Wimberly Lawson
Wright Daves & Jones, PLLC
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Briefly

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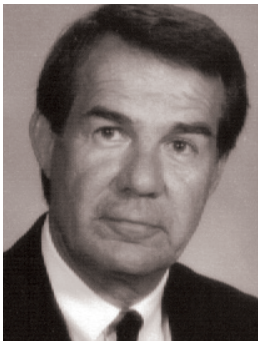
CIVIL WAR RAGES IN STATES OVER UNIONS AND BUDGET CUTS



Ronald G. Daves

"In all, at least two dozen states have legislation pending involving substantial changes in how state and local governments treat their workforces…"

Organized labor and Democrats are trying to re-energize and take advantage of what they consider to be the anti-union sentiment expressed in Wisconsin and more than a dozen other states over budget cuts and other measures that they consider an attack on labor unions. As a result of last November's elections, many states with large union memberships and pro-union public collective bargaining laws, such as Wisconsin and Ohio, elected conservative Republican Governors. At the same time, many states face necessary budget cuts and are addressing the often lucrative pension and health plans given to public employees under state collective bargaining laws. In many cases, states and municipalities have granted "Cadillac" pension and healthcare plans in part because the pensions at least do not require immediate funding, and the public employee unions in certain states have been very politically powerful and influential in getting such plans adopted. The states must now meet sterner budget demands, however, and these pensions and healthcare costs are being considered as part of overall budget reductions.

In some instances, labor unions contend that the Governors and other state leaders are overreacting, and not only requiring public employees to contribute more to their pensions and healthcare plans, but also limiting the collective bargaining process or changing it so that such excesses cannot re-occur. These labor leaders contend that the Governors are in essence trying to limit collective bargaining, a sacred right to organized labor.

Some pending state legislation goes beyond simply the budget process. A bill in Indiana would make Indiana the 23rd "right-to-work" state. A bill in Florida would prevent the state from deducting union dues. Legislation in some other states, particularly Wisconsin, bar the state and other local governments from negotiating over pensions and healthcare plans, unless local voters said otherwise in a referendum.

It is going to be extremely interesting how these issues play out in public opinion and in the political process. Research polls say that unions have a very low approval rating from the public, although traditionally, low approval ratings of unions often correspond to high unemployment rates. Both Republican and Democratic leaders seem to be engaging in the bargaining fight over public labor unions with each party feeling it is energizing its core supporters and clarifying key differences between the parties. The AFL-CIO has planned rallies and protests in dozens of state capitals as they try to gain public sympathy by shifting the conversation from whether they earn overly generous benefits to whether there is an attack on collective bargaining. Democrats say the fight has injected fresh energy into the ranks of labor unions, a major source of funding and volunteers to Democratic candidates.

According to a Bloomberg National Poll conducted in March, Respondents are divided over whether public employees should sacrifice to help states ease their monetary crises, with about half saying Governors are unfairly targeting unions and 46% are saying public employees should be willing to accept benefit cuts. The debates appear to have intensified support for unions among their members and Democrats, and indeed 70% of Democrats say Republican Governors are unfairly targeting public employee unions.

Democrats are cautious, however, about some of the ramifications of their position. While the President took an initial position in support of the Wisconsin unions, he has subsequently remained silent on the issue since the Administration itself has frozen federal salaries and has its own federal budget issues, and is attempting to move toward the political center.

Right-to-work legislation has been introduced in thirteen states. In all, at least two dozen states have legislation pending involving substantial changes in how state and local governments treat their workforces, including Arizona, Florida, Indiana, Iowa, Michigan, New Hampshire, New Jersey, and New Mexico. Democratic Governors such as Andrew Cuomo in New York and Jerry Brown in California are proposing reductions in state staffing and employee compensation as a necessary budget-tightening mechanism. Even

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REASONABLE BREAK TIME AND AREA FOR NURSING MOTHERS

Rebecca Brake Murray

"The provision requires employers to provide 'reasonable break time for an employee to express milk for her nursing child for one year after the child's birth each time such employee has need to express the milk.'"

The healthcare law contained an amendment to the wage-hour laws (FLSA) pertaining to nursing mothers. The provision requires employers to provide "reasonable break time for an employee to express milk for her nursing child for one year after the child's birth each time such employee has need to express the milk." Employers are also required to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk." See 29 U.S.C. 207(r).

This break time requirement is now in effect, and the Department of Labor (DOL) has issued Wage and Hour Fact Sheet #73: "Break Time for Nursing Mothers under the FLSA" at http://www.dol.gov/whd/regs/compliance/whdfs73.pdf. The Fact Sheet indicates that a bathroom, even if private, is not a permissible location under the Act. The location provided must be functional as a space for expressing breast milk. If the space is not dedicated to the nursing mother's use, it must be available when needed in order to meet the statutory requirement. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view, and free from any intrusion from co-workers and the public. The DOL has also issued a Federal Notice of a request for information from the public regarding the recent amendment, in which certain information is sought as well as DOL's statements of position are set forth. Federal Register, Vol. 75, No. 244, December 21, 2010.

Only employees who are not exempt from Section 7, which includes the FLSA's overtime pay requirements, are entitled to breaks to express milk. While employers are not required under federal law to provide breaks to nursing mothers who are exempt from the overtime requirements, they may be obligated to provide such breaks under state laws.

Employers with fewer than 50 employees are not subject to the wage-hour break time requirement if compliance with the provision would impose an undue hardship by causing "significant difficulty or expense." It is expected that this standard will be difficult to meet. All employees who work for the covered employer, regardless of work site, are counted when determining whether this exemption may apply.

Employers are not required under the FLSA law to compensate nursing mothers for breaks taken for the purpose of expressing milk. However, where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break time. In addition, the law's general requirement applies that an employee must be completely relieved from duty or else the time must be compensated as work time.

The law does not require employers to allow employees to extend their work day to make up for unpaid break time used for expressing milk. Where it is not practical for an employer to provide a room for expressing milk, the DOL's initial interpretation is that the requirement can be met by creating a space with partitions or curtains. Further, an anteroom or lounge area connected to a bathroom may be sufficient to meet the requirements of the law. Locker rooms that function as changing rooms may also be adequate so long as there is a separate space designated within the room for expressing milk that is shielded from view and free from intrusion. In order to be a functional space that may be used by an employee to express breast milk, at a minimum, a space must contain a place for the nursing mother to sit, and a flat surface, other than the floor, on which to place the pump.

The DOL interprets an employee's right to express milk for a nursing child to include the ability to safely store the milk for her child. While employers are not required to provide refrigeration options for nursing mothers for the purpose of storing the expressed milk, they must allow a nursing mother to bring a pump and an insulated food container to work for expressing milk and storing the milk and ensure there is a place where she can store the pump and insulated food container while she is at work. Finally, in situations where the employee is off-site, the DOL recommends that the employer arrange with the client to allow the employee to use a space at the client's site for the purpose of expressing milk.

2011 INCOME TAX CREDIT FOR CONTINUING TO EMPLOY PERSONS HIRED IN 2010

Fred Baker

"The HIRE Act created two tax benefits for employers hiring workers who were previously unemployed or only working part time."

Last year Congress passed and the President signed the Hiring Incentives to Restore Employment (HIRE) Act. The HIRE Act created two tax benefits for employers hiring workers who were previously unemployed or only working part time.

First, the HIRE Act provided for a reduction of 2010 payroll tax liability. An employer who hired certain unemployed workers after Feb. 3, 2010 and before Jan. 1, 2011 was eligible to qualify for exemption from its share of Social Security taxes on wages paid to these workers after March 18, 2010. This reduced tax liability had no effect on the employee's future Social Security benefits, and the employer still needed to withhold the employee's 6.2-percent share of Social Security taxes, as well as income taxes. The employer and employee's shares of Medicare taxes also still applied to these wages.

Second, the HIRE Act provided for a credit against 2011 income tax liability. For each worker retained for at least a year, an employer may claim an additional general business tax credit, up to $1,000 per worker, when it files its 2011 income tax return. An employer can take this credit only for those employees who worked for a maximum of 40 hours in the 60 days prior to their hire date and who have remained employed for 52 consecutive weeks. Also, pay in the last 26 weeks cannot be less than 80% of the pay in the first 26 weeks.

More information about both of these tax benefits is available at:

http://www.irs.gov/businesses/small/article/0,,id=220745,00.html

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November 3 – 4, 2011 Knoxville, Tennessee

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THE 2011 WIMBERLY LAWSON LABOR EMPLOYMENT UPDATE

KNOW YOUR CONSULTANT

CAROL R. MERCHANT

CAROL R. MERCHANT is a consultant with Wimberly Lawson Wright Daves & Jones, PLLC. She provides consulting services, in conjunction with the firm's attorneys, with emphasis on compliance with regulations under the Fair Labor Standards Act, Family and Medical Leave Act, Davis Bacon and Related Acts, Service Contract Act, Contract Work Hours and Safety Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, H2A provisions of the Immigration Reform and Control Act, Employee Polygraph Protection Act and the Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act).

Carol recently retired from the U. S. Department of Labor, Wage and Hour Division, after 33 years of service with the Division. From 2000 to the end of 2007 she was the Nashville District Director, supervising enforcement of Wage and Hour laws in the state of Tennessee . Prior to that she had been Assistant District Director of the Knoxville Wage and Hour office after 11 years as an investigator in Columbia, South Carolina.

During her years as District Director and Assistant District Director, she reviewed investigative files, conferred with the Solicitor's Office of the U.S. Department of Labor on cases that should be litigated, and assessed and negotiated payment of civil money penalties under the Fair Labor Standards Act (including child labor), Migrant and Seasonal Agricultural Worker Protection Act, H2A and Employee Polygraph Protection Act.

She worked on rewriting portions of the Wage and Hour Divisions' Field Operations Handbook, organized and conducted the last three national training classes for Wage and Hour Technicians, and co-wrote the national training manual for investigators on developing litigation cases.

From 2003 until her retirement in December 2007 she was the Southeast Regional Representative on the National Health Care Team examining compliance problems in the health care industry. She testified in Federal Court on numerous cases litigated by the U. S. Department of Labor.

Carol received her Master of Arts degree in American History from the College of William and Mary and her Bachelor of Arts degree in History from Columbia College. In 2000 she was awarded the Distinguished Career Service Award from the Secretary of Labor.

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"CIVIL WAR RAGES IN STATES"
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President Franklin D. Roosevelt , who was instrumental in getting the pro-labor National Labor Relations Act passed in 1935, opposed the idea of a labor organization that could go on strike and shut down public services. Currently, of the entire pool of unionized workers in the U.S., 52% hold government jobs.

Another States Rights Issue Pertains to Secret Ballot Laws

In response to the proposed federal "card-check" legislation, several states passed constitutional amendments that require secret ballot elections before a company can be unionized, including the states of Arizona, South Carolina, South Dakota, and Utah. The National Labor Relations Board (NLRB) has written the Attorneys General of those states, stating that the state laws conflict with the rights covered under the Labor Act, threatening that, if a favorable response is not received within two weeks, the NLRB intends to initiate lawsuits against those states. The lawsuits will contend that the states can't override the federal law that the NLRB contends gives workers the option of the so-called card-check method of organizing. At least one Attorney General, Mark Shurtleff, said he was prepared to fight: "If they want to sue, my attitude is, bring it on, because we think card-check violates federal constitutional protections." Shurtleff and three other Attorneys General responded to the NLRB in a joint letter that they are ready to defend their state laws and guarantee the use of secret ballots in union representation elections.

Pending Federal Legislation

Some federal lawmakers are advocating a federal law, the Public Safety Employer-Employee Cooperation Act, "PSEECA," which would REQUIRE states to pass legislation allowing collective bargaining with public safety employees, including the right to bargain over wages, hours, terms and conditions of employment as well as the right to fact-finding, mediation, arbitration, or comparable procedures to resolve impasse. The bill has been introduced several times since 1995. It seemed close to passage at the end of the last session, but did not. Although its passage seems unlikely given the current composition of Congress, it has been a perennial favorite with many lawmakers, including Rep. John Duncan, Republican, Tennessee, who is a co-sponsor.

EEOC SUES EMPLOYER OVER RANDOM ALCOHOL TESTS

Fred Bissinger

"The EEOC asserts that alcohol tests fall under the category of medical exams…"

The Equal Employment Opportunity Commission (EEOC) is suing U.S. Steel in Pennsylvania after the company fired an employee based on a positive alcohol test result, under the U.S. Steel policy of requiring a random alcohol test for all probationary employees. The EEOC asserts that alcohol tests fall under the category of medical exams because they are "invasive" and normally require blood, urine, or breath to be drawn. Such exams are permitted only when the outcome is "job-related and consistent with business necessity." Under these qualifiers and the ADA, medical exams are only permitted when an employer has a "reasonable belief, based on objective evidence, that a particular employee will be unable to perform the job or will pose a direct threat due to a medical condition." Under this view, employers engaging in alcohol testing of current employees without any observed, objective evidence of a problem, are inviting a claim under the ADA. There may be an argument that random alcohol testing is permissible as a preventative measure in a safety sensitive position, however. In contrast, drug testing is allowed for employees because of a special provision of the ADA, indicating that drug testing is not considered a medical examination.

EEOC ADDRESSING DISCRIMINATION AGAINST UNEMPLOYED

Heather Thorne

"…excluding the unemployed may have a greater effect on African Americans, Hispanics, and other ethnic minorities that tend to have higher jobless rates.."

Many employers attempt to weed out the unemployed or those showing significant gaps in employment in the hiring process, considering such "unemployables" as less desirable workers. The EEOC at a hearing during February stated they are investigating whether excluding the unemployed may have a greater effect on African Americans, Hispanics, and other ethnic minorities that tend to have higher jobless rates. Currently, there is no specific legal protections for the unemployed, nor has the EEOC issued any guidance on the issue.

A spokesman for the U.S. Department of Labor (DOL) has stated that the chances of an employer considering an ethnic minority are decreased by one-third if jobless applicants are excluded. The DOL is also concerned about reports that some recent company advertisements have discouraged the unemployed from applying, stating the practice could hamper the government's efforts to get people back to work.