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# Pennsylvania vs. Right to Work

- Section 7 of the Labor Management Relations Act provides all employees with the right to engage in or refrain from engaging in union membership and activities.
- Specifically, § 8(a)(3) makes it an unfair labor practice for an employer to discriminate in the hiring or tenure of employment of an individual in order to encourage or discourage union membership.

# Union Security Clauses

- However, § 8(a)(3) is subject to an exception that allows an employer and a union to enter into a union security agreement which requires union membership on or after the 30<sup>th</sup> day of employment (8<sup>th</sup> day in construction) as long as the union represents an uncoerced majority of employees in the appropriate bargaining unit.

# Union Security Clauses

- Under most union security agreements, all employees are required to join the union or pay some level of dues and fees to the union to cover the cost of acting as the employees' bargaining representative. The union may request the termination of an employee who fails to meet the requirements of the agreement.

# Statutory Provisions

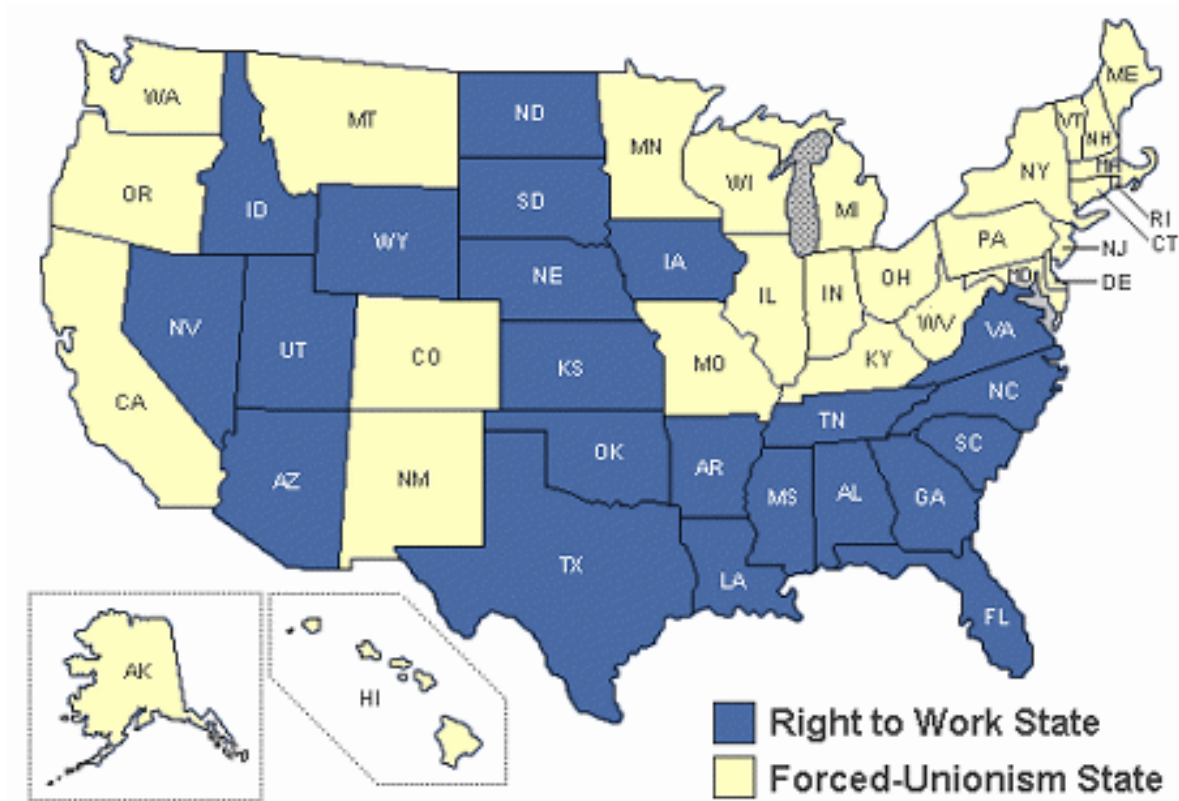
- Because of the 1<sup>st</sup> Amendment, an employee cannot be compelled to become a full member. “Membership as a condition of employment is whittled down to its financial core.” An employee is a “member” as long as he has satisfied his financial obligation to the union.
  - Full union membership subjects a member to the union's rules and discipline. A financial core member, also referred to as a nonmember employee, is merely responsible for meeting his or her financial obligation to the union.

# Statutory Provisions

- Section 14(b) allows states to pass laws restricting or outlawing union security agreements which would otherwise be lawful under §8(a)(3) of the LMRA. States have the power to both legislate in the field of union security and enforce their laws regarding same.
  - States may regulate union shop, agency shop, and maintenance of membership agreements. Right-to-work laws may not be used to regulate or prohibit hiring halls or checkoff provisions that are otherwise permissible under the LMRA.

# Union Security in the U.S.

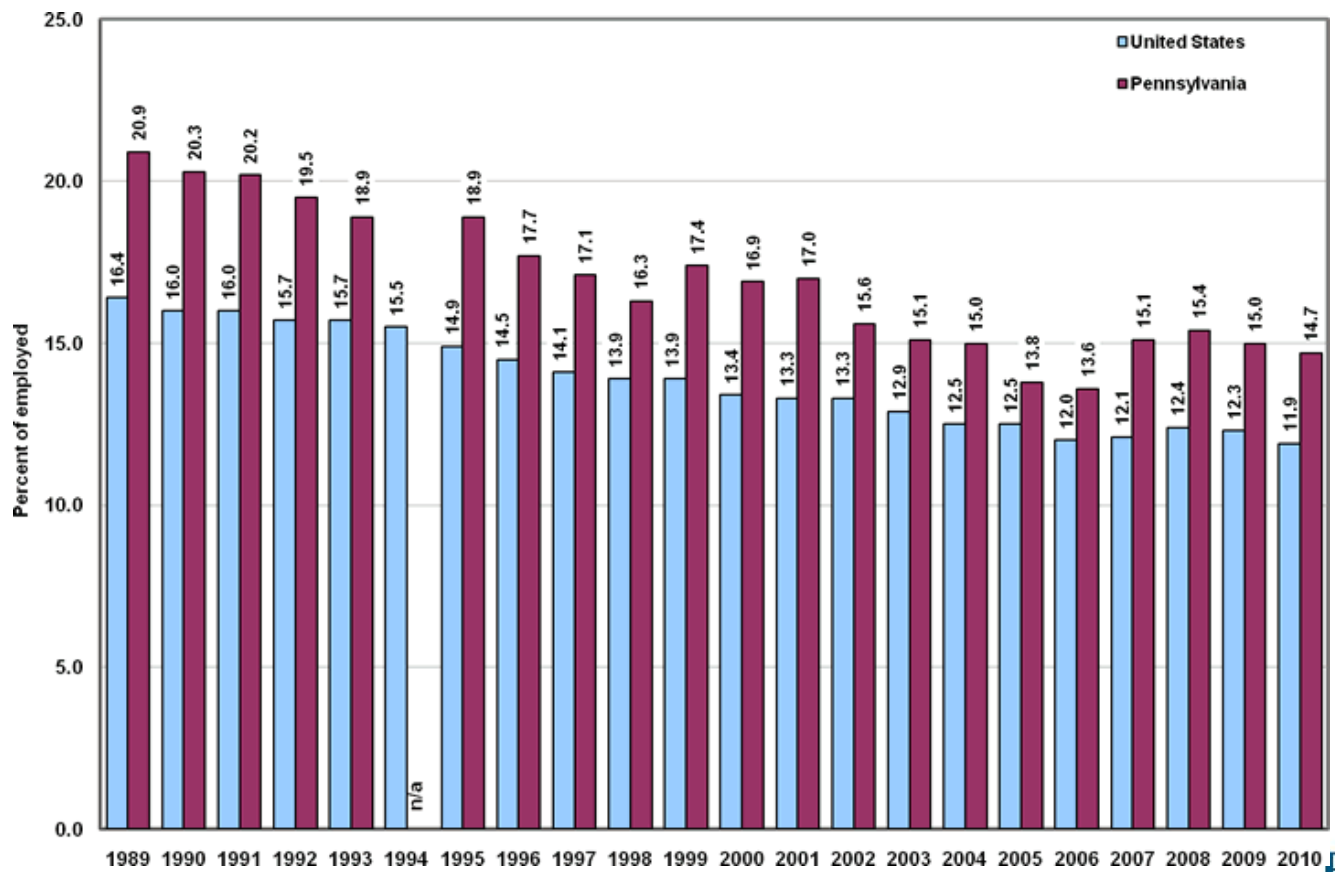
Source: <http://www.nrtw.org/rwts.htm>



# Pennsylvania comparison

- In 2010, the number of workers belonging to a union was 770,000 in the Commonwealth of Pennsylvania.
- Union members accounted for 14.7 percent of wage and salary workers in Pennsylvania in 2010, compared with 15.0 percent posted in 2009.
- At its peak in 1989, the first year for which comparable state data was available, the union membership rate for the Commonwealth was 20.9 percent.
- The Commonwealth of Pennsylvania has had union membership rates above the U.S. average since 1989, the first year state data was gathered.

# Chart 1. Members of unions as a percent of employed in the United States and the Commonwealth of Pennsylvania, 1989-2010



“It is the declared public policy of the Commonwealth of Virginia that, “. . . the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.” Section 40.1-58, Code of Virginia, as amended. Employers may not, in the Commonwealth of Virginia, require as a condition of employment, membership in a union or the payment of union dues. Sections 40.1-60,62. Code of Virginia, as amended. An agreement which would cause an employer to violate the provisions of the right-to-work law is similarly illegal.”

*Orr v. NFL Players’ Assn.*, 35 Va.Cir. 315, 147 LRRM 2845 (Loudon County Cir. Ct., 1994).

# Pennsylvania Labor Relations Act

**“[I]t is hereby declared to be the public policy of the State to encourage the practice and procedure of collective bargaining and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from the interference, restraint or coercion of their employers.”**

# DEALING WITH UNION ORGANIZATION A SUPERVISOR'S GUIDE

John A. McCreary, Jr., Esq.

and

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# Employees' Rights and the Law

- The National Labor Relations Act gives employees the right to organize themselves for collective bargaining with their employer
- An employer cannot interfere with this right by coercing employees, threatening or acting adversely against them because of union activity, or by attempting to influence them with promises or other benefits.
- The law's purpose has always been to protect the right of workers to organize and belong to unions without employer interference.

# Employer Rights and the Law

- YOU CAN Express Your Opinion:
  - Speak out against unions and union leaders.
  - Answer most employee's questions.
  - Generally listen to anything your employees tell you voluntarily about the union organization drive.
  - Meet with employees who work for you, either individually or in groups.
  - Hold meetings at work place or in some general area (but not in a manager's office or employees' homes).

# Employees' Rights and the Law

- YOU CANNOT:
  - Try to influence by promising or granting wage or benefit increases
  - Threaten
    - Facility will relocate or close
    - An agreement with union will never be signed
    - Cutting wages and benefits, increasing work rules
    - Increasing employee discipline
    - Firing employees
    - Intimidating, *i.e.*, lecturing or questioning employees

# Employees' Rights and the Law

- Management can argue effectively against the union, but cannot act directly
  - You can't suggest organizing in-house committee or independent union
  - You can't "spy" on a union meeting
  - You can't ask who is behind the union or how much support there is (no polls to test union support)

# Legal Rights of Employer

- Use your influence within the law:
  - Contact every employee you feel will be receptive to a discussion with you
  - Suggest that if anyone hears any wild stories or rumors, they should ask for the truth
  - Ask employees if a union will solve the problem or become the problem
  - Mention that company has been fair in past dealings
  - Point out that unions favor and support severely restrictive rules, which can cripple company's operation

# Legal Rights of Employer

- Relate “horror stories” concerning strikes, layoffs, etc. caused by union activity. The company would try to work with employees, but unions can make that impossible
- Explain that wage rates are comparable to others in the area
- Point out that a friendly shop can become an unfriendly, divided shop with internal friction over union policies (company doesn't cause it, but it can't control it, either)

# Legal Rights of Employer

- State what you think about unions, but avoid specifics such as:
  - “Union isn’t going to get you a thing”
  - “This company will never give in to a union or give any kind of raise”
- Point out the union cannot get anything a company doesn’t agree to
- Discuss union politics
  - Stress that the loudest mouths often win

# Legal Rights of Employer

- Emphasize union fines, dues, assessments and collections
  - Remind that unions have fined workers for refusing to strike – and the NLRB has upheld the right of the union to do so!
  - Remind them that much of their dues are used for political purposes
- Stress that during a strike, it may be necessary to replace them while they serve on a picket line

# Legal Rights of Employer

- Point out where the company's benefits are better than other companies
  - Layoffs have been few or non-existent
  - Union's can't create real job security or stop layoffs – only a healthy, expanding company can
- State that union contracts to not prohibit discharge for cause, layoffs for lack of work, changes in equipment or going out of business
- Ridicule union promises
  - Increases must be bargained for – if a union makes a ridiculous demand, it must settle for less or strike
  - The company will bargain in good faith but it won't be "taken"

# Legal Rights of Employers

- Indicate how difficult it is to vote out a union
  - You are stuck for at least a year, but possibly as long as three
  - Unions pay their organizers and attorneys, but groups that desire to eliminate a union pay their own expenses (it takes a signature of at least 30% of employees just to get an election)
- Explain that it is important for unions to bargain hard for dues check-off and compulsory membership

# Legal Rights of Employers

- Mention that unions have used violence as a means to an end
  - Employees who don't conform are labeled “scabs”
  - Employees may find themselves agreeing to something just to avoid being singled out and hassled by hard core union members

# Maintaining Your Position Within the Law

- REMEMBER
  - A supervisor cannot offer to settle a long-standing grievance during a union campaign
  - Never state that employees can get more by staying out of a union
  - Don't take any action in work assignment, overtime, etc., that is significantly different from prior practice without clearing it first
  - Refrain from making any “confidential” comments that will come back to haunt you

# Maintaining Your Position Within the Law

## – TRICKS!

- Every trick you can think of has been tried before and the NLRB agents and union organizers have experienced all of them
  - Play it straight – hard but straight
- Don't predict that if a union wins, the company's customers will go elsewhere or that business will fall off
- Don't stress that if a union gets in, strikes are inevitable
- Say instead that a union always presents the possibility of a strike

# Conclusion

- While the question of union organization is not up to you, your input is important to your employees. They will want to know how their union will effect your working relationship and the atmosphere within the workplace. Your influence and best efforts will help to clarify any questions and establish precedent for future actions. Your best endeavors are greatly appreciated.



Thank You

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# Pennsylvania Human Relations Commission

# Pennsylvania Human Relations Act

**Protected Classes:** individuals by reason of race, color, religious creed, ancestry, age [(40+); not a protected class for public accommodations], sex, national origin, non-job related handicap or disability, use of guide or support animals, handicap/disability of an individual with whom a person is known to have a relationship or assoc., or possession of a GED rather than a high school diploma. 43 P.S. § 955

# Employers Subject to Non-Discrimination Laws

- PHRA

- Employers of 4 or more persons within the Commonwealth. 43 P.S. § 954(b)

- **\*\*\*NOTE:** as long as there are 4 employees on the day the alleged act occurred, the statutory requirement is met
- **\*\*\*NOTE:** no sovereign immunity defense to actions brought under the PHRA

# Independent Contractors

- Under section 5 of the PHRA, 43 P.S. § 955, independent contractors are covered both as potential victims of discrimination and as potential discriminators
  - “[a]ny person who is subject to the provisions governing any of the professions and occupations regulated by the State licensing laws enforced by the Bureau of Professional and Occupational Affairs in the Department of State, or is included in the Fair Housing Act.” 43 P.S. § 954(x)
- They are not covered under Title VII, the ADA, or the ADEA

# Practice Under the PHRA

- The commission, on its own initiative, may file a complaint. 43 P.S. § 959(a)
- The attorney general, on his own initiative, may file a complaint. 43 P.S. § 959(a)
- Employees or Independent Contractors may file a complaint alleging unlawful discrimination.

# Investigation

- After the complaint is filed, it is assigned to an investigator
  - Request for Documents
    - Normally, the respondent will be asked to provide the documents within 30 days after the request is made, along with the answer to the complaint.
    - Respondent is not required to serve the complainant with the response to the document request

# Fact-Finding Conference (FFC)

- Usually scheduled within 2-4 months after service of the complaint; purpose of presenting their respective positions and supporting evidence; no right to cross-examine; testimony not stenographically recorded or given under oath.
- No legal requirement that a respondent attend the FFC
- Failure of the complainant to attend will not automatically close the case; however, the Commission may close if the complainant fails to cooperate with the Commission's investigation

# Post-FFC Investigation

- Investigator may ask the complainant to provide additional documents
- Pre-determination settlements
  - Encouraged by the Commission and may occur at any time during the above process, 43 P.S. § 959(b)(4)

# Finding of Probable Cause and Pre-Hearing Conciliation

- The Finding
- PHRC Function and Status
- Pre-Hearing and Conciliation

# Public Hearing

- If conciliation efforts fail, the case will be placed on the Commission's public hearing docket.
  - In the county in which the alleged act occurred. 43 P.S. § 959(d).
  - The Commission attorney represents the “complaint” as opposed to the complainant.
  - PHRC is not bound by the strict rules of evidence.
  - Testimony is taken under oath and transcribed.
  - The Commission usually requests the parties to file post-hearing briefs. 16 Pa. Code § 42.121.

# Commission Decision

- If the Commission finds in favor of the respondent, then s/he dismisses complaint.
- If the Commission finds in favor of the complainant, then it has broad remedial discretion.
  - See, *Murphy v. PHRC*, 506 Pa. 549, 486 A.2d 338 (1985).

# Remedies

- The victim of discrimination is entitled to “make whole” relief, which will restore the victim to his/her pre-injury status. *Abermarle Paper Company v. Moody*, 422 U.S. 405, 95 S. Ct. 2362 (1975).
- Usual remedies may include, but are not limited to: back pay, hiring, promotion, retroactive seniority, front pay, compensation for lost benefits, reimbursement of certifiable travel expenses in matters involving the complaint, etc. 43 P.S. § 959(f)(1)

# Local Ordinances

- Philadelphia Fair Practice Ordinance (“Phila. F.P.O.”)
- Chapter 9-1100, *et seq.* of the Philadelphia Code
  - **Enforcement Agency:** Philadelphia Commission on Human Relations
  - **Protected Classes:** race, color, sex, religion, national origin, ancestry, age, sexual orientation, marital status, handicap
  - **Employers Subject to Non-Discrimination Laws:** 1+ persons
  - **Employment Actions Covered by Non-Discrimination Laws:** basically the same as the PHRA and Title VII

# Local Ordinances

- Harrisburg Human Relations Ordinance (“Hbg. H.R.O.”)
- Amending Part 7, Article 725 of Codified Ordinances
  - **Enforcement Agency:** Harrisburg Human Relations Commission
  - **Protected Classes:** race, color, religion, ancestry, national origin, place of birth, sex, age, non-job related handicap or disability, marital status, familial status, GED, or, sexual preference/orientation
  - **Employers Subject to Non-Discrimination laws:** 4+ persons
  - **Employment Actions Covered by Non-Discrimination Laws:** basically the same as the PHRA and Title VII

# Local Ordinances

- Pittsburgh Human Relations Ordinance (“Pgh. H.R.O.”)
- Pittsburgh City Code, Chapters 751-759
  - **Enforcement Agency:** Pittsburgh Commission on Human Relations
  - **Protected Classes:** race, color, religion, ancestry, national origin, place of birth, sex, age, non-job related handicap or disability, or sexual orientation or preference
  - **Employers Subject to Non-Discrimination Laws:** 5+ persons
  - **Employment Actions Covered by Non-Discrimination Laws:** basically the same as the PHRA and Title VII

# Complying with Pennsylvania Employment Laws

# Pennsylvania Laws

- At-will employment state
- Pennsylvania Wage Payment and Collection Act
- Pennsylvania Cobra

# PA Wage Payment

- The Pennsylvania Wage Payment and Collection Act does not create a right to wages or benefits, but provides a statutory remedy where the employer breaches a contractual right to wages that have been earned.
- Under the WPCL, the term “employer” includes “agent or officer” meaning that a corporate officer may be personally liable for the corporation’s failure to pay wages.
- Braun v. WalMart

# PA Cobra and Mini Cobra

- Persons no longer employed have a right to Cobra, regardless of the reason for separation.
- Except gross misconduct.
- Pennsylvania's Mini-COBRA applies to employees of smaller businesses (2-19 employees).
- Applies for a shorter length of time (nine months).

# Non-Competes with Executives

Non-compete agreement

Non-solicitation agreement

Non-disclosure agreement

- Pennsylvania law requires consideration
- Courts will blue pencil agreements
- Employees can be bound to keep information confidential even in the absence of a non-compete
- Doctrine of inevitable disclosure