Kentucky's Right-To-Work Law Upheld By State Supreme Court

Insights
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A bitterly divided state Supreme Court upheld Kentucky's right-to-work law by a 4-3 vote yesterday, cementing Kentucky's status as one of 27 states in the country to have such a law on the books. Although the law was originally signed in January 2017 and immediately took effect, unions in Kentucky resisted accepting the reality of right-to-work and were banking on this litigation to overturn law. Now that the legal challenges have been denied, employers should ensure they are familiar with right-to-work, as the law could have an impact on your workplace.

What Does Right-To-Work Mean?
Before we analyze the litigation, it's helpful to ensure a complete understanding of what the law says. Right-to-work laws generally make it unlawful to require a person to be or become a union member, or to pay union dues, as a condition of initial or continued employment. The name comes from the idea that people should be allowed to work without having to financially support organizations or causes that they do not morally support.

Union advocates make the counterargument that employees who work in unionized workplaces should have to share the cost of union representation. It is important to note that right-to-work laws do not prevent people from joining or supporting unions, they just prohibit requiring them to do so.

Brief History Of Right-To-Work In Kentucky—And Beyond
In 2012, Indiana became the 23rd right-to-work state in the country—the first state to do so in 12 years—and started a flurry of right-to-work legislation. Following in its footsteps, Michigan, Wisconsin, and West Virginia enacted such laws in the next several years. And on January 9, 2017, Kentucky became the 27th state to put right-to-work into effect. (As an aside, another Midwestern state passed a right-to-work law later in 2017 when Missouri's state legislature took action, but state voters rejected the law in a recent election and wiped it off the books.)

Like other laws of its kind, Kentucky's right-to-work law prohibits any employer (public or private) from compelling a person to join or remain a union member as a condition of being hired or remaining employed. It also prohibits requiring any employee to pay dues, fees, assessments, or similar charges to a labor organization, and prohibits requiring any employee to make payments to charities in lieu of payments to labor organizations.

Kentucky's law has a few special provisions that apply only to public sector employees. For example, it prohibits deducting dues and similar payments from public sector employees' pay without written

consent, and allows them to easily withdraw consent. It also prohibits public sector employees from engaging in strikes or other work stoppages (private sector employees remain free to do so).

The law does not apply to labor agreements entered prior to January 9, 2017, but it does apply to extensions and renewals of such contracts made from that date forward. The law expressly prohibits local governments from enacting inconsistent legislation, so you will not see cities, counties, or other municipalities passing their own measures contradicting right-to-work.

Governor Bevin has touted the success of the new law as being instrumental in the state's economic recovery. As he stated yesterday, "with $13.5 billion invested in the Commonwealth since the passage of HB 1 in 2017 and business increasing by 40 percent this year, we are already reaping the benefits of this transformative legislation." Further, the Kentucky Chamber of Commerce has stated that the law, which had been one its priorities for decades, has resulted in a record number of economic development commitments in the last two years.

Union Challenge To The Law Rejected By Supreme Court

Unions did not agree with these assessments, however, believing that right-to-work was harmful to their membership and to their organizations. Shortly after it went into effect, union members Fred Zuckerman (Teamsters Local 89) and William Londigran (Kentucky State AFL-CIO), challenged the new law by arguing that it violated several state constitutional provisions. Their lawsuit was tossed out by a lower state court in September 2017, but the state Supreme Court agreed to hear the challenge without review by the state Court of Appeals. After over a year of briefing and legal argument, the court issued the 4-3 ruling in favor of the law on November 15.

Writing for the four-justice majority, Justice Laurence VanMeter knocked aside the four main arguments brought by the union advocates:

- First, the unions argued that the law violates the equal protection protections put into place by the state constitution. However, the majority said that the state had a sufficient justification for passing the law—namely, the goal of shoring up the state's economy, attracting new employers and new jobs, and increasing overall business—and that was enough to satisfy the constitutional test. After all, the majority reasoned, the federal Taft-Hartley Act expressly permits states to pass right-to-work laws, which means that it would only examine the state's justifications with the lightest level of scrutiny.
- Next, the court rejected the contention that the law was a "special" piece of legislation that had been outlawed by a 19th-century revision to the state constitution, disagreeing with the premise that it singled out a certain class for harsher treatment than others. As the majority stated, "the act applies to all collective bargaining agreements entered into on or after January 9, 2017, with the exception of certain employees covered or exempted by federal law. With the exceptions required by federal law, it applies to all employers and all employees, both public and private."
- Third, the unions argued that they would be forced to represent non-members without compensation, which violated the constitution's "takings" clause. But the Supreme Court

compensation, which violated the constitution's "takings" clause. But the Supreme Court disagreed. The unions would still be compensated by being designated as the exclusive representative of whatever bargaining unit they represented, it said, acting on behalf of all of the workers in that unit. The majority noted that this gave unions a "tremendous" amount of power over the wages, benefits, and working conditions afforded their membership, which cast doubt on any "takings" challenge.

- Finally, the unions contended that the labeling of the law as an "emergency" act—which permitted it to take effect immediately and not wait the traditional 90 days before implementation—was not proper. Once again, the Supreme Court swept aside the challenge. By justifying the need for immediate passage and implementation because it would attract new business and investment, the state provided all the justification necessary to warrant the "emergency" designation and survive the challenge.

What Does This Mean For Kentucky Employers?

Now that the law has been given the final green light, it is time to ensure full compliance. If you are or are about to negotiate a union contract, you must ensure that the final agreement does not run afoul of the right-to-work law. This includes existing contracts that are being renewed, renegotiated, or extended. If you currently have union contracts that include mandatory union membership and dues payment, you should make a note to remove such language when the contract comes up for renegotiation.

You should also be aware that even though the "union shop" is now prohibited, many contracts will still have dues-checkoff provisions which require you to withhold union dues from employees' paychecks in accordance with written dues authorization cards signed by employees. It is important for employees to be informed about their rights to revoke their written authorization cards at least annually. You should also educate your supervisors and higher-level managers regarding the law to ensure no one violates employees' rights.

For more information about how this law affects your workplace, contact any attorney in our Louisville office at 502.561.3990, or your Fisher Phillips attorney.

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