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A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

JUNE 2008

The U.S. Supreme Court in *Chamber of Commerce v. Brown* holds that the NLRA preempts California's "union neutrality" law that prohibited employers who accept state funds from using those funds to deter union organizing.

U.S. Supreme Court Overturns California's Limitation on Employer Free Speech Rights to Resist Union Organizing

By John C. Kloosterman and Jennifer L. Mora

On June 19, 2008, in a widely anticipated decision, the United States Supreme Court overturned a decision of the Ninth Circuit Court of Appeals and ruled in a 7-2 opinion authored by Justice Stevens that the National Labor Relations Act (NLRA) "unequivocally pre-empted" California's "union neutrality" law, which prohibited employers who accept state funds from using those funds to deter union organizing. *Chamber of Commerce v. Brown*, No. 06-939 (June 19, 2008). This decision is welcome news for many employers who do business in California and were faced with the burdensome accounting task of separating state-provided funds from other funds in order to counter union organizing attempts. The decision also provides assurance to employers doing business in other states that have contemplated adopting a law similar to California's.

History of an Employer's Free Speech Rights Under The NLRA

Congress passed the original NLRA (also known as the Wagner Act) in 1935. The Wagner Act made no mention of an employer's right to free speech, and the National Labor Relations Board (NLRB) initially took the position that the Wagner Act demanded complete employer neutrality during organizing campaigns. In 1941, however, the Supreme Court held in *NLRB v. Virginia Electric & Power Co.*,[1] that the Wagner Act did not prohibit an employer from expressing its views on labor relations matters unless its views were coercive. Four years later, the Supreme Court characterized *Virginia Electric* as recognizing an employer's First Amendment right to free speech.

Despite these holdings, the NLRB continued to act restrictively when regulating employer speech. As a result of the NLRB's stance on this and other issues, in 1947 Congress passed the Taft-Hartley Act, which amended the NLRA in a number of ways. Importantly, Taft-Hartley added Section 8(c), which prohibits any regulation of speech by both unions and employers unless the speech contains a "threat of reprisal or force or promise of benefit." According to the Supreme Court, Section 8(c) "merely implements the First Amendment."

Background of *Chamber of Commerce v. Brown*

In late 2000, in response to intensive lobbying from the AFL-CIO, the California legislature passed Assembly Bill (AB) 1889, the "union neutrality" law, which expressly provided that it was California's policy to remain neutral with regard to union organizing. The law prohibited entities from using state funds to "assist, promote or deter union organizing" and potentially applied to any state contractor or grant recipient if that entity employed one or more individuals. All state contractors who sought payment from the State of California were required to certify that they were not seeking reimbursement for any costs incurred to assist, promote, or deter union organizing. Moreover, if an employer commingled state funds with other funds, the neutrality law assumed that any expenditures related to union organizing were allocated between the two sources of money on a pro rata basis unless the employer could prove otherwise. As the U.S. Supreme Court described it, AB 1889 established a "formidable enforcement scheme" to deter otherwise protected employer speech.

The stated purpose of AB 1889 was "not to interfere with an employee's choice about whether to join or to be represented by a labor union." However, the law exempted expenses incurred in connection with certain activities that promote unionization, including allowing a labor union or its representatives access to the employer's property and negotiating, entering into, or carrying out a voluntary recognition agreement with a labor union.

After AB 1889 was signed into law, labor unions aggressively began to utilize the neutrality law during organizing drives by filing complaints with the California Attorney General and by filing lawsuits alleging that employers were using public funds to oppose organizing. The unions' use of the law in this manner forced employers to expend time and money defending against the unions' allegations.

In response to the unions' tactics, in April 2002, the Chamber of Commerce of the United States, the Chamber of Commerce of California, and numerous other associations and employers (collectively referred to as "Chamber") filed suit in federal district court against California Attorney General Bill Lockyer seeking to have the law overturned on the basis that it was preempted by the NLRA. The AFL-CIO intervened on the state's behalf. The NLRB's General Counsel weighed in, taking the position that the neutrality law was preempted. On September 16, 2002, the district court ruled that the NLRA preempted two portions of the law, section 16645.2 (applying to recipients of state grants of any amount) and section 16645.7 (applying to private employers receiving $10,000 or more in state funds in any calendar year), because they "regulat[e] employer speech about union organizing under specified circumstances, even though Congress intended free debate."

The Ninth Circuit's Several Decisions

Attorney General Lockyer and the AFL-CIO appealed the district court's ruling to the Ninth Circuit, which, on April 26, 2004, issued a unanimous opinion by a three-judge panel upholding the district court decision and agreeing that the NLRA preempted the California neutrality law.

Over one year after issuing its decision, however, the panel withdrew its opinion and, on September 6, 2005, issued a new opinion, written by a different Judge on the panel, as the author of the original panel opinion had changed his mind and wrote a dissenting opinion in favor of upholding the neutrality law. On January 17, 2006, the Ninth Circuit voted to hear the case *en banc*, meaning it would be reheard by a larger panel of 15 judges. On September 21, 2006, the en banc panel released its opinion, which, this time, upheld the neutrality law, finding that it was not preempted by the NLRA.

In ruling that the NLRA did not preempt the neutrality law, the Ninth Circuit found that: (1) Section 8(c) of the NLRA does not grant speech rights to employers, and as the NLRA extensively regulates other aspects of union organizing, an area of organizing unregulated by the NLRA is an appropriate subject for state action; (2) there is a difference between regulating the use of state funds (which the court held was allowable) and the receipt of state funds, which it felt would be problematic; and (3) that other federal statutes perform the same function as AB 1889.

The Supreme Court Rejects All Three Bases of the Ninth Circuit's Decision and Holds that California's Neutrality Law Is Preempted by the NLRA

The Supreme Court unequivocally rejected each of the Ninth Circuit's bases for its ruling. First, the Supreme Court reviewed the history of the NLRA and rejected the Ninth Circuit's holding that Section 8(c) of the NLRA does not grant free speech rights to employers. More importantly, the Supreme Court noted that Section 8(c) manifests Congress' intent to encourage free debate on labor relations issues, and that Congress explicitly intended that noncoercive employer speech was to remain unregulated. The Court then reviewed the California law's policy statement, which indicates that partisan employer speech necessarily interferes with employee free choice and held that California was engaging in "the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act." Accordingly, the Court struck down portions of California's neutrality law as being preempted by federal law.

Second, the Court determined that the Ninth Circuit's distinction between the use and receipt of state funds is a distinction without difference. The Court noted that the neutrality law placed heavy burdens on an employer because a trivial accounting error or similar violation could give rise to substantial liability. Accordingly, the use/receipt distinction did nothing to alleviate the tension between the neutrality law and the NLRA, and expressly predicated state benefits on an employer's agreement to refrain from activities permitted under the NLRA.

Finally, the Court dismissed the Ninth Circuit's finding that the neutrality law did nothing more than Congress did in three federal statutes involving grant monies. The Court noted that Congress has the authority to create narrow exceptions to otherwise applicable federal policies; the states, however, do not.

Implications

California employers no longer have to choose between foregoing their free speech right to communicate with their employees during union-organizing drives in exchange for continued receipt of state-provided funds. They also need not deal with the accounting nightmare of maintaining separate accounts for state funds and all other funds. Other portions of California's neutrality law have not been challenged in the courts – the Supreme Court's decision, and the lower courts' decisions, only dealt with two sections of a larger statutory scheme. However, the Supreme Court's ruling casts doubt on the enforceability of the remaining portions of the statute.

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[1] 314 U.S. 469 (1941).