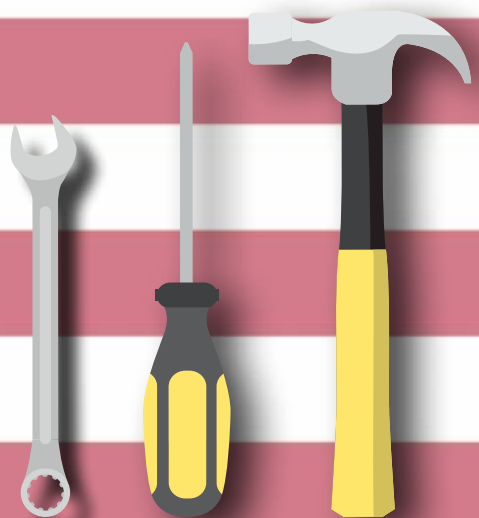




U.S. CHAMBER OF COMMERCE

State Labor Law Reform Tools for Growth





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State Labor Law Reform: Tools for Growth

INTRODUCTION

Labor policy in the United States is determined, to a large degree, at the federal level. Through statutes like the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA) the federal government essentially sets the contours of the playing field, although in different ways. In the case of the NLRA, robust preemption limits the scope for state and local government to intervene in labor matters. By contrast, the FLSA “sets the floor,” but gives other levels of government the ability to go beyond what is spelled out in the Act with regard to wages and overtime protections.

Policy discussions on labor and employment issues in Washington, D.C., have frequently been contentious, and in recent years any significant legislative proposals have become mired in gridlock. The result is that some state and even local governments have begun taking up labor and employment law reforms on their own.

States do have considerable scope to act, even in the face of strong NLRA preemption. Perhaps the most dramatic illustration of this has occurred in states like Indiana, Michigan, Wisconsin, and West Virginia, which recently enacted right-to-work laws. But while right-to-work might be the most well-known state-level reform, it is far from the only one.

For example, in 2015, the Nevada legislature enacted a new mass picketing statute, and Tennessee passed a bill allowing threats associated with requests for “card check” union organizing and employer neutrality to be prosecuted under the state’s bribery and extortion law. Numerous states have also passed their own preemption laws with regard to local wage and benefit ordinances.

This report examines ten labor law initiatives that can be implemented at the state level. It is based on an analysis of proposed legislation, already-enacted laws, and the current legal landscape. It is by no means a comprehensive listing of all such initiatives, but highlights a number of tools available to promote a favorable business climate.

RIGHT-TO-WORK



Labor unions and “right-to-work” laws occupy a long chapter in American history. Membership in trade unions began surging in the early twentieth century.¹ By the time Congress passed the NLRA in 1935, workers had been attempting to organize and collectively bargain for decades. Thus, in passing the NLRA, Congress did not invent collective bargaining, but merely recognized the right to organize and created the National Labor Relations Board (NLRB) to oversee it. Two years later, against a flurry of lawsuits attempting to dismantle the NLRA, the U.S. Supreme Court affirmed the law’s constitutionality.² From then on, union membership steadily rose, reaching its peak in the 1950s when approximately 35% of American workers belonged to a labor union.³

Then, as now, labor unions were funded largely by their members’ dues. There are several ways that unions have been able to gather dues even from

1 Richard B. Freeman, *Spurts in Union Growth: Defining Moments and Social Processes*, National Bureau of Economic Research (1997).

2 *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Virginian Railway v. System Federation No. 40*, 300 U.S. 515 (1937).

3 Paul Osterman *et al.*, *Working in America: A Blueprint for the New Labor Market* 46 (2001).

workers who do not desire to belong. In the most extreme case, subsequently outlawed by the Taft-Hartley Act, unions could condition employment itself on membership in the union, the so-called “closed shop.” A close relation is the “union shop,” where a union permits hiring of non-union workers but requires those workers to join the union within a certain timeframe. By joining the union, of course, the workers may also be required to pay any applicable fees, membership dues, and assessments. Finally, in “agency shops,” the union can collect fees from workers, however, the workers are not required to formally join the union. Both union and agency shops are effectuated through provisions in the collective bargaining agreement, thus guaranteeing the employer’s assent to the terms.⁴

Union dues, fees, and assessments are no small matter. In fact, they are a multi-billion dollar industry. According to one analysis conducted by the National Institute for Labor Relations Research in 2012, union dues, fees, and assessments collectively generated \$14.06 billion for public and private labor unions in the United States.⁵ On average, this was \$854 a year per member.⁶

“Right-to-work” laws, or state laws that allow workers the right to opt out of mandatory union membership are not new. Beginning with Florida in 1944,⁷ states began outlawing mandatory membership in labor unions, either by amendment to the state constitution or by statute. By 1947, just 10 years after the NLRA was upheld by the U.S. Supreme Court, 11 states had passed right-to-work laws.⁸ These early right-to-work laws were supported by a changing U.S. Supreme Court, which increasingly permitted regulation of the employment relationship, including a decision specifically upholding

4 Robert Gorman, *Basic Text on Labor Law: Unionization and Collective Bargaining* (West 2d ed. 2004).

5 National Institute for Labor Relations Research, *Labor Unions Receive \$14 Billion in Dues Per Year from CBAs (2012)*, available at <http://www.nilrr.org/2012/03/31/unions-rake-in-over-14-9-billion-in-dues-per-year-from-cbas/>.

6 *Id.*

7 Florida, Fla. Const. Article 1, § 6 (1944).

8 Arizona, A.R.S. Const. Art. XXV (1946); Nebraska, Neb. Const. Art. XV, §§ 13, 14, 15 (1946); South Dakota, S.D. Const. Art. VI, § 2 (1946); Arkansas, Ark. Stat. Ann. §§ 11-3-301 (1947); Georgia, O.C.G.A. §§ 34-6-6, *et seq.* (1947); Iowa, Iowa Code Ann. §§ 731.1, *et seq.* (1947); Tennessee, Tenn. Code Ann. §§ 50-1-201, *et seq.* (1947); Texas, Tex. Lab. Code § 101.051, *et seq.* (1947); Virginia, Va. Code Ann. §§ 40.1-58, *et seq.* (1947); North Dakota, N.D. Cent. Code, §§ 34-09-01, *et seq.* (1947); North Carolina, N.C. Gen. Stat. §§ 95-78, *et seq.* (1947).

the concept of statutory right-to-work.⁹ Finally, in 1947, right-to-work was enshrined in the Taft-Hartley Act. Section 14(b) of this law guarantees the right of individual states to enact right-to-work laws and has been broadly interpreted by the Supreme Court.¹⁰

State Law Initiative

Right-to-work laws grant workers the individual freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment. To date, 26 states and Guam have passed such laws, primarily in the South and Midwest, but notably also in the previous union strongholds of Indiana, Michigan, Wisconsin, and West Virginia.

The interest of state governments in right-to-work laws is understandable. Government data indicates a positive correlation between job growth and right-to-work. From 2004 to 2014, data from the Bureau of Labor Statistics showed that private sector employment grew by 9.9% in right-to-work states, nearly double that of non-right-to-work states.¹¹ Since 1990, nearly all of the top ten states for job growth have been right-to-work states, while nearly all of the bottom ten have been non-right-to-work states.¹² And in 2014, 17 of the 20 top states for business were right-to-work states.¹³ While such data does not prove direct causation, they are strong indicators of the benefits of right-to-work.

However, it is not just state government that finds right-to-work attractive. In many cases, workers themselves want the option of whether to join a union

9 *Lincoln Fed. Labor Union v. N.W. Iron & Metal Co.*, 335 U.S. 525 (1949).

10 29 U.S.C. 164(b); *Lincoln Fed. Labor Union v. N.W. Iron & Metal Co.*, 335 U.S. 525 (1949) (upholding constitutionality state right-to-work laws); *NLRB v. General Motors*, 373 U.S. 734 (1967) (holding that unions may not require formal membership); *Retail Clerks International Association, Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963) (holding that states may enforce right-to-work laws).

11 See U.S. Department of Labor, Bureau of Labor Statistics, <http://www.bls.gov/>.

12 *Id.*; see also National Right to Work Committee, Job Growth Twice as Fast in Right to Work States (June 19, 2015), available at <https://nrtwc.org/job-growth-twice-as-fast-in-right-to-work-states>; Mackinac Center for Public Policy State Employment Growth Chart 1990-2014, available at http://www.michigancapitolconfidential.com/media/images/2014/State_Employment_Growth_RTW_vs_Non.jpg (based on U.S. Department of Labor, Bureau of Labor Statistics January 1990 to April 2014 seasonally-adjusted data).

13 CNBC, America's Top States for Business 2014, available at <http://www.cnbc.com/2014/06/24/americas-top-states-for-business.html>.

and do not want to be compelled to pay union dues or join an association with which they may not philosophically agree. This is particularly true if the workers were not even present to vote in the original organizing campaign, or if they were, voted no.

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Since the unions' legal authority to run "union shops" and "agency shops" is provided through collective bargaining agreement provisions, right-to-work laws operate by prohibiting such contract provisions as a matter of law. Specifically, the majority of right-to-work laws prohibit any requirement that an employee pay dues, fees, or other charges to a labor union.

For example, Michigan voids union shops with the following language: "An individual shall not be required as a condition of obtaining or continuing employment [to] become or remain a member of a labor organization [or] pay any dues, fees, assessments, or other charges, or expenses of

any kind or amount or provide anything of value to a labor organization."¹⁴ It further provides that a contract is void if it requires an employee to be part of a union or remain part of a union as a condition of employment and provides for financial penalties and injunctive relief in the event its provisions are violated.¹⁵

Texas's law contains language that is fairly standard among right-to-work laws. It states: "A contract that permits or requires the retention of part of an employee's compensation to pay dues or assessments on the employee's part to a labor union is void unless the employee delivers to the employer the employee's written consent to the retention of those sums."¹⁶ The law voids any contract that purports to require an employee to be part of a

¹⁴ MCLS § 423.14.

¹⁵ *Id.*

¹⁶ Tex. Lab. Code § 101.004.

union or remain part of a union as a condition of employment.

Arizona, which has one of the oldest right-to-work laws in the nation, prohibited “closed shops” by constitutional amendment a year before the Taft-Hartley Act. Arizona’s constitution states: “No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the State or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization.”¹⁷

Most right-to-work states impose civil liability in the form of financial penalties on employers and labor organizations that violate the provisions.¹⁸ A number of states such as Virginia and Louisiana, also criminalize violations.¹⁹

Some states, but not all, specifically ban any fees of the type allowed in agency shops. Such fees, often referred to as service fees, typically are equal to the pro rata share of collective bargaining expenses. In *International Union v. NLRB*,²⁰ a divided three-judge panel held that union service fees were within the scope of Section 14(b), and thus could be prohibited by state law. Florida’s and North Dakota’s right-to-work laws, for instance, prohibit service fees as well as membership in a union as a condition of employment. Courts in both states have upheld the respective state law.²¹ In five other states, however, right-to-work laws prohibit agency shops, but are silent on the issue of service fees.²²

States that wish to create a more business-friendly environment could

17 A.R.S. Const. Art. XXV.

18 See Ala. Code § 25-7-35; Ariz. Rev. Stat. Ann. § 23-1306; Fla. Stat. § 447.17; O.C.G.A. § 34-6-27 (1982); La. Rev. Stat. Ann. § 23.986; Miss. Code Ann. § 71-1-47; Nev. Rev. Stat. § 613.290; N.C. Gen. Stat. § 95-83; S.C. Code Ann. § 41-7-90; Utah Code Ann. § 34-34-11; Va. Code § 40.1-67; Wyo. Stat. § 27-7-113.

19 Ark. Stat. Ann. § 81-204; O.C.G.A. § 34-6-28; Iowa Code Ann. § 731.6; La. Rev. Stat. Ann. § 23.985; Neb. Rev. Stat. § 48-219; S.C. Code Ann. § 41-7-80; S.D. Comp. Laws Ann. § 60-8-3; Tenn. Code Ann. § 50-1-204; Utah Code Ann. § 34-34-17; Va. Code § 40.1-69; Wyo. Stat. § 27-77-113.

20 675 F.2d 1257 (D.C. Cir. 1982), cert. denied, 103 S. Ct. 816 (1983)

21 *Florida Educ. Ass’n v. Public Employees Relation Comm’n*, 346 So.2d 551 (Fla. Dist. Ct. App. 1977); *Ficek v. Boilermakers Local 647*, 87 L.R.R.M. (BNA) 2739 (N.D. 1974).

22 The states are Kansas, Nevada, Arizona, Texas, and South Dakota.

consider any number of the right-to-work provisions discussed above. Such laws present virtually no legal risk, as they have been repeatedly upheld by courts for over 50 years and are specifically authorized by federal law. Other states can bolster their existing laws by prohibiting the type of service fees permitted in agency shops or strengthening penalties and injunctive relief.

The strongest right-to-work laws are those that, like Michigan's, not only ban closed shops, but also specifically ban any payment of dues, fees, or assessments. Some states, including Arizona and Arkansas, have also chosen to put right-to-work not just in their legal code, but also in the state constitution.

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There are now 26 right-to-work states. With more than half the country covered by these laws, this is an idea that additional state legislatures may consider in the next few years.

23 Arizona: A.R.S. Const. Art. XXV; Constitution of the State of Arkansas of 1874, Amendment 34, §1.

STATE FRANCHISE LAW REFORM



On August 27, 2015, the NLRB issued its decision in *Browning-Ferris Industries*, a much-anticipated case that significantly broadened the standard for joint employment under the NLRA.²⁴

In a 3-2 decision, the NLRB determined that Browning-Ferris Industries, operator of a recycling facility, was a joint employer with Leadpoint, a staffing company that supplied workers to the facility. As such, both “employers” were required to bargain with Leadpoint’s workers who had previously voted to join Teamsters Local 350.²⁵

In holding that Browning-Ferris and Leadpoint were joint employers, the NLRB changed its decades-old joint employer test articulated in *TLI/Laerco*.²⁶ Under the previous standard, entities were joint employers if they directly and immediately shared the ability to control or co-determine the essential terms and conditions of employment such as hiring, firing, and discipline. Under the new standard, an entity may be a joint employer if it

²⁴ 362 NLRB No. 186, August 27, 2015.

²⁵ Browning-Ferris has refused to do so, triggering an unfair labor practice charge that is being used to challenge the *Browning-Ferris* decision in federal court.

²⁶ *TLI, Inc.*, 271 NLRB 798 (1984); *Laerco Transportation*, 269 NLRB 324 (1984).

exercises control over the terms and conditions of employment directly or indirectly through an intermediary, or if it has reserved the authority to do so, even if that authority is unexercised.

The NLRB's broadened standard creates additional duties and liabilities for those deemed to be joint employers. A greater number of entities traditionally *not* considered employers, such as franchisors and firms that use subcontractors, may now be required to engage in collective bargaining, be held liable for unfair labor practices, and be subject to the unions' right to exert economic pressure. For example, companies that are now "joint employers" under the broadened standard are no longer "neutral" in their fellow joint employer's labor disputes for Section 8(b)(4) purposes. Therefore, in such a circumstance, a union representing one company's employees can lawfully utilize pickets directed at the second company.

Browning-Ferris, along with the ongoing *McDonald's* case brought by the NLRB's General Counsel,²⁷ pose significant threats to the franchise business model.²⁸ The new joint employment standard may erode the traditional independence between franchisor and franchisee and cause franchisors to exercise greater control over wages, hiring, and other aspects of employment at franchisee-operated businesses. It may also result in unions demanding the opportunity to bargain with a franchisor parent company in any dispute with an individual franchisee. In addition to franchising, any company that uses subcontractors, or contract workers is at risk.

State Law Initiative

Although the NLRB broadly defines joint employment pursuant to their federal powers, states still retain control over the standard by which employment and joint employment status is established under *state* law. As such, legislation that clarifies the definition of a franchise or redefines the joint employment standard can help ensure that state courts and state enforcement agencies do not adopt the expansive new joint employer standard established by *Browning Ferris*.

²⁷ *McDonald's USA, LLC, a joint employer, et al.*, NLRB Case No. 02-CA-093893.

²⁸ See, e.g., Lydia DePillis, *Franchises Fear a "Devastating" Change to Their Business Model*, The Washington Post, June 19, 2015, available at <https://www.washingtonpost.com/news/wonk/wp/2015/06/19/franchises-fear-a-devastating-change-to-their-business-model/>.

For example, state legislatures in Texas, Tennessee, Louisiana, Michigan, Wisconsin, Indiana, Utah and Georgia have already passed franchise law reform.²⁹ Tennessee's law, signed by Governor Bill Haslam on April 10,

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2015, was adopted specifically in response to franchisor concerns about possible joint employment liability in light of the NLRB's *McDonald's* case.³⁰ The law provides explicit legal separation between franchisors and franchisees by legislating that "neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose."³¹

Texas' law, which became effective on September 1, 2015, was passed "[i]n an effort to ensure that franchisors in Texas are not held unfairly liable for the actions of franchisees, to prevent frivolous lawsuits and to encourage franchisees to act responsibly."³²

Generally speaking, the law protects franchisors from employment liability arising from franchisee employees. The law amends the Texas Labor Code to confirm that the franchisor is not the employer of the franchisee's employees for any purpose, including discrimination, wages, unemployment, workplace safety, and workers' compensation.

While each state and set of facts is different, there are several ways that states can exercise their control over the joint employment standard.

First, if a state already has a franchise law, the law can simply be amended to include language such as: "The franchisor party to a franchise agreement as set out in Section __ of this chapter shall not be deemed an employer of workers providing labor services for the franchisee party for purposes of [insert citations for state statutes on employment discrimination, wage payment, leave, and collective bargaining]." Second, if a state does not have

²⁹ Additional states may pass similar laws in the 2016 legislative sessions.

³⁰ The *McDonald's* case, being pursued by the NLRB's General Counsel, is separate from the *Browning-Ferris* decision and represents a second track of the NLRB's efforts to broaden the definition of joint employer.

³¹ Tenn. Code Ann. § 50-1-208.

³² H. Comm. Rep., Bill Analysis, Tex. S.B. 652, 84th Leg., R.S. (2015).

a franchise law, standalone legislation such as the Franchise Employer Separation Act or the Franchisee Worker Classification Act can be adopted, as was done in Tennessee. A final approach can be to establish a rebuttable presumption that an individual is solely the employee of a franchisee if that franchisee is responsible for specific aspects of the employment relationship, such as hiring, firing, compensation, training, or day-to-day oversight.

Regardless of the legislative approach adopted, a state law cannot supersede the NLRB, given that the agency's investigations are guided by federal law and Board precedent. Still, a state law that clarifies or defines the employment status of franchisee employees may provide a measure of clarity and confidence to franchisors and franchisees. To a varying degree, all states regulate the employment relationship, as reflected in state wage payment, discrimination, and insurance laws. As such, in a state that has passed franchise law reform, a finding of joint employment under the NLRB's standard would not necessarily affect the putative joint employer's liability or status under state employment laws and enforcement.

LEGISLATION PROHIBITING LABOR PEACE AGREEMENTS

Some governmental bodies require employers to sign “labor peace” agreements as a condition of obtaining public financing assistance, such as underwriting of bonds, or being awarded a public contract. Labor peace agreements can also be required of employers doing business at a facility in which a government body asserts a proprietary interest, such as revenue received through the lease of real property owned by a city.³³

Labor peace agreements are inherently favorable to unions in that they can require card check certification, provide for union access to the workplace, require the employer to accept a standard union contract, or guarantee employer neutrality during organizing campaigns.³⁴ As a result, employers are essentially forced into relinquishing their rights under federal labor laws and accepting unfair union organizing concessions.

Pittsburgh’s labor peace ordinance, for example, was passed in 1999 and covers contractors and subcontractors hired to staff hospitality operations of the City of Pittsburgh’s capital projects.³⁵ At first glance, the ordinance appears to include a favorable commitment by the union not to picket, strike, boycott, or engage in work stoppages or other economic interference. However, it explicitly provides that employers “shall be or become signatory to valid collective bargaining agreements” with any labor organization seeking to represent its employees “as a condition precedent to its contract with the City of Pittsburgh.”³⁶ This language goes far beyond what is seen in other labor peace ordinances, including those in San Francisco, which pioneered the use of labor peace agreements. Even under San Francisco’s two labor peace ordinances, a union still needs to campaign for worker support, albeit the campaign is heavily tilted toward the union since support can be expressed by signed cards rather than a secret ballot. By contrast, the

³³ Baltimore City Code, Art. 11, §13-6(b).

³⁴ See U.S. Chamber of Commerce, Labor Peace Agreements: Local Government as Union Advocate (Sept. 12, 2013), <https://www.uschamber.com/report/labor-peace-agreements-local-government-union-advocate>.

³⁵ City of Pittsburgh Code, § 161.30.1(a).

³⁶ *Id.*

Pittsburgh ordinance automatically grants unionized status, thus removing the union's relatively minor burden in collecting cards.

Other localities, and the states of New York and Maryland, have enacted less specific labor peace ordinances.³⁷ These require covered employers to enter into agreements with unions under which the union consents not to engage in economic action such as strikes and pickets. But the laws leave it to the parties to determine the specific content of the agreement, including the nature of the rules that will govern the parties' behavior during organizing campaigns and the method by which employees will express their decision regarding collective representation. Such statutes provide unions with substantial leverage to demand card check since a covered employer *must* provide a labor peace agreement signed by a union, and most unions will only sign if their demands for card check and other negotiating concessions are met.³⁸

Although purportedly designed to reduce conflict, labor peace agreements may easily be used to pressure employers into agreeing to unfair demands by unions. Not surprisingly, in some localities, labor peace requirements were initially proposed and advanced by union-supported politicians.

State Law Initiative

In response to local labor peace ordinances, states can pass legislation prohibiting local governments from imposing such policies, or repealing those already in place.

Legislation can state, for example, that “No governmental body may pass any law, ordinance, or regulation, or impose any contractual, zoning, permitting, licensing, or other condition that requires any employer or employee to waive its rights under federal labor laws, including but not limited to the National Labor Relations Act.” Similarly, legislation could state something such as: “No governmental body may enact and/or enforce

³⁷ See, e.g., D.C. Code § 32-851.

³⁸ See, e.g., Pittsburgh (Penn.) Ordinance ch. 161.30; 20 Ill. Comp. Stat. Ann. 689/15(a)(3), 689/25(a). See also U.S. Chamber of Commerce, Labor Peace Agreements: Local Government as Union Advocate (Sept. 12, 2013), <https://www.uschamber.com/report/labor-peace-agreements-local-government-union-advocate>.

any law, regulation, or ordinance, that would require, in whole or in part, an employer or multi-employer association to accept or otherwise agree to any provisions that are mandatory or non-mandatory subjects of collective bargaining under federal labor laws, including but not limited to the National Labor Relations Act.”

Language can also specifically address the procurement process. Such language could state that plans, specifications, and contract documents may not: (a) require an employer to enter into or comply with an agreement with a labor organization; (b) discriminate against an employer for refusing to enter into or comply with an agreement with a labor organization; or (c) require an employer to enter into or comply with an agreement requiring an employee to waive his or her rights under federal labor laws.

States including Georgia, Tennessee, Louisiana, Michigan, Alabama and Mississippi have already passed legislation prohibiting labor peace agreements. Louisiana’s law, the first of these, which was passed in 2001, prohibits any governmental body from imposing any zoning, contractual, permitting, or licensing conditions on an employer or employee which would limit their “full freedom to act” under the federal labor laws.³⁹ Like Louisiana, the language of Tennessee’s law also phrases the legislative goal as a preservation of federally-guaranteed rights by providing that “No law, ordinance, or regulation shall impose any contractual, zoning, permitting, licensing, or other condition that requires any employer or employee to waive their rights under the National Labor Relations Act.”⁴⁰

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Neither Louisiana’s law, or any of the more recent bans on labor peace agreements, has faced any constitutional or other legal challenges. The fact that a ban on labor peace agreements has gone unchallenged as established law for over a decade is encouraging for other states that wish to enact similar legislation.

³⁹ La. Rev. Stat. § 23:984.

⁴⁰ Tenn. Code Ann. § 50-1-207.

LEGISLATION PROHIBITING PROJECT LABOR AGREEMENTS



Project labor agreements (PLAs) are contracts that require construction contractors to use exclusive union hiring halls, grant a union exclusive bargaining privileges over all of their workers, and force workers to pay dues to keep their jobs when working on government construction projects. The terms of a PLA typically result in government paying above-market prices.⁴¹ To effectuate a PLA, the awarding governmental body simply includes a collective bargaining agreement in the construction project's bid specifications. In order to receive a contract, a contractor must sign the agreement and consent to the terms contained in it. PLAs are authorized by the NLRA, which includes specific language permitting employers to enter into pre-hire agreements with labor unions in the construction industry.

Proponents argue that PLAs provide uniform wages, equip contractors with an uninterrupted supply of qualified workers, and reduce misclassification of workers and the related underpayment of payroll taxes. They also claim

⁴¹ See, e.g., Maurice Baskin, *The Case Against Union-Only Labor Project Agreements*, *The Journal of Labor Research*, Vol. 19 (Winter 1998).

that PLAs help ensure projects are delivered on time and within budget, and provide job opportunities for disadvantaged communities.⁴²

However, detractors note that PLAs significantly increase costs and are anti-competitive. They can result in qualified contractors declining to submit bids, and contracts being awarded to unionized contractors without competition and without regard to the contractor's merit, all of which is to the detriment of the public. When a PLA was instituted for renovations of the Roswell Park Cancer Institute, for instance, submitted bids dropped by 30% and costs increased by more than 26%.⁴³ The Beacon Hill Institute, a research group affiliated with Suffolk University, concluded that PLAs increased the price of bids on school building projects in Massachusetts by 14% and construction costs by 12%.⁴⁴

State Law Initiative

PLAs are authorized, but not required, by the NLRA, and states retain the authority to regulate public construction projects. As a result, some states have restricted the ability of state and local governments to use PLAs via state legislation, thereby leveling the playing field for the approximately 80% of contractors that are non-unionized.

For example, on June 9, 2015, Nevada became the 23rd state to restrict the ability of state and local government entities to implement project labor agreement mandates on taxpayer-funded construction projects. Specifically intending to provide more “economical, nondiscriminatory, neutral and efficient contracts for public works by public bodies in this State as market participants,”⁴⁵ Nevada's law prohibits any public body in the state from requiring or prohibiting an eligible bidder, contractor, or subcontractor

42 Carl Horowitz, New Bill Would Ban Mandatory Project Labor Agreements, National Legal and Policy Center, Apr. 30, 2015, *available at* <http://nlpc.org/stories/2015/04/30/new-bill-would-ban-mandatory-project-labor-agreements>.

43 Maurice Baskin, *The Case Against Union-Only Labor Project Agreements*, The Journal of Labor Research, Vol. 19 (Winter 1998).

44 Paul Bachman, *et al.*, Project Labor Agreements Increase Costs for New School Construction, New BHI Study Finds (Sept. 25, 2003), *available at* <http://www.beaconhill.org/BHIStudies/PLAPolicyStudy12903PRel.pdf>; *see also Mich. Bldg. & Constr. Trades Council & Genesee v. Snyder*, 729 F.3d 572 (6th Cir. 2013) (containing citations of sources reporting that PLAs result in higher construction costs).

45 2015 Nev. ALS 455, 5.

from entering into an agreement with one or more labor organizations as part of a public works project. The law also prohibits discrimination against bidders, contractors, or subcontractors for refusing to adhere to an agreement with one or more labor organization with regard to public work.

In addition to maximizing taxpayer money, state statutes that prohibit PLAs can also serve to clarify and strengthen competitive bidding laws. Many states require that contracts be awarded to the “lowest responsible bidder,”⁴⁶ and a number of state courts have invalidated PLAs as conflicting with such competitive bidding statutes.⁴⁷ Other courts, however, have upheld PLAs despite the presence of a competitive bidding statute.⁴⁸ Thus, clarifying competitive bidding statutes can help reduce litigation.

State laws prohibiting PLAs are not at a high risk of being invalidated by courts, particularly when they only restrict government entities from entering into PLAs themselves and are enacted for the public interest, such as to preserve taxpayer resources and encourage competition. While the so-called “market participant” doctrine has primarily applied to laws that attempt to *require* PLAs, the Sixth Circuit recently imported the same reasoning to uphold Michigan’s 2011 state law that banned PLAs, the Fair and Open Competition in Governmental Construction Act.⁴⁹ Opponents had challenged the law in court by arguing that it was preempted by the NLRA and overbroad since it did not consider projects on a case-by-case basis. However, the Sixth Circuit rejected these arguments in part because the state had a proprietary interest in the efficiency of construction projects and could decide how to spend public money.

46 Cal Pub Contract Code § 20128.

47 *E.g., John T. Callaban & Sons, Inc. v. City of Malden*, 713 N.E.2d 955, 961 (Mass. 1999) (noting that PLAs are not absolutely forbidden on public projects and may be valid where they serve the purposes of the competitive bidding statute).

48 *E.g., George Harms Constr., Co. v. N.J. Tpk. Auth.*, 644 A.2d 76, 94-95 (N.J. 1994) (noting that where the competitive bidding law requires open competition for bids, a PLA is invalid if it limits competition).

49 *Mich. Bldg. & Constr. Trades Council & Genesee v. Snyder*, 729 F.3d 572 (6th Cir. 2013).

STATE PREEMPTION OF MINIMUM WAGE AND OTHER CITY ORDINANCES

An increasing number of county and municipal governments have passed local employment ordinances. These ordinances typically involve higher minimum wages and additional sick leave requirements that go well beyond state and federal requirements. In addition, San Francisco recently passed a predictive scheduling ordinance mandating advance notice of schedules with accompanying employer penalties that may become a model for other local governments.

Buoyed in part by the “Fight for \$15” movement, at least 35 cities or municipalities have now enacted minimum wage ordinances, most notably California and New York State.⁵⁰ Many of these include significant monetary penalties for any violations, including back pay and liquidated damages. For instance, on June 3, 2014, Seattle’s mayor signed an ordinance into law that will phase in a \$15 minimum wage over a three to seven year period depending on employer size. The wage amount varies slightly depending on whether the employer provides health insurance.⁵¹

Aside from the wage increase, Seattle’s ordinance also discriminates against franchise businesses. The slower minimum wage phase in for small employers (those with fewer than 500 employees) does not apply to franchisees associated with a national brand, despite the fact that franchises are legally separate businesses.⁵²

A second type of local ordinance requires employers to provide a certain amount of paid sick leave to their employees each year. To date, over 20 counties and cities including San Francisco, Seattle, Philadelphia, and Newark, have passed paid sick leave ordinances. San Francisco’s law, for instance, mandates that paid sick leave accrue at the rate of 1 hour for every

50 See City Minimum Wage Laws: Recent Trends and Economic Evidence, National Employment Law Project, *available at* <http://www.nelp.org/>.

51 Seattle City Council, Select Committee on Minimum Wage and Income Inequality, <http://www.seattle.gov/council/issues/MinimumWage/default.html>.

52 City of Seattle Ordinance Number: 124490.

30 hours worked, up to 40 or 72 hours depending on the business size.⁵³ These hours can be used during the year, or carried forward to the next calendar year, and employees can sue in court over alleged violations.

Although local governments often tout their action as leadership in light of state and federal inaction, higher minimum wage standards differing from one locale to another can encourage residents to conduct their business in jurisdictions where wage costs, and hence prices, are lower. The flurry of ordinances in different communities also creates a hodge-podge of varying requirements, which increases compliance costs.

Fifteen states have already successfully enacted legislation that specifically preempts local wage and/or paid leave ordinances.

Importantly, these ordinances are often spearheaded by labor unions. For example, according to its annual financial disclosure with the U.S. Department of Labor (known as an LM-2), the Service Employees International Union (SEIU) has spent over \$55 million supporting the national “Fight for \$15” campaign.⁵⁴

State Law Initiative

To address the expansion of employment-related city ordinances, states can pass preemption legislation that prohibits municipalities from imposing local employment mandates. Fifteen states⁵⁵ have already successfully enacted legislation that specifically preempts local wage and/or paid leave ordinances.

In Georgia, in response to warnings that Atlanta would soon adopt its own living wage ordinance, the General Assembly in 2004 passed a blanket prohibition on all local minimum wage ordinances. House Bill 1258 amended the state’s minimum wage law by providing that “No local government entity may adopt, maintain, or enforce by charter, ordinance, purchase agreement, contract, regulation, rule, or resolution, either directly

53 City and County of San Francisco, Paid Sick Leave Ordinance, <http://sfgov.org/olse/paid-sick-leave-ordinance-pslo>.

54 LM-2 disclosures can be found at: <https://olms.dol-esa.gov/query/getOrgQry.do>.

55 Alabama, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Oklahoma, Oregon, Tennessee, and Wisconsin.

or indirectly, a wage or employment benefit mandate.”⁵⁶ On May 13, 2004, Governor Sonny Perdue signed the bill into law.

Wisconsin has enacted two separate laws preempting local wage and paid sick leave ordinances. In 2005, given the importance of a uniform policy throughout the state, the Wisconsin legislature preempted local wage ordinances as a matter of statewide concern.⁵⁷ Six years later, in 2011, Governor Scott Walker signed Wisconsin Act 16 into law. Act 16 prohibits a locality from enacting or administering an ordinance that requires private employers to provide paid or unpaid leave.⁵⁸ The Act does not interfere with employers’ obligations to provide leave guaranteed by state or federal law, such as the Family and Medical Leave Act.

While Georgia and Wisconsin preempt future ordinances, states can also repeal previously-passed ordinances with language such as, “Any and all living wage mandates enacted by any political subdivision of this state are repealed.” To survive legal challenge, however, it is important that the state’s preemption law carve out legally-recognized exceptions, such as prevailing wage orders under state laws and the right of a political subdivision to enforce a minimum wage requirement paid to employees of the political subdivision.

⁵⁶ O.C.G.A. § 34-4-3.1(b)(2).

⁵⁷ Wis. Stat. § 104.001.

⁵⁸ Wis. Stat. § 103.10.

STATE PREEMPTION OF WAGE THEFT LAWS

Wage theft—essentially, not paying workers what they are owed—is illegal in all 50 states. Wage theft can encompass a variety of offenses, including not paying the full wage that is owed (including commissions and bonuses), paying below the minimum wage, failing to pay wages when due, not paying overtime, taking illegal deductions, and misclassifying a worker as an independent contractor. Despite the fact that wage theft is already illegal, union-funded advocacy groups like Interfaith Worker Justice and the National Employment Law Project have pushed for stringent new laws at the local level.

In response, several cities and states have addressed a perceived wage theft problem through tough legislation and increased enforcement efforts. Generally, those efforts include stiffer penalties—in some cases including revocation of a business license, more resources for investigations and enforcement, burdensome record keeping requirements, and anti-retaliation provisions.

For instance, a new wage theft law was enacted in Illinois in 2010.⁵⁹ Included in Illinois' Wage Payment and Collection Act is a streamlined procedure allowing workers to take claims under \$3,000 to the Illinois Department of Labor. The law also provides protection from retaliation and permits employees to file suit in circuit court against business owners *as individuals*.⁶⁰ It requires employers that are found guilty to pay wages owed, a fine, interest, and legal fees. The law also expressly allows workers to file class action lawsuits against employers.⁶¹

In Illinois' wake, the city of Chicago passed one of the toughest wage theft laws in the country in January 2013. It provides that if a business is convicted of a willful violation, its business license can be revoked.⁶² Chicago activists also took their wage theft campaign to Cook County and

⁵⁹ 820 ILCS 115/1, *et seq.*

⁶⁰ 820 ILCS 115/11.

⁶¹ *Id.*

⁶² Chicago, Illinois, Code of Ordinances Sec. 4-4-320.

succeeded in passing a county-wide wage theft ordinance in 2015.⁶³ Chicago and Cook County join other cities such as Washington, D.C., Miami-Dade County, San Francisco, Seattle, and Fayetteville, AR, with strict local ordinances governing wage theft. Activists and other supporters hope these laws, particularly the provisions revoking a business license, will become the national standard.⁶⁴

State Law Initiative

Like minimum wage and paid leave preemption, states can pass laws prohibiting localities from imposing wage theft ordinances. One state,

Like minimum wage and paid leave preemption, states can pass laws prohibiting localities from imposing wage theft ordinances.

Tennessee, has already done so.⁶⁵ Tennessee already had a strong preemption law covering health insurance benefits, leave policies, hourly wage standards, and prevailing wage standards that deviate from existing requirements of state and federal law.⁶⁶

However, it was specifically amended to include a prohibition against local governments enacting wage theft ordinances, stating that enforcement of existing wage statutes is the province of the state and federal governments. The amendment was proposed, at least in part, to address concerns about proposed wage theft laws in Memphis and Shelby County.

Model state legislation preempting local wage theft ordinances would provide language similar to the following: “A local government shall not adopt or maintain in effect any law, ordinance, or rule that creates requirements, regulations, or processes for the purpose of addressing wage theft. Any existing or additional wage theft ordinance or regulation that exceeds the designated state and federal laws shall be explicitly preempted by the state.” State legislation can also limit the scope of wage theft laws to

63 Cook County Government, Cook County Board of Commissioners Passes Wage Theft Ordinance, <http://www.cookcountyil.gov/2015/02/11/cook-county-board-of-commissioners-passes-wage-theft-ordinance/>.

64 Josh Eidelson, *Big win for labor in Chicago*, SALON, Jan. 18, 2013, available at http://www.salon.com/2013/01/18/big_win_for_labor_in_chicago/.

65 Tenn. Code Ann. § 50-2-113.

66 See, e.g., Tenn. Code Ann. § 50-2-112.

intentional employer misconduct, and can specifically exclude from coverage certain employer actions, such as payroll deductions for employer reimbursement.

Although municipalities in several states have enacted wage theft ordinances, legislators have the ability to pass state laws barring and voiding such policies. This type of preemption preserves uniformity within political boundaries and can help protect a state's business climate.

MASS PICKETING



Picketing is a tactic frequently employed by unions during disputes with employers. As such, most people assume that a state law restricting picketing activity would be preempted by the NLRA. However, that does not apply when the conduct can be described as “mass picketing,” which is a longstanding area of state regulation. Mass picketing is not merely the act of picketing in large numbers. Traditionally, it is associated with threats of violence, obstruction of public streets, interference with access to private property by employees or members of the public, and/or other disorderly and coercive conduct.

While courts have occasionally enjoined some mass picketing activities in the absence of a regulatory statute,⁶⁷ in states without laws regulating mass picketing unions have more leeway to organize disruptive pickets, sit-ins, and other demonstrations. Such assemblies are protected under the First Amendment so long as they remain peaceful; however, they are not

⁶⁷ See, e.g., *Acme Markets, Inc. v. Retail Store Emp. Union Local No. 692, AFL-CIO*, 231 F. Supp. 566, 571 (D. Md. 1964) (“If a record contains adequate proof that a pattern of violence has been established which is so enmeshed in the picketing that violence can only be prevented by enjoining all picketing, a State Court may be justified in entering such an injunction.”).

protected if they escalate and result in the blocking of roadways and building entrances and exits, and threats of (or actual) violence.

State Law Initiative

State mass picketing legislation can curb disruptive activities associated with such pickets and enable workers and employers to carry out their regular business activities without impediment, concerns for safety, or fear of violence. The existence of mass picketing legislation fortifies judicial resolve in this area, helps to preserve public order, and encourages peaceful, non-coercive communication. Additionally, mass picketing legislation empowers states to prohibit or limit the blockage of building and workplace entrances and exits; violent, threatening, or disruptive assemblies; and the picketing of private residences.

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Currently, only a handful of states have enacted mass picketing laws, including Texas, Michigan, Utah, Mississippi, Nevada, North Carolina, Minnesota, and Wisconsin.

Tennessee has also introduced legislation over the past several years, although it has not yet passed the state senate as of this writing.

The nature of new state legislation will necessarily depend on what, if any, mass picketing laws are already in place. In states without any laws regulating mass picketing, mass picketing legislation should preserve free ingress and egress to and from buildings and places of employment, prohibit mass picketing involving violence and physical trespass, ban the picketing of private residences, include penalties, and provide for injunctive relief. Such legislation will provide property owners with an effective means of protecting their property rights. It will also serve the public peace by allowing for unobstructed access to buildings and worksites for employees, customers, and visitors.

In states with some form of mass picketing legislation in place, legislatures can enhance the law by increasing the penalties under existing statutes, addressing potential overbreadth and vagueness concerns, allowing for

injunctions, and mandating disciplinary action, up to and including termination of employment, against law enforcement officials who are derelict in their duty to enforce mass picketing laws. This last item can be an issue in jurisdictions where police are unionized and may harbor sympathy for union activists.

For instance, Texas’s mass picketing statute broadly defines picketing to include any person who, on behalf of an organization, induces anyone not to enter a location being picketed or observes the location to determine who does enter.⁶⁸ Texas’s definition of picketing also includes those who follow employees or patrons to or from a location or attempts to dissuade them from doing so.⁶⁹ Although Texas’s law contains moderate financial penalties, it does not include the right of businesses to seek injunctive relief.

When crafting state legislation with an eye toward labor disputes, drafters must be aware of several legal issues to ensure that a court will not invalidate the law. These include issues of preemption, First Amendment rights, and vagueness and overbreadth.

Preemption

There are several recognized labor preemption doctrines, each known by the seminal case articulating the doctrine. Of primary concern when dealing with mass picketing statutes is *Garmon* preemption from the U.S. Supreme Court’s decision in *San Diego Building Trades Council v. Garmon*.⁷⁰

Under *Garmon*, when an activity is arguably permitted or prohibited pursuant to Section 7 or Section 8 of the NLRA, a state law that regulates such activity is preempted by the statute.⁷¹ However, an exception to the *Garmon* preemption doctrine exists for conduct “defined by the traditional law of torts” as “marked by violence and imminent threats to the public order.”⁷² This exception applies when state law addresses something “peripheral” to the federal interests in the NLRA and the state interest “weighs so heavily by

68 Tex. Lab. Code § 101.152.

69 Tex. Lab. Code § 101.152(b)(2).

70 359 U.S. 236 (1959).

71 *Id.* at 245.

72 See *UAW v. Russell*, 356 U.S. 634 (1958); *United Constr. Workers v. Laburnum*, 347 U.S. 656 (1954).

comparison to the NLRB's interest in exercising exclusive jurisdiction that congressional interest to deprive the state of its power cannot be inferred."⁷³ The Supreme Court also has permitted states to enjoin such conduct.⁷⁴

In addition, the U.S. Supreme Court ruled in *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*⁷⁵ that an employer, based on state trespass laws, may seek a state court-issued injunction against a union picketing on company property. One key to avoiding preemption in *Sears* was that the employer "asserted no claim that the picketing itself violated any state or federal law. Rather, it sought simply to remove the pickets from its property to the public walkways, and the injunction issued by the state court was strictly confined to the relief sought." Another key was that the employer had "no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board."⁷⁶ While the union in *Sears* had the opportunity to file a § 8(a)(1) charge with the NLRB to determine whether the trespassory picketing was protected as a result of an absence of alternative means of communication, it did not do so.⁷⁷

In addition to allowing state courts to enjoin threats of violence, name-calling calculated to provoke violence, and tortious trespass and nuisance, *Garmon* preemption also permits courts to enjoin more "peaceful" activity,

73 *Hotel Employees & Restaurant Employees v. Jensen*, 753 P.2d 1277 (1988) (citing *Garmon*, 359 U.S. at 243-44).

74 See *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (state may enjoin threats of violence, obstruction of the streets and entrances to a plant, and name-calling calculated to provoke violence).

75 *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180 (1978).

76 *Id.* at 202.

77 Similarly, in *Helmsley-Spear, Inc. v. Fishman*, 08-164 (Ny. Ct. App. Nov. 24, 2008), the New York Court of Appeals (New York's highest state court) affirmed a lower court's injunction, holding that an employer's private nuisance action against a union was not preempted by the NLRA. 2006 NY Slip Op 50855. In *Helmsley-Spear*, a union engaged in an organizing campaign assembled union members outside entrances to the employer's building and distributed leaflets while one or more members drummed on a plastic container, metal pot, or tin can. The employer commenced a private nuisance action against the union seeking an order enjoining it from engaging in drumming or other noise-making activities. The state supreme court (New York's lowest state court) granted the injunction sought by the employer, finding that the drumming had "caused stress and business interruption," which, if left unabated, would cause more stress and harm to the listeners. The Court of Appeals held that, "[b]alancing the state interest in adjudicating private nuisance claims against the interference with the NLRB's ability to determine matters committed to it by the NLRA and the risk that state courts will prohibit conduct otherwise protected by the Act, we conclude that Congress did not intend to preempt the jurisdiction of state court to adjudicate the tortious conduct alleged here."

such as obstructing streets and highways or picketing residential homes. However, the doctrine generally prevents state courts from enjoining all types of peaceful picketing activity. Accordingly, in cases where an employer wishes to use a mass picketing law to enjoin or punish picketing activity that negatively affects its business interests, the court will only enjoin activity that is outside the purview of federal labor law. Because the NLRA protects a union's right to engage in non-obstructive peaceful picketing of a business, any state-level mass picketing statute must not purport to curtail or interfere with this federally protected right.⁷⁸

First Amendment Rights

In addition to preemption, state mass picketing laws must comply with the U.S. Constitution's rights to freedom of speech and assembly as spelled out in the First Amendment. Lawmakers must be careful that mass picketing statutes do not infringe upon these rights more than is constitutionally permissible. States do, however, have scope for action. As one Texas court observed, "First Amendment protection of peaceful labor picketing does not confer [the] right to picket at any time or in any manner and reasonable time, place, and manner regulations are permissible restrictions on that right."⁷⁹

Accordingly, a mass picketing law will not offend the First Amendment if its restriction on speech is content-neutral, it only regulates the time, place, and manner of speech, and it leaves open alternative means of communication. A mass picketing law likely will be held unconstitutional on First Amendment grounds if it is drafted with the intent to discriminate and limit speech based on the identity of the speaker or the content of his or her message. Therefore, it is essential that legislators avoid singling out unions in the language of mass picketing legislation—either by limiting application to

78 See *Youngdahl v. Rainfair*, 355 U.S. 131 (1957) (state permitted to enjoin threats of violence, obstruction of the streets and entrances to a plant, and massed name-calling calculated to provoke violence, but may not simultaneously enjoin other workplace picketing, as peaceful picketing is within the exclusive domain of the NLRB); *Dallas Gen. Drivers, Warehousemen & Helpers Local 745 v. Cent. Beverage, Inc.*, 507 S.W.2d 596, 599 (Tex. Civ. App. 1974) ("Any nonviolent coercion of nonstriking employees resulting from the number of strikers peaceably assembled in front of the employer's premises was at most conduct 'arguably prohibited' by s 8(b)(1) of the National Labor Relations Act.... Consequently, such conduct was within the exclusive jurisdiction of the National Labor Relations Board.").

79 *Sherman v. State*, 626 S.W.2d 520 (Tx. Cr. App. 1981).

particular groups or excepting particular groups from coverage—and that the understood purpose of the law is to protect all citizens from the dangerous effects of mass picketing.

Vagueness and Overbreadth

A law is unconstitutionally vague “if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.”⁸⁰ Where a case involves the First Amendment, a greater degree of specificity and clarity is required.⁸¹ At the same time, “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.”⁸²

Mass picketing statutes have been challenged for vagueness arising out of requirements as to the specified distance picketers must remain from targets of picketing⁸³ and the nature of prohibited conduct.⁸⁴ Generally, courts are reluctant to find a statute void for vagueness and provide a limiting construction to otherwise vague provisions.⁸⁵ Where neither context nor

80 *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

81 See *Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001).

82 *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

83 *E.g., Klein v. San Diego County*, 463 F.3d 1029 (9th Cir. 2006). In affirming the federal district court’s denial of the picketers’ freedom of speech challenge, the U.S. Court of Appeals for the Ninth Circuit held that the ordinance is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternatives for communication. The court denied the overbreadth challenge, holding that there is no realistic danger that the ordinance itself will significantly compromise recognized First Amendment protection. Finally, the court denied the vagueness challenge, holding that the language of the ordinance itself is not ambiguous.

84 *E.g., State v. Guzman*, 968 P.2d 194 (Haw. 1998). In analyzing the legal challenge, the Hawaii Intermediate Court of Appeals here held that the statute was not unconstitutionally vague because: (1) a person of ordinary intelligence would have a reasonable opportunity to know that it is unlawful to refuse or willfully fail to move as directed by an officer; (2) a person may then choose between the lawful and unlawful conduct; and (3) the law provides sufficiently explicit standards for those who apply it. The court also held that the law is constitutional as applied because it does not prohibit picketing or the communication of messages altogether, but rather is specifically aimed at conduct causing an obstruction of ingress to or egress from public or private places, and individuals may continue to exercise rights generally guaranteed by the First Amendment and the Hawaii constitution. Finally, as to the security guards’ third argument that the law is preempted by the NLRA, the court upheld the law as not preempted because its enforcement by the state focused on the location of the picketers and not on the picketing conduct itself.

85 See also *Cox*, 379 U.S. at 568-69 (upholding statute prohibiting picketing “near” a courthouse, despite statute’s failure to define the term “near”).

definitions within the statute itself provide clarification, however, a law will be struck down.⁸⁶

An overbreadth challenge asserts that a statutory restriction's scope includes a substantial amount of protected conduct. A law is overbroad if it "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech"⁸⁷

Applied to a mass picketing situation, a law would be considered overbroad if, for instance, it prohibited not only picketing that interferes with ingress to and egress from buildings, but also outlawed peaceful picketing across the street from a targeted location. For example, the San Diego residential picketing ordinance in *Klein v. San Diego County*⁸⁸ was challenged on overbreadth grounds because, plaintiffs argued, it banned the communication of messages the targeted resident might want to receive (citing examples such as a little league team holding a "Get Well Soon Tommy" sign in front of their teammate's house, or a picketer who wished to "target" a neighborhood to warn residents about some danger in a neighborhood, such as a sex predator). The court held, consistent with Supreme Court precedent, that because a facial overbreadth challenge is a strong remedy, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge,"⁸⁹ and accordingly denied the overbreadth challenge. Applied to mass picketing statutes, the overbreadth doctrine means that legislators must be careful to narrowly tailor statutory provisions so that they prohibit only conduct that is harmful to the citizens and associations the law is designed to protect.

⁸⁶ See *Nash v. State of Tex.*, 632 F. Supp. 951, 980 (E.D. Tex. 1986) *aff'd in part, rev'd in part sub nom. Nash v. Chandler*, 848 F.2d 567 (5th Cir. 1988).

⁸⁷ *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

⁸⁸ 463 F.3d 1029 (9th Cir. 2006).

⁸⁹ *Id.* at 800.

In conclusion, mass picketing legislation can be beneficial to businesses wishing to keep their workplaces safe and accessible. It must be emphasized, however, that these laws may not regulate activity already covered by federal labor statutes. Moreover, peaceful picketing in general is constitutionally protected speech. Accordingly, mass picketing legislation must be tailored to regulate or prohibit picketing activity that targets residential domiciles; blocks ingress to and egress from buildings and worksites; or involves threats of violence, name-calling calculated to provoke violence, or tortious trespass and nuisance. In short, it must be drafted carefully and narrowly enough to withstand constitutional scrutiny.

NORTH CAROLINA TRESPASSING BILL



In a 1987 speech, International Brotherhood of Electrical Workers (“IBEW”) President Jack J. Berry invited local unions to “drive the non-union element out of business” through a coordinated “salting” campaign aimed at placing union organizers as employees inside non-union businesses. These “employees” would then attempt to organize the businesses. The campaign was complete with a union organizing manual that provided guidance to local unions on how to conduct salting campaigns.⁹⁰

Two years later, in 1989, a large non-union electrical contractor in Wisconsin advertised positions for licensed electricians. The IBEW Locals 292 and 343 learned of the job openings and paid its unemployed members to apply for the job with the understanding that the members, if hired, would obtain information about the employer’s worksite and attempt to organize it. This case of union salting famously came before the U.S. Supreme Court in *NLRB v. Town & Country Electric, Inc.*⁹¹ Although the “applicants” were on union payroll, the U.S. Supreme Court held that they were not precluded from the NLRB’s protections as “employees” under the

90 *Toering Elec. Co.*, 351 NLRB 225 (NLRB 2007).

91 *NLRB v. Town & Country Elec.*, 516 U.S. 85 (U.S. 1995)

NLRA. As such, non-covert (or covert) paid union organizers may be protected as employees under the NLRA, including applicable anti-retaliation provisions.

Union salting has been called a powerful and effective organizing method for unions. In 2005, for instance, the Laborer's International Union of North America placed two members within a Manhattan-based demolition company that was notorious for resisting union organizing efforts. Within one week, the union had convinced 17 of 18 workers to sign union cards.⁹²

Union salting has equally been referred to by the National Right to Work Committee as “an instrument of economic destruction” and sabotage. Once inside, union salts have direct access not only to workers, but also to potentially confidential business information of the employer. As noted by Richard Bensinger, former executive director of the AFL-CIO's organizing department, “There is no better way to gain an understanding of the needs, fears and beliefs of workers than to work and experience an organizing drive side by side with them. During my time as an inside organizer, I played an important role in organizing workers and gained invaluable insight into the psychological and interpersonal dynamics of uniting personalities into a single voice for change.”⁹³

Congress has attempted to address the placement of union insiders numerous times. Some version of the Truth in Employment Act, which would amend the NLRA's definition of “employee” to exclude applicants or employees on union payroll, has been introduced nearly every legislative session in the past few decades, though it has yet to pass. Although employers have been occasionally buoyed by helpful Board decisions,⁹⁴ they still tend to face a lose-lose menu of options when confronted with potential union salts. On one hand, employers understandably want to hire only those applicants genuinely interested in the job, not potential union placements. On the other hand, if they choose to hire someone else besides

92 Carl Lipscombe, *Inside Job: Union Organizing Today*, POLITICAL AFFAIRS, Apr. 26, 2006, available at <http://politicalaffairs.net/inside-job-union-organizing-today/>.

93 Carey Dall and Jonathan Cohen, *Salting the Earth: Organizing for the Long Haul*, 10 NEW LABOR FORUM 36 (2002).

94 See, e.g., *Toering Elec. Co.*, 351 N.L.R.B. 225 (2007). Here, the Board found that employees may be fired if they are not “genuinely interested” in obtaining the job.

the potential union placement, an unfair labor practice charge will almost certainly follow. To make the situation even more difficult, in today's high-tech world, the threat of corporate sabotage or unauthorized access to confidential employer information is perhaps greater than ever.

State Law Initiative

Internal threats to employers have greatly increased with the wide availability of technology. In addition to placing a union insider at an

North Carolina recently took action with its state Property Protection Act. Effective January 1, 2016, the North Carolina law protects employers in number of ways.

employer to help organize its employees, a union salt in the twenty-first century need only access an employer computer or database for several minutes in order to potentially walk away with contact information for employees nationwide. In part for these reasons, and Washington's inaction at the federal level, North Carolina recently took action with its state Property Protection Act.⁹⁵ Effective January 1, 2016,

the North Carolina law protects employers in number of ways.

First, the law strengthens employers' defenses against common forms of corporate espionage by prohibiting any person from placing a camera or electronic surveillance device on the employer's premises without permission, or from interfering with the employer's real property rights. Second, the law prohibits employees who do not have a "bona fide intent of seeking or holding employment" from capturing or removing the employer's data, paper and records, or from recording sounds or images.

Although North Carolina's law has been labeled as an "Ag-Gag" law, or a law intended to protect agricultural and industrial employers from covert recordings, it is clear that the legislature intended its protections go beyond industrial operations. In the preamble to the law, the General Assembly of North Carolina recognized that "when personal property is wrongfully taken and carried away from the owner or person in lawful possession of such property without his consent and with the intent to permanently deprive

⁹⁵ N.C. Gen. Stat. § 99A-2.

him of the use, possession and enjoyment of said property, a right of action arises for recovery of actual and punitive damages from any person who has or has had, possession of said property knowing the property to be stolen.”⁹⁶

As such, the law broadly protects employers of all sizes and industries, as well as their financial, employee, customer and business information, from employees who have no bona fide intention of seeking or holding employment. The law prohibits employees from using their employment status to obtain access to non-public areas of the workplace, removing the employer’s information or setting up covert surveillance. Although the law does not include criminal provisions, it does include a right to injunctive relief and stiff civil penalties enforceable through a private right of action. These include the right to recover attorneys’ fees and punitive damages of up to \$5,000 per day. Of significance, in addition to holding the individual wrongdoer liable, the employer can also hold jointly liable any “person who intentionally directs, assists, compensates, or induces another person to violate” the law.⁹⁷ According to the law’s preamble, this includes even those third persons with actual or constructive possession of the wrongfully-obtained property, and thus, is broad enough to cover most, if not all, members involved in organized attempts at employer theft or corporate sabotage.⁹⁸

96 2015 N.C. ALS 50, 1.

97 N.C. Gen. Stat. § 99A-2(c).

98 2015 N.C. ALS 50, 1 (“An agent having possession, actual or constructive, of property lawfully owned by his principal, shall have a right of action in behalf of his principal for any unlawful interference with that possession by a third person.”).

NEUTRALITY AND CARD CHECK AGREEMENTS AS THINGS OF VALUE



Under Section 9 of the NLRA, the NLRB can order an election if 30% of the employees of a collective bargaining unit demonstrate an interest in electing an employee representative. A union organizing campaign typically follows, in which both the union, the employer, and interested employees urge the workers to vote for or against unionization in an election to be held at a designated voting time and conducted by secret ballot.

Beginning in the 1970s, however, unions began demanding more favorable election procedures. These included “neutrality” agreements, under which the employer would refrain from engaging in campaign activities thus foregoing their federal rights under the NLRA to truthfully educate their employees about union representation. They also included “card check” agreements, under which an employer agrees to recognize the union not through secret ballots cast during an election, but through signed authorization cards collected and presented by the union. Since the 1990s, neutrality and card check agreements have gone hand-in-hand and organizing by card check, rather than secret ballots, is clearly the unions’

preferred method.⁹⁹ Employers will often agree to such organizing concessions as a condition of public works or government contracts or in exchange for the union’s promise not to engage in disruptive pickets, boycotts, and strikes.

Simultaneously, however, Section 302 of the Labor Management Relations Act (LMRA) prohibits employers from providing “any money or **other thing of value . . .** to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce”¹⁰⁰ The LMRA, which amended the NLRA in 1947, was passed specifically to address “extortion or a case where the union representative is shaking down an employer.”¹⁰¹

For years, it has been argued that neutrality and card check agreements constitute unlawful “things of value” under the LMRA. Although most courts have historically disagreed,¹⁰² in 2012, the Eleventh Circuit held that a Section 302 violation could not be ruled out simply because ground rule concessions such as card check and neutrality agreements were intangible.¹⁰³ Rather, the Eleventh Circuit explicitly provided that Section 302 “prohibits payment of a thing of value, and intangible services, privileges, or concessions can be paid or operate as payment.”¹⁰⁴ The Eleventh Circuit raised a common criticism among employers that neutrality and card check agreements are more than intangible concessions of ground rules since “innocuous ground rules can become illegal payments if used as valuable consideration in a scheme to corrupt a union or to extort a benefit from an employer.”¹⁰⁵ Given the clear split in authority created by the Eleventh Circuit, the U.S. Supreme Court granted certiorari, only to subsequently

99 Nicholas M. Ohanesian, *Does “Why” or “What” Matter: Should Section 302 Apply to Card Check Neutrality Agreements?*, 45 U. MEM. L. REV. 249, 256 (2015).

100 29 U.S.C. § 186(a)(2) (emphasis added).

101 CONG. REC. 4746 (1946) (statement Sen. Taft); see also S. REP. NO. 86-187 at 2329 (1959).

102 *Adcock v. Freightliner LLC*, 550 F.3d 369 (4th Cir. 2008); *Hotel & Rest. Emps. Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206 (3d Cir. 2004).

103 *Mulhall v. UNITE HERE Local 355*, 667 F.3d 1211 (11th Cir. 2012), cert. granted, 133 S. Ct. 2849 (2013).

104 *Id.* at 1215.

105 *Id.* at 1215.

dismiss it as improvidently granted.¹⁰⁶

Meanwhile, there is strong evidence that the use of card check and neutrality agreements greatly benefits unions. A study by the AFL-CIO that examined 100 organizing campaigns discovered that 78% of campaigns run by card check were successful, compared to only 48% of secret ballot elections.

Card check campaigns are also prone to coercion. Because the card check process only requires a signature, it has “resulted in deceptions, coercion, and other abuses” according to the Washington-based HR Policy Association.¹⁰⁷ For instance, there have been reports of union threats against the children and personal property of employees unless they agreed to sign a card.¹⁰⁸ Although these are the extreme cases, the story of Marlene Felter provided to the U.S. House of Representatives Committee on Education and the Workforce illustrates a more common scenario.¹⁰⁹ Ms. Felter was a medical records coder at Chapman Medical Center which entered into a card check and neutrality agreement with the Service Employees International Union (“SEIU”). During the time SEIU representatives were gathering signed union cards, Ms. Felter reported that union operatives were “calling them on their cell phones, coming to their homes, stalking them, harassing them, and even offering to buy them meals at restaurants to convince them to sign union cards.”¹¹⁰ She described in detail how “SEIU operatives followed employees to the floors in the hospital, harassed them to get signatures, and caused workplace disruptions and even a decline in the quality of patient care.”¹¹¹ The National Right to Work Legal Defense Foundation has collected testimony of many similar stories.¹¹²

106 *Unite Here Local 355 v. Mulhall*, 134 S. Ct. 594 (U.S. 2013).

107 See Committee on Education and the Workforce Press Release, July 23, 2002. Available at <http://archives.republicans.edlabor.house.gov/archive/press/press107/corcams72302.htm>.

108 See, e.g., *Shawnee Manor*, 321 N.L.R.B. 1320 (1996).

109 Testimony of Marlene Felter, U.S. House of Representatives Committee on Education and the Workforce, (June 26, 2013).

110 *Id.* at 2.

111 *Id.* at 5.

112 National Right to Work Legal Defense Foundation, Neutrality, available at <http://www.nrtw.org/neutrality/info>.

State Law Initiative

Several state-level legislative solutions deal with union demands for card check and neutrality agreements, and seek to prevent violent conduct.

Not surprisingly, violating Section 302 is one of the enumerated activities that can give rise to charges under the federal Racketeer Influenced and Corrupt Organizations Act (“RICO”). As such, states can strengthen or amend their own RICO acts to cover the extracting of neutrality and card check agreements from employers as “things of value.” In 2014, for instance, Tennessee amended its laws to include known coercive tactics in the state’s criminal definition of extortion.¹¹³ The Tennessee law defines extortion to include any person who impairs any person or entity “from the free exercise or enjoyment of any right or privilege secured by the Constitution of Tennessee, the United States Constitution or the laws of the state, in an effort to obtain something of value for any entity.”¹¹⁴ The very next section defines “something of value” as “a neutrality agreement, card check agreement, recognition, or other objective of a corporate campaign.”¹¹⁵

Another option is to prohibit neutrality and card check agreements where possible. Some states that have passed legislation prohibiting labor peace agreements also include a prohibition on neutrality agreements. Louisiana’s law, for instance, prohibits any governmental body from imposing any zoning, contractual, permitting, or licensing conditions on an employer or employee which would limit their “full freedom to act” under the federal labor laws.¹¹⁶

Yet another option is that taken by Mississippi, which recently passed a state law prohibiting the underlying coercive conduct. Finding that “[i]ntimidation, extortion, and coercion are illegal and present a substantial risk to public safety and the well-being of the state’s citizens, workers and businesses; and certain limited and reasonable restrictions are deemed necessary to protect our citizens from these harms,” the Mississippi Legislature in 2014 adopted

113 Tenn. Code Ann. § 39-14-112

114 Tenn. Code Ann. § 39-14-112(a)(3)(A).

115 *Id.*

116 La. Rev. Stat. § 23:984.

the Prohibition Against Employer Intimidation Act.¹¹⁷ The Act prohibits persons, organizations, and unions from using coercive tactics to intimidate employers or employees from exercising their rights in an effort to “obtain something of value” which includes “a neutrality agreement, card check agreement, collective bargaining recognition or other objective of an organized initiative.”¹¹⁸ The Act further contains a private right of action and a “savings clause” to protect from potential First Amendment concerns, expressly stating that nothing in the law shall be construed to impede upon First Amendment rights.¹¹⁹

The Act prohibits persons, organizations, and unions from using coercive tactics to intimidate employers or employees from exercising their rights in an effort to “obtain something of value” which includes “a neutrality agreement, card check agreement, collective bargaining recognition or other objective of an organized initiative.”

Neither Mississippi’s nor Tennessee’s laws have undergone a specific legal challenge. However, in 2015, the Court of Criminal Appeals of Tennessee stated that the revised extortion statute, in light of First Amendment critiques, “serves the worthy goal of precluding threats made with the intent to obtain an advantage, to obtain services or property, or to restrict unlawfully another’s freedom of action” and did not “chill a citizen’s right to petition the government regarding legitimate grievances.”¹²⁰ While the statement is not the same as a court ruling, it is a strong indicator that the law is on sound legal footing.

117 Miss. Code Ann. § 71-13-3

118 Miss. Code Ann. § 71-13-5.

119 Miss. Code Ann. § 71-13-9.

120 *State v. Fitzpatrick*, 2015 Tenn. Crim. App. LEXIS 730 (Tenn. Crim. App. Sept. 8, 2015).

PROHIBIT CARD CHECK FOR PUBLIC EMPLOYEES

Card check organizing does not just occur in the private sector. A number of states have also given legal blessing to card check for public sector employees, who are not subject to the NLRA.¹²¹

It may seem surprising that states would authorize card check, since studies have shown that employees actually prefer NLRB-style secret ballot elections, which protect their confidentiality. According to a survey taken by proponents of the Employee Rights Act, 82% of non-union households supported secret ballot elections as opposed to card check procedures, as did 85% of union households.¹²² Secret ballot elections also significantly reduce the risk of the type of coercive behavior discussed in the previous section, thus protecting employees themselves from intrusive, and at times even threatening, behavior.

Not surprisingly, local and state laws that authorize card check have been correlated with an increase in unionization. At least fourteen states have authorized public sector card check at some point, eight of which did so between 2000 and 2009.¹²³ During a similar time period, 2000 to 2011, public sector membership in labor unions increased from 7.1 million to 7.5 million.¹²⁴ This growth was in spite of a slow, downward trend nationally and the majority of the growth was in the states with public sector card check legislation.¹²⁵

State Law Initiative

States can take a number of actions to preserve public sector employees' confidentiality and protect them from potential coercion. The nature of the action will necessarily depend on what, if any, public sector card check laws are already in place. If a state already has a public sector card check law in

121 29 U.S.C. § 152(2).

122 What Does the Employee Rights Act Accomplish?, <http://employeeightsact.com/>.

123 The fourteen states are North Dakota, California, Illinois, Oklahoma, New Jersey, Massachusetts, New Hampshire, Oregon, New Mexico, New York, Kansas, Connecticut, Maryland and Ohio. However, New Hampshire and Oklahoma later repealed their laws in 2011.

124 Timothy D. Chandler and Rafael Gely, *Before Wisconsin and Ohio: The Quiet Success of Card-Check Organizing in the Public Sector*, 16 EMPL. RTS. & EMPLOY. POL'Y J. 629, 647 (2012).

125 *Id.*

place, it can repeal or amend the law, as New Hampshire and Oklahoma did in 2011.¹²⁶

Another, more dramatic, approach is legislation to prohibit public sector unions altogether. North Carolina and Virginia, for example, have taken this approach. North Carolina's law states in unequivocal terms that "Any agreement, or contract, between the governing authority of any city, town, county, or other municipality . . . and any labor union, trade union, or labor organization, as bargaining agent for any public employees . . . is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect."¹²⁷ Virginia's law simply divests the state and its subdivisions from

Kansas, for instance, has effectively prohibited card check organizing by requiring secret ballot elections for all public employees except teachers.

recognizing any labor union as a bargaining agent of any public employee.¹²⁸

Finally, a middle ground is requiring that public sector union recognition be established by a representative election to be held by secret ballot. Kansas, for instance, has effectively prohibited card check

organizing by requiring secret ballot elections for all public employees except teachers.¹²⁹ Its law provides that recognition of public sector unions "shall be granted only to an employee organization that has been selected as a representative of an appropriate unit, in a secret ballot election, by a majority of the employees in an appropriate unit who voted at such election."¹³⁰ In 2013, the law was further strengthened by an amendment which assessed the costs of a secret ballot election to the party seeking the election.

Note that a state law prohibiting card check recognition can only apply to the public sector, or to private sector employees not covered by the NLRA. The NLRB recognizes card check as a valid form of demonstrating majority support for a union and a contrary state law would fall to a preemption challenge.

¹²⁶N.H. Rev. Stat. Ann. § 273-A:10 (repealed effective August 8, 2011); 11 Okl. St. § 51-200 (repealed effective November 1, 2011).

¹²⁷N.C. Gen. Stat. § 95-98.

¹²⁸Va. Code Ann. § 40.1-57.2.

¹²⁹Kan. Stat Ann. § 72-5416.

¹³⁰Kan. Stat. Ann § 75-4327.

CONCLUSION

With gridlock in Washington, D.C., changes in labor law are increasingly taking place in the states. While there are some limits based on federal preemption, states do have ample scope to take action. The ten proposals discussed in this report have all been passed in various state legislatures, and many of them have withstood court challenges. For those wishing to nurture a positive economic climate, there are many tools available.



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