New York, Minnesota, and Maine Ban "Captive Audience Meetings" – But the Fight is Just Beginning

Insights
8.11.23

Effective August 1, Minnesota now prohibits employers from "captive audience meetings" – that is, requiring, under threat of discharge, discipline, or some other penalty, employee attendance or participation in employer-sponsored meetings or otherwise requiring them to listen or receive communications regarding employer opinions on "religious" or "political" matters. These captive audience bans tilt the balance of power to labor unions as they prevent employers from making the reasonable and appropriate case as to why employees may not want to vote in favor of union organization. Minnesota now joins the ranks of Connecticut, Maine, and New York – all of which passed captive audience laws in 2022 or 2023 – and Oregon (which has had a similar law on the books since 2010). These states have largely justified such restrictions by asserting that they coercively interfere with employee freedom of speech. Nonetheless, they face a multitude of potential legal challenges – one of which has already succeeded. What do employers need to know about this renewed trend of labor laws cropping up again across the country?

Captive Audience Meetings Under the NLRA

As we've written before (here and here), captive audience meetings have been upheld as a lawful exercise of employer free speech rights under Section 8(c) of the National Labor Relations Act (NLRA). This stems from the NLRB's 1948 decision in *Babcock & Wilcox*, which held that mandatory group meetings are lawful in the absence of other prohibited conduct (*i.e.* conduct that coerces employees in the exercise of their rights) under Section 7 of the NLRA.

In April 2022, however, NLRB General Counsel Jennifer Abruzzo expressed the view that mandatory captive audience meetings convened to discuss the issue of union representation actually violate the NLRA. In a controversial memo, she directed the agency's regional offices to pursue unfair labor practice charges against employers in an effort to ultimately secure a reversal of *Babcock & Wilcox*. In doing so, the General Counsel maintained that employees would reasonably understand their presence to be mandated when they are forced to convene on paid time, or "cornered" by management while performing their job duties.

State Survey of Captive Audience Prohibitions

Here's a quick overview about the states that have captive audience meeting laws on the books.

Oregon and Wisconsin – the Original Duo

While there has been a recent push in the northeast to legislate restrictions on captive audience meetings, Oregon and Wisconsin were well ahead of the curve, passing their laws 14 years ago. But only one state's law was able to survive a legal challenge.

Or. Rev. Stat. Ann. 659.785 was passed in 2009, taking effect on January 1, 2010. The law prohibits employers from taking adverse action against an employee's refusal to attend an employer-sponsored meeting or otherwise listen to speech or view communications, the primary purpose of which is to communicate the employer's opinions on "religious" or "political" matters. "Political" matters are explicitly defined to include "the decision to join, not join, support or not support" a "labor organization."

In 2020, the Trump-era NLRB sued Oregon to secure a declaration that the law should be blocked by the NLRA. In September 2021, the U.S. District Court for the District of Oregon dismissed the suit without reaching the merits of preemption on the basis that the NLRB lacked standing to assert the claim on the basis that it could not show that it had been injured. No further action was taken after that dismissal given the winds of change that swept through Washington, D.C. in 2021.

Mirroring the Oregon legislation, Wisconsin passed the Wisconsin Fair Employment Act, Wis. Stat. 11.31 *et. Seq.*, shortly thereafter. The law took effect in May 2010, but it was short lived. Several business associations brought suit against the state and alleged the law encroached upon employer free speech rights and was therefore preempted by the NLRA. By November 2010, the parties had entered into a stipulation, later formalized into a judgment by the court, whereby Wisconsin agreed not to enforce the law on the basis that it was preempted by the NLRA.

Connecticut Starts the Next Wave

After many years of deliberating passing a captive audience law, the Connecticut legislature passed Conn. Gen. Stat. Ann. 31-51q, effective July 1, 2022, containing similar provisions to the Oregon and Wisconsin laws. The Connecticut law similarly defined "political matters" to include the subject of union representation. Five months later, the U.S. Chamber of Commerce, among other trade and business associations, brought suit in federal district court to invalidate the law, which remains pending. The suit alleges that the law violates employer free speech rights and that the law is preempted by the National Labor Relations Act (NLRA).

The U.S. Chamber's suit alleges both *Garmon* and *Machinist* preemption – *Garmon* preemption because the Connecticut law seeks to prohibit conduct in the form of employer "free speech rights" that are expressly permitted by Section 8(c) of the NLRA, and *Machinist* preemption because the law purports to regulate areas intentionally left silent by the NLRA. The legislature had analyzed whether the NLRA would potentially preempt previous versions of the bill. By 2022, however, the legislature was clearly amenable to moving forward despite previously expressing concerns.

New York, Minnesota, and Maine Pass Laws in 2023

Which brings us to the present day, as 2023 has seen three more states brought into the fold.

- The Maine legislature passed 26 MRSA 600-B on June 6, which was signed into law by the governor on July 11.
- On June 10, New York passed Senate Bill S4982 to amend New York Labor Law 201-d, which had already prohibited discrimination on the basis of an individual's political activities outside of working hours and other legal recreational activities. The law will go into effect as soon as the governor signs it. Interestingly, the legislature made clear that the bill was driven by concerns that "labor union membership has declined and worker protections have been stripped." **[Ed. Note: The governor signed this bill on September 6 and it immediately took effect.]**
- Minnesota's law – Minn. Stat. 181.531 – went into effect on August 1.

All three laws mirror Oregon and Connecticut's laws and prohibit all captive audience meetings and forced communications regarding "political" matters, which are defined to include any decision to join or support a labor organization.

Who's Next?

Currently, California appears to be the state most likely to pass a captive audience prohibition next. Senate Bill 399 passed the state Senate on May 25 and was ordered to the Assembly. Since then, the bill – to the cheers of organized labor in the state – has passed out of several Assembly committees and is on a path to be passed by the Assembly and end up on the Governor's desk, where it will almost assuredly be signed. **[Ed. Note: As of August 17, our sources indicate that the California legislature will <u>not</u> pass this bill in 2023 but instead are aiming to finalize it during the 2024 legislative session.]**

Vermont, too, has a bill pending in the legislature banning captive audience meetings, but it appears it is farther away from passage than California's. Bill S.102 passed in the state Senate at the end of March and is working its way through committees in the state's House of Representative.

Both laws are similar to those already passed and restrict employers from providing their non-coercive opinion on unionization in mandatory meetings.

The Legal Landscape Leaves Employers in the Dark

With more states imposing legislative restrictions on captive audience meetings, we can expect to see a bevy of additional legal challenges alleging NLRA preemption and unlawful employer free speech infringement. With the potential for conflicting decisions across various jurisdictions, it could be years before employers can secure a modicum of certainty in this area from coast to coast.

Coupled with lingering uncertainty over prospects that the NLRB General Counsel will prevail in her objective to render captive audience meetings unlawful (a determination which itself may bear on the legality of the various state laws), employers operating in states with existing captive audience prohibitions face double-sided uncertainty.

To the extent that any of these laws are upheld, the interplay between the NLRA and state action warrants careful consideration. For example, state law may prohibit adverse action based an employee's refusal to attend an employer-sponsored meeting or listen to speech or view communications, but whether and to what extent this definition fully supports (or even conflicts) with the General Counsel's view remains to be seen.

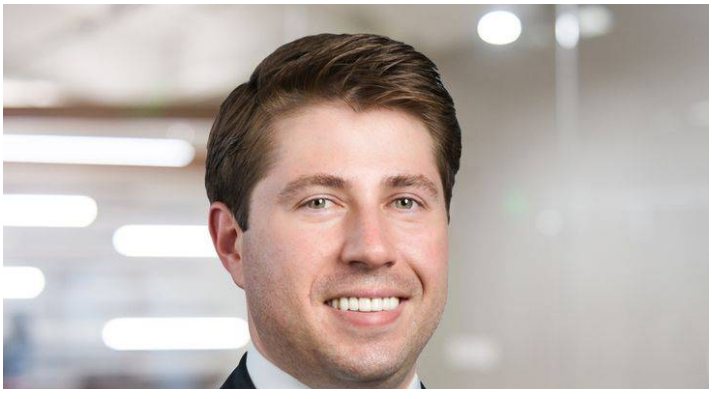
Additionally, state laws will undoubtedly have specific nuances to their own legal jurisdictions, as interpreted by state Courts based on their unique legislative histories. For instance, the preamble to the New York law states that the law would allow for "non-partisan communication, like neutral 'get out the vote' drives." This suggests that a captive audience meeting that is confined to encouraging participation in an upcoming union vote may not violate this law (although it could be deemed in violation of the laws of other states – and ultimately the NLRA).

Conclusion

For the time being, employers operating in states that prohibit captive audience meetings should tread carefully – particularly to the extent that they plan to mandate attendance. Because these laws provide for private rights of action, employers confront the prospect of both state court litigation and corresponding ULP charges when taking adverse action against those who refuel to attend meetings or otherwise consider employer communications addressing issues such as union representation.

We will continue to monitor developments in this area as they unfold, and would encourage readers to consult with their legal counsel for additional guidance in this rapidly evolving legislative arena. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Labor Relations group.

Related People



Seth D. Kaufman
Partner
212.899.9975
Email

Service Focus

Labor Relations

Related Offices

Minneapolis

New York

Portland, ME