CONNECTICUT HOSPITAL ASSOCIATION

TESTIMONY OF
CONNECTICUT HOSPITAL ASSOCIATION
SUBMITTED TO THE
LABOR AND PUBLIC EMPLOYEES COMMITTEE
Thursday, February 10, 2011

HB 5460, An Act Concerning Captive Audience Meetings

The Connecticut Hospital Association (CHA) appreciates the opportunity to submit testimony on **HB 5460, An Act Concerning Captive Audience Meetings.**

HB 5460 would prohibit any person engaged in business from requiring his or her employees to attend employer-sponsored meetings that have as their primary purpose communications concerning religious or political matters. HB 5460 defines political matters as including the decision to join any labor organization. HB 5460 should not be enacted for the following reasons.

First, HB 5460 is preempted by the National Labor Relations Act (NLRA). HB 5460 would limit an employer's current right under the NLRA to require attendance at meetings in which the employer conveys its view on organizing, or so-called "captive audience" meetings. In March 2006, the Connecticut Office of Legislative Research concluded that "it appear[ed] likely" that the NLRA preempted the labor organizing provisions of Substitute HB 5030, a precursor of HB 5460 that contained almost identical language to HB 5460 prohibiting captive audience speeches.

The doctrine of preemption arises from the Supremacy Clause of the United States Constitution and it invalidates state laws that frustrate the purpose of national legislation or impair the efficiency of federal agencies entrusted to discharge the duties for which they were created. The NLRA was enacted in 1935 in large part because Congress wanted to provide an administrative mechanism to peacefully and expeditiously resolve questions concerning union representation. Section 7 of the NLRA affords employees the right "to self-organization" and "to form, join, or assist labor organizations," and "to refrain from ... such activities." Section 8 creates a network of prohibitions on employer and union conduct that has a reasonable tendency to interfere with employees' Section 7 rights.

Section 8(c) of the NLRA sets forth an explicit "free speech" exemption for employees and employers alike, which provides that "the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provisions of [the Act], if such expression contains no threat of reprisal or force or promise of benefit." The United States Supreme Court has ruled that Section 8(c) is a codification of the First Amendment of the United States Constitution.

In 1948, following the passage of Section 8(c), the NLRB reversed an earlier ruling in which it prohibited employers from compelling attendance at employer speeches on self-organization, and approved the use of employer captive audience speeches provided the union was given an opportunity to reply in similar circumstances. In 1953, the NLRB further refined its position and held that "an employer does not commit an unfair labor practice if he makes a preelection speech on company time and premises to his employees and denies the union's request for an opportunity to reply," provided the captive audience speech is not delivered within 24 hours preceding an election. The NLRB has consistently applied this rule since that time and its interpretation has been sanctioned by federal courts.

Indeed, citing NLRB decisions, the Seventh Circuit found that the NLRA has consistently been interpreted to allow employers to require its employees to attend so-called "captive audience" meetings on the employer's premises during work time, in which the employer expresses its opposition to unionization. Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277, 280 (7th Cir. 2005).

Moreover, in Chamber of Commerce v. Brown, 128 S. Ct. 2408, the United States Supreme Court established the law of the land when it noted that "Congress' express protection of free debate [on issues dividing labor and management] forcefully buttresses" its holding that the NLRA preempted California laws prohibiting private employers' use of funds earned from the state to deter union organizing through non-coercive speech. Accordingly, it is simply not the case, as some have argued in the past regarding previous iterations of this proposed bill, that federal law does not protect an employer's right to hold mandatory meetings with its employees to advise them concerning its position on labor organizing activities – federal law absolutely protects that right. There can be no question that HB 5460 seeks to overturn federal labor policy that was established by the NLRB more than 62 years ago and is, therefore, preempted.

In point of fact is the recent experience where the state of Wisconsin enacted a law like HB 5460 prohibiting employers from holding "captive audience" meetings or discriminating or taking action against an employee who refused to attend an employer-sponsored meeting in which the employer communicates its opinion about labor organizations (available at http://www.legis.state.wi.us/2009/data/acts/09Act290.pdf (last visited Jan. 26, 2011)). The Metropolitan Milwaukee Association of Commerce and the Wisconsin Manufacturers & Commerce commenced a lawsuit in federal court in September 2010 challenging the statute based on preemption. The lawsuit quickly culminated in a settlement and stipulation on November 4, 2010, in which the Governor acknowledged that the Wisconsin statute was preempted by the NLRA and agreed to be permanently enjoined from enforcing the unconstitutional "captive audience" law in the future. (See Final Stipulation in Metro. Milwaukee Ass'n of Commerce v. Doyle, Case no. 10-C-0760 (E.D. Wis. Nov. 4, 2010) avail. at www.wispolitics.com/1006/Fina_Stipulation.pdf (last visited Jan. 26, 2011).

In addition, in recent weeks the NLRB has authorized its Acting General Counsel to file lawsuits in federal court, to stop or invalidate Arizona's, South Carolina's, South Dakota's, and Utah's state constitutional amendments mandating secret ballot elections as the only means employees can utilize to choose union representation. The NLRB's official position, which speaks volumes, is that the amendments are preempted by the NLRA and, therefore, unconstitutional. (See State Amendments and Preemption, available at ww.nlrb.gov/About_Us/news_room/State_Facts_Sheets/index.aspx (last visited Jan. 26, 2011). Because HB 5460 would also impair a well-established federally protected right of employers to hold captive audience meetings, it is very clear that HB 5460 is also preempted.

Second, HB 5460 would have the unintended effect of subjecting employees to conduct currently unlawful under the NLRA. For example, HB 5460 does not prohibit employers from asking employees voluntarily to attend meetings or participate in communications regarding union activities and employees are free to choose to attend or participate in those communications as they so wish. Under the proposed law, employees would be put in the position of identifying themselves to their employer and co-workers as supporting or being against unionization when they choose or choose not to attend meetings. Such self-identification would run counter to the protection afforded by secret ballot elections and would interfere with the established body of NLRB law protecting employees in these circumstances. With mandatory attendance at meetings, employees are not put in this position.

Third, enactment of HB 5460 would interfere with employees' rights by creating impediments to the union organizing process since the inevitable outcome would be an increase in unfair labor practice charges and lawsuits until the law is set aside as preempted. For example, the state of Oregon enacted a law similar to HB 5460 which became effective January 1, 2010. Before the statute went into effect, the Associated Oregon Industries and the U.S. Chamber of Commerce filed suit, alleging that statute was preempted by the NLRA and unconstitutional under the First Amendment. See Associated Or. Indus. v. Vakian, No. CV 09- 1494-MO, 2010 WL 1838661 (D. Or. May 6, 2010). However, without ruling on the merits, the suit was dismissed on procedural grounds of standing and ripeness because the law had not yet been enforced. Id. Nevertheless, it is a foregone conclusion that this law will be challenged again and the uncertainty about its enforceabilty will only generate more litigation and expense in the meantime until it is invalidated.

Furthermore, HB 5460 limits employees' rights to be presented with an alternative view and information that a union would not provide. The Second Circuit Court of Appeals, which has appellate jurisdiction over Connecticut district courts, eloquently noted this when it articulated that Section 8 (c), in addition to preserving an employer's right to freedom of speech, "also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance."

HB 5460, which is not neutral but seeks to limit the free speech rights of employers but not of unions, appears to have its genesis in a belief that federal law does not provide a balanced approach to labor relations. Although critics have argued that the NLRA allows employers an undue opportunity to influence employees to reject unionization, it is the job of the United States Congress and not the State of Connecticut to amend federal law. There is certainly a benefit in having a national labor relations policy. Federal law encourages collective bargaining and establishes a framework that is fair, impartial, and carefully regulated to protect the rights of employees. The federal body of law has been thoughtfully crafted and refined over decades of case law to guarantee and protect employee rights while maintaining a careful balance in the critical areas of free speech and employee access to information. If HB 5460 is enacted, not only would it be preempted by federal law, its anti-business message would discourage employers who have the option to relocate from moving to or staying in Connecticut.

Thank you for your consideration of our position.

For additional information, contact CHA Government Relations at (203) 294-7310.