A Timely Analysis of Legal Developments

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Employer Speech in Oregon's Workplaces, the Impact of SB 519

By Howard Rubin and Janice H. Kim

New Oregon Law Regarding Workplace Meetings

Oregon's Governor Ted Kulongoski (D) signed SB 519 on June 30, 2009. The new law, referred to by its opponents as the "Employer Gag Bill," and heralded by its supporters as the "Worker Freedom Act," prohibits employers from mandating employee attendance at meetings involving an employer's opinions regarding religious or political matters and prohibits employers from taking any adverse employment action against employees who decline to attend those meetings. One of the practical effects of the law is to try and impose a substantial change to union organizing campaigns in Oregon's workplaces. The law is effective January 1, 2010.

What Are Religious or Political Matters?

SB 519 defines *religious matters* to include "religious affiliation or the decision to join, not join, support or not support a bona fide religious organization." Under SB 519 *political matters* include "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." The law does not prohibit a religious organization from requiring its employees to attend employer-sponsored meetings involving the employer's religious beliefs and likewise exempts an employer that is a political organization and that employer's politically themed meetings.

Effect on the Workplace

For the majority of Oregon's employers - employers that are neither religious nor political organizations - the key words in SB 519 are "constituent group." A political matter includes the decision to join, support, not join, or not support a *constituent group*, and, under SB 519, a *constituent group* is defined as, among other things, "civic associations, community groups, social clubs and mutual benefit alliances, *including labor organizations*." Not surprisingly, consensus among the bill's supporters

and detractors alike is that the law would substantially change the landscape of union organizing in Oregon's workplaces. In essence, SB 519, if enforced, would restrict an employer's ability to hold mandatory meetings to discuss union organizing and seek to educate employees about union campaigns and elections.

Preemption: SB 519 and the National Labor Relations Act

Whatever other legal challenges to SB 519 may be raised,[1] a key issue is whether the provisions of SB 519 that prohibit an employer from communicating with employees regarding labor organizations are preempted under the National Labor Relations Act (NLRA). A preliminary analysis of that question suggests that SB 519's intended application to employer meetings regarding labor organizations would be preempted by federal law pursuant to the NLRA.

Labor Preemption

Federal preemption arises out of the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States * * * shall be the supreme Law of the Land[.]"[2] As a practical matter, preemption means that when Congress legislates on a particular subject, it is empowered to preempt state laws to the extent it is believed that such action by Congress is necessary to achieve the legislation's nationally focused purposes.

In the labor context, it is well established that the NLRA preempts state action in the area of industrial and labor relations. Notably, the United States Supreme Court, in *Chamber of Commerce of U.S. v. Brown*,[3] recently struck down a California law that similarly purported to impose "union-neutrality" requirements on employers by limiting what employers could say about union organizing efforts in the workplace. Writing for the majority, Justice Stevens noted that, "Congress' express protection of free debate forcefully buttresses the preemption analysis in this case. Concerning the California law, which withheld state funds from companies in violation of the law's neutrality requirements, Stevens added, "California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition. It is equally clear that California may not indirectly regulate such conduct by imposing spending restrictions on the use of state funds."[4] For further information on this case, see Littler's ASAP, *U.S. Supreme Court Overturns California's Limitation on Employer Free Speech Rights to Resist Union Organizing*. In its opinion, the Supreme Court "noted that Section 8(c) of the NLRA manifests Congress' intent to encourage free debate on labor relations issues, and that Congress explicitly intended that noncoercive employer speech was to remain unregulated." Accordingly, the Court reasoned that California's law impermissibly sought to regulate employer speech because any regulation on that particular subject rests exclusively and preemptively with Congress.

In 2000, Milwaukee County, Wisconsin, passed a local ordinance providing, among other things, that "no employee ... shall be required to attend a meeting or event that is intended to influence his or her decision in selecting or not selecting a bargaining representative." The 7th Circuit US Court of Appeals struck down this ordinance in 2005, stating bluntly that "[f]ederal labor law allows employers to require their employees to attend meetings, on the employer's premises and during working time, in which the employer expresses his opposition to unionization."[5]

Even more recently, the State of Washington Attorney General issued an informal opinion that analyzed SB 5446, proposed legislation in the Washington State Senate that bore an uncanny resemblance to Oregon's SB 519.[6]

In that informal opinion, the Washington Attorney General concluded that the NLRA would preempt state legislation prohibiting an employer from communicating with employees regarding "labor and other mutual aid organizations." Given that opinion, the Washington State legislation has essentially been tabled from further consideration.

What Does SB 519 Mean to Oregon Employers?

Prior to the governor's signature , industry organizations and other concerned parties indicated that among other legal measures, they will seek a determination whether SB 519 is preempted by the NLRA.

Until that determination is made, however, SB 519 (unless temporarily enjoined) would permit an aggrieved employee to sue his or her employer in state court within 90 days after the date of the alleged violation. If successful that employee may be awarded all "appropriate relief" including, but not limited to, injunctive relief, rehiring or reinstatement, back pay and reestablishment of any employee benefits, and any other appropriate relief as deemed necessary by the court to make the prevailing employee whole. Additionally and importantly, the law provides for an award of treble damages in addition to an employee's attorney fees and costs.

For an employer faced with union organizing, the Oregon law creates a difficult choice. Meetings with employee are perhaps the most crucial and effective part of an employer's campaign. An employer that holds such meetings runs the risk that an employee would sue if he or she was disciplined for refusing to attend. Employers that do not hold meetings with employees lose the use of an important tool against union organizing. It is important for employers to evaluate the strategy of how to educate employees about unions, as well as what to do if an employee refuses to attend a meeting to discuss union organizing. Given the legally questionable nature of the new law, employers may decide to take the risk under the new law (and gain the ability to challenge it in court) rather than lose a union campaign. That decision is a significant one and should be made after discussion with labor counsel.

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[1] In addition to federal preemption, SB 519 may not survive a challenge under Article I, section 8 of the Oregon Constitution as the bill restricts certain employer/employee communications while allowing others based solely on the content of the communication. The Oregon Supreme Court has ruled consistently that Article I, section 8, "Prohibits lawmakers from enacting restrictions that focus on the content of speech or writing either because that speech itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences." *State v. Robertson*, 293 OR 402, 416 (1982). *See also Moser v. Frohnmeyer*, 315 OR 372, 376 (1993) (invalidating a statute prohibiting use of automated phone message devices when used to solicit commercial services of goods but not prohibiting their use for other types of messages). *Outdoor Media Dimensions, Inc. v. Dept. of Transportation*, 340 OR 275, 297 (2006) (invalidating a restriction on outdoor advertising on grounds that limiting, "one of those types of expression [off-premises signs] more stringently than the other [on-premises signs] because of its content is an impermissible restriction on the 'subject' of expression under Article I, section 8.").

[2] U.S. Const. Art. VI, cl. 2.

[3] 128 S. Ct. 2408 (2008).

[4] *Id*. at 2414-15.

[5] *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 280 (2005).

[6] Richard Davis, *AG Opinion on Employer Gag Rule: Preempted by Federal Law*, (Feb. 17, 2009) *available at* Website of the Washington Alliance for a Competitive Economy, Feb. 17, 2009).