CONNECTICUT HOSPITAL ASSOCIATION

TESTIMONY OF
CONNECTICUT HOSPITAL ASSOCIATION
SUBMITTED TO THE
JUDICIARY COMMITTEE
Friday, March 6, 2020

SB 318, An Act Protecting Employee Freedom Of Speech And Conscience

The Connecticut Hospital Association (CHA) appreciates this opportunity to submit testimony concerning **SB 318, An Act Protecting Employee Freedom Of Speech And Conscience**. CHA opposes the bill.

Before commenting on this 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, and work to improve the health of those who live in our communities. Supporting Connecticut's hospitals strengthens our healthcare system and our economy.

SB 318 seeks to amend section 31-51q of the general statutes, which addresses employer liability for discharging an employee when that employee was exercising certain constitutional rights. SB 318 would effectively prohibit employers from holding "captive audience" meetings where the primary purpose is to communicate the employer's opinion concerning religious or political matters. The bill defines political matters to include the decision to join a labor organization.

But federal law preempts a state law seeking to prohibit employers from holding mandatory meetings during which the employer communicates its opinion on the decision to join or support a labor organization. States are preempted from regulating activity that the National Labor Relations Act (NLRA) addresses. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). Section 8(c) of the NLRA 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 provisions of this subchapter." And the Supreme Court has interpreted Section 8(c) to "expressly preclude regulation of speech about unionization." Chamber of Commerce of U.S. v. Brown, 554 U.S. 60, 68 (2008). This means that states cannot regulate communications about union organization, even if it is the employer making the statement. SB 318 seeks to do exactly that, and, therefore, is preempted by federal law.

This conclusion aligns with the National Labor Relations Board's (NLRB) longstanding position and practice. 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 preelection 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, 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 318 seeks to impermissibly overturn federal labor policy that was established by the NLRB 70 years ago and is, therefore, preempted.

By way of illustration, the state of Wisconsin previously enacted a law like SB 318 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. 3, 2020]). 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]).

In addition to being preempted, SB 318 is problematic for several other reasons. First, SB 318 would have the unintended effect of subjecting employees to conduct currently unlawful under the NLRA. For example, SB 318 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 either 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 318 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.

Third, SB 318 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 318, 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. Regardless of this belief, the courts have been clear; federal law preempts state law in this matter. There is 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.

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