Legal Alert: Federal Labor Law Pre-empts California's Prohibition on Use of State Funds to Promote or Deter Organizing

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The U.S. Supreme Court recently held that a California law that prohibits employers who receive state funds from using those funds to "assist, promote, or deter union organizing" is pre-empted by federal labor law. *See Chamber of Commerce v. Brown* (June 19, 2008).

Background: AB 1889 forbids certain employers that receive state funds from using such funds to "assist, promote, or deter union organizing." *See* Cal. Govt. Code Ann. §§16645 – 16649. The statute specifies that the spending restriction applies to "any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for . . . an activity to assist, promote, or deter union organizing." §16646(a). Although it purports to have a neutral purpose, the statute exempts activities performed or expenses incurred in connection with undertakings that promote unionization.

The law requires covered employers to certify that no state funds will be used for prohibited expenditures and to maintain and provide, upon request, "records sufficient to show that no state funds were used for those expenditures." Violators are liable to the state for the amount of the funds spent in violation of the law plus a civil penalty equal to twice the amount of those funds. Suspected violators may be sued by the state attorney general or any private taxpayer, and prevailing plaintiffs are entitled to recover reasonable attorney's fees and costs.

In 2002, several organizations whose members do business in California sued the state to enjoin enforcement of the law. The Ninth Circuit held that the National Labor Relations Act (NLRA) does not preclude enforcement of the law. The Supreme Court overruled this decision.

Machinists Pre-Emption: The Court held that AB 1889 is pre-empted under the *Machinists* pre-emption analysis. *Machinists* pre-emption forbids states and the National Labor Relations Board (the Board) from regulating conduct that Congress intended to be left unregulated and controlled by the free play of economic forces. The Court found that the California law is pre-empted under *Machinists* because it regulates within a zone protected and reserved for market freedom.

In holding that the NLRA pre-empts the California law, the Court emphasized that both the First Amendment and § 8(c) of the NLRA protect noncoercive

speech about unionization. According to the Court, this policy judgment, which suffuses the NLRA as a whole, favors "uninhibited, robust, and wide-open debate in labor disputes." Further, the Court held that "Congress' express protection of free debate [as set forth in § 8(c) of the NLRA] forcefully buttresses the pre-emption analysis in this case."

Use Versus Receipt of State Funds: The Court rejected the Ninth Circuit's analysis that the law is permissible because the spending restrictions apply only to the use of state funds and are not a restriction on the receipt of funds. The Supreme Court held that just as California may not directly regulate noncoercive speech about unionization, it cannot indirectly regulate such conduct by imposing spending restrictions on the use of state funds. The Court held that the Ninth Circuit's distinction between use and receipt of state funds is not consequential because the law couples the "use" restriction with compliance costs and litigation risks that are calculated to make union related advocacy prohibitively expensive for employers that receive state funds. By doing so, the law reaches beyond the "use of funds over which California maintains a sovereign interest."

NLRB Regulation: The Court also rejected the Ninth Circuit's analysis that *Machinists* pre-emption does not apply because this is not an area that is free from all regulation, since Board has regulated employer speech that takes place on the eve of a union election. The Court held that regardless of the Board's regulation of speech in special settings such as imminent elections, Congress has clearly denied it the authority to regulate the broader category of noncoercive speech encompassed by the California law. "It is equally obvious that the NLRA deprives California of this authority, since '[t]he States have no more authority than the Board to upset the balance that Congress has struck between labor and management.'"

Federal Regulation: Finally, the Court rejected the Ninth Circuit's analysis that Congress could not have intended to pre-empt AB 1889 because it enacted similar restrictions in three federal statutes. "[T]he mere fact that Congress has imposed targeted federal restrictions on union-related advocacy in certain limited contexts does not invite the States to override federal labor policy in other settings."

Employers' Bottom Line:

The Court's decision is good news for employers because it should preclude other states from enacting similar legislation. Additionally, the decision will likely impact the outcome of litigation challenging a similar New York law (New York Labor Law 211-a). In 2005, a federal trial court found the law to be pre-empted by the NLRA; however, in 2006, the Second Circuit reversed this decision and remanded the case for further proceedings. *See Healthcare Ass'n of New York State v. Pataki*, 471 F.3d 87 (2d Cir. 2006).

More importantly, the Court's decision reiterates the importance of an employer's right to engage in noncoercive speech about unionization. An employer's right to provide employees with information about unions has never been more important, as unions increasingly engage in more aggressive organizing tactics.

If you have any questions regarding this decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.