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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 15, 2023

Representative Paul Holvey
900 Court Street NE H277
Salem OR 97301

Re: House Bill 3183 preemption concerns

Dear Representative Holvey:

You asked us to review and provide comments regarding a memorandum submitted by legal counsel for United Food and Commercial Workers Local 555 (UFCW) in response to our legal opinion dated April 13, 2023, which has subsequently been made publicly available.[1]

Discussion

At the outset, we clarify that the preemption concerns raised in our previous opinion are to advise you that, if enacted, certain provisions of HB 3183 may be susceptible to a federal preemption challenge and to highlight the arguments that could be raised as basis for such a challenge. The memorandum provided to us states that "[House Bill] 3183 is carefully crafted so as not to intrude on federal power as outlined in the *Garmon* and *Machinists* line of cases."[2] Whether the provisions at issue are preempted by the National Labor Relations Act (NLRA), would be a matter of first impression for the National Labor Relations Board (NLRB) and the courts. Although we do not agree with the memorandum's reasoning or conclusion, absent judicial guidance on this issue, we cannot predict with certainty how the NLRB or a court would ultimately decide.

As we understand it, the memorandum disagrees with the preemption concerns raised in our prior opinion relating to the provisions of HB 3183 that condition cannabis-related licensure on an applicant's attestation to remain neutral with respect to a labor organization's communications regarding union organizing[3] and the entering into a labor peace agreement with a bona fide labor organization.[4] The disagreement appears particularly directed toward the preemption arguments that could be raised with respect to the conduct that HB 3183 seeks to regulate and whether or not certain exceptions to preemption would apply.

As explained in our previous opinion, the NLRA[5] contains no express preemption provision. However, the United States Supreme Court has established two preemption doctrines

[1] Op. Leg. Counsel LC 4416 (April 13, 2023).
[2] Memorandum from Andrew Toney-Noland, Of Attorneys for United Food and Commercial Workers Local 555 at 1 (April 20, 2023) (included with your opinion request).
[3] House Bill 3183, section 2 (2).
[4] House Bill 3183, section 2 (2); -3 amendments to House Bill 3183, section 2 (2).
[5] 29 U.S.C. 151-169.

with respect to the NLRA. The first preemption doctrine, known as the *Garmon* preemption,[6] prohibits state regulation of activities that the "NLRA protects, prohibits, or arguably protects or prohibits."[7] Under the second preemption doctrine, known as the *Machinists* preemption,[8] states may not regulate certain labor-related activities that Congress intended to be unregulated and "'left to be controlled by the free play of economic forces.'"[9]

Employer noncoercive expression

The memorandum contends that "[n]othing in the text of this provision of HB 3183 and the -3 amendments [to HB 3183] infringes upon an employer's rights to engage in lawful, noncoercive speech that does not interfere with employee rights to engage in protected concerted activity under the National Labor Relations Act (NLRA)."[10] The memorandum bases that argument on the fact that HB 3183 does not define "neutral," but instead, leaves the meaning of that term to the negotiating parties.

We recognize that nothing in the language of HB 3183 explicitly restricts an applicant's right to express noncoercive views regarding union organization. However, even if the meaning of "neutrality" is left to the parties to negotiate, it is difficult to see how an employer's expression of views regarding the disadvantages of unionization could be considered "neutral."

Additionally, we believe that the language under the provisions of section 2 (2) of both the introduced version and the -3 amendments to HB 3183 that condition cannabis-related licensure and renewal on an applicant's entering into a labor agreement under which an applicant has agreed to remain neutral could be interpreted as effectively stifling an applicant's ability to engage in noncoercive expression, which is a type of economic weapon of self-help that Congress intended to leave unregulated under *Machinists* principles.[11]

In *Chamber of Commerce of U.S. v. Brown*,[12] the United States Supreme Court examined whether the NLRA preempted state statutes that prohibited employers that received state grants of a certain amount from using such funds to assist, promote, or deter union organizing. The Court held that the state statutes were preempted under the *Machinists* doctrine, because the statutes regulated employer speech about union organizing, which was contrary to Congress' protection of free debate.[13] In reaching its holding, the Court pointed to provisions of the NLRA that enumerated the permissible and impermissible mechanisms for promoting or opposing unionization,[14] that protect employees' rights to refrain from joining a union,[15] "which implies an underlying right to receive information opposing unionization[,]"[16] and that prohibit noncoercive expression regarding unionization from being used as evidence of an unfair labor practice[17] to conclude that that Congress clearly intended to leave noncoercive expression unregulated.

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[6] *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 79 S. Ct. 773 (1959).
[7] *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286, 106 S. Ct. 1057, 1061(1986), *citing Garmon* at 247, 781.
[8] *See Int'l Assoc. of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S. Ct. 2548 (1976).
[9] *Int'l Assoc. of Machinists* at 140, 2553, *quoting NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S. Ct. 373, 377 (1971).
[10] Toney-Noland Memorandum at 2.
[11] *Chamber of Commerce of the U.S. v. Brown,* 554 U.S. 60, 68, 128 S. Ct. 2408, 2414 (2008).
[12] *Brown*, 554 U.S. 60, 128 S. Ct. 2408.
[13] *Id*. at 68, 2414.
[14] 29 U.S.C. 158(a) and (b); *see also*, *Brown* at 68, 2414.
[15] 29 U.S.C.157.
[16] *Brown* at 68, 2414.
[17] 29 U.S.C. 158(c).

With respect to issues concerning NLRA preemption, "'judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'"[18] As stated above, we believe the provisions at issue seek to regulate noncoercive expression regarding union organization that Congress intended to be left unregulated. Under *Brown*, the state "could not directly regulate noncoercive speech about unionization by means of an express prohibition" or "indirectly regulate such conduct by imposing spending restrictions on the use of state funds."[19] Similarly, we believe that the state cannot indirectly regulate an employer's noncoercive speech by requiring, as a condition of licensure, a labor peace agreement that compels employer neutrality.

Regarding the concerns raised with respect to the *Machinists* preemption, the memorandum also asserts that "the legislature has chosen a statutory scheme that reflects the least intrusive means of enforcement in light of the state's interest in ensuring a stable labor-management environment across the cannabis industry."[20] As explained above, the question of preemption does not turn on the intrusiveness of state action, rather, "'[p]reemption analysis . . . turns on the actual content of [the State's] policy and its real effect on federal rights.'"[21] Nevertheless, the statutory scheme that is reflected in the relevant provisions of HB 3183 may not necessarily be the least intrusive means. For instance, a challenger might argue that rather than require applicants to enter into a labor peace agreement with a labor organization, an arguably less intrusive alternative might be to condition cannabis-related licensure on an applicant's attesting to not interfere with any of the rights afforded to employees under ORS 663.110.

Finally, as we discussed in our earlier opinion, under *Garmon* preemption principles, states may not regulate conduct or activity that is protected or arguably subject to the provisions of the NLRA. The text of NLRA makes it clear that an employer's noncoercive expression is protected activity.[22] Because section 2 (2) of HB 3183 seeks to limit that protected conduct through conditioning licensure upon the entering of a labor peace agreement under which an employer must attest to remain neutral with respect to union organizing efforts, we also believe that the provisions at issue may be vulnerable to a preemption challenge under *Garmon* principles.

Interference with the protected rights of employees

The memorandum asserts that our concern regarding "[t]he requirement that an applicant enter into a labor peace agreement with a bona fide labor organization that is 'attempting to represent the applicant's employees' arguably interferes with the rights of employees to select a representative of their own choosing"[23] indicates a misunderstanding of labor agreements. We acknowledge that nothing in the language of HB 3183 requires an applicant to sign a voluntary recognition agreement with a labor organization attempting to represent the applicant's employees. However, the memorandum fails to consider that, depending on the contractual provisions that are ultimately included in the labor peace agreement, a labor peace agreement could operate as the functional equivalent of a voluntary recognition agreement or otherwise arguably interfere with the rights of employees to select a representative of their own choosing.

[18] *Brown* at 69, 2414.
[19] *Brown* at 69, 2414-2415.
[20] Toney-Noland Memorandum at 2.
[21] *Brown* at 69, 2414, *quoting Lividas v. Bradshaw*, 512 U.S. 107, 119, 114 S. Ct. 2068, 2076 (1994).
[22] *Brown* at 68, 2414.
[23] Toney-Noland Memorandum at 1.

Under the -3 amendments to HB 3183, "labor peace agreement" is defined in terms of minimum requirements. Specifically, "labor peace agreement" is defined as "an agreement under which, at a minimum" an applicant or licensee agrees to remain neutral, and the bona fide labor organization agrees to refrain from strikes, work stoppages, boycotts and other types of economic interference.[24] Nothing in the language of either the introduced version or the -3 amendments to HB 3183 prohibits a labor peace agreement from including any contractual terms that potentially impact representation determinations. For instance, although a labor peace agreement may not necessarily require an employer's recognition of a union based on card check instead of a secret ballot election, nothing prohibits the applicant and the labor organization from entering into a labor peace agreement that includes negotiated contractual provisions to that effect. For these reasons, we believe that a challenger may argue that HB 3183 interferes with the rights of employees protected under the NLRA.

Local interest exception to *Garmon* preemption

The memorandum states that labor peace agreements have been used by states as a condition of certification in the casino and hospitality industries and compares such industries to the cannabis industry.[25] The memorandum concludes, without explanation, that because those industries "'touch[] interests so deeply rooted in local feeling and responsibility,'"[26] it can be inferred "that Congress did not intend to preempt the state's action."[27] Accordingly, we understand the memorandum to be arguing that the state's requirement of a labor peace agreement as a condition of cannabis-related licensure or renewal falls within the "local interest" exception to the *Garmon* preemption and therefore, should not be preempted. Without more, we cannot verify this assumption.

As previously explained, we believe that the provisions of HB 3183 that require a labor peace agreement as a condition of cannabis-related licensure seek to regulate conduct that is protected under the NLRA. In NLRA-preemption cases based on the primary jurisdiction of the NLRB, "a presumption of federal preemption applies even when the state law regulates conduct only arguably protected by federal law."[28] While the presumption of federal preemption recognizes an exception "when unusually 'deeply rooted' local interests are at stake[,]"[29] it is worth noting that that exception has ordinarily been applied in cases involving "state breach of contract actions by strike replacements, state trespass actions, or state tort remedies for intentional infliction of emotional distress"(citations omitted).[30] As noted, the memorandum fails to explain how the relevant provisions of HB 3183 would necessarily involve any of the matters just described in order for the "local interest" exception to apply.

Market participant immunity

With respect to the question of whether, absent a proprietary interest, state regulation may require, as a condition of licensure, that applicants and labor organizations enter into labor peace agreements, the memorandum argues that the fact that "a state is not a market participant does

[24] -3 amendments to House Bill 3183, section 2 (1)(g).
[25] Toney-Noland Memorandum at 3.
[26] *Id*., *quoting* Garmon, 359 U.S. at 244.
[27] Toney-Noland Memorandum at 3.
[28] *Brown v. Hotel and Restaurant Employees and Bartenders Intern. Union Local 54*, 468 U.S. 491, 502, 104 S. Ct. 3179, 3186 (1984).
[29] *Id*. at 502-503, 3186.
[30] *Id*. at 503, 3186.

not automatically mean that its actions are preempted."[31] The memorandum further contends that, given the belief that HB 3183 is not preempted, "[w]hether the State is acting as a market participant is ultimately irrelevant."[32]

"[P]re-emption doctrines apply only to state *regulation*."[33] The regulation in question is found in the provisions of HB 3183 that require a labor peace agreement as a condition of receiving cannabis-related licensure, a requirement that we believe arguably implicates federal preemption under the NLRA. The market participant immunity doctrine is one way in which state action may survive a preemption challenge by acting as a "market participant" rather than as a regulator.

The memorandum misstates that we rely on *Johnson v. Rancho Santiago Community College District*,[34] to reassert our belief that the labor peace agreement provisions of HB 3183 are vulnerable to a preemption challenge. On the contrary, we point to *Johnson* to examine whether the state's requirement of a labor peace agreement as a condition of cannabis-related licensure would qualify for market participant exemption from preemption or whether the state is acting as a regulator in imposing such a requirement.

In *Johnson*, the Ninth Circuit Court of Appeals examined whether a pre-hire project stabilization agreement that required certain labor standards on particular district construction projects was preempted under the NLRA. The court held that the project labor agreement was sufficiently narrow in scope to qualify for the market participation exemption from preemption. As we noted in our earlier opinion, in making that determination, the court relied on a two-prong test established in the Fifth Circuit case of *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas*,[35] which asks the following two questions:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?[36]

Contrary to the assertion in the memorandum, nothing in our earlier opinion suggests that both prongs of the above test must be met. That said, we provide further detail as to why we believe the state action fails to satisfy either prong. As we discussed in our earlier opinion, we find it difficult to see how the state could demonstrate a proprietary interest where the state is not engaged in any business or contractual relationship for procuring goods or services from an applicant for a cannabis-related license, nor providing any public funds or financial support to the

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[31] Toney-Noland Memorandum at 4.
[32] *Id.*
[33] *Building & Constr. Trades Council v. Assoc. Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227, 113 S. Ct. 1190, 1196 (1993).
[34] *Johnson v. Rancho Santiago Community College District*, 623 F.3d 1011 (9th Cir. 2010) (a project stabilization agreement [PSA] required, among other things, "established dispute-resolution mechanisms; required use of union 'hiring halls' to obtain workers; required all workers on covered projects to start paying union dues within seven days of their employment; and prohibited strikes, picketing, and other disruptions" and further "required all contractors and subcontractors working on a covered project to agree to the PSA and to the craft unions' master labor agreements, which required contractors to use the unions' apprenticeship programs and to contribute to union vacation, pension, and health plans." Id. at 1017.
[35] *Johnson*, 623 F.3d at 1023-1024.
[36] *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas*, 180 F.3d 686, 693 (5th Cir. 1999).

private entities. The memorandum concedes that the state is not likely to meet this proprietary interest prong.

With respect to the second prong, the memorandum claims that such regulation would not be subject to preemption because "the narrow scope of HB 3183 and its addressing of specific deficiencies in the State's workforce regulatory schema would satisfy either of the 'alternative' prongs offered in *Johnson* (though only one is required) and attach the market participant immunity described."[37] However, the memorandum fails to describe, and we fail to see, how HB 3183 is sufficiently narrow in scope to show "that the action is not regulatory"[38] under the second prong of the *Cardinal Towing* test.

In *Johnson*, the court found that the challenged project stabilization agreement was sufficiently narrow in scope to qualify for market participant immunity because the agreement applied only to campus improvement construction projects of a specific size and cost that were funded by a specific initiative and only for a limited time period.[39] Conversely, the requirements under section 2 (2) of HB 3183 would broadly apply to licenses and certifications related to the processing, retail, research and testing sectors within the cannabis industry. In addition, the scope of the labor peace agreement requirements are not conditions that narrowly apply only to certain applicants for a specific or limited duration (e.g., to first-time applicants applying for an initial license). Instead, applicants for cannabis-related licensure across the cannabis sector must comply with the requirements throughout the life cycle of a business. Furthermore, both the introduced version of HB 3183 and the -3 amendments include penalties for failing to comply with the labor peace agreement requirements. Moreover, the positions set forth in the memorandum affirm that HB 3183 is intended to accomplish regulatory goals. For example, the memorandum suggests that the "statutory scheme" proposed in HB 3183 strikes a balance between "the least intrusive means" of state enforcement of a regulation and the "state's interest in ensuring a stable labor-management environment across the cannabis industry"[40] and further describes HB 3183 as "addressing . . . specific deficiencies in the State's workforce regulatory schema."[41] For the forgoing reasons, we do not believe that the scope of HB 3183 is sufficiently narrow to overcome the inference that the state is acting as a regulator of labor relations with respect to licensees within the cannabis industry so as to qualify for market participation under the second prong.

Finally, the memorandum compares HB 3183 to provisions in ORS chapter 806 that "require[] that an individual enter into a contract with an auto insurance provider in order to purchase a vehicle from a dealer[,]" to "laws requiring employers to enter into contracts with a Workers' Compensation Insurance provider" and to the labor standards requirements applicable to certain renewable energy projects under chapter 51, Oregon Laws 2022 (Enrolled House Bill 4059).[42] As we understand it, the memorandum provides these examples to support its argument that the provisions at issue would not be preempted and thus, the state need not act as a market participant to condition cannabis-related licensure on the applicant's attesting to remain neutral regarding union organizing efforts and the entering into a labor peace agreement. The memorandum concludes, without offering any supporting evidence or legal analysis, that because these laws are not preempted by federal law, the state need not act as a market participant for purposes of requirements under HB 3183. Without more, we cannot verify these assumptions. However, we reiterate that market participation is one way for a state action to survive a

[37] Toney-Noland Memorandum at 4.
[38] *Johnson*, 623 F.3d at 1024.
[39] *Id.* at 1028.
[40] Toney-Noland Memorandum at 2.
[41] Toney-Noland Memorandum at 4.
[42] *Id.*

preemption challenge. And, as described above, we do not believe that HB 3183 meets either of the prongs under the *Cardinal Towing* test for market participation immunity to attach.

Summary

For the reasons discussed above, we believe that the provisions of HB 3183 that condition cannabis-related licensure on an applicant's attestation to remain neutral with respect to a labor organization's communications regarding union organizing and the entering into a labor peace agreement with a bona fide labor organization are susceptible to a federal preemption challenge because (1) the provisions at issue arguably regulate conduct that is protected or arguably protected under the NLRA; (2) the provisions at issue seek to regulate conduct that Congress intended to be unregulated and left to the "free play of economic forces";[43] and (3) we do not believe either the local interest exception or market participant exemption to preemption would apply. While we recognize that several states have passed similar legislation, the fact that none of been challenged thus far does not eliminate the risk that the provisions at issue may be susceptible to a preemption challenge.

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Very truly yours,

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[43] *See* cases cited *supra* note 9.