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Judge throws out 'labor neutrality law'

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SYRACUSE — Senior U. S. District Judge Neal P. McCurn ruled on May 17 that New York's Labor Law Section 211-a was pre-empted by the National Labor Relations Act (NLRA), thus enjoining the state from implementing or enforcing the statute.

Section 211-a — known by its detractors as the "employers' gag law" and by its defenders as the "labor neutrality law" — states that "… no monies appropriated by the state for any purpose shall be used or made available to employers to train managers, supervisors or other administrative personnel regarding methods to discourage union organization." The law, which was expanded in December 2002, barred organizations that receive state funding, including Medicaid, from using such monies to either encourage or discourage union organizing.

Louis P. DiLorenzo, a labor attorney at Bond, Schoeneck & King, PLLC in Syracuse, says, "Dennis Rivera, the president of the Service Employees International Union 1199 (SEIU), was a prime mover in getting the law passed." Because union membership in the private sector has declined nationwide to 7.9 percent, DiLorenzo says, "unions are now targeting those industries that can't physically pick up and leave the area." Citing municipalities, universities, and healthcare complexes like hospitals and nursing homes as examples, he states that union strategy is not to engage in organizing members through frontal assaults but by superseding NLRA regulations through "card-check" activities encouraged by federal and state law. A card-check merely requires the union to present the employer with membership cards from a majority of the workers in order to be recognized, thus eliminating the need for organizing campaigns and secret ballots.

Plaintiffs in the case were a group of five health-care organizations, whose members or affiliates provide a broad range of health-care services, such as operating 220 acute-care hospitals, 300 residential, health-care facilities, and services to individuals with mental retardation and other developmental disabilities. The lead plaintiff was the Healthcare Association of New York State (HANYS).

In the suit, plaintiffs claimed that section 211-a is pre-empted by the NLRA; also, the state law is unconstitutional because it violates the first and 14th amendments. McCurn, in his decision, cited the *Machinists v. Wisconsin Employment Relations Comm'n* case of 1976, which "prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces." DiLorenzo adds that the "NLRA, now celebrating 70 years of experience, deliberately left gaps in its regulations so that market forces will act out on a level playing field, a form of civilized warfare."

McCurn addressed whether 211-a was sheltered from any preemption doctrines, because it had a proprietary (market participant) rather than a regulatory role. His conclusion: "211-a falls closer to the regulatory end of the continuum than it does to the proprietary end." He then went on to say that "th[is] regulatory scheme … effects [sic] the policy of neutrality in the labor arena. It does this by in essence allowing unions to actively participate in union organization campaigns, while at the same time significantly curtailing the ability of employers to voice their opposition to unions."

Speaking for HANYS — an organization representing 550 non-profit and public hospitals, nursing homes, home-care agencies, and other New York State health-care organizations — Matthew Cox said that he applauded the federal-court decision. Section 211-a "had prevented health-care providers from speaking freely with their own workers during a unionization campaign, [depriving] workers from hearing both sides of the debate." Further, Cox said it was impossible to follow state record-keeping requirements because money is fungible: Health-care providers simply couldn't distinguish money from multiple sources.

While Cox cast the decision as a free-speech issue, McCurn never addressed the constitutional questions raised by the plaintiffs. He focused only on the question of pre-emption in deciding the case.

Gerald T. Hathaway, an attorney with the nation's largest labor and employment-law firm representing management — Littler Mendelson, PC, says that "Judge McCurns's decision reinforces the law that states can't create broad-brush rules. States shouldn't be in the business of managing labor relations."

Hathaway assumes that the defendants in the case — Gov. George E. Pataki, Attorney General Eliot Spitzer, and New York State Commissioner of Labor Linda Angello — will exercise their right to appeal the case to the U.S. Second Circuit. The appeal will probably take six to 18 months to complete and could be followed by an appeal to the U.S. Supreme Court.

Hathaway feels that employers will now breathe a sigh of relief that they are once again free to voice their opinion on matters of union organizing while accepting state money. He also feels that the unions will have to change their card-check strategy while the wheels of justice grind slowly.

Richard J. Farfaglia, the director of communications for SEIU 1199 Upstate, says, "he hadn't had a chance to review the decision, but felt the law was constitutional. Employers shouldn't use taxpayer dollars either for or against labor-organizing activities." Farfaglia thought that "section 211-a was still good legislation; its purpose was appropriate and correct." He feels the state attorney general should "decide to appeal" the decision. SEIU 1199 has 250,000 members statewide. ❑

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