



## **Worker Freedom from Employer Intimidation Act Violates First Amendment**

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### **For Discussion Only**

On July 26, 2006, New Jersey Governor Jon S. Corzine signed P.L. 2006 Ch. 53, the “Worker Freedom from Employer Intimidation Act” into law. This statute, which went into effect immediately, is designed to protect New Jersey employees from employer intimidation by prohibiting most employers from requiring their employees to attend employer sponsored meetings or participate in any communication whose purpose is to convey the employer’s opinion about religious or political matters. In practice, the Act most likely violates the First Amendment and/or is preempted by the National Labor Relations Act or the Federal Election Campaign Act.

The statute prohibits, with certain exceptions, employers from requiring their employees to “attend an employer-sponsored meeting,” or to “participate in any communications with the employer,” where the purpose of the communication is to communicate the employer’s opinion about religious or political matters. “Political matters” are broadly defined to include “political party affiliations and decisions to join or not join or participate in any lawful political, social, or community organization or activity.”

Union organizing activity, however, is not covered. The version of the law as originally introduced in the New Jersey General Assembly would have included “labor organizations” in the definition of political activity, and thus, arguably, would have prevented employers from communicating with their employees in response to a union organizing campaign. If enacted, such a prohibition would clearly have raised concerns that it was preempted by federal law, since the federal National Labor Relations Board regulates an employer’s conduct in the course of an organizing campaign. In any event, the Senate Labor Committee dropped “labor organizations” from the definition of “political activity” under the statute, and thus, the Act does not prohibit an employer from communicating with its workforce in response to a union organizing campaign.

The statute also provides that it is not to be interpreted as preventing an employer from allowing its employees to attend employer-sponsored meetings or providing other communications to the employees, so long as the employer notifies the employees that they are free to refuse to attend the meetings or accept the communications without penalty.

In response to concerns raised in the business community about the scope of the phrase, “participate in any communications,” Governor Corzine stated in a signing statement that he did not interpret the phrase to prohibit an employer from merely sending an e-mail to employees, which the employee is free to delete or disregard, but the phrase must be interpreted in the context of the phrase “attend a meeting.” Thus, in the Governor’s view, the phrase “participate in any communications” is “intended to cover interactive communications such as video-conferences and tele-conferences, and not simple e-mails.”

The statute contains several exceptions. New Jersey employers may continue to communicate information about religious or political matters where they are required by law to do so, but only to the extent required by law. Religious organizations are permitted to require their employees to attend employer-sponsored meetings and participate in communications concerning their religious beliefs, practices, or tenets. Likewise, political organizations may require their employees to attend employer sponsored meetings and participate in communications relating to their political tenets or purposes. Finally, educational institutions may continue to require their students and instructors to attend lectures on political or religious matters that are part of the regular course work at the institution.

Still, the Act burdens the right for employers to speak with their employees about political matters. In *NLRB v. Gissel Packing Co.* (1969), the U.S. Supreme Court reinforced the notion that an employer's First Amendment free speech right was entrenched in section 8(c) of the National Labor Relations Act. When Congress added 8(c) to the NLRA in 1947 it was expressly to ensure that "an employer's free speech right to communicate his views to his employees [was] firmly established..." These views can be about labor unions or about political matters in general and can be expressed during captive audience meetings, which have been considered lawful under the NLRA for over sixty years.

It is well-settled, that the States may not regulate “activity that the NLRA protects, prohibits, or arguably protects or prohibits.” *Gould, Inc.*, 475 U.S. at 286 (citing *San Diego Bldg. Trades Coun. v. Garmon*, 359 U.S. 236, 244, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)). In *Garmon*, the Court explained that Congress intended to preempt state regulation that potentially impaired the jurisdiction of the Board as the federal forum for the resolution of labor disputes. State law cannot regulate the same employer or employee conduct that Congress empowered the Board to regulate under uniform national law. *See Garmon*, 359 U.S. at 242-44; *see also Gould, Inc.*, 475 U.S. at 286. When the conduct to be regulated is “plainly within the central aim of federal regulation,” then state regulation presents a “danger of conflict between power asserted by Congress and requirements imposed by state law” and “potential frustration of national purposes.” *Garmon*, 359 U.S. at 244.

The Federal Election Campaign Act (FECA) also regulates employers’ political speech. The statute provides that corporations are permitted unlimited communication with and solicitation of shareholders and executive and administrative personnel (the corporation’s “restricted class”). Rank-and-file employees, on the other hand, could be solicited for corporate Political Action Committees (PACs) only twice a year (originally pegged to primary and general election seasons), only by mail sent to their home addresses, and only through an accounting system that