TESTIMONY OF
CONNECTICUT HOSPITAL ASSOCIATION
SUBMITTED TO THE
JUDICIARY COMMITTEE
Monday, March 18, 2019

SB 440, An Act Protecting Employee Freedom of Speech And Conscience

The Connecticut Hospital Association (CHA) appreciates this opportunity to submit testimony concerning **SB 440, An Act Protecting Employee Freedom of Speech and Conscience**. CHA opposes the bill.

Before commenting on the bill, it is important to point out that Connecticut hospitals and health systems provide high quality care for everyone, regardless of their ability to pay. They do more than treat illness and injury. They build a healthier Connecticut by improving community health, managing chronic illness, expanding access to primary care, preparing for emergencies, and addressing social determinants of health. By investing in the future of Connecticut's hospitals, we will strengthen our healthcare system and our economy, put communities to work, and deliver affordable care that Connecticut families deserve.

SB 440 seeks to amend Connecticut General Statutes Section 31-51q, which provides employees protection when exercising certain of their constitutional rights, with language that is entirely outside of the scope of the statute. By defining "political matters" to include employees' "decision to join or support any … labor organization," SB 440 would prohibit employers from having mandatory meetings with their employees, sometimes called "captive audience meetings," about unionization. However, if enacted, any such prohibition would be preempted by federal law, i.e., the National Labor Relations Act ("NLRA").

In April 2018, the Office of the Attorney General of Connecticut issued a formal opinion regarding HB 5473, *An Act Concerning Captive Audience Meetings*. See George Jepsen, FORMAL OPINION ON HOUSE BILL 5473 (2018) (available at https://portal.ct.gov/-/media/AG/Opinions/2018/2018-02_Captive_Audience.pdf) (last visited Mar. 13, 2019). The Attorney General explained that federal law precludes states from regulating activity that is addressed by the NLRA, citing the U.S. Supreme Court's decision in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). The Attorney General also pointed out that the United States

Supreme Court has interpreted Section 8(c) of the NLRA to "expressly preclude regulation of speech about unionization," Chamber of Commerce of U.S. v. Brown, 554 U.S. 60, 68 (2008). Finally, the Attorney General concluded that if faced with the issue, a court would hold that HB 5473's provision prohibiting employers from requiring employees to attend employer-sponsored meetings to communicate the employer's opinion concerning joining or supporting a union is preempted by the NLRA. SB 440 has this same prohibition, and characterizing it as a political matter does not cure its defects.

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

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

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

Indeed, citing NLRB decisions, the Seventh Circuit Court of Appeals found that the NLRA has consistently been interpreted to allow employers to require its employees to attend so-called "captive audience" meetings on the employer's premises during work time, in which the employer expresses its opposition to unionization. Metro.

Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277, 280 (7th Cir. 2005).

Moreover, in Brown, 554 U.S. at 68, the United States Supreme Court established the law of the land when it noted that "Congress' express protection of free debate [on issues dividing labor and management] forcefully buttresses" its holding that the NLRA preempted California laws prohibiting private employers' use of funds earned from the state to deter union organizing through non-coercive speech. Accordingly, it is simply not the case, as some have argued in the past regarding previous iterations of this proposed bill, that federal law does not protect an employer's right to hold mandatory meetings with its employees to advise them concerning its position on labor organizing activities – federal law absolutely protects that right. There can be no question that SB 440 seeks to overturn federal labor policy that was established by the NLRB seventy years ago and is, therefore, preempted.

By way of illustration, the state of Wisconsin previously enacted a law like SB 440 prohibiting employers from holding "captive audience" meetings or discriminating or taking action against an employee who refused to attend an employer-sponsored meeting in which the employer communicates its opinion about labor organizations (available at http://docs.legis.wisconsin.gov/2009/related/acts/290 (last visited Mar. 2, 2019)). However, the Metropolitan Milwaukee Association of Commerce and the Wisconsin Manufacturers & Commerce commenced a lawsuit in federal court in September 2010 challenging the statute based on preemption. The lawsuit quickly culminated in a settlement and stipulation on November 4, 2010, in which the Governor acknowledged that the Wisconsin statute was preempted by the NLRA and agreed to be permanently enjoined from enforcing the unconstitutional "captive audience" law in the future. (See Final Stipulation in Metro. Milwaukee Ass'n of Commerce v. Doyle, Case no. 10-C-0760 (E.D. Wis. Nov. 4, 2010) See also Idaho Bldg. & Const. Trades Council, AFL-CIO v. Inland Pac. Chapter of Associated Builders & Contractors, Inc., 801 F.3d 950, 953 (9th Cir. 2015) (a recent example of state law being preempted when the state law regulates conduct that is *arguably* protected by the NLRA).

SB 440 is problematic for several additional reasons. First, SB 440 would have the unintended effect of subjecting employees to conduct currently unlawful under the NLRA. For example, SB 64 does not prohibit employers from asking employees voluntarily to attend meetings or participate in communications regarding union activities, and employees are free to choose to attend or participate in those communications as they so wish. Under the proposed law, employees would be put in the position of identifying themselves to their employer and co-workers as supporting or being against unionization when they choose or choose not to attend meetings. Such self-identification would run counter to the protection afforded by secret ballot elections and would interfere with the established body of NLRB law

protecting employees in these circumstances. With mandatory attendance at meetings, employees are not put in this position.

Second, enactment of SB 440 would interfere with employees' rights by creating impediments to the union organizing process, since the inevitable outcome would be an increase in unfair labor practice charges and lawsuits until the law is set aside as preempted. For example, the state of Oregon enacted a law similar to SB 440, which became effective January 1, 2010. Before the statute went into effect, the Associated Oregon Industries and the U.S. Chamber of Commerce filed suit, alleging that statute was preempted by the NLRA and unconstitutional under the First Amendment. See Associated Or. Indus. v. Vakian, No. CV 09- 1494-MO, 2010 WL 1838661 (D. Or. May 6, 2010). However, without ruling on the merits, the suit was dismissed on procedural grounds of standing and ripeness because the law had not yet been enforced. Id. Nevertheless, it is a foregone conclusion that this law will be challenged again and the uncertainty about its enforceability will only generate more litigation and expense in the meantime, until it is invalidated.

Third, SB 440 limits employees' rights to be presented with an alternative view and information that a union would not provide. The Second Circuit Court of Appeals, which has appellate jurisdiction over Connecticut district courts, eloquently noted this when it articulated that Section 8 (c), in addition to preserving an employer's right to freedom of speech, "also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance."

SB 440, which is not neutral but seeks to limit the free speech rights of employers but not of unions, appears to have its genesis in a belief that federal law does not provide a balanced approach to labor relations. Although critics have argued that the NLRA allows employers an undue opportunity to influence employees to reject unionization, it is the job of the United States Congress and not the state of Connecticut to amend federal law. There is certainly a benefit in having a national labor relations policy. Federal law encourages collective bargaining and establishes a framework that is fair, impartial, and carefully regulated to protect the rights of employees. The federal body of law has been thoughtfully crafted and refined over decades of case law to guarantee and protect employee rights while maintaining a careful balance in the critical areas of free speech and employee access to information. If SB 440 is enacted, not only would it be preempted by federal law, its anti-business message would discourage employers who have the option to relocate from moving to or staying in Connecticut.

Thank you for your consideration of our position. For additional information, contact CHA Government Relations at (203) 294-7310.