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LABOR & EMPLOYMENT

Right to Work Initiatives: Rallying Cry for Unions or Contributor to Decline?

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Special to the Legal

Organized labor unions in both the public and private sectors have experienced declining relevance and power since the 1980s—a decline made more precipitous by right-to-work (RTW) legislation and laws throughout various states—28 at last count. Though labor unions are woven into the cultural, political, and economic fabric of America, the changing climate for American labor has challenged unions' influence over the workplace and has presented potential risks to their continued survival. According to the U.S. Bureau of Labor Statistics, the union membership rate of workers nationally has declined from 20.1 percent in 1983 to 10.7 percent in 2016. Union membership in the public sector has proven to be more robust, however, with 34.4 percent of those workers in unions in 2016, more than five times higher than workers in the private sector.

The commonwealth of Pennsylvania finds itself contending with challenges from both sides of the RTW debate despite an especially long history with organized labor—from the Molly Maguires and Carpenters Hall, to the legal and legislative battles being waged today. Here, the battles are being fought in the legislative and executive branches of Pennsylvania government, as legislators pursue RTW measures and the Governor counters their efforts with executive fiat.

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For public sector union members and employers, the outcome of these battles may come down to the nation's highest court. In 2018, the U.S. Supreme Court will revisit its precedent on the constitutionality of RTW initiatives in public employment. The result may be continued erosion organized labor's power or a rallying cry for unions as they fight for relevance, collective rights and even survival.

> *"RTW opponents argue that RTW laws restrict freedom of association and limit the sorts of agreements individuals acting collectively can make with their employer.*

PENNSYLVANIA'S AND THE COUNTRY'S LABOR PAST

Pennsylvania has a colorful history surrounding organized labor dating back to 1724 when Philadelphia workers organized a carpenters association. The Carpenters Hall became the location for the First Continental Congress in 1774 and the Philadelphia carpenters were the first to "strike" in the U.S. in 1791 demanding a shorter, 10-hour workday.

In the late 1800s, the Molly Maguire uprisings were an early example of the power struggle between businesses and unions. The Molly Maguires, Irish immigrant coal miners in Northeastern Pennsylvania, formed a union and protested abuse by supervisors and company owners.

Pennsylvania also was part of larger labor movements involving clashes between workers and companies, including the

Great Railroad Strike of 1877 and the 1919 steelworkers strike involving half of the nation's steelworkers.

During and after World War II, organized labor grew stronger and remained at its strongest during the late 1940s and 1950s. Legislation to protect workers and favorable judicial decisions helped the unions reach their pinnacle and laws addressing child labor, overtime, working hour standards, and anti-discrimination were enacted.

Employers and employees received protection in 1947 in the form of the Labor Management Relations Act of 1947 or the Taft-Hartley Act. Taft-Hartley placed limits on unions' ability to strike and prohibited "closed shops," so employers could not agree to hire only unionized workers. Thus, employees who ceased being members of the union for any reason, from failure to pay dues to expulsion from the union as an internal disciplinary punishment, were no longer required to be fired even if the employee did not violate any of the employer's rules. Section 14(b) of the Taft-Hartley Act authorized that any state law that eliminates the closed shop is known as a "Right-to-Work law."

RIGHT-TO-WORK (RTW) LEGISLATIVE EFFORTS

RTW laws typically allow an employee to work at any place of employment without having to join a union in order to stay employed. They further prohibit unions and employers from entering into union security agreements and from making workers pay dues if they do not wish to do so.

Although state RTW laws vary, most generally govern the extent to which a union can require employees' union membership, or payment of union dues as a condition of employment. States with RTW laws require that if a union is voted in to a workplace, the collective bargaining agreement must cover all workers, both union and nonunion. These states allow employees to receive the benefits of a union contract and join a union if they wish, but employers cannot compel employees to join a union as a condition of employment.

In states without RTW laws, the workers covered by a union contract can refuse to join the union but they still must pay their "fair share" of fees associated with the workplace bargaining. Labor organizations have successfully argued for decades that they deserve some dues if they have to cover the costs of protecting non-union members. The more dues-paying workers, the more power and strength the unions possess. However, RTW legislation will likely lead to the reduction in union membership and dues collected, with a resulting decline in unions' bargaining strength.

RTW initiatives have weakened organized labor via legislative, judicial, and executive actions. Since the beginning of 2017, Kentucky and West Virginia have enacted RTW legislation and in February 2017, Missouri became the 28th state to enact a RTW law. The New Hampshire legislature recently narrowly defeated RTW legislation.

Surprisingly, even states with historically influential unions have successfully enacted RTW laws. Wisconsin enacted the nation's first workers' compensation and unemployment compensation laws and was considered the birthplace of the progressive movement in America. Despite this pro-worker history, the state enacted RTW legislation, which was upheld for a second time in July 2017 by the U.S. Court of Appeals for the Seventh Circuit Court. The win for employers in the state ended the ability of unions to enter into labor contracts that require all workers in certain jobs to pay union dues regardless of union membership.

Even Michigan, with its many unionized automobile workers and history of strikes and sit downs, has enacted RTW legislation. Twenty-two states, including Pennsylvania, do not have RTW laws—however the battle is being fought in the courts and state houses of many of these states.

In Pennsylvania, legislators have repeatedly introduced RTW bills over the last four legislative sessions and are calling the series of RTW bills the "Open Workforce Initiative." Introduced by several state lawmakers in the state House and Senate in the 2017-2018 Session, the "Open Workforce Initiative" seeks to eliminate forced dues in the public and private sectors and make Pennsylvania the latest state to enact RTW legislation.

THE USE OF EXECUTIVE ORDER TO BATTLE RTW

Organized labor has found an effective strategy to battle to the RTW proliferation; state governors' executive orders affecting the rights of government employees that bypass RTW legislative efforts to the contrary.

An example includes executive orders regarding the growing home healthcare industry where direct care workers, often relatives of the patient, frequently give government subsidized home care and aid to aging baby boomers who do not want to enter nursing homes. Unions argue that the direct care workers are government contractors due to receipt of Medicaid or Medicare funds and have influenced many states' governors, including Illinois and Pennsylvania, to use their executive power to establish processes to unionize home health care workers.

As discussed below, the Illinois Executive Order was successfully challenged by home care providers. Similarly, Pennsylvania direct care workers brought suit challenging the constitutionality of the executive order issued by Gov. Tom Wolf in 2015 that attempted to implement collective bargaining for direct care workers. The Pennsylvania Commonwealth Court held in 2016 that

Gov. Wolf's executive order was an unconstitutional attempt to exercise legislative power, in violation of the separation of powers doctrine. *Markham v. Wolf*, 147 A.3d 1259, 1279 (Pa. Cmwlth. 2016). Gov. Wolf appealed the Commonwealth Court's decision to the Pennsylvania Supreme Court, continuing the fight.

PUBLIC SECTOR JUDICIAL ACTION

The unions have also pressed to maintain/regain their strength through judicial action. In 1977, the Supreme Court of the United States (SCOTUS) in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), considered whether consistent with the First Amendment's protection of freedom of association, union dues of nonunion public employees could be used to support political and ideological causes of the union unrelated to collective bargaining activities.

SCOTUS held that compelling public sector employees to contribute to a particular association, through dues and membership, infringed on the employees' right to free association. Union officials, therefore, could not constitutionally spend objectors' funds for political and ideological activities. However, SCOTUS concluded that it is constitutional for the government to require its employees, who do not want to join a union, to pay union fees to subsidize collective bargaining and contract administration.

Since 1977, SCOTUS has questioned its *Abood* holding many times. In one such case, *Harris v. Quinn*, 134 S. Ct. 2618, 2632–34 (2014), Illinois home care providers challenged a state executive order authorizing Service Employees International Union (SEIU) officials to require the providers, who receive state Medicaid subsidies to give home care to disabled persons, to pay union dues or fees. In a 5-to-4 decision, SCOTUS held that the forced-dues requirement violated the providers' First Amendment rights because it rose to the level of forced speech and association without a compelling government interest. Justice Alito in criticizing *Abood* summarized its reasoning by writing, "except perhaps in the rarest of circumstances, no person in this country may be compelled to subsidize speech by a third party that he or she does not wish to support."

Last term, the SCOTUS split 4-to-4 (following the death of Justice Antonin Scalia) on whether to overrule *Abood* and declare public agency fee arrangements unconstitutional under the First Amendment. *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016). In *Friedrichs*, a group of public school teachers sued the California Teachers' Association for requiring nonmember teachers to pay union fees. In *Friedrichs*, SCOTUS was urged to overrule *Abood* and hold that under the First Amendment, public employees who decline to join a union cannot be required to pay union agency fees.

On Sept 28, the SCOTUS granted *certiorari* in a case nearly identical to *Friedrichs*; *Janus v. AFSCME, Council 31*, 851 F.3d 746 (7th Cir. 2017). *Janus* involves an Illinois state government child support specialist who is an unwilling member of AFSME. Janus has argued that forcing him to pay dues to AFSCME, which supports positions with which he does not agree, violates the First Amendment rights. Both the district court and the Seventh Circuit have rejected Janus' position, citing *Abood*. The decision in *Harris*, the *Friedrich* deadlock, and now certiorari in *Janus*, demonstrate a willingness by SCOTUS to revisit *Abood*. With Justice Neil Gorsuch joining the court, the question is: Will he be the necessary fifth vote to overrule *Abood*?

CONCLUSION

RTW opponents argue that RTW laws restrict freedom of association and limit the sorts of agreements individuals acting collectively can make with their employer. They do so by prohibiting workers and employers from agreeing to contracts that include "fair share fees." Since the law imposes a duty of fair representation on unions, non-members in RTW states can, and do, force unions to provide grievance services paid for by union members. Opponents also point out that workers in RTW states have on average lower wages, higher health insurance premiums, and fewer pension benefits. A 2015 study by the Economic Policy Institute found that wages in RTW states were 3.1 percent lower than states without the legislation.

Today labor unions are doing everything possible to fight RTW legislation and judicial challenges. As more states enact RTW legislation, it tears away at the fabric of traditional unions. Should SCOTUS hold in *Janus* that government employees are not required to pay mandatory union fees, public sector unions may find themselves on their heels and organized labor may hit one of its weakest and least influential points in American history. ●