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Public Sector Right to Work Fact Sheet

Background

Since the 2010 election, public employees have been under attack from conservative politicians and corporate interest groups with a specific union-busting agenda. Since the passage of Wisconsin's new law in 2015, twenty-five (25) states in the U.S. are so-called "right to work" (RTW) states[1], meaning that non-members can refuse to pay dues for services that the union must provide to them under the law, or risk violating the duty of fair representation.[2] Public employees and their unions currently face a number of right to work challenges in legislatures, at the ballot, and in the courts.

Overview

This fact sheet discusses the following:

1. Current Public Sector RTW Challenges in the States
2. Legal History of Attacks on Public Sector Agency Fees
3. Options for Fighting Back Against RTW Attacks

Current Public Sector RTW Challenges- States

Anti-union groups are pushing RTW for the public sector in a number of states this year, including those generally thought of as labor-friendly states.

- **Wisconsin's** public employees, already hit by the 2011 law basically eliminating their bargaining rights, are now also covered by the state's 2015 RTW law that applies to both the public and private sector.
- In **Illinois**, one of the first actions taken by Governor Rauner was to issue an Executive Order and file a court case against public employee unions' agency fees. Specifically, Gov. Rauner's Executive Order banned agency fees from being paid to public sector unions from the agencies. In his lawsuit, the Governor wrongly relies on a recent U.S. Supreme Court case, *Harris v. Quinn* (2014), to claim that agency fees are unconstitutional. Thankfully, with help from the Illinois Comptroller and Attorney General, who have correctly interpreted the U.S. Supreme Court's decision, public sector unions are still collecting agency fees.
- In **Oregon**, efforts are underway to put two public sector RTW challenges on the 2016 ballot. These initiatives are model legislation by the American Legislative Exchange

[1] The 23 current public sector RTW states are: AL, AZ, AR, FL, GA, ID, IN, IA, KS, LA, MI, MS, NE, NV, NC, ND, OK, SD, TX, UT, VA, WI, WY. South Carolina and Tennessee are also RTW in the private sector; although they are not RTW in the public sector, they have no bargaining rights (SC) or limited bargaining rights (TN) for public employees.

[2] The duty of fair representation arises out of a U.S. Supreme Court case, Vaca v. Sipes (1967), which requires unions to represent all bargaining unit employees in matters arising under the collective bargaining agreement (CBA) in a way that not arbitrary, discriminatory, or in bad faith. That is usually interpreted to mean that public sector unions must at least file a grievance or handle other matters rising under the CBA without regard to whether the worker is a member or non-member of the union. There are some exceptions to this, as explained below.

Council (ALEC), which is a well-known union-busting organization. The Oregon initiatives would make the public sector RTW, but also allow "members-only unions." "Members only unions" may sound good in concept because it can take away the union's argument that we have to still represent the free-loading non-members. However, in actuality, the way that the Oregon RTW initiatives are drafted, they effectively end exclusive representative status for the unions, and would require annual re-certification by every member, notice from the union to each employee annually that they can quit the union, bar "me, too" benefits, and require the employer to bargain with any non-member, taking away the bargaining strength from the unions.

- **RTW Zones** – conservative counties in states such as Kentucky, Illinois, Delaware, and Washington are attempting to pass RTW at the county/local level when they cannot get RTW though at the state level. These attempts in the private sector are clearly pre-empted by the National Labor Relations Act and in the public are pre-empted by state law as well, but require unions to spend time and money fighting them.

Public Sector Agency Fee Legal Challenges

The U.S. Supreme Court has ruled in the past that agency fees are constitutional. The first major case was *Abood v. Detroit Board of Education* (1977), where the Court held that non-members can be assessed their portion of dues for bargaining, contract administration and the grievance process. *Lehnert v. Ferris Faculty Association* (1991), also upheld agency fees, clarifying that chargeable activities must be "germane" to collective bargaining activity[3] and justified by the government's policy interest in labor peace and avoiding free riders[4]. More recently, the Court again chipped away at agency fees by requiring an affirmative opt-in for supplemental dues for political expenses in *Knox v. SEIU* (2012).[5] The Court in *Harris v. Quinn* (2014) failed to overturn agency fees completely, as was argued by the National Right to Work Foundation, but did make the entire home health sector RTW[6]. In its next term, which begins October 2015, the U.S. Supreme Court will hear the next agency fee case – *Friedrichs v. CTA* – which argues that *Abood* and the Court's other agency fee precedents should be overturned in favor of making the entire public sector in the U.S. RTW, and even asks to eliminate public sector bargaining. A decision will come out by June 2016. Even if the Court does not strike down agency fees entirely, it is expected that the Court may require affirmative opt-in for any lobbying/political expenditures/activities, even those related to collective bargaining.

[3] This "germane" test stated that lobbying and political activities relating to collective bargaining where chargeable, but those unrelated to the contract process were not.

[4] Importantly, Justice Scalia sided with the majority in this case. Although he is a very conservative Justice, he went on record in *Lehnert* opposing free riders. He is unlikely to overturn his own precedent upholding agency fees in general, but it's unclear where he will draw the line in the future regarding chipping away at what agency fees can be used for.

[5] Justice Alito's majority opinion for the Court unilaterally required this opt-in although it was neither briefed nor argued at the U.S. Supreme Court. Justice Scalia concurred with this provision.

[6] Alito's majority opinion stated that home health workers were not really "public employees" merely because they received public funds, and so the agency fee statute did not apply to them. By extension, child care workers were also made RTW.

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Options for Fighting Back Against Public Sector RTW Attempts

Since the U.S. Supreme Court could make the entire U.S. RTW by the end of this year, all public sector unions, not just those in current RTW states, should begin to explore their options to retain as many members as possible should this happen. The following section details some advantages unions have in certain RTW states.

- *DFR exception* – Florida has a Duty of Fair Representation exception for public sector unions due to the fact that the Florida public employee bargaining law contains a provision to allow any worker to represent him/herself through the grievance process.[7] Therefore, public employee unions in Florida do not have to represent non-members in the grievance process.[8] Florida is currently the only state with this DFR exemption, but other states could review their bargaining law or state constitution to see if they have similar provisions under which to legislate or litigate to gain this right. There are concerns by some public sector unions that ending the DFR would open the door to members only unions, which could weaken unions' bargaining rights (See below).
- *Charge non-members a fee for service* – The Nevada Supreme Court held in 2000 that despite the state's RTW law, unions can charge non-members a fee for handling grievances[9]. The fees cover some of the cost of hearing officers, arbitrations, and the union's attorney fees. This provision has led to Nevada unions having a high rate of membership. This year, the NLRB announced that it was inviting briefs on a case about whether a union can charge a non-member for representation that could make this fee provision apply to the entire private sector RTW workforce.[10] Public sector unions in RTW states could investigate whether to pursue this option through litigation or legislation.
- *Offer members-only benefits* – Unions can offer benefits that are only available to dues-paying members, including the Union Plus program[11], insurance (life, car, AD&D, dental, identity theft, liability), legal assistance, retirement bonuses, scholarships, and immigration assistance. Less traditional members-only benefits include: sports tickets, access to cribs or carseats for low-income members, and continuing education for members who need those to be licensed for work (attorneys, nurses, etc). These benefits are good organizing tools for public unions in RTW states.
- *Members-only or minority unions* – The Oregon RTW ballot initiative would establish "members-only" unions. Anti-union groups support members-only unions in the context of turning an agency-fee state to RTW because it takes away the unions' argument that we have to represent free-riders. While the Oregon RTW/members-only ballot initiative

[7] Fl. Stats. 447.301 and 447.401.

[8] Florida courts have upheld this interpretation that unions do not have to represent non-members. See, *Galbreath v. School Bd. Of Broward Co.*, 446 So.2d 1045, 1047-47 (1984), and *Sherry v. United Teachers of Dade*, 368 So.2d 445 (1979)

[9] *Cone v. Nevada Service Employees Union/SEIU Local 1107*, 998 P.2d 1178 (2000).

[10] http://www.law360.com/articles/644547/nlrb-invites-briefs-on-union-fees-for-nonmembers; The NLRB later dropped the case.

[11] http://www.unionplus.org/

is flawed (see above), it may be worth researching the benefits of members-only unions in current RTW states. In current RTW states, if the union can have a members-only contract with just cause/due process protections, wage increases, etc., non-members would likely decide to join the union to get those benefits. However, the public sector does not have safeguards for unions like the private sector and government employers could take advantage of members-only union status to give non-members the same perks negotiated by the union. More research needs to be done in this area. Note that members-only unions are different than minority unions. Minority unions have gotten some attention lately with the UAW organizing drive at Volkswagen in Tennessee. After the UAW lost the election due in part to conservative politicians scaring workers into thinking that jobs would be lost if there was a union, VW and UAW, as well as some labor lawyers, have looked into whether to have a minority union. Minority unions are allowed under the NLRA if the employer consents, but it is unclear if they are allowed if the employer objects. The ability to have a public sector minority union in a RTW state would depend on how a particular state law modeled the NLRA, and could come about through litigation.

Conclusion

With RTW attacks on public sector unions and their members through the U.S. Supreme Court, legislation, ballot initiatives, Executive Orders, and state and Federal litigation, all of LIUNA's public sector Locals should be aware of the depth and breadth of these fights. Even if certain states appear "safe" now because of labor-friendly Governors or legislatures, the U.S. Supreme Court could make the entire public sector RTW by the end of 2015. LIUNA's public sector Locals could also consider options, whether they are currently in agency fee or RTW states, such as DFR exemptions, charging members for representation, offering members-only benefits, or pursuing members-only or minority union status; these changes would depend on state law and require well-planned litigation and coordination with the Regional Managers and International Union. LIUNA's public sector Locals should be in constant contact with their membership about these challenges.