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Briefly

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NATIONAL RIGHT-TO-WORK GROWING

Ronald G. Daves

"[S]ome local governments are passing right-to-work laws even if their states have not, but unions are litigating such circumstances …"

After going almost 50 years without any state passing a right-to-work law, six states have passed right-to-work laws in the last five years. The latest two states are Missouri and Kentucky, which became right-to-work states this year. Now there are 28 right-to-work states. The only recent setback to right-to-work has been in New Hampshire, where one of the state legislatures defeated a right-to-work bill by a narrow margin. Virtually all of the states with Republican governors and legislatures have right-to-work laws, except for New Hampshire, which would have been the first right-to-work state in the Northeast. Other states considering right-to-work laws include Colorado, Connecticut, Maine, Washington, Oregon, New Jersey, and also Puerto Rico. In addition, some local governments are passing right-to-work laws even if their states have not, but unions are litigating such circumstances contending that a local government may not pass right-to-work legislation, but only a state can. Right-to-work laws are being promoted as a way to increase employment and economic growth and to attract new business, and there are statistics backing up that claim.

President Trump has announced his support for the right-to-work concept. On February 1, 2017, Republican House members introduced a national right-to-work law, which would prohibit "union security" clauses in collective bargaining agreements requiring non-union members to pay union fees or dues. While the House would likely pass such a bill, which would likely be signed by the President, the bill would be subject to a filibuster in the Senate, requiring 60 votes to overturn. Republicans have only 52 seats, and thus Democrats could block the bill unless the Senate does away with its filibuster rules and adopts the so-called "nuclear" option. Unions privately believe that a national right-to-work concept is likely, at least in the public sector. Only a 4-4 Supreme Court tie vote following the untimely death of Justice Scalia kept such a national requirement in the public sector from becoming the law of the land, on the basis that allowing mandatory contributions to labor unions is unconstitutional.

An increasing number of right-to-work states are having a negative effect on union membership. Union membership is now less than 11% of the public and private work forces, and approximately one-half of all union members in the U.S. are employed by the government. Membership in the private sector has dropped to just 6.4%. Union leaders privately forecast that they will lose over one-half of their membership under right-to-work laws. Such a loss of membership and dues also adversely affects the unions' political strength. Some see a correlation in the loss of union members and Republican gains in mid-western states like Indiana, Wisconsin and Michigan, now all right-to-work states.

How Are Unions Reacting to the Right-to-Work Movement

Unions are fighting very hard legislatively, and also in the court system, to defeat right-to-work laws. Second, unions are moving to reduce their budgets and spending. Several unions have already announced reductions in their budgets of around 30%. Unions are also trying to directly address their membership in new and different ways so as to maintain as much membership as possible when dues are no longer mandatory. At least one union has attempted to keep its members from withdrawing from "check-off" authorizations, which are lawful even in right-to-work states. These authorizations require members to have a portion of their paychecks withheld and forwarded to the union as union dues, if they sign a check-off card which is generally irrevocable for a period of one year. Most check-off authorization cards are vaguely worded so members are not aware of the brief periods each year they can revoke their check-offs without their being automatically renewed. In a recent case, a Michigan labor union required all members wishing to revoke their check-off authorizations to appear at the union hall in person along with photographic identification. *Local 58, International Brotherhood of Electrical Workers,* 365 NLRB No. 30 (2/10/17). The NLRB said this was an undue restriction on a member's right to resign, but the union is appealing the case to court.

The relationship between President Trump and organized

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Edward H. Trent ..

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THOUGHTS ON THE NEW SECRETARY OF LABOR
AND THE EFFECT ON EMPLOYERS

One day after President Trump's first nominee for Secretary of Labor withdrew, the President announced that Alexander Acosta would be his new Labor Secretary - Designate. The prior Labor Secretary - Designate, Andy Pudzer, had been the President's perhaps most controversial appointment to the Cabinet. Not only was he president of various fast-food restaurant chains, but he was a highly-publicized advocate of management rights. In response, Democrats made him their primary target for opposition and an almost "perfect storm" of adverse publicity caused even several Republican senators to withdraw their support. In this environment, on February 15, Pudzer withdrew his nomination and a day later the President appointed a person who is widely considered a "safe" nominee.

It is hard for anyone to say anything bad about Alexander Acosta. He is Hispanic and has been confirmed by the U.S. Senate three times in prior positions as a member (for eight months) of the National Labor Relations Board, as Assistant Attorney General for Civil Rights, and as a U .S. attorney for the Southern District of Florida. He is Harvard-educated and is currently the law school dean at Florida International University. He is also a former law clerk for Supreme Court Justice Samuel A. Alito, Jr., when Justice Alito was a judge on the United States Court of Appeals for the Third Circuit.

Both Republicans and Democrats have praised the nomination, and even organized labor has been somewhat supportive. AFL-CIO President Richard L. Trumka is quoted as saying that Mr. Acosta's "nomination deserves consideration" and refers to him as "a public servant with experience enforcing" our nation's labor laws. He is considered by many who have worked for him as an open and fair-minded person able to grasp both sides of highly contentious issues. He is praised for his work in recruiting a diverse and talented faculty and student body at FIU. Most commentators consider him a deep thinker and an intellectual, and he is expected to be confirmed by the Senate. His hearing before the Senate Committee on Health, Education, Labor & Pensions is scheduled for March 22nd. Tennessee Senator Lamar Alexander is Chairman of the Committee.

How should employers react to the nomination of Acosta? In general, employers looked upon the prior nominee, Pudzer, as a leader and a "firebrand" for management rights. Many aggressive measures in support of management were expected. Acosta, on the other hand, is expected to move much slower to build more of a consensus, and to be more of a moderate. Such an approach may prove far more effective in getting his initiative through during this highly divisive political climate.

KNOW YOUR ATTORNEY - BRENT A. MORRIS

BRENT A. MORRIS is a Senior Associate of the Nashville, Tennessee office of the firm, which he joined in 2016. His law practice has a focus in employment and housing discrimination matters in both State and Federal courts. Brent also has significant experience in workers' compensation, general liability matters, and coverage issues. He received his Bachelor of Arts in English Literature from the University of Memphis, and his law degree, *cum laude*, from the Cecil C. Humphries School of Law at the University of Memphis. Brent was a member of law review for the *University of Memphis Law Review* and was a recipient of the Herff Scholarship. After practicing for several years in Knoxville, Brent took a position with Chubb Insurance in Connecticut where he was a member of the litigation management unit and an employment claims examiner.

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NEW WRINKLES IN ENFORCEMENT
OF NON-COMPETE AGREEMENTS

Edward H. Trent

"The [National Labor Relations] Board … went on to find that certain standard provisions in a non-compete agreement may violate Section 7 of the National Labor Relations Act."

Two new developments have raised the stakes in the drafting and enforcement of non-competition agreements. While there are various forms of non-competition agreements, basically they prohibit a former employee from competing against a former employer for a period of time, often between one and two years. An alternative is to prohibit the employee from soliciting the employer's customers on behalf of a competitor for a period of time after termination of employment. According to a fact sheet distributed by the White House, non-compete agreements apply to an estimated 20% of workers in the U.S.

The Obama Administration had called on Congress to pass federal legislation eliminating non-competes for workers who fall below a specified salary. Currently the law of non-competes is based almost entirely on state law, which varies considerably from state to state. Some states, such as California, ban non-compete agreements almost completely, but a majority of states enforce non-compete agreements that are reasonable in terms of time, territory, and activities prohibited -- provided they are designed to protect a legitimate and protectable business interest that, absent a non-compete agreement, would give a competitor an unfair economic advantage over the company.

In October 2016, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued its "Antitrust Guidance for Human Resource Professionals" addressing possible antitrust violations for collusion between companies to set salaries or avoid recruiting the other's employees. In doing so, the Guidance specifically states: "Note that this guidance does not address the legality of specific terms contained in contracts between an employer and an employee, including non-compete clauses." Guidance, p. 2. The Guidance, however, does address subtle efforts to suppress wages and even "job opportunities" for employees and that the DOJ and FTC will look to the antitrust laws to prosecute "no poaching" agreements and efforts by businesses to share confidential salary information that has the effect of suppressing wages and benefits. So, while an employer may legitimately inform a competitor that seeks to hire its current or former employee who is subject to a non-compete agreement of the existence and scope of the agreement, coordinated efforts to get competitors to not target its employees by agreeing to not hire the competitor's employees is likely to invoke scrutiny under the antitrust laws.

A more direct attack on the scope of a non-compete agreement has come from the National Labor Relations Board (NLRB). In Minteq International, Inc., 364 NLRB No. 63 (July 29, 2016), the Board held that a company must bargain over whether employees will be required to sign a non-compete agreement. The Board ruled that employee work rules are mandatory subjects of bargaining and that the employer's non-compete agreement, which prohibited an employee from competing during employment and for 18 months afterward, directly affected the wages, hours, and working conditions that must be bargained over. The Board rejected the employer's argument that nothing in the agreement indicated that an employee would be disciplined during employment under the non-compete agreement.

The Board, however, did not stop with the issue of mandatory bargaining, but went on to find that certain standard provisions in a non-compete agreement may violate Section 7 of the National Labor Relations Act. Specifically, the Board found that an "interference with relationships" provision was unlawful. This provision required employees for 18 months after their employment to refrain from soliciting or encouraging any present or future customer or supplier of the company to terminate or "otherwise alter his, her, or its relationship with the Company in an adverse manner." The Board concluded that this "interference" provision would reasonably be interpreted to impair an employee's ability to encourage customers to boycott the company's services or products as part of a labor dispute or in an effort to improve wage, hours, or working conditions. The Board also found that the "at-will" language in the non-compete potentially conflicted with the "at-will" limitations in the collective bargaining agreement and, therefore, could reasonably be read to discourage an employee from exercising his or her Section 7 rights. The outcome for non-union employers is to review any non-compete agreements not just for compliance with state law, but to ensure the provisions are not overly broad when read in light of Section 7 of the National Labor Relations Act.

Editor's Note: The Minteq case and others represent a growing trend of using seemingly unrelated laws to attack private agreements reached between employers and employees. An employee might defend against an employer's effort to enforce a non-compete agreement by arguing that the agreement was never negotiated with the union or that its terms limit or restrict an employee's right to engage in protected concerted activity with regard to wages, hours, and working conditions. There are several cases pending in the federal courts, including some addressing whether individual employment agreements requiring employees to bring all legal claims in arbitration rather than in court, or requiring employees to waive the right to bring or participate in a class or collective action, are invalid because they adversely affect the rights of employees to engage in protected concerted activities under the Labor Act, several of which rely on rulings from the NLRB under the Obama Administration.

Jerome D. Pinn....

"The AARP had sued to block the rules ..."

EEOC RULES ON WELLNESS PLANS TAKE EFFECT

New EEOC rules allowing employers to offer employees incentives to participate in wellness programs took effect on January 1, 2017. The AARP had sued to block the rules contending that the rules permit employers to compel employees to surrender private health and genetic information that the ADA (Americans With Disabilities Act) and GINA (Genetic Information Nondiscrimination Act of 2008) generally protect from involuntary disclosure. The EEOC rules provide that employers may offer workers up to 30% of the cost of self-only health insurance for participation in wellness programs that include health risk assessments or tests that can divulge disabilities or genetic data. The rules contemplate that these financial inducements are "incentives" and not penalties against workers who refuse to give out their private health and genetic information. On December 29, 2016, a federal district court in Washington refused to enjoin the implementation of these rules. *AARP v. EEOC*, No. 16-2113 (12/29/ 16).

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labor can be described as mixed. Building trades generally have said nice things about the President, particularly since he supports building infrastructure and increasing jobs. Some 40% of union members voted for President Trump, and the President wants to maintain his image as being supportive of "blue collar" concerns. The unions generally say that they will support good Trump ideas and oppose bad Trump ideas, reflecting their overall attitude towards the President.