An Analysis of the Proposed Workers' Rights Constitutional Amendment

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In May, the General Assembly, at the urging of organized labor, passed a resolution to amend the Bill of Rights Article of the Illinois Constitution to add the following new right:

> Employees shall have a fundamental right to organize and to bargain collectively through representatives of their own choosing for the purpose of negotiating wages, hours, and working conditions, and to protect their economic welfare and safety at work. No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively over their wages, hours, and other terms and conditions of employment and workplace safety, including any law or ordinance that prohibits the execution or application of agreements between employers and labor organizations that represent employees requiring membership in an organization as a condition of employment.

It will be on a separate ballot in the November, 2022, general election. To secure passage, the Illinois Constitution provides:

> A proposed amendment shall become effective as the amendment provides if approved by either three-fifths of those voting on the question or a majority of those voting in the election.

The three principal components of the proposed constitutional amendment are analyzed below, together with the reasons why each is objectionable.

MAKES COLLECTIVE BARGAINING A CONSTITUTIONAL RIGHT

At the outset, it is important to understand that the United States Supreme Court has never recognized collective bargaining as a constitutional right. Thus, in a 1979 decision, the Supreme Court unanimously stated that "the First Amendment does not impose any affirmative obligation on the government "to recognize the association and bargain with it."

Only four states constitutionally protect collective bargaining--Florida, Hawaii, Missouri, and New York. None of those four states, however, go further and provide, as the proposed Illinois amendment would, that "[n]o law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively ...." or prohibit the enactment of a "right-to-work" law or ordinance.

The interpretation of those state constitutional provisions should give serious pause to whether Illinois should be the fifth state. On that score, alarm bells should go off based on a 1981 Florida Supreme Court decision that held retirement

benefits were a part of the collective bargaining process and that therefore the legislature's exclusion of retirement as a subject of bargaining violated the constitutional right to bargain collectively.

It is legitimate to ask, "Should Illinois courts be given the right to determine what the constitutional right to collective bargaining encompasses?" The answer should be a resounding "NO."

PROHIBITS THE ENACTMENT OF ANY LAW THAT "INTERFERES WITH, NEGATES OR DIMINISHES" COLLECTIVE BARGAINING RIGHTS

As troubling as the provision guaranteeing collective bargaining is, even more troubling is the provision that unequivocally states: "No law shall be passed that interferes with, negates, or diminishes the right of employees to organize and bargain collectively . . ." This would permanently prohibit the General Assembly from enacting any collective bargaining reform measures, regardless of how popular the measures might be. For example, plenty has been written about the need to address collective bargaining provisions that stand in the way of police reform,

Stated differently, the proposed constitutional amendment would "lock-in" all existing pro-labor legislation, as well as any future pro-labor legislation that might be enacted. Among the multitude of pro-labor legislative enactments that could not be repealed or amended are the following:

- Making minimum manning for firefighters a mandatory subject of bargaining;
- Providing for "card check" certification of unions and thereby bypassing secret ballot elections as the basis for determining whether employees wish to be represented for the purposes of collective bargaining;
- Prohibiting municipalities with collective bargaining agreements from subcontracting any work that firefighters currently perform, such as EMS; and,
- Establishing onerous requirements for fire department promotions, including promotions to the first supervisory position outside the established bargaining unit.

As matters now stand, Illinois has the nation's most pro-labor legislative framework for public sector unions. It is, therefore, legitimate to ask whether Illinois public sector unions be extended the extraordinary constitutional right to forever "lock-in" all union-friendly laws that are currently on the books, as well as any new union-friendly laws that might be enacted in the future? My recommended response would be an unequivocal "NO."

PROHIBITS THE ENACTMENT OF "RIGHT-TO-WORK" LAWS OR ORDINANCES

The clear purpose of the last component is to bar the enactment of a "right-to-work" law or ordinance. Although the sponsors seemed to suggest that the proposed amendment would not apply to the private sector, the anti-right-to-work provision is clearly aimed at the private sector since the Supreme Court in its Janus decision held that public sector union security and fair share clauses were unconstitutional. To the extent that the anti-right-to-work provision purports to legalize union security or fair share provisions in the Illinois public sector, it is blatantly unconstitutional.

Another facet of the anti-right-to-work provision is to bar the enactment of municipal "right-to-work" ordinances. In a clear response to the Village of Lincolnshire's passage of a mini-right-to-work ordinance, unions pushed for the enactment of "The Collective Bargaining Freedom Act." This 2019 Act effectively bars municipalities from enacting mini-right-to-work ordinances. As a result, there is no need for a constitutional amendment to address any concerns over the possible passage of mini-right-to-work ordinances.

RECOMMENDATION

In recommending that public sector employers oppose the constitutional collective bargaining ballot measure, I considered the following facts:

- Only four states make collective bargaining a constitutional right, BUT;
- No state has a constitutional provision prohibiting the passage of any law that would "interfere with, negate, or diminish" collective bargaining rights; and,
- No state has a constitutional provision prohibiting the passage of a "right-to-work" law or ordinance.

Given the extensive collective bargaining rights that Illinois public sector unions already possess, there is simply no reason, let alone a compelling reason, to adopt the proposed constitutional amendment, especially one that is unprecedented.

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