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*UNION ORGANIZING*

# Fate of labor "neutrality" law will soon be decided

On March 19, the U.S. Supreme Court will consider whether a California law that forbids private-sector employers from using state grant monies to assist or deter union organizing is preempted by the National Labor Relations Act (NLRA). Before the Court is the *en banc* Ninth Circuit's ruling that the California statute was not preempted by the National Labor Relations Act (NLRA). *Chamber of Commerce of the United States v. Lockyer,* 153 LC ¶10,727 (9th Cir. 2006), cert granted *sub nom. Chamber of Commerce of the Umited States v. Brown,* Dkt. No. 06-939, Nov. 20, 2007.

## Background

The statute (Cal. Gov't. Code §§ 16645-16649) prohibits the use of state grants in excess of $10,000 in any calendar year "to assist, promote, or deter union organizing," which includes any attempt by an employer to influence the decision of its employees or its subcontractors' employees regarding whether to support or oppose a labor organization that represents or seeks to represent those employees, or whether to become a member of any labor organization. Expenditures for "legal and consulting fees and salaries of supervisors and employees incurred for research for, or preparation, planning, or coordination of, or carrying out, an activity to assist, promote, or deter union organizing" are expressly prohibited.

**Voluntary recognition exempt.** The statute does not apply to activities or expenses incurred in connection with the administration of a collective bargaining agreement or the adjustment of grievances; allowing a labor organization or its representatives access to the employer's facilities or property; performing an activity required by federal or state law or by a collective bargaining agreement; or negotiating, entering into, or carrying out a voluntary recognition agreement with a labor organization.

**Recordkeeping required.** Employers must certify that no state funds will be used for prohibited purposes. Where employers do take part in prohibited activities, they must maintain records sufficient to show they did not use state funds for those purposes. Where state and other funds are commingled, the presumption is that state funds were used in violation of the statute.

**Penalties.** Employers who violate the statute are liable for a fine of twice the amount of the state funds used as well as the return of state funds used in violation of the statute. The Attorney General or a private taxpayer may sue and is entitled to reasonable costs and attorney's fees if successful.

## Ninth Circuit's decision

Employer groups led by the Chamber of Commerce of the U.S. (Chamber) challenged the law, which they argued violated the First Amendment and the free-speech guarantees of Section 8(c) of the NLRA, among other concerns. The AFL-CIO and others intervened. The district court enjoined enforcement, finding the statute preempted by the NLRA. A panel of the Ninth Circuit twice ruled that the law was preempted before the *en banc* Ninth Circuit concluded that it was not.

**Market participant exception.** At the outset, the *en banc* court held that the state was acting in its regulatory capacity rather than its proprietary capacity when it enacted the law, *i.e.,* it was not a "market participant," as understood by the Supreme Court in *Boston Harbor* and subsequent cases applying the market participant exception to preemption doctrine. [In *Boston Harbor,* the Court held that a state agency acted as a market participant when it required contractors working on the cleanup of Boston Harbor to agree to the terms of a project labor agreement that recognized one union as the exclusive bargaining

## Inside

*Chamber of Commerce of the Umited States v. Brown,* scheduled for oral argument before the Supreme Court on March 19, is the subject of comments this month by:

- **Michael C. Harper,** Professor of Law, Boston University School of Law, and co-author of LABOR LAW: CASES, MATERIALS AND PROBLEMS, 6th ed. (with Samuel Estreicher and Joan Flynn), Aspen Publishers (2007); and
- **Henry H. Drummonds,** Professor of Law, Lewis and Clark Law School, Portland, OR, and author of *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace,* 62 FORDHAM L. REV. 469 (1993).

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agent and contained a 10-year no-strike commitment. *Bldg. & Construc. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass/RI, Inc.*, 124 LC ¶10, 564 (1993).]

On its face the law did not reflect the state's interest in efficient procurement of goods and services but indicated a general state policy of neutrality with regard to organizing rather than a narrow attempt to achieve a specific procurement goal, the Ninth Circuit concluded. As evidence of the broad scope of the law, the court noted that it applied to all employers in the state who accept any state grant or program funds in excess of $10,000. The court also cited the availability of civil penalties and enforcement by private parties as evidence of the regulatory nature of the law.

***Machinists* preemption.** Although the market participant exception did not apply, the court held that the statute was not preempted under the *Machinists* strand of preemption doctrine, or "field preemption" doctrine, which requires preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress to be controlled by "the free play of economic forces." The statute does not restrict an employer's use of its own funds in connection with union organizing, the court reasoned. It only restricts the use of grant or program funds for that purpose. "Employers remain free to convey their views regarding unionization, and thus to exercise their First Amendment rights, provided only that they do not use state grant and program funds to do so," the court wrote, noting identical restrictions on the use of federal funds for such purposes under other federal grant programs.

***Garmon* preemption.** Nor was the statute preempted under *Garmon* preemption doctrine, which applies when there is an actual or potential conflict between state regulation and federal labor law. Section 8(c) prohibits sanctioning employers under the NLRA for engaging in protected speech, the court noted. In contrast, the California law merely addressed the misuse of state funds for such speech, and had no bearing on whether the employer violated the NLRA. Thus, there was no identity of claims or potential overlap between the Board's jurisdiction and that of a state court.

And even if the statute intruded on an activity arguably protected or prohibited by the NLRA, it would nonetheless not be preempted, the appeals court concluded, as it would fall within the recognized exception to preemption where important state prerogatives are implicated—in this instance, the state's ability to control the allocation of its resources.

## The state's argument

The state argues that the California statute was enacted to further the state's legitimate governmental interest in preserving the state's neutrality by ensuring that the state does not subsidize an employer's efforts to assist or deter union organizing.

**Non-state funds not restricted.** The statute only restricts an employer's use of state funds; it does not restrict the use of non-state funds to assist, promote or deter union organizing. Furthermore, it does not condition receipt of state grant or program funds on an employer's remaining neutral on union organizing activities. "A state's decision on how best to use its funds is not a matter that is left to the free play of market forces," the state argues. Therefore it is not preempted under *Machinists* preemption doctrine.

**No conflict with NLRA.** *Garmon* preemption doctrine does not apply either. The statute does not regulate speech and therefore would not violate any NLRA-guaranteed free speech right, even if the NLRA could be construed as affirmatively providing employers with a free speech right independent of the First Amendment, the state maintains.

With respect to an employer's coercive speech, which falls within the NLRB's jurisdiction, the state asserts that a state court would not infringe on the NLRB's jurisdiction because the issue in an enforcement action under the statute would be limited to determining whether an employer used state funds to assist or deter union organizing, not whether the speech was coercive.

*The argument would be that even though a state acts with a regulatory purpose and a view toward appropriate labor policy, it can do so for the sole purpose of controlling its own funds, not to control employer behavior generally.*

**MICHAEL HARPER**

## The Chamber's argument

Echoing the Ninth Circuit's conclusion that the statute is an exercise of the state's regulatory authority, the Chamber argues that the statute impermissibly burdens noncoercive employer speech. It imposes a complete ban on employers, such as Medi-Cal providers, who receive all of their revenue from the state, forcing them to bear the expense of re-vamping their businesses or forego their right to speak. Employers with revenue sources in addition to state funds must comply with burdensome regulatory requirements, including the creation of segregated accounts, or run the risk of paying treble damages and attorney's fees if found to have violated the statute.

The Chamber noted that there are laws in at least five other states that affect federal labor policy through conditions on the use of state funds. Laws "materially identical" to the California statute are, or have recently been, under consideration in eight states. Exempting regulatory exercises of the state spending power "would lead to the 'balkanization' of federal labor law," the Chamber asserted.

**Labor Law Reports *Insight***
EDITOR: Martha Pedrick, J.D.

*Nothing in the NLRA suggests that Congress meant to restrict the states from using state monies as the voters' elected representatives see fit.*

**HENRY DRUMMONDS**

## Can the law survive?

The Ninth Circuit's interpretation of *Machinists* preemption – that it applies only to "zones of activity left free from all regulation" by the NLRA – is wrong and will be rejected by the Supreme Court, Professor Michael Harper predicted. "Interestingly, the State of California's brief makes no serious attempt to defend the Ninth Circuit's position."

**Proprietary goal emphasized.** "Instead, the thrust of the State's brief is that the statute, rather than asserting an alternative system for regulating employer speech during union organizing, protects the state's proprietary interest in not wasting state funds on union organizational campaigns," Harper observed.

The distinction between a state's regulatory and proprietary interests was the basis for the Court's decision in *Boston Harbor,* Harper noted, the case that all members of the Ninth Circuit seemed to think was not applicable. "The State's brief effectively rejects the Ninth Circuit's *en banc* determination that the statute was a regulatory measure and attempts to repaint it as having a proprietary goal," he said.

**Drafting, legislative history are problematic.** Had the statute been drafted more carefully with a less revealing legislative history, Harper thinks this argument might have been persuasive to the Court, as a state does have a proprietary interest in having money used on the programs it funds rather than on unnecessary personnel battles. But he doubts that it will be successful on this record.

One problem is that the prohibition on the use of state funds is directed at one kind of human resources-related expenditure, and at the same time it exempts expenditures involving voluntary recognition. Another is that the preamble to the statute expressly states a regulatory purpose.

"The Court is not likely to find that the statute has a proprietary rather than regulatory purpose based on assertions in a brief rather than evidence contemporaneous with the statute's passage, especially after none of the judges participating in the *en banc* decision questioned the regulatory nature of the statute," Harper suggested.

***Boston Harbor* distinguished.** This case differs from the *Boston Harbor* case in significant ways. Political pressure by construction unions may have been behind not only the Massachusetts Water Resources Authority's approval of the pre-hire collective bargaining agreement challenged in that case but also the Authority's selection of a contractor that would work with union subcontractors, Harper acknowledged. "But the agreement was drafted to ensure labor peace for the long cleanup of the harbor and was at least ostensibly sold to the Authority on that basis."

"The Court could easily accept that the Authority was attempting to advance the state's proprietary interest in an efficient cleanup of the harbor, but it doesn't appear that in this case the Court will be able to find a proprietary purpose," said Harper. He thinks the way the statute is written makes it look like it has a regulatory purpose.

**Narrower statute preferable.** The Court might accept a different, narrower statute as having a proprietary purpose. "It would purport to be based on ensuring that funds not be used for unnecessary personnel expenditures rather than directly on program activities the state wants to fund," he said.

For example, a more narrowly drawn statute would prohibit the use of state funds on any expenditure for lawyers' or consultants' fees involving union organizing. In order to make bookkeeping easier, it would not apply to managerial or supervisory salaries, as does the challenged statute. And in order to make the proprietary purpose more clear, it would cover other unnecessary expenditures, at least for personnel costs, as well, Harper suggested.

## A different approach

Could the state have made a more effective argument? If he was arguing this case, Harper would have also argued that even if the state's purpose is not proprietary and is in an area subject to Board regulation, the state should be able to prohibit the use of state funds to engage in conduct of which the state disapproves. "I would do so by suggesting that the Court should presume that Congress did not mean to restrict a state's sovereignty over how its own funds are to be used."

**State sovereignty.** "This would not be an argument that the Constitution restricts Congress' authority to restrict state regulation by controlling the use of state funds, but rather for a presumption that Congress would want to protect state sovereignty over the use of state funds in the absence of express preemption," Harper explained. He believes this argument would give the Court—or at least the conservative members of the Court—an appealing theory to use to uphold a law.

**Expand market participant exception.** "This argument would require a more expansive formulation of the market participant exception to *Machinists* preemption, an argument that could not have been made successfully to the Ninth Circuit given the controlling Supreme Court precedent," Harper conceded. Conceivably, however, the Supreme Court could find a reformulation of this exception to be appropriate.

Why? Harper agrees with the Ninth Circuit's distinction between the California legislation and the project labor agreement language upheld in *Boston Harbor*. As he noted following the Ninth Circuit's decision, the California law seems to express the state's view on appropriate labor policy, rather than an interest in the efficient operations of the party with whom the state is contracting.

**State as consumer boycotter.** "California is acting not as a 'market participant' interested only in efficiency, but

rather – to use the Court's language in *Boston Harbor* – as a 'consumer boycotter,'" Harper suggested. In *Boston Harbor,* the Court states that a private party consumer may boycott on the basis of political views, but a public party may not because a boycott by the latter has too great an impact.

Harper would argue that this is generally true in the case where the state refuses to deal at all, but when it is only trying to control the use of state funds, the impact need not be as great. "Moreover, the state has a greater interest in protecting how its funds are utilized and, at least in the absence of express Congressional directives, ought to be able, as a private consumer can, to control on the basis of labor policy, as well as efficiency, how those funds are used," he suggested.

"The argument would be that even though a state acts with a regulatory purpose and a view toward appropriate labor policy, it can do so for the sole purpose of controlling its own funds, not to control employer behavior generally," he said.

Harper stressed that the distinction, which the Ninth Circuit accepted, between a law like the California law that says to the employer, "you can't use our money" and one that says "if you participate at all in an organizing campaign, we won't contract with you" is important. "As the Ninth Circuit recognized, somewhat inconsistently with its dismissal of *Machinists* preemption, the latter has to be preempted, just as a direct prohibition would be. But the California law does not express a direct prohibition," Harper said.

Although this distinction is not suggested in *Boston Harbor* and so would be difficult to advance, Harper still thinks this approach would have had a better chance of succeeding in the Supreme Court than does the Ninth Circuit's treatment of *Machinists* or, he believes, California's belated effort to frame its law as having primarily a proprietary purpose.

## Possible impact of a reversal

The fact that the Court took this case and is very likely to reverse the Ninth Circuit does not mean that the Court is more likely or anxious to preempt state laws governing employment relations, Harper said. "Finding preemption would not signal any expansion of preemption doctrine."

He thinks the Court can and probably will reverse simply by adhering to its primary precedents, *Machinists* and *Boston Harbor.* On the other hand, if the Court affirms the Ninth Circuit, it might signal an effort to find new ways to protect state sovereignty, he added.

## Time to change?

Professor Henry Drummonds thinks that is exactly what the Court should do.

He argues that after 50 years the time has come for a major reworking of labor law preemption doctrine to reflect what he sees as the realities of the 21st Century: the private sector union movement is dying; only management advocates believe today that the NLRB protects and fosters in an even-handed way the right to organize and the right to refrain from organizing; unions now seek whenever possible to avoid NLRB processes; and the politicalization of Board decision-making has become palpable.

"At the same time, NLRA preemption doctrine – entirely judge made – stifles experimentation in the sister sovereign states," said Drummonds. "While the mantra of a 'uniform federal labor policy' continues to be repeated in judicial opinions, labor law preemption now falls outside the non-preemption norm in the broad sweep of workplace regulation such as Title VII and other status discrimination statutes, including the Occupational Safety and Health Act, Family Medical Leave Act, and the Fair Labor Standards Act."

Drummonds questions why a uniform policy is so vital in labor law but not in wage and hour law, leave law, discrimination law, and workplace safety law. "Even in its own terms, the NLRA actually leaves the most important of all labor law issues - the union and agency shop - up to the states in the form of 'right to work' laws," he noted.

"While reform may well have to come from the Congress, this case provides the Supreme Court with a golden opportunity to modernize labor law preemption doctrine and square the Court's commitment to federalism and state sovereignty in other contexts with labor law's excessive assumptions about the efficacy and wisdom of an exclusive federal regime," Drummonds suggested.

**Presumption against preemption.** Several considerations point toward a ruling upholding the statute. First, while often ignored, the Court has repeatedly expressed a strong presumption against preemption, Drummonds explained. Second, the California statute does not prohibit employers from expressing their views about unionization to their employees with their own money.

**State sovereignty.** Deciding the proper purposes for state funds fundamentally expresses the sovereignty of the states, Drummonds suggested. Further, the summary judgment record in the case discloses that the burden of accounting for state funds separately falls no heavier under the California statute than do many similar restrictions on the use of federal funds, he noted.

"Under the *Garmon* doctrine – a 5-4 decision with Justice Harlan writing a concurrence joined by three other justices disputing the broad primary agency jurisdiction rationale of Justice Frankfurter's opinion for a bare majority – the California statute does not regulate anything arguably protected or prohibited by the NLRA," said Drummonds. "The NLRB does not protect the right to use state funds to oppose or promote unionization, nor does the federal law prohibit the use of state funds to promote or oppose unionization," he added.

"In any event, just as state statutes and common law regulate labor violence, the intentional infliction of emotional distress, malicious defamation, blockages of ingress and egress, trespass to land, and other matters deeply rooted in local feeling without running afoul of NLRA preemption, the power to control the use of state tax money since the American Revolution has been at the heart of state sovereignty and local control," Drummonds asserted. ■