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Management Alert

Ninth Circuit Rules *en banc* that California's Union Neutrality Law Not Preempted by the NLRA

The Statute

In September 2000, then-California Governor Gray Davis signed into law Assembly Bill No. 1889 (AB 1889), Cal. Gov't Code §§ 16645-16649, which forbids employers who receive state grants or funds in excess of $10,000 from using such funding to "assist, promote, or deter union organizing." Employers who violate this statute are subject to fines and penalties, including disgorgement of the state funds and a civil penalty to be paid to the state that is equal to twice the amount of the funds.

History of the Case

In April 2002, the plaintiffs, including the U.S. and California Chambers of Commerce and other business organizations, sued for injunctive and declaratory relief on several grounds, including National Labor Relations Act (NLRA) preemption. On September 16, 2002, the District Court granted partial summary judgment in favor of the Chamber of Commerce finding that the NLRA preempted these provisions. *Chamber of Commerce v. Lockyer*, 225 F. Supp. 2d 1199 (C.D. Cal. 2002).

The Ninth Circuit affirmed the District Court's grant of summary judgment to the defendants, but the panel subsequently withdrew its opinion and granted rehearing. *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004), *withdrawn and reh'g granted*, 408 F.3d 590 (9th Cir. 2005). Upon rehearing, the Ninth Circuit again ruled that the statute is preempted by the NLRA. *Chamber of Commerce v. Lockyer*, 422 F.3d 973 (9th Cir. 2005); however, this opinion was vacated and withdrawn from publication for rehearing *en banc* (by the full court). *Chamber of Commerce v. Lockyer*, 435 F.3d 999 (9th Cir. 2006), vacated by *Chamber of Commerce v. Lockyer*, 437 F.3d 890 (9th Cir. 2006). Ruling *en banc*, the Ninth Circuit now reverses the District Court's decision that the NLRA preempts the California statute and the court vacates the injunctive order. *Chamber of Commerce v. Lockyer*, 2006 U.S. App. LEXIS 24025 (9th Cir. Sept. 21, 2006).

The Decision

The *en banc* majority held that the statute is not preempted by federal labor law. As a preliminary matter, the court determined that California acted as a regulator,

not a proprietor or market participant in enacting the statute. *Id.* at *16.

Turning to the question of preemption, the court first addressed the "*Machinists* preemption" set forth in *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). *Lockyer*, 2006 U.S. App. LEXIS 24025 at *18. "[*Machinists*] requires the preemption of any state regulation of activity that, although not directly regulated by the NLRA, was intended by Congress 'to be controlled by the free play of economic forces'" in a "zone free from all regulations, whether state or federal." *Id*. at *19, quoting *Machinists*, 427 U.S. at 140. The doctrine is based on the premise that economic pressure by the parties to a labor dispute is "part and parcel" of the collective bargaining process. *Lockyer*, 2006 U.S. App. LEXIS 24025 at *19. The court noted, however, *Machinists* has been applied in the context of collective bargaining; not, as here, in the context of organizing. *Id*. at *20.

Moreover, the Ninth Circuit opined that California did not condition the receipt of state funds on employer neutrality; rather, the statute merely forbids the employer from spending state grant and program funds on its union-related advocacy. *Id*. at *26. If the California statute had required neutrality as a condition of receiving state funds, the employer's use of its own funds would thereby have been curtailed and the analysis would be quite different.

The Ninth Circuit next addressed whether the statute is preempted under Garmon, set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *Lockyer*, 2006 U.S. App. LEXIS 24025 at *34. The "*Garmon* preemption arises when there is an actual or potential conflict between state regulation and federal labor law due to state regulation of activity that is actually or arguably protected or prohibited by the NLRA." *Id*. *Garmon* expresses the federal concern with state interference with national labor policy. *Id*., quoting *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 188 (1978). Areas protected by the NLRA are set forth in Section 7, areas prohibited are set forth in Section 8; thus, if a state regulates employee activities that are actually protected or prohibited under these sections that regulation will be preempted unless it falls within an exception to *Garmon*.

In determining that the statute is not preempted by *Garmon*, the Ninth Circuit rejected the Chamber of Commerce and dissent's argument that "to say an activity is not punishable by the NLRA is to protect that activity." *Lockyer*, 2006 U.S. App. LEXIS 24025 at *37. According to the Ninth Circuit, "some activities in labor relations are neither protected nor prohibited by the NLRA and are therefore not preempted under *Garmon*." *Id*. at *38. The court went on to conclude that, in *Lockyer*, "the NLRB has no interest in resolving the central controversy that a state court would have to resolve in enforcing AB 1889, namely, whether state funds were used to 'assist, promote, or deter union organizing.'" *Id*. at *43.

The Ninth Circuit next considered "whether the state statute is preempted because Congress would 'prefer[] the costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction.'" *Id*. at *46. The court found that, in *Lockyer*, even if there were some risk of jurisdictional overlap, "California has as important and legitimate a sovereign interest in determining how the

recipients of state grant and program funds use those funds as it does in entertaining trespass actions." *Id*. at *47-48.

The last issue the Ninth Circuit addressed is the First Amendment implications raised by the statute's limitation on employer speech. The court dismissed the dissent's argument that AB 1889 "compels" employers to be neutral with respect to labor relations. *Id*. at *52. As the court stated earlier in the decision, employers are free to raise and spend their own funds to "assist, promote, or deter union organizing," they just cannot use state grant and program funds on union-related advocacy. In other words, employers are not denied the right to engage in union-related activities they are merely prohibited from using public funds for it. *Id*. at *54.

In dissent, Judge Robert Beezer phrased the question as whether a state may "leverage its spending power to induce an employer to adopt a neutral policy toward labor union organizing." *Id*. at *59. He characterizes AB 1889 as imposing "gag rules" on the use of state money granted to an employer but it also "co-opts the payment for goods and services and profit realized under a contract (undoubtedly not state funds)." *Id*. at *59-60. Judge Beezer found the statute "stifles employers from fully participating in organizing and exercising the rights granted to them under the NLRA" and "rides roughshod over the delicate balance" between labor unions and employers. *Id*. at *60. The statute also "interferes with the NLRA's extension of exclusive jurisdiction to the NLRB for adopting and enforcing election rules. *Id*. For these reasons, the dissent concludes that the statute infringes upon employers' First Amendment rights and the California statute is preempted the NLRA.

The Impact of the Decision

The Ninth Circuit's refusal to recognize NLRA preemption in this case permits the State of California to enforce a law that tips the balance in favor of organized labor's ability to unionize employers receiving state funds. The California statute, AB 1889, impacts the organizing process (and, as a result, collective bargaining), because an employer receiving state funds who decides against "neutrality" when faced with a union organizing drive will incur substantial compliance costs and litigation risks. Without question, we expect that organized labor will attempt to enact similar legislation in other states where unions and their proxies have the legislative muscle to do so. What is less certain is whether federal courts outside of the Ninth Circuit will share the Ninth Circuit's extremely narrow view of NLRA preemption and allow such laws to stand.

If you have any questions regarding the Lockyer case or any Labor & Employment related questions, please contact the Seyfarth Shaw attorney with whom you work or any of the Labor & Employment attorneys on our website: www.seyfarth.com

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