

**VIRGINIA DEPARTMENT OF LABOR AND INDUSTRY
DIVISION OF LABOR AND EMPLOYMENT LAW**

FIELD OPERATIONS MANUAL

CHAPTER SIX RIGHT TO WORK

This document is part of the latest version of the Virginia Department of Labor and Industry Division of Labor and Employment Law's Field Operations Manual. This document supersedes any and all previous editions.

Revised March 2010

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6.00 Right-to-Work Law

A. Coverage

Virginia’s Right-to-Work Law is set forth in §§ 40.1-58 through 40.1-69 of the Code of Virginia and applies to both private and public industry employees (40.1-58.1).

B. Summary

Virginia is one of twenty-one states with a Right-to-Work Law. Under Section 14(b) of the National Labor Relations Act (NLRA) Virginia exercised its option to adopt a “right to work” law.

The law prohibits a closed shop, where employers may hire only members of the contracting union, and a union shop, where the employee who is not a member of a union must join after a certain period of employment and must remain a member as a condition of employment, even if a union is the NLRB-certified representative of employees at a company.

Under the statute, the right to work cannot be denied or abridged an individual on account of membership or nonmembership in a labor union or organization and an employer cannot require employees to become or remain members of a labor union nor require that dues or fees be paid to a union or labor organization as a condition of employment.

Any person required to join a union or denied employment in violation of Virginia’s right-to-work law is entitled to recovery from the employer, and from any person or union acting in concert with the employer, any damages sustained by reason of denial or deprivation of employment. Employees adversely affected as a result of any violation or threatened violation of the right-to-work law are also entitled to injunctive relief and to recover damages from violators. Violation also constitutes a Class 1 misdemeanor.

C. Exemptions

The Virginia Right-to-Work Law does not apply to the following:

1. Railroads and airlines. The labor relations activities of these industries are governed by the Railway Labor Act. This Act created a National Mediation to conduct elections to determine whether or not workers want union representation and to mediate disputes that arise during contract negotiations. The National Railroad Adjustment Board provides procedures for settling disputes in the railroad industry arising out of grievances or the application of contracts. Inquiries from employees, employers, or other interested person should be referred to the National Mediation Board.
2. Federal enclaves with exclusive jurisdiction. Exclusive jurisdiction can only be gained by Acts of the General Assembly. When the Commonwealth deeds

property to the federal government, exclusive jurisdiction is not a given. Rather, the federal government must ask the General Assembly for exclusive jurisdiction which can only be granted by Acts of Virginia's General Assembly. The right-to-work law does prevail on federal properties having either "concurrent" or "proprietary" jurisdiction.

D. National Labor Relations Act and National Labor Relations Board

1. Summary

The National Labor Relations Board (NLRB) is an independent federal agency established to enforce the National Labor Relations Act. As an independent agency, they are not part of any other government agency such as the Department of Labor. Basically, the NLRB has two functions:

- (1) To prevent and remedy unfair labor practices, whether committed by labor organizations or employers.
- (2) To establish, usually by secret ballot elections, whether or not certain groups of employees wish to be represented by labor organizations for collective-bargaining purposes.

The NLRB is organized into two major parts: the five-member Board itself, which has its own staff, and the Office of the General Counsel. The Board Members and the General Counsel are appointed by the President with the consent of the Senate. Their offices are located in Washington, D.C. In addition, the agency maintains field offices in major cities across the nation.

2. National Labor Relations Act Preemption Doctrine

As a general rule, the state is preempted from enforcing allegations of unfair labor practices and must refer such complaints to the NLRB. There are certain exceptions, however. For example, the state may investigate and enforce its law prohibiting any agreement "requiring membership in a labor organization as a condition of employment."

Whenever the federal labor law regulates an area which the state also regulates, the state law is preempted by the federal law. Section 101 of Title 29 of the United States Code states: "The interest in a uniform national labor policy clearly outweighs any recognized interest in state regulation. Hence, subject to certain exceptions discussed below, state statutes are pre-empted by federal labor law wherever the two areas overlap." In San Diego Building Trades Council vs Garmon, 395 U.S. 236 (1959) it was ruled "If an activity is even arguably regulated or protected by federal law, the states have no jurisdiction to regulate that activity." Therefore, the general rule is that any allegation of an unfair labor practice must be referred to NLRB.

Exemptions to Preemption Doctrine

1. Statutory Exemptions:

- (1) State limitations on union security agreements: The exception to the preemption doctrine which allows states to enforce their Right-to-Work Laws is set forth in Section 29 U. S. Code Section 164(b) of the National Labor Relations Act and reads as follows:

“Nothing in this Chapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment and in any State or Territory in which such execution or application is prohibited by State or Territorial law.”

Therefore, if we receive a complaint alleging that an employer and a union have entered into an agreement which creates a “union shop” (where employees must join the union after securing employment), or an “agency shop” (where employees must pay dues and initiation fees to the union, but need not join), we must investigate and enforce the Right-to-Work Law without regard to the NLRB. A closed shop (where employees must be union members before they are hired) is outlawed under both federal and state law.

- (2) Where NLRB refuses to exercise jurisdiction: Section 14(c) of the 1959 Landrum-Griffin Amendment provides that state courts or state agencies may exercise jurisdiction over activities as to which the NLRB has declined jurisdiction because of an insubstantial effect on commerce. DOLI will only accept complaints alleging violations of the provisions of the Virginia Right-to-Work Law. Other allegations would have to be pursued by the claimant’s attorney through the courts.
- (3) Damages for unlawful strikes or boycotts: Under Taft-Hartley section 303, suits to recover damages for certain types of unlawful strikes or boycotts may be brought in state court --- even though the activity is also an unfair labor practice under federal law. DOLI will only accept complaints alleging violation of the provisions of the Virginia Right-to-Work Law. Other allegations would have to be pursued by the claimant’s attorney through the courts.
- (4) Action for breach of collective bargaining contract: Likewise, Taft-Hartley section 301 permits suit for breach of a collective bargaining agreement in either federal or state court --- whether or not the breach-of-contract claim also constitutes a federal unfair

labor practice. DOLI will only accept complaints alleging violation of the Virginia Right-to-Work Law. Other allegations would have to be pursued by the claimant's attorney through the courts.

2. Judicial Exemptions:

- (1) Matters of overriding local concern: The Supreme Court has carved out an exception to the preemption doctrine to permit state regulation of conduct which “touches interests deeply rooted in local feeling and responsibility.”
- (2) Matters of “peripheral” federal concern: The Supreme Court has also stated that the preemption doctrine does not apply where the matter is of only “peripheral” (minor) concern to federal labor policy.
- (3) Matters where state regulation will promote, rather than impede, federal labor policy: The Supreme Court also has disregarded the preemption doctrine where the particular rule of law invoked in state court is so structured that state regulation would promote, rather than interfere with, federal labor policy.
- (4) Union duty of fair representation: A union's failure to represent all of its members fairly is an unfair labor practice under the NLRA. However, the NLRA does not preempt duty-of-fair-representation suits by union members in state courts. In such cases, the state court applies federal substantive law under section 301 of the NLRA, augmented by state remedial law. The union's duty of fair representation is so fundamental that Congress did not intend to oust state courts of jurisdiction. Instead, concurrent state jurisdiction and state remedies should be preserved where they promote this goal of the NLRA.

Note: Complaints under these judicial exemptions to the preemption doctrine would only be accepted by DOLI if allegations of violations of Virginia's Right-to-Work statute exist. Other allegations would have to be pursued by the claimant's attorney through the courts.

E. Employees Wishing to Withdraw from the Union

Sole jurisdiction of NLRB.

F. Case Assignment

1. Regional, Field, or Central Office staff person receives complaint.

2. The claimant should be requested to write a letter documenting all information regarding the allegations.
3. Representative should review claim with Supervisor prior to commencing investigation. Supervisor should bring claim to the attention of designated Central Office staff person. All Right-to-Work complaints are considered significant cases and should be coordinated by Supervisor with Central Office.

G. Investigation

1. Interviews complainant.
2. Interviews employer, union management, etc.
3. Interviews co-workers, witnesses, if necessary.
4. Reviews records where deductions have been made for union dues, etc.
5. Reviews policies regarding union and nonunion membership.
6. Requests employer and/or union official to provide proof to claim of exclusive jurisdiction on a federal enclave.
7. If doubt exists concerning NLRB jurisdiction, contact one of NLRB's Field Offices for clarification.

H. Case Disposition

Central Office staff person will advise affected parties (complainant, employer, union official) of what determination DOLI has made in the case, and what action has to be taken as a result of the determination.