NATIONAL RIGHT TO WORK
LEGAL DEFENSE FOUNDATION, INC.
Defending America's workers from the abuses of compulsory unionism since 1968

Right to Work and Collective Bargaining: Is It Right for You?

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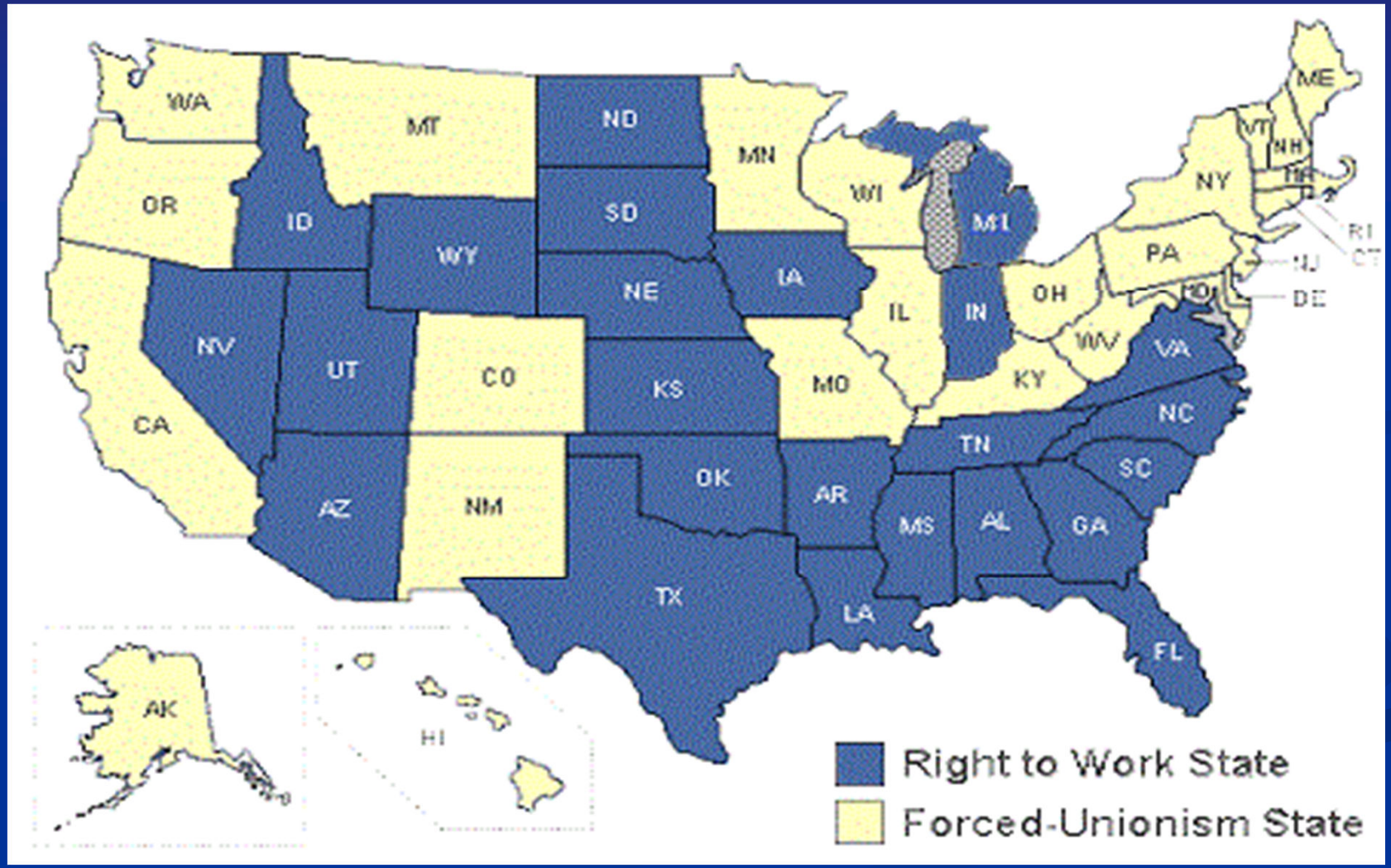
Right to Work Laws

- Prohibit employers and unions from requiring employees to join or pay union fees to work
- Some provide for civil damages & injunctive relief; some provide for criminal penalties
- Twenty-four Right to Work states
  - First were Florida & Alabama (1943)
  - Most recent are Oklahoma (2001), Indiana (2012), & Michigan (2012)
- Federal (71 U.S.C. § 7102) and postal (39 U.S.C. § 1209(c)) employees

Twenty-Four Right to Work States



Right to Work Laws

- Cover private-sector employees subject to NLRA (except on exclusive federal enclaves), but not Railway Labor Act (railroad & airline employees), 45 U.S.C. § 152, Eleventh preempts
- Coverage of state & local public employees varies from state to state & type of employee
- *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746 (1963): state Right to Work laws may prohibit ***both*** forced fees and forced membership

Right to Work Laws

- Expressly permitted: NLRA § 14(b), 29 U.S.C. § 164(b), added by Taft-Hartley Act (1947)
  - *Algoma Plywood & Veneer Co. v. Wis. Employment Relations Bd.*, 336 U.S. 301 (1949): (Right to Work laws authorized under Wagner Act before § 14(b))
- *Lincoln Fed. Labor Union v. Nw. Iron & Metal Co.*, 335 U.S. 525 (1949): Right to Work laws do not violate 1st Amendment or contracts, equal protection & due process clauses
- *Davenport v. WEA*, 551 U.S. 177, 184 (2007): "it would be constitutional for Washington to eliminate [public-sector] agency fees entirely."

Recent Right to Work Law Litigation

Oklahoma

- *Eastern Okla. Bldg. & Constr. Trades Council v. Pitts*, 82 P.3d 1008 (Okla. 2003): Right to Work law does not violate state constitution
- *Local 514 Transp. Workers Union v. Keating*, 358 F.3d 743 (10th Cir. 2004): Right to Work law valid & not preempted by federal law except for certain provisions in certain circumstances

Recent Right to Work Law Litigation

Indiana

- *Sweeney v. Daniels*, 2013 WL 209047 (N.D. Ind. Jan. 17, 2013): union challenge dismissed
  - Right to Work law does not violate contracts, ex post facto and equal protection clauses of U.S. Constitution, & is not preempted by federal labor laws
  - Union has appealed to 7th Circuit, which heard oral argument on Sept. 12, 2013

Recent Right to Work Law Litigation

Indiana (cont.)

- *United Steel Workers v. Daniels*, No. 45C01-1207-PL-00071 (Lake Cnty., Ind., Super. Ct. filed Mar. 15, 2012):
  - Alleges Right to Work law violates state constitutional provision that "no person's particular services shall be demanded without just compensation"
  - No violation because unions are volunteers, Right to Work law doesn't require union services
  - Oral argument on summary judgment motions after Nov. 1, 2013

Recent Right to Work Law Litigation

Michigan

- *In re Request for Advisory Opinion on Constitutionality of [Mich. RTW Laws]*, No. 146595 (Mich. S. Ct. filed Jan. 28, 2013): Gov.'s request denied July 5
- *United Auto Workers v. Green*, No. 314781 (Mich. Ct. App. filed Feb. 14, 2013): Alleges public-sector Right to Work law can't apply to state civil service
  - Court held Aug. 15, 2013, law constitutionally applies to civil service; appeal to Mich. Supreme Court filed Sept. 11, 2013

Recent Right to Work Law Litigation

Michigan (cont.)

- *Michigan AFL-CIO v. Callaghan*, No. 2:13-cv--10557 (E.D. Mich. filed Feb. 11, 2013): Alleges private-sector Right to Work law preempted, motions to dismiss & for 4 workers to intervene pending

Future Right to Work Laws?

- National Right to Work Committee targets: Kentucky, Maine, Missouri, Montana, Ohio, Pennsylvania, special emphasis on PA
- These are long term projects, but roll call vote is expected in Pennsylvania
- National Right to Work Act, S. 204, introduced 1/31/13 by U.S. Sen. Rand Paul (R-KY) (14 cosponsors), & H.R. 946, introduced 3/5/13 by Rep. Steve King (R-IA) (101 cosponsors)

Right to Work Laws Protect Freedom of Speech & Association

"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

– Thomas Jefferson

Right to Work Laws Protect Freedom of Speech & Association

- Even as to collective bargaining, unionism is 1st Amendment protected ideological cause:
  - "The right . . . to discuss, and inform people concerning, the advantages & disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945)
  - "To compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests." *Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 222 (1977).

Right to Work Laws Protect Freedom of Speech & Association

- Union dues and fees also used for politics, lobbying and ideological advocacy
- 1st Amendment and federal labor statutes forbid forced full membership & forced financial support of politics & ideological activities other than bargaining
  - *Abood* – public employees
  - *Communications Workers v. Beck*, 487 U.S. 735 (1988) – private-sector employees

Right to Work Laws Protect Freedom of Speech & Association

- Right to Work laws only effective way to prevent forced support of union political & ideological activities
  - Unions keep the financial records & calculate the breakdown of chargeable & nonchargeable expenses
  - Employees have to negotiate objection procedures just to pay the union-calculated reduced fee
  - Protacted, complex & expensive litigation necessary to challenge the union's calculation
- Right to Work: simply refrain or resign & revoke

Right to Work Laws Prevent "Forced Riding"

- Unions seek monopoly bargaining privilege, depriving workers of right to negotiate their own employment terms and conditions
  - NLRA permits unions to represent only members: *Con. Ed. Co. v. NLRB*, 305 U.S. 197, 236-37 (1938)
- Monopoly bargaining often hurts individual workers:
  - "Full-timers may bargain to limit the jobs of part-timers, seniority provisions may disadvantage younger workers, and wage increases of the low skilled may be at the expense of the highly skilled." Clyde W. Summers, Book Review, 16 Comp. Lab. L.J. 262, 267 (1995).

Right to Work Laws Prevent "Forced Riding"

- Right to Work laws thus protect workers from "forced riding," forced association with & subsidization of private organizations:
  - they don't want representing them
  - activities of which they oppose, and
  - monopoly bargaining agreements of which may be to their detriment

Supreme Court Questions Unions' "Free-Rider" Argument

- *Knox v. SEIU Local 1000*, 132 S. Ct. 2277 (2012):
  - "[F]ree-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Id.* at 2289.
  - "Acceptance of the free-rider argument as a justification for compelling nonmembers to pay a portion of union dues represents something of an anomaly . . . ." *Id* at 2290.

Right to Work Laws Are Economically Beneficial

- Right to Work status correlates with faster growth in jobs and employee compensation, and, when differences in cost of living are taken into account, higher employee compensation
- 2001 to 2011
  - total private-sector employment in Right to Work states grew 12.5%, in other states only 3.5%
  - inflation-adjusted private-sector compensation grew 12% in Right to Work states, only 3% in other states (U.S. Com. Dep't Bur. of Econ. Analysis data)

Right to Work Laws Are Economically Beneficial

- In 2011, adjusted for cost of living, private-sector employees earned $46,886 in wages and/or salary per employee in Right to Work states, only $45,482 per employee in non-Right to Work states (BEA and Mo. Econ. Res. Info. Cent. data)
- Oklahoma 2003-2011
  - Total private-sector employment up 10.9%, nearly 80% greater than its 3 non-Right to Work neighbors
  - Inflation-adjusted private-sector compensation up 17.9%, only aggregate 4.1% in non-Right to Work

Public-Sector Collective Bargaining

- Legal compulsory monopoly: "exclusive representation"
  - Gives union officials disproportionate say over public policy – only parties at bargaining table, all other citizen groups locked out
  - At taxpayers' expense through payroll deduction
  - Deprives individual employees of right to bargain for themselves, limiting their free speech and economic freedom
  - In non-Right to Work states, adds insult of forced fees

Public-Sector Bargaining

- Fundamentally different from private sector
  - No competition moderates union demands & gives employers incentive to keep costs down
  - No profits over which to bargain
  - Bargaining over tax dollars & other public policy decisions
  - Voters are ultimate employer, but don't fully control spending, tax and other public policy decisions

Public Employees Have No *Right* to Bargain Collectively

- Although public employees have 1st Amendment right to *join* unions, they have no constitutional right to bargain collectively – statutory privilege
- The "'First Amendment does not impose any affirmative obligation on the government to listen, to respond or . . . to recognize [a labor] association and bargain with it.'" *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) (quoting *Smith v. Ark. State Highway Employees*, 441 U.S. 463, 465 (1979))

Historically, Public-Sector Bargaining Seen as Bad Policy

- Traditional legal view: forbidden on grounds of sovereign immunity and unconstitutional delegation of government powers
- *Ry. Mail Ass'n v. Murphy*, 44 N.Y.S.2d 601, 607-08 (N.Y. Sup. Ct. 1943): "Nothing is more dangerous to public welfare than to admit that hired servants of the State can dictate to the government the hours, the wages and conditions on which they will carry on essential services vital to the welfare, safety, and security of the citizen."

Historically, Public-Sector Bargaining Seen as Bad Policy

- FDR (1937): "the process of collective bargaining, as usually understood, cannot be transplanted into the public service."
- George Meany (1955): "It is impossible to bargain collectively with government."
- AFL-CIO Executive Council (1959): "In terms of accepted collective bargaining procedures, government workers have no right beyond the authority to petition Congress—a right available to every citizen."

Historical View Abandoned

- Beginning in late 1950s, state and local governments began to grant public employees collective bargaining privileges
- State courts then abandoned traditional view that public-sector bargaining is inconsistent with governmental sovereignty & unconstitutional delegation of governmental authority
- By 2011, 26 states had bargaining laws for all public employees, and 12 for some

Adverse Consequences

Disproportionate leverage over budgets & taxes

- Diverts public monies to salaries and benefits rather than public services such as roads, schools, police & fire stations
- Inflates pay: as of 2010, state and local public workers earned on average $14 more per hour in wages and benefits than private-sector counterparts
- Increases government employment & spending, leading to higher taxes and massive budget deficits

Adverse Consequences

Representative government undermined & civil service politicized

- Elected representatives forced to negotiate with union officials, who are not accountable to public
- All other citizens and nonunion employees excluded
- Unions elect politicians who sit across bargaining table
  - Victor Gotbaum, AFSCME: "We have the ability, in a sense, to elect our own boss"

Adverse Consequences

Strikes paralyze public services

- Public can't purchase alternative services due to government's monopoly
- Prohibition means little, strikes occur even if illegal
  - U.S. Rep. Bill Clay (D-MO): "in reality, [public- sector strike prohibitions] have not stopped strikes."
  - Al Shanker, AFT president: "One of the greatest reasons for the effectiveness of the public employees' strike is the fact that it is illegal."
- Threat gives tremendous leverage for extracting concessions from public employers

Adverse Consequences

Binding arbitration exacerbates problem

- Unelected arbitrators decide contracts, raising costs of employing gov't workers & necessitating tax increases or worse
  - *E.g.*, Central Falls, RI, city of 18,000, annual budget of $16.4 million, filed for bankruptcy in 2011 due to $80 million in pension obligations for city employees, mostly imposed by arbitrators in binding arbitration required by RI law

Adverse Consequences

Government used to serve private interests

- Contract provisions that direct public resources to the union, such as Wis. Education Ass'n Trust health insurance that cost taxpayers $68 million per year
- Payroll deduction of union dues at taxpayer expense
- Forced union fees from nonmembers
- Provisions that benefit members at the expense of quality public service, such as seniority, which eliminates incentive to perform better, or prevent **o**r make it difficult to fire bad employees, such as tenure, or to reward good ones, such as one size fits all wages

2011 Wisconsin Act 10

- Repeals bargaining for University of Wisconsin employees and home-care and day-care providers
- For municipal, public school, and state employees, except transit and most "public safety" employees:
  - Prohibits bargaining except for base wages, increasing voter control over some spending decisions
  - Limits agreements to one year and requires unions to show majority support in annual secret-ballot elections
  - Ends taxpayers' subsidization through payroll deduction
  - Prohibits agreements requiring membership or payment of union fees as a condition of employment

Act 10 Not Union "Busting"

- Public employees can continue to join unions voluntarily
- Giving workers a choice to pay or not pay dues is hardly union "busting"
- Public employee unions can still lobby state and local governments for their members
- Bargaining agents still have considerably more negotiating power than federal employee unions

Act 10's Fiscal Benefits

- School districts' aggregate 2012 health-care costs 13%-19% lower than they would have been without Act 10
- Three school districts have started merit-pay programs to recognize high-performing educators and lure others
- Many school districts have controlled spending largely without layoffs
- Study projects Act will save Milwaukee Public Schools $110,000 annually & 1000+ teaching jobs by 2020
- State budget balanced & state spending over the biennial budget reduced by 6.7%

Legal Challenges to Act 10

- *Wisconsin Education Ass'n Council v. Walker*, 705 F.3d 640 (7th Cir. 2013)
- Entire Act 10 upheld:
  - Ban on payroll deduction of union dues does not violate 1st Amendment
  - Exemption of public safety employees from ban on forced fees and other bargaining limitations does not violate equal protection
  - Union did not petition for U.S. Supreme Court review, decision final & binding

Legal Challenges to Act 10

- *Madison Teachers v. Walker*, 2012 WL 4041495, 194 L.R.R.M. (BNA) 2113 (Dane Cnty., Wis., Cir. Ct. Sept. 14, 2012): Act 10 unconstitutional
  - Contrary to 7th Circuit, Act violates unions' 1st Amendment rights and equal protection
  - No injunction, so Act 10 still in effect except in Madison school district
  - Appeal pending in Wis. Supreme Court on certification from Wis. Court of Appeals

More Information/Questions

- National Right to Work Legal Defense Foundation
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- National Right to Work Committee
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- National Institute for Labor Relations Research
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