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EMPLOYMENT LAW

Wage Transparency Laws

By Michael Starr and Christine Wagner

Colorado recently joined at least two other states in passing a law restricting the ability of employers to discipline or discharge their employees for comparing or otherwise discussing their salaries with one another. Other states are considering similar "wage transparency" legislation, and it is likely to gain traction among even more states following the Democratic electoral gains this November. But these wage-transparency laws may, in fact, lack legal effect due to the doctrine of federal labor law pre-emption. The National Labor Relations Act (NLRA) is popularly understood to deal only with unions and employers with unionized employees. But there are circumstances in which the NLRA, as interpreted by the National Labor Relations Board (NLRB), regulates matters affecting both union and nonunion employees—and this looks to be one of those.

Under the doctrine of labor law preemption, state laws that regulate conduct falling within the province of the NLRA are superceded and displaced by federal law. The NLRB has just recently ruled that an employer committed an unfair labor practice by restricting its employees' abilities to discuss their wages with others. Because employer activity that is regulated by the NLRA or that constitutes an unfair labor practice cannot simultaneously be regulated by the states, wage-transparency laws like the one recently passed in Colorado may be pre-empted by the NLRA. Irony of ironies: Because the NLRB has elected to involve itself in a matter involving nonunionized employees, seemingly "progressive" state legislation aimed at protecting that same group of workers may be, by operation of law, ineffective as of its enactment.

State laws that restrict employers from disciplining workers who discuss salaries may be pre-empted by the NLRA.

Three states have enacted laws on wage transparency

Colorado's Wage Transparency Act, which was signed into law in April and become effective on Aug. 5, amends the Colorado Anti-Discrimination Act. It applies only to employers who are subject to the NLRA and makes it unlawful for an employer to discharge, discipline, discriminate against or in any way interfere with any employee who had "inquired about, disclosed, compared, or otherwise discussed the employee's wages." It also prohibits making nondisclosure by an employee of his or her wages a condition of employment or requiring employees to sign a waiver of "the right to disclose" their wage information. Colorado Senate Bill 08-122. Laws in two other states—California and Michigan—similarly prohibit employer limitations on when, how and with whom their employees may discuss their wages. The California law also explicitly prohibits employers from requiring employees to sign a waiver of the right to disclose their wage information. See Calif. Labor Code §§ 232, 232.5; Mich. Comp. Laws Ann. § 408.483a(13a)(1).

For employers, their interest in prohibiting employee discussions of wages lies, in part, in avoiding employee unrest should an employee find that a co-worker, friend or enemy makes more, or thinks the other should. It also protects employees from co-workers interested only in economic voyeurism. For employees, the ability to discuss wages with co-workers

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can help in their salary negotiations and, in groups of employees, enhance their ability to receive salaries commensurate with their positions and equal to those of their co-workers. Whatever its merits, the policy question has been resolved in states that make wage transparency the law.

Though one would not ordinarily think that the NLRA has anything to say about wage transparency for employees not represented by unions, or seeking to be so, it turns out that it does. Section 7 guarantees both union and nonunion employees certain rights that an employer cannot interfere with. Among these is the right "to engage in...concerted activities for the purpose of collective bargaining or other mutual aid and protection." Employers who infringe on so-called "§ 7 rights" commit an unfair labor practice under § 8(a), and the NLRB has exclusive primary jurisdiction to determine what is or is not a § 8(a) violation.

Based upon this grant of primary jurisdiction, courts have repeatedly found that state laws that attempt to regulate conduct even "arguably" constituting an unfair labor practice are pre-empted by the NLRA, with the only occasional exception being when the conduct at issue touches interests "deeply rooted" in local feeling and responsibility. See *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 613 (1986); *San Diego Building Trades Council v. Garmon*, 359 U.S. 263 (1959). These fundamental precepts of federal labor pre-emption were reaffirmed by the U.S. Supreme Court last term in *Chamber of Commerce of U.S. v. Brown*, 128 S. Ct. 2408 (2008), which invalidated on labor pre-emption grounds a California statute that forbade private companies receiving state funds (such as nursing homes) from using those funds to "support or oppose" union organizing by their employees. The *Brown* court's forceful application of labor pre-emption principles, even with respect to how a state directs private actors to use its funds, shows how sweeping that doctrine can be.

Just recently, the NLRB took up the issue of "wage transparency" and held that employers that maintain rules restricting their employees' abilities to discuss their wages with co-workers commit an unfair labor practice and violate § 8(a) of the act. In *Northeastern Land Services Ltd. (d/b/a The NLS Group)*, 352 NLRB No. 89 (June 27, 2008), the employer (a temporary employment agency) required its employees to sign an agreement in which they acknowledged that their terms of employment, including compensation, were confidential, and that disclosure of such information could constitute grounds for dismissal. During the course of his employment at NLS, one employee, Jamison Dupuy, began encountering problems regarding his pay, and, while attempting to resolve the matter with NLS, disclosed information regarding his employment to the client with whom he was then placed. This information included that Dupuy's paychecks were being delayed as well as the daily amount that Dupuy believed he was entitled to for reimbursement of his use of his own personal computer. Based upon these disclosures, NLS fired Dupuy for violating his agreement not to disclose the terms of his employment to others.

Dupuy then filed an unfair labor practice charge with the NLRB. Though an administrative law judge initially dismissed the complaint, the NLRB reversed, determining that the confidentiality provision of the Dupuy employment agreement constituted an unfair labor practice and ordered him reinstated.

The NLRB found that the confidentiality provision, "by its clear terms, precludes employees from discussing compensation and other terms of employment with 'other parties.' Employees would reasonably understand this language as prohibiting discussions of their compensation with union representatives. Accordingly, the confidentiality provision is unlawfully overbroad at least in this respect, in violation of Section 8(a)(1)." 352 NLRB No. 89 at 2. Significantly, the NLRB reasoned that even though Dupuy had not disclosed his compensation to a union or as part of any "concerted activities...for mutual aid and protection" to organize a union at his workplace, the nondisclosure rule could reasonably be expected to deter such conduct by others, and that made the rule itself illegal. The NLRB ordered that NLS rescind the entire confidentiality provision. It did not allow NLS to merely carve out an exception allowing employees to discuss the terms and conditions of their employment with each other and their unions, even in light of earlier NLS arguments that temporary employment agencies must carefully guard their rates of pay and other terms or conditions from disclosure to competitors and clients.

The NLRB has thus ruled that employment rules restricting employees' abilities to discuss the terms of their employment, including their compensation, with others infringe on § 7 rights and violate § 8(a). Under labor pre-emption, states cannot regulate in areas that are "arguably" protected by § 7 or prohibited by § 8 unless the issue touches on interests "deeply rooted" in local feeling and responsibility, such as protecting against picket line violence. See *Garmon*, 359 U.S. at 244; *Youngdahl v. Rainfair*, 355 U.S. 131, 138-39 (1957). It is far from clear that state interest in "transparency" concerning wages is so "deeply rooted" in traditional state concerns that it is exempt from the pre-emptive effect of federal labor law on matters relating to the workplace.

Employers and state legislators: Take heed

Employers and state legislators would be well served by considering the effect of the NLRA on confidentiality rules concerning wage disclosure among employees and on wage-transparency laws, actual or contemplated. All employers, not simply those in California, Michigan and Colorado, must be wary of using confidentiality rules that restrict employees' abilities to discuss their wages with others, particularly their co-workers and unions, and must carefully review any such rules they are currently using in light of the NLRB's decision in *NLS*. State legislators considering investing their time in supporting wage-transparency laws would be well-served to review principles of federal labor law pre-emption and consider whether their limited time would be better spent focusing on other pressing needs that are not already exclusively regulated by the NLRA. NLJ