Fact Sheet
National Labor Relations Board

January 14, 2011

State Constitutional Amendments Conflict With the NLRA

- **Operation of the Supremacy Clause of the United States Constitution**. State enactments that conflict with federal laws such as the National Labor Relations Act are invalid by operation of the Supremacy Clause of the U.S. Constitution. U.S. Const. Art. VI, cl. 2. That clause states:

  > **This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;** and all Treaties made, or which shall be made, under the Authority 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.**

- **Board Authorization of Lawsuits against Four States.** On January 6, 2011 the National Labor Relations Board authorized the Acting General Counsel to file lawsuits against the States of Arizona, South Carolina, South Dakota, and Utah in order to enjoin the application or enforcement of recently approved State Constitutional Amendments insofar as they conflict with the federal rights of private sector employees to designate a union to represent them.

- **The Nature of the State Amendments.** The four Amendments differ in language, but all conflict with federal law by closing off a well-established path to union representation recognized by the Supreme Court and protected by the National Labor Relations Act. The Amendments require secret ballot elections in circumstances where federal law permits private sector employees to express their choice of union representation by other means. South Carolina and Utah provide an absolute guarantee of a secret ballot election. Arizona and South Dakota require a secret ballot election whenever an election is permitted by state or federal law.

- **Effective Dates of the Amendments**. Voters in the States approved the Amendments on November 2, 2010. However, the Amendments become effective on different dates. The first was South Dakota's, which became effective November 2, 2010. Utah's became effective January 1, 2011. Unless South Carolina and Arizona fail to take additional action, the amendments in those states will become effective shortly.

- **Agency Communication with the States.** In letters dated January 13 and delivered January 14, the Acting General Counsel communicated with the States to explain the Agency's position regarding the federal-state conflict created by the Amendments, and to inform the States that the Board has authorized the commencement of civil actions in federal court if necessary to invalidate the Amendments.

- **Precedent for the Lawsuits.** The authority of the Board to bring such lawsuits was long ago settled. In NLRB v. Nash-Finch Co., 404 U.S. 138, 144-147 (1971), the U.S. Supreme Court upheld the NLRB's authority to seek federal court injunctions against state actions that conflict with federal rights. On several occasions in recent years, the Board has either initiated or participated in litigation seeking to invalidate state laws inconsistent with the NLRA. For example, in NLRB v. State of North Dakota, 504 F. Supp. 2d 750 (D.N.D. 2007), the Board successfully argued that a state statute requiring non-union members to pay the union for the costs of processing their grievances conflicted with federal law. Other lawsuits where the Board has acted to protect federal rights from state interference include Chamber of Commerce v. Brown, 554 U.S. 60 (2008) (statute impaired employer's right to campaign for or against unionization); Livadas v. Bradshaw, 512 U.S. 107 (1994) (state's interpretation of statute impaired employees' right to collective bargaining representation); Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277 (7th Cir. 2005) (ordinance impaired employer's right to decide whether to enter a card check and labor peace agreement); and NLRB v. State of Illinois Dep't of Emp't Sec., 988 F.2d 735 (7th Cir. 1993) (statute impaired employees' receipt of a back pay award).

- **Federal Law at Issue: NLRA Section 7 Grants Employees Two Paths to Vindicate Their Rights**. Section 7 of the NLRA (29 U.S.C. § 157) guarantees the right of employees to organize and select their own bargaining representatives, as well as the right to refrain from all such activity. The Supreme Court has long recognized that Congress did not condition that fundamental right on the employees' manifesting their choice in a secret ballot election. Instead, federal law provides employees two 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 reliable evidence of majority support. Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 309-310 (1974); NLRB v. Gissel Packing Co., 395 U.S. 575, 596-599 (1969).

- **Impact of the Amendments on Private Sector Employees and Employers.** The State Amendments' impair the rights that federal law grants employees and employers. The option that federal law gives employers to act on employee petitions or written authorizations of union representation is denied by the States. Instead, employers are placed under direct state law pressure to refuse to recognize – or

withdraw recognition from – their employees' choice of a bargaining representative if that representative has not been designated in a secret ballot election. In addition, even though employees have designated their choice of a union representative in accordance with federal law and federal law obliges their employer to bargain with that representative, the State Amendments invite employees unhappy with a union designated by the majority of their fellow employees to bring state court lawsuits claiming a violation of their state constitutional rights.

For further information, please contact the NLRB Office of Public Affairs at 202-273-1991, or publicinfo@nlrb.gov.

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