RIGHT TO WORK BILL PASSED BY NEW HAMPSHIRE HOUSE OF REPRESENTATIVES

By: Mark Broth, Esq.
Email: mbroth@devinemillimet.com
Phone: 603.695.8558

FEBRUARY 18, 2011

On February 15, 2011, by a vote of 221 to 131, the New Hampshire House of Representatives voted to approve a Republican sponsored bill that would establish New Hampshire as the only "Right to Work" state in New England and the Northeast United States. The following discusses Right to Work and its implications for private sector workplaces.

What is Right to Work?

Understanding Right to Work requires some background in federal labor law. Under the Labor Management Relations Act (LMRA), non-supervisory private sector employees have the right to unionize. Under current law, a work force decides whether or not to unionize through the democratic process of a secret ballot election. At the time these votes occur, the employees in the proposed "bargaining unit" are usually not Union members. If a Union receives the majority of the votes cast by eligible employee voters, the Union is certified as the "bargaining agent" for the entire bargaining unit, *including those employees who may have voted against the Union*. Bargaining group members are then subject to the provisions of any collective bargaining agreement that the Union might negotiate with the employer, *regardless of whether an individual employee voted for the Union or ever became a Union member after the election*. This means that those employees who do not support the Union would still be able to take advantage of negotiated dispute resolution procedures and to expect Union representation in accessing and pursuing claims through a contractual grievance procedure.

The LMRA prohibits so-called "closed shop" agreements, which means that unionized employers cannot refuse to hire individuals because they are not already Union members. However, the LMRA does not prohibit employers and Unions from agreeing to so-called "open shop" agreements, which require new employees to become Union members as a condition of employment. The LMRA also allows parties to agree to "agency fee" arrangements, by which employees are not required to join the Union, but are required, as a condition of employment, to pay a fee to cover a portion of the Union's representation expenses. Open shop and agency fee provisions in collective bargaining agreements are referred to as "union security clauses."

Why would an employer agree to a Union security clause?

The short answer is that many employers use the union security clause to create negotiating leverage. Union security is obviously important to Unions,

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Anthony Augeri
978.289.1228
aaugeri@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

in that it assures a revenue stream in the form of dues or agency fees that offsets the Union’s operating expenses. In order to obtain an employer’s agreement to a union security clause, unions are often willing to agree to provisions important to employers, such as a “management rights” clause which reserves to the employer the right to control business operations and direct the workforce.

Some would argue that Right to Work, by removing union security as a bargaining subject, is an unnecessary governmental restraint on employers’ freedom to contract. It is unclear how the removal of union security clauses from labor negotiations will impact the bargaining table. At a minimum, it should be anticipated that Unions would seek some other trade off, whether in the form of wages, benefits or job protection, in exchange for a strong management rights clause.

What does Right to Work do?

The LMRA expressly reserved to the States the authority to prohibit open shop and agency fee provisions. Section 14(b) of the LMRA states:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

HB 474, if enacted, would bar union membership or the payment of agency fees as a condition of employment in any private or public sector workplace. In addition, HB474 would require employers to post a notice in the workplace advising employees of their right to join or refrain from joining a union and their right to refuse to pay dues or fees to a labor union.

How can a state law affect federal labor law?

Although The Supremacy Clause of the US Constitution generally limits the ability of state governments to change, modify or ignore federal laws, Section 14(b) of the LMRA specifically reserves the right of states to prohibit agreements requiring membership in labor organizations as a requirement of employment. Currently, 22 states and Guam have enacted Right to Work legislation.

Will Right to Work prevent employees from unionizing?

Right to Work legislation does not take away the federally protected rights of employees to unionize. However, without the prospects of an open shop agreement that would provide a reliable revenue stream, Unions may be less likely to invest in organizing activity. Generally, states with Right to Work laws have a lower percentage of unionized employees than in non-Right to Work states. However, with Unions currently representing less than 10% of New Hampshire’s private sector workforce, and in the absence of any widespread organizing efforts, it is unlikely that Right to Work will substantially impact the rate of unionization.

What impact will Right to Work have on workplaces that are already unionized?

HB 474, if enacted as drafted, will go into effect on January 1, 2012, provides that it will not apply to collective bargaining agreements then in effect, but

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

will provide to any renewals or extensions, as well as to any new contracts enacted after the effective date.

It is unclear whether the removal of a negotiated union security clause will cause represented employees to abandon Union membership. In some workplaces, employees may feel well served by the Union and see no problem in paying for the services they are receiving. In some industries and workplaces, Union membership is a longstanding tradition and it may be difficult for employees to resist the peer pressure to remain in the Union. The impact may be more significant in workplaces where employees have grown dissatisfied with Union representation or in newly organized workplaces where a significant minority of employees voted against unionization. If a great number of employees decline to voluntarily join the Union, Union representation may not be financially viable.

Are Unions obligated to represent employees who chose not to become Union members or pay a fee for Union services?

Yes. A Union that is certified as a bargaining representative is obligated to provide services to bargaining unit members who do not become dues or fee payers. The Unions often refer to such employees as “free riders” who benefit from Union representation without sharing in the cost, a primary basis for Union objections to Right to Work.

Will Right to Work improve the New Hampshire economy?

Some bill sponsors have argued that Right to Work will make New Hampshire more attractive to businesses seeking to avoid the higher labor costs associated with unionization. This was certainly the case during the 1900’s, when New Hampshire’s once vibrant textile and shoe industries relocated to largely non-union Southern states. It is unclear whether businesses might give more weight to other factors-energy and housing costs, workforce availability, tax policy-in deciding whether to expand in New Hampshire. In our current global economy, employers interested in avoiding high labor costs increasingly move jobs overseas, even from states where Right to Work is already the law.

Will Right to Work become law in New Hampshire?

It is too early to tell. Having passed the House by almost a 2-1 margin, the bill will move to the Senate, where Republicans hold a large majority. Governor Lynch has stated that he will veto Right to Work, but the Republicans may have sufficient votes to override a veto.

The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at *employment@devinemillimet.com*.