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Subject: Whether a local government may enact a right-to-work ordinance

Requested by: Sen. Robert Stivers
Rep. Jeffery M. Donohue

Written by: Matt James

Syllabus: A local government may not enact a right-to-work ordinance.

Statutes construed: 29 U.S.C. § 164

Opinion of the Attorney General

Sen. Robert Stivers and Rep. Jeffery M. Donohue have separately requested this office issue an opinion regarding whether a local government may enact a "right-to-work" ordinance. We advise that a local government may not enact a right-to-work ordinance.

A right-to-work law forbids "employers from contracting or agreeing to exclude persons from employment because they are or are not members of a labor union." 51 C.J.S. *Labor Relations* § 361. Right-to-work laws "outlaw 'union shops' and 'agency shops.'" *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360, 361 (Ky. 1965).¹ Sen. Stivers inquires as to whether a county or consolidated local

¹ "A 'union shop' agreement provides that no one will be employed who does not join the union within a short time after being hired. An 'agency shop' agreement generally provides that while employees do not have to join the union, they are required usually after 30 days to pay the union a sum equal to the union initiation fee and are obligated as well to make periodic payments to the



government may enact a right-to-work ordinance. Rep. Donohue inquires as to the validity of a right-to-work ordinance that has been passed by the Warren County Fiscal Court and scheduled for a final reading on Dec. 19.² At issue is whether local governments may enact such right-to-work ordinances.

Section 8(a) of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 158(a), provides that:

It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later

29 U.S.C. § 158(a)(3) forbids an employer from discriminating in employment based on whether that person is a member of a union, forbidding "closed shops" that only consider union members for employment, although an employee may be required to join a union upon commencing employment, in what is known as a "union shop." Section 14(b) of the NLRA, as amended, 29 U.S.C. § 164(b), provides that "nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." Although 29 U.S.C. § 158(a)(3) allows union and agency shops, 29 U.S.C. § 164(b) provides that states may enact right-to-work laws forbidding union and agency shops. Twenty-four states have enacted such right-to-work laws. Kentucky has not.

union equal to the union dues." *Oil, Chem. and Atomic Workers, Int'l. Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 410 n.1 (1976).

² *Warren County votes for right-to-work ordinance*, LEXINGTON HERALD-LEADER, Dec. 13, 2014, <http://www.kentucky.com/2014/12/13/3591574/warren-county-votes-for-right.html>.

In *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360 (Ky. 1965), the City of Shelbyville had enacted a right-to-work ordinance providing that "the right of persons to work shall not be denied or abridged on account of membership or nonmembership in, or conditioned upon payments to, any labor union, or labor organization." *Id.* at 361. The court considered the question of "whether Congress has pre-empted the field of regulation of such union-security agreements to the extent that local political subdivisions of a state have no power to legislate in the field." *Id.* at 361-62. The *Puckett* court considered *Retail Clerks Int'l. Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96 (1973), which stated that "even if the union-security agreement clears all federal hurdles, the States by reason of s 14(b) have the final say and may outlaw it. . . . It is a conflict sanctioned by Congress with directions to give the right of way to state laws . . ." *Id.* at 102-03. Based on *Schermerhorn*, the court reasoned that:

Section 14(b) makes an exception out of the otherwise full pre-emption by the Act. The exception should be strictly and narrowly construed because it represents a departure from the overall spirit and purpose of the Act. . . . We think it is not reasonable to believe that Congress could have intended to waive other than to major policy-making units such as states and territories, the determination of policy in such a controversial area as that of union-security agreements. We believe Congress was willing to permit varying policies at the state level, but could not have intended to allow as many local policies as there are local political subdivisions in the nation.

Id. at 362. The *Puckett* court construed the exemption for states and territories narrowly to refer only to states and territories, reasoning that Congress did not want variations in right-to-work laws in each local political subdivision. The court then concluded that "Congress has pre-empted from cities the field undertaken to be entered by the Shelbyville ordinance." *Id.*

Other courts, following *Puckett*, have come to the same conclusion. *Puckett* was cited with approval in *Oil, Chem. and Atomic Workers, Int'l. Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 413 n. 7 (1976). More specifically, in *United Food and Commercial Workers Union Local 1564 v. City of Clovis, N.M.*, 735 F.Supp. 999 (D.N.M. 1990), the court expressly addressed the question of whether a

municipality with home rule powers could enact a right-to-work ordinance.³ The *City of Clovis* court reviewed *Puckett* in detail with approval. *Id.* at 1003. The court then turned to the issue of "whether local right-to-work enactments, either through home rule authority or otherwise, constitute 'state' law within the meaning of § 14(b). I find that they do not. There is nothing in the legislative history of § 14(b) to indicate that Congress intended a broad reading of 'state.'" *Id.* at 1004. The court concluded that "the plain language of the statute indicates to me that only a state, through state legislation, may prohibit union security agreements. Such state legislation does not include a state law granting local political subdivisions permission to prohibit union security provisions." *Id.* See also *Grimes & Hauer, Inc. v. Pollock*, 127 N.E.2d 203, 207 (Ohio 1955) ("Section 164(b) has reference to a constitutional provision or a legislative enactment"). The courts are uniform that the exemption carved out in 29 U.S.C. § 164(b) only refers to states themselves, and not political subdivisions of states.

While *Puckett* expressly dealt only with cities, it was also express that the intent of Congress in enacting 29 U.S.C. § 164(b) was not "to allow as many local policies as there are local political subdivisions in the nation." *Puckett*, 391 S.W.2d at 362. "Counties are unincorporated political subdivisions of the state" *Lexington-Fayette Urban Cnty. Gov't v. Smolcic*, 142 S.W.3d 128, 133 (Ky. 2004). *Puckett* is clear that 29 U.S.C. § 164(b) preempts all political subdivisions of a state from enacting right-to-work laws, including counties as well as cities.⁴

³ *Puckett* was decided prior to cities being granted home rule powers by KRS 82.082 in 1980. The fact that cities did not have home rule powers at the time of *Puckett* does not affect the preemption analysis, as the finding of preemption forecloses any further analysis of a local government's authority to regulate an area. See *Puckett*, 391 S.W.2d at 363 ("We find it unnecessary to discuss the questions of whether the ordinance in issue is within the scope of the policy power of a Kentucky city"); *City of Clovis*, 735 F.Supp. at 1004 ("Based on these findings and conclusions, I find it unnecessary to address the question of whether . . . the City of Clovis has the authority to enact the Ordinance at issue").

⁴ Although it may be argued that counties may enact a right-to-work ordinance under KRS 67.083(3)(m), which provides that a fiscal court may enact ordinances for the "regulation of commerce for the protection and convenience of the public," counties are similarly preempted by federal law from enacting right-to-work ordinances. See *supra* note 3; *Interstate Towing Ass'n, Inc. v. City of Cincinnati, Ohio*, 6 F.3d 1154, 1157 (6th Cir. 1993) ("The courts presume that federal legislative or regulatory action intends to preempt parallel state and local legislation").

In summary, local governments have no power to enact right-to-work ordinances, as they are preempted by the NLRA.

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