

January 18, 2018 Advisory Letter — Opinion Request – Sandoval County Right to Work Ordinance

The Honorable Benny Shendo, Jr.
New Mexico State Senator
PO Box 634
Jemez Pueblo, NM 87024

Re: Opinion Request - Sandoval County Right to Work Ordinance

Dear Senator Shendo:

You requested our advice regarding Sandoval County's proposed "right to work" ordinance. See Sandoval County, N.M., An Ordinance Relating to Promotion of Economic Development and Commerce by Regulation of Certain Involuntary Payments Required of Employees in Sandoval County, Ordinance No. 1-18-18.9C (proposed), also known as the Right to Work Ordinance ("RTW Proposed Ordinance").

As discussed below, we conclude that the proposed ordinance, if adopted, would involve the exercise of powers beyond the scope of those granted by the legislature to non-Home Rule entities under Dillon's Rule. *Einer v. Rivera*, 2015-NMCA-045, 346 P.3d 1197. Even if the County had adopted a Home Rule Charter, the proposed ordinance would exceed the county's Home Rule authority given that it would create serious concerns about uniformity in the law: "[S]erious concerns about generating non-uniformity" arise when an "ordinance will generate confusion in the law ... produce great inefficiency among the businesses that are required to comply with the ordinance, or cause choice of law problems." *New Mexicans for Free Enterprise v. City of Santa Fe*, 2006-NMCA-007, ¶¶ 25, 35, 126 P.3d 1149, 1161, 1164. Finally, the proposed ordinance would likely be preempted by the National Labor Relations Act, and if challenged in court, would likely be found invalid and unenforceable on these multiple, identified grounds.

RTW Proposed Ordinance

We understand that the Sandoval County Board of Commissioners intends to vote on the RTW Proposed Ordinance at its regular meeting on January 18, 2018. See Regular Meeting Agenda, ¶ 9(C) (Jan. 18, 2018), <http://www.sandovalcountynm.gov/commission/sccmeetings>.

The proposed ordinance is intended "to provide that no employee covered by the National Labor Relations Act need join or pay dues to a union, or refrain from joining a union, as a condition of employment...." RTW Proposed Ordinance, para. 1. The substantive provisions of the proposed ordinance are found in Sections 4 and 5. Under Section 4, a person may not be required to become or remain a member of a labor organization or to pay dues or other charges to a labor organization as a condition of employment. Section 5 makes it unlawful to deduct from an employee's compensation

any union dues or other charges to be paid to a labor organization unless the employee agrees to the deductions in writing and that the employee may revoke the authorization at any time.

Sandoval County's Legislative Powers

The New Mexico constitution places clear eligibility requirements on counties' ability to become a home rule charter. N.M. Const. art. X, §§ 5 and 10. A county must also have adopted a charter incorporating itself. *Einer v. Rivera*, 346 P.3d 1197, at 1999. Under such limitations, it appears that Sandoval County has not adopted a home rule charter. Without adoption of a home rule charter, a New Mexico county is subject to Dillon's Rule, which means it "possesses only such powers as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers." *Id.* at 1200.

NMSA 1978, Section 4-37-1, provides that "counties are granted the same powers that are granted municipalities," but this has been interpreted to mean the particular powers granted to municipalities by statute and not the general grant of home rule authority in Art. X, Sec. 6(D) of the Constitution. *Bd. of Comm. of Rio Arriba County v. Greachen*, 129 N.M. 177, 181, 3 P.3d 672, 675-676.

The only arguable authority to enact the RTW Proposed Ordinance, then, is the statutory grant, "providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants." NMSA 1978, § 3-17-1(B). Such a grant of authority does not encompass or include the authority to adopt an ordinance which regulates contracts between employees, employers, and unions.

Even if Sandoval County has the Constitutional authority of a Home Rule Amendment, it still likely lacks the authority to enact the RTW Proposed Ordinance under the "Home Rule Amendment" of the Constitution. Home Rule authority permits a County to exercise broad legislative powers; however, "this grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power." N.M. Const. art. X, § 6(D).

The RTW Proposed Ordinance is a private law because it attempts to establish new rights and causes of action between private individuals and parties and the relationships between an employer and employee, between an employee and a collective bargaining organization, and between the collective bargaining organization and the employer. *New Mexicans for Free Enterprise*, at 1160. Accordingly, a municipality may enact a right-to-work ordinance only as an incident to the exercise of an independent municipal power. "An 'independent municipal power,' ... means a[] power other than home rule." *Id.* at 1161. "Where a municipality has been given [such] powers by the legislature ..., those may be sufficiently independent municipal powers to allow regulation of a civil relationship as long as (1) the regulation of the civil relationship is reasonably 'incident

to' a public purpose that is clearly within the delegated power, and (2) the law in question does not implicate serious concerns about uniformity in the law." *Id.*

Adoption of Sandoval County's proposed right-to-work ordinance clearly implicates serious concerns about uniformity in the law. "[S]erious concerns about generating non-uniformity" arise when an "ordinance will generate confusion in the law ... produce great inefficiency among the businesses that are required to comply with the ordinance, or cause choice of law problems." *New Mexicans for Free Enterprise*, at 1164.

"[I]f cities, counties, and other local governmental entities were free to enact their own [right-to work] regulations" the "result would be a crazy quilt of regulations" that could easily "subject a single collective bargaining relationship to numerous regulatory schemes." *N M. Fed 'n of Labor, United Food & Commercial Workers v. City of Clovis*, 735 F.Supp. 999, 1003 (D.N.M. 1990). As a result, the "bargaining parties would often be left in a state of considerable uncertainty if they were forced to identify and evaluate all the relevant [local ordinances] in order to determine the potential validity of a proposed union-security provision." *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407,419 (1976).

Since, the RTW Proposed Ordinance does not comport with the existing state law, rather it proposes to change the existing civil relationships, it is unlikely a New Mexico Court will uphold this RTW Proposed Ordinance in its current form. This conclusion would be true if the RTW Proposed Ordinance were adopted in a home rule charter situation and, especially here, if the municipality were not a home rule municipality.

Preemption by the National Labor Relations Act

The National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA") regulates private sector employment. The NLRA generally governs matters of collective bargaining and preempts, or precludes, state and other non-federal laws that attempt to regulate areas covered by the NLRA. See *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282,286 (1986) ("in passing the NLRA Congress largely displaced state regulation of industrial relations"). Because Sections 4 and 5 of the RTW Proposed Ordinance regulate collective bargaining matters covered by the NLRA, their validity and enforceability depend on whether they are preempted by the NLRA.

1. Section 4 - Union Security Provision

The NLRA permits employers and unions to bargain over union security agreements, which require employees to join or pay dues to a union. See *NM. Fed 'n of Labor*, at 1002. The NLRA makes it an unfair labor practice for an employer "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," but provides that no federal law shall preclude an employer and union from entering into a union security agreement. 29 U.S.C. § 158(a)(3).

Section 14(b) of the NLRA provides an exception to the NLRA's exclusive regulatory authority over union security agreements. The exception provides that the NLRA does not "authoriz[e] 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." 29 U.S.C. § 164(b). In other words, the NLRA does not preempt state laws that prohibit union security agreements.

Whether the prohibition against union security agreements in Section 5 of Sandoval County's RTW Proposed Ordinance is valid and enforceable depends on whether the ordinance is a "state law" for purposes of the exception in Section 14(b) of the NLRA. In an opinion issued in 1990, the federal district court for the District of New Mexico reviewed a prohibition against union security agreements in a municipal ordinance similar to Sandoval County's RTW Proposed Ordinance. See *New Mexico Fed'n*, 735 F.Supp. 999. The court held that "Congress preempted the field of regulation of union security agreements, except to the extent specifically permitted in § 14(b)," and that neither the legislative history nor language of Section 14(b) suggested that right to-work enactments of political subdivisions constituted "state" law within the meaning of statute. *Id.* at 1002, 1004. According to the court, "[t]he plain language of the statute indicates . . . that only a state, through state legislation, may prohibit union security agreements." *Id.* at 1004.

Only one federal court has concluded that Section 14(b)'s use of the term "state" includes political subdivisions. See *United Auto., Aerospace & Agric. Implement Workers v. Hardin Cnty.*, 842 F.3d 407 (6th Cir. 2016), *cert. denied*, 138 S.Ct. 130 (2017). That decision applies only to states within the Sixth Circuit (Kentucky, Michigan, Ohio and Tennessee). It does not affect the New Mexico federal district court's decision in *New Mexico Fed'n of Labor*, which continues to bind New Mexico and its political subdivisions, including Sandoval County.

After the Sixth Circuit issued its decision in *United Auto*, the federal district court for the Northern District of Illinois issued an opinion addressing an Illinois municipality's ordinance prohibiting union security agreements. The Illinois federal district court expressly disagreed with the Sixth Circuit's analysis and, as in *New Mexico Fed'n of Labor*, concluded "laws of political subdivisions do not qualify as 'State law' under [Section 14(b)]." *Internat'l Union of Operating Eng'rs v. Village of Lincolnshire*, 228 F.Supp.3d 824 (N.D. Ill. 2017), *app. filed in Seventh Circuit Court of Appeals* (Feb. 15, 2017).

Under the ruling in *New Mexico Fed'n of Labor*, Sandoval County's RTW Proposed Ordinance does not constitute "State law" for purposes of Section 14(b) of the NLRA. Consequently, we believe that Section 4 of the ordinance, which attempts to prohibit union security agreements, is preempted by the NLRA and is unenforceable.

2. Section 5 - Dues Check-off Provision

Section 5 of the RTW Proposed Ordinance prohibits employers from deducting union dues and other charges from an employee's compensation without the employee's written authorization, which may be revoked by the employee "at any time." Courts

reviewing similar dues deduction provisions enacted by state and local governments have uniformly found that the provisions do not fall under the Section 14(b) exception discussed above and are preempted by provisions of the Federal Labor-Management Relations Act that regulate dues check-off arrangements, 29 U.S.C. § 186(c)(4). See *SeaPAK v. Indus., Technical & Prof'l Employees*, 300 F.Supp. 1197 (S.D. Ga. 1969), *aff'd per curiam*, 423 F.2d 1229 (5th Cir. 1970), *aff'd per curiam*, 400 U.S. 985 (1971); *United Auto*, 842 F.3d at 421 (holding that under *SeaPAK*, provisions of a county's right-to-work ordinance prohibiting dues check-off arrangement unless employee had right to revoke employee's written authorization at any time were preempted by federal law and unenforceable); *Internat'l Union of Operating Eng'rs*, 228 F.Supp.3d at 839 (holding that unions were entitled to summary judgment on their claim that a village's ordinance requiring a dues check-off arrangement to be revocable by the employee at any time was preempted by the NLRA and the Labor Management Relations Act). See also *New Mexico Fed'n of Labor*, at 1001 (city conceded that a dues deduction provision similar to Section 5 in city's right-to-work ordinance was invalid under *SeaPAK*).

In light of the prevailing view of courts addressing similar dues deduction provisions enacted by state and local governments, it appears likely that a court reviewing Section 5 of the RTW Proposed Ordinance would conclude that it is preempted by federal law and, like Section 4's prohibition of union security agreements, unenforceable.

We also note that Section 8, of the RTW Proposed Ordinance makes violation a crime with possible fines and imprisonment and that Section 10 requires the Sheriff to investigate "complaints of violation or threatened violations" of the Ordinance. In light of the analysis detailed above, these sections mean that the RTW Proposed Ordinance could divert law enforcement and prosecutorial resources away from other important matters to the enforcement of provisions that are pre-empted and therefore unenforceable under federal law. In addition to any public safety consequences, this issue creates additional legal and financial risk for the County, should it choose to enact the RTW Proposed Ordinance.

Your request to us was for a formal Attorney General's opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

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