



Rob McKenna
ATTORNEY GENERAL OF WASHINGTON
1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

February 17, 2009

The Honorable Mike Hewitt
Senator, 16th District
P. O. Box 40416
Olympia, WA 98504-0416

Dear Senator Hewitt:

By letter previously acknowledged, you have requested an opinion on a question relating to a bill currently pending before the Legislature, Senate Bill 5446 (SB 5446). I have paraphrased your question as follows:

Are provisions of SB 5446 proposing to prohibit an employer from communicating with employees regarding “labor and other mutual aid organizations” preempted by the federal National Labor Relations Act?

BRIEF ANSWER

I conclude that the National Labor Relations Act preempts the provision of SB 5446 you ask about.

ANALYSIS

The bill you ask about, SB 5446,¹ proposes to prohibit employers from requiring employees to attend a meeting or otherwise receive a communication regarding political or religious matters. S.B. 5446, 61st Leg., Reg. Sess., at § 2(1) (Wash. 2009). The bill sets forth its own definition of “political matters” that includes, among other things, “matters directly related to . . . labor or other mutual aid organizations.” S.B. 5446, 61st Leg., Reg. Sess., at § 1(4) (Wash. 2009). The bill would apply to both public and private sector employers. S.B. 5446, 61st Leg., Reg. Sess., at § 1(3) (Wash. 2009) (defining “employer” by reference to RCW 49.12.005(3)(b)).

¹ The House of Representatives also has a companion bill under consideration, HB 1528. The two bills appear to be the same, and so I will refer only to the Senate version for convenience.

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As you point out, federal law generally governs labor relations through the National Labor Relations Act (NLRA). 29 U.S.C. §§ 141 *et seq.* As the Washington Supreme Court has recently observed, “federal law generally preempts the field of labor law”. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 828, 194 P.3d 221 (2008). Federal preemption stems from the Supremacy Clause of the federal constitution (U.S. Const. art. VI, cl. 2) and essentially means that when Congress legislates on a particular subject, “it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes.” *City of New York v. F.C.C.*, 486 U.S. 57, 63, 108 S. Ct. 1637, 100 L. Ed. 2d 48 (1988).

In the labor context, it is well established that the NLRA “forbids States to ‘regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.’ ” *Chamber of Commerce v. Brown*, ___ U.S. ___, 128 S. Ct. 2408, 2412, 171 L. Ed. 2d 264 (2008) (quoting *Wisconsin Dep’t of Indus. v. Gould, Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986)). In *Brown*, the United States Supreme Court re-iterated that “Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy.” *Brown*, 128 S. Ct. at 2412. The first type is known as “*Garmon* pre-emption”² and “ ‘is intended to preclude state interference with the National Labor Relations Board’s interpretation and active enforcement of the ‘integrated scheme of regulation’ established by the NLRA.’ ” *Id.* (quoting *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986)). The second type is referred to as “*Machinists* pre-emption” and forbids “States to regulate conduct that Congress intended ‘be unregulated because left “to be controlled by the free play of economic forces.” ’ ” *Brown*, 128 S. Ct. at 2412 (quoting *Machinists v. Wisconsin Empl. Relations Comm’n*, 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S. Ct. 373, 30 L. Ed. 2d 328 (1971))). Based upon these principles, the Court in *Brown* recently invalidated a California law that prohibited employers from using state funds to “assist, promote, or deter union organizing.” *Brown*, 128 S. Ct. at 2411 (quoting 2000 Cal. Stats. ch. 872, § 1). The Court reasoned that, given the preemptive effect of the NLRA, “California plainly could not directly regulate noncoercive speech about unionization by means of an express prohibition.” *Brown*, 128 S. Ct. at 2414-15.

SB 5446 would prohibit employers from communicating with employees concerning “labor or other mutual aid organizations.” The proposed bill would, if enacted, thus address subject matter pre-empted by federal law. Even when that speech is not coercive in nature, the NLRB pre-empts state regulation, because this is an area that Congress intended to leave unregulated and “controlled by the free play of market forces.” *Id.* at 2412.

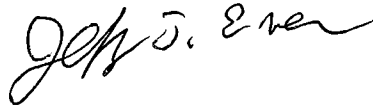
² See *San Diego Bldg. Trades Coun. v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959).

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I hope the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely,

A handwritten signature in cursive script that reads "Jeff T. Even".

JEFFREY T. EVEN
Deputy Solicitor General
(360) 586-0728

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