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LEGAL ANALYSIS OF NEBRASKA LEGISLATIVE BILL 226

What effect would Legislative Bill 226 have on Nebraska's Right to Work Law? The bill would effectively repeal the law and violate the Nebraska Constitution.

Section 1 of Bill 226 would require a nonmember compelled to accept a union as his or her exclusive bargaining representative to reimburse that union "for his or her pro rata share of the actual legal fees and court costs incurred by" it if he or she "chooses to have legal representation from the labor organization in any grievance or legal action."

- This is an attempt to overrule a line of National Labor Relations Board cases which hold that "[w]here state law prohibits a labor organization from compelling membership, a union may not require a fee for vital collective-bargaining services, including grievance processing, which is due nonmembers as a matter of right" under the duty of fair representation. *Local 282, Electronic Workers IUE*, 291 N.L.R.B. 182, 183 (1988); *accord Columbus Area Local, American Postal Workers*, 277 N.L.R.B. 541 (1985); *Machinists Local 697*, 223 N.L.R.B. 832 (1976); *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).
- This would be bad public policy, because the exclusive bargaining agent's duty to represent nonmembers in grievance proceedings is part of the statutory *quid pro quo* for having denied nonmembers the right to represent themselves in any of their employment relations with their employer. See *Machinists Local 697*, 223 N.L.R.B. at 834. An additional *quid pro quo* of forced payment for the representation is neither necessary nor consistent with the principles underlying Right to Work laws. Compelling employees to either pay for or give up the grievance representation which is due them as a matter of right under Federal law adds to the denial of employee freedom of choice already inherent in exclusive representation. If employees want to pay voluntarily for union grievance representation in Right to Work states, of course, they are free to join the union or make a voluntary contribution.

Section 2 of Bill 226 would repeal the Right to Work statute's prohibition of agreements requiring union fees as a condition of employment.

- This would render the Right to Work law a superfluous nullity. All that would be left is a prohibition on requiring formal union membership as a condition of employment. Compulsory formal union membership is already prohibited by section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), which permits only agreements requiring employees to pay dues. *Pattern Makers v. NLRB*, 473 U.S. 95, 106 (1985).

- Repeal of the Right to Work Law’s prohibition of agreements requiring union fees as a condition of employment would allow the negotiation and enforcement of “agency shop” agreements requiring workers to pay the full amount of union dues to keep their jobs. Such a requirement is “the practical equivalent of union ‘membership,’ as Congress used that term in the proviso to § 8(a)(3).” *NLRB v. General Motors Corp.*, 373 U.S. 734, 743 (1963). Moreover, a union could use nonmember workers’ forced dues for political, ideological, and other non-bargaining purposes unless the workers annually notified the union during a narrow “window” period that they objected to use of their forced fees for purposes other than collective bargaining. *E.g.*, *Abrams v. Communications Workers*, 59 F.3d 1373, 1381-82 (D.C. Cir. 1995). Even then, the union would initially determine the amount of the reduction or rebate. Unions typically do not inform employees of their right to object and, unless they have been sued by nonmembers, typically overstate the percentage of their expenses that are lawfully chargeable to objecting nonmembers.

Both sections of Bill 226 may be unconstitutional under the Right to Work Amendment to Nebraska’s Constitution. Article XV, section 13 of the Nebraska Constitution provides that “[n]o person shall be denied employment because of . . . refusal to join or affiliate with a labor organization.” Payment of fees to a labor organization is a form of affiliation with that organization. Article XV, section 15 of the Nebraska Constitution provides that “no law shall limit or restrict the provisions” of the Right to Work Amendment. A law requiring or authorizing agreements requiring payment of money to—*i.e.*, affiliation with—a labor organization as a condition of employment would unconstitutionally limit the provision prohibiting denial of employment because of refusal to affiliate with a labor organization.