CAPTIVE AUDIENCE LEGISLATION AND LITIGATION

Margaret Angelucci
Asher, Gittler & D'Alba

Sam Hensel
Allison, Slutsky & Kennedy

CAPTIVE AUDIENCE RECAP

Effective January 1, 2025

The law prohibits an employer from disciplining, discharging, penalizing or threatening discipline, discharge, or penalizing employees:

Who refuse to attend mandatory employer-sponsored meeting if the meeting's purpose is to communicate the opinion of the employer about religious matters or political matters, including but not limited to unionization;

As a way to "induce" employees to attend employer-sponsored meetings on such matters; and

Because an employee or person acting on behalf of an employee he made a good faith report of a violation or suspected violation of the law.

WHAT IS "MANDATORY/"

- IF ATTENDANCE AT A MEETING IS:
  - Incentivized by a positive change in any employment condition, including any form of compensation or other benefit of employment
  - Under threat of negative change in employment condition for non-attendance,

EXCEPTIONS

- Does not prohibit communications that an employer is required by law to communicate;
- Does not prohibit voluntary meetings or written communication whose receipt is voluntary;
- Does not prohibit communications necessary for employees to perform their job duties;
- Does not prohibit requiring attendance at training intended to foster a civil and collaborative workplace or to prevent workplace harassment or discrimination;

EXCEPTIONS

- Does not prevent institutions of higher education from holding meetings concerning any coursework, research, publications or academic programs;
- Does not prohibit a organizations exempt under 501(c)(4) **[social welfare organizations]**, 501(c)(5) **[labor organizations]** or 501(c)(6) [**business leagues]** from requiring its staff to attend meetings to communicate the employer's policies tenants or purposes.
- Does not prohibit local government from requiring employees to attend meetings designed to explain legislation or public policy;
- Does not prohibit religious organizations from requiring employees to attend meetings to communicate the employer's religious beliefs.

ENFORCEMENT –EMPLOYEES

An aggrieved employee may bring a **civil action** to enforce any provision of the law no later than one year after the date of the alleged violation.

An action may be brought by one or more employees for and on behalf of themselves and other similarly situated employees.

The court may award all appropriate relief including injunctive relief, reinstatement, back pay, reestablishment of any employee benefits, and any other appropriate relief.

The Court shall award a prevailing employees reasonable attorneys' fees and costs.

ENFORCEMENT - IDOL

- Department shall inquire into any alleged violation of the law, brought to its attention by an interested party, to institute the actions for penalties provided by the law. In addition to the relief available to aggrieved employees, the IDOL may also assess a civil penalty of $1,000 for each violation, payable to IDOL.
- Each employee who is subject to a violation constitutes a separate violation.

PROCEEDINGS BEFORE THE IDOL

IP submits Complaint to IDOL

ER can either contest or cure the violation

RIGHT TO SUE

If no response, IDOL issues right to sue.

IDOL determines allegation is unjustified or they do not have or want to exercise jurisdiction

ENFORCEMENT – INTERESTED PARTY

- Who is an “interested party”? an organization that monitors or is attentive to compliance with public or worker safety laws, wage and hour requirements or other statutory requirements
- If IDOL has not issued a right to sue within 180 days, the interested party may initiate civil action for penalties and injunctive relief
- Three years to file after alleged conduct, plus tolling of 180-day pre-right to sue period
- An interested party may bring an action for penalties and injunctive relief in the county where the violated occurred or where the principal office of the employer is located
- Interested parties shall receive 10% of statutory penalties assessed and attorney’s fees and expenses

Legal Challenge to Illinois Worker Freedom of Speech Act

- Case No. 1:24-cv-06976 (J. Frank Valderrama).
- Challenge brought by Illinois Policy Institute. Alleges statute violates First Amendment. First Amended Complaint adds count claiming the statute pre-empted by NLRA.
- On October 30, 2024, IPI and Technology & Manufacturing Association moved for preliminary injunction against the statute.
- As of 11/17/2024, State has not been served. Judge won't address motion until service. (Dkt. #11).

Legal Challenge to Minnesota Statute

- Case No. 24-cv-00536 (J. Katherine Menendez)
- Law passed on 5/24/2023 and it took effect on 8/1/2023. May be found at Minnesota Statute § 181.531.
- Plaintiffs brought challenge in February 2024. Complaint alleged that statute violated First Amendment and was pre-empted under NLRA.
- Governor Tim Walz, Attorney General Keith Ellison, and Labor Commissioner Nicole Blissenbach listed as defendants. Defendants moved to dismiss and contend they are not proper defendants for suit, which is barred by the Eleventh Amendment.
- The District Court denied the motion, and defendants are seeking interlocutory appeal in the Eighth Circuit. Appeal pending. Motion to stay proceedings in district court pending. Appellants' brief due on 12/9/2024.

Connecticut Litigation

- 3:22-cv-01373 (J. Kari A. Dooley)
- Business organizations including the Chamber of Commerce and Connecticut Business and Industry Association (CBIA) brought suit against Connecticut law, arguing it violates the First Amendment and is pre-empted by LMRA.
- District Court expected to rule on the merits after the complaint survives a motion to dismiss and discovery is taken.
- Parties cross-motioned for summary judgment. Oral arguments were on Monday (11/18/2024).

State's Standing Arguments

- District Court denied motion to dismiss, in part, based on standing.
- State renewed standing arguments to challenge law under NLRA pre-emption after (1) deponent from CBIA essentially admitted no efforts to conduct captive audience meetings, and (2) Connecticut DOL issued CBIA letter specifically providing that holding staff meeting with employees to discuss public policy would not violate statute and they would not face penalties.

State's First Amendment Arguments

- Statute regulates conduct, not speech. The conduct at issue is the retaliation, discipline, or threat of discipline of employees for non-attendance.
- The conduct is not expressive and can be separated from the employer's speech. The State maintains that employers remain free to say whatever they want to their employees in meetings.
- Even if the statute did restrict speech, SCOTUS has said that the state may restrict speech to protect unwilling listeners when the degree of captivity makes it impractical for the unwilling listener to avoid exposure. Employees' economic dependence on employer makes it impractical for employees to refuse to listen without statute's protections.
- Even if statute restricted speech, it would be a content-based restriction narrowly tailored to serve compelling state interest in protecting employees.
- Even if court were to accept CBIA's argument, the statute still constitutional in public employer setting.

Garmon Refresher

- *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).
- *Garmon* Pre-emption: Pre-empts state laws that regulate activities arguably protected by Section 7 of the NLRA or constitute ULPs. Party asserting *Garmon* pre-emption must advance an interpretation of the NLRA that is not plainly contrary to its language and that has not been authoritatively rejected by the courts or the NLRB.

Garmon Pre-emption

- Employer argued that statute pre-empted because of Section 8(c). State's argument is that 8(c) ensures employer right to give non-coercive anti-union speeches. 8(c) does not empower employers, State says, to discipline/discharge or threaten to discipline/discharge employees for refusing to attend or remain at anti-union speeches, and thus it does not touch upon Section 7 rights or unfair labor practices that would invoke *Garmon* pre-emption.
- State also argued no pre-emption because nothing in the statute would threaten the primary jurisdiction of the NLRB to adjudicate conduct representing a ULP. No existing dispute arising under the statute would be identical with an NLRA dispute over which the state's courts would usurp NLRB jurisdiction.

Garmon (cont'd)

- State highlighted recognized exception to *Garmon* where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, a court cannot conclude that Congress deprived the states of power to act.
- In terms of deeply rooted interests, State reiterated First Amendment arguments that they have a compelling interest in protecting its citizens' independence and free-thinking, integral to a healthy and vibrant political system and its citizens' freedom from workplace harassment in the form of captive audience meetings.
- NLRB's decision last week in *Amazon.com Services LLC* held that requiring employees to attend anti-union meetings under pain of discipline constitutes a ULP under 8(a)(1), imperils State's argument.

Machinists Pre-emption Refresher

- *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976).
- *Machinists* Pre-emption: Applies when a state law regulates certain zones of labor activity that Congress intended to be left unregulated and subject to the free play of economic forces. However, even though they intended some things to be left unregulated, state possess broad authority under their policy powers to regulate the employment relationship.

Machinists Pre-emption

- State likened the statute to other state laws that withstood the Second Circuit's scrutiny in *Machinists*' pre-emption cases.
- Second Circuit previously said that NLRA does not pre-empt state laws that boost minimum wages for home healthcare aides in NYC and surrounding areas, and New York prohibiting discharge without just cause.
- State argues it the statute sets a minimum labor standard that does not put a thumb on the scale for either labor or management during the bargaining process, which is what *Machinists* pre-emption is meant to prohibit.
- Law regulates the substance, rather than the process, of labor negotiations, neither encourages or discourages the collective bargaining process, and has only indirect effects on the right of self-organization.

Other States

- Several other states currently have anti-captive audience meeting statutes on the books, including: CA, HI, ME, NY, OR, VT, and WA.
- Alaska voters approved a measure during the November 5, 2024 election to prohibit compulsory anti-union meetings.
- NLRB as Plaintiff challenged Oregon captive audience ban, first in the nation, during Trump years. District Court dismissed due to NLRB's lack of injury/standing. NLRB dismissed their appeal pending in the Ninth Circuit during Biden Administration.