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July 6, 2011

Opinion No. 11-54

Selection of exclusive bargaining representative

QUESTIONS

1. Do any provisions in 2011 Tennessee Public Chapter No. 502 conflict with federal law, including, but not limited to, the National Labor Relations Act of 1935 (NLRA), as amended, and any rules, regulations or guidelines promulgated thereto and, if so, are any provisions in Public Chapter No. 502 thereby pre-empted by federal law pursuant to the Supremacy Clause of the United States Constitution?

2. Does the language in 2011 Tennessee Public Chapter No. 502, which would amend Tenn. Code Ann. § 50-1-701, violate the United States Constitution, and all rights and protections guaranteed herein?

OPINIONS

1. No, the bill does not conflict with federal law and is not pre-empted by federal law.

2. No, the bill does not appear to violate the United States Constitution.

ANALYSIS

1. Section (1)(a) of 2011 Tennessee Public Chapter No. 502 provides as follows:

> All employees and employers in this state, when seeking to designate an exclusive bargaining representative through an election permitted by state or federal law, have the right to make such designation by secret ballot, when secret ballot is permitted by such law; under such circumstance, no alternative means of designation shall be used in this state as convincing evidence of employee majority support.

Concern has been raised that the above subsection of 2011 Tennessee Public Chapter No. 502 may conflict with federal labor law. However, there is no conflict. The potential for a pre-emption conflict with federal law stems from the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. § 141, *et seq*. The NLRA recognizes secret ballot elections as one means which can be

used by labor organizations to demonstrate that they have majority support to establish the organization as the exclusive bargaining representative for the purposes of collective bargaining with an employer. *See* 29 U.S.C. § 159. In *N.L.R.B. v. Gissel Packing Co.,* 395 U.S. 575 (1969), the United States Supreme Court held that the NLRA does not require a secret ballot election as the only method for the selection of an exclusive bargaining representative. Thus, should a state attempt to restrict this federal right, a pre-emption conflict would arise.

The above law does not establish secret ballot elections as the only means by which a labor organization may select an exclusive bargaining representative for the purposes of collective bargaining. The law states that should employees and employers seek to designate an exclusive bargaining representative through an election, they have the right to a secret ballot election; if a secret ballot election is chosen, no alternative means of designation shall be used. The law does not foreclose the option of selecting an exclusive bargaining representative through means other than secret ballot election when employees or employers seek to designate an exclusive bargaining representative through other means.

2. The law does not appear to violate any provision of the United States Constitution.

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Requested by:

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