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BY EMAIL AND HAND DELIVERY

The Honorable Leonard A. Fasano
Senate Republican Leader
Legislative Office Building, Suite 3400
300 Capitol Avenue
Hartford, CT 06106-1591

Dear Leader Fasano:

You have asked for a formal opinion on whether Senate Bill 64, captioned *An Act Concerning Captive Audience Meetings* (SB 64), and Senate Bill 440, captioned *An Act Protecting Employee Freedom of Speech and Conscience* (SB 440), are preempted by the federal National Labor Relations Act (NLRA) and therefore unconstitutional under the Supremacy Clause of the U.S. Constitution.

As you note, Attorney General George Jepsen issued an opinion last year on proposed legislation, House Bill 5473 (2018), that was substantively identical to SB 64. That opinion concluded that a court would likely strike down as preempted under the NLRA the proposed legislation's prohibition on employers requiring employees to attend employer-sponsored meetings if the primary purpose of the meeting is to communicate the employer's opinion concerning the decision to join or support a labor organization. A.G. Op. No. 2018-02, 2018 WL 2215260 (April 26, 2018) (2018 Opinion). We stand behind that opinion, and for purposes of your inquiry as to SB 64, we refer you to it.

Senate Bill 440, however, is materially different from the proposed legislation that was the subject of the 2018 Opinion. As a generally applicable state law aimed at protecting the constitutional rights of all Connecticut employees, the law, if enacted, can be fairly defended as outside the scope of NLRA preemption as articulated by the courts.

Background

Senate Bill 440 would amend and clarify the scope of § 31-51q of the General Statutes; it does not create a new statute from whole cloth. Presently, § 31-51q imposes liability for damages on an employer, including the State and its political subdivisions, who subjects an employee to discipline or discharge for the employee's exercise of rights protected under the First Amendment of the U.S. Const. and §§ 3, 4 and 14 of Article I of the Conn. Const. Section 31-51q carves out from such liability employee activity that substantially or materially interferes with the employee's *bona fide* job performance or the working relationship between the employee and the employer. Conn. Gen Stat. § 31-51q; s*ee generally Trusz v. UBS Realty Investors, LLC*, 319 Conn. 175 (2015).

Senate Bill 440's proposed amendments to § 31-51q would do several things. First, it would expressly define the scope of the constitutional rights protected under the statute to include "the right of freedom of speech, freedom of religion and freedom of association, and shall include the right not to be required to listen to speech." SB 440, § 1(a)(3).

Second, it would impose liability on an employer for damages arising from discipline or discharge in derogation of such constitutional rights, including discipline or discharge related to the employee's exercise of such rights by refusing to attend an employer-sponsored meeting or to listening to speech or view communications, the primary purpose either of which is to communicate the employer's opinion on religious or political matters. *Id.*, § 1(b).

Third, it would make clear that certain employer activities are not prohibited, including communications required by law, communications necessary for employees to perform their duties, certain communications at institutions of higher education, casual conversations, and communications limited to managerial and supervisory employees. *Id.*, § 1(c).

Discussion

Under the Supremacy Clause of the U.S. Constitution, state law that is preempted by a congressional enactment must give way. *Sarrazin v. Coastal, Inc.*, 311 Conn. 581, 592 (2014). As discussed in the 2018 Opinion, U.S. Supreme Court precedent holds that Congress, through the enactment of the NLRA, has preempted state law in two ways.

First, "*Garmon* pre-emption" precludes "state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986) (quotation marks omitted); *see San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959). *Garmon* preemption prohibits states from regulating activity that "the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986). Second, "*Machinists* pre-emption" precludes states from regulating conduct that Congress intended to remain unregulated and left to "the free play of economic forces." *Lodge 76, Intern Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976) (quotation marks omitted); *accord Chamber of Commerce of the U.S. v. Brown*, 554 U.S. 60, 65 (2008).

As the 2018 Opinion also noted, the scope of NLRA preemption is not unlimited. In particular, it observed that "[t]he scope of preemption under the NLRA leaves intact broad state law authority over many issues that touch upon the employer-employee relationship." 2018 Opinion, at 5 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 757 (1985)). As the Supreme Court has indicated, NLRA preemption doctrine "does not sweep away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 188 (1978). Indeed, as the Court in *Garmon* itself stated, preemption does not extend to "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244.

For this reason, the Court has repeatedly stated that "'States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples.'" *Metropolitan Life*, 471 U.S. at 754 (quoting *DeCanas v. Bica*, 424 U.S. 351, 356 (1976)). Similarly, the Court has rejected preemption claims for state laws of general applicability that protect employees from a range of employer conduct. *See, e.g., Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 62 (1966) (defamation); *Farmer v. United Bhd. of Carpenters and Joiners of America, Local*

25, 430 U.S. 290, 302-03 (1977) (infliction of emotional distress); *International Union, United Auto., Aircraft and Agr. Implement Workers of America (UAW-CIO) v. Russell*, 356 U.S. 634 (1958) (malicious interference with lawful occupation).

The evident purpose of § 31-51q, as well as SB 440's proposed amendments, is to provide a cause of action for employees who have suffered adverse employment actions because of the exercise of their constitutional rights to free speech and conscience. SB 440's amendments would advance this purpose by amending and clarifying an existing statute and expressly defining the rights protected to include "the right to freedom of speech, freedom of religion and freedom of association, and shall include the right not to be required to listen to speech." SB 440, § 1(a)(3). The U.S. Supreme Court has expressly recognized that the First Amendment permits government to protect the interest of the unwilling listener who cannot avoid speech. *Hill v. Colorado*, 530 U.S. 703, 716-17 (2000); *Frisby v. Schultz*, 487 U.S. 474, 487 (1988).

For these reasons, we view SB 440 as materially different from the proposed legislation that was the subject of the 2018 Opinion. As part of the larger framework of § 31-51q, SB 440's amendments would comprise a generally applicable state law aimed at protecting the constitutional rights of all Connecticut employees. In this sense, a strong argument can be made that it falls beyond the reach of NLRA preemption and is more fairly characterized as akin to the kind of generally applicable, minimum standards legislation that the Supreme Court has concluded states retain the power to enact.

This is not to say that the question is free from doubt. We acknowledge that SB 440 could face a preemption challenge in the courts. But we are also ever mindful that enacted legislation carries with it a strong presumption of constitutionality. *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405 (2015). In light of that presumption, and the sound arguments that can be made in support of the view that SB 440 is not preempted, we conclude that it is defensible, and if enacted, this Office stands ready to defend it.

Very truly yours,

WILLIAM TONG