

Client Alert

A report
for clients
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of the Firm June 2008

U.S. Supreme Court Strikes Down California's Attempt to Regulate Employer Speech

On June 19, 2008, in *Chamber of Commerce of the United States of America v. Brown*, No. 06-923, the U.S. Supreme Court reversed the Court of Appeals for the Ninth Circuit and held that the National Labor Relations Act ("NLRA") preempted a California law that barred employers receiving state funds from using the funding to engage in any activity that opposed union organizing activity, because the statute "impermissibly 'predicat[es] benefits on refraining from conduct protected by federal labor law.'"

The California Law – AB 1889

In 2000, California enacted AB 1889, which prohibited employers who receive more than \$10,000 in state funds from using those funds to "assist, promote or deter union organizing." The prohibition included expenditures of any kind, including the payment of employee salaries, attorneys' fees or payments to consultants, that were used in "any attempt by an employer to influence the decision of its employees" regarding whether or not they should join a union. Despite this seemingly neutral stance, another provision granted an exemption for expenditures that could be viewed as promoting unionization, such as allowing union meetings on company property or entering into voluntary recognition agreements.

The law imposed strict record keeping requirements on employers receiving state funds to ensure they had not improperly used those monies to oppose union organizing. Although AB 1889 did not specifically prohibit employers from using other funds for that purpose, it created a presumption that all expenditures from commingled state and non-state funds were made from the state funds.

Violation of the statute would result in severe sanctions, including repayment of the funds used for organizing activities, plus double that amount in civil penalties. The statute was enforceable both by the state attorney general and private parties, with the employer being required to pay a prevailing plaintiff's attorneys' fees and costs.

The District Court and Ninth Circuit Decisions

AB 1889 was challenged by the Chamber of Commerce in 2002. The District Court granted summary judgment on behalf of the Chamber, finding that the statute was preempted by the NLRA. The Ninth Circuit twice affirmed the lower court's decision. In 2004, a three judge panel held that the NLRA preempted AB 1889, because the California statute unlawfully interfered with the NLRA's protection of free debate over labor issues. The Ninth Circuit panel subsequently granted a rehearing and affirmed the District Court again.

However, in 2006 the court granted *en banc* review and upheld AB 1889, reasoning that AB 1889 was not preempted because (i) it applied only to the use of state funds, and was thus not an improper state regulation of the field of labor law, (ii) Congress had allowed some regulation of speech regarding union organizing, and (iii) Congress had enacted similar federal statutes that forbid the use of certain federal funds to influence union activities.

The Supreme Court Decision

In its 7-2 ruling, the Supreme Court rejected the Ninth Circuit's reasoning and held that the California law was preempted by the NLRA. The Court primarily relied on its previous decision in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), holding that the NLRA forbids the states from regulating conduct in the labor relations context that Congress intended to "be controlled by the free play of economic forces." In reviewing the history of the NLRA, in particular the Taft-Hartley Act amendments, which added Section 8(c), the "free speech" provision, the Court concluded that Congress

had meant to protect employer speech on union activity in order to foster a “robust and wide-open debate in labor disputes.” The California law clearly encroached on an employer’s ability to participate in the debate, and, thus, was preempted by the NLRA.

In reaching its conclusion, the Court rejected each of the Ninth Circuit’s justifications for upholding the law. First, although acknowledging that states can impose certain restrictions regarding unionization when they act as an employer or are otherwise purchasing services as a “market participant,” the Court concluded that the California law was an attempt to regulate employer speech. While AB 1889 purported to apply only to the use of state funds, it contained a specific negative restriction on employer speech on unionization, combined with strict compliance burdens and extensive litigation risks, all of which acted as a deterrent to any violation of the proscription. Thus, the statute improperly “plac[ed] considerable pressure on an employer either to forego his ‘free speech right to communicate his views to his employees’ or else refuse the receipt of any state funds.”

The Court next concluded that, while Congress had provided for certain limited restrictions on speech within 24 hours of a union election, Congress had clearly denied the National Labor Relations Board, and by extension the states, permission to regulate “the broader category of noncoercive speech encompassed by AB 1889.”

Finally, the several federal laws cited by the Ninth Circuit that prohibited the use of federal funds to influence union activities did not justify California’s intrusion into labor relations. The Court reasoned that while Congress had the authority to “to create tailored exceptions to otherwise applicable” federal laws, allowing the states to do so would open “the door to a 50 state patchwork of inconsistent labor policies.”

In dissent, Justices Breyer and Ginsburg took issue with the majority’s position that AB 1889’s “pending limitations amount to regulation that the NLRA pre-empts.” Justice Breyer opined that AB 1889 only prevented employers from using state funds to influence union activities. It did not prevent them from using non-state funds to do so. Accordingly, in his view AB 1889 did not represent the kind of regulation that the NLRA would pre-empt. The dissenters, however, did express concern about AB 1889’s stringent enforcement measures, and would have returned the case to the lower courts to determine if those measures would infringe an employer’s ability to use funds from non-state sources to comment on union activities.

Significance to Employers

The decision is an important victory for employers that receive funding of any kind from state governments. With the Employee Free Choice Act looming in the next Congress, employers who receive state funds in California can breathe a sigh of relief that they will not risk costly litigation simply by commenting on union related issues or by otherwise engaging in lawful activity in opposition to unionization. It is also likely that employers will be able to challenge state laws similar to AB 1889, including those already on the books and under challenge in New York, Ohio, and Maine.

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