Why "Right to Work" is Wrong

JUSTIN D. CUMMINS, of Cummins & Cummins, LLP, is Board Certified as a Labor & Employment Law Specialist by the Minnesota State Bar Association, is past Chair of the Association's Labor & Employment Law Section, and is a past Officer of the National Employment Lawyers Association's Eighth Circuit and Minnesota Boards. Justin has taught courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.

Introduction

The past year has seen a coordinated campaign in State legislatures around the country, including in Minnesota, to amend State constitutions or to adopt statutes that include a "right to work" provision. The public debate about "right to work" has often been as misinformed as the impact of such initiatives has been negative. Recent events in Indiana, Michigan, Ohio, and Wisconsin exemplify this reality.

Although the "right to work" effort failed during this year's legislative session in Minnesota, the push will likely resume next session as it probably will in other States around the nation for reasons discussed more fully below.

Indeed, the United States Supreme Court recently inserted itself into the political fray. Specifically, the Court reached out to address an issue not even raised by the parties in a case concerning public employees in California who organized in opposition to the political agenda of Governor Arnold Schwarzenegger. In rendering its decision against the union representing public employees, the Court implicitly invited litigation to create a "right to work" doctrine under the Federal Constitution.

Therefore, it is important to understand what "right to work" actually means for employees in Minnesota and elsewhere when evaluating workplace rights and responsibilities.

I. "Right To Work" Is Based On A Falsehood And Would Encourage Freeloading In The Name Of Freedom

Many supporters of "right to work," and even coverage by reputable media outlets, have regularly framed the proposal in Minnesota as necessary so employees have the "freedom" not to be union members in a unionized workplace. Both Federal and State law have long established, however, that employees do not have to be union members in a unionized workplace. Both Federal and State law enable employees to refuse to join at the outset, or subsequently to withdraw membership in, a union that represents employees in their workplace.

Importantly, a union has a legal obligation to represent the interests of employees who refuse to join, or withdraw membership in, the union in a workplace where those employees' coworkers are members of that union. For example, unions still have to file and pursue grievances on behalf of non-union employees and to bargain regarding safety, wages, healthcare, and other terms of employment for those non-union employees just as unions do for the union employees.

Because the vast majority of union dues go toward representational activity, such as handling grievances and collective bargaining, both Federal and State law recognize that non-union employees – who necessarily benefit from union representation in a given workplace – must still pay a portion of the union dues paid by union members. Otherwise, those non-union employees would be getting something – in fact, a lot – for nothing.

Nonetheless, employees who choose not to be in the union representing them and their coworkers often still end up being free-riders to a certain extent. For example, based on our observations, unions typically dedicate over 90% of union dues to representational services as opposed to political contributions; under State law, however, non-union employees only have to pay – at the most – 85% of the union dues that their union coworkers pay. In short, non-union employees in a unionized workplace covered by State law receive all of the benefits of union representation while often paying less than their union coworkers for those benefits.

II. The Practical Impact Of "Right To Work" Around The Country: Less Safety, Less Employment Opportunity, And Less Workplace Democracy

Given that employees already have the right not to be in a union in a unionized workplace and, further, the right not to pay for political contributions by unions, "right to work" would change the law in only one meaningful way. Specifically, "right to work" would allow employees to receive all of the benefits of union representation without paying for any of those benefits.

The "right to work" approach, then, resembles allowing someone to opt out of paying taxes

necessary to provide for first responders, safe roads, good schools, clean drinking water, and other public services which benefit everyone. That makes no sense.

Besides creating basic unfairness, "right to work" has meant less safety, less employment opportunity, and less workplace democracy in States that have adopted such an approach. According to the data from the Current Population Survey of the United States Bureau of Labor Statistics, for instance, the rates of workplace injuries and deaths are much higher in "right to work" States.

Government data also shows that wages are not only substantially lower in "right to work" States, but the wage gap between women and men and between people of color and whites is far greater there. In addition, fewer employees have healthcare coverage in "right to work" States according to a study by the Economic Policy Institute.

Despite such "cost savings" for employers in "right to work" States, "right to work" does not boost job growth. Before Indiana adopted the "right to work" approach this year, the last State to do so was Oklahoma. Since adopting "right to work" a decade ago, Oklahoma has witnessed a 1/3 drop in manufacturing jobs and a 1/3 drop in new companies coming to the State to open businesses there. Not surprisingly, business surveys confirm that "right to work" ranks low among the considerations for companies in deciding where to locate.

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[1]Knox v. Service Employees Int'l Union, Local 1000, 132 S.Ct. 2277, 2291 (2012).

[2]Id.

[3]See, e.g., Communication Workers of America v. Beck, 487 U.S. 735 (1988); Teachers v. Hudson, 475 U.S. 292 (1986); Minn. Stat. § 179A.06, Subd. 3; Minn. R. § 5510.1410, et. seq.

[4]Id.

[5]See, e.g., Int'l Broth. Elec. Workers v. Foust, 442 U.S. 42, 47 (1979) ("[A] union must represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective-bargaining agreements.").

[6]Id.

[7]Beck, 487 U.S. at 746 ("Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost."); see also Minn. Stat. § 179A.06, Subd. 3 ("An exclusive representative may require employees who are not members of the exclusive representative to contribute a *fair*

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share fee for services rendered by the exclusive representative.") (emphasis added).

[8]Minn. Stat. § 179A.06, Subd. 3.

[9]H.F. No. 2140, Section 1; S.F. No. 1705, Section 1.

[10]AFL-CIO, Death on the Job Report, http://www.aflcio.org/Issues/Job-Safety/Death-on-the-Job-Report.

[11]Elise Gould and Heidi Shierholz, "The Compensation Penalty of 'Right to Work' Laws," Economic Policy Institute Briefing Paper No. 299, 6 (February 17, 2011), http://www.epi.org/page/-/old/briefingpapers/BriefingPaper299.pdf.

[12]Id. at 6-7.

[13]See, e.g., Gordon Lafer, "Right to Work – For Less," The Nation 24, 25 (February 26, 2012).

[14]Id.

[15]Id. at 25-26.

[16]Minnesota AFL-CIO, "'Right to Work' Laws: Get the Facts," http://www.mnaflcio.org/news/right-work-laws-get-facts.

[17]"Unions Making a Difference," http://www.americanrightsatwork.org/index.php?option=com_issues&view=issue&id=12&Itemid=90.

[18]Richard B. Freeman, "Do Workers Still Want Unions? More Than Ever," Economic Policy Institute Briefing Paper No. 182, 2 (February 22, 2007) ("[I]f workers were provided the union representation they desired in 2005, then the overall unioniza¬tion rate would have been about 58%."); http://www.sharedprosperity.org/bp182/bp182.pdf.; United States Department of Labor Bureau of Labor Statistics, "Union Members -- 2011," http://www.bls.gov/news.release/pdf/union2.pdf.

[19]Id.

[20]Human Rights Watch, "Unfair Advantage: Workers' Freedom Of Association In The United States Under International Human Rights Standards" 85 (2000), http://www.hrw.org/reports/pdfs/u/us/uslbro08.pdf; see also generally National Labor Relations Board Annual Reports, "Remedial Actions Taken in Unfair Labor Practice Cases Closed," http://nlrb.gov/annual-reports.

[21]Human Resources Policy Association, "Mistitled 'Employee Free Choice Act' Would Strip Workers of Secret Ballot in Union Representation Decisions," http://www.hrpolicy.org/memoranda/2004/04-10_Employee_Free_Choice_Act_PB.pdf.

[22]H.F. No. 2140, Section 1; S.F. No. 1705, Section 1.

[23]See, e.g., Snyder's Drug Stores, Inc. v. Minn. St. Bd. of Pharm. 221 N.W.2d 162, 165 (Minn. 1974) (establishing "'injury in fact' as the test for standing in this jurisdiction, absent a discernible legislative intent to the contrary in a given case.").

[24]H.F. No. 2140, Section 1; S.F. No. 1705, Section 1 (emphasis added).

[25]See generally Lynch v. Household Finance Corp., 405 U.S. 538 (1972).

[26]National Conference on State Legislatures, "2011 Legislation on Unions and Collective Bargaining," http://www.ncsl.org/documents/employ/Unions2-15-11.pdf.

"Right to work" has also compromised workplace democracy by silencing the voices of employees. Because of the free-riding "right to work" has caused, unions have less resources to give voice to employee concerns in the workplace and otherwise to advocate for greater fairness in the workplace and beyond. In that regard, it warrants emphasizing that unions played an instrumental role in passage of the Occupational Health & Safety Act, the Family and Medical Leave Act, and the Voting Rights Act, among other vital public policies codified by Congress or State legislatures.

In addition, "right to work" States have unionization rates far less than what the popular will dictates. Approximately 60% of employees want to belong to a union, but less than 6% are members of unions in "right to work" States. The unionization rate in free-bargaining States is generally higher than in "right to work" States, but it is still less than what employees want.

The democracy gap in the workplace should not be surprising given that employers fire or otherwise retaliate against approximately 25,000 employees *each year* for supporting or seeking to join a union. By contrast, there have been only 12 instances of union coercion in obtaining signed union authorization cards in nearly 75 *years* – that is, since Congress established the existing labor law regime.

III. The "Right To Work" Proposal In Minnesota Would Allow Parties Who Have Suffered No Injury To Sue For Purported Damages And Attorney's Fees/Litigation Costs – All Under The Minnesota Constitution

During the last legislative session, Minnesota legislators in both the House and in the Senate proposed virtually identical bills that, if approved by a majority of the Legislature, would put on the ballot for the next election cycle whether the Minnesota Constitution should be amended to include a "right to work" provision.

The substance of these bills is extreme. Both the House and Senate bills would create a private right of action under the Minnesota Constitution to enable individuals to sue in court for damages and attorney's fees/litigation costs. Remarkably, the "right to work" proposal authorizes litigation even if there has been no injury – despite the clearly established requirement that one must have an injury in fact before gaining the legal standing to sue. The House and Senate bills proclaim, in pertinent part, as follows: *"A person who suffers...a threatened injury under this section may bring a civil action for damages..."*

Creating the right of uninjured people to sue for damages and attorney's fees/litigation costs directly under the constitution is novel, to put it mildly. For example, Congress enacted 42 U.S.C. § 1983 and 42 U.S.C. § 1988 precisely because the Federal Constitution does not create a private right of action to enforce, for example, the First, Fourth, Eighth, and Fourteenth Amendments or authorize the recovery of damages and attorney's fees/litigation costs in that regard.

IV. The Nationally Coordinated Campaign For "Right To Work" Raises Concerns As Much About Democracy In The United States As It Does About Democracy In The Workplace

It is not mere coincidence that certain legislators from Minnesota to New Mexico and from Alaska to New Jersey are simultaneously demanding adoption of "right to work" provisions. This effort has been coordinated and aggressively advanced by the American Legislative Exchange Council ("ALEC"), which absurdly has been designated a charity for tax purposes.

As the Minnesota Association for Justice recently documented, ALEC is a group that has been funded and led by corporations like Wal-Mart, ExxonMobil, AT&T, State Farm, Johnson & Johnson, and Koch Companies. ALEC holds private meetings at luxury resorts for corporate agents and allied State legislators to draft pro-corporate "model" legislation that those State legislators then seek to pass in their respective States. Approximately 20 legislators from Minnesota have been active recently with ALEC.

ALEC reportedly has over 1,000 of its "model" bills introduced in State legislatures every year, with one in every five actually becoming law. ALEC's arsenal of anti-employee "model" bills seek, among other things, to eliminate living-wage protections, prevailing-wage laws, and better minimum-wage standards.

Among its anti-employee initiatives, ALEC has recently made "right to work" a priority. A consortium of purported charities like ALEC, including the Council of State Governments ("CSG"), have also dedicated considerable resources toward imposing similar pro-corporate laws in States across the country. Consequently, the "right to work" proposal in Minnesota is strikingly similar to the proposals that have been advanced in other States, such as Missouri, New Jersey, and West Virginia.

In short, "right to work" not only threatens workplace democracy, it reflects the subversion of political democracy. As the nationally coordinated "right to work" campaign illustrates, corporate agents now draft self-serving legislation in secret meetings with State legislators who, upon return to their respective States, essentially become lobbyists for the corporate funders and leaders of ALEC, CSG, and allied special interest groups. Such a campaign evidently serves the interests of the proverbial 1% rather than the general public.

Conclusion

"Right to work" is based on the falsehood that an employee working in a unionized environment must be a union member and pay for the union's political contributions. Moreover, adoption of "right to work" in Minnesota would likely cause a significant reduction in workplace safety, opportunity, and democracy – as has already occurred in States that have adopted "right to work." In sum, "right to work" and similar provisions should be understood for what they are – corporate giveaways contrary to the public interest and the general welfare.

[27]Miles Mogulescu, "ALEC: The Behind-the-Scenes Player in the States' Fight Against the Middle Class," The Huffington Post (March 7, 2011), http://www.huffingtonpost.com/miles-mogulescu/alec-states-unions_b_832428.html.

[28]See generally Carla Ferrucci and Joel Carlson, "Have You Met ALEC?: A Needed Introduction To The American Legislative Exchange Council And How They Are Working To Undo Minnesota's Consumer Protections," Minnesota Trial 8-9, 26-29 (Winter 2012); Mary Bottari, "Hang on to That Paycheck! ALEC 'Sharpens Focus on Jobs,'" (April 23, 2012), http://truth-out.org/news/item/8693-alecs-vision-of-pre-empting-epa-coal-ash-regs-passes-house.

[29]Bottari, supra, at 9; see also ALEC Exposed, "What is ALEC?," http://alecexposed.org/wiki/What_is_ALEC%3F.

[30]Ferruci & Carlson, supra, at 26.

[31]ALEC Exposed, "What is ALEC?," http://alecexposed.org/wiki/What_is_ALEC%3F.

[32]Bottari, supra (analyzing ALEC's "Living Wage Mandate Preemption Act," "Starting Wage Repeal Act," "Prevailing Wage Repeal Act," and initiatives promoting the privatization of prisons).

[33]See generally Sarah Blaskey and Steve Horn, "Uncovering the Other ALECs" (May 16, 2012), http://truth-out.org/news/item/9033-subverting-the-statehouse-uncovering-the-other-alecs.

[34]National Conference of State Legislatures Collective Bargaining Legislation Database, http://www.ncsl.org/issues-research/labor/collective-bargaining-legislation-database.aspx; see also Bottari, supra (discussing ALEC's "Public Employee Freedom Act" and "Public Employer Payroll Deduction Policy Act," which have served as models for the "right to work" provisions being pushed around the nation).

[35]Lisa Graves, "About ALEC Exposed," http://www.prwatch.org/news/2011/07/10883/about-alec-exposed.

[36]See generally ALEC Exposed, supra; Ferruci & Carlson, supra, at 8-9, 26-29; Blaskey & Horn, supra. For a more detailed discussion of the coordinated campaign orchestrated through ALEC and similar groups, see Sarah Blaskey and Steve Horn, "Exposed: The Other ALEC's Corporate Playbook" (June 21, 2012), http://truth-out.org/news/item/9889-exposed-the-other-alecs-corporate-playbook.