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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

ASSOCIATED OREGON INDUSTRIES and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

BRAD AVAKIAN, Individually and as Commissioner of the Oregon Bureau of Labor and Industries, and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 296,

Defendants.

Case No.:

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

[28 U.S.C. §§ 2201-2202; F.R.C.P. 65]

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Plaintiffs, Associated Oregon Industries ("AOI") and the Chamber of Commerce of the United States of America (the "Chamber") (collectively "Plaintiffs"), by and through their counsel of record, for their complaint against Defendants Brad Avakian, individually and as Commissioner of the Oregon Bureau of Labor and Industries ("Avakian"), and Laborers' International Union of North America, Local No. 296 ("Local 296") (collectively "Defendants"), upon knowledge and belief allege:

I.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331, as Plaintiffs' claims arise under the United States Constitution provision guaranteeing free speech and further arise under the laws of the United States, namely the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), as this Court is sited in the judicial district where a substantial part of the events giving rise to Plaintiffs' claims have occurred, are now occurring, and will occur in the future. Some of Plaintiffs' employer-members are situated in this district and are and will continue to be affected by the harms sought to be remedied in this Complaint.

II.

NATURE OF ACTION

3. This action seeks declaratory relief pursuant to the Declaratory Relief Act, 28 U.S.C. §§ 2201-2202, that Oregon Laws 2009, chapter 658, which originated in the 2009 Oregon Legislature as Senate Bill 519 ("SB 519"), is preempted by the NLRA and violates the First

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Amendment guarantee of free speech under the United States Constitution. A copy of the full text of SB 519 is attached hereto as Exhibit A, and is hereby incorporated herein by reference.

III.

PARTIES AND ASSOCIATIONAL STANDING

4. Plaintiff Chamber is an association that represents 300,000 direct members and indirectly represents an underlying membership of three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. Plaintiff AOI is a member of the Chamber. The Chamber's mission is, in part, to advocate for its members about matters of importance to the membership and to advocate on the membership's behalf when the members could be exposed to adverse actions by challenging issues. The Chamber has several hundred members located in Oregon, some of which are currently experiencing union organizing campaigns and which plan to hold mandatory meetings after January 1, 2010 to express employer views about whether employees should join a labor organization. The Chamber brings this action in a representative capacity on behalf of its members who qualify as private sector "employers" under SB 519, who are currently experiencing union organizing activity, who anticipate experiencing union organizing activity after January 1, 2010, who engage in mandatory communications with employees about whether or not to join a labor organization, and who do not qualify as a political organization under SB 519.

5. AOI is a non-profit association with approximately 1,530 employer members in Oregon which collectively employ approximately 225,000 Oregon employees. AOI's mission is, in part, to advocate for its members about matters of importance to the membership and to advocate on the membership's behalf when the members could be exposed to adverse actions by challenging issues. AOI brings this action in a representative capacity on behalf of its members

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who qualify as private sector "employers" under SB 519, who are currently experiencing union organizing activity, who anticipate experiencing union organizing activity after January 1, 2010, who engage in mandatory communications with employees about whether or not to join a labor organization, and who do not qualify as a political organization under SB 519.

6. At least one of AOI's members is currently the target of an aggressive union organizing campaign undertaken by Defendant Local 296 (hereafter "Member A").

7. Avakian is currently serving as Commissioner of the Oregon Bureau of Labor and Industries ("BOLI"). Oregon Revised Statute ("ORS") 651.050 mandates that as Commissioner, Avakian enforce all laws regulating the employment of adults, including all laws enacted for the protection of employees. SB 519, which creates a broad new statutory class of wrongful terminations in Oregon, is a law enacted to protect employees. ORS 651.060(1) authorizes the Commissioner to investigate alleged violations. Pursuant to ORS 651.060(1) and Oregon Administrative Rule ("OAR") 839-026-0020, the Commissioner is empowered to issue subpoenas *ad testificandum* and subpoenas *duces tecum* as part of executing his enforcement obligations. The Commissioner's office has already identified SB 519 as a Civil Rights Law and has set up a complaint intake procedure. (Exhibit B.)

IV.

GENERAL FACTUAL ALLEGATIONS

8. Frustrated by delays in amending the NLRA to limit employer opposition to union organizing, organized labor resorted to state-by-state attack on federally protected speech rights. The AFL-CIO drafted model legislation, which is often generically referred to as the Worker Freedom from Intimidation Act ("WFA"). Over the past several years, versions of the WFA have been introduced in numerous states. The legislation has drawn sharp criticism in several

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states, including Washington where the Washington Attorney General recently issued a clear rebuke of Washington's proposed WFA, a copy of which is attached hereto as Exhibit C. Through passage of SB 519, Oregon became the first state in the nation to pass a version of the WFA that includes a bar on mandatory employer communications in opposition to union organizating.

9. On June 30, 2009, Governor Kulongoski signed SB 519 into law. The law is scheduled to become effective January 1, 2010.

10. It is not immediately clear from an initial reading of SB 519 why the AFL-CIO drafted the WFA and why the legislation has been placed so high on its national agenda. A careful review of the bill, however, reveals its true purpose. Section 2 of SB 519 prohibits employers from taking "any adverse employment action" against an employee who declines to attend or participate in an employer-sponsored meeting or communication with the employer . . . if the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters[.]" "Political matters," in turn, are defined in Section 1(5) of SB 519 to include "the decision to join, not join, support or not support any lawful political or constituent group or activity." "Constituent group," in turn, is defined in Section 1(1) of SB 519 to include "mutual benefit alliances," which in turn are defined to include a "labor organization." Lest there be any confusion, SB 519 was drafted, introduced, lobbied for and ultimately passed to prevent employers from holding mandatory meetings with employees to discuss whether employees should join a union.

11. As mentioned above, at least one of AOI's members is currently the target of an aggressive union organizing campaign undertaken by Defendant Local 296. Member A has been the organizing target of Local 296 since approximately May 2009. Local 296 has engaged in an

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assortment of aggressive organizing activity directed at Member A, including trespassing, hand billing, displaying large inflatable animals, group picketing, disseminating buttons and other union insignia, contacting employees at home, holding group meetings during evening hours away from the job site, falsifying union authorization cards, and even threatening immigration raids. In addition, Local 296 has filed 20 unfair labor practice charges against Member A with the National Labor Relations Board (NLRB), some of which are scheduled for trial in January 2010. Local 296 has also instigated or prolonged an audit by the Office of Federal Contract Compliance Program ("OFCCP") and has been instrumental in the filing of at least five administrative complaints of discrimination with the Bureau of Labor and Industries ("BOLI"). In short, Local 296 is aggressively targeting Member A and in so doing is consistently attempting to portray the company and its executive management in a negative light.

12. Over the last six months, Member A has held multiple mandatory meetings with its non-management employees to both counter union rhetoric and provide information to employees about the realities of a unionized workplace, including the requirement to pay dues and the possibility of being forced out on strike. As part of these meetings, Member A's executive management informs employees that the company has chosen not to support the union's efforts and believes that a non-union workplace benefits both workers and the company. To ensure that all employees have the benefit of hearing the employer's views, these meetings have been mandatory.

13. Member A believes that the organizing campaign initiated by Local 296 will continue well into 2010. The NLRB has scheduled a mid-January trial on some of the unfair labor practice charges filed by Local 296 against Member A. As a result, Member A fully anticipates the union will use the trial as an opportunity to engage in boisterous demonstrations.

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In addition, the union has yet to file a petition with the NLRB seeking an election, although it is likely that Local 296 has already obtained enough authorization cards to petition for an election. Even if Local 296 were to file an election petition in mid-December 2009, the NLRB election would not take place until 2010. Finally, Local 296 has been consistently engaging in organizing activity over the last three months with no signs of abating.

14. Local 296's ongoing organizing activity, coupled with the Member A's continuing need to counter union rhetoric and communicate its own views about the negative aspects of a unionized workplace, have created an environment in which it is vitally important for Member A to continue to hold mandatory meetings on the subject of whether employees should vote to join a labor organization. Member A intends to continue holding such mandatory meetings after January 1, 2010.

15. Fearing that Local 296 will attempt to use SB 519 to its advantage after January 1, 2010, Member A recently sent the union a letter seeking some measure of assurance. In that letter, Member A sought the Local 296's agreement that it would not: (1) distribute any handbills regarding alleged violations of SB 519; (2) allege in any meeting or other form of communication that Member A has violated SB 519; (3) encourage any employee to file a civil action under SB 519; (4) file any lawsuit on behalf of an employee against Member A pertaining to SB 519; or (5) file an administrative complaint with BOLI pertaining to SB 519. The letter closed with a statement that the union's silence would be construed as a representation that it intended to engage in one or more of the preceding attacks based on SB 519. To date, the union has not responded to Member A's letter.

16. In addition to Member A, Plaintiffs have numerous member-employers who hold mandatory meetings and engage in other forms of mandatory communications as a preferred

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means of communicating their views about whether employees should join a labor organization. Employees are required to participate in the communications, or face discipline up to and including termination. These mandatory communications have been ongoing and are planned to continue in 2010.

17. Due in part to the threat of civil litigation and potential for negative publicity resulting from a knowing violation of Oregon law, these employers have joined and maintain memberships in the Plaintiff associations and rely on those associations to advocate on their behalf with respect to important issues facing the membership. These members are private sector "employers," as that term is defined in Section 1(3)(a) of SB 519.

V.

STATEMENT OF CLAIMS

FIRST CLAIM FOR RELIEF

(NLRA Preemption)

18. Plaintiffs reallege and incorporate herein their allegations in paragraphs 1 through 17 above.

19. Section 2 of SB 519 prohibits employers from requiring their employees to attend meetings "if the primary purpose of the meeting . . . is to communicate the opinion of the employer about . . . political matters." Section 1(5) of SB 519 defines "political matters" to include "the decision to join [or] not join . . . any constituent group," and Section 1(1) defines "constituent group" to include "labor organizations." As such, SB 519 effectively prohibits employers from conducting mandatory meetings with their employees to discuss whether those employees should join a union.

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20. Employers have a fundamental right under the NLRA to freely communicate views about whether employees should join a labor organization. *See Linn v. United Plant Guard Workers*, 383 U.S. 53, 59-64 (1966) (Section 8(c) of the NLRA manifests a congressional intent to "encourage free debate on issues dividing labor and management."); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (employers may express "any of [their] general views about unionism or any of [their] specific views about a particular union . . . ."); *United Technologies Corp.*, 274 N.L.R.B. 1069, 1074 (1985), *aff'd* 789 F.2d 121 (2d Cir. 1986) ("an employer has a fundamental right, protected by Section 8(c) of the Act, to communicate with its employees").

21. Pursuant to Section 9 of the NLRA, the NLRB is empowered to regulate the Board election process. See 29 U.S.C. § 159(c). The Board has determined that mandatory employer meetings to discuss an employer's views about whether its employees should join a union are protected speech under the NLRA. *See e.g., Peerless Plywood*, 107 N.L.R.B. 427, 429 (1953) (holding employers may deliver mandatory audience speeches to employees, provided the speech is non-coercive and does not take place within 24 hour of a Board election). The Board has upheld this fundamental employer right for more than 50 years.

22. Courts have developed two preemption doctrines within the labor context, both of which are designed to ensure a uniform body of federal law. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1975). SB 519 is preempted under both doctrines.

23. The *Garmon* preemption doctrine "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integral scheme of regulation' established by the NLRA." *Chamber of Commerce v. Brown*, __ U.S. __,

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128 S. Ct. 2408, 2412 (quoting *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986)). To accomplish that goal, the NLRA "forbids States to 'regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.'" *Brown* at 2412 (quoting *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 286 (1986)). *Garmon* preempts state regulation of "*any* conduct subject to the regulatory jurisdiction of the NLRB." *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 749 (1985) (emphasis added).

24. Commencing with *Peerless Plywood* and continuing over the last 50 years, the NLRB has used its authority under section 9 to consistently uphold the ability of employers to conduct mandatory meetings with employees pursuant to section 8(c). SB 519 seeks to deny employers precisely what the NLRB has stated they are guaranteed under federal law, thus triggering *Garmon* preemption.

25. The Court in *Machinists* expanded on *Garmon*, recognizing Congress intended for certain conduct to remain unregulated. *Machinists*, 427 U.S. at 147 ("[S]elf-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable."); *see also Golden State Transit v. City of Los Angeles*, 493 U.S. 103, 112 (1989) ("The interest in being free of governmental regulation of the 'peaceful methods of putting economic pressure upon one another,' is a right specifically conferred on employers and employees by the NLRA.").

26. The Court recognized in *Brown* that although the NLRB does regulate speech within the organizing context, *Machinists* preemption still provides employers with an avenue for relief. Specifically, the Court noted that the NLRA has "policed a narrow zone of speech to ensure free and fair elections . . . ." That said, the Court also noted that Congress has not conferred to the NLRB the right to regulate employer speech more generally. Rather, non-

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coercive employer speech is meant to be a zone free from all regulation, including any regulation by states.

27. Through SB 519, Oregon has attempted to regulate employer speech about whether employees should join a union. Oregon's decision to assist unions during organizing campaigns by limiting federally protected speech is precisely the type of governmental action that *Machinists* preemption is intended to bar.

28. Based on the foregoing, Plaintiffs seek a judgment declaring the provisions of SB 519 applicable to speech regarding whether employees should join a labor organization to be preempted by the NLRA under both the *Garmon* and *Machinists* doctrines. Plaintiffs' declaratory judgment request is applicable only to those Oregon employers subject to the NLRA.

SECOND CLAIM FOR RELIEF

(Violation of First Amendment to United States Constitution)

29. Plaintiffs reallege and incorporate herein their allegations in paragraphs 1 through 28 above.

30. The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech." The First Amendment is applicable to the State of Oregon by virtue of the Fourteenth Amendment to the United States Constitution.

31. Employers have a First Amendment right to engage in non-coercive speech about unionization. *See Thomas v. Collins*, 323 U.S. 516, 537-538 (1945). SB 519 is a content based restraint on employers' ability to communicate views about whether employees should join a labor organization. In short, Plaintiffs' members have a First Amendment right to speak to their employers on "political matters," as that term is defined in Section 1(1) and 1(5) of SB 519.

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32. Based on the foregoing, Plaintiffs seek a judgment declaring the provisions of SB 519 applicable to speech regarding whether employees should join a labor organization to violate the First Amendment to the United States Constitution.

WHEREFORE, plaintiffs pray for judgment as follows:

1. Declaring that SB 519, as applied to NLRA-covered employers engaging in mandatory communications with non-management employees about whether they should join a labor organization, is preempted by the NLRA;
2. Declaring that SB 519, as applied to private sector employers engaging in mandatory communications with non-management employees about whether they should join a labor organization, violates the First Amendment to the United States Constitution;
3. Enjoining Defendants from taking any action to enforce SB 519 against Plaintiffs or their members, including any attempt by Local 296 to publicize alleged employer violations of SB 519;

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4. Awarding Plaintiffs their reasonable costs and disbursements; and

5. Granting such other relief that the court finds just and equitable.

DATED: December 22, 2009

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By: _____

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CHAPTER 658

AN ACT SB 519

Relating to mandatory workplace communications to employee about employer's opinions.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in this section and section 2 of this 2009 Act:

(1) "Constituent group" includes, but is not limited to, civic associations, community groups, social clubs and mutual benefit alliances, including labor organizations.

(2) "Employee" means an individual engaged in service to an employer in a business of the employer.

(3) "Employer" includes:

(a) A person engaged in business that has employees; and

(b) A public body, as defined in ORS 174.109.

(4) "Labor organization" means an organization that exists for the purpose, in whole or in part, of collective bargaining, of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment.

(5) "Political matters" includes political party affiliation, campaigns for legislation or candidates for political office and the decision to join, not join, support or not support any lawful political or constituent group or activity.

(6) "Religious matters" includes religious affiliation or the decision to join, not join, support or not support a bona fide religious organization.

SECTION 2. (1) An employer or the employer's agent, representative or designee may not discharge, discipline or otherwise penalize or threaten to discharge, discipline or otherwise penalize or take any adverse employment action against an employee:

(a) Who declines to attend or participate in an employer-sponsored meeting or communication with the employer or the agent, representative or designee of the employer if the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters;

(b) As a means of requiring an employee to attend a meeting or participate in communications described in paragraph (a) of this subsection; or

(c) Because the employee, or a person acting on behalf of the employee, makes a good faith report, orally or in writing, of a violation or a suspected violation of this section. This paragraph does not apply if the employee knows that the report is false.

(2) An aggrieved employee may bring a civil action to enforce this section no later than 90 days after the date of the alleged violation in the circuit court of the judicial district where the violation is alleged to have occurred or where the principal office of the employer is located. The court may award a prevailing employee all appropriate relief, including injunctive relief, rehiring or reinstatement of the employee to the employee's former position or an equivalent position, back pay and reestablishment of any employee benefits, including seniority, to which the employee would otherwise have been eligible if the violation had not occurred and any other appropriate relief as deemed necessary by the court to make the employee whole. The court shall award a prevailing employee treble damages, together with reasonable attorney fees and costs.

(3) An employer subject to this section shall post a notice of employee rights under this section in a place normally reserved for employment-related notices and in a place commonly frequented by employees.

(4) This section does not:

(a) Limit an employee's right to bring a common law cause of action against an employer for wrongful termination;

(b) Diminish or impair the rights of a person under a collective bargaining agreement;

(c) Limit the application of ORS 260.432;

(d) Prohibit a religious organization from requiring its employees to attend an employer-sponsored meeting or participate in any communication with the employer or the employer's agent, representative or designee for the primary purpose of communicating the employer's religious beliefs, practices or tenets;

(e) Prohibit a political organization, including a political party or other organization that engages, in substantial part, in political activities, from requiring the political organization's employees to attend an employer-sponsored meeting or participate in any communication with the employer or the employer's agent, representative or designee for the primary purpose of communicating the employer's political tenets or purposes;

(f) Prohibit communications of information about religious or political matters that the employer is required by law to communicate, but only to the extent of the lawful requirement;

(g) Prohibit mandatory meetings of an employer's executive or administrative personnel to discuss issues related to the employer's business, including those issues addressed in this section; or

(h) Limit the rights of an employer to offer meetings, forums or other communications about religious or political matters for which attendance or participation is strictly voluntary.

Approved by the Governor June 30, 2009
Filed in the office of Secretary of State June 30, 2009
Effective date January 1, 2010

BOLI

Commissioner Brad Avakian
Bureau of Labor and Industries

Fresh from the Legislature:
Recent Changes in Oregon Civil Rights Law

BOLI's Civil Rights Division enforces laws granting job seekers and employees equal access to jobs, career schools, promotions, and a work environment free from discrimination or harassment. Each year, the Division fields about 25,000 inquiries and investigates nearly 2,200 cases.

Recent changes to Oregon Civil Rights law, made by the 75th Legislative Assembly, are listed below. BOLI CRD staff is available to answer questions regarding existing or new civil rights law and filing a complaint (971-673-0764). Employers with questions regarding proper application of the law can utilize the Bureau's Technical Assistance for Employers Program, which will be offering guidance on our website (www.oregon.gov/boli/ta), seminars on these new laws and is available to answer employer questions by phone (971-673-0824) or email (bolita.ta@state.or.us).

Bill	Description
HB 2298	Includes overtime in calculation of amounts of donated leave employee of State of Oregon, county, municipality or other political subdivision may receive. • *Passed House 59-0; passed Senate 26-0* • *Effective January 1, 2010*
HB 2510	Strengthens veterans' preference in hiring for public employment, clarifying definitions and removing 15-year limit on preference. • *Passed House 58-0; passed Senate 26-0* • *Effective January 1, 2010*
HB 2600	Requires certain lodging facilities with 175 or more units to provide a lift system for persons with disabilities to access bed, toilet and shower or bath. • *Passed House 41-15; passed Senate 21-7* • *Effective upon enrollment*
HB 2744	Requires employers of 25 or more persons in Oregon to provide leave to spouses of service members prior to deployment or during leave from active duty during periods of military conflict. • *Passed House 58-0; passed Senate 27-0* • *Effective June 25, 2009*
HB 3162	Makes discrimination against employee who reports violation of state or federal laws, rules or regulations unlawful employment practice. • *Passed House 41-19; passed Senate 26-4* • *Effective January 1, 2010*
HB 3256	Creates protection for uniformed service members from unlawful employment practices by employers on the basis of service commitments. • *Passed House 56-3; passed Senate 28-0* • *Effective January 1, 2010*
SB 56	Requires complainant to sign complaint alleging unlawful practice of discrimination. • *Passed Senate 27-1; passed House 59-0* • *Effective January 1, 2010*

(continued)

The mission of the Bureau of Labor and Industries is to protect employment rights, advance employment opportunities, and protect access to housing and public accommodations free from discrimination.

Fresh from the Legislature: Recent Changes in Oregon Civil Rights Law (cont.)

SB 58	Allows landlord to condition permission for modification to real property on renter's agreement to restore interior of premises to pre-modification condition. • *Passed Senate 29-0; passed House 59-0* • *Effective May 21, 2009*
SB 59	Allows award of prevailing party costs and reasonable attorney fees to intervenor in housing discrimination hearing. • *Passed Senate 28-1; passed House 59-0* • *Effective July 1, 2009*
SB 60	Strengthens BOLI authority to recover collection fees on judgments against respondents, ensuring that claimants receive the full judgment owed to them. • *Passed Senate 22-6; passed House 58-1* • *Effective January 1, 2010*
SB 519	Prohibits employer from taking adverse employment action against employee who declines to attend meeting or participate in communication concerning employer's opinion about religious or political matters. • *Passed Senate 16-14; passed House 34-24* • *Effective January 1, 2010*
SB 786	Requires employer to provide reasonable accommodation to religious observance or practice of employee unless providing the accommodation would impose an undue hardship on the employer. • *Passed Senate 19-11; passed House 38-21* • *Effective January 1, 2010*
SB 874	Conforms Oregon disability law with the Americans with Disabilities Act Amendments Act of 2008, strengthening protections for individuals with disabilities. • *Passed Senate 18-10; passed House 40-17* • *Effective January 1, 2010*
SB 875	Prohibits person from charging fee or deposit for assistance animal in rented housing. • *Passed Senate 30-0; passed House 52-4* • *Effective upon enrollment*
SB 928	Prohibits employer from taking certain employment actions toward individual who is victim of domestic violence, sexual assault or stalking. • *Passed Senate 25-3; passed House 57-0* • *Effective January 1, 2010*

Fresh from the Legislature: Unsuccessful Civil Rights Legislation

Bill	Description
HB 2319	Changes unlawful discrimination laws that determine if individual is person with disability to be more similar to federal Americans with Disabilities Act. • *Died in House Judiciary Committee*

(continues)

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Fresh from the Legislature:
Unsuccessful Civil Rights Legislation (cont)

HB 2497	Expands ability of employer to prohibit use of medical marijuana in workplace. • *Died in House Committee on Business & Labor*
HB 2503	Prohibits discrimination in employment under certain circumstances if discrimination is based on person's status as medical marijuana registry cardholder or use of medical marijuana off property or premises of employment or during hours that are not hours of employment. • *Died in House Committee on Business & Labor*
HB 2555	Defines "individual with a disability" for products of individuals with disabilities as individual who receives Social Security disability benefits or Social Security income. • *Died in House Committee on Business & Labor*
HB 2692	Establishes that employee who returns to work after taking family leave is entitled to be restored to available equivalent position instead of being restored to same position of employment held by employee before taking leave. • *Died in House Committee on Business & Labor, Subcommittee on Workforce Development*
HB 2708	Requires employer to verify legal status of employee to be employed in United States through federal E-Verify program prior to deducting expenses related to worker's employment from Oregon taxable income. • *Died in House Judiciary Committee*
HB 2717	Allows court to award punitive damages in public employee whistleblower case. • *Died in House Committee on Business & Labor*
HB 2748	Prohibits public employer from laying off or terminating employee who does not speak Spanish. • *Died in House Committee on Business & Labor*
HB 2821	Prohibits covered employer from requiring eligible employee to use accrued vacation leave when taking family leave. • *Died in Senate Committee on Rules*
HB 3027	Prohibits discrimination in real property transactions based on person receiving federal rent subsidy payments and other local, state or federal housing assistance. • *Died in House Committee on Sustainability & Economic Development*
HB 3052	Expands ability of employer to prohibit use of medical marijuana in workplace. • *Died in House Committee on Business & Labor*
HB 3160	Creates Family Leave Benefits Insurance Program to provide benefits to employees taking family leave. • *Died in House Committee on Human Services*
HB 3215	Requires employers to verify immigration status of employees hired after January 1, 2009. • *Died in House Judiciary Committee*
HB 3362	Provides credit against income taxes for English as a second language class. • *Died in House Committee on Education*
HB 3449	Prohibits discrimination against individual because of individual's height or weight. • *Died in House Committee on Human Services*

(continues)

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Fresh from the Legislature:
Unsuccessful Civil Rights Legislation (cont)

SB 57	Provides that employer commits unlawful employment practice if employer discriminates against employee or job applicant based on fact that member of employee's or applicant's family works or worked for employer, even though employer has mixed motives for discrimination. • *Died in Senate Judiciary Committee*
SB 358	Imposes limits on awards of punitive damages based on nature of action and type of defendant. • *Died in Senate Judiciary Committee*
SB 426	Expands ability of employer to prohibit use of medical marijuana in workplace. • *Died in Senate Committee on Commerce & Workforce Development*
SB 427	Allows employer to adopt comprehensive drug-free workplace program, including drug and alcohol testing policies. • *Died in Senate Committee on Commerce & Workforce Development*
SB 471	Prohibits state or local government from discriminating against homeowner by imposing permit requirement for certain rentals. • *Died in Senate Committee on Consumer Protection & Public Affairs*
SB 638	Requires granting of school activity leave to employees in same manner as provided for family leave. • *Died in Senate Committee on Commerce & Workforce Development*
SB 707	Provides that employer who discloses information about current or former employee's job performance to prospective employer of employee is presumed to be acting in good faith and immune from civil liability unless presumption is rebutted by clear and convincing evidence. • *Died in Senate Committee on Commerce & Workforce Development*
SB 727	Establishes unlawful employment practice of subjecting employee to abusive work environment. • *Died in Senate Judiciary Committee*
SB 805	Requires employer to provide leave to certain employees who are spouses of members of military forces that are on active duty during periods of military conflict. • *Died in Senate Committee on Commerce & Workforce Development*

The mission of the Bureau of Labor and Industries is to protect employment rights, advance employment opportunities, and protect access to housing and public accommodations free from discrimination.

Opinion

Rob McKenna

Attorney General of Washington

LABOR — FEDERAL PREEMPTION — Whether the National Labor Relations Act would preempt the provision of a proposed bill regarding communications between employers and employees.

The National Labor Relations Act would preempt the provision of a proposed bill which would prohibit employers from requiring employees to attend certain meetings at which matters relating to "labor and other mutual aid organizations" are discussed.

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July 22, 2009

The Honorable Mike Hewitt
Senator, 16th District
P. O. Box 40416
Olympia, WA 98504-0416

The Honorable Janéa Holmquist
Senator, 13th District
P. O. Box 40413
Olympia, WA 98504-0413

Cite As:
AGO 2009 No. 3

Dear Senators Hewitt and Holmquist:

By letter previously acknowledged, you requested an opinion on a question relating to a bill proposed during the 2009 Legislature, Substitute Senate Bill 5446 (SSB 5446). We paraphrase your question as follows:

> **Does the federal National Labor Relations Act (NLRA) preempt provisions of SSB 5446 proposing prohibitions on how an employer communicates with employees regarding "labor and other mutual aid organizations?"**

BRIEF ANSWER

"Preemption" is the term that describes how federal law displaces state authority to legislate or allow civil litigation on a topic. Due to the supremacy of federal law under the Constitution of the United States, when a topic is addressed by federal law, it raises the question of whether state law is preempted and, if so, to what extent.

SSB 5446 would limit how an employer communicates with employees regarding "labor and other mutual aid organizations." The proposed state law would prohibit an employer from

requiring employee attendance at meetings where the employer addresses matters directly related to unions, and would prohibit the employer from taking adverse employment actions against employees who refuse to attend required meetings or who complain that the employer may be violating this state law prohibition.

The NLRA also includes provisions that concern employer communications about labor unions. Section 7 of the NLRA protects an employee's right to organize or not to organize into a union. Section 8 of the NLRA protects from employer conduct or communication the employee's right to organize where such conduct or communication is an "unfair labor practice." Section 8(c) of the NLRA provides that employer speech regarding union organization shall not be considered an unfair labor practice, so long as it does not contain a promise of benefit or threat of reprisal with respect to union organizing.

SSB 5446 would be preempted for two independent reasons. First, the bill proposes a state prohibition and sanction for employer actions that arguably are already prohibited by the NLRA in some circumstances. Second, the provisions of SSB 5446 could be applied to limit the type of employer speech regarding union organization that Congress intended to be controlled by the free play of economic forces and reserved for market freedom.

ANALYSIS

1. Background — SSB 5446[1]

Your question involves the provisions in SSB 5446 that would prohibit employers from requiring employees "to attend a meeting, or listen to, or respond to, or participate in, any communication relating to *political* or religious *matters as defined* in" the bill. Substitute S.B. 5446, 61st Leg., Reg. Sess., § 3(1) (Wash. 2009) (emphasis added) (copy attached for ease of reference). The bill would define the term "political matters" to include, among other topics, "matters directly related to . . . labor or other mutual aid organizations." SSB 5446 § 2(4). Section 3(1) of SSB 5446 would therefore prohibit an employer from requiring an employee to meet, listen to, or participate in a communication about labor or other mutual aid organizations.

Section 3(2) would further restrict an employer's actions by providing that the employer may not take an adverse action against an employee who refuses to attend the meeting prohibited by section 3(1), who challenges the employer's action, or who is involved in a claim, suit, or investigation where an employee reasonably believes there has been a violation of the statute. The proposed language for section 3(2) reads:

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[1] SSB 5446 was introduced during the 2009 legislative session and remains pending in the 2010 legislative session. *See* Senate Concurrent Resolution 8407 (2009) (a bill not enacted during one session of the 61st Legislature is retained pending future sessions of the same Legislature). We note also that the House of Representatives has a companion bill, HB 1528. Our analysis focuses on the language of SSB 5446.

(2) An employer may not take or threaten to take an adverse employment action against an employee because the employee:

(a) Refuses to attend a meeting or listen or otherwise respond to, or participate in, any other communication that the employee reasonably believes violates or would violate this section;

(b) Challenges or opposes any practice or action that the employee reasonably believes violates or would violate this section; or

(c) Makes a claim, files suit, testifies, assists, or participates in any manner in any investigation, proceeding, or hearing involving any practice or action that the employee reasonably believes violates or would violate this section.

SSB 5446 § 3(2).

SSB 5446 § 4 would authorize an employee to bring a civil action in superior court and claim a violation of Section 3(1) (the prohibition against requiring an employee to attend, listen to, or participate in a communication) or Section 3(2) (the prohibition on adverse employment actions). In such a civil action, a court could award injunctive relief, rehiring, back pay, restoration of benefits, and damages for losses incurred as a result of the employer's violation. SSB 5446 § 4.

The application of state laws to employer speech about union organizing has been the subject of substantial legal commentary. Some commentators explain the objective of proposed laws like SSB 5446 as efforts to eliminate an employer's use of "captive audience" meetings when there is a pending proposal for union organization. *See, e.g.*, Paul M. Secunda, *Toward The Viability Of State-Based Legislation To Address Workplace Captive Audience Meetings in the United States*, 29 Comp. Labor Law & Pol'y J. 209, 209-11 (2008); Elizabeth J. Masson, *"Captive Audience" Meetings In Union Organizing Campaigns: Free Speech Or Unfair Advantage?*, 56 Hastings L.J. 169 (2004).

2. Background — Federal Preemption Of State Laws

In our federal system of government, the authority of the federal government is limited, but when Congress enacts a federal law pursuant to its constitutional authority, the federal law prevails over conflicting state laws. *United States v. Gillock*, 445 U.S. 360, 370, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980). This principle, known as the "preemption doctrine," lies at the heart of your question.

Article VI, clause 2 of the federal constitution includes the "Supremacy Clause" under which the federal "Constitution, and the Laws of the United States . . . shall be the supreme law of the land." As a result of the Supremacy Clause, when Congress legislates on a particular

subject, "it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes." *City of New York v. FCC*, 486 U.S. 57, 63, 108 S. Ct. 1637, 100 L. Ed. 2d 48 (1988). To resolve a preemption claim, the courts examine the specific federal and state laws at issue to determine whether Congress superseded the authority of states to act with regard to a particular subject. *E.g., Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008).

3. Background — The National Labor Relations Act, 29 U.S.C. §§ 151-169

Congress enacted the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169, to "create a national, uniform body of labor law and policy, to protect the stability of the collective bargaining process, and to maintain peaceful industrial relations." *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 861 (7th Cir.), *cert. denied*, 525 U.S. 949 (1998). The NLRA provides an integrated scheme of rights, protections, and prohibitions governing employee, employer, and union conduct during organizing campaigns, representation elections, and collective bargaining. The NLRA also creates the National Labor Relations Board (Board) to interpret and administer the Act and to resolve labor disputes. *See* 29 U.S.C. §§ 153-154, 160; *Garner v. Teamsters, Chauffeurs & Helpers Local Union 776*, 346 U.S. 485, 490, 74 S. Ct. 161, 98 L. Ed. 228 (1953).

Specific provisions in the NLRA protect an employee's right to join or not join a union and provide mechanisms to resolve questions concerning union representation. *See Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-79, 84 S. Ct. 894, 11 L. Ed. 2d 849 (1964). Section 7 of the NLRA provides the core rights of employees "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities" as well as the right "to refrain from any or all such activities[.]" 29 U.S.C. § 157. Section 8 defines and prohibits union or employer "unfair labor practices," which would include employer actions that infringe on an employee's Section 7 rights. 29 U.S.C. § 158. Section 10 authorizes the Board to adjudicate claims of unfair labor practices. *See* 29 U.S.C. § 160.

Parties have "frequently litigated" whether an employer's attempts to persuade employees not to join a union—or to join a particular union favored by the employer—amounted to a form of coercion or unfair labor practice prohibited by Section 8. *See generally Chamber of Commerce v. Brown*, 128 S. Ct. 2408, 2413 (2008) (describing history of litigation over employer communication to employees under the NLRA). When the NLRA was adopted in 1935, the first Board ruled that the ban on unfair labor practices in Section 8 demanded complete employer neutrality during union organizing campaigns; it concluded that partisan employer speech about unions would interfere with the Section 7 rights of employees. *Id.* In 1941, however, the Supreme Court rejected the Board's original approach. Nothing "in the NLRA prohibits an employer 'from expressing its view on labor policies or problems' unless the employer's speech 'in connection with other circumstances [amounts] to coercion within the

meaning of the Act.'" *Id.* (quoting *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469, 477, 62 S. Ct. 344, 86 L. Ed. 348 (1941)).[2]

In 1947, Congress adopted the Taft-Hartley Act amending the NLRA. The stated purpose of Taft-Hartley was to "insure both to employers and labor organizations full freedom to express their views to employees on labor matters." S. Rep. No. 105, at 23-24 (1947). The Taft-Hartley amendments added Section 8(c) to accomplish this purpose and clarify that partisan employer speech would not be considered an unfair labor practice:

> The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). The NLRA, and court decisions construing it, thus speak of "coercion" in the context of employer speech that contains a threat of reprisal or promise of benefit relating to labor matters, not as to whether an employee is required to attend a meeting.

In short, the NLRA provides for a prohibition on unfair labor practices. As discussed next, SSB 5446 must be examined for how it affects the Board's jurisdiction to identify and address unfair labor practices. Further, SSB 5446 must be examined for interference with congressional policy judgments concerning employers engaging in speech concerning union organization.

4. Preemption Under The NLRA

As a result of the comprehensive federal laws, the courts have frequently found that the NLRA preempted state laws. "[I]n passing the NLRA Congress largely displaced state regulation of industrial relations." *Wisconsin Dep't of Indus.* v. *Gould, Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986). To answer your question, we examine two lines of cases that define when state law is preempted by the NLRA. One line of cases is known as "*Garmon* preemption," and a second line of cases is known as "*Machinists* preemption," named after the cases in which the Supreme Court identified these forms of NLRA preemption. *San Diego Bldg. Trades Coun. v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959); *Machinists v. Wisconsin Employ. Relations Comm'n*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976).

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[2] A few years later, the Court explained its 1941 ruling by expressly stating that an employer had First Amendment rights to speak during union organization campaigns:

> [E]mployers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. . . . When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. But short of that limit the employer's freedom cannot be impaired.

Thomas v. Collins, 323 U.S. 516, 537-38, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (footnotes and citations omitted).

As explained below, both types of preemption protect the NLRA from state laws that are inconsistent with the federal act, but each focuses on different federal concerns. *Garmon* preemption protects the *Board's authority and discretion to apply a uniform system of laws and remedies* for conduct that is arguably prohibited or protected by the NLRA. *Machinists* preemption exists because the NLRA reflects *a congressional policy that certain conduct and speech is to be left unregulated* and open to natural economic forces.

A. *Garmon* Preemption

States may not regulate "activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Gould, Inc.*, 475 U.S. at 286 (citing *San Diego Bldg. Trades Coun.* v. *Garmon*, 359 U.S. 236, 244, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)). In *Garmon*, the Court explained that Congress intended to preempt state regulation that potentially impaired the jurisdiction of the Board as the federal forum for the resolution of labor disputes. State law cannot regulate the same employer or employee conduct that Congress empowered the Board to regulate under uniform national law. *See Garmon*, 359 U.S. at 242-44; *see also Gould, Inc.*, 475 U.S. at 286. When the conduct to be regulated is "plainly within the central aim of federal regulation," then state regulation presents a "danger of conflict between power asserted by Congress and requirements imposed by state law" and "potential frustration of national purposes." *Garmon*, 359 U.S. at 244.

Garmon preemption, however, is broader than simply preempting matters plainly within the aim of the NLRA. *Garmon* preemption also applies even when it is unclear that the conduct to be regulated is subject to the Board's power under the NLRA. "When an activity is *arguably* subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245. The preemption of state law that is "arguably" subject to the NLRA protects the Congressional policy that allows the Board to decide whether a subject is to be regulated under the NLRA. *Id.* at 245. The Board is charged with using its procedures and "its specialized knowledge and cumulative experience" to apply the NLRA and, in many circumstances, to define the scope of what is addressed by the NLRA. *Id.* at 242.

Thus, the first step in evaluating preemption under *Garmon* is to examine whether the employer conduct to be regulated by SSB 5446 is "arguably subject" to being addressed by the Board. We conclude that it is. A brief history of the NLRA shows that the Board has frequently addressed how employers may communicate during union organization and when an employer's conduct amounts to an unfair labor practice, including requiring employees to attend meetings for such purposes.

In its earliest case, the Board concluded that when an employer advises employees not to join a union, it interferes with and coerces the employees, because the employer has the power to fire. *In re Pennsylvania Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 22-23 (1935). Subsequent cases such as *Virginia Electric* and *Thomas* allowed employer speech addressing union organization. *Virginia Electric*, 314 U.S. at 479-80 (remanding case to Board for further consideration of whether the employer's speech constituted an unfair labor practice); *Thomas*, 323 U.S. at 537-38.

With regard to the employer conduct of speaking to an audience of employees who are required to attend, the Board originally concluded it was an unfair labor practice. *In re Clark Brothers*, 70 N.L.R.B. 802 (1946), *enforced sub nom. Nat'l Labor Relations Bd. v. Clark Brothers*, 163 F.2d 373 (2d Cir. 1947). After the Taft-Hartley amendments in 1947, the Board initially issued orders requiring an employer either to cease "captive audience" speech or to allow union representatives an equal opportunity to address the employees. *In re Bonwit Teller, Inc.*, 96 N.L.R.B. 608 (1951).[3] Subsequent Boards both rejected and refined how employers may require employees to listen to their position on unions. *In re Livingston Shirt Corp.*, 107 N.L.R.B. 400, 409 (1953) (rejecting *Bonwit Teller, Inc.*, and holding that "in the absence of . . . an unlawful broad no-solicitation rule . . . 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"). More recent Board cases have ruled that "captive audience" speeches by an employer are lawful except during the last twenty-four hours before an employee election on a proposal to organize. *In re Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953). In addition to this "twenty-four hours before elections" rule, other Board decisions have found "captive audience" speeches by employers unlawful when combined with unlawful barriers to union solicitation. *In re Montgomery Ward & Co.*, 145 N.L.R.B. 846 (1964).

These Board cases illustrate that the Board has addressed conduct such as an employer requiring an employee to attend a meeting discussing a union or taking adverse employment actions against employees who refuse to attend such a meeting. In its cases, the Board has drawn and redrawn lines based on the timing of the employer action and other circumstances. We therefore conclude that conduct to be regulated by SSB 5446 is, at the least, "arguably subject to" the prohibition against an unfair labor practice in Section 8 of the NLRA. As a result, SSB 5446 meets the threshold test for *Garmon* preemption.[4]

We next turn to the recognized exceptions to *Garmon* preemption. Preemption is inappropriate if the Board has clearly determined that an activity is neither protected nor prohibited by the NLRA, and such Board precedent can be applied to "essentially undisputed facts." *Garmon*, 359 U.S. at 246. In other words, this exception applies to matters that the Board has determined are clearly outside the scope of the federal act. One might argue that this exception applies here—the provisions of the NLRA do not explicitly grant an employer a protected right to require employees to listen to employer speech concerning labor organizing. *See* Secunda, 29 Comp. Labor Law & Pol'y J. at 233-34 (arguing that *Garmon* preemption is not applicable to a state law prohibition on "captive audience" speech by employers). However, such an argument would misapply this exception. Rather than concluding that such matters are outside the scope of the NLRA, the Board has delineated the lawful and unlawful use of this

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[3] The Second Circuit, however, refused to enforce the Board's order in this regard. *Bonwit Teller, Inc. v. N.L.R.B.*, 197 F. 2d 640, 646 (2d Cir. 1952).

[4] Our conclusion is underscored by legal commentary regarding "captive audience" speech by employers. For example, the thrust of one law review article is that the Board should extend *Peerless Plywood* and ban "captive audience" speech by employers generally, not merely within twenty-four hours of an election. Masson, 56 Hastings L.J. at 185. In other words, the article illustrates how the Board arguably has authority to prohibit the employer conduct addressed by SSB 5446 but, to date, has not exercised its authority in that regard.

practice by employers; it has been and remains a topic where employer conduct may be brought to the Board and where the Board may refine or revisit its view of such employer conduct. Put another way, the Board has not clearly indicated the absence of NLRA authority or concern regarding when an employer may lawfully require employees to attend meetings or suffer consequences for refusing to attend and instead, on several occasions, has addressed the issue under the NLRA.

Another *Garmon* exception allows for application of the "traditional law of torts" or state laws that address "conduct marked by violence and imminent threats to the public order." *Garmon*, 359 U.S. at 247. This exception applies when state law addresses something "peripheral" to the federal interests in the NLRA and the state interest "weighs so heavily by comparison to the NLRB's interest in exercising exclusive jurisdiction that congressional interest to deprive the state of its power cannot be inferred." *Hotel Employees & Restaurant Employees v. Jensen*, 51 Wn. App. 676, 679-80, 754 P.2d 1277 (1988) (citing *Garmon*, 359 U.S. at 243-44). The state interests advanced by proposed SSB 5446 would not meet this exception. The NLRA focuses on employer and employee communications regarding labor or mutual aid organizations and has delineated when employer communications constitute an unfair labor practice. We therefore conclude that the manner of employer communication is not a "peripheral" interest of the NLRA or the Board and, therefore, this exception would not apply to save SSB 5446.

B. *Machinists* Preemption

The Supreme Court described a second basis for preemption in *International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976), now known as *Machinists* preemption. Under *Machinists*, "the crucial inquiry [is] whether Congress intended that the conduct involved be unregulated" and whether the conduct is "to be controlled by the free play of economic forces." *Id.* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971)).

Machinists arose when an employer and union reached an impasse after a collective bargaining agreement expired. The Court recognized that both employers and unions have "economic weapons," and state law regulating the use of economic force by the union or employer could frustrate the processes built into the Act for resolving such disputes. *Id.* at 147-48. The employer obtained a state court order, pursuant to state law, requiring the employees not to use their "economic weapon" of refusing to work overtime. *Id.* at 148-49. The Court held that the state law affected the substantive aspects of bargaining between the union and employer, which Congress implicitly meant to be unregulated. *Id.* at 149. In reaching this conclusion, the Court held that by adopting the NLRA, Congress intended that certain employer and employee actions were not to be regulated by the States.

> Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful. Rather, both are without authority to attempt to introduce some

> standard of properly balanced bargaining power to define what economic sanctions might be permitted negotiating parties in an ideal or balanced state of collective bargaining.

Id. at 149-50 (citations and internal quotation marks omitted). The Court therefore held that the state law that impaired the union's economic pressure interfered with the accomplishment of the full purposes of Congress. *Id.* at 151.

Under *Machinists,* the United States Supreme Court has repeatedly preempted state laws that affect the economic powers of employers and unions in connection with organizing or collective bargaining. In the recent *Brown* case, the Supreme Court applied *Machinists* to strike down a California law that barred employers who received state funding from using those funds to assist, promote, or deter union organizing; the law also sanctioned violators. *See Brown,* 128 S. Ct. at 2412. The Court concluded that the California statute attempted to regulate "within 'a zone protected and reserved for market freedom.'" *Brown,* 128 S. Ct. at 2412 (quoting *Bldg. & Constr. Trades Coun. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.,* 507 U.S. 218, 227, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993)). To conclude that there was a zone reserved for market freedom, *Brown* cited Section 8(c) of the NLRA, 29 U.S.C. § 158(c). Section 8(c) provides:

> 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 of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

The Court recognized that Section 8(c) "manifested a 'congressional intent to encourage free debate on issues dividing labor and management.'" *Brown,* 128 S. Ct. at 2413 (quoting *Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53, 62, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966)). Because Congress amended the NLRA to adopt Section 8(c), there was a congressional policy judgment to be protected from inconsistent state law:

> We have characterized this [congressional] policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB."

Brown, 128 S. Ct. at 2414 (quoting *Letter Carriers v. Austin,* 418 U.S. 264, 272-73, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974)).

Like the California law in *Brown,* SSB 5446 does not directly prohibit or restrain employer speech. However, SSB 5446, Section 3 bars a "captive audience" meeting by an employer and Section 4 authorizes a broad civil action and sanctions against an employer who violates Section 3. The employer would be subject to significant liability if the employer fails to anticipate what is allowed or not allowed by SSB 5446. For example, under SSB 5446, Section

3(2), an employee may simply have a reasonable belief that the employer was violating the law and any adverse employment action against the employee could trigger liability for the employer. SSB 5446 thus makes an employer less able to participate in the "robust debate" contemplated by Congress and described in *Brown*. Like California's sanction for misuse of state grants, SSB 5446 would chill one side of what the NLRA envisions as a robust debate between labor and management. *See Brown*, 128 S. Ct. at 2416-17.

Our conclusion is supported by the Supreme Court's general observation that "Congress has been rather specific when it has come to outlaw particular economic weapons." *Machinists*, 427 U.S. at 143. We therefore conclude that provisions of SSB 5446 directed at employer meetings that address labor and mutual aid organizations would be state regulation in an area Congress intended to be open to economic forces. SSB 5446 would deny "one party to an economic contest a weapon that Congress meant him to have available." *Machinists*, 427 U.S. at 150. Therefore, it would be preempted.

We trust that the foregoing information will prove useful.[5]

Sincerely,

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FOR

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:pmd
:wrs
Enc.

[5] The proposed bill would apply to both public and private sector employers. SSB 5446 § 1(3) (defining "employer" by reference to RCW 49.12.005(3)(b), which includes private and public employers). The conclusions in this opinion are based on application of SSB 5446 to private "employers" and "employees" as those terms are defined in the NLRA. *See* 29 U.S.C. § 152(2), (3). The NLRA excludes domestic service, agricultural laborer, and employment by a parent or spouse from the definition of employees covered by the Act. Furthermore, the NLRA does not govern collective bargaining with state public employers. *See* 29 U.S.C. § 152(2); *see also Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 127 S. Ct. 2372, 2376, 168 L. Ed. 2d 71 (2007) ("The National Labor Relations Act [NLRA] leaves States free to regulate their labor relationships with their public employees."). Because the NLRA does not apply to public employers, the above preemption analysis is not directly applicable.