CLIENT ALERTS & INSIGHTS

New York Challenges Captive Audience Meetings with Long-Rejected Principle

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On September 6, 2023, New York Governor Kathy Hochul signed legislation prohibiting employers from disciplining employees who choose not to attend captive audience meetings. Enactment of this legislation comes as no surprise, as Governor Hochul announced her intent to ban captive audience meetings in late spring 2023, and legislation facilitating that objective followed shortly on the heels of that announcement in both chambers of New York's legislature (see our prior alert here). New York joins a growing list of states enacting legislation to curb or outright prohibit captive audience meetings (to date, a list that also includes Connecticut, Maine, Minnesota, and Oregon).

However, it is questionable whether these state laws will survive legal challenges, particularly given conflicting federal law that may preempt these state initiatives.

Captive audience meetings have long been viewed as an essential tool for employers to present their case to remain union-free to the workforce during a union organizing campaign and prior to a union election. Captive audience meetings are intended to level the playing field between employers and unions in their ability to communicate with the employees about unionization. The propriety of captive audience meetings has also been recognized since the passage of the Taft-Hartley Act in 1947, which contains an explicit free speech proviso providing that an employer's expression of views, arguments, or opinions about a union does not constitute an unfair labor practice where such expression "contains no threat of reprisal or force or promise of benefit."

Despite this clear, longstanding, statutory blessing of the legality of captive audience meetings, New York's new law is framed as one that "[p]rotects employee freedom of speech and conscience" by prohibiting employers from compelling attendance at a meeting at which the employer will espouse "political matters," which is broadly defined to include "matters relating to . . . the decision to join or support any . . . labor organization."

New York's law, and the laws on the books in Connecticut, Maine, Minnesota, and Oregon, are likely to be subject to ongoing legal challenges on the grounds that states' interest in limiting an employer's authority to address union organization is a matter that has been preempted by federal law. Specifically, in *Chamber of Commerce of United States v. Brown*, 554 U.S. 60 (2008), the Supreme Court already ruled that the National Labor Relations Act (as amended by the Taft-Harley Act of 1947) preempted a state law in California designed to limit an employer's ability to advocate against union organization.

The California bill challenged in *Brown* sought to prohibit employers receiving state funds over $10,000 per year from using those funds to "assist, promote, or deter union organizing." The funds could not be used to inform employees about the risks of unionization but permitted using the funds

to cover expenses associated with providing union access to the workplace or voluntarily recognizing unions. In a 7-2 decision, the Supreme Court held that Congress intended for such activity to remain unregulated (relying on its prior preemption decision in *Machinists v. Wisconsin Employment Relations Comm,*, 427 U.S. 132 (1971)). Specifically, Justice Stevens wrote that Congress, not states, have the authority to create tailored exceptions to federal policy, and the mere fact that Congress imposed targeted restrictions on some union-related advocacy but not others did not invite states to override federal labor policy in those other settings. Justice Stevens also wrote in *Brown* that Congress in Taft-Hartley provided explicit direction to leave noncoercive speech unregulated, rejecting a counterargument from the Wagner Act that partisan employer speech interferes with an employee's choice regarding union representation. The California legislation in *Brown* advanced the same Wagner Act argument that Congress already rejected (and preempted) in Taft-Hartley.

Key Takeaways for Employers

New York's new law took effect immediately, and employers that continue to hold captive audience meetings are at risk of being charged with committing an unfair labor practice under the National Labor Relations Act, particularly given the recency of these legislative developments. Despite Taft-Hartley's legalization of captive audience meetings and decades of Supreme Court precedent upholding that permission, the NLRB has targeted captive audience meetings during the Biden administration pursuant to NLRB General Counsel Jennifer Abruzzo's April 2022 mandate in a GC guidance memo. As a result, despite the clear statutory and legal precedent permitting captive audience meetings for over 75 years, GC Abruzzo and a handful of states are at least creating costly obstacles to conducting such meetings in an effort to reduce their use.

Faced with the growing restrictions on captive audience meetings, employers (and particularly multistate employers) should stay abreast of developments in each of the states in which they operate to ensure that their anti-organizational activities do not run afoul of applicable state law. Given the size of New York's workforce, other states will likely look to New York and its new law as a guidepost regarding the extent to which a state can curb employers' responses to union organizations. And as the campaign against captive audience meetings continues to gain traction, employers should also be aware that a Board decision may ultimately reject captive audience meetings as unlawful, which would render the meetings unlawful nationwide unless and until such decision is overturned.

In the meantime, and even in New York and other states where captive audience meetings are no longer permitted, employers may lawfully be able to hold voluntary meetings with the workforce. This alternative reduces but does not entirely eliminate, the risk that the meeting will be deemed coercive and in violation of applicable state law. Employers could also post uncoercive messages on bulletin boards in their facilities to share their message about unionization without running afoul of these captive audience prohibitions. Furthermore, employers and supervisors may also use regular employee meetings, like weekly shift or safety meetings, to generally invite employees to volunteer any concerns or invite the use of existing open door policies to engage with employees regarding any issues the employees would like to be addressed. These tools are effective in staying engaged with the workforce, even outside the context of a union campaign.

To learn how these developments can affect your business, contact a member of Benesch's

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