

THE SCOOP

Inside Perspectives on Right-to-Work and
Other Hot Topics In Labor Law

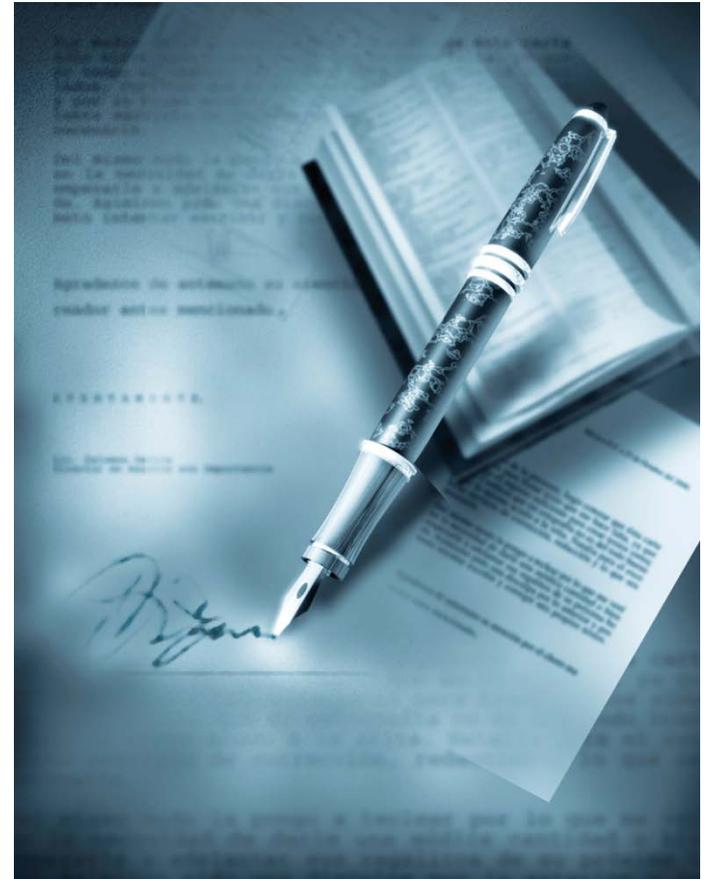
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History Behind Right-to-Work

- ▶ 1935: NLRA allowed an employer and union to agree to a “closed shop,” which meant an employee had to be a union member to work there and pay union dues as a condition of employment.
- ▶ 1947: NLRA amended to outlaw “closed shop.” Allowed “union shop” and permitted states to decide on an individual state-by-state basis whether to outlaw “union shop.”
 - ▷ “Union shop” requires union membership or the payment of dues equivalent after 30 days of (non-construction) or 8 days (construction).
- ▶ States that outlawed “union shop” known as “right to work” because employees have the right to work for an employer without being obligated to pay union dues as a condition of employment.
- ▶ Indiana was a “right to work” state from the late 1950s until 1964.

IT'S THE LAW IN INDIANA!

- ▶ Governor Daniels signed the bill into law on February 1, 2012.
- ▶ Indiana is now the nation's 23rd right-to-work state.
- ▶ Prior to Indiana, Oklahoma was the last state to enact a right to work law (in 2001).
- ▶ Many southern and southwestern states are right to work states.



Right to Work States

Alabama

Arizona

Arkansas

Florida

Georgia

Idaho

Indiana

Iowa

Kansas

Louisiana

Mississippi

Nebraska

Nevada

North Carolina

North Dakota

Oklahoma

South Carolina

South Dakota

Tennessee

Texas

Utah

Virginia

Wyoming

What Is RTW?

- ▶ The Right to Work law ("RTW") makes it a Class A misdemeanor to require an individual as a condition of employment to:
 - ▷ Become or remain a member of a labor organization;
 - ▷ Pay dues, fees, assessments or other charges to a labor organization; or
 - ▷ Pay to a charity or another third party an amount that is equivalent to, or a pro rata part of, dues, fees, or other charges required of a member of a labor organization.
- ▶ In short, Indiana law now makes it unlawful for an employer and a labor organization to agree to require that an employee, as a condition of employment, become or remain a member of a labor organization or pay dues, fees, assessments, or other charges to a union.
 - ▷ RTW does NOT outlaw unions in Indiana; it just prohibits compulsory union membership

When is RTW Effective?

- ▶ **March 14, 2012**
- ▶ Under RTW, contracts in effect as of March 14, 2012, will not be affected. RTW only applies to contracts executed after that date.
- ▶ So, once any such contracts expire, are modified, renewed, or extended, then RTW's prohibitions will apply.
- ▶ If a labor contract is being negotiated now, but will be ratified or takes effect after March 14, 2012, RTW applies to that contract



Are Any Employers Excluded From RTW?

- ▶ RTW only applies to *private sector* employers
- ▶ RTW applies to all employers with 1 or more employees in Indiana
- ▶ Except:
 - ▷ Employees or employers subject to the Railway Labor Act
 - ▷ Employees employed on property over which the United States government has exclusive jurisdiction.
- ▶ As a result, RTW applies to nearly all Indiana employers.
- ▶ This includes construction industry employers and unions

Remedies for Violations

- ▶ An individual who is employed by an employer may file a complaint that alleges a violation or threatened violation of RTW with:
 - ▷ the Indiana Attorney General; the Indiana Department of Labor; or the prosecuting attorney of the county in which the individual is employed.
- ▶ An individual may also bring a civil action in state court. The court can award a successful plaintiff:
 - ▷ The greater of: the actual and consequential damages resulting from the violation or threatened violation; or liquidated damages of not more than \$1,000;
 - ▷ Attorneys' fees, litigation costs, and expenses;
 - ▷ Declaratory or injunctive relief; and
 - ▷ Any other relief the court considers proper.

Payments to Union-Affiliated Funds

- ▶ RTW has no effect on employer payments to union-affiliated funds
 - ▷ as the payments are being made by *employers* and *not employees*, and employees' continued employment is unrelated to such payments.
- ▶ RTW has no effect on certain types of employee payments to union-affiliated funds
 - ▷ RTW only applies to agreements between "employers" and "labor organizations."
 - ▷ If the funds to which the contributions are made do not exist to assist employees in negotiating with, or employment is not conditioned upon employees' contributing to those funds, RTW would not be violated by post-March 14 labor contract provisions that require employees to pay into certain union-related funds.

Applicability of CBA to Non-Members

- ▶ If an employee in a bargaining unit decides not to be a union member or pay any type of dues/fees/assessments to the union:
 - ▶ The employee remains a member of the bargaining unit.
 - ▶ The labor contract still applies to the employee.
 - ▶ Under the NLRA, a union is required by law to represent all individuals in a bargaining unit equally, regardless of whether individuals are, or are not, members of the union.
 - ▶ The union still has to process the non-member's grievances and represent that employee in arbitration.
 - ▶ The union cannot charge non-union members for such representation.
 - ▶ The unions has the discretion, however, to determine whether particular grievances should be taken to arbitration – but cannot exercise that discretion discriminatorily.

Voting on Union Matters

- ▶ Non-union members in a bargaining unit can be prohibited from voting in any internal union matters, including in collective bargaining agreement ratification votes
- ▶ Union's by-laws control



Communication with Employees

Can't opt out until expiration of applicable CBA

On or about the date of expiration, may provide employees with new payroll deduction forms to decide whether to continue paying or not

RTW's Effect on Unions in Indiana

- ▶ Unions far weaker in right to work states, due to a number of factors:
 - ▷ Employees are not forced to pay union dues, and with fewer employees paying union dues, fewer employees are involved in the union or pay much attention to what the union does.
 - ▷ In RTW states, not uncommon for only 50% of the bargaining unit to be dues-paying union members.
 - ▷ Employers have more leverage in bargaining.
 - ▷ Individuals who are not members of the union cannot be required to strike and the union cannot impose a fine on those employees for failing to join the strike.
 - ▷ Unions know in the event there is not an agreement, a substantial percentage of employees will likely not withhold their labor as part of a strike, and will cross a picket line.

RTW's Effect on Unions in Indiana

- ▶ This is a divisive issue among employees.
- ▶ Union members often resent the fact that non-member employees get the same things union members get without having to pay anything.
- ▶ Approaches could range from friendly persuasion to haranguing to threatening.
- ▶ Most employers have work rules that prohibit threatening a co-worker and a non-member can report threats to management.
- ▶ Non-member could also file an unfair labor practice charge against the union.

What Does RTW Do To Non-Union Operations?

- ▶ Likely, not much, unless an organizing drive started.
- ▶ In that event, RTW means you lose a powerful message: that if the union wins, it will require employees to "pay dues or be fired".
 - ▷ Now, because an employer cannot require employees as a condition of employment to pay union dues, employees cannot be fired if they choose under Indiana law not to pay union dues.
 - ▷ This has always been a potent message to counter a union's organizing effort. Now greatly diminished, if not lost altogether, in Indiana as a result of Right to Work.
- ▶ Still, generally speaking, unions will be weaker in Indiana because the culture and public policy in the state will be less pro-union (as it has been for some time now).

NLRB Posting Rule

- ▶ August 2011: NLRB implements rule requiring employers to post notices informing employees of their rights under the NLRA and providing for certain penalties if employers failed to comply
 - ▷ Failure to post the notice would be an unfair labor practice and would toll the statute of limitations for claims brought by employees/unions.
- ▶ Employer groups—including the NAM, NRTWF, and US Chamber—filed lawsuits seeking to prevent the NLRB from implementing the rule
- ▶ December 2011: NLRB postpones effective date until April 30, 2012
- ▶ March 2012: Federal court invalidates parts of the rule that provide penalties for failing to post the notice, but not the posting requirement
- ▶ Employer groups have appealed – but rule still in effect

NLRB Posting Rule

- ▶ Posting requirement takes effect **April 30, 2012** for all employers subject to the NLRA.
- ▶ Tips for dealing with the posting rule:
 - ▷ Confirm whether your organization is subject to the NLRA.
 - ▷ Review the posting on the NLRB's website.
 - ▷ If appropriate, consider posting a non-union philosophy statement adjacent to the NLRB's required notice on your organization's bulletin boards and online.
 - ▷ Check Faegre Baker Daniels' alerts/website for any further changes in the posting requirement or the effective date.
- ▶ Assuming the posting requirement goes into effect on April 30, confirm compliance with posting requirements after the effective date.

Full-Strength Union-Friendly NLRB

- ▶ January 4, 2012: President Obama bypassed the Senate and appointed Sharon Block, Richard Griffin, and Terence Flynn to the NLRB
 - ▷ Used temporary “recess appointments.”
 - ▷ Recess appointments were needed to allow the NLRB to maintain enough members to operate.
 - ▷ President Obama had attempted to nominate Griffin and Block through the formal Senate confirmation process, but those formal nominations had been blocked by Senate Republicans.
- ▶ January 13, 2012: Several parties challenged the validity of these appointments in court.
 - ▷ Argued that these appointments were unconstitutional and created a new grounds for enjoining the NLRB’s notice posting requirement.

NLRB Permits Small Units Within a Facility

- ▶ NLRB recently changed the standard for determining who can be in a voting unit, which makes smaller units more likely.
- ▶ Union seeks to represent employees in one department or only one job classification at a facility.
- ▶ Employer claims appropriate unit includes employees that the union excluded (*DTG Operations* example)
- ▶ Then a two-step process applies:
 - ▷ Is the petitioned-for unit is an appropriate bargaining unit under traditional community-of-interest principles?
 - ▷ If so, the employer must show the additional employees it wants to include share an overwhelming community of interest with the petitioned-for employees.

NLRB Permits Small Units Within a Facility

- ▶ Under the “community of interest” standard, the NLRB will consider whether the employees:
 - ▷ Are organized into a separate department;
 - ▷ Have distinct skills, training, and job functions and perform distinct work;
 - ▷ Are functionally integrated and have frequent contact with other employees;
 - ▷ Have distinct terms and conditions of employment; and
 - ▷ Are separately supervised.
- ▶ If this standard is met, the NLRB deems the petitioned-for unit to be an appropriate unit, which raises the possibility of several mini-units
- ▶ Unions now are positioned to organize smaller, discrete groups within a location as opposed to traditional larger groups such as production and maintenance employees or drivers and warehouse employees.

NLRB Expedites Union Representation Elections

- ▶ Just before losing quorum, NLRB made significant changes to long-standing representation election procedures.
- ▶ Amends existing procedures by:
 - ▷ Limiting the issues to be determined in the pre-election process and
 - ▷ Precluding pre-election review of regional office decisions in most cases.
- ▶ Amendments include:
 - ▷ Allowing hearing officers to limit the evidence introduced at pre-election hearings;
 - ▷ Allowing hearing officers to forego post-hearing briefs;
 - ▷ Consolidating appeals over pre-election issues and conduct during the election into one post-election procedure; and
 - ▷ Eliminating the practice of delaying elections during pre-election appeal.

NLRB Expedites Union Representation Elections

- ▶ Before, the election was scheduled between 25 and 30 days after the regional office decided representation issues (e.g., whether the petitioned-for bargaining unit is an appropriate one).
- ▶ This rule eliminates the 25 day period, which means that the election could be scheduled as soon as 10 days after the regional office's decision.
- ▶ Bottom Line: Elections will occur faster if the employer and the union cannot agree on issues concerning the scope of the bargaining unit.
 - ▶ Places employers at a disadvantage in a number of ways, including when educating employees about risks and downsides of unionization
 - ▶ Leaves employees with less time to consider the facts before making a decision about unionization

The New Reality

- ▶ The confluence of these events means that business are likely to see:
 - ▷ More pro labor regulations and decisions from the NLRB; and
 - ▷ An uptick in union organizing because of the opportunity to organize smaller groups of employees within a location and get NLRB elections more quickly.
- ▶ Businesses can follow one of two paths:
 - ▷ Be proactive and prepare in advance.
 - ▷ Be reactive and respond once a union has started organizing efforts.

Steps To Take NOW to Prevent Unionization LATER

- ▶ Build and maintain a positive work environment where employees do not consider unionization as an option.
 - ▷ Audit your existing practices
 - ▷ Evaluate your existing communication methods
 - ▷ Develop an employee education strategy
 - ▷ Get employee input
- ▶ Determine if workforce restructuring is appropriate.
 - ▷ Look at group or team leader positions
 - ▷ Take steps to expand employees' "community of interest"
- ▶ Assess your current supervisors
- ▶ Train your management teams

QUESTIONS?

