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## Wyoming, Take Another Look at Unions: How Unions Can Increase Equality for Women in the Workplace

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COMMENT

**Wyoming, Take Another Look at Unions: How Unions Can Increase Equality for Women in the Workplace**

*Hallie Guidry\**

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I. INTRODUCTION

According to the National Women’s Law Center (NWLC), “the wage gap among union members is less than half the size of the wage gap among nonunion workers, and female union members typically earn over \$230 per week more than women who are not represented by unions.”<sup>1</sup> In 2017, the Wyoming State Legislature passed legislation approving a study on the wage gap in Wyoming.<sup>2</sup>

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\* J.D. candidate, University of Wyoming, Class of 2020. I would like to thank Professor Michael C. Duff for encouraging my interest in labor law and fostering the discussion which led to this Comment. I would also like to thank my friend Dr. Cedric Reverand for indulging my passion for law and graciously reading and editing this Comment. Finally, I would like to thank my husband, Jacob Guidry, for supporting me through law school and engaging in innumerable discussions about unionization.

<sup>1</sup> KATHERINE GALLAGHER ROBBINS & ANDREA JOHNSON, NATIONAL WOMEN’S LAW CENTER FACT SHEET: UNION MEMBERSHIP IS CRITICAL FOR EQUAL PAY (2016), <https://nwlc.org/wp-content/uploads/2015/02/Union-Membership-is-Critical-for-Equal-Pay.pdf>.

<sup>2</sup> H.B. 209 64th Leg., Gen. Sess. (Wyo. 2017); see also Nick Reynolds, *Wyoming Wage Gap Report ‘Sobering’*, JACKSON HOLE NEWS & GUIDE (Oct. 10, 2018), [https://www.jhnewsandguide.com/jackson\\_hole\\_daily/state\\_and\\_regional/wynews/article\\_2a25d6ac-8130-5a59-87af-6ab9345a43f7.html](https://www.jhnewsandguide.com/jackson_hole_daily/state_and_regional/wynews/article_2a25d6ac-8130-5a59-87af-6ab9345a43f7.html).

House Bill 209 was cosponsored by Representative Cathy Connolly and Representative Marti Halverson, both of whom argued the wage disparity was a result of different factors.<sup>3</sup> Representative Halverson asserted that the study would disprove the wage gap.<sup>4</sup> However, Representative Connolly attributed the wage gap to gender discrimination.<sup>5</sup>

As a result of House Bill 209, the Wyoming Department of Workforce Services released a report entitled “A Study of the Disparity in Wages and Benefits Between Men and Women in Wyoming.”<sup>6</sup> The report both confirmed the wage disparity between men and women and offered potential legislative solutions, including: (1) prohibiting employers from asking about past salary; (2) prohibiting retaliation against employees who discuss their salaries; (3) raising the minimum wage, which disproportionately affects women; (4) raising pay equity for public employees; (5) encouraging companies to address pay equity through leveraging government contracts; and (6) requiring employers to explain gender wage disparity to employees.<sup>7</sup> Yet, the report did not mention unionism as a tool for decreasing the wage disparity.<sup>8</sup>

Wyoming must make changes to increase the salaries, benefits, and rights of female employees.<sup>9</sup> Female-dominated industries in particular can especially benefit from unionization.<sup>10</sup> In 2017, the national statistics indicated that 33.5%

<sup>3</sup> See Reynolds, *supra* note 2.

<sup>4</sup> Matt Murphy, *Wyoming Lawmakers Want Study on Gender Wage Gap*, WYO. TRIB. EAGLE (Jan. 29, 2017), [https://www.wyomingnews.com/news/local\\_news/wyoming-lawmakers-want-study-on-gender-wage-gap/article\\_68ac46a6-e526-11e6-9be6-5f1083d75c1e.html](https://www.wyomingnews.com/news/local_news/wyoming-lawmakers-want-study-on-gender-wage-gap/article_68ac46a6-e526-11e6-9be6-5f1083d75c1e.html).

<sup>5</sup> See Reynolds, *supra* note 2.

<sup>6</sup> WYO. DEP’T OF WORKFORCE SERVS., A STUDY OF THE DISPARITY IN WAGES AND BENEFITS BETWEEN MEN AND WOMEN IN WYOMING: UPDATE 2018, H.B. 209, 64th Leg., Gen. Sess. (Wyo. 2017); [http://doe.state.wy.us/lmi/WYWageGap2018/Update\\_2018.pdf](http://doe.state.wy.us/lmi/WYWageGap2018/Update_2018.pdf).

<sup>7</sup> *Id.* at 4, 7. While the report offered legislative solutions, it also recognized past attempts of Wyoming legislators to enact the proffered solutions. *Id.* at 10. For example, Representative James Byrd sponsored a bill during the 2017 legislative session that would have raised the minimum wage from \$5.15 per hour, which is lower than the federal minimum wage, to \$9.15 per hour. Unfortunately, the bill died in the House—twenty votes to forty. *Id.* at 11; H.B. 140, 64th Leg., Gen. Sess. (Wyo. 2017). This Comment will be using both the term “employee” and the term “worker.” “Employee” will be used as a technical term which has various statutory definitions, while worker will be used as a generic term that is not meant to refer to a statutory definition. When important, this Comment will indicate which definition of employee is being used. Here, employee is used to correspond with the language in the Wyoming Department of Workforce Services’ report.

<sup>8</sup> WYO. DEP’T OF WORKFORCE SERVS., *supra* note 6, at 63, 70. The report tangentially mentioned unions as a variable which was not taken into account. *Id.*

<sup>9</sup> See generally *id.*

<sup>10</sup> As used in this Comment, “female-dominated industries” refers to those industries where women make up 70% or more of the industry population, as determined by the Bureau of Labor Statistics. See BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYED PERSONS BY DETAILED INDUSTRY, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY tbl. 18 (Jan. 18, 2019)

of employees in education, training, and library occupations were unionized, whereas only 12.4% of healthcare practitioners and technical occupations and only 6.9% of healthcare support occupation employees were members of a union.<sup>11</sup> This is in sharp contrast to Wyoming, where unions on average represent 5.5% of women and 9.2% of men.<sup>12</sup> The lack of unionism in Wyoming is due in part to public-sector employees not having the right to unionize.<sup>13</sup>

The primary tools for unionization in Wyoming are the National Labor Relations Act (NLRA) and a narrowly applicable state statutory scheme.<sup>14</sup> The NLRA grants protections to private-sector employees, which can benefit women and increase equity in wages and benefits.<sup>15</sup> Wyoming statutory law grants firefighters the right to collective bargaining and unionization, but all other public-sector employees do not have these rights.<sup>16</sup> Wyoming must amend its statutes to grant the same rights to public-sector employees, thus expanding protections to thousands of more employees and allowing more women to gain the advantages of union representation.<sup>17</sup>

This Comment explores the benefits unions provide to women and how Wyoming can use unions to advance women's working conditions and interests.<sup>18</sup> Part II of this Comment explores the history of women in labor unions, and examines the participation of women in unions today.<sup>19</sup> Part III outlines labor law at both federal level under the NLRA and state law under Wyoming's statutory scheme.<sup>20</sup> Part IV explains the permissible subjects for collective bargaining under

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[hereinafter HOUSEHOLD DATA ANNUAL AVERAGES], <https://www.bls.gov/cps/cpsaat18.htm>. Female-dominated industries include retail bakeries, libraries and archives, savings institutions, educational and health services, social assistance, personal and laundry services, and administration of human resource programs. *Id.* See also *infra* notes 152–53, 178, 180 and accompanying text (displaying potential benefits of unionism).

<sup>11</sup> HOUSEHOLD DATA ANNUAL AVERAGES, *supra* note 10.

<sup>12</sup> INST. FOR WOMEN'S POL'Y RESEARCH, STATUS OF WOMEN IN THE STATES: THE UNION ADVANTAGE FOR WOMEN 2 tbl. 1 (2015), <http://statusofwomendata.org/wp-content/uploads/2015/08/R409-Union-Advantage.pdf>.

<sup>13</sup> See *infra* notes 92–96 and accompanying text.

<sup>14</sup> 29 U.S.C. §§ 151–169 (2012); see also *infra* notes 70–130 and accompanying text.

<sup>15</sup> See *infra* notes 72–89 and accompanying text.

<sup>16</sup> WYO. STAT. ANN. §§ 27-10-101 to -109 (2019).

<sup>17</sup> WYO. DEP'T OF WORKFORCE SERVS., RESEARCH & PLANNING, WYOMING NONAGRICULTURAL WAGE AND SALARY EMPLOYMENT FINAL BENCHMARK 1990-2017 – PRELIMINARY BENCHMARK 2018, <https://doe.state.wy.us/lmi/CES/naanav9002.htm> (showing that Wyoming had 211,000 private-sector employees and 70,000 governmental (federal, state, and local) employees in 2017); see also *generally infra* notes 131–80 and accompanying text.

<sup>18</sup> See *infra* notes 65–69, 133–202 and accompanying text.

<sup>19</sup> See *infra* notes 31–69 and accompanying text.

<sup>20</sup> See *infra* notes 70–130 and accompanying text.

the NLRA, including wages, sexual harassment, family and medical leave, medical insurance, job security, and safe work environments, as well as how collective bargaining agreements (CBAs) can protect women's interests in the workplace.<sup>21</sup> Part V advocates for legislation that grants public employees the right to bargain collectively.<sup>22</sup> Part VI concludes that unions can improve workplace conditions for women and, therefore, illustrates Wyoming must pass laws that grant collective bargaining rights to public-sector employees.<sup>23</sup> Then, part VII proposes legislation that would grant public employees the right to bargain collectively in Wyoming.<sup>24</sup>

## II. WOMEN AND THE LABOR MOVEMENT

In 19th century New York, a fire broke out in the factory space of the Triangle Shirtwaist Company.<sup>25</sup> Before the fire, young girls from the company had organized a strike against the unsanitary conditions and demanded safer working conditions.<sup>26</sup> But their efforts failed and, on March 25, 1911, 146 people died, primarily young women, when they could not use the fire escapes because they were chained shut.<sup>27</sup> When faced with the choice of suffocating or burning to death, many of the workers chose instead to jump out of the eighty-foot-high windows, falling to their deaths.<sup>28</sup> This workplace tragedy was one of the many catalysts of the 19th century labor movement which led to New York passing foundational legislation for modern labor law.<sup>29</sup>

When male-dominated industries established the first trade unions in America during the 1820s, women were primarily omitted from membership even though 66,000 women were employed in the New England cotton mills.<sup>30</sup> Over the following three decades, many of these women organized strikes and

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<sup>21</sup> See *infra* notes 131–80 and accompanying text. For a discussion of bargaining subjects, see *infra* notes 87, 135–42 and accompanying text.

<sup>22</sup> See *infra* notes 105–202 and accompanying text.

<sup>23</sup> See *infra* notes 203–07 and accompanying text.

<sup>24</sup> See *infra* notes 207–13 and accompanying text.

<sup>25</sup> Christopher Lucas, *The Triangle Shirtwaist Fire and the Merrill Lynch Analyst Ratings Scandal: Legislative and Prosecutorial Responses to Corporate Malfeasance*, 1 BROOK. J. CORP. FIN. & COM. L. 449, 456–57 (2006).

<sup>26</sup> *Id.* at 456. The owners of the company, Max Blanck and Isaac Harris, had defeated a plan to organize the shop several months before the fire by hiring gangsters and prostitutes to violently engage their employees. *Id.* Hiring sex workers to fight women workers was common practice at the time. See *id.*

<sup>27</sup> *Id.* at 456–57.

<sup>28</sup> *Id.* at 456.

<sup>29</sup> *Id.* at 459.

<sup>30</sup> Gail Falk, *Women and Unions: A Historical View*, 1 WOMEN'S RTS. L. REP. 54, 54–55 (1973); THERESA WOLFSON, *THE WOMAN WORKER AND THE TRADE UNIONS* 27 (1926).

protests to improve working conditions.<sup>31</sup> When the mills encountered economic hardships, employers decreased wages and increased working hours, leading to strikes by female workers.<sup>32</sup> In 1934 and again in 1936, the workers organized strikes against wage cuts and petitioned for reduced hours.<sup>33</sup> The petitions for reduced hours eventually became known as the “Ten Hour Movement.”<sup>34</sup> This movement was a predecessor for the Fair Labor Standards Act of 1938, which requires overtime pay for any hours of work above forty hours per week.<sup>35</sup>

### A. *Union History and Exclusion of Women Workers*

Women encountered many obstacles to participating in unions.<sup>36</sup> First, they faced financial challenges, such as wage disparity: many women employed in unskilled jobs were paid less than their male coworkers, sometimes receiving only a fraction of the salaries men received for equivalent jobs.<sup>37</sup> The dual responsibility of caring for the home while working resulted in little to no money to spare for payment of dues to a labor organization.<sup>38</sup> Second, men often condemned women for entering into male-dominated fields and unions.<sup>39</sup> For example, the unions in the American barber industry originally denied membership to women.<sup>40</sup> The Barbers’ Union eventually admitted women in 1924 as a means to control the industry by regulating the competition posed by women barbers, but gave women different fees and benefits.<sup>41</sup> Third, as women created their own unions, the segregation of men’s and women’s unions resulted in higher wages for men and lower wages for women in the “sister” union.<sup>42</sup>

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<sup>31</sup> Thomas Dublin, *Women, Work, and Protest in the Early Lowell Mills: “The Oppressing Hand of Avarice Would Enslave US”*, 16 LAB. HIST. 1, 99 (1975). Women were over 80% of the workforce of the Lowell mills. *Id.* at 114. In Lowell, Massachusetts, women comprised the majority of the 8,000 textile mill workers throughout the 1830s. *Id.* at 99.

<sup>32</sup> *Id.* at 100 (“Overproduction became a problem and the prices of finished cloth decreased. The high profits of the early years declined and so, too, did conditions for the mill operatives. Wages were reduced and the pace of work within the mills was stepped up. Women operatives did not accept these changes without protest.”).

<sup>33</sup> *Id.* at 100.

<sup>34</sup> *Id.* at 112.

<sup>35</sup> 29 U.S.C. § 207 (2012).

<sup>36</sup> See *infra* notes 37–42 and accompanying text.

<sup>37</sup> Falk, *supra* note 30, at 55.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 56–57. Both the National Typographical Union and the International Barber’s Union banned women from union membership. *Id.*

<sup>40</sup> WOLFSON, *supra* note 30, at 77.

<sup>41</sup> *Id.* at 79. Additionally, there was added pressure for the Barbers’ Union to admit women as the bob hair cut grew in popularity during the early twenties, creating increased demand for female barbers. Falk, *supra* note 30, at 57–58.

<sup>42</sup> Falk, *supra* note 30, at 55–56. For example, the international union recognized the Women’s Typographical Union No. 1 in 1867, but by 1870, it was determined that having the women’s union

As unionism progressed into the 20th century, the strain between women and unions continued.<sup>43</sup> Women were either excluded or discouraged from participating in labor unions and, as the population of women in the workforce increased, the number of women in labor unions remained low.<sup>44</sup> In 1920, only 73,000 women were union members, with total union membership totaling above two million.<sup>45</sup> When men finally allowed women to join unions, they subjected women to various discriminatory policies, including decreased benefits.<sup>46</sup> For example, unions denied benefits to women who missed work due to pregnancy or menopause.<sup>47</sup> Other unions lowered their dues for women, but then often excluded women from many basic advantages of unionization, such as strike benefits.<sup>48</sup> Ultimately, unionism was a risk for women; often times, when women were involved in organized strikes alongside male colleagues, the men would prevail at the women's expense.<sup>49</sup> For example, in 1918, the Cleveland Railway Company and Street Railwaymen "settled" a three-day strike by agreeing that women would no longer be employed.<sup>50</sup>

In 1935, Congress passed the National Labor Relations Act (NLRA), adding legal rights to the labor movement and providing private-sector industry employees the right to collectively bargain and strike.<sup>51</sup> After the NLRA passed, union membership flourished.<sup>52</sup> American unionism reached its highest saturation in the mid-1950s when "union density rate increased from 13.2 percent [in 1935] to 34.7 percent."<sup>53</sup> In 1940, approximately 800,000 women were members of labor unions.<sup>54</sup> By the early 1950s, approximately three million women were

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separate from the men's union led to a tiered pay scale where women were making less than men. PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT* 384 (1947). The International Typographical Union decided not to charter any more local unions that only had women members. *Id.*

<sup>43</sup> See *infra* notes 44–50 and accompanying text.

<sup>44</sup> Charles B. Craver, *The Relevance of the NLRA and Labor Organizations in the Post-Industrial Global Economy*, 57 *LABOR L.J.* 133, 140 (2006). From 1890–1910, women in the labor force grew from four million to over eight million. *Id.*

<sup>45</sup> *Id.* at 140.

<sup>46</sup> Falk, *supra* note 30, at 60; WOLFSON, *supra* note 30, at 79. See also, e.g., *supra* note 41 and accompanying text.

<sup>47</sup> Falk, *supra* note 30, at 60.

<sup>48</sup> *Id.*

<sup>49</sup> See *infra* note 50 and accompanying text.

<sup>50</sup> WOLFSON, *supra* note 30, at 89; Falk, *supra* note 30, at 60.

<sup>51</sup> 29 U.S.C. §§ 151–169 (2012).

<sup>52</sup> Ruth Milkman, *Two Worlds of Unionism: Women and the New Labor Movement*, in *SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR* 1, 63 (Dorothy Sue Cobble ed., 2011).

<sup>53</sup> Craver, *supra* note 44, at 134.

<sup>54</sup> DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 5 (2004).

members of unions.<sup>55</sup> This was due in part to women moving into leadership positions within their unions.<sup>56</sup> Once in leadership positions, women were able to advocate for changes in wages and working hours, and to increase social services for child-bearing and child care.<sup>57</sup>

American women's activism within the labor movement culminated in the 1960s when President Kennedy created the President's Commission on the Status of Women.<sup>58</sup> In 1963, this Commission published a report which found, in relevant part, that women needed to work to support their families, day care for their children in order to work, better education to be promoted or work in higher paying industries, and that women were paid less than men.<sup>59</sup> In the next few years, the Equal Pay Act, Title VII of the Civil Rights Act, and amendments to the Fair Labor Standards Act would increase protections for working women at the federal level.<sup>60</sup>

### *B. Benefits of Unionization for Women*

In many academic discussions regarding labor law, scholars call unionism "antiquated" or "irrelevant," even though some 14.8 million Americans were members of unions in 2017.<sup>61</sup> The criticisms of unions' role in workers' rights extend beyond the academic realm as unions are inconsistent in benefitting women's work conditions.<sup>62</sup> Historically, unions have been hostile towards women.<sup>63</sup> But

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 6.

<sup>58</sup> *Id.* at 145.

<sup>59</sup> ESTHER PETERSON & RICHARD LESTER, AMERICAN WOMEN: REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN 7, 27–28, 30 (1963).

<sup>60</sup> COBBLE, *supra* note 54, at 145.

<sup>61</sup> Press Release, Dep't of Labor, Bureau of Labor Statistics, USDL-19-0079, Union Members Summary tbl. 1 (Jan. 18, 2019), <https://www.bls.gov/news.release/pdf/union2.pdf> (union affiliation of employed wage and salary workers by selected characteristics, 2017–2018 annual averages); Wilma B. Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 570 (2007); Cynthia L. Estlund, *The Death of Labor Law?*, 2 ANNU. REV. L. & SOC. SCI. 105, 105 (2006) (Public Law Research Paper No. 06-16).

<sup>62</sup> Marion Crain, *Sex Discrimination as Collective Harm*, in SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR, *supra* note 52, at 1, 103. Crain's article explores how unions have benefitted women's work movements, but describes how, within the context of sexual harassment, the conflict between male and female union members resulted in fewer protections for women union members. *Id.* ("Union women were among the first to understand workplace sexual harassment as a group problem justifying a collective response. Women workers who complained to union stewards of workplace sexual harassment by male co-workers encountered resistance and hostility. Initially, stewards sought to protect their male members' job security by discouraging female members from filing formal sexual harassment complaints. When women persisted, unions took the position that sexual harassment was the employer's problem rather than the union's.")

<sup>63</sup> See *supra* notes 31–50 and accompanying text.



some scholars are hopeful that unionism can be a vehicle for positive change in work conditions, especially in female-dominated fields.<sup>64</sup> Overall, women benefit economically from union membership:

[O]rganized labor remains a powerful source of economic empowerment. This is especially the case for women workers. Women who are union members earn considerably more than their nonunion counterparts. In 2004, female union members earned, on average, \$19.18 per hour, which was 127 percent of the average earnings of nonunion female workers (\$15.05 per hour). The wage premium for men was considerably smaller: male union members in 2004 earned, on average, \$21.24 per hour, or 109 percent of the average earnings of nonunion male workers (\$19.46).<sup>65</sup>

Union members enjoy many benefits, including health, retirement, and life-insurance benefits, paid sick leave, higher salaries, more paid holidays, and decreased gender and racial wage gaps.<sup>66</sup>

Critics of unions have reproved unions for being sexist and patriarchal.<sup>67</sup> Nonetheless, Americans are seeing a resurgence of unionization as a vehicle for labor equality for women, especially now that women occupy organizational and leadership roles in unions.<sup>68</sup> In short, union representation both benefits employees and helps create positive changes in the workplace.<sup>69</sup>

### III. THE CURRENT STATUS OF LABOR LAW

#### A. Federal

The law of collective bargaining and union representation traces back to 1935 when Congress passed the NLRA.<sup>70</sup> The purpose of the NLRA was to promote industrial peace because, at the time, the relationship between an employee

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<sup>64</sup> Milkman, *supra* note 52, at 63.

<sup>65</sup> *Id.* at 64.

<sup>66</sup> AFL-CIO, DEP'T FOR PROF. EMPS., THE BENEFITS OF COLLECTIVE BARGAINING FOR PROFESSIONALS (2015), <https://dpeaflcio.org/wp-content/uploads/Benefits-of-Collective-Bargaining-2015.pdf>.

<sup>67</sup> See Heidi Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex: The Historical Roots of Occupational Segregation*, 1 SIGNS 137 (1976); DIANE BALSER, *SISTERHOOD SOLIDARITY: FEMINISM AND LABOR IN MODERN TIMES* 27–28 (1987).

<sup>68</sup> Dorothy Sue Cobble, *Rethinking Troubled Relations between Women and Unions: Craft Unionism and Female Activism*, 16 FEMINIST STUDIES 519, 520 (1990).

<sup>69</sup> INST. FOR WOMEN'S POL'Y RESEARCH, *supra* note 12, at 4, 8.

<sup>70</sup> 29 U.S.C. §§ 151–169 (2012).

and an employer was strained to such an extent that violence and disharmony affected work, industry, and commerce.<sup>71</sup> The NLRA allowed employees to engage in protected concerted activity and put economic pressures on employers to negotiate workplace conditions.<sup>72</sup> The NLRA's protections and rights did not, however, extend beyond the private-sector.<sup>73</sup> Therefore, collective bargaining rights of public-sector employees and industries not covered by the NLRA were left to each state.<sup>74</sup>

The NLRA represents an amalgamation of the ideas from the Norris-LaGuardia Act of 1932, the Wagner Act of 1935, and the Taft-Hartley Act of 1947.<sup>75</sup> As a product of its time, the NLRA grants employees so-called "Section 7" rights, which includes rights such as the right to form and join labor unions, to work with fellow employees to bargain with employers for conditions or employment, and to be protected from termination when collectively advocating for their rights under the NLRA.<sup>76</sup>

Section 8 outlines prohibited actions for employers and labor organizations, which are called unfair labor practices.<sup>77</sup> Additionally, as a result of the Taft-

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<sup>71</sup> 29 U.S.C. § 151; *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 267 (1939) ("It is the function of the Board to weigh the charges and countercharges and determine the adjustment most conducive to industrial peace."); *see also, e.g.*, Jonathan Rees, *Beyond Body Counts: A Centennial Rethinking of the Ludlow Massacre*, 11 *LAB.: STUDIES IN WORKING-CLASS HIST.* 107, 115 (2014).

<sup>72</sup> 29 U.S.C. §§ 151–169; *see infra* notes 88–89 and accompanying text.

<sup>73</sup> 29 U.S.C. § 152(2)–(3). The NLRA limited the scope of its protections by defining "employer" and "employee" narrowly. *See id.* ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. . . . The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.")

<sup>74</sup> *Id.*; *see also supra* note 73. In addition to public-sector employees, the NLRA does not apply to agriculture, domestic service, independent contractors, or employees of railways and airlines. *See* 29 U.S.C. § 152(2)–(3).

<sup>75</sup> SECUNDA, HIRSCH & DUFF, *LABOR LAW: A PROBLEM-BASED APPROACH* 19–20 (2nd ed. 2017).

<sup>76</sup> 29 U.S.C. § 157.

<sup>77</sup> *Id.* § 158(a)–(b). Section 158(a) includes the prohibited activity for employers, while § 158(b) includes the prohibited activity for labor organizations. *Id.*

Hartley Act, union power is tempered by provisions that require unions to bargain in good faith and to impose regulations to prevent union abuses.<sup>78</sup> Section 8(d) requires both union representatives and employers to bargain “in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>79</sup> This duty does not require the employer to make wage or benefit concessions that would damage its economic stability.<sup>80</sup> Once the employer and labor organization reach an impasse, the employer can unilaterally implement the last deal it offered to the union in good faith.<sup>81</sup> This guarantees that the employer, so long as it can establish a good faith basis for its negotiations, does not have to place itself in an economically precarious position to satisfy the desires of the labor representative.<sup>82</sup> Section 14(b) further limits the power of unions by allowing states to decide if mandatory membership in a labor organization as a condition of employment is allowed.<sup>83</sup> States that prohibit compulsory union membership and payment of union dues are called “right-to-work” states.<sup>84</sup>

After employees select a union to represent them, unions advocate and bargain for work-related subjects with the employer.<sup>85</sup> Section 8(d) describes bargaining subjects as “wages, hours, and other terms and conditions of employment.”<sup>86</sup> “Conditions of employment” is a broad term, and often requires consulting National Labor Relations Board (NLRB) opinions because the definition varies depending on the work place and the industry.<sup>87</sup> The NLRA provides additional safeguards for workers by protecting “concerted activity.”<sup>88</sup> Concerted activity

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<sup>78</sup> *Id.* § 158.

<sup>79</sup> *Id.* § 158(d). For a discussion of these bargaining subjects in relation to women’s employment issues, see *infra* notes 131–81 and accompanying text.

<sup>80</sup> *Colo.-Ute Elec. Ass’n v. NLRB*, 939 F.2d 1392, 1404 (10th Cir. 1991) (“In the context of wage negotiations, therefore, while an employer cannot use its economic power to remove a subject completely from the bargaining table, it is not compelled to agree to the union’s wage terms. That being the case, the union does not enjoy a unilateral veto over wage terms, and the employer may try to achieve the wage terms it desires by using its economic weapon of implementing at impasse.”).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1404.

<sup>83</sup> 29 U.S.C. § 164(b).

<sup>84</sup> SECUNDA, HIRSCH & DUFF, *supra* note 75, at 21. Right-to-work legislation is currently adopted by twenty-eight states. See *infra* notes 107–19 and accompanying text.

<sup>85</sup> 29 U.S.C. § 158(a)(5) & (d); SECUNDA, HIRSCH & DUFF *supra* note 75, at 461.

<sup>86</sup> 29 U.S.C. § 158(d).

<sup>87</sup> For a discussion of mandatory bargaining subjects which are conditions of employment, see generally *NLRB v. Am. Nat’l Ins. Co.*, 343 U.S. 395 (1952). The National Labor Relations Board is “[a]n independent five-member federal board created to prevent and remedy unfair labor practices and to safeguard employees’ rights to organize into labor unions. The board hears complaints of unfair labor practices and issues orders that can be reviewed or enforced by a U.S. court of appeals.” *National Labor Relations Board*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>88</sup> 29 U.S.C. § 157.

occurs when two or more employees confront or address a work-related issue and if one employee acts or speaks on behalf of her fellow employees; in such cases, the employees are protected from discipline or termination under Section 7.<sup>89</sup>

### B. Wyoming

Due to federal preemption, states are prohibited from increasing or decreasing labor law regulations that conflict with the NLRA.<sup>90</sup> This has its benefits and its disadvantages: states can neither reduce workers' collective bargaining rights already granted by the NLRA, nor increase employee rights.<sup>91</sup> While there is limited opportunity for states to regulate labor law, states do have the ability to regulate collective bargaining rights of employees if those rights are not covered under the NLRA.<sup>92</sup>

In Wyoming, the primary statute regarding collective bargaining rights, passed in 1957, states:

It is hereby declared to be the policy of the state of Wyoming that workers have the right to organize for the purpose of protecting the freedom of labor, and of bargaining collectively with employers of labor for acceptable terms and conditions of employment, and that in the exercise of the aforesaid rights, workers should be free from the interference, restraint or coercion of employers of labor, or their agents in any concerted activities for their mutual aid or protection.<sup>93</sup>

This statute on its face appears to grant to all *workers* in Wyoming the right to organize and bargain collectively, but the Wyoming Supreme Court interpreted

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<sup>89</sup> SECUNDA, HIRSCH & DUFF, *supra* note 75, at 138; *see also, e.g.*, NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984).

<sup>90</sup> *See, e.g.*, Chamber of Commerce of United States v. Brown, 554 U.S. 60 (2008) (holding that a California statute that prohibited use of grants for union organizing is preempted by the NLRA); *see also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (establishing the *Garmon* preemption, which prohibits interference with the interpretation role of the NLRB); Machinists v. Wis. Emp't Relations Comm'n, 427 U.S. 132, 140 (1976) (establishing the *Machinists* preemption, which preempts regulation by the NLRB or states of conduct which Congress intended to be left unregulated). The third preemption doctrine is § 301, which "allows either an employer or union to sue or be sued in federal court based on an alleged breach of a provision in a collective bargaining agreement." SECUNDA, HIRSCH & DUFF, *supra* note 75, at 643.

<sup>91</sup> *See generally* SECUNDA, HIRSCH & DUFF, *supra* note 75, at 617–60.

<sup>92</sup> *See generally* MONT. CODE ANN. §§ 39-31-101 to -505 (2017) (granting public employees collective bargaining rights). For employers and employees covered under the NLRA, *see supra* note 73 and accompanying text.

<sup>93</sup> WYO. STAT. ANN. § 27-7-101 (2019).

this provision to apply to a limited category of workers.<sup>94</sup> In the seminal labor case of *Retail Clerks Local 187 v. University of Wyoming*, the court stated: “It has been held generally that statutes governing labor relations between employers and employees are construed only to apply to private industry . . . and had the legislative intent been that municipalities be forced to engage in collective bargaining the legislature would have been explicit in its language.”<sup>95</sup> Due to the court’s decision in *Retail Clerks*, public employees do not have the right to bargain collectively in Wyoming, and § 27-7-101 did little to extend the rights of workers beyond the NLRA, which preempts any conflicting Wyoming law.<sup>96</sup> The decision in *Retail Clerks* eliminated the protection of public employees when engaging in labor actions and collective bargaining, thus dramatically weakening unions in Wyoming in general.<sup>97</sup>

Regardless of the decision in *Retail Clerks*, private-sector employees still have the right to collectively bargain under the NLRA.<sup>98</sup> For example, in February of 2018, twelve of the eighteen non-management newsroom employees of the Casper Star-Tribune voted to unionize.<sup>99</sup> The new union, Casper News Guild, justified its unionization by asserting the decision would benefit the paper.<sup>100</sup> Since the Casper Star-Tribune distributes papers statewide, the unionization of the employees was more visible than in other industries.<sup>101</sup> Furthermore, in April of 2018, the Casper News Guild filed charges against its employer, Lee Enterprises, for alleged unfair labor practices related to the termination of one employee and the suspension of another.<sup>102</sup> Most recently, in December of 2018, the Casper News Guild ratified its first contract with Lee Enterprises, which marks the first collective bargaining

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<sup>94</sup> *Retail Clerks Local 187 v. Univ. of Wyo.*, 531 P.2d 884 (Wyo. 1975). For a discussion of WYO. STAT. ANN. § 27-7-101 before the *Retail Clerks* decision, see generally William L. Corbett, *The Right of Wyoming State and Municipal Employees to Organize, Receive Exclusive Recognition, and Bargain Collectively*, 5 LAND & WATER L. REV. 605 (1970).

<sup>95</sup> *Retail Clerks Local 187 v. Univ. of Wyo.*, 531 P.2d 884, 888 (Wyo. 1975) (internal citations omitted).

<sup>96</sup> *Id.* For more information about the relevant preemption doctrines, see *supra* notes 90–92.

<sup>97</sup> Corbett, *supra* note 94, at 620.

<sup>98</sup> 29 U.S.C. §§ 151–169 (2012); see also *supra* notes 70–89 and accompanying text.

<sup>99</sup> Elise Schmelzer, *Casper Star-Tribune Journalists Vote to Unionize*, CASPER STAR-TRIB. (Feb. 27, 2018), [https://trib.com/news/local/casper/casper-star-tribune-journalists-vote-to-unionize/article\\_bc26a3b8-9c8a-5240-88c8-6e8f5ad6d072.html](https://trib.com/news/local/casper/casper-star-tribune-journalists-vote-to-unionize/article_bc26a3b8-9c8a-5240-88c8-6e8f5ad6d072.html).

<sup>100</sup> *Id.* (“As we have said from the beginning, our goal is to protect and strengthen the future of the Star-Tribune, as well as Casper and Wyoming’s news, for many years to come.”).

<sup>101</sup> *Id.*

<sup>102</sup> Maxwell Strachan, *In Wyoming, A Newly Unionized Newsroom Says Corporate Bosses Are Retaliating*, HUFFINGTON POST (Apr. 10, 2018), [https://www.huffingtonpost.com/entry/casper-star-tribune-retaliation\\_us\\_5accade4e4b0337ad1ebc1ba](https://www.huffingtonpost.com/entry/casper-star-tribune-retaliation_us_5accade4e4b0337ad1ebc1ba); see also *supra* note 77 and accompanying text.

agreement for the newspaper in its 127-year history.<sup>103</sup> Through the NLRA, the Casper Star-Tribune employees were able to create a union, to hold their employer accountable, and to negotiate a collective bargaining agreement protecting their workplace interests.<sup>104</sup> The Casper News Guild had a platform from which to explore and defend its decision to unionize.<sup>105</sup> This dialogue can act as a catalyst for a shift in Wyoming to prioritize protection for collective bargaining for all employees.<sup>106</sup>

### 1. *Right-to-Work Legislation*

The right-to-work (RTW) doctrine is crucial to the discussion of Wyoming labor law.<sup>107</sup> In 1957, Wyoming passed its right-to-work laws, which primarily state: “No person is required to become or remain a member of any labor organization as a condition of employment or continuation of employment.”<sup>108</sup> Critics of RTW legislation largely consider RTW to be an effort to weaken unionization and rights of employees, yet unionization is still permissible in RTW states as long as the employees fall under the protection of a federal or state statute.<sup>109</sup> The fundamental principle of RTW legislation is protecting employee freedom.<sup>110</sup> Those who advocate for RTW assert that required union membership limits employees’ individual rights: if their membership is required for employment, then employees may be forced to pay money to a union which does not represent their interests.<sup>111</sup> In *Janus v. AFSCME*, the United States Supreme Court held:

Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related

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<sup>103</sup> *Workers at Casper Star-Tribune Ratify First Contract*, NEWS GUILD (Dec. 17, 2018), <http://www.newsguild.org/mediaguild3/workers-at-casper-star-tribune-ratify-first-contract>.

<sup>104</sup> See *supra* notes 98–103 and accompanying text.

<sup>105</sup> See *supra* notes 99–103 and accompanying text.

<sup>106</sup> See *supra* notes 100–03 and accompanying text.

<sup>107</sup> See *supra* note 84 and accompanying text; see also *infra* notes 108–19.

<sup>108</sup> WYO. STAT. ANN. §§ 27-7-108 to -115 (2019).

<sup>109</sup> See Richard A. Epstein, *The Misconceived Modern Attack on Right to Work Laws*, 2017 U. CHI. LEGAL F. 95, 96 (2017) (“The real purpose of right to work laws is to tilt the balance toward big corporations and further rig the system at the expense of working families. These laws make it harder for working people to form unions and collectively bargain for better wages, benefits and working conditions.” (quoting the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO))); see also *infra* notes 111–19; Nathan Goldfinger, *The Case against Right-to-Work Laws*, 77 INT’L LAB. REV. 121, 131 (1958).

<sup>110</sup> See Dray W. Perry, *Right to Work: Prohibition of Expression or Coercion*, 17 WYO. L.J. 214, 220, 225 (1963).

<sup>111</sup> *Id.*

activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.<sup>112</sup>

*Janus* thus struck down state practices that required public-sector employees to pay a “fair share fee”—generally 70% of union membership fees—because the fee infringed on the employee’s freedom of speech.<sup>113</sup>

While *Janus* marked a change in the treatment of mandatory dues to unions, the limitation on dues and compulsory membership does not prohibit unionization; rather, employees can still create and elect unions as their primary bargaining representative.<sup>114</sup> In fact, the NLRA encourages private-sector workplaces to utilize collective bargaining, and allows states to enact laws to “protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”<sup>115</sup> The right to bargain collectively is not influenced by RTW; instead, RTW affects the right of unions to collect dues as proscribed by the NLRA, allowing states to prohibit compulsory union membership for employment.<sup>116</sup>

Another criticism surrounding RTW legislation is that, in a workplace that has both union and nonunion members, nonmembers “free ride” on union representation.<sup>117</sup> In RTW states, employees who are covered under a union contract do not have to be members of the union, but are still represented by the union because of the exclusive bargaining rule.<sup>118</sup> Free-riding is an ongoing

<sup>112</sup> *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2459–60 (2018).

<sup>113</sup> *Id.* For a general discussion of the impacts of the *Janus* decision, see Daniel D. Schudroff & Megann K. McManus, *The Practical Implications of Janus v. AFSCME Council 31*, BUS. L. TODAY (Sept. 28, 2018), <https://businesslawtoday.org/2018/09/practical-implications-janus-v-afscme-council-31/>.

<sup>114</sup> For example, Nevada is a right-to-work state, and 13.9% of its employees are members of unions, while 15.7% of its employees are represented by unions. Press Release, *supra* note 61, tbl. 5; *Right to Work States*, NAT’L RIGHT TO WORK LEGAL DEF. FOUND., <https://www.nrtw.org/right-to-work-states/>.

<sup>115</sup> 29 U.S.C. § 151 (2012). For statutory requirements of application of the NLRA to a workplace, see *id.* § 152(1)–(3); *supra* notes 73–74 and accompanying text.

<sup>116</sup> 29 U.S.C. § 164.

<sup>117</sup> See Dale D. Pierson, *After Janus What Comes Next? Possible Solutions to the Free-Rider Problem*, 43 LAB. STUDIES J. 269, 272–74 (2018).

<sup>118</sup> Section 9 of the NLRA sets forth the exclusive bargaining rule: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or

issue in RTW states because unions are required to represent the interests of all employees, not just those who pay union dues.<sup>119</sup> The *Janus* decision overturned the previous standard and held that compulsory union dues and fair share fees were unconstitutional.<sup>120</sup> As union groups are reeling from the *Janus* decision, the effects of the Court's holding on unionization are yet to be realized in their entirety.<sup>121</sup>

## 2. Wyoming Labor Statistics

In 2017, there were 137,840 women employees in Wyoming, comprising 40.8% of the Wyoming workforce.<sup>122</sup> Their average wage was \$29,011; by contrast, the average wage for men was \$46,270.<sup>123</sup> Overall, only 5.5% of women and 9.2% of men in Wyoming are covered by a union contract.<sup>124</sup> In 2018, the national union membership rate was 10.5%.<sup>125</sup> While the rate of male employees covered under union contracts in Wyoming is not far from the national rate, the key difference between the two is that, in Wyoming, the only public-sector employees who can unionize are firefighters.<sup>126</sup> In 2015, 32.4% of women were covered by union contracts, making Wyoming second-to-last in the country for percentage of women with union membership.<sup>127</sup> Wyoming's women union membership contrasts with eight other states where more women than men are covered by union representation.<sup>128</sup> In 2017, Wyoming had 211,000 private-sector employees and 70,000 governmental (federal, state, and local) employees.<sup>129</sup>

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other conditions of employment . . . ." 29 U.S.C. § 159; see also SECUNDA, HIRSCH & DUFF, *supra* note 75, at 645–48 ("If a majority of employees in a bargaining unit have designated or selected a union to represent the unit, dissenting bargaining unit employees are not required to join the union. Indeed, dissenting employees may decline to join or may resign from the union at any time. The union in that case retains the duty to represent all employees in the bargaining unit, including employees who pay no dues . . .").

<sup>119</sup> Epstein, *supra* note 109, at 118.

<sup>120</sup> *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2459–60 (2018).

<sup>121</sup> Pierson, *supra* note 117, at 269–96; see also Aaron Tang, *How to Undo Janus: A User-Friendly Guide* (June 27, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3189206](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3189206) (follow links to open or download).

<sup>122</sup> *Wyoming Earning Tables 2000-2017*, WYO. DEP'T WORKFORCE SERVS. (Jan. 2019), [http://doe.state.wy.us/LMI/earnings\\_tables.htm](http://doe.state.wy.us/LMI/earnings_tables.htm).

<sup>123</sup> *Id.*

<sup>124</sup> INST. FOR WOMEN'S POL'Y RESEARCH, *supra* note 12, at 2.

<sup>125</sup> Press Release, *supra* note 61.

<sup>126</sup> *Id.*; see also WYO. STAT. ANN. §§ 27-10-101 to -109 (2019) (granting collective bargaining rights to firefighters).

<sup>127</sup> INST. FOR WOMEN'S POL'Y RESEARCH, *supra* note 12, at 1–2.

<sup>128</sup> *Id.* Women have higher union membership than men in California, Connecticut, the District of Columbia, Massachusetts, New Hampshire, New York, Oregon, and Vermont. *Id.*

<sup>129</sup> WYO. DEP'T OF WORKFORCE SERVS., *supra* note 17.



While RTW legislation allows employees to refuse union membership, in 2017, out of 16,000 Wyomingites represented by unions, 15,000 were union members; Despite RTW legislation, most Wyoming employees choose to pay union dues and become members of unions.<sup>130</sup>

#### IV. PLATFORMS FOR COLLECTIVE BARGAINING

Some union advocates and employees perceive unions as a vehicle for social justice, but this was not the reason Congress created the NLRA.<sup>131</sup> Originally, unions were established to reduce industrial strife.<sup>132</sup> While the original purpose of the NLRA was to decrease the violence associated with striking at the turn of the century, the current NLRA and its protections should be applied to the social damage that occurs when women are underpaid, denied benefits, and subjected to workplace discrimination.<sup>133</sup> The mission of the NLRA, which was to prevent industrial strife, is still relevant today: women's workplace issues should be perceived as industrial strife and should therefore fall within the scope of labor law to regulate and remedy.<sup>134</sup>

Collective bargaining agreements (CBAs) are one of the most valuable tools for employees granted through the NLRA.<sup>135</sup> Collective bargaining agreements

<sup>130</sup> Press Release, *supra* note 61. This Comment references 2017 statistics in order to keep the year consistent for comparison. However, it is worth noting that, in 2018, the number of overall employees in Wyoming decreased by approximately 10,000, but employees represented by unions increased by about 2,000. *Id.* Furthermore, the number of employees who were members of unions remained the same at 15,000, so there was an increase in non-member union representation in 2018. *Id.*

<sup>131</sup> 29 U.S.C. § 151 (2012); *see also* MARY MARGARET FONOW, UNION WOMEN: FORGING FEMINISM IN THE UNITED STEELWORKERS OF AMERICA 2–3 (2003) (gender equality); Jake Rosenfeld & Meredith Kleykamp, *Organized Labor and Racial Wage Inequality in the United States*, 117 AMER. J. SOC. 1460, 1462 (2012) (racial equality); Sarah Barriage, *The Role of the Union in Promoting Social Justice*, in PERSPECTIVES ON LIBRARIES AS INSTITUTIONS OF HUMAN RIGHTS AND SOCIAL JUSTICE 231, 237–40 (Ursula Gorham et al. eds, 2016) (social justice work and unionization).

<sup>132</sup> 29 U.S.C. § 151.

<sup>133</sup> *See supra* note 71 and accompanying text.

<sup>134</sup> *See* Liebman, *supra* note 61, at 570; *see also* Jack Rosenfeld, *The Rise and Fall of US Labor Unions and Why They Still Matter*, CONVERSATION (Mar. 27, 2015), <http://theconversation.com/the-rise-and-fall-of-us-labor-unions-and-why-they-still-matter-38263>; *see also generally* Women in the Workplace: A Research Roundup, HARV. BUS. REV. (Sept. 2013), <https://hbr.org/2013/09/women-in-the-workplace-a-research-roundup>; Nikki Waller, *How Men & Women See the Workplace Differently*, WALL STREET J. (Sept. 27, 2016), <http://graphics.wsj.com/how-men-and-women-see-the-workplace-differently/>; Caryl Rivers & Rosalind C. Barnett, Commentary, 8 *Big Problems for Women in the Workplace*, CHI. TRIB. (May 18, 2016), <https://www.chicagotribune.com/news/opinion/commentary/ct-women-pay-gap-workplace-equality-perspec-0519-jm-20160518-story.html>.

<sup>135</sup> *See, e.g.*, Carolyn York, *Bargaining for Work and Family Benefits*, in WOMEN AND UNIONS 129, 129–31 (Dorothy Cobble ed., 1993) (describing the power of unions to win parental leave through contract provisions in collective bargaining agreements).

are “contract[s] between an employer and a labor union regulating employment conditions, wages, benefits, and grievances.”<sup>136</sup> The power of CBAs is derived from Section 8, which dictates what subjects employers must bargain with employees on.<sup>137</sup> If the subject of bargaining falls under Section 8(d) of the NLRA, then employers cannot refuse to negotiate.<sup>138</sup> The NLRA itself is vague on what constitutes bargaining: “To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”<sup>139</sup> The right to bargain for wages and hours is sufficiently clear but, depending on the industry, a term or condition of employment can have a variety of different interpretations.<sup>140</sup> Industry by industry, the combination of CBAs and good faith bargaining can make critical improvements to conditions of employment.<sup>141</sup> The NLRA clearly outlines the requirement of bargaining for wages, but other crucial issues arising in women’s workplaces require a more thorough knowledge of various statutes and policies.<sup>142</sup>

### A. *Wages and Equal Pay*

When bargaining for better wages, women must combat gender-pay disparity.<sup>143</sup> While the Equal Employment Opportunity Commission (EEOC) prohibits discrimination of wages based on sex, proving noncompliance requires demonstrating an employer’s intent to discriminate.<sup>144</sup> According to the American Association of University Women (AAUW), Wyoming is ranked 39th in the nation for gender-pay equality, with a pay ratio of 77%.<sup>145</sup> This means that, for every \$1.00 a man makes in Wyoming, a woman is on average making only

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<sup>136</sup> *Collective-Bargaining Agreement*, BLACK’S LAW DICTIONARY, *supra* note 92.

<sup>137</sup> 29 U.S.C. § 158(a)(5), (d).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* § 158(d).

<sup>140</sup> SECUNDA, HIRSCH & DUFF, *supra* note 75, at 479 (stating that at the extreme, conditions of employment can mean “any subject which is insisted upon as a prerequisite for continued employment,” while a narrower construction is usually adopted by the courts).

<sup>141</sup> *See supra* note 35.

<sup>142</sup> 29 U.S.C. § 158(d).

<sup>143</sup> *See* Nick Reynolds, *Wyoming Has the Nation’s Worst Gender Pay Gap. Lawmakers are Pursuing Several Bills to Change That*, CASPER STAR-TRIB. (Nov. 21, 2018), [https://trib.com/news/state-and-regional/wyoming-has-the-nation-s-worst-gender-pay-gap-lawmakers/article\\_0b06e452-f368-51c6-86be-aedeb3b8cfd.html](https://trib.com/news/state-and-regional/wyoming-has-the-nation-s-worst-gender-pay-gap-lawmakers/article_0b06e452-f368-51c6-86be-aedeb3b8cfd.html).

<sup>144</sup> Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 648 (2018).

<sup>145</sup> Kate Nielson, *The Gender Pay Gap by State: An Interactive Map*, AAUW, <https://www.aauw.org/resource/gender-pay-gap-by-state-and-congressional-district/> (last visited Apr. 21, 2019); *The Wage Gap, State by State*, NAT’L WOMEN’S L. CTR. (Dec. 31, 2018), <https://nwlc.org/resources/wage-gap-state-state/>. This Comment uses the AAUW data because it is derived from the U.S. Census and the NWLC has similar corroborative statistics. Nielson, *supra*.

\$0.77.<sup>146</sup> To decrease the wage gap, AAUW advocates for legislation to protect employees who disclose their wages, to allow employees to take action to secure fair wages, and to prohibit employers from lowering other employees' pay in order to reduce the wage gap.<sup>147</sup> AAUW designed such legislation to make tangible differences in women's salaries, but unions can negotiate for female employees without this legislation.<sup>148</sup> With unions facilitating conversations about gender wage gaps, they can encourage "having an expectation of equality and a bargaining process [that] brings information about wages and how they are set into the open, increasing pay transparency as a matter of course in the union context—a key focus of some current pay equity reform efforts."<sup>149</sup> Furthermore, unions represent the interests of all union members, not just male employees, so unions can easily address the rights and needs of its female members as well as its male members.<sup>150</sup>

While all employees' salaries increase with unionization, women's salaries drastically improve when they are members of unions.<sup>151</sup> As mentioned, the wage gap of female union members is less than half of the wage gap of female workers who are not members of unions.<sup>152</sup> Union members also, on average, make more money than nonunion members.<sup>153</sup> The NLRA does not require employers to make collective bargaining agreements which they cannot financially sustain, so the increase of women's wages when the employees are unionized displays the substantial bargaining power unions wield.<sup>154</sup>

### B. *Sexual Harassment*

In June of 2016, the EEOC released a report from the Select Task Force on the Study of Harassment in the Workplace, which found that change in workplace harassment must come from the highest levels of management: "Workplace culture has the greatest impact on allowing harassment to flourish, or conversely, in preventing harassment. The importance of leadership cannot

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<sup>146</sup> See *supra* note 145.

<sup>147</sup> See, e.g., THE FIGHT FOR PAY EQUALITY: A FEDERAL ROAD MAP, AAUW [https://www.aauw.org/aauw\\_check/pdf\\_download/show\\_pdf.php?file=Gender\\_Pay\\_Gap\\_Wyoming](https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=Gender_Pay_Gap_Wyoming) (last updated Feb. 2019).

<sup>148</sup> See Bornstein, *supra* note 144, at 634.

<sup>149</sup> *Id.* (internal quotations omitted).

<sup>150</sup> *Id.*

<sup>151</sup> ROBBINS & JOHNSON, *supra* note 1, at 2.

<sup>152</sup> *Id.* at 1.

<sup>153</sup> Press Release, *supra* note 61, at 2. ("Among full-time wage and salary workers, union members had median usual weekly earnings of \$1,051 in 2018, while those who were not union members had median weekly earnings of \$860.")

<sup>154</sup> See *supra* notes 79–82 and accompanying text.

be overstated—effective harassment prevention efforts . . . must start with and involve the highest level of management of the company.”<sup>155</sup> The EEOC task force also drafted workplace civility policies designed to decrease workplace harassment but, as a remedy, these policies lacked any provisions for enforcement.<sup>156</sup> The NLRB, however, has frustrated the EEOC’s efforts by ruling that such policies are illegal because they restrict NLRA Section 7 rights.<sup>157</sup>

While the EEOC’s civility policies conflict with the policies of the NLRB, women in the workplace are not without remedies.<sup>158</sup> The Civil Rights Act of 1964 states that it is unlawful for an employer to discriminate against an employee, or potential employee, “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>159</sup> These protections also extend to sexual harassment.<sup>160</sup> In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court held that “without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”<sup>161</sup> Furthermore, Title VII of the Civil Rights Act of 1964 includes an “antiretaliation policy” that grants protection to female employees beyond the NLRA work-related provisions.<sup>162</sup> The Civil Rights Act “forbids an employer from ‘discriminating against’ an employee or job applicant because that individual opposed any practice made unlawful by Title VII or made a charge, testified, assisted, or participated in a Title VII proceeding or investigation.”<sup>163</sup> The antiretaliation policies of the Civil Rights Act protect women employees who report or oppose workplace sexual harassment from retaliation from their employers.<sup>164</sup> In *Burlington Northern & Santa Fe Railway Co. v. White*, the Court expanded the protections of the Act’s antiretaliation policy:

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<sup>155</sup> Chai R. Feldblum & Victoria A. Lipnic, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE exec. summary (June 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_Toc453686298](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686298).

<sup>156</sup> Lindsey A. White, *The EEOC’s Civility Training Program—Watch Out For that NLRB Charge!*, LAB. & EMP. REP.: MGMT’S WORKPLACE BLOG (Oct. 12, 2017), <https://www.laboremploymentreport.com/2017/10/12/the-eeocs-civility-training-program-watch-out-for-that-nlr-charge/#more-2700>.

<sup>157</sup> *Id.*

<sup>158</sup> *See supra* note 155 and accompanying text; *infra* note 159 and accompanying text.

<sup>159</sup> 42 U.S.C. § 2000e-2 (2012).

<sup>160</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986); *see also Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

<sup>161</sup> *Meritor Sav. Bank, FSB*, 477 U.S. at 64.

<sup>162</sup> *Burlington N. & Santa Fe Ry.*, 548 U.S. at 57.

<sup>163</sup> *Id.* at 56 (internal quotations omitted) (quoting 42 U.S.C. § 2000e-3(a)).

<sup>164</sup> 42 U.S.C. § 2000e-3(a); *see supra* notes 162–63 and accompanying text.

We conclude that the antiretaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.<sup>165</sup>

The Civil Rights Act adds an additional layer of protection against sexual harassment and discrimination beyond that given by the NLRA.<sup>166</sup> Sexual harassment is an area where union support and expertise can supplement workers' rights; unions can help employees learn what their rights are which, in turn, will enable them to exercise those rights.<sup>167</sup>

### C. *Family and Medical Leave*

Women's involvement in the workplace is often affected by familial obligations.<sup>168</sup> When women have a career, research indicates that family and home responsibilities are not generally shared equally between male and female parents.<sup>169</sup> Work-life balance is an important part of workplace satisfaction: "Research shows that paid leave increases the likelihood that workers will return to work after childbirth, improves employee morale, has no or positive effects on workplace productivity, reduces costs to employers through improved employee retention, and improves family incomes."<sup>170</sup> Only 14% of non-union employees have access to paid family leave, but this number increases to 19% for employees

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<sup>165</sup> *Burlington N. & Santa Fe Ry.*, 548 U.S. at 57.

<sup>166</sup> *Id.*

<sup>167</sup> DEP'T FOR PROF'L EMPS., *2019 Fact Sheet: The Union Difference for Working Professionals*, ALF-CIO (2019), <https://dpeaffcio.org/wp-content/uploads/Union-difference-for-professionals-2019.pdf>. It is important to note that treatment of sexual harassment by unions in male-dominated fields has been highly criticized. See Marion Crain, *Women, Labor Unions, and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9, 61–77 (1995).

<sup>168</sup> 29 U.S.C. § 2601(a); see Wayne Carlisle, *Sharing Home Responsibilities: Women in Dual-Career Marriages*, in *WOMEN AND CAREERS: ISSUES AND CHALLENGES* 138, 142–44 (Carol W. Konek & Sally L. Kitch eds., 1994).

<sup>169</sup> Kim Parker, *Women More than Men Adjust their Careers for Family Life*, FACT TANK: NEWS IN THE NUMBERS (Oct. 1, 2015), <https://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/>; see Carlisle, *supra* note 168.

<sup>170</sup> Barbara Gault et al., *Parental Leave in the United States*, INST. FOR WOMEN'S POL'Y RESEARCH 1, 7, [https://www.dol.gov/wb/resources/paid\\_parental\\_leave\\_in\\_the\\_united\\_states.pdf](https://www.dol.gov/wb/resources/paid_parental_leave_in_the_united_states.pdf); see also Margarita Leon & Susan Millns, *Parental, Maternity and Paternity Leave: European Legal Constructions of Unpaid Care Giving*, 58 N. IR. LEGAL Q. 343, 358 (2007).

who are represented by unions.<sup>171</sup> This increase may seem trivial, but the national average is 15%, thus increasing family leave for union-represented employees by 4%.<sup>172</sup>

The Family and Medical Leave Act of 1993 (FMLA) created a threshold for eligible employees to take up to twelve weeks of unpaid, job-protected leave for a number of medical or familial reasons.<sup>173</sup> This is, however, only an established minimum.<sup>174</sup> The FMLA does not provide protections for workers who are employed by companies that employ fewer than fifty employees, thus limiting access to family leave for many workers throughout the nation.<sup>175</sup> Through CBAs, in conjunction with rights granted by the NLRA, employees can bargain with their employers for additional leave.<sup>176</sup>

#### D. Medical Insurance

Employees can also bargain for health insurance.<sup>177</sup> According to the Bureau of Labor Statistics, 94% of union workers have access to employer-provided medical insurance, in sharp contrast to only 67% of nonunion workers.<sup>178</sup> Workers in female-dominated industries generally lack health insurance benefits: 69% of workers in these industries received health insurance benefits, compared to private industry employees, which ranged between 76% for management

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<sup>171</sup> WILLIAM J. WIATROWSKI & R. ALEXANDER ACOSTA, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES tbl. 32 (Sept. 2017), <https://www.bls.gov/ncs/ebs/benefits/2017/ebb10061.pdf> ("Table 32. Leave benefits: Access, civilian workers, March 2017").

<sup>172</sup> *Id.*

<sup>173</sup> 29 U.S.C. §§ 2601–2654; *see also, e.g.*, *Smother v. Solvay Chems., Inc.*, No. 11-CV-200-F, 2014 U.S. Dist. LEXIS 169019 (D. Wyo. Sept. 15, 2014) (awarding an employee \$740,535.00 for his employer's violation of the FMLA).

<sup>174</sup> 29 U.S.C. § 2653 ("Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.").

<sup>175</sup> 29 U.S.C. § 2611(B)(ii). For context, small businesses comprise 98.8% of Wyoming businesses. U.S. SMALL BUS. ADMIN. OFF. ADVOC., 2018 SMALL BUS. PROFILE (2018), <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-WY.pdf>. In 2018, there were 15,541 small businesses in Wyoming that employed twenty or fewer employees. *Id.*

<sup>176</sup> 29 U.S.C. § 157, 158(d). For examples of CBA language, see AFSCME'S COMPREHENSIVE GUIDE TO UNDERSTANDING THE FAMILY AND MEDICAL LEAVE ACT, <https://www.afscme.org/news/publications/health-care/afscmes-comprehensive-guide-to-understanding-the-family-and-medical-leave-act/bargaining-for-fmla> (last visited Feb. 21, 2019).

<sup>177</sup> AFL-CIO, DEP'T FOR PROF. EMPS., *supra* note 66, at 1–2.

<sup>178</sup> *94 Percent of Union Workers had Access to Medical Care Benefits in March 2017*, ECON. DAILY (Oct. 6, 2017), <https://www.bls.gov/opub/ted/2017/94-percent-of-union-workers-had-access-to-medical-care-benefits-in-march-2017.htm>.

and professional industries and 92% for service industries.<sup>179</sup> According to the Institute for Women's Policy Research, 76% of women covered by a union contract receive health insurance benefits, in contrast to 51% of women whose workplace does not have union representation.<sup>180</sup> Accordingly, unionization helps to decrease the gap in women's coverage through their power to collectively bargain.<sup>181</sup>

## V. SOLUTION FOR DISPARITY IN THE EMPLOYMENT OF WOMEN IN WYOMING

For Wyoming women, labor and employment obstacles are poignant due to the gender wage gap and the struggle for representation in state offices.<sup>182</sup> In 2017, women made up 65% of Wyoming's educational services industry, but their salaries were only 78.5% the salaries of their male counterparts.<sup>183</sup> Furthermore, out of the thirty representatives in the Wyoming Senate, there are only six women.<sup>184</sup> Out of the sixty member Wyoming House of Representatives, there are only eight women.<sup>185</sup> It is difficult for women's interests to be represented through state legislation when women are not equally represented at the state level.<sup>186</sup>

Women can increase their wages, benefits, and working conditions by joining and engaging in labor organizations.<sup>187</sup> Unions often result in increased wages and benefits for employees, but Wyoming women lack unionization.<sup>188</sup> For many women, unionization is not an option.<sup>189</sup> For example, education, a heavily

<sup>179</sup> DEP'T OF LABOR, BUREAU OF LAB. STAT., NATIONAL COMPENSATION SURVEY: HEALTH AND RETIREMENT PLAN PROVISIONS IN PRIVATE INDUSTRY IN THE UNITED STATES, 2017, at 1–4 tbl. 1 (2017), <https://www.bls.gov/ncs/ebs/detailedprovisions/2017/ownership/private/table01a.pdf> (“Medical Care Benefits: Plan Type, Private Industry Workers, 2017”).

<sup>180</sup> INST. FOR WOMEN'S POL'Y RESEARCH, *supra* note 12, at 9.

<sup>181</sup> See *supra* notes 177–80 and accompanying text.

<sup>182</sup> Reynolds, *supra* note 2 (“[W]hether by industry, level of education, age or location—women were consistently paid at lower rates than their male counterparts.”); Madeline Farber, *This State Has the Largest Gender Wage Gap in the U.S.*, FORTUNE (Jan. 19, 2017), <http://fortune.com/2017/01/19/gender-wage-gap-by-state/>; WYO. DEP'T OF WORKFORCE SERVS., *supra* note 6, at 4–6 (discussing the gender wage gap and the cross-industry disparity); see *Senators*, WYO. LEG., <https://www.wyo.leg.gov/Legislators/2019/S; Representatives>, WYO. LEG., <https://www.wyo.leg.gov/Legislators/2019/H> (last visited Feb. 21, 2019).

<sup>183</sup> WYO. DEP'T OF WORKFORCE SERVICES, *supra* note 17.

<sup>184</sup> *Senators*, *supra* note 182.

<sup>185</sup> *Representatives*, *supra* note 182.

<sup>186</sup> See Amy Caiazza, *Does Women's Representation in Elected Office Lead to Women-Friendly Policy? Analysis of State-Level Data*, 26 WOMEN & POLITICS 35, 59 (2004) (“Women have an impact at a more aggregate level, across the U.S. states, and their presence in elected office encourages states to pursue policies that are relevant and beneficial to women's lives.”).

<sup>187</sup> INST. FOR WOMEN'S POL'Y RESEARCH, *supra* note 12, at 4–6.

<sup>188</sup> See *supra* notes 122–29 and accompanying text.

<sup>189</sup> Press Release, *supra* note 61.

female-dominated industry, lies outside the protections offered by the NLRA.<sup>190</sup> The NLRA excludes public school teachers because they are public-sector employees.<sup>191</sup> The Wyoming Education Association (WEA) represents teachers, but it is not a union, although some teachers mistakenly believe that it is.<sup>192</sup> The WEA does not enjoy the economic weapons or tools that legally protected unions do: “[T]he WEA is an organization with whom no school district is obligated to bargain, which possesses no right to strike, and which apparently counts administrators among its ranks.”<sup>193</sup> While the WEA lobbies and makes legally enforceable contracts with school districts, the protections against unfair labor practices, the right to concerted activity, and the right to bargain collectively are not within the WEA’s purview—nor does the WEA have the ability to apply economic pressure.<sup>194</sup> If women unionize and use the accompanying tools that come with labor law protections, women’s employment conditions can be improved.<sup>195</sup> But in order for female-dominated industries to unionize, Wyoming’s state statutes need to extend collective-bargaining rights from firefighters to all public employees.<sup>196</sup>

Other states have successful unions that represent public-sector employees.<sup>197</sup> In Montana, all public employees have the right to bargain collectively.<sup>198</sup> Chapter 31 of the Montana Code outlines this right, as well as the method for

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<sup>190</sup> *Id.*

<sup>191</sup> See *supra* note 73 and accompanying text. Private schools are under the protection of the NLRA, with a few exceptions, and are therefore not included in this discussion of unionization. *Id.*

<sup>192</sup> Michael C. Duff, “*Terms Matter: Reflections on the Wyoming Debate over the Teacher’s ‘Union’ and Teacher ‘Tenure,’*” 34 WYO. LAW. 16, 16 (2011). Even informational websites for teachers misidentify the WEA as a union. See, e.g., Am Winkler, *How Strong Are US Teacher Unions? A State-by-State Comparison*, ED EXCELLENCE MEDIA, <http://www.edexcellencemedia.net/publications/2012/20121029-How-Strong-Are-US-Teacher-Unions/20121029-Union-Strength-Wyoming.pdf>.

<sup>193</sup> Duff, *supra* note 192, at 17.

<sup>194</sup> *Id.* (“While one may term the WEA a union, it is a ‘union’ defanged severely, in a position to influence the educational debate through persuasion, but without access to traditional avenues of collective bargaining leverage.”).

<sup>195</sup> See *supra* notes 131–42 and accompanying text.

<sup>196</sup> WYO. STAT. ANN. §§ 27-10-101 to -109 (2019) (granting collective bargaining rights to firefighters).

<sup>197</sup> See *Teacher’s Unions/Collective Bargaining: State and Local Laws*, FINDLAW, <https://education.findlaw.com/teachers-rights/teacher-s-unions-collective-bargaining-state-and-local-laws.html> (last visited Apr. 21, 2019).

<sup>198</sup> MONT. CODE ANN. § 39-31-201 (2019) (“Public employees shall have and shall be protected in the exercise of the right of self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.”).



representation, appropriate units, union dues, and limitations.<sup>199</sup> For added protection of employees, Montana includes an antidiscrimination statute requiring labor unions to represent all employees equally.<sup>200</sup> The Wyoming State Legislature should modify its statutory scheme that currently exists only for firefighters to include *all* public employees in order to extend the NLRA protections to the public workforce.<sup>201</sup> By passing legislation that grants employees collective bargaining rights, employees will have more representation to change workplace conditions and bargain for women-friendly CBAs, which can mean constructive changes in the work environment and an increase in other crucial benefits.<sup>202</sup>

## VI. CONCLUSION

Unions improve wages, benefits, and workplace conditions for female employees.<sup>203</sup> Female-dominated industries in the private-sector should take advantage of the protections and tools provided by the NLRA to decrease gender disparity and increase essential benefits.<sup>204</sup> But women in public-sector employment lack these protections: the only Wyoming public-sector employees who have the right to collective bargaining are firefighters.<sup>205</sup> Wyoming should expand the right to collective bargaining to all public employees in order to diminish the equity disparity for women.<sup>206</sup>

## VII. PROPOSED LEGISLATION

The following proposed legislation should supplement Wyoming's Collective Bargaining for Firefighters statutory scheme.<sup>207</sup> Modeled after Montana's public-employee collective bargaining statutes, these proposed provisions require setting

<sup>199</sup> *Id.* §§ 39-31-201 to -205.

<sup>200</sup> *Id.* § 39-31-205 (“Labor organizations designated in accordance with the provisions of this chapter are responsible for representing the interest of all employees in the exclusive bargaining unit without discrimination for the purposes of collective bargaining with respect to rates of pay, hours, fringe benefits, and other conditions of employment.”).

<sup>201</sup> *See* WYO. STAT. ANN. §§ 27-10-101 to -109 (2019). There are few obstacles to adopting legislation granting collective bargaining rights to public employees. However, these obstacles should not prevent legislation on the matter, especially because Wyoming has both RTW and state law that grant collective bargaining rights to firefighters. *Id.*; *see also id.* §§ 27-7-108 to -115 (right-to-work).

<sup>202</sup> *See supra* notes 152–53, 178, 180 and accompanying text.

<sup>203</sup> *See supra* notes 131–80 and accompanying text.

<sup>204</sup> *See supra* notes 152–53, 178, 180 and accompanying text.

<sup>205</sup> WYO. STAT. ANN. § 27-10-101 to -109 (2019); *see also supra* notes 95–96 and accompanying text.

<sup>206</sup> *See supra* notes 152–53, 178, 180, 187 and accompanying text.

<sup>207</sup> WYO. STAT. ANN. §§ 27-10-101 to -109. Sections 27-10-104 to -107, 109 should remain unchanged with regard to language, but may require re-numbering.

up an administrative body to handle collective bargaining, unfair labor practice, and election disputes. In the alternative, the Legislature can opt for a mandatory arbitration approach.<sup>208</sup>

**27-10-101. Definitions.**<sup>209</sup>

(a) As used in this act [ §§ 27-10-101 through 27-10-112 ] the following terms shall, unless the context requires a different interpretation, have the following meanings:

- (i) “Appropriate unit” means a group of public employees banded together for collective bargaining purposes as designated by the board.
- (ii) “Board” means the board of personnel appeals [This provision can be modified to include any appropriate administrative board or can be omitted in favor of mandatory arbitration.]
- (iii) “Confidential employee” means any person found by the board to be a confidential labor-relations employee and any person employed in the personnel division, department of administration, who acts with discretionary authority in creating or revising state classification specifications.
- (iv) “Exclusive representative” means the labor organization that has been designated by the board as the exclusive representative of employees in an appropriate unit or has been so recognized by the public employer.
- (v) “Labor dispute” includes any controversy concerning terms, tenure, 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 the proximate relation of employer and employee.
- (vi) “Labor organization” means any organization or association of any kind in which employees participate and which exists for the

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<sup>208</sup> See MONT. CODE ANN. § 2-15-1705 (2019) (establishing the board of personnel appeals); WYO. STAT. ANN. § 27-10-105 (establishing arbitration after thirty days of dispute between employer and firefighters). In addition to the proposed legislation mentioned in this Comment, there are additional options to restrain the rights of striking for public-employees whose striking could result in harm to the public. See, e.g., MONT. CODE ANN. §§ 39-31-501 to -505 (prohibition of striking for police officers).

<sup>209</sup> Montana Code § 39-31-103 (2019) serves as a model for this proposed provision.

primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment.

- (vii) “Management official” means a representative of management having authority to act for the agency on any matters relating to the implementation of agency policy.
- (viii) “Person” includes one or more individuals, labor organizations, public employees, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.
- (ix) “Public employee” means:
  - (A) except as provided in subsection (9)(b), a person employed by a public employer in any capacity; and
  - (B) an individual whose work has ceased as a consequence of or in connection with any unfair labor practice or concerted employee action.
  - (C) Public employee does not mean:
    - (1) an elected official;
    - (2) a person directly appointed by the governor;
    - (3) a supervisory employee;
    - (4) a management official;
    - (5) a confidential employee;
    - (6) a member of any state board or commission who serves the state intermittently;
    - (7) a school district clerk;
    - (8) a school administrator;
    - (9) a professional engineer.
- (x) “Public employer” means the state of Wyoming or any political subdivision thereof, including but not limited to any town, city, county, district, school board, board of regents, public and

quasi-public corporation, housing authority or other authority established by law, and any representative or agent designated by the public employer to act in its interest in dealing with public employees.

- (xi) “Supervisory employee” means an individual having the authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment. This is the only criteria that may be used to determine if an employee is a supervisory employee. Any other criteria, including any secondary test developed or applied by the National Labor Relations board or the Wyoming board of personnel appeals, may not be used to determine if an employee is a supervisory employee under this section.

- (xii) “Unfair labor practice” means any unfair labor practice listed in the corresponding section.

**27-10-103. Selection of exclusive bargaining agent by majority; withdrawal of agent by majority.**

The organization selected by the majority of the ~~fire fighters~~ public employees in the appropriate bargaining unit in any city, town, or county shall be recognized as the sole and exclusive bargaining agent for all of the members of the ~~department~~ unit, unless and until recognition of such bargaining agent is withdrawn by vote of a majority of the employees in the unit.<sup>210</sup>

...

**27-10-110. Policy.**

In order to promote public business by removing certain recognized sources of strife and unrest, it is the policy of the State of Wyoming to encourage the practice and procedure of collective bargaining to arrive at friendly adjustment of all disputes between public employers and their employees.<sup>211</sup>

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<sup>210</sup> WYO. STAT. ANN. § 27-10-103 (2019). This proposed change to Wyoming Statute § 27-10-108 will replace the term “firefighters” with “public employees.”

<sup>211</sup> Montana Code § 39-31-101 (2019) serves as a model for this proposed provision.

**27-10-11. Public Employees Protected Right to Self-Organization.**

Public employees shall have and shall be protected in the exercise of the right of organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing on questions of wages, hours, fringe benefits, and other conditions of employment, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection free from interference, restraint, or coercion.<sup>212</sup>

**27-10-12. Labor Organization Obligation to Represent Employees without Discrimination.**

Labor organizations designated in accordance with the provisions of this Act are responsible for representing the interest of all employees in the exclusive bargaining unit without discrimination for the purposes of collective bargaining with respect to rates of pay, hours, fringe benefits, and other conditions of employment.<sup>213</sup>

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<sup>212</sup> Montana Code § 39-31-201 serves as a model for this proposed provision.

<sup>213</sup> Montana Code § 39-31-205 serves as a model for this proposed provision.