



Right-To-Work Battle Heating Up Early In 2017

News

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Law360, New York (January 11, 2017, 3:47 PM EST) -- One of the hottest areas of labor law in recent years only got hotter over the first full weekend of 2017, with another state passing a right-to-work law and an Illinois federal judge setting the stage for a circuit split on whether cities and towns can pass such laws when state legislatures don't.

On Saturday, Kentucky **became the 27th state overall** and third in three years to make it illegal to require that workers be union members as a condition of employment, continuing a trend among manufacturing-heavy states that labor attorneys say is driven by economic pressure.

That same day, a federal judge in neighboring Illinois ruled the National Labor Relations Act bars municipalities from enacting right-to-work ordinances. This decision was in contrast to **a November decision** by the 6th Circuit allowing a right-to-work law passed in Hardin County, Kentucky, setting up for a split among circuits should the National Labor Relations Board-deferential 7th Circuit affirm the lower court.

Less than two weeks into 2017, it's clear the right-to-work fight is heating up. With yet another state now among the right-to-work ranks, other states and municipalities likely to join soon and a possible U.S. Supreme Court case on the horizon, attorneys say this is one area of labor law to watch closely.

"Right-to-work is not going away," Fisher Phillips regional managing partner Steve Bernstein said. "It's a fixture largely for economic reasons that are a lot more intractable than the whim of public opinion, so we're going to be hearing, I suspect, about right-to-work — its viability in different arenas, in different contexts — and there's a lot at stake for organized labor depending on which way this battle goes."

The phrase right-to-work is a bit of a misnomer, as the laws don't enshrine a right to employment but rather guarantee a worker can't be fired or denied a job for refusing to join a union or pay dues. Proponents of these laws say they protect workers from being forced to join unions against their will while detractors criticize them as attempts to undermine unions by cutting membership and reducing revenues from dues.

The power of states to pass right-to-work laws derives from Section 14(b) of the NLRA, which says

that the act doesn't block states or territories from enacting laws that bar mandatory union membership and dues-paying. The section was added in 1947 through the Taft-Hartley Act, and by 1960, 18 states had passed right-to-work.

Its expansion slowed dramatically from there, but has recently picked back up. Indiana became the 23rd right-to-work state in February 2012, and Michigan followed as the 24th that December. Wisconsin, West Virginia and now Kentucky have followed in the years since.

This expansion is driven by economics, attorneys say. Because right-to-work laws are perceived to weaken unions, states that pass right-to-work legislation are more attractive to businesses that want to keep unions out. This draw is especially strong in times of economic trouble, and when one right-to-work domino falls, its neighbors tend to follow.

"A state like Kentucky, for example, is bordered by right-to-work states," Jackson Lewis PC Boston office principal Howard Bloom said. "In a number of instances where a county in Kentucky or the state of Kentucky was vying for businesses to come to Kentucky, they've lost it because companies see the opportunity somewhere else to be union-free."

After previous pushes to enact right-to-work across Kentucky stalled, Kentucky counties began passing right-to-work laws on their own. The United Auto Workers challenged Hardin County's law and **won in February** but lost on appeal when the 6th Circuit ruled Section 14(b) empowers local governments to enact right-to-work.

The central question in the case is whether Congress intended Section 14(b) to give state subdivisions like cities or counties the power to enact right-to-work or if it intended that the right be restricted to state or territorial legislatures. The Supreme Court has ruled in other cases that "state or territory" should be read to include local governments where Congress doesn't say otherwise, but the 6th Circuit's ruling was the first applying this reading to the NLRA.

"It's a pretty expansive decision in that it sort of now grants pretty much any political subdivision, theoretically, the right to pass this kind of legislation," Proskauer Rose LLP's Mark Theodore said.

Like their peers in the Kentucky General Assembly in prior years, state legislators in Ohio have been hesitant to pass right-to-work. It is now the only state in the 6th Circuit without a right-to-work law, making its municipal governments prime candidates to pass right-to-work locally. But Ohio is not unique in having pockets of local support for right-to-work despite inaction in the capital.

"States like Minnesota, Pennsylvania, Colorado, Maine and a handful of others, they may not operate within the 6th Circuit, but they're thinking, 'What about us?'" Bernstein said. "'If the 6th Circuit feels that way, why wouldn't our circuit courts?'"

The Northern District of Illinois may have provided an answer to that question on Saturday when it

The Northern District of Illinois may have provided an answer to that question on Saturday, when it struck down a right-to-work ordinance passed by the village of Lincolnshire. In his opinion, U.S. District Judge Matthew F. Kennelly ruled Congress intended a narrow reading of “state” that restricts right-to-work authority to state governments and that another reading would result in a “patchwork scheme” of conflicting laws across city and county lines.

The ruling is unlikely to deter local governments from passing right-to-work outside of the Northern District of Illinois given that an appeals court has already ruled they can, attorneys say. The new Kentucky law also isn't likely to kill the UAW's push for an en banc review of the Hardin County law with the chance the law might be repealed down the line. But the ruling could upset local rule down the line as a vehicle for the Supreme Court to weigh in.

The 6th Circuit reversed the district court in its decision in November, but there are reasons to believe the 7th Circuit will not do the same. The court tends to be more deferential to the NLRB and federal regulators than some, according to Bernstein. And, at least in his experience, unions hold more sway in the region than they do in others.

“Now, more than ever, it seems not only possible but perhaps somewhat likely — barring a surprise from the 7th Circuit — that the Supreme Court may have an opportunity to resolve this,” Bernstein said.

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