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LEGISLATIVE ANALYSIS

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Worker Privacy Act is not preempted by federal law

(Feb. 19, 2009)—An informal Attorney General opinion penned Feb. 17 by Deputy Solicitor General Jeffrey T. Even, which was written in response to a letter from Senate Minority Leader Mike Hewitt regarding SB 5446 (HB 1528), the Worker Privacy Act, concludes that SB 5446 would be preempted by the National Labor Relations Act. With all due respect, the Washington State Labor Council's legal analysis finds Mr. Even's analysis to be flawed and incorrect for several reasons.

If SB 5446 actually prohibited employer communication with their employees on political and religious matters as defined in the act, then Mr. Even's opinion would have some merit. However, SB 5446 contains no ban on employer speech either directly through its provisions or indirectly through its enforcement scheme.

Further, the Washington State Labor Council believes that SB 5446 neither falls within the two categories of the preemption doctrine specified by the U.S. Supreme Court, nor do we agree that the recent Supreme Court decision in *Chamber of Commerce v. Brown*, No. 06-939 (June 19, 2008), is applicable to SB 5446 (HB 1528).

Federal labor law, specifically, the National Labor Relations Act, (NLRA), 29 U.S.C. 141 *et seq.* does not bar states from enacting legislation prohibiting employers from forcing their employees to listen to speech unrelated to job performance on pain of termination or other disciplinary action.

The Worker Privacy Act is permissible labor standards legislation. The Supreme Court has made clear that "[s]tates possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *Metropolitan Life Ins.*, 471 U.S. at 756 (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)). "Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples." *Id.*

"[T]here is no suggestion in the legislative history of the [National Labor Relations] Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards." *Id.* "Federal law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act." *Id.* In other words, the Supreme Court has long recognized that states can establish minimum working conditions without interfering with federal labor law.

The proscriptions of the Worker Privacy Act are aimed at establishing minimum working conditions. The Act applies to all workers in the State and protects all such workers from mandatory meetings where they are subjected to indoctrination on religious and political issues unrelated to job performance. Just as a state can pass a law preventing an employer from forcing employees to work under conditions that threaten their physical safety ("laws affecting occupational health and safety"), so can a state can pass a law preventing an employer from forcing employees to attend a meeting that threatens their freedom of conscience.

It is clear, to cite another example, that a state can pass a law barring the discharge of employees without just cause. See, e.g., Mont. Code Ann. 39-2-901 (Wrongful Termination from Employment Act); *St. Thomas-St. John Hotel v. Govern. U.S. Virgin Islands*, 218 F.3d 232 (3d Cir. 2000) (holding Virgin Islands' unjust discharge law not preempted). It is also clear that a state can pass a law barring the discharge of employees for a limited set of improper reasons, such as state anti-discrimination statutes, including state statutes protecting against discrimination on the basis of political contributions or lack thereof. The proposed legislation falls into this category. It bars employers

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from disciplining or discharging employees for refusing to listen to religious or political speech unrelated to their job performance.

Since the bill establishes permissible minimum conditions, it is not preempted by federal labor law.

As the United States Supreme Court has recognized, [t]he NLRA contains no express preemption provision. *Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhodes Island, Inc.*, 507 U.S. 218, 224 (1993). Moreover, A consideration under the Supremacy Clause starts with the basic assumption

that Congress did not intend to displace state law. Id. (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Finally, [t]he Court has recognized that it cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much of this is left to the States.

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1985) (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289 (1971)).

Guided by these principles, the Supreme Court has developed its preemption precedent. Under *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and its progeny, the NLRA preempts state regulation of the use of economic weapons (i.e., strikes, lockouts, picketing, etc.) that Congress intended be left unregulated. The Machinists preemption doctrine recognizes that Congress intended to give parties . . . the right to make use of economic weapons, not explicitly set forth in the act, free of governmental interference. *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110-11 (1989) (*Golden State II*) (quoting *Machinists*, 427 U.S. at 154).

Under the *Garmon* preemption doctrine, which flows from *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the NLRA also preempts state regulation of an activity that the NLRA protects, prohibits, or arguably protects or prohibits. *Golden State Transit v. City of Los Angeles*, 475 U.S. 608, 613-14 (1986) (*Golden State I*). Specifically, *Garmon* preemption forbids state and local regulation of activities that are protected by section 7 of the [NLRA] or constitute an unfair labor practice under section 8. *Garmon*, 359 U.S. at 244. *Garmon* preemption is intended to preclude state interference with the National Labor Relation Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA. *Golden State I*, 475 U.S. at 613 (internal quotation marks omitted).

The proposed bill does not fall within either of those two categories of preempted laws. The Worker Privacy Act bans the discharge or discipline of employees to force them to attend and listen to speech unrelated to their job performance which involves matters of individual conscience. This is not what was at issue in *Chamber v. Brown*, No. 06-030 (June 19, 2008), the most recent Supreme Court case to consider *Machinists* preemption. The California statute that the Supreme Court found preempted in that case attempted to regulate union-related, non-coercive speech by employers. Applying the principles of *Machinists*, the Supreme Court disallowed the California statute on the basis that Congress intended

to leave unregulated the sort of non-coercive speech that the California statute sought to regulate.

The Worker Privacy Act does not seek to impose a labor relations policy at odds with the National Labor Relations Act. It is not like the statute found preempted in *Chamber v. Brown*. There, the Court found that the California statute interfered with free

debate in labor disputes, that its onerous enforcement scheme, punitive penalties, and burdensome record-keeping requirements pressured employers to forgo their free speech right. But the Worker Privacy Act does not prohibit employer speech. Its provisions are very different and do not create any similar pressure to forgo free speech rights. The Worker Privacy Act contains no ban on employer speech either directly through its provisions or indirectly through its enforcement scheme. It has no record-keeping requirements or punitive sanctions that chill employer speech.

The narrowly drawn prohibition of the Worker Privacy Act bars the discharge or discipline of workers to force their attendance, participation and forced listening to matters of individual conscience unrelated to job performance. It is the act of discharging or disciplining or threatening to do so—not employer speech—which is banned. Its ban is aimed at the discharge or discipline of employees as a means of forcing them to participate in and listen to non-job-related workplace speech directed at affecting their opinions and beliefs regarding politics and religion.

Unlike the California statute examined by the Supreme Court in *Chamber v. Brown*, the Worker Privacy Act neither denies employees' opportunities to listen freely nor employers' opportunities to speak freely. The Worker Privacy Act does not intrude on a fair and free election process under the National Labor Relations Act and does not interfere with robust debate. The Supreme Court's recent decision in *Chamber v. Brown* is not applicable to the Worker Privacy Act and does not require its preemption.