collective bargaining agreements with labor unions — despite the fact that state law does not authorize collective bargaining for state employees. If this constitutionally suspect legislation is passed, I will take legal action to protect our state from yet another case of federal overreach.

...

At the heart of our state's system is not only a labor-relations framework that was properly established by the Texas Legislature — rather than the federal government — but also an appropriate respect for local control. Under Texas' approach, local taxpayers decide based on local considerations whether to give labor unions control over their relationships with local public safety officials. If that relationship is going to be changed, it must be changed at the state level by the Texas Legislature and cannot be imposed by the federal government.

<sup>9</sup> The Congressional Research Service (CRS) works exclusively for the United States Congress, providing policy and legal analysis to committees and Members of both the House and Senate.

<sup>10</sup> CRS, *The Public Safety Employer-Employee Cooperation Act*, June 21, 2010, at p.5.

## VI. Proactive Approach to Labor Relations

Regardless of whether PSEECA is passed, state, county and local governments should develop positive human resource programs and review their strategies and approaches in light of the PSEECA. State and local governments should consider the changes that would result if PSEECA were enacted and take proactive steps now to maximize their chance of meeting the challenges posed by the bill and successfully resisting unionization efforts.

Proactive state and local governments should:

- Determine what it means for *your* government to be an “employer of choice” — today and tomorrow;
- Develop an up-to-date strategic, comprehensive, integrated labor relations plan;
- Create an effective labor relations *and* communications program for important “stakeholders” – (i.e., City or County Council members, politicians, citizens, etc.);
- Conduct a vulnerability assessment to address and eliminate legitimate workplace issues;
- Update employee handbooks and policies, including no solicitation/distribution rules;
- Consider a peer review system and other alternative dispute resolution mechanisms;
- Consider a specially trained legal/HR/management team to respond quickly and lawfully to union activity;
- Consider generating employee communications about union issues; and
- Consider working with an association to ensure lawmakers understand your concerns and issues with this bill.

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