



Ohio Legislative Service Commission

Bill Analysis

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H.J.R. 5

130th General Assembly
(As Introduced)

Reps. Roegner and Maag

BILL SUMMARY

- Submits to the voters at the November 5, 2013, election a proposal to amend the Ohio Constitution to prohibit an employee from being forced, directly or indirectly, to become a member of or provide financial support to a labor organization.
 - States that the joint resolution does not prevent an employee from voluntarily joining or financially supporting a labor organization.
 - Allows any person directly or indirectly affected or threatened with any harm by a violation of the joint resolution to bring a civil or equitable action to enforce it and to receive injunctive relief, reasonable attorney's fees, costs, and other damages.
 - Prohibits other constitutional provisions from impairing or limiting the rights contained in the joint resolution.
 - Requires, if a majority of the electors approve the joint resolution, the joint resolution to take effect January 1, 2014.
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CONTENT AND OPERATION

Prohibition against required membership

The joint resolution prohibits any law, rule, agreement, or arrangement from requiring, directly or indirectly, any person to become or remain a member of a labor organization (essentially, a union). For purposes of the joint resolution, "indirect" requirements include:

- The imposition of fines, penalties, or other costs or charges for failing to become or remain a member of a labor organization;

- The conditioning of public or private sector employment or employment opportunities on becoming or remaining a member of a labor organization;
- The conditioning of public or private sector employment or employment opportunities on paying or transferring dues, fees, assessments, other charges, or anything else of value to a labor organization or a third party in lieu of the labor organization (see "**Background**," below).¹

Prohibition against involuntary financial support

The joint resolution also prohibits any law, rule, agreement, or arrangement from requiring, directly or indirectly, as a condition of employment, any person or employer to pay or transfer any dues, fees, assessments, or other charges of any kind, or anything else of value, to a labor organization or third party in lieu of the labor organization.²

Joint resolution application

The joint resolution does not prevent any person from voluntarily belonging to or voluntarily providing support to a labor organization. The joint resolution, if approved by a majority of the electors, takes effect January 1, 2014. The joint resolution does not apply to agreements entered into or renewed prior to January 1, 2014.³

Remedy

Under the joint resolution, any person directly or indirectly affected or threatened with any harm by a violation of the joint resolution may bring a civil or equitable action to enforce it, and, upon prevailing, is entitled to injunctive relief, reasonable attorney's fees, costs, and other damages.⁴

Interaction with other laws

The joint resolution states that no other provision of the Ohio Constitution impairs or limits the rights contained in the joint resolution. The joint resolution must be implemented to the maximum extent that the United States Constitution and federal law permit. Any invalid or inoperative provisions must first be construed as not

¹ Proposed Article I, Section 22(A) and (G)(3) of the Ohio Constitution.

² Proposed Article I, Section 22(B) of the Ohio Constitution.

³ Proposed Article I, Section 22(C) of the Ohio Constitution.

⁴ Proposed Article I, Section 22(F) of the Ohio Constitution.



conflicting with federal law, and then, only if necessary, severed from remaining portions of the section, which remain in effect (see **COMMENT**).⁵

Definitions

The joint resolution defines the following terms:

- "Labor organization" means any agency, union, employee representation committee, or organization of any kind that exists for the purpose, in whole or in part, of dealing with employers concerning collective bargaining, grievances, wages, benefits, rates of pay, hours of work, other forms of compensation, or other conditions of employment.
- "Person or employer" includes all persons and employers in Ohio, whether public or private, with the exception of the United States federal government and its employees.
- "Fines, penalties, or other costs or charges" include any civil, criminal, or contractual penalty; any fine, tax, or monetary charge; and any salary or wage withholding or surcharge or fee that is used to punish or discourage the exercise of rights protected under the joint resolution.⁶

Background – public and private sector collective bargaining

Collective bargaining involves an employer and employees reaching an agreement with respect to rates of pay, wages, hours of employment, or other conditions of employment. Collective bargaining in the public sector is governed by the Public Employees' Collective Bargaining Law⁷ (PECBL). Collective bargaining in the private sector, with certain exceptions, is governed by the federal National Labor Relations Act (NLRA).⁸

Although the PECBL prohibits a public employer from agreeing to a provision in a collective bargaining agreement requiring that a public employee become a member of an employee organization as a condition for securing or retaining employment, a public employer and a labor organization (referred to as an "employee organization" in the PECBL) may agree to a provision that requires as a condition of employment, on or

⁵ Proposed Article I, Section 22(D) and (E) of the Ohio Constitution.

⁶ Proposed Article I, Section 22(G) of the Ohio Constitution.

⁷ R.C. Chapter 4117.

⁸ 29 United States Code (U.S.C.) 151 *et seq.*



after a mutually agreed upon probationary period or 60 days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. The PECBL includes procedures for the assessment of and specified rebates of this fee.⁹

Under the NLRA, a private sector employer may require either of the following as a condition of employment:

(1) An employee to join the employee organization that represents the employer's employees 30 days after the date the employee begins employment;

(2) An employee who is not a member of the employee organization but is covered by an agreement between the employer and an employee organization to pay agency, or "fair share," fees to the employee organization.

However, the NLRA expressly permits a state to have a law that prohibits requiring employee organization membership as a condition of employment.¹⁰

COMMENT

Any state regulation of the right of private employers and employees to bargain collectively runs the risk of conflicting with, and potentially being preempted by, the NLRA. Enacted in the 1930s, the NLRA does not contain an express preemption provision. Nevertheless, the United States Supreme Court has interpreted the NLRA as having broad and comprehensive applications to the field of private sector collective bargaining, and but for a few narrowly drawn exceptions, the NLRA takes supremacy over state law.

The Court has held that, when a state purports to regulate activities that are protected by section 7 of the NLRA¹¹ governing labor-management relations (e.g., the right to bargain collectively) or that constitute an unfair labor practice under section 8,¹² the state jurisdiction must yield to the federal law.¹³ Another type of federal

⁹ R.C. 4117.09(C).

¹⁰ 29 U.S.C. 158(a)(3) and 164(b) and *International Union of United Assn. of Journeymen & Apprentices of Plumbing & Pipefitting Industry v. NLRB*, 675 F.2d 1257 (D.C. Cir. 1982).

¹¹ 29 U.S.C. 157.

¹² 29 U.S.C. 158.

¹³ *San Diego Bldg. Trades Council, Millmen's Union Local 2020 v. J.S. Garmon*, 359 U.S. 236, 244 (1959).



preemption, the so-called "*Machinists* preemption," prohibits state and local regulation of areas that have been left "to be controlled by the free play of economic forces."¹⁴

While states are not totally excluded from activities affecting private sector labor relations, federal preemption likely would be invoked whenever a court thought a very real potential of conflict between federal law and the state regulation existed. Preemption under the NLRA is inappropriate only if the conduct at issue is a peripheral federal concern, or if the conduct involves a significant state interest that heavily outweighs the interests of the National Labor Relations Board in maintaining exclusive jurisdiction.¹⁵ When it is not clear whether the particular labor-relations activity being regulated by a state is covered under the NLRA, state courts are not the primary tribunals to adjudicate such issues. Rather, the National Labor Relations Board retains sole jurisdiction over matters concerning or potentially concerning the NLRA.¹⁶

HISTORY

ACTION	DATE
Introduced	05-02-13

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¹⁴ *Lodge 76, Internatl. Assn. of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Emp. Relations Comm.*, 427 U.S. 132 (1976).

¹⁵ *Garmon*, 359 U.S. at 243-244.

¹⁶ *Garmon* at 244-245.

