



**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL**

Washington, D.C. 20570

January 13, 2011

The Honorable Mark L. Shurtleff
Attorney General
State of Utah
Utah State Capitol Complex
350 North State Street Suite 230
SLC UT 84114-2320

Re: Preemption of State of Utah Constitution Article 4, Section 8
by the National Labor Relations Act

Dear Mr. Shurtleff:

I am writing to apprise you of the National Labor Relations Board's conclusion that a recently approved amendment to the Utah Constitution, Article 4, Section 8 (attached) ("the Amendment"), conflicts with the rights afforded individuals covered by the National Labor Relations Act. 29 U.S.C. 151, *et seq.* ("NLRA"). The purpose of this letter is to explain the Agency's position and to advise you that I have been authorized to bring a civil action in federal court to seek to invalidate the Amendment. See NLRB v. Nash-Finch Co., 404 U.S. 138, 144-147 (1971) (authorizing the NLRB to seek declaratory and injunctive relief to invalidate state laws that conflict with the NLRA). I also want to express our willingness to first discuss any alternative you can see to satisfy the Agency's desire to preclude persons from relying upon the Amendment so as to interfere with employees' rights under the NLRA.

The NLRA, enacted by Congress in 1935, is the primary law governing relations between employees, employers, and unions in the private sector. The NLRA implements the national labor policy of assuring "full freedom" in the choice of employee representation and encouraging collective bargaining as a means of maintaining industrial peace. 29 U.S.C. § 151. Section 7 of the NLRA guarantees the right of employees to organize and select their own bargaining representatives, as well as the right to refrain from all such activity. *Id.* at § 157. This Section 7 right of employees to select their own representatives is a "fundamental right." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

Congress could have conditioned that fundamental Section 7 right on the employees' choice "surviv[ing] the crucible of a secret ballot election." NLRB v. Gissel Packing Co., 395 U.S. 575, 598-599 n.14 (1969) (Gissel). But Congress did not do so.

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Section 9(a), 29 U.S.C. § 159(a), the section that defines the conditions under which a union may obtain the status of "exclusive representative," requires only that the union be "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes." As a result, "[a]lmost from the inception of the Act . . . it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation" Gissel, 395 U.S. at 596-597.

The recent Amendment to the Utah Constitution, Article 4, Section 8, approved by voters on November 2, 2010, conflicts with the employee rights and employer obligations set forth in the NLRA. Federal law provides employees two different paths to vindicate their Section 7 right to choose a representative: certification based on a Board-conducted secret ballot election *or* voluntary recognition based on other convincing evidence of majority support. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 309-310 (1974); Gissel, 395 U.S. at 596-597. Article 4, Section 8, by contrast, allows only one path to union representation. It states that a secret ballot vote is required for all elections to designate or authorize employee representation. By closing off an alternative route to union representation authorized and protected by the NLRA, this Amendment creates an actual conflict with private sector employees' Section 7 right to representatives of their own choosing. The Amendment is therefore preempted by operation of the Supremacy Clause of the United States Constitution. See U.S. Const. art. VI, cl. 2; Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54, 468 U.S. 491, 501 (1984); Livadas v. Bradshaw, 512 U.S. 107, 134-135 (1994) (finding conflict preemption where a state policy had "direct and detrimental effects on the federal statutory rights of employees"); NLRB v. State of North Dakota, 504 F. Supp. 2d 750, 758 (D.N.D. 2007) (finding statute requiring non-union members to pay the union for the costs of processing their grievances preempted as a matter of law because in actual conflict with employee rights under the NLRA).

The inevitable consequence of this Amendment is that Utah employers are placed under direct state law pressure to refuse to recognize – or withdraw recognition from – any labor organization lacking an election victory. In addition, employees unhappy with a union designated by the majority of their fellow employees and recognized by their employer in accordance with federal law could bring state court lawsuits against their employer and union claiming a violation of their constitutional rights. Cf. Adcock v. Freightliner LLC, 550 F.3d 369, 371, 373-375 (4th Cir. 2008) (upholding employer-union card check agreement in the face of a legal challenge brought by individual employees). In these circumstances, the Amendment impairs important federal rights of employees, employers, and unions covered by the NLRA in Utah.

If you agree with our legal position, I would welcome a judicially sanctioned stipulation concerning the unconstitutionality of the Amendment, so as to conserve state and federal resources. The Attorney General of Wisconsin recently executed such a stipulation in a preemption case. See Final Stipulation in Metro. Milwaukee Ass'n of

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Commerce v. Doyle, Case No. 10-C-0760 (E.D. Wis. Nov. 4, 2010) avail. at www.wispolitics.com/1006/Final_Stipulation.pdf (last visited Jan. 10, 2011).

In light of the significant impact of this Amendment, I request that any response to this letter on behalf of Utah be made within two weeks. Absent any response, I intend to initiate the lawsuit.

Please feel free to contact directly Mark G. Eskenazi, the attorney assigned to this matter (202) 273-1947), Deputy Assistant General Counsel Abby Propis Simms (202) 273-2934), or myself with any questions or to discuss the Board's position. Thank you for your attention to this matter. I look forward to hearing from you.

Sincerely yours,

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Enclosure

C

West's Utah Code Annotated Currentness

Constitution of Utah

▣ Article IV. Elections and Right of Suffrage

→ **Sec. 8. [Ballot to be secret]**

(1) All elections, including elections under state or federal law for public office, on an initiative or referendum, or to designate or authorize employee representation or individual representation, shall be by secret ballot.

(2) Nothing in this section may be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election , as long as secrecy in voting is preserved.

CREDIT(S)

HISTORICAL NOTES

Laws 2009, H.J.R. 8, § 1 rewrote the section, which formerly read:

“Sec. 8. [Ballot to be secret]

“All elections shall be by secret ballot. Nothing in this section shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election: Provided, That secrecy in voting be preserved.”

Laws 2009, H.J.R. 8, §§ 2 and 3, provide:

“Section 2. Submittal to voters.

“The lieutenant governor is directed to submit this proposed amendment to the voters of the state at the next regular general election in the manner provided by law.

“Section 3. Effective date.

“If the amendment proposed by this joint resolution is approved by a majority of those voting on it at the next regular general election, the amendment shall take effect on January 1, 2011.”

Laws 2009, H.J.R. 8, was approved by the electorate at the November 2, 2010 general election.

CROSS REFERENCES

Property qualification for voting prohibited, see Const. Art. 1, § 4.
Voting by secret ballot, see § 20A-3-102.

LIBRARY REFERENCES

Elections  28.
Westlaw Key Number Search: 144k28.
C.J.S. Elections § 201.

UNITED STATES SUPREME COURT

Ballots,

In general,

Party names, established political parties, affiliation, restrictions on use, see *Norman v Reed*, U.S.Ill.1992, 112 S.Ct. 698, 116 L.Ed.2d 711, on remand 180 Ill.Dec. 685, 154 Ill.2d 77, 607 N.E.2d 1198, certiorari denied 113 S.Ct. 3000, 509 U.S. 906, 125 L.Ed.2d 693.

Ballot form,

State regulation of congressional elections, ballot requirements for candidate information, see *Cook v. Gralike*, U.S.Mo.2001, 121 S.Ct. 1029, 525 U.S. 182.

Ballot measures,

Initiative and referendum, petition circulators, identification badges, registered voter requirement, see *Buckley v. American Constitutional Law Foundation*, U.S.Colo.1999, 119 S.Ct. 636.
Payment of petition circulators, see *Meyer v. Grant*, U.S.Colo.1988, 108 S.Ct. 1886, 486 U.S. 414, 100 L.Ed.2d 425.

Ballot petitions,

Ballot petitions, number of signatures required of new political parties in multidistrict political subdivisions, see *Norman v. Reed*, U.S.Ill.1992, 112 S.Ct. 698, 502 U.S. 279, 116 L.Ed.2d 711, on remand 180 Ill.Dec. 685, 154 Ill.2d 77, 607 N.E.2d 1198, certiorari denied 113 S.Ct. 3000, 125 L.Ed.2d 693.

Write-in votes,

Free speech, elections, prohibition on write-in voting, see *Burdick v. Takushi*, U.S.Haw.1992, 112 S.Ct. 2059, 119 L.Ed.2d 245.

NOTES OF DECISIONS

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1. Purpose

The secrecy of the ballot, guaranteed by Const. art. 4, § 8, is intended to protect voters from being unduly influenced or interfered with in the exercise of the franchise. *Hardy v. Beaver City*, 1912, 41 Utah 80, 125 P. 679. Elections 28

2. Construction and application

The secrecy of the ballot guaranteed by Const. art. 4, § 8 does not require perfect secrecy of the ballot. *Hardy v. Beaver City*, 1912, 41 Utah 80, 125 P. 679. Elections 28

3. Construction with other laws

So much of Act March 28, 1896, § 26, as provides for the identification of ballots by numbering them, conflicts with Const. art. 4, § 8, requiring that all elections shall be by secret ballot. *Stanton v. Hardy*, 1896, 14 Utah 380, 47 P. 1102; *Ritchie v. Richards*, 1896, 14 Utah 345, 47 P. 670.

4. Duty of Legislature

It is duty of lawmaking power to enact laws which will effect purpose of constitutional provision requiring secrecy in voting. Const. art. 4, § 8. *Evans v. Reiser*, 1931, 78 Utah 253, 2 P.2d 615, rehearing denied 78 Utah 307, 3 P.2d 253. Elections 28

5. Intention to destroy secrecy

The numbering of the ballots by election officers under the honest belief that the same is proper, and without intending to destroy the secrecy of the ballot, does not vitiate the election, because violating Const. art. 4, § 8. *Hardy v. Beaver City*, 1912, 41 Utah 80, 125 P. 679. Elections 218

6. Separation from other ballots

Constitutional provision requiring secrecy in voting contemplates that no one except voter shall see voter cast ballot, and also that ballot cast may not, because of markings unauthorized by law, be separated from other ballots. Const. art. 4, § 8. *Evans v. Reiser*, 1931, 78 Utah 253, 2 P.2d 615, rehearing denied 78 Utah 307, 3 P.2d 253. Elections 28

U.C.A. 1953, Const. Art. 4, § 8, UT CONST Art. 4, § 8

Current through 2010 General Session, including results from the November 2010 General Election.

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