Supreme Court Strikes Down California Labor Law

Insights
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June 19, 2008 - The U.S. Supreme Court delivered a substantial victory for those employers who choose to take efforts to fend off union campaigns at their workplaces. In a 7 to 2 decision, the Court found that the National Labor Relations Act (NLRA) preempts a California law that prohibits certain employers from using State funds to assist or deter unionization efforts by their employees. A contrary decision could have opened the door for other states to utilize their spending and regulatory power to restrict employer free-speech rights during union organizing campaigns. *U.S. Chamber of Commerce v. Brown*.

Background

One of Congress's primary goals when it enacted the NLRA in 1935 was to federalize labor laws in order to ensure uniformity in labor-management relations throughout the country. Although the NLRA does not contain an express preemption provision, it has long been accepted that, in passing the NLRA, Congress largely displaced state regulations of labor relations in the private sector. In particular, the Supreme Court has previously held that the NLRA preempts state regulation in two specific instances. First, in 1959, the Court held that the NLRA prohibited states from regulating areas that are protected, prohibited, or arguably protected or prohibited by the NLRA – more commonly known as "*Garmon* preemption doctrine," after the name of the case in the ruling. Second, in 1976, the Court held that states could not regulate activity that Congress intended to remain unregulated and left to "the free play of economic forces." This is referred to as the "*Machinists* preemption," again after the name of the case. The scope of the *Machinists* and *Garmon* preemption doctrines were at the heart of the dispute in *Chamber of Commerce v. Brown*.

Facts of the Case

The California law at issue was signed into law by Gov. Gray Davis in September 2000. The statute forbade employers that received either a state "grant," or more than $10,000 from a "state program," from using those funds "to assist, promote, or deter union organizing." In essence, state funds could not be used in support of most activities in which employers normally engage during a union election campaign, including legal and consulting fees, planning or coordination of the employer's campaign, or even payment of salaries for supervisors or employees that carry out campaign tasks or participate in campaign meetings. While the statute did not prohibit employers from using funds received from sources other than the State of California in opposing a union organizing campaign, employers were required to clear significant administrative hurdles in order to do so. For instance, if an employer co-mingled state and other funds into a single account, the law

presumed that *any* expenditures made during an organizing campaign were derived, at least in part, from state funds. The law also mandated that an employer engaging in anti-union persuasion must keep and provide, upon request, "sufficient" records demonstrating that state funds were not used to cover campaign expenditures.

Employers who violated the law were subject to fines and penalties, which included payment of the amount of state funds used for organizing, as well as civil penalties equal to twice the amount of said funds. Lawsuits to enforce the law could be brought by either the State Attorney General or a private taxpayer (including a union). In the latter case, the prevailing taxpayer was entitled to an award of attorney fees and costs associated with bringing the suit.

Shortly after this law took effect, the U.S. Chamber of Commerce, the California Chamber of Commerce, the Employers Group, and several individual employers sued to block the California law. Their primary argument was that Section 8(c) of the NLRA specifically protects an employer's right to express its views, arguments or opinions either against or in support of unionization, provided that such expression does not contain threats of reprisal or force or promise of benefit. Concurrently, in establishing such a right of free expression, Congress intended to encourage free debate on issues dividing labor and management, and that such debate would be free from state regulation. Therefore, according to the Chamber of Commerce and its fellow plaintiffs, the California law is preempted by the NLRA under both *Garmon* and *Machinists* preemption doctrines.

After a federal district court judge ruled that certain provisions of the California law were preempted by the NLRA, the matter became hotly contested on appeal. When first presented to the U.S. Court of Appeals for the 9th Circuit, a three-judge panel unanimously affirmed the district court's ruling. But the panel agreed to rehear the case and one judge switched sides, resulting in a 2 to 1 decision in favor of preemption. Then the entire 9th Circuit agreed to rehear the case (this is called an *en banc* hearing) and concluded that the state law was *not* preempted. In short, the *en banc* panel determined that California was merely exercising its own spending power and its valid authority to determine how taxpayer dollars should be spent. Likewise, since employers were left free to utilize their own funds in organizing campaigns, the panel determined that the California statute's effect on employer free speech was only "indirect and incidental." The plaintiffs successfully appealed this decision to the Supreme Court.

The Court's Ruling

In rendering its decision, the Supreme Court squarely renounced the 9th Circuit's opinion that AB 1889 is not preempted by the NLRA. Justice John Paul Stevens, who delivered the opinion of the seven-member majority, utilized the legislative history of the NLRA to emphasize the importance Congress has placed upon an employer's right to speak against union organization attempts—a right that was, and is, clearly intended to be free from state regulation.

In particular, the Court noted that, at its enactment, the NLRA did little to address the tension between union rights to organize and employer rights to oppose. Instead, the Act left it for the

National Labor Relations Board ("NLRB") and federal courts to determine what was appropriate conduct during an organization campaign. For one, the NLRB took a consistent approach that *any* employer speech – either in favor or against a particular union – was prohibited conduct. According to the Court, it was this labor-favorable stance that Congress was addressing when it amended the NLRA in 1947. In passing those amendments, Congress chose to give employers the explicit right to speak either for or against a union, provided that the employer is not acting coercively when doing so. Congress' intent in giving employers such a right was more than to merely "implement the First Amendment" in the labor-relations context: it was, in the opinion of the Court, an intent to foster "uninhibited, robust, and wide-open debate in labor disputes." In other words, or so the Court held, Congress intended to place non-coercive employer speech squarely within a "zone of activity" to be shielded from state or federal regulation. Therefore, any state regulation of non-coercive employer speech (or, at least, the kind of regulation contained in the California statute) is precluded under the *Machinist* pre-emption doctrine.

In the Court's opinion, California's policy decision to prevent partisan employer speech during union organizing is the exact type of policy Congress chose to prohibit when it amended the NLRA. In fact, because, the California statute actually allows for state funds to be used by employers in certain activities *favoring* unions (*i.e.*, entering or negotiating voluntary recognition agreements) the Court found that the statute "imposes a targeted negative restriction on employer speech about unionization."

Central to the Court's decision in favor of preemption was the California statute's enforcement mechanism of lawsuits brought against offending employers coupled with the availability of treble damages. These provisions of the California statute were found by the Court today to be calculated specifically to make it prohibitively expensive for employers receiving state funds to speak out against union organization efforts. As the Court stated, the statute's "enforcement mechanism put considerable pressure on an employer either to forgo his 'free speech rights to communicate his views to his employees,' or else to refuse the receipt of any state funds." In short, the California statute has been found by the Court to "chill" one side of the "robust debate" between employer and union, which Congress has previously chosen to protect under the NLRA.

This Significance of the Decision

Today's ruling in *Chamber of Commerce* is a vindication for employers who do business with their state governments. The impact of the decision will be felt most immediately in California, where employers will no longer be faced with the decision to either forgo revenue from state funds or to remain silent and complicit in the face of a union organizing blitz.

But the impact will carry over into other states as well. Currently, a New York statute similar to the California law is being contested in a federal district court and before the U.S. Court of Appeals for the 2nd Circuit. Likewise, at least fifteen other states are considering neutrality statutes either modeled on, or similar to, the California law. Today's decision should give states pause before they

take further action on these measures, as the Supreme Court has solidified an employer's right to combat union tactics designed to pressure employees into union ranks.

This Legal Alert is intended to highlight important aspects of one particular Court decision. It is not intended to be, and should not be construed as, legal advice on any specific fact situation.