



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 13, 2023

Representative Paul Holvey
900 Court Street NE H277
Salem OR 97301

Re: House Bill 3183

Dear Representative Holvey:

You asked three questions regarding House Bill 3183, which relates to labor peace requirements as a condition for cannabis-related licensure. We begin with a brief summary of the relevant provisions of HB 3183 and then proceed in answering each of your specific questions.

House Bill 3183

Section 2 (2) of HB 3183 requires the Oregon Liquor and Cannabis Commission to require an applicant,¹ as a condition for a cannabis-related license or renewal, to submit either of the following, along with an application for a license or renewal:

- (a) A signed declaration or attestation stating that the applicant will not interfere with communications from a representative of a labor organization informing the employees of the applicant of the rights afforded to employees under ORS 663.110; or
- (b) An attestation signed by the applicant and the labor organization certified to represent the employees of the applicant stating that the applicant and the labor organization have entered into and will abide by the terms of a labor peace agreement.

The -3 amendments² to HB 3183 replace the language in section 2 (2)(a) to require an applicant to submit with an application for licensure or renewal "a signed labor peace agreement entered into between the applicant and a bona fide labor organization actively engaged in representing or attempting to represent the applicant's employees." (Emphasis added.)

¹ As used in this opinion, "applicant" means an applicant for or a holder of a cannabis-related license or certification or renewal of a license or certification.

² The -3 amendments to HB 3183 make numerous changes to language of the introduced version of the bill that are neither relevant to this discussion nor change the outcome of our answers set forth in this opinion. Those changes include, but are not limited to the following:

- Providing the specific statutory references to the licenses and certificates that are subject to the licensure and certification requirements upon which the issuance and renewal of a cannabis-related license or certification are based.
- Defining "bona fide labor organization."
- Defining "employee" to exclude employees who perform agricultural labor.
- Providing a penalty structure in the event that a labor peace agreement is terminated.

Under both the introduced and amended versions of HB 3183, the meaning of a “labor peace agreement” can essentially be reduced to an agreement under which, at a minimum:

- The applicant agrees to remain neutral with respect to the bona fide labor organization’s representatives communicating with the applicant’s employees of the applicant regarding the rights concerning union organization and collective bargaining; and
- A labor organization has agreed to refrain from engaging in strikes, work stoppages, boycotts or other economic interference with the applicant’s business of the applicant or licensee to resolve a labor dispute.³

Questions and Answers

1. Does the NLRA preempt the state from enacting parameters for union/labor management activities contained in HB 3183?

If enacted, we think that both House Bill 3183 and the -3 amendments to HB 3183 would most likely be preempted under preemption principles outlined in *San Diego Bldg. & Constr. Trades Council v. Garmon*⁴ as a state law that seeks to regulate conduct that is, at the very least, arguably protected or prohibited by the National Labor Relations Act (NLRA)⁵. We also think that the provisions of both the introduced and amended versions of HB 3183 requiring the applicant and the labor organization to enter into a labor peace agreement as a condition of licensure, would likely be preempted under principles of *Int’l Assoc. of Machinists v. Wisconsin Employment Relations Commission*⁶ as an attempt to regulate conduct that Congress left “to be controlled by the free play of economic forces.”⁷

The Supremacy Clause of the United States Constitution states, in part:

“[t]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁸

The Supremacy Clause allows federal law—and, in some instances, federal regulations—to nullify contravening state laws and rules. The NLRA contains no express preemption provision; however, the United States Supreme Court has concluded that Congress intended the Act to preempt state laws and rules by reason of implied preemption under two theories of preemption, outlined below.

In *Garmon*, the United States Supreme Court determined that Congress intended to nullify state laws or rules that “[set] forth standards of conduct inconsistent with the substantive requirements of the NLRA,” and to prevent states “from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act.”⁹ It is well settled principle that

³ House Bill 3183, section 2 (1)(c); -3 amendments to House Bill 3183, section 2 (1)(g).

⁴ 359 U.S. 236, 79 S. Ct. 773 (1959).

⁵ 29 U.S.C. 151-169.

⁶ 427 U.S. 132, 96 S. Ct. 2548 (1976).

⁷ *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 92 S. Ct. 373, 144 (1971).

⁸ Article VI, clause 2, United States Constitution.

⁹ *Wisconsin Department of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 106 S. Ct. 1057, 286 (1986), citing *Garmon* at 247.

under the *Garmon* rule, “[s]tates may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.”¹⁰

In a subsequent preemption case, the United States Supreme Court held that Congress intended to leave certain types of labor-related activities unregulated and left to be controlled by the free play of economic forces.¹¹ This is known as the *Machinists* preemption rule. Essentially, the *Machinists* preemption rule prohibits state and local regulation that “upset[s] the balance of power between labor and management expressed in our national labor policy”¹² by “introduc[ing] some standard of properly ‘balanced’ bargaining power . . . [or defining] what economic sanctions might be permitted negotiating parties in an ‘ideal’ or ‘balanced’ state of collective bargaining.”¹³

Turning to the question of whether the NLRA preempts HB 3183, we believe that section 2 (2) of HB 3183, either as introduced or as amended by the -3 amendments, would likely be preempted under *Garmon* because it seeks to regulate conduct or activity that is actually or arguably protected or prohibited by the NLRA.

As previously stated, under the *Garmon* preemption rule, “[s]tates may not regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits.”¹⁴ When evaluating a question of *Garmon* preemption, the first inquiry necessarily must be “whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA.”¹⁵

The NLRA governs labor interactions between private sector employees and employers and unions. As a threshold matter, we must first discuss whether employers and employees engaged in the cannabis industry are subject to the protections and prohibitions under the NLRA.

It is important to note that questions of the scope of jurisdiction of the National Labor Relations Board (NLRB) may ultimately be decided by the board.¹⁶ For instance, where a labor dispute’s effect on commerce is not “sufficiently substantial to warrant the exercise of its jurisdiction,” the board may decline to assert jurisdiction.¹⁷

To date, the NLRB has not issued any formal decision regarding whether the protections and prohibitions under the NLRA apply generally to employers and employees in the cannabis industry. That said, the board appears to have demonstrated its willingness to assert jurisdiction in cases concerning allegations of unfair practices brought against employers operating cannabis businesses.¹⁸ We cannot say with certainty that the employers and employees in the cannabis industry are covered employers and employees for purposes of the protections and prohibitions of the NLRA. However, because the NLRA broadly defines the terms “employer”¹⁹ and

¹⁰ *Wisconsin Department of Industry* at 286.

¹¹ *Int’l Assoc. of Machinists* at 140, quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971).

¹² Roger C. Hartley, “Preemption’s Market Participant Immunity--A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies” 5 U. PA. J. Lab. & Emp. L. 229, 231 (2003), quoting *Garner v. Teamsters Union*, 346 U.S. 485, 500 (1953).

¹³ *Id.*, citing *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (*Golden State I*).

¹⁴ *Wisconsin Department of Industry* at 286.

¹⁵ *Local 926, Int’l Union of Operating Engineers v. Jones*, 460 U.S. 669, 103 S. Ct. 1453, 676 (1983).

¹⁶ 29 U.S.C. 164 (c)(1).

¹⁷ *Id.*

¹⁸ See, e.g., *Curaleaf Massachusetts, Inc. and United Food and Commercial Workers Union Local 328*, 2021 WL 3036484 (2021).

¹⁹ 29 U.S.C. 152 (2).

“employee”²⁰ we believe it’s reasonable to expect that the board will assert jurisdiction and bring such employers and employees within the scope of coverage of the NLRA.

Employee rights under the NLRA include “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”²¹ Concerted activities protected under the NLRA include the right to strike, economic picketing and other work stoppages.²² The NLRA also protects employees’ right to refrain from engaging in those protected activities.²³

Section 2 (2) of HB 3183 requires applicants, as a condition for cannabis-related licensure or renewal, to either engage in or refrain from engaging in certain labor-related activities that are protected under the NLRA, and therefore would likely be preempted under *Garmon* preemption principles.

First, under the provisions of section 2 (2)(b) of the -3 amendments to HB 3183, the state essentially compels an applicant and a bona fide labor organization actively engaged in representing or attempting to represent the applicant’s employees to enter into a labor peace agreement as a condition of licensure or renewal. As noted above, employee rights under the NLRA include “the right to bargain collectively through representatives of their own choosing.”²⁴ The 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.

Moreover, under the NLRA, employers also have the right to express views regarding the advantages and disadvantages of joining or forming a union, provided that such expression “contains no threat of reprisal or force or promise of benefit.”²⁵ By conditioning cannabis-related licensure and renewal upon an applicant’s attesting to remain neutral regarding labor organization communication with the applicant’s employees, we believe that HB 3183 and the -3 amendments to HB 3183 also infringe on an employer’s ability to express noncoercive views regarding union organization.

We also think that the provisions of HB 3183 and the -3 amendments to HB 3183 requiring the applicant and a bona fide labor organization to enter into a labor peace agreement would likely be preempted under *Machinists* preemption principles as an attempt to regulate conduct that Congress left “to be controlled by the free play of economic forces.”²⁶ A “labor peace agreement” as defined in HB 3183 and the -3 amendments to HB 3183, must require, at a minimum, that a signatory bona fide labor organization “refrain from engaging in strikes, work stoppages, boycotts or other economic interference” with the business of the applicant or licensee “to resolve a labor dispute,” all of which are concerted activities protected under the NLRA²⁷ and

²⁰ 29 U.S.C. 152 (3).

²¹ 29 U.S.C. 157.

²² 29 U.S.C. 163.

²³ *Id.*

²⁴ 29 U.S.C. 157.

²⁵ 29 U.S.C. 158 (c).

²⁶ *NLRB* 404 U.S. at 144.

²⁷ 29 U.S.C. 163 (stating that “[n]othing in this [Act], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.”).

which the *Machinists* doctrine makes clear are economic “weapon[s] of self-help” that were meant to be left unregulated.²⁸

For the reasons stated above, we believe that the language of HB 3183, either as introduced or as amended by the -3 amendments, attempts to regulate activities that are, at the very least, arguably protected or prohibited under the NLRA and would most likely be preempted under the *Garmon* rule. We also believe that the provisions under section 2 (2)(b) conditioning cannabis-related licensure and renewal upon the entering of a labor peace agreement would contravene the principles set forth in *Machinists* by removing a labor organization’s ability to engage in activities that were meant to be left unregulated.

2. Does the NLRA or other federal regulation preempt state legislation enacting union/labor management activities in an industry considered illegal at the federal level as presented in HB 3183?

As discussed in our answer to question 1, we think that the provisions of HB 3183 that seek to regulate labor relations between private sector employers and employees and unions would be preempted under both *Garmon* and *Machinists* principles. Our answer remains the same regardless of whether the labor relations occur in an industry that is considered illegal at the federal level.

For the reasons that follow, we believe that the fact that an industry is considered illegal under one federal law does not necessarily constrain the NLRA’s application over private sector labor relations in that industry. For purposes of determining whether federal law preempts a state law that seeks to regulate private sector labor relations, the relevant inquiry would still depend on whether the state law seeks to regulate labor relations that are protected or prohibited or arguably protected or prohibited by the NLRA, or whether the state law attempts to regulate in areas that Congress intended to be left unregulated. The preemption question would not turn on the fact that cannabis enterprise activities are illegal under federal law.

Regardless of the cannabis industry’s illegal status at the federal level,²⁹ federal agencies continue to exercise jurisdiction over employers in the industry. For instance, the federal Occupational Health and Safety Administration recently conducted an investigation at a cannabis business in response to a fatality that arose from an employee’s asthma attack from exposure to cannabis dust.³⁰

In the context of federal labor law, a legal advice memorandum released by the NLRB’s Office of General Counsel concluded that the NLRB had jurisdiction over a labor dispute between employers and the marijuana processing assistants employed by the employer, despite the fact that the underlying marijuana enterprise violated federal law.³¹ Specifically, the memo suggested that the board should exercise jurisdiction over medical marijuana companies, stating: “[t]hat the

²⁸ See *American Hotel and Lodging Association v. City of Los Angeles*, 834 F.3d 958, 963 (9th Cir. 2016), citing *Int’l Assoc. of Machinists* at 146.

²⁹ Marijuana remains classified as a Schedule I drug under the Controlled Substances Act (21 U.S.C. 812(c)); see also 21 U.S.C. 844 (prohibiting possession of marijuana).

³⁰ See Occupational Safety and Health Administration, Inspection Detail for Inspection Nr. 1572011.015, Trulieve Holyoke Holdings LLC, https://www.osha.gov/ords/imis/establishment.inspection_detail?id=1572011.015 (last visited April 11, 2023).

³¹ National Labor Relations Board, Advice Memorandum from Office of the General Counsel re: Northeast Patients Group dba Wellness Connection of Maine, Case Number 01-CA-104979 (October 25, 2013), <https://www.nlr.gov/case/01-CA-104979> (last visited April 11, 2023).

[e]mployer is violating one federal law, does not give it license to violate another.”³² Although the NLRB’s advice memorandum is not binding precedent, the memo provides some indication that the NLRB would likely assert jurisdiction over labor disputes concerning employers and employees in the cannabis industry that meet the monetary jurisdictional thresholds, regardless of the illegality of the underlying industry.

3. Does the state without a proprietary interest have authority to dictate terms between private sector business and private sector unions under the Taft Hartley Act or other constitutional or federal provisions?

We understand you to be asking whether, absent a proprietary interest, state regulation may require, as a condition of licensure, applicants and labor organizations to enter into labor peace agreements, the terms of which require the applicant to remain neutral with respect to a labor organization’s organizing efforts in exchange for the labor organization’s pledge not to strike or engage in other forms of work stoppages or interference with the applicant’s business. The answer is no.

Labor peace agreements are a tool by which private employers and unions may balance their respective interests regarding labor relations. Nothing in federal labor law prohibits those private actors from voluntarily deciding to enter into agreements that demonstrate a commitment to neutrality.

However, states may impose requirements of labor peace agreements on private enterprises only when the state is acting as a “market participant” and has an economic or proprietary interest in the business.³³ When a state is acting in a proprietary capacity versus that as a regulator, the state acts as a “market participant” and may be immune from preemption. To determine whether the state is acting in a proprietary capacity or acting as a regulator, the court applies a two-prong test which first asks whether “the challenged governmental action [is] undertaken in pursuit of the ‘efficient procurement of needed goods and services,’ as one might expect of a private business in the same situation,”³⁴ and second, whether “the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than [to] address a specific proprietary problem.”³⁵

Here, by requiring a labor peace agreement as a condition for cannabis-related licensure, the state is acting as a regulator of private conduct. The labor peace agreement provisions do not concern the state as a party to a contract with either of the private businesses. On the contrary, the labor peace agreement provisions only involve a private contractual relationship between private entities. Additionally, it is difficult to see how the state could demonstrate having a proprietary interest where the state is not engaged in doing business or procuring goods or services from an applicant, nor providing any public funds or other financial support to the private entities. Absent such a showing, we think a court would find the labor peace agreement provisions as attempting to regulate labor activities rather than serving the state’s need to protect any proprietary interest. Accordingly, the market participant immunity would not attach, and the provisions would likely be preempted.

³² *Id.* at 11, citing *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 939 (8th Cir. 2013).

³³ See *Johnson v. Rancho Santiago Community College District*, 623 F.3d 1011, 1023 (9th Cir. 2010) (explaining that for purposes of federal labor law preemption, Congress preempts only state regulation and not actions a state takes as a market participant).

³⁴ *Airline Service Providers Association v. Los Angeles World Airports*, 873 F.3d 1074, 1080 (2017), citing *Johnson* at 1023.

³⁵ *Johnson* at 1023-1024.

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Very truly yours,

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A handwritten signature in black ink, appearing to read 'js', is positioned below the typed name of the signatory.

By
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