Lake Champlain Chamber

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Members of the House Committee on General and Housing
Vermont State House
115 State Street
Montpelier, VT 05633-5301

April 18, 2024

Member of the House Committee on General and Housing,
Thank you for allowing us the opportunity to share our concerns with S.102, which we've outlined below as a follow-up to our testimony per your request.

There are four issues we'd like to highlight with captive audience provision:

First, the language, as we understand it, is to prevent an employer from holding a mandatory meeting to counter union-forming activity, however, the application of this goes far beyond that, and we worry it could even include Diversity, Equity, and Inclusion, often referred to as DEI training.

We know some have shrugged that off, saying that nothing stops an employer from holding a meeting on DEI because the employer can talk about laws and policies around discrimination, however, that is not what DEI training is. It's about having people put themself in the shoes of someone who is not as privileged as them, and that will be perceived as political.

Would office fund drives for local charities or nonprofits fall under the captive audience provision?

Regarding union organization, it is reasonable for the employer to want to discuss with employees how operations might change after the formation of a bargaining unit, such as the role of seniority, changes in scheduling, and what negotiating collective bargaining units entails.

Second, what individuals perceive as political is subjective. During the pandemic, we had employers reporting that employees would claim that having to wear a mask is political. Now, this might not be a bone fide case, however, this could still create a great deal of stress and expense as the employee brings this language to their side.

This is an evergreen reminder that lawsuits, even when frivolous, nuisance, or when the employer ultimately succeeds, come at an astronomical cost of time, energy, and money.

Third, this legislature added language to the statute in 2021 that provides the union with a captive audience for new employees. Under 21 V.S.A. § 1738 the union must receive 60 minutes of time with the employee, at their usual worksite, with the employee paid for that time. This effectively crushes any case that the State of Vermont might want to make that they care explicitly about the ability of employees to not need to be compelled to sit through meetings on these topics and instead makes clear that the state wants to solely provide unions with a captive audience.

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Will this legislation be amended to repeal existing statutes that give union organizers a captive audience?

Fourth, to tie all of the items we've listed off already, we need not look any further than two states that attempted to advance similar legislation and have subsequently been subjected to legal battles.

Connecticut's Act Protecting Employee Freedom of Speech and Conscience makes it illegal for an employer to warn or discipline, carry out discipline, or discharge an employee on account of such employee's refusal to (A) attend an employer-sponsored meeting with the employer or its agent, representative or designee, the primary purpose of which is to communicate the employer's opinion concerning religious or political matters, or (B) listen to a "speech or view communications the primary purpose of which is to communicate the employer's opinion concerning religious or political matters."

Connecticut's bill is slightly more lenient than this bill, as it doesn't cover "casual conversations" if participation is voluntary. The law also does not apply to meetings limited to the employer's managerial and supervisory employees.

A credible case brought by businesses in second circuit court to invalidate this law contends that the law violates the constitutional guarantee of free speech and is preempted by the National Labor Relations Act. Broadly, there are two U.S. Supreme Court preemption theories that protect NRLA policy from state and local meddling.

- The Garmon preemption prohibits states and municipalities from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits."
- The Machinists preemption bars states and municipalities from regulating conduct that Congress intended to "be unregulated because it has been left to be controlled by the free play of economic forces."

Whether the NRLB might be entering a time of different perspective after a 75-year captive audience precedent, or if they do not, is strictly in the purview of the NRLB to assess that change, not the state legislatures who would be stepping into activity the NLRA "protects, prohibits, or arguably protects or prohibits."

Connecticut passed this with the understanding that it would trigger litigation, and it would be best to let them carry out that litigation, which would be costly and resource-intensive for their Attorney General's office, as outlined by Vermont's Solicitor General. Why put ourselves in the position to be sued? Why not let this play out in a neighboring state that shares the same appeals district?

While Connecticut is in line with the goal of this legislation, it is worth noting that challenging precedent on freedom of speech is a double-edged sword. On the opposite side of the political

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spectrum, Florida would like to see these precedents changed as well to support allowing a way for their passed legislation to achieve their goals.

The Florida legislation, the Individual Freedom Act, made it an unlawful employment practice for an employer to require employees to attend training or "any other required activity" that promotes any about eight listed topics related to race, color, sex, or national origin.

A lawsuit, Honeyfund.com Inc. v. Governor, State of Florida, followed by employers, and a Florida Court granted an injunction, rejecting Florida's argument that the statute does not regulate speech and only regulates "the conduct of making attendance at training events or sessions [covered by the IFA] mandatory" for employees."

Oddly enough, Connecticut and Florida are arguing the same things and facing the same obstacles in an attempt to achieve very different ways of regulating businesses. So, we have two ongoing cases, one in a nearby blue state taking place in the second circuit that covers Vermont as well and another for a very red state taking place in the United States Court of Appeals for the Eleventh Circuit.

If Florida wins their case, likely Connecticut will too, which will mean that not only Florida's legislation preventing DEI training will be valid, it will also mean that the Connecticut law around captive audiences can be used to prevent those trainings, as will this law if you decide to proceed.

Card check provision not in the spirit of democracy:

Generally, where card checks can be applied to in this legislation is limited to that which is not preempted by the National Labor Relations Act, so ultimately, this legislation will most affect municipalities.

While the card check proposal seems simple enough, when you work through how it plays out, it is not a process that creates a high probability of an outcome that is a fair and accurate representation of all the employees' desires. This is because it bypasses the democratic process in a way that excludes 49% of those who are affected by the result. The card check process doesn't ensure that everyone is included in the process; it only ensures that 50 percent plus one participant.

Imagine, if you will, if to run for your office, you did not need to have an election day instead, you only needed to collect enough petition signatures to get elected. That is effectively a card check. Should you be unseated from your current position because someone in your district was able to gain enough signatures this weekend?

If you are to disagree and think this is still reflective of the democratic process, then look at this as equivalent of gerrymandering. Just as some state legislatures try to carve out large swaths of voters who they know will not agree with, organizers might know which employees might not want to unionize, they could only seek the signatures needed by those they know will support bargaining

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unit formation. Imagine never being approached or having any discussion about forming a bargaining unit, and you one day find out you are in one.

Another concern often heard is that under the card check system, union organizers can approach employees directly and pressure them to sign union cards, which may result in some employees feeling coerced or intimidated into supporting the union. We have laws in our elections system that prevent campaigning within the places where people fill out their ballots, and we are afforded the privacy of a voting booth to have our decision be our own honest decision, free of interference or potential judgment. Card check deprives people of that.

We hope that you hit pause on both these ill-advised provisions and wait for further clarity from litigation in our neighboring state.

Sincerely,

Austin Robert Davis
Government Affairs Manager