ALABAMA POLICY INSTITUTE

GUIDE TO THE ISSUES

Automatic Payroll Deductions for Politically Active Organizations

Background

Ala. Code §§ 36-1-4.3 and 36-1-4.4 allows public employees to request that the Alabama State Comptroller arrange for the payment of membership dues for employee organizations by payroll deduction. Many organizations rely on these automatic deductions in large part for their main source of revenue. For example, the Alabama Education Association (AEA) has collected approximately $191,000 a month through automatic payroll deductions since June of 2013.[1]

In response to growing public pressure to re-tool Alabama's ethics laws, Governor Bob Riley called a special session in December of 2010. During the special session, the Alabama Legislature enacted a bill to amend Ala. Code §§ 17-17-5(b)(1) – (2).[2] The intent of the bill was to remove the State from essentially being the collector, holder, and payer of dues to any organization involved in political activities. As amended, the statute prohibits a state or local government employee from arranging "by salary deduction or otherwise" contributions to organizations that may use those resources for political activity. It also provides a detailed list of activities deemed by the Legislature as political in nature.

As a result, the AEA, the International Association of Fire Fighters, and other organizations sued. Judge Lynwood Smith of the U.S. District Court for the Northern District of Alabama issued an injunction, preventing the enforcement of the statute, stating that the term "or otherwise" was overbroad and "political activity" was unduly vague.[3] The District Court held that the law infringed on the Plaintiffs' First Amendment rights. The various State Defendants appealed the decision to the 11th Circuit.

ISSUE SNAPSHOT

Alabama's ban on payroll deductions to organizations using them for political activities has been challenged by the AEA and others.

The Alabama Supreme Court answered questions for the 11th Circuit Court of Appeals that casts doubt on the ban's constitutionality due to First Amendment considerations.

In its December 23, 2011 Order, the 11th Circuit noted that a ban on salary deductions to organizations engaged strictly in attempting to elect a candidate or drum up support for a particular issue, i.e., electioneering, would be constitutional, as the State may choose not to subsidize the exercise of a fundamental right.[4] However, the Court determined that the law's constitutionality depended solely on the interpretation of "political activity;" any prohibition above and beyond simple payroll deductions for organizations engaged in electioneering would likely be too vague and unconstitutional.

The Court then determined that interpretations of state law are generally resolved by that State's Supreme Court. As such, the 11th Circuit certified two questions to the Alabama Supreme Court: 1. "Is the 'or otherwise' language in the statute limited to the use of state mechanisms to support political organizations, or does it cover all contributions by state employees to political organizations, regardless of the source?" and 2. "Does the term 'political activity' refer only to electioneering activities?"[5]

The Decision

On October 25, 2013, the Alabama Supreme Court answered those questions.[6] To the first question, the Court unanimously held that the "or otherwise" language in the statute was "limited to the use of State mechanisms to make payments to organizations that use at least some portion of those payments for political activity" and that the language referred to any manner of payment to such organization that is in the nature and context of a salary deduction. The Court reasoned that the law would not ban private contributions from state employees in any other manner other than one similar to a salary deduction.[7]

To the second question, a divided Court, by way of a 6-2 decision[8], found that political activity covered more than electioneering. The majority specifically focused on Ala. Code § 17-17-5(b)(1)(c) which held that "engaging in or paying for any form of political communication, including communications which mention the name of a political candidate" was political activity.[9] The majority reasoned that any organization even speaking a candidate's name, while not necessarily in favor of or in opposition to a specific candidate, was political activity, and thereby prohibited under the statute. As a result, the majority concluded that the law dealt with much more than just electioneering and answered the certified question in the negative.

Chief Justice Moore and Justice Bolin dissented arguing that the Court has a duty to construe statutes in an effort to make them constitutional. The statute itself "limits" political activity to a number of different actions. The dissent maintained that the "limitations," as set out in the statute, do not themselves define political activity, rather, they merely limit them to the actions listed in § 17-17-5. Therefore the dissent determined that the actual meaning of political activity must be found elsewhere. The dissent argued that the definition of political activity, contained within the State's Election Code, refers to elections/electioneering. Therefore, the dissent contended the "communications" limitation under Ala. Code § 17-17-5(b)(1)(c) would only refer to communications in the manner of electioneering, i.e., to elect or oppose a candidate.[10]

Policy Consideration

The statute faces two constitutional hurdles on its way back to the 11th Circuit. The first hurdle regarding the "or otherwise" language will be easily cleared. However, the political activity hurdle may prove problematic for the statute. The 11th Circuit will likely find that the prohibition on deductions to organizations engaged in "political activity," and not specifically electioneering, is constitutionally flawed and void the statute in whole or with respect to activities beyond electioneering.

Recommendation

The Alabama Legislature can remedy this situation in one of two ways. First, the Legislature may follow the U.S. Supreme Court's guidance in a similar case, *Ysursa v. Pocatello Education Association*, by amending the statute to avoid the vagueness the Court has found with the term "political activity."[11] The Legislature also has the option of ending the practice of using taxpayer resources to manage payroll deductions for all organizations regardless of their political activities. With modern technology, automatic electronic bank drafts set up by members could eliminate the need for State involvement.

By either amending the existing statute to comply with Supreme Court precedent or eliminating the practice of State-supported dues collection, the Legislature will bring finality to the State's service as a bank through which many organizations fund political activities.

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[1] Tim Lockette, *Campaign Treats: A Year From Election Day, Millions Already Spent on Alabama's 2014 Contests*, Anniston Star, (Oct. 27, 2013), http://www.annistonstar.com/view/full_story/23930481/article-Campaign-treats--A-year-from-election-day--millions-already-spent-on-Alabama-s-2014-contests?instance=home_lead_story.
[2] Act. No. 2010-761.
[3] *Alabama Educ. Ass'n v. Bentley*, 788 F. Supp. 2d 1283, 1287 (N.D. Ala. 2011).
[4] *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 355 (2009).
[5] *Alabama Education Association et al., vs. State Superintendent of Education et al.*, 665 F.3d 1234, 1238 (11th Cir. 2011).
[6] *State Superintendent of Education et al., v. Alabama Education Association et al.*, No. 11-11266 (Ala. Oct. 25, 2013).
[7] *Id.* at *20-21.
[8] Justice Main recused.
[9] *Id.* at *27.
[10] *Id.* at *44.
[11] 555 U.S. 353 (2009).