

LABOR MANAGEMNT RELATIONS BACKGROUND

Mandatory binding arbitration for first contracts. Legislation mandating binding arbitration for first contracts is clearly pre-empted by the National Labor Relations Act (NLRA), it reduces the incentives for good-faith bargaining and gives a third-party arbitrator significant power to write the first contract. One of the fundamental principles of the NLRA is that both parties must agree to use arbitration. Mandatory binding arbitration laws violate this principle by requiring binding arbitration if only one of the parties requests it. In addition, unions believe arbitration will yield a better first contract than negotiations with an employer. They have little incentive to bargain in good faith on the first contract because they could request arbitration six months after the union is certified. This is of major concern because the first contract covers the entire spectrum of the bargaining relationship.

Laws mandating binding arbitration for first contracts also give third parties broad and binding authority to create contract standards that will bind the parties under an agreement, even if only one of the parties requests arbitration. Arbitrators are often ill equipped and lack the necessary information to structure and dictate the terms of an initial contract. The result will be arbitration awards that vary widely from arbitrator to arbitrator, and may result in the imposition on businesses of contracts that are simply unworkable or unaffordable.

Employer neutrality in union-organizing campaigns. Two separate panels for the U.S. Court of Appeals for the Ninth Circuit in *Chamber of Commerce v. Lockyer* both found that a California law prohibiting employers receiving state funds in excess of \$10,000 from using the funds to advocate for or against union organizing was pre-empted by the NLRA. The panels concluded that the law was pre-empted because it substantially affects the collective bargaining system created by the NLRA. A main principle of the NLRA is that employers and employees must be able to engage in free and open debate about unionization. After the two panel hearings, the Ninth Circuit court met en banc and reversed the panel decisions (i.e. that the law was not preempted by the NLRA). The case has subsequently been appealed to the United States Supreme Court, where a decision awaits. Notably, the decision of the Ninth Circuit stands in direct conflict with the Second and Seventh United States Circuit Courts of Appeals.

In 2007, similar legislation was introduced in Minnesota that prohibited employers that receive state funds – whether through grants, or contracts for goods or services – from using them to discourage union organizing. The Minnesota Chamber opposed this bill because believing this legislation would be pre-empted by federal law because it would interfere with the National Labor Relations Act. This bill traveled through several House committees, but never received action on the House Floor. The Senate companion did not receive a hearing

Union recognition. State legislation that regulates the recognition of a union is also clearly pre-empted by the NLRA. The NLRA delegates to the National Labor Relations Board (NLRB) the power to conduct secret ballot elections to determine whether a group of employees wants to be represented by a union. An election will be held only after the NLRB determines if 30 percent of the employees have signed a union authorization card. Since the NLRA regulates union recognition, any state law would be in direct conflict with the act.

The U.S. Supreme Court also has ruled that employers have no duty to bargain with a union if it requests recognition based on a majority of signed authorization cards. It did so because there are several reasons an employee might sign a card other than desiring representation by a union. For example, an employee may be afraid of reprisals from the union or, while being sympathetic to unions in general, may not want to be represented by the particular union in question.

Moreover, the NLRB recently ruled in *Dana Corporation* (Sept. 29, 2007) that an employer's recognition of a union does not inhibit employees from petitioning for a decertification election. This case protects the right of employees to a secret ballot election in the event that the Employee Free Choice Act becomes law.

Unfair labor practices. State legislation that expands what is considered an unfair labor practice also would be pre-empted by the NLRA. Section 7 of the act defines employer and union conduct that is “unfair.” Therefore, states are prohibited from regulating in this area of labor law.

The Minnesota Legislature has considered unfair labor practice legislation in the past. For example, it considered making it an unfair labor practice for an employer to refuse to allow a union representative to be present at employer meetings where the employer’s views of unionization are discussed. Legislation like this should be opposed on its merits because it directly attacks the notion of employer control of the workplace. It does so because an employer would be forced to subsidize the union organizing of its own workplace through lost production time and by paying employees to hear the union’s message. Furthermore, the legislation does not require any showing that the union has been unable to have reasonable access to employees outside of the work premises or outside of work time.

Mandatory employee meetings. In 2006, the Minnesota Legislature debated a bill to prohibit mandatory employee meetings or communications about the employer’s opinion about “religious or political matters.” The term “political matters” was defined to include among other things the decision to join or not join a union. Section 8(c) of the NLRA prescribes an employer’s ability to communicate with its employees about union organizing activities. Therefore, it is likely pre-empted by the NLRA.

The legislation also prohibits meetings or communication about the decision to join political, social or community groups and activities. Since the U.S. Supreme Court has ruled that financial support of an organization is equivalent to joining an organization, this legislation would prohibit employer-sponsored fundraising drives for the United Way, American Cancer Society or similar organizations. In addition, the legislation would prohibit employers to solicit funding for a political action committee or communicate with employees about legislation that could affect the employer’s future. Many believe this likely violates the 1st and 14th Amendments to the U.S. Constitution.

2005 legislation. In 2005, the Senate considered legislation to create an international cargo zone. One version of the legislation required employers that wanted to take advantage of the cargo zone tax benefits to be neutral in union-organizing campaigns and recognize unions based on a card check. The constitutionality of these provisions is suspect because they would likely be pre-empted by the NLRA. They were not included in the final cargo zone legislation.

St. Paul ordinance. The St. Paul City Council considered a draft “living wage” policy that would require, among other things, businesses that receive city subsidies or city contract to demonstrate “responsible labor relations.” That term was defined as neutrality on union organizing, voluntary union recognition based on a card check, binding arbitration on the first union contract, providing a list of names and addresses of employees, and providing reasonable access to employees and facilities during non-work hours. The ordinance was put on hold and likely will be debated again in 2007.

Duluth ordinance. The Duluth City Council adopted an ordinance that requires employers in the hotel and restaurant industries that receive economic development assistance to agree to a “city protection agreement.” This agreement must include union recognition based on a card check, prohibition from the use of intimidation, reprisal or threats of reprisal, and prohibition of strikes and picketing by labor organizations that sign the agreement.

Equal time and notice to union representatives. In 2007, legislation was introduced that required employers to give notice and opportunity to unions to speak at meetings where employers are specifically discussing reasons not to certify a union. This notice and equal opportunity for unions to speak regarding union certification would have extended to all required employee meetings, as well as meetings that employers paid their employees for attendance. Although this legislation never received a hearing, the Chamber opposed it because it is most likely preempted by the NLRA.