A Timely Analysis of Legal Developments

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Wisconsin Becomes Next "Right to Work" State

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On March 6, 2015, Wisconsin's State Assembly approved legislation that will make Wisconsin the 25th "Right to Work" state in the country. Governor Walker has said he intends to sign 2015 Assembly Bill 61 into law within days. The legislation significantly modifies Chapter 111 of the Wisconsin Statutes by, among other things, prohibiting employers and labor organizations from requiring employees to join, remain a member of, or financially support a labor organization as a condition of employment. Violation of the law will be a Class A misdemeanor. A brief summary of the key points follows.

The Nuts and Bolts

The law will not impact an existing collective bargaining agreement unless it is renewed, modified, or extended after the law's effective date. In other words, the "union security", "union shop" or similar provisions in current union contracts will still be valid and enforceable until the contract is renewed, modified, or extended.

In addition, in negotiations for a first union contract or negotiations to renew, modify, or extend an existing contract, employers and unions may not require, as a condition of obtaining or continuing employment, that any individual:

1. Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization;
2. Become or remain a member of a labor organization;
3. Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value, to a labor organization; or
4. Pay to any third party an amount that is in place of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of, or employees represented by, a labor organization.

This means, among other things, that employers and unions are prohibited from agreeing on or maintaining "union security", "union shop" or other similar provisions that require employees to become union members and/or pay union dues or fees as a condition of employment. To the extent permitted by federal law, such provisions would be deemed void.

Dues Check-Off Clauses

The new law will not impact the right of employers and labor organizations to negotiate dues check-off and other similar provisions. However, an employer cannot deduct dues or assessments from an employee's earnings unless the employee has voluntarily signed and provided to the employer an order (i.e., authorization) that such deductions be made. To the extent permitted by federal law, the order must be terminable by the employee's giving the employer at least thirty 30 days' written notice of the termination.

Open Issues

Employers and unions will likely arm-wrestle over what certain provisions of the law actually mean. For example, does an existing "union security" clause really need to be removed or modified in order to comply with the law? What does "provide anything of value" mean when it comes to the prohibition on requiring employees to support a labor organization as a condition of employment? How will a ban on required payments to "third parties" (which is likely aimed at worker centers and other union front organizations) be applied? How will "federal law" impact an employee's right to revoke his or her dues check-off authorization? Only time will tell how these questions will be answered.

Practically Speaking

Unions may challenge the constitutionality of the law on federal preemption and other grounds. Recent challenges to similar laws in Michigan and Indiana ultimately failed.

While the law will potentially be a blow to union coffers and political clout, it does not negate an employer's obligation to continue to recognize and bargain with an existing union under the National Labor Relations Act (NLRA). Nor will it be a license for employers to encourage employees to decertify existing unions - the National Labor Relations Board (NLRB) is still watching employers. In addition, it does not change a union's duty of fair representation to employees who choose not to be members of and/or pay dues to the union. Those employees remain part of their bargaining unit and covered by the applicable union contract.

Unionized employers will undoubtedly receive questions from employees about the new choice they have and whether, when and how they can revoke their dues check off authorization and what it means if they decide to do so. Because any communication will impact both the union and employee relationship, employers need to think carefully about, and work with legal counsel on, when and how best to respond to such questions. Some employers may find it advantageous to proactively communicate with employees; others may prefer to remain neutral and steer employees to the NLRB or, more likely, the National Right to Work Legal Defense Foundation. In either case, employers should expect to see more activism from their unions as unions try to convince employees that their union dues are well spent.

Finally, non-union employers need to revisit their efforts to stay union free through positive employee relations. Besides taking advantage of the NLRB's new ambush election rule (should it survive pending legal challenges), union organizers will now try to convince targeted employees that there truly is a "free lunch" – i.e., that employees have nothing to lose by giving the union a try because they cannot be required to pay union dues.

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