Democratic Lawmakers Push for Compulsory Union Membership and Dues Payment in Reintroduced Legislation

Insights
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In yet another push to strengthen worker organizing efforts, a group of Democratic lawmakers joined Senator Elizabeth Warren (D-Mass.) and Representative Brad Sherman (D-Calif.) last week in announcing the reintroduction of the Nationwide Right to Unionize Act. The legislation, reintroduced on September 8, seeks to bolster employees' right to unionize by taking aim at "right-to-work" laws that have proliferated in states throughout the country. Such laws are currently permitted under Section 14(b) of the National Labor Relations Act (NLRA) and generally ban compulsory union membership and payment of union dues and fees as a condition of employment. What do employers need to know about right-to-work laws and this pro-labor legislation?

Section 14(b) of the NLRA and the Nationwide Right to Unionize Act

When the NLRA was first enacted in 1935, unions and employers were granted authorization to enter into "closed shop" agreements (a union security agreement whereby an employer agrees to employ only union members) and to compel the payment of union dues. This federal policy approving forced unionization changed in 1947, when Congress amended the NLRA to include Section 14(b) through its passage of the Taft-Hartley Act. Section 14(b) of the NLRA grants every state and U.S. Territory the authority to enact right-to-work laws forbidding unions and employers from entering into agreements which compel union membership and the payment of union dues and fees as a condition of employment.

The Nationwide Right to Unionize Act seeks to return federal labor policy to that existing prior to 1947 by repealing Section 14(b) of the NLRA and banning state right-to-work laws.

Unsurprisingly, the legislation has already received the endorsement of numerous labor unions, such as the United Steelworkers, the International Association of Machinists, Transport Workers Union of America, Service Employees International Union, Communications Workers of America, and the American Federation of Government Employees.

What are Right-To-Work Laws?

The right-to-work doctrine provides employees with the option to refrain from engaging in collective action such as labor organizing and union representation. If your business is located in one of the 27 states that have enacted right-to-work laws, each of your employees have the individual right to

decide whether or not to join a union and pay dues. Labor unions still operate in right-to-work states, but employees cannot be compelled to become members or pay dues as a requirement of their job.

If your business is located in a state that has not enacted a right-to-work law, however, your employees could be required to join a union and pay dues in order to get or keep a job. For example, if the requisite percentage of your employees organize to form a union, or elect to join an existing union, you will likely be forced to negotiate a union security clause into a collective bargaining agreement that requires all of your employees to be a member of the union (*e.g.* pay union dues), regardless of whether the employee(s) support the union.

Aren't Employees Generally Considered At-Will?

In short, yes. It is common for employers to conflate the meanings of "right-to-work" and "at-will" since each doctrine deals with labor and employment rights, but they are very different. "At-will" employment — which is the presiding common law in all but one state (Montana) — describes the general presumption that employers and employees have entered into an agreement with each other to be free to terminate the employment relationship at any time and for any (legal) reason. The presumed at-will agreement is made between each employee and the employer and is generally only subject to change when a formal employment contract is executed.

The right-to-work doctrine does not, as some unfamiliar with the term may assume, entail any guarantee of employment for individuals who are ready and willing to work, or alter the presumption of at-will employment. Rather, it vests employees with the right to freely choose whether to be represented by a union (a third-party) in the bargaining relationship between the union and the employer. While the right-to-work doctrine does not itself alter the at-will presumption, a resulting collective bargaining agreement may contain terms that limit, alter, or supersede it.

What are the Benefits of Right-to-Work Laws and What Effect Will the Reintroduced Legislation Have?

A majority of states in the country enacted right-to-work laws after the NLRA was amended to include Section 14(b). Among other reasons, these states have found that such laws are necessary to protect employees' individual rights and freedom of association, to foster economic growth, and to allow workplaces to remain competitive in a global economy.

Union advocates generally assert that such laws are unfair because, although a union possesses a duty of fair representation for everyone in the bargaining unit (even non-members), employees in right-to-work settings may nonetheless decide to be "free riders" by receiving the benefits associated with union representation without paying membership dues or fees. Such opponents also argue that right-to-work laws erode union bargaining power, resulting in lower wages and benefits for workers.

for workers.

Status of the Nationwide Right to Unionize Act and Practical Implications for Employers

Whether the reintroduced legislation will be passed into law is unclear. Organized labor has tried repeatedly, without success, to secure the repeal of Section 14(b). Senator Warren recently attempted to pass versions of this bill on two prior occasions to no avail — first in 2017 and then in 2020.

Notably, across that same time period, the number of states with right-to-work laws grew by almost a quarter: from 22 states in 2011 to 27 today. Businesses should also be aware that the legislation's ban on right-to-work laws is also included in a separate and more sweeping labor law reform package known as the Protecting the Right to Organize (PRO) Act, which is currently stalled in the U.S. Senate. You can read about the PRO Act here and here.

If passed, the reintroduced legislation would outlaw right-to-work laws and pave the way for compulsory union membership and payment of union dues, at least for employers in the ***private*** sector. Employers should then expect increased organization efforts, and would also be wise to proactively prepare in-kind with self-education and relevant labor law trainings to be in a position to best serve the interests of the employees.

It is unclear if the legislation would undo all right-to-work protections, however, due to a 2018 ruling by the U.S. Supreme Court in *Janus v. AFSCME*. The high court held in that case that the First Amendment prohibits States and ***public***-sector unions from compelling government employees to pay union fees (even when they benefit from union representation).

Conclusion

The pro-labor policy of the current administration is being disseminated in many forms and at a rapid pace. Fisher Phillips will continue to monitor this and other NLRB-related issues, but if you have any questions in the meantime, we encourage you to consult with your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations Group. Also, make sure you are subscribed to Fisher Phillips' Insight System to receive the most up-to-date information directly in your inbox.

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