

Innovations in State and Local Labor Legislation

NEUTRALITY LAWS AND LABOR PEACE
AGREEMENTS IN CALIFORNIA

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THE NATIONAL LABOR RELATIONS ACT (NLRA) HAS BEEN WIDELY criticized in recent decades for its failure to protect employees against the actions of increasingly aggressive anti-union employers. The counter-organizing campaigns conducted by employers are now more expensive and more sophisticated than at any time during the postwar period, and the professional anti-union industry is worth hundreds of millions of dollars annually.¹ Yet conservatives in Congress have blocked every effort to enact federal legislation that would limit employers' "union prevention" efforts.

The resolute and cohesive opposition of national employer organizations and trade associations has presented the principal obstacle to NLRA reform for three decades. Employer opposition was instrumental in two of the largest labor law reform campaigns in the past quarter-century: the defeat of the Labor Law Reform Bill in the late 1970s and labor's failed effort during the early 1990s to outlaw the employer practice of hiring "permanent replacements" for striking workers. In the late 1970s and early 1990s union density was significantly higher than it is today, and Democrats controlled both the White House and the Congress, yet businesses' congressional allies successfully blocked these pro-labor bills by filibustering in the Senate. In response, organized labor began to explore strategies to advance its interests at the state and local levels.

In the 1990s unions and their political allies have attempted to protect workers' rights through state and local legislation. These imaginative initiatives have opened a second front in labor's longstanding conflict with business over labor law reform. Business has continued to prevail at the federal level, but labor has enjoyed some successes, particularly in California, at the state and local levels. Paradoxically, these successes have provoked calls for strong federal intervention from business groups that are normally hostile to any employment regulation emanating from Washington. These fervent advocates of states' rights and economic liberalism have found

1. In 1990 one scholar estimated that employers were making over \$200 million dollars per year in direct payments to consultants, but that the true cost of anti-union campaigns rose to over \$1 billion when one took into account management and supervisor time off to fight unions and consultant-led opposition that continued after union election victories (Lawler 1990).

themselves in the unaccustomed role of championing aggressive federal regulation of labor-management relations.

Among the most important of these new state and local labor laws are neutrality laws, which prohibit employers that receive state funds from using that money to promote or deter unionization. The first such law with effective enforcement mechanisms was California's Assembly Bill (AB) 1889, passed in September 2000; it became effective in January 2001.² Although designed to protect the integrity of state funds, AB 1889 was expected also to benefit unions, as, in practice, employers regularly spend millions of dollars of state money opposing unionization, but rarely use state money to encourage it.

Prior to the passage of AB 1889, California also took the lead in establishing several other innovative labor laws. In October 2001 Governor Gray Davis signed a "card check recognition" law, AB 1281, which became effective in January 2002. This amendment to the Meyers-Milias-Brown Act (MMBA)—landmark legislation passed in 1968 that grants California's public employees the right to organize—requires employers to recognize unions for public employees when a majority sign authorization cards.³ California has also passed legislation that expands collective bargaining coverage to include home health care workers and a "responsible contractor" law, which promotes better wages and working conditions by requiring all businesses seeking city contracts, leases, or financial assistance to provide information on past employment practices. In addition, the California legislature passed a number of other pro-worker bills in recent months, some of which were signed into law by the governor, while others were still waiting his approval at this writing. These bills include the "California Living Wage Act" (AB 1093), which requires employers providing goods and services with state contracts over \$100,000 and 100 or more employees to pay a "living wage" of \$10 per hour with health benefits or \$12 per hour without benefits; AB 226 (signed into law), which prohibits employers from purchasing "dead peasant insurance"—that is, life insurance naming the employer as the beneficiary, often without workers' knowledge or consent—for their employees; AB 274, an "unlawful employment practices" bill, which creates a rebuttable presumption that an employee terminated within ninety days for exercising rights under state law is a victim of unlawful retaliation; SB 796, a labor code penalties bill,

2. AB 1889 was not an entirely novel law. It was modeled, in part, on more limited statutes in New York, Illinois, and Massachusetts. The New York law prohibits the use of state money to train supervisors in anti-union techniques; the Illinois law prohibits the use of state money to influence unionization by employers in the public or education sectors; the Massachusetts law prohibits government contractors from using state money to pay the salaries of individuals whose primary purpose is to persuade employees to support or oppose unionization. None of these laws, however, included effective enforcement mechanisms.

3. The law created a mandatory collective bargaining system for local and county employees and for those in special districts. Similar provisions for state employees were provided with the passage of the Dill Act. School district employees are covered by the Educational Employee Relations Act.

which allows employees to sue in a private action to recover penalties for labor code violations that would normally be paid to the state (employees would keep 25% of the penalty); and AB 311, which eliminates the existing one-week waiting period for unemployment insurance for locked-out workers. At the city and county level, similar efforts have yielded “labor peace” ordinances, an innovation pioneered by the city of San Francisco and imitated elsewhere. Such ordinances, which are intended to minimize labor disruptions, generally require that employers receiving assistance from the city or county sign a “labor peace” agreement with any union that requests it.

All these new initiatives have been met with vigorous opposition from business, which has done everything in its power to defeat the laws in the political arena or, failing that, to overturn them in the courts. The Washington-based Labor Policy Association (LPA), which has long played a major role in opposing labor law reform at the federal level, has now taken the lead in opposing state and local legislation that guarantees neutrality and labor peace.⁴ The NLRA itself contains no explicit provision preempting state and local labor laws, but these laws are potentially vulnerable to the broad doctrine, created by the federal courts between the late 1950s and early 1970s, that upholds federal supremacy in questions of labor-management law. Although the consolidation of this “preemption” doctrine has presented a major obstacle to legislative innovation in labor relations at the state and local levels during the past few decades, the courts have ruled that state action is not preempted by the NLRA if the state is acting as a market participant rather than as a regulator. This so-called proprietary exemption acknowledges that a state has an exclusive legal interest in how its funds are spent.⁵ Several of California’s new laws are currently facing court challenges, and their outcomes will clarify the precise limits of federal preemption.

AB 1889: THE NATION’S FIRST EFFECTIVE STATE NEUTRALITY LAW

In September 2000 the California state legislature enacted AB 1889, whose purpose was to “prohibit the use of state funds and facilities to assist, promote, or deter union organizing.”⁶ In arguing for this bill, unions and their allies maintained that

4. The Labor Policy Association was recently renamed; it is now the HR Policy Association.

5. A detailed discussion of the preemption doctrine is beyond the scope of this paper and has, in any case, been covered in dozens of law review articles. For critiques of a broad preemption doctrine in labor relations, see Gottesman 1990; Silverstein 1991; and Estlund 2002. For defenses of a broad preemption doctrine, see Cox 1972; and Gregory 1986. For a recent discussion of preemption issues relating to state neutrality and labor peace, see Hartley 2003.

6. AB 1889 is often referred to as the Cedillo bill. It (and its predecessor) was sponsored by Gil Cedillo (D-Los Angeles), a former officer with SEIU Local 600 in Los Angeles. The bill was authored by Scott Kronland and Stephen Berzon of the labor law firm Altshuler, Berzon, Nussbaum, Rubin and Demain.

the suppression of organizing campaigns had “grown into a multi-million dollar business” in recent years and that employers had spent tens of millions of dollars of state funds on a wide variety of anti-union activities, such as hiring management consultants, training supervisors to oppose unionization, and writing and distributing anti-union literature. While recognizing that state neutrality would not solve entirely the problem of aggressive anti-union campaigns, advocates hoped that it would at least “put an end to taxpayer financing of these campaigns.” The use of state funds for anti-union activities, unions argued, not only represented an indefensible waste of scarce public resources but also effectively used “workers’ own tax dollars against them.”⁷ Thus, the law would ensure that the power and resources of the state would no longer be used to “deprive employees of their right to choose or not to choose a union.”⁸

Unions anticipated that the neutrality bill would affect employers in a wide range of industries—including transportation, telecommunications, technology, and manufacturing—that received money from a variety of different state agencies. The California Employment Training Panel, for example, distributes grants to employers to provide employees with vocational training. The use of that money for anti-union purposes, unions argued, was “nothing less than the theft of state money.”⁹ Its principal target, however, was the health care industry, especially employers that received state funds in the form of Medi-Cal reimbursements.¹⁰ Indeed, several employer groups attacked the bill as simply the “latest offensive” in the national campaign by the Service Employees International Union (SEIU) to organize an “already debilitated profession.”¹¹ Advocates of the neutrality bill repeatedly cited the example of

7. Allen Davenport (director of government relations, SEIU Local 250), letter to Darrell Steinberg (chair, Assembly Labor and Employment Committee, California State Assembly), 7 April 2000, copy obtained from the California Labor Federation (hereafter abbreviated CLF).
8. Tom Rankin (president, California Labor Federation), letter to Senator John Burton (president pro tempore, California State Senate), 21 August 2000, CLF.
9. Jonathan Hiatt and Scott A. Kronland (AFL-CIO), letter to Arthur F. Rosenfeld (general counsel, NLRB), 10 January 2003, copy obtained from the National Labor Relations Board (hereafter abbreviated NLRB).
10. The nursing home sector, for example, is heavily dependent on Medi-Cal funds: most skilled nursing home facilities receive about two-thirds of their operating budgets from Medi-Cal reimbursements. Only about 10 percent of the home health care industry is organized statewide, and SEIU has identified it as one of its highest organizing priorities in recent years. The union is currently attempting to create an agreement with the major nursing home chains. It is asking the chains to remain neutral during organizing campaigns in return for union assistance in pursuing increased funding from the state legislature. Other health care facilities, such as intermediate care facilities for the mentally retarded, often receive close to 100 percent of their operating budgets from Medi-Cal.
11. Charles H. Roadman (president and CEO, American Health Care Association), letter to Arthur F. Rosenfeld (general counsel, NLRB), 1 March 2002, NLRB; Jack M. Stewart (president, California Manufacturers and Technology Association), letter to Denise F. Meiners (Special Litigation Branch, NLRB), 3 July 2002, NLRB.

Catholic Healthcare West's two-year campaign against SEIU Locals 250 and 399 in the late 1990s. The hospital chain is a major recipient of state tax dollars, receiving over \$400 million in Medi-Cal reimbursements in 1998 alone. While fighting unionization at Mercy Healthcare in Sacramento and the St. Francis Medical Center in Los Angeles, CHW spent millions of federal and state health care dollars on anti-union consultants.¹²

AB 1889 was not the first attempt to enact a state neutrality law in California: the California Labor Federation had promoted such legislation for over a decade. In 1999 the state legislature passed a neutrality bill (Assembly Bill 442), but the governor vetoed it.¹³ In response, supporters made several changes to the bill: they removed its detailed record keeping requirements, limited its application to the lifetime of state contracts and to companies with contracts in excess of \$50,000, introduced limits on the action by potential plaintiffs in civil lawsuits, and inserted wording that state funds could not be used either to promote or to deter unionization. Claiming that the new bill was "virtually identical" to its 1999 counterpart, employers dismissed these changes as insignificant. In particular, they disparaged the idea that the bill was now neutral because it stated that public money could not be used to encourage or to discourage unionization. As a "practical matter," one employer representative maintained, "the purported distinction is without a difference as employers normally do not encourage their employees to unionize" (Berman and McCoy 2002).¹⁴ Other employer groups pointed out that the law did not prohibit companies that received state funds from agreeing to card check recognition or granting organizers access to the workplace, which were identified as the "most powerful actions" employers can take in support of organization. They concluded that the measure was "aimed more at curbing employer opposition to unionization than their support for it" (Associated Builders and Contractors and Labor Policy Association 2003).

The revised version of the bill, AB 1889, prohibited private and public employers from using state funds to "assist, promote, or deter" union organizing by their employees. The bill identified private employers as recipients of state grants, any employer receiving a state contract for more than \$50,000, and any employer receiving more

12. The hospital system, which is headquartered in San Francisco, caters to large numbers of low-income patients who are covered by Medi-Cal. According to the CHW's own financial records, it paid the Malibu-based Burke Group over \$2.6 million in 1998. The campaign against SEIU also involved the Missouri-based consultants Management Science Associates.

13. Gray Davis, "AB 442: Veto Message" (1999). The governor's veto message stated that the legislation's record keeping requirements had the potential to "impose an unreasonable burden" on businesses and significantly increase employers' litigation costs "by providing countless opportunities for disgruntled employees to file civil actions merely in an effort to harass employers."

14. The AFL-CIO claimed that the assumption that employers never pressure their employees to join unions was "an incorrect assumption," and it cited several cases in which this somewhat unusual event had occurred. Jonathan Hiatt and Craig Becker (AFL-CIO), letter to Arthur F. Rosenfeld (general counsel, NLRB), 28 June 2002, NLRB.

than \$15,000 during any calendar year. Private contractors could not be reimbursed for such costs, and public employers who knowingly spend state funds in such a way were liable for the amount of those funds. AB 1889 contained two further prohibitions: employers conducting business on state property under state contracts could not use that property to hold meetings related to unionization; and contractors could not assist, promote, or deter union organizing by employees who were performing work on a state contract. AB 1889 required employers to maintain financial records sufficient to demonstrate that they have not used state funds for prohibited purposes and, upon request, to provide these records to the state attorney general. The law contained two enforcement mechanisms. First, the attorney general could file a lawsuit against an employer to obtain injunctive relief, damages, and penalties. Second, any taxpayer could file a lawsuit to enforce the statute, upon providing the attorney general with sixty days' notice (Kronland, 2000).

In support of AB 1889, unions pointed out that several federal statutes already prohibit federal funds from being used to influence employees' decisions on unionization. The Job Training Partnership Act, the Workforce Investment Act, the National Community Service Act, and the Head Start Programs Act all state that public funds cannot be used to "assist, promote, or deter union organizing."¹⁵ Just as it is important to maintain the integrity of federal tax funds, they argued, it is essential to protect state tax dollars. Unions noted that the purpose of AB 1889 was to advance the state's legitimate interest in avoiding entanglements in labor conflicts: rather than unfairly limiting employers' ability to resist unionization, the bill "leveled the playing field" and ensured that the state would "stay out of labor-management disputes" (California Labor Federation 2000).

As its supporters pointed out, AB 1889 was not, strictly speaking, "neutrality" legislation. It did not require that employers remain entirely neutral during organizing campaigns. Employers were simply prohibited from using public money to oppose or promote unionization; they were not restricted from using their own funds to oppose organizing campaigns. If the state allowed employers to use public money to oppose union campaigns, supporters of AB 1889 argued, it was effectively taking sides in private labor disputes. The neutrality required by AB 1889 was *state* neutrality, not *employer* neutrality. Opponents of the bill were not convinced.

Employer Opposition to AB 1889

Opposition to labor law reform has been unusually determined and cohesive, and employers have fought even minor reforms affecting their ability to resist unioniza-

15. In particular, supporters of AB 1889 used Head Start as an example of a federal law with similar restrictions. In November 1997 the Administration for Children and Families issued an Information Memorandum stating, "Funds appropriated to carry out this subchapter shall not be used to assist, promote or deter union organizing" (U.S. Department of Health and Human Services 1997).

tion. When the Clinton Department of Labor expanded the financial reporting requirements for management consultants, for example, several influential employer groups made reversal of that policy their top priority. Indeed, one of the first major actions of the Bush administration was to rescind these rules.¹⁶ The shift in labor's focus to state and local legislation has not been lost on its opponents. According to the LPA, the explanation behind recent state and local policy innovations was "quite obvious" to any observer of labor-management relations.¹⁷

It started with the doomed effort to enact President Carter's sweeping labor law reform proposal in the late 1970s, and culminated in the failure of a Democratic Congress to enact a ban on permanent striker replacements in the 1990s. . . . Labor's solution? Look to venues where labor's political strength can bring such victories. (Yager 2003)

California is among the states where organized labor enjoys considerable political influence.¹⁸ Employer groups have vigorously resisted efforts to enact progressive labor legislation at the state and local levels in California and elsewhere. Employer opposition to AB 1889 involved extensive political lobbying prior to and legal challenges after its enactment. The political debate on the bill was highly polarized, as employer groups continually sought not to modify, but to kill the legislation entirely. This was a "no compromise" issue for the business community, and nothing short of the defeat of AB 1889, in either the state legislature, the governor's office, or the courts, would satisfy them.

Employers' arguments against AB 1889 are worth examining in some detail because employer opposition has been the major obstacle to labor law reform and because the same arguments have been used against every subsequent state neutrality bill. Employer objections to AB 1889 fell into several categories. Most employer organizations claimed that the bill infringed upon their constitutional right to free speech, a right that was also explicitly protected by Section 8(c) of the NLRA.¹⁹ The real

16. On the Labor Reform Bill, see Townley 1986; on consultant financial reporting, see Logan 2002.

17. For more on striker replacement, see Logan, forthcoming.

18. After two years of anti-union initiatives from a Republican-controlled legislature, Democrats regained control of the California Assembly in 1996 with critical assistance from organized labor; see *Daily Labor Report* 1996. The political environment in at least four states—New Mexico, Maine, Illinois, and Maryland—became broadly favorable to the enactment of pro-union legislation following the November 2002 elections, but lawmakers have attempted to pass neutrality legislation only in Illinois, where Democrats control the house, senate and governor's mansion for the first time in more than two decades. The Illinois state neutrality bill passed the senate but died in the house on the last day of the legislative session in June 2003.

19. Contrary to employers' contention that it protects their "free speech rights," Section 8(c) of the NLRA simply states that the board cannot use noncoercive employer speech as evidence of an unfair labor practice. In response to employers' free speech arguments, supporters of the bill stated that it did not prevent employers from exercising their First Amendment rights; it merely said that the state would not pay them to do so and that the decision not to subsidize a fundamental right was not the same as an attempt to infringe upon that right.

intention of the bill, they argued, was to eliminate altogether employer opposition during union organizing campaigns. The California Chamber of Commerce argued that the bill involved “clear violation of federal labor policy and unconstitutional suppression” of employers’ free speech rights.²⁰

Several employer groups claimed that AB 1889 would have a deleterious impact on business performance, especially through the imposition of its onerous accounting provisions. For example, the Associated Builders and Contractors (ABC) warned of its “devastating impact” on the construction industry, “which is often reliant on state funding and is often the target of union organizing.”²¹ ABC argued that AB 1889 would impose a “mammoth accounting nightmare” on small businesses and complained that, when enforced by government officials sympathetic to “top-down” organizing, prohibited expenses could include “membership dues paid to business associations” such as ABC. Employers that could not afford to pay prevailing union wage rates, it concluded, would “either go out of business or move from the state’s hostile environment.”²² The California School Bus Contractors Association attacked the bill for imposing an “accounting nightmare” on employers that “choose to remain free from collective bargaining.” The true intent of the bill, it complained, was to enhance unionization where an employer had “chosen to work non union.”²³ (Like several other employer groups, the School Bus Contractors appeared not to realize that the purpose of federal labor law is to protect employees’ choice of bargaining representatives, not employers’ “choice” to remain union free). Other employer groups claimed that the legislation would send investors the message that “California is a hostile environment” and would “severely damage” the state’s business climate.²⁴

Some employer groups opposed the very notion that the state had a right to control funds transferred to employers in the form of state contracts. The Roofing Contractors Association announced that it was “fundamentally opposed to the concept that the state has any say in what a contractor does with monies” received from state-funded contracts.²⁵ The American Electronics Association also used the “whose

20. Julianne Broyles (director, Insurance and Employee Relations, California Chamber of Commerce), letter to Gil Cedillo (California State Assembly), 5 April 2000, NLRB.

21. Maurice Baskin (Venable, LLP, counsel for amicus curiae ABC), letter to Margery Lieber (assistant general counsel for special litigation, NLRB), 28 June 2002, NLRB.

22. Employers’ Group, “Sample Letter to Governor Davis,” 16 November 2000, NLRB.

23. Robert C. Cline (legislative advocate, California School Bus Contractors Association), letter to Gil Cedillo (California State Assembly), 5 April 2000, NLRB.

24. Russell J. Hammer (president and CEO, Sacramento Metropolitan Chamber of Commerce), letter to Carole Migden (California State Assembly), 8 May 2000, NLRB; Parke D. Terry (California Landscape Contractors), letter to Gil Cedillo (California State Assembly), 27 March 2000, NLRB.

25. Doug Hoffner (director of public affairs, Roofing Contractors Association of California), letter to Gil Cedillo (California State Assembly), 17 April 2000, NLRB.

money is it, anyway” argument, claiming that the by same logic, the state could forbid its employees from using their paychecks to “gamble or purchase birth control.”²⁶

Employer groups also refuted the notion that AB 1889 would protect the integrity of state funds. Rather than serving the public interest, they contended, the true intent of the law was to increase the number of unionized employees in the state by mandating employer neutrality. With the declining employee interest in collective bargaining, one management representative argued, unions were resorting to enlisting the support of state governments to “do their work” through legislation (Atkinson et al. 2002). In response to the claim that AB 1889 would stop the misappropriation of public money, the National Right to Work Committee stated that, by undermining employers’ ability to resist unionization, it would “rob” the taxpayers’ “pocket books” by forcing state contractors to pay “monopoly union wages.”²⁷

Other employers worried that pro-union state officials would use the law to expose the extent of their private spending on union suppression. As the California-based Employers’ Group cautioned, “Compliance [with AB 1889] does not guarantee that expenditures to avoid unionization will remain secret” (Pepe and North 2002).

A few employer groups were less vociferous in their criticism, reluctant to leave the impression that they supported the misappropriation of state funds or opposed the right to organize. The California Water Agencies called the bill a “well-intentioned effort to protect taxpayer dollars,” but criticized its “guilty unless proven innocent” approach to the misappropriation of state money.²⁸ Likewise, the Motion Picture Association of America “appreciated the intentions” of AB 1889 but cautioned that the law could have the “unintended consequence of sending film projects outside of California.”²⁹

Finally, employer groups argued that the impact of the law would clearly extend beyond firms’ use of state money in at least two respects. First, they claimed that the onerous record-keeping requirements of the law created “significant disincentives” for firms to use their own money to oppose unionization. If firms chose to use private money to oppose unionization, they would be required to keep two sets of accounts, and, as a result, might fall victim to union complaints and lawsuits. If, on the other hand, employers remained silent when confronted with an organizing campaign, they would be able to rest peacefully. Thus, employers argued, the bill

26. Chris Shultz (California government affairs manager, American Electronics Association), letter to Darrell Steinberg (chair, Assembly Labor and Employment Committee, California State Assembly), 4 April 2000, NLRB.

27. Reed Larson (president, National Right to Work Committee), letter to Gil Cedillo (California Assembly), 17 April 2000, NLRB.

28. Kimberly Dellinger (legislative advocate, California Water Agencies), letter to Hilda Solis (chair, Senate Industrial Relations Committee, California State Assembly), 22 June 2000, NLRB.

29. Melissa Patack (Motion Picture Association of America, California Group), letter to Gil Cedillo (California State Assembly), 4 April 2000, NLRB.

limited their speech both directly, by restricting their use of state money, and indirectly, by imposing burdensome accounting requirements on firms that use their own money to resist unionization. The U.S. Chamber of Commerce concluded that the law's allegedly complex accounting requirements were nothing more than a "devious burden designed to force employers into neutrality" (U.S. Chamber of Commerce 2003). Second, employers claimed that the law would allow unions to organize contractors while they were working on state projects, thus becoming the employees' exclusive bargaining agent for all future projects, which might not involve state money. The law would, therefore, profoundly alter the balance of power in labor-management relations "on an ongoing basis" (Associated Builders and Contractors and Labor Policy Association 2003).

Employers' efforts to defeat AB 1889 failed. In September 2000 AB 1889 passed the legislature on a strict party line vote. Influenced by the fact that the original bill had been revised, Governor Davis signed AB 1889 into law. Employer groups were not especially discouraged by this political defeat, for they recognized that the real struggle over AB 1889 would take place in the courts. After the bill was signed, a coalition of employer groups announced their intention to challenge it. In late December 2000 they mounted an eleventh-hour effort to stop its enforcement, but the U.S. District Court for the Central District of California ruled that there was "insufficient evidence" to sustain their contention that the law was unconstitutional and preempted by federal law. The court found the employers' lawsuit "premature" because it failed to provide evidence that a single employer had suffered actual harm as a result of the statute.

After the district court declined their petition, management representatives conceded that they might "have to wait until an employer gets sued under the law" before filing another legal challenge.³⁰ They tried again sixteen months after the law took effect. In April 2002 the National Chamber Litigation Center—the public policy legal arm of the U.S. Chamber of Commerce—filed suit, seeking to enjoin enforcement of AB 1889 on behalf of the U.S. and California Chambers of Commerce, five other employer associations, and seven individual businesses. The lawsuit sought injunctive and declaratory relief, arguing that AB 1889 was unconstitutional and preempted by the NLRA, the Labor Management Reporting Disclosure Act, and the Medicare Act. The AFL-CIO and California Labor Federation intervened as defendants.³¹

The plaintiffs attempted to enlist the support of the National Labor Relations Board (NLRB), the government agency charged with enforcing the NLRA; the NLRB

30. Brent North, quoted in Robertson 2001. North, a Newport Beach attorney, filed the suit on behalf of the California Chamber of Commerce, the California Manufacturers and Technology Group, the Employers Group, and the California Healthcare Association.

31. Several other employer groups and management law firms filed amicus briefs in support of this challenge.

has the authority to challenge state laws on grounds of federal preemption. The plaintiffs charged that AB 1889 was preempted by federal law, calling it a “pervasive regulatory scheme” that had been “written by unions [and] agreed to by a pro-union Legislature and Governor.” They stated that the law “clearly favors union organizing efforts by trying to mandate employer neutrality via state law.”³² In early 2002 several employer organizations wrote to Arthur Rosenfeld, the general counsel of the NLRB, requesting that he “treat this matter as the crisis that it has become” and seek a Nash-Finch injunction, which would halt enforcement of the law, or file an amicus curiae (friend of the court) brief supporting the employers’ court challenge.³³ Noting that pro-union lawmakers had introduced broadly similar bills in several other state legislatures, the ABC appealed to the NLRB to discourage other states from “enacting such unlawful legislation.”³⁴ Verizon Wireless argued that if the board were to intervene against California’s “blatant usurpation of federal authority,” it would prevent the need for it to intervene against dozens of similar laws in subsequent months and years.³⁵

In May 2002 Rosenfeld requested that California Attorney General Bill Lockyer explain why federal labor law did not preempt AB 1889 and asked business and labor organizations for comments on employers’ request for NLRB intervention (Labor Policy Association 2002). Lockyer and the AFL-CIO responded, stating that it would be inappropriate for the board to intervene in support of the employers’ legal challenge. The NLRB does not generally become involved in litigation between third parties, the AFL-CIO pointed out, and the court challenge involved several issues other than that of NLRA preemption.³⁶ After accepting submissions from

32. Peggy Goldstein (acting president and CEO, California Association of Health Facilities), letter to Arthur F. Rosenfeld (general counsel, NLRB), 2 July 2002, NLRB; Harold P. Coxson (Ogletree, Deakins, Nash, Smoak, and Stewart, P.C.), letter to Arthur F. Rosenfeld, 28 June 2002, NLRB.

33. Jack M. Steward (president, California Manufacturers and Technology Association), letter to Denise F. Meiners (Special Litigation Branch, NLRB), 3 July 2002, NLRB. Nash-Finch injunctions spring from *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), the Supreme Court decision that first recognized the NLRB’s ability to halt state action that infringes on its jurisdiction. Calling the NLRB the “sole protector of the ‘national interest’” in labor-management relations, the court stated that the labor board possesses an “implied authority” to “enjoin state action where its federal power preempts the field.” The Court reasserted the labor board’s power to prevent enforcement of state laws in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 738 (1983). The NLRB rarely exercises this power. However, since 1971 the labor board has sought Nash-Finch injunctions on only seven occasions; all were extreme cases where, the board argued, there existed no alternative means of vindicating federal interests.

34. Baskin to Lieber, 28 June 2002.

35. William J. Emanuel (Jones, Day, Reavis, and Pogue, LLP, counsel for Verizon Wireless), letter to Margery E. Lieber, assistant general counsel for special litigation, NLRB), 27 June 2002, NLRB.

36. Suzanne M. Ambrose (deputy attorney general, State of California), letter to Denise F. Meiners (special litigation branch, NLRB), 27 June 2002, NLRB; Hiatt and Becker to Rosenfeld, 28 June 2002.

business groups, labor organizations, and the state, the NLRB took no immediate action against AB 1889.³⁷

In September 2002 the U.S. District Court for the Central District of California struck down large parts of the statute, ruling that federal labor law preempted it. The court invalidated those sections that prohibited money obtained from state grants or (more significantly) through participation in state programs from being used to promote or deter unionization. It did not rule on the law's applicability to public employers or state contractors. The court dismissed the attorney general's argument that AB 1889 represented a valid exercise in the use of state money, ruling that the law was a "traditional legislative enactment, not a proprietary act." And while the court recognized that several federal statutes contained provisions similar to those found in AB 1889, it stated that these federal restrictions on the use of money for anti-union activities supported the view that Congress had intended that such matters be regulated at the federal level. Judge Gary Taylor also noted that AB 1889 would "prevent the free debate" of issues related to unionization that Congress had intended to protect: "AB 1889 is preempted because it regulates employer speech about union organizing under specified circumstances, even though Congress intended free debate."³⁸ The court declared the law invalid on the grounds of NLRA preemption; the ruling did not address the question of AB 1889's relationship to the First Amendment, which had constituted part of the case against the law. The ruling also did not address the bill's relationship to federal laws other than the NLRA—particularly the Medicare and Medicaid Acts—which were also cited in the plaintiff's brief.

Predictably, employer groups welcomed the court's *Lockyer* decision, while the AFL-CIO criticized its "plainly erroneous" ruling.³⁹ The U.S. Chamber of Commerce celebrated the outcome as a "major victory for employer's rights" and announced that it would continue to fight against AB 1889 if the state took the ruling to the U.S. Court of Appeals. Stephan Bokart, general counsel of the U.S. Chamber of Commerce, stated that the decision had ensured the continuation of a "free and open debate on the relative merits of unionization" (U.S. Chamber of Com-

37. Employer groups also sought to enlist the support of the U.S. Department of Labor, on the grounds that the 1959 Labor-Management Relations and Disclosure Act, which the Labor Department enforces, preempts 1889. Under AB 1889's "evisceration" of the LMRDA, they claimed, employers are "deprived of their federally protected rights to engage in non-coercive persuader activities." The Labor Department declined to take action against the law. See Stephen P. Pepe (O'Melveny & Myers, LLP), letter to Elaine L. Chao (U.S. secretary of labor) and Arthur F. Rosenfeld (general counsel, NLRB), 7 December 2001, NLRB; and Eugene Scalia, letter to Stephen P. Pepe, 25 January 2002, NLRB.

38. *The Chamber of Commerce of the U.S., et al. vs. Bill Lockyer, et al.*, United States District Court, Central District of California, Southern Division, 16 September 2002. Employer groups chose the location of the ruling, Orange County, and most observers consider Judge Taylor a conservative judge. Taylor later denied a state motion to stay the judgment pending its appeal to the Ninth Circuit Court.

39. Hiatt and Kronland to Rosenfeld, 10 January 2003.

merce 2002). One management law firm believed that the decision had established beyond any doubt that employer free speech rights “trump” state neutrality laws and that, as a result, employers facing legal proceedings under AB 1889 or those fearful of such action could “take comfort” from the outcome (Atkinson et al. 2002). Noting that the ruling had struck down the provision on employers that participate in state programs, one health care representative called the ruling a “clear victory” for hundreds of long-term care facilities that receive Medi-Cal reimbursements (Hooper et al. 2002). Employer groups also thought it likely that the ruling would halt the rush in other states to enact neutrality bills. The U.S. Chamber of Commerce hoped that the decision would discourage pro-union lawmakers and warned that other states that were considering legislation designed to “prevent employers from engaging their workers in an open debate” could expect the business community to “remain united against that effort” (*Daily Labor Report* 2002a).

Following the district court’s decision, the attorney general temporarily suspended enforcement of the entire law, pending an appeal to the Ninth Circuit Court.⁴⁰ Employer representatives recognized that the district court’s decision was not the end of the matter. One employer law firm doubted that the ruling would “mark the last work” on the state’s efforts to “muzzle” California employers (Brown 2002). Another warned that, regardless of how “overreaching and blatantly unjust” AB 1889 might appear to employers, the threat of enforcement might not yet be over, for in the past the Ninth Circuit Court had proved “less than sympathetic to employer interests” (Atkinson et al. 2002).⁴¹

In late May 2003, shortly before the circuit court’s deadline for amicus briefs, the NLRB voted 3–2 (along strict party-appointed lines) to support the challenge to AB 1889. The board rarely files amicus briefs in cases that do not directly involve one of its own decisions. A few days after meeting with labor and business representatives, the NLRB, which has a pro-management majority and general counsel for the first time since 1993, authorized General Counsel Rosenfeld to file a brief arguing that the NLRA preempts AB 1889.

The general counsel’s brief argues that, unlike the state of California, “Congress generally favors robust debate of union representation issues as a means of enhancing the opportunity for employees to make a free and informed choice” (National Labor Relations Board 2003). The majority on the board apparently accepts the con-

40. The attorney general could have continued to enforce those sections of AB 1889 not overturned by the district court. The law contains a “severability clause,” which limits the scope of a ruling: if the court holds invalid any portion of the law, “that invalidity shall not affect any other section.” When the district court struck down the law’s applicability to recipients of Medi-Care reimbursements, however, continued enforcement of the law was rendered pointless.

41. The ninth circuit is one of the few remaining circuit courts with a Democratic majority, historically a significant factor in circuit court decisions relating to labor policy. One study of NLRB success rates in the federal courts between the mid-1980s and the mid-1990s found wide variations between the different circuit courts (Brudney 2002).

tention, expressed by employer groups, that laws such as AB 1889 represent a devious effort to “de facto rewrite” the NLRA by undermining employers’ free speech rights on a state-by-state basis. The brief characterizes the California law—which, it says, is presented in the “guise” of protecting state funds—as “one state’s legislative response” to the growing perception among pro-union circles that the NLRA no longer adequately protects employees’ right to organize. Insisting that “partisan employer speech” during organizing campaigns fosters “informed employee choice,” the brief argues that the real intent of AB 1889 was to use the state’s considerable spending power to stifle such speech, thereby imposing its views of how employers ought to conduct themselves when confronted with union organizing campaigns.

AFL-CIO President John Sweeney attacked the NLRB’s intervention, calling it an “outrageous” decision and stating that it represents a “sharp departure from the Board’s primary mission of protecting workers’ rights.” The California Labor Federation expressed “surprise.”⁴² Labor representatives stated that the board’s brief conflicts with two recent labor rulings on preemption and employer speech issued by the D.C. circuit court, arguing that the “only consistency” between the court decisions and the board’s brief was the “anti-union position” (*Daily Labor Report* 2003c).

In contrast, Jackson-Lewis (the law firm representing the U.S. Chamber of Commerce and the California Association of Health Facilities) announced that its clients were “extremely pleased” that the board had decided to intervene against organized labor’s attempt to “jump start” its “struggling organizing efforts” (Jackson-Lewis 2002). The LPA welcomed the brief, which “extolled the virtues” of robust debate and delivered a “stinging repudiation” to organized labor’s contention that any employer speech inherently interferes with employee free choice (Labor Policy Association 2003a). Even if the circuit court rejects the board’s arguments, its decision to intervene against the California law will undoubtedly make it more difficult for state officials and organized labor to argue that the NLRA does not preempt AB 1889.⁴³

The circuit court is considering the state’s appeal on an expedited schedule, but as of June 2003 it had not yet scheduled oral arguments or assigned a panel of three judges—a crucial consideration in such cases. If the circuit court overrules the district court’s decision, the statute may enjoy an additional few months or years of

42. The AFL-CIO had argued that, if the board were to intervene, it should do so only to urge the ninth circuit to reverse the “erroneous decision” of the district court. “Statement by AFL-CIO President John Sweeney on NLRB Supporting Chamber of Commerce’s Lawsuit Against California Law Prohibiting Public Money to Influence Employees on Union Issue,” 4 June 2003; Jonathan Hiatt (general counsel, AFL-CIO), letter to Arthur F. Rosenfeld (general counsel, NLRB), 8 May 2003, NLRB.

43. Not only was the board split on whether to intervene against AB 1889 but it also left the general counsel to “formulate and express the arguments to be made against the California law.” Thus, the NLRB’s brief to the circuit court arguably represents the opinion of none of the five board members.

enforcement. Employer groups would appeal the decision to the U.S. Supreme Court, however, hoping that the upper court would settle the issue, once and for all, in their favor and “on a national scale” (Atkinson et al. 2002).⁴⁴

AB 1889 in Operation

California’s state neutrality law took effect on 1 January 2001; the district court overturned it on 16 September 2002. What was the impact of this controversial piece of legislation during the twenty months of its operation? Prior to the law’s enactment, employer groups had claimed that AB 1889 would have a potentially devastating impact on California businesses. This prediction failed to materialize. Unions filed only twenty-four requests for investigation with the state attorney general’s office between January 2001 and December 2002—about one complaint per month (five of the complaints were received after the district court invalidated the law) (see Table 5.1). Three unions—SEIU, the California Nurses Association (CNA), and the Teamsters—submitted twenty-one of the twenty-four requests. The SEIU was by far the most active union, filing thirteen. As expected, the majority of complaints involved private nursing homes and long-term care facilities or public and private hospitals (most of which receive state money in the form of Medi-Cal reimbursements), indicating that the law has the potential for significant impact in the health care sector.

The twenty-four complaints accused employers of misappropriating state funds for a variety of prohibited activities: hiring consultants and law firms to direct anti-union campaigns; running anti-union orientation and training sessions for supervisors; paying supervisors and managers to conduct group and individual captive meetings; paying employees to attend these anti-union meetings; creating and distributing anti-union literature; and, in a few cases, mounting elaborate public campaigns against unionization. Unions believed in particular that many employers were using state funds to pay supervisors and employees for running and attending “captive audience” meetings (i.e., mandatory anti-union meetings at the workplace during working time).

Most of the complaints alleged that the employer was a recipient of state money, had engaged in prohibited activities, and had failed to maintain accounts sufficient to demonstrate compliance. In several cases unions claimed that state funds represented the employer’s predominant or exclusive source of income, thus making it likely that the employer had misappropriated public money. Prominent management consultants

44. If the ninth circuit overturns the district court’s decision, the Supreme Court will almost certainly hear employers’ appeal. If, on the other hand, the ninth circuit rules in employers’ favor, it is extremely doubtful that the Supreme Court would agree to review its decision.

TABLE 5.1. Union Requests for Investigations of AB 1889 Violations, 2001–2002

| <i>Union</i> | <i>Employer</i> | <i>Location</i> | <i>Date of Complaint</i> | <i>ULP Allegation</i> |
|---------------------------------------|---|---------------------|--------------------------|-----------------------------------|
| SEIU Local 399 | Fountain View (nursing homes) | Los Angeles | 03-22-01 | No |
| SEIU Local 399 | A.B. Crispino and Company, Inc. | Santa Monica | 03-22-01 | No |
| SEIU Local 399 | Summit Care California (nursing homes) | Torrance | 03-22-01 | No |
| SEIU Local 399 | MEK Long Beach LLC (nursing homes) | Long Beach | 06-08-01 | No |
| IBT Local 85 | M.V. Transportation, Inc. (paratransit services) | San Francisco | 12-03-01 | Yes |
| IBT Local 78 | M.V. Transportation, Inc. (paratransit services) | San Leandro | 02-06-02 | No |
| CNA | Palomar Pomerado Health System (public hospital) | Escondido and Poway | 03-28-02 | Yes MMB Violation ^a |
| IUOE Stationary Engineers Local 39 | Golden Sierra Job Training Agency (public employees) | Loomis | 04-12-02 | No MMB Violation ^a |
| SEIU Locals 399 and 434B | Mid-Wilshire Health Care Center (nursing home) | Los Angeles | 04-22-02 | Yes |
| CNA | St. Mary's Medical System (private hospital) | Apple Valley | 04-24-02 | Yes |
| IBT Local 952 | Laidlaw Transit Services, Inc. | Irvine | 04-25-02 | Yes |
| SEIU Local 1292 | Siskiyou Training and Employment Program, Inc. | Various | 05-01-02 | Yes |
| SEIU Local 250 | Ensign Group, Inc. (nursing homes) | Sonoma | 05-16-02 | No |
| IUOE Local 3 | Rancho Murieta Community Services District | Alameda | 05-17-02 | No MMB Violation ^a |
| SEIU Locals 399 and 121RN | Valley Health System (acute care hospitals) | Moreno Valley | 05-23-02 | No |
| SEIU Local 790 | Laidlaw Transit Services | San Joaquin | 06-16-02 | Yes |
| SEIU Local 399 and the Nurse Alliance | Tenet Queen of Angels Hollywood Presbyterian Medical Center (acute care hospital) | Los Angeles | 06-17-02 | Yes |
| CNA | Antelope Valley Health Care District (public hospital) | Antelope Valley | 07-12-02 | Yes MMB Violation ^a |
| SEIU Nurse Alliance | Providence St. Joseph Medical Center (acute care hospital) | Burbank | 09-10-02 | Yes |

TABLE 5.1. (continued)

| <i>Union</i> | <i>Employer</i> | <i>Location</i> | <i>Date of Complaint</i> | <i>ULP Allegation</i> |
|---------------------|---|--|--------------------------|-----------------------|
| SEIU Local 1997 | Oasis Rehabilitation, Inc. (mental health center) | Indio | 10-09-02 | No |
| SEIU Nurse Alliance | Pomona Valley Hospital Medical Center (public hospital) | Pomona | 10-24-02 | No |
| IBEW Local 11 | GTECH Corporation (contractor with state lottery) | Woodland Hills and Santa Fe Springs | 10-28-02 | No |
| CNA | Cedars Sinai Medical Center (private hospital) | Los Angeles | 11-06-02 | Yes |
| CNA/USWA | Long Beach Memorial Medical Center (private hospital) | Long Beach | 11-13-02 | Yes |

^aThese complaints involving public employees also included allegations that the employer had violated AB 1281, an amendment to the Meyers-Milias-Brown Act, by refusing to recognize the union on the basis of a majority of signed authorization cards.

and law firms with long-established reputations for no-holds-barred anti-unionism orchestrated several of the campaigns that generated complaints. The Burke Group ran anti-union campaigns at Antelope Valley Health Care District and St. Mary’s Medical Center; the American Consulting Group ran the campaigns at the St. Joseph Medical Center and Pomona Valley Hospital Medical Center; Cruz and Associates ran the MEK Long Beach campaign; and Jackson-Lewis ran the Oasis Rehabilitation, Inc., campaign.

SEIU Local 250, for example, filed a complaint against Sonoma Health Care Center (Ensign Group), a nursing home that receives a majority of its total annual income through Medi-Cal reimbursements. The anti-union consultant firm, Labor Relations Services, Inc., of Newport Beach, orchestrated the nursing home’s anti-union campaign, providing Spanish- and Tagalog-speaking consultants to talk with employees, who were largely Latino and Filipino. Local 250 provided the attorney general with the names of employees who attended mandatory anti-union meetings; the names of the consultants, managers, and supervisors who conducted group and individual captive meetings; the date, time, and location of these meetings; information on whether employees were paid for attending these meetings and, if so, out of which funds; information on the anti-union consultants who orchestrated the anti-union campaign; and copies of anti-union literature distributed to employees. Responding to the union’s “reckless accusations,” Sonoma Healthcare denied

that it had used any state funds to discourage its employees from supporting unionization.⁴⁵

Not all of the complaints indicated clear violations of AB 1889. At least one union, Teamster Local 78, apparently believed that AB 1889 required strict neutrality from employers that received state money; it did not accuse the employer of misappropriating public funds, but merely stated that it had distributed anti-union literature to employees. The union believed that the company's distribution was "in violation of its obligation as a state contractor to remain neutral in a union organizing drive."⁴⁶ One or two other unions appeared uncertain as to whether the employer had received sufficient state funds to trigger the requirements of the law. One complaint issued against Long Beach Memorial Medical Center involved both the employer's efforts to defeat an organizing campaign and its attempt to prevent the union from securing a first contract for previously unionized employees. Another complaint, against Tenet Queen of Angeles Medical Center, alleged that the employer had used state funds to persuade its employees to revoke their union membership.⁴⁷

The workplaces named in the complaints ranged from bargaining units of fewer than 40 employees that received tens of thousands of dollars in state grants or contracts, to bargaining units of over 400 employees, mostly hospitals, that received hundreds of millions of dollars in state funds. Between 1995 and 1999, for example, Palomar Pomerado Medical Center received almost \$270 million, Long Beach Memorial Medical Center received over \$600 million, and Cedars Sinai Medical Center received over \$1,100 million in Medi-Cal payments. Another hospital accused of misappropriating state funds, Tenet Queen of Angels Hollywood Presbyterian Medical Center, received over \$74 million in Medi-Cal funds between 2000 and 2001, which accounted for over half of the hospital's income.

Unions alleged that several hospitals had financed anti-union campaigns with tax dollars by co-mingling Medi-Cal reimbursements with other sources of funds. The CNA, for example, believed that the Antelope Valley Health Care District (north of Los Angeles) had spent over \$1 million in state money on its intensive anti-union campaign (California Nurses Association 2002). The campaign lasted several months. The Burke Group invoiced Antelope Valley for almost \$55,000 for the period 3–25 June 2002, during which time its two consultants reportedly worked eleven to sixteen hours per day. The hospital's anti-union literature, posters, and

45. Regina J. Brown (deputy attorney general), letter to Stephen P. Berzon (Altshuler, Berzon, Nussbaum, Rubin, and Demain), 19 July 2002, copy obtained from the State of California, Department of Justice (hereafter abbreviated SCDJ); Gregory K. Stapley (vice president and general counsel, Ensign Group), letter to Bill Lockyer (attorney general, California Department of Justice), 16 May 2002, SCDJ.

46. Shelia K. Sexton (Beeson, Tayer & Bodine, for Teamsters Local 78), letter to California Department of Justice, 19 February 2002, SCDJ.

47. David M. Johnson (Southern California director, CNA), letter to William Lockyer (attorney general, State of California), 13 November 2002, SCDJ; David M. Johnson, letter to William Lockyer, 6 November 2002, SCDJ.

floor mats all contained the message that they were produced “in accordance with the requirements of AB 1889,” but the CNA stated that the hospital’s consultants and managers had engaged in many other anti-union activities for which they made no claim of compliance with AB 1889.⁴⁸

Health care unions contended that the anti-union campaigns repeatedly threatened patient care, since hospital management frequently ordered employees away from patient-care duties to attend lengthy captive meetings and screenings of anti-union videos. At St. Mary’s Medical Center in Apple Valley (northeast of Los Angeles), nurses reported “numerous incidents” in which they were “pulled away from the bedside to attend one-on-one anti-union meetings with their managers” (California Nurses Association 2002a, 2002b).⁴⁹

Half of the complaints also alleged unfair labor practices, several of which had been referred to the NLRB or California’s Public Employment Relations Board (PERB). In addition, the four complaints involving public employees accused employers of violating the state’s card check recognition law, AB 1281.⁵⁰

Responses to these complaints by employers varied considerably. None admitted to financial wrongdoing. Some responded that they would be happy to cooperate with the attorney general’s office to demonstrate that they had not misappropriated state money. Others, however, stated that they did not recognize the legitimacy of AB 1889 and would not cooperate with any investigation into how they had spent state funds. One employer named in two separate complaints, Laidlaw Transit Services, refused to comply with the “unconstitutional” and “unenforceable” law. The firm’s lawyers stated that Laidlaw would not be cowed by the Teamsters’ “baseless accusations” and would continue its efforts to dissuade employees from supporting unionization.⁵¹

In addition to the twenty-four union complaints, at least one employer attempted unsuccessfully to use AB 1889 to justify denying a union access to a workplace notice board, thereby violating a negotiated agreement that provided the union with such access. Ruling against the employer’s illegal action, the NLRB dismissed its arguments concerning the requirements imposed by AB 1889 as “specious from the outset” and “empty of logic.”⁵²

48. The Burke Group, invoice to Antelope Valley Hospital, 30 June 2002, SCDJ; Beth Kean (organizing director, CNA), letter to William Lockyer (attorney general, State of California), 12 July 2002, SCDJ.

49. See also Luisa Blue (president, SEIU Nurse Alliance) and Dave Bullock president, SEIU Local 399), letter to Bill Lockyer (attorney general, State of California), 24 October 2002, SCDJ.

50. AB 1281 is one of several laws around the country that provide card check recognition for certain groups of employees. In January 2002 the New York legislature, for example, enacted a broadly similar law (A 9202) that affects private-sector employees who are not covered by the NLRA.

51. Theodore R. Scott (Luce, Forward, Hamilton, and Scripps, LLP, for Laidlaw Transit Services, Inc.), letter to Florice Hoffman (for Teamsters Local 952), 25 March 2002, SCDJ.

52. 338 NLRB 180, *ATC/Vancom of California* (May 2003). Opponents of the law have cited its exemptions allowing pro-union activities such as union access to the workplace and the negotiation of voluntary recognition agreements as clear evidence of the law’s “one-sidedness.”

If the number of union complaints was surprisingly small—especially when one considers the many thousands of employers that receive state funds—the number of cases pursued by the attorney general was even smaller.⁵³ Prior to the district court’s decision, Lockyer stated repeatedly that he was “strongly committed” to the enforcement of AB 1889. As a result of employers’ challenges, however, most of the attorney general’s energies went into defending AB 1889 in the courts, rather than investigating and prosecuting cases of noncompliance. Indeed, prior to the district court’s overturning of AB 1889, the attorney general had filed suit against only one employer, Fountain View, Inc.⁵⁴

Fountain View owns approximately twenty skilled nursing homes in California. In 2001 SEIU Local 399 asked the attorney general to investigate three Fountain View homes—Brier Oak Terrace Care Center in Los Angeles and Baycrest and Royalwood Care Centers in Torrance—for misappropriation of state funds. The union argued that the company had used state money to hire management consultants Russ Brown and Associates to deter its employees from supporting unionization. Brier Oak, Baycrest, and Royalwood receive a majority of their total annual income from participation in the Medi-Cal program. SEIU alleged that expenses associated with Fountain View’s anti-union activities were paid from accounts in which Medi-Cal funds were “co-mingled with other funds” and that the firm had failed to maintain records sufficient to demonstrate compliance with AB 1889.⁵⁵

Fountain View refused to cooperate with the investigation. The company questioned the veracity of the evidence offered against it as well as the authority of the attorney general to investigate its financial records. It claimed that it had “numerous sources of funding” and that the amount of its non-state sources of income far exceeded the sum it had allegedly spent on resisting unionization.⁵⁶ Fountain View

53. In April 2002 Governor Davis announced that the number of certified small businesses participating in state contracting had reached 10,000, which marked a 30 percent increase over the previous twelve months. One prominent opponent of the neutrality legislation, Verizon Corporation, estimated that between 10,000 and 20,000 employers were affected by the various provisions of AB 1889. According to the California Works Foundation, the number of employees covered by state contracts exceeds 175,000 and that the total value of these contracts exceeds \$15 billion. Fifteen separate government departments account for over 90 percent of these state contracts with private companies. Office of the Governor, “Governor Davis Gives Keynote Address Announcing Small Business Partnerships with State Reaches 10,000,” *Press Release*, 24 April 2002; Emanuel to Lieber, 27 June 2002. For a complete list of state contractors, see State of California, Department of General Services 2002.

54. *Attorney General of California vs. Fountain View, Inc.*, Superior Court of the State of California for the County of Los Angeles, Central District, 19 November 2001. Fountain View subsequently filed a cross-complaint against the state.

55. John J. Sullivan (associate general counsel, SEIU), letter to William Lockyer (attorney general, State of California), 22 March 2001, SCDJ.

56. According to U.S. Department of Labor records, Fountain View paid Russ Brown and Associates \$45,978.

refused to provide the financial documentation required by the law, which it called “fatally vague.”⁵⁷

After three separate requests for records proving that Fountain View had not misappropriated state funds, the attorney general filed suit against the company in Los Angeles Superior Court in November 2001. The lawsuit attempted to compel the release of accounting records sufficient to demonstrate compliance with AB 1889, underscoring the vital importance of the law’s record-keeping requirement: it provided the only practical way to prove that an employer that receives both state and non-state funds had used state funds for prohibited activities. The attorney general failed to gain an enforcement order against Fountain View before to the district court overturned the law.

Enforcement of AB 1899 was not limited to actions undertaken by California’s attorney general. Under the provisions of the law, private individuals could pursue legal claims against employers for noncompliance sixty days after filing a complaint. Employer groups had singled out this aspect of the law, calling it a “bounty hunter” provision and predicting that unions and disgruntled employees would use it to harass innocent employers. One employer group predicted that this private right of action would provide an “open invitation to endless litigation about how individual employees perceived an employer’s feelings about unionization.”⁵⁸ Despite these pronouncements, only one union pursued enforcement on its own. SEIU Local 399 brought suit against A.B. Crispino, owner of Santa Monica Convalescent Homes, in May 2001, after waiting sixty days for the attorney general to initiate legal proceedings. The attorney general’s office then closed its investigation. SEIU subsequently settled the case after the nursing home agreed to pay it \$13,000 in legal fees.⁵⁹ The union also filed suit against Fountain View, but that case is currently on hold, pending the outcome of the state’s appeal.

Opponents have used the twenty-four complaints filed by unions as evidence of the law’s alleged “chilling impact” on employers’ free speech rights. Employer groups have charged that unions coerced employers into neutrality agreements by accusing them of AB 1889 violations and by threatening enforcement proceedings after the

The reported figure excludes costs that Fountain View incurred for management and giving supervisors time off to meet with consultants and conduct captive group and one-on-one meetings with employees. It also does not include the costs of giving employees time off to attend captive meetings. See Russ Brown and Associates, LM 21 (Receipts and Disbursements Report) File No. C-0435, 2 April 2002, copy obtained from the U.S. Department of Labor.

57. John A. Lawrence (Radcliff, Frandsen, and Dongell, LLP), letter to Thomas P. Reilly (deputy attorney general, State of California), 5 June 2001, SCDJ. See also Office of the Attorney General 2001.

58. Parke D. Terry (California Landscape Contractors), letter to Gil Cedillo (California Assembly), 27 March 2000, SCDJ.

59. *SEIU Local 399 v. AB Crispino & Company, Inc.*, Superior Court of the State of California, County of Los Angeles, West District, May 23, 2001; Louis Verdugo, Jr. (senior assistant attorney general, State of California), letter to Jamie Rudman (Knee and Ross, LLP), 26 November 2001, SCDJ.

complaints were filed. Such a charge resulted when Teamsters Local 952 offered to withdraw its complaint against Laidlaw if the company consented to a neutrality agreement.⁶⁰ One of the bill's opponents claimed that management's voice was often being "silenced by the threat of prosecution" (North 2002). Calling the attorney general's enforcement actions "significant," the LPA warned in June 2002 that "many more" complaints and "numerous" enforcement actions "could be filed shortly."⁶¹ These failed to materialize.

Employer groups have also charged unions with using the attorney general's office as a "clearinghouse" for unfair labor practice (ULP) complaints that should, more appropriately, be filed with the NLRB. The U.S. Chamber of Commerce stated that AB 1889 had "armed unions by allowing them to bring unfair labor practice claims to the attorney general and the courts" (U.S. Chamber of Commerce 2003). Several other employer groups—including the California Association of Health Facilities, the LPA, and the ABC—have repeated this charge. Unions have provided this information to indicate the range of prohibited activities on which employers have spent state money, not as evidence of any ULP against which they expected the attorney general to take action. Indeed, in addition to their AB 1889 complaints, several unions filed separate ULP complaints with the NLRB.

Undaunted by the small number of complaints, some employer groups have pointed to one complaint filed by the CNA to illustrate the "crystal clear" impact of AB 1889 in undermining employers' ability to resist unionization and to provide evidence that unions had used the law as a "bargaining tool" (Associated Builders and Contractors and Labor Policy Association 2003). In late 2001 the CNA began what employer groups called a "heated organizing drive." The union had accused management of committing numerous unfair practices during its campaign to unionize almost 600 nurses at the facility. In March 2002 the CNA filed a complaint with the attorney general, stating that Palomar Pomerado Health System had made a "serious and substantial misappropriation of state funds" to finance its "aggressive, heavily funded" anti-union campaign. Three months later, according to employer groups, the union revealed its "true motivation for threatening enforcement": the CNA withdrew its AB 1889 complaint and urged the attorney general to take no action against Palomar, reporting that the hospital had now agreed to card check recognition.⁶² Thus, for employer groups, the Palomar campaign provided concrete

60. Patrick D. Kelly (secretary treasurer, Teamsters Local Union No. 952), letter to Jim Byrne (general manager, Laidlaw Transit Service), 21 March 2002, SCDJ; Theodore R. Scott (Luce, Forward, Hamilton, and Scripps, LLP, for Laidlaw Transit Services, Inc.), letter to Florice Hoffman (for Teamsters Local 952), 25 March 2002, SCDJ.

61. Daniel V. Yager (senior vice president and general counsel, LPA), letter to Margery E. Lieber (assistant general counsel for special litigation, NLRB), 28 June 2002, SCDJ.

62. David M. Johnson (Southern California director, CNA), letter to William Lockyer (attorney general, State of California), 28 March 2002, SCDJ; David M. Johnson, letter to William Lockyer, 24 June 2002; Yager to Lieber, 28 June 2002, SCDJ.

evidence that unions were using the threat of enforcement proceedings “as an organizing tactic to achieve employer neutrality” (U.S. Chamber of Commerce 2003).

The LPA stated that the hospital’s dramatic change of heart—from vigorous resistance to voluntary recognition within a ninety-day period—provided a stark demonstration of the “dramatic degree to which the California law alters bargaining power” between unions and employers. However, the CNA’s threat to initiate AB 1889 proceedings played little role in the card check decision. The critical factors were changes in the hospital’s CEO and board of directors and the hospital’s subsequent decision to comply with AB 1281 (which guarantees card check recognition for public employees).⁶³ Nevertheless, employer groups have repeatedly cited the Palomar case—mostly recently in their briefs to the Ninth Circuit Court—as evidence that state neutrality laws such as AB 1889 are, in reality, thinly veiled “pro-union organizing tools” (U.S. Chamber of Commerce 2003).

The number of union requests for investigations and prosecutions by the attorney general and the number of private lawsuits are not the only measures of the impact of the legislation, and they perhaps are not the most important. Starting in March 2002 the Department of Health Services and other state agencies distributed to employers that receive state funds forms that asked the recipients to agree to abide by the provisions of AB 1889. Those who refused to sign and return the forms within forty-five days faced termination from Medi-Cal and other state programs. Although no employer lost state funding for that reason, employer groups claimed that, as a result of the distribution of these notices, firms that depend on state funding had been faced with the “Hobson’s choice” of either losing their businesses or signing away their protected rights.⁶⁴ Not surprisingly, they argued, most had chosen financial survival over bankruptcy. Employer groups asserted, however, that certain companies with alternative sources of funding had decided not to conduct business with the state. Employers also claimed, without providing any direct evidence, that unions officials had attempted to “apply pressure” to state agencies such as

63. In its account of the Palomar case to the NLRB, the LPA failed to mention that the PERB was investigating the hospital for violation of state law by refusing to recognize the union based on a card check and for unlawfully interfering with the rights of the nurses. In addition, a majority of the health care system’s nurses had voted for union representation in October 1995, but at that time state law allowed the hospital to deny recognition because the union failed to win the support of a majority of those *eligible* to vote. That law was overturned in 2001, thus giving public employees the same right as their private counterparts.

64. The number of firms that receive all, or practically all, of their operating budgets from state sources is a matter of considerable controversy. Employer groups have repeatedly claimed that over 500 members of the California Association of Health Facilities receive their entire operating budgets from state grants or state programs and that AB 1889 would “obliterate” the free speech rights of these employers. Supporters of AB 1889 contest this figure and argue that, in any case, nothing in the law precludes these employers from seeking other sources of revenue to finance their anti-union campaigns.

the Department of Health Services in order to get them to “coerce” employers to remain neutral during organizing campaigns.⁶⁵

AB 1889 might have had a greater impact had the attorney general focused on enforcement rather than lawsuits. Several unions reported limited successes in using the law against employers that had a reputation for aggressively resisting unionization. Some of these employers decided to mount low-key and inexpensive anti-union campaigns and, in most cases, the overwhelming majority of employees voted for unionization.

The first reported organizing victory in which the law was a factor involved the Amalgamated Transit Union (ATU). Eighty-six days after AB 1889’s enactment, the ATU used the law in an organizing campaign in Yolo County at Laidlaw Transit Services. The ATU reported that it had encountered “fierce” employer resistance in previous organizing campaigns with the company (*California AFL-CIO News* 2001). This time, however, the union wrote to the Yolo County Transportation District, a recipient of public money in the form of State Transit Assistance, requesting that it remind its contractor, Laidlaw, of its obligation not to use state funds for the purpose of promoting or discouraging unionization. As a result, the union reported, Laidlaw brought in a human resource expert, but “meetings were voluntary.” The union won the NLRB election with a 41 to 6 vote.⁶⁶

Most other organizing campaigns involving AB 1889 were not as straightforward, suggesting that even if the law survives legal challenges, unions will face an uphill struggle in dealing with anti-union employers that receive state funds. CNA, for example, has attempted to use the law in several of its organizing campaigns. As most of the employers CNA faces are major recipients of state funds, the union had potentially much to gain from AB 1889. Its experiences in recent campaigns suggest that the law was most useful when used as part of a public campaign designed to persuade the employer not to engage in aggressive anti-union behavior.

The CNA’s campaigns, along with those of several other unions, indicate that

65. Charles H. Roadman (president and CEO, American Health Care Association), letter to Arthur F. Rosenfeld (general counsel, NLRB), 1 March 2002, SCDJ; Frank G. Vanacore (chief, Audit Review and Analysis Section, Financial Audits Branch, Audits and Investigations), letter to participants in state programs, 15 March 2002, SCDJ; Theodore R. Scott (Luce, Forward, Hamilton, and Scripps, LLP), letter to Denise Meiners (special litigation branch, NLRB), 25 June 2002, SCDJ.

66. Donald Delis (president and business agent, Amalgamated Transit Union, Local 256), letter to Terry Bassett (executive director, Yolo County Transportation District), 25 January 2001, SCDJ. Other organizing victories in which AB 1889 played a significant role were those by UNITE Local 75 against Mission Linen and GCIU Local 202M at Ivy Hill Printing in Glendale. At Mission Linen, the union convinced the company to agree to expedited union representation elections in five Western cities and negotiated a three-year agreements including higher wages and improved health and safety protections for unionized workers. As with the Laidlaw campaign, both Mission Linen and Ivy Hill involved relatively small bargaining units.

even if AB 1889 survives, state officials will face considerable employer opposition when enforcing the law. The fact that several employers that receive state funds continued to mount anti-union campaigns (most of which were *not* the subject of AB 1889 complaints) after the bill's passage suggests that, contrary to the assertion of employer groups, firms could comply with the neutrality law, yet still exercise their right to oppose unionization.

Neutrality Legislation in Other States

California has not been alone in enacting legislation designed to prevent the use of state tax dollars for anti-union activities.

In June 2002 the New York State Assembly passed a bill prohibiting employers from using state money for certain purposes related to unionization.⁶⁷ A coalition of employer organizations opposed the bill, but to their dismay the bill passed both houses with broad bipartisan support. The Business Council of New York (2002) lambasted the state legislature's "dizzying tilt" toward labor and asked despondently, "Where does it stop?"⁶⁸

On 30 September 2002, just two weeks after the California district court ruled against AB 1889, Governor George Pataki signed New York's neutrality bill into law.⁶⁹ In contrast with AB 1889's blanket prohibition on the use of public money for activities designed to promote or deter unionization, the New York bill proscribes using state money for three specific anti-union actions: training managers, supervisors, or other administrative personnel on methods to encourage or discourage unionization; hiring or paying attorneys, consultants, or other contractors to encourage or discourage unionization; and hiring employees or paying the salary and other compensation of employees whose principal job duties are to encourage or discourage unionization. New York employers can still use state money to finance other nonspecified anti-union activities, such as captive-audience meetings, providing they are not conducted by someone whose principal job is to discourage unionization.

Not surprisingly, employer representatives in New York welcomed the California court's "instructive" decision and argued that, because their law was a virtual replica of AB 1889, the legal outcome ought to be the same. On 30 December 2002, the day

67. The New York Legislature had enacted a law limiting the use of state funds in 1996 and revised it in 1998. It did not include effective enforcement provisions or penalties for violations, and New York unions complained that it was ineffectual: employers had evaded the law simply by claiming that they were spending tax money to train supervisors on how to conform to federal labor law. See *Daily Labor Report* 1998a, 1998b, 2002b.

68. Daniel B. Walsh (president and CEO, Business Council of New York State, Inc.), letter to Honorable Members of the New York Senate, 1 July 2002, NLRB.

69. Governor Pataki has strong links to certain segments of the New York labor movement and had earlier signed legislation providing card certification for the private sector workers who are not covered by the NLRA. See *Daily Labor Report* 2001b.

after the New York law went into effect, a coalition of health care and social service associations urged the NLRB to intervene against the statute, arguing that the “sole purpose” and “fatal flaw” of the law was to attempt to restrict employer speech.⁷⁰ In April 2003 a coalition of organizations representing over 550 non-profit and public hospitals, nursing homes, and home care agencies filed suit in a New York district court, seeking to overturn the law and halt its enforcement.⁷¹

As was the case in California, the employers’ legal challenge has slowed the regulatory process. The resources of the attorney general have gone primarily into defending the law against employers’ challenge and the threat of NLRB opposition, rather than investigating cases of noncompliance.⁷² At this writing, the NLRB has yet to announce whether it intends to seek a Nash-Finch injunction or (more probably) file an amicus brief in support of the court challenge. It seems likely that the NLRB will not intervene unless the case reaches the appellate court, as was the case in California.

The California and New York laws are part of a nationwide movement to enact legislation prohibiting the misappropriation of state funds (see the Appendix for a list of these laws). Pro-union legislators in certain states have adopted a cautionary approach until the outcomes of the litigation in California and New York are clearer. Unions and their political allies have a long-term interest in avoiding the enactment of legislation that would ultimately be blocked by federal preemption. Of particular concern are court rulings based on employers’ “super free speech rights”—rights over and above those provided by the First Amendment—that are allegedly provided under Section 8(c) of the NLRA.⁷³ Nevertheless, neutrality legislation has been introduced in a number of states. To date, however, these neutrality bills have suffered defeat in the legislature, been vetoed by the governor, or have yet to be voted on.

70. Jeffrey J. Sherrin (O’Connell and Aronowitz, for the Healthcare Association of New York State, the New York State Health Facilities Association, the Cerebral Palsy Association of New York State, the New York Association of Homes and Services for the Aging, and the New York State Association for Retarded Citizens), letter to Arthur F. Rosenfeld (general counsel, NLRB), 30 December 2002, NLRB.

71. Jeffrey J. Sherrin (O’Connell and Aronowitz, for Plaintiffs), complaint filed with United States District Court, Northern District of New York, 3 April 2003. Claiming that the employer challenge is without merit, New York State has asked the District Court to summarily dismiss the case.

72. A ruling by the Ninth Circuit Court of Appeals against AB 1889 could, according to the Labor Policy Association, “lead to similar rulings by other circuits regarding laws in New York, New Jersey, and elsewhere” (Labor Policy Association 2003b). Since the NLRB intervened against 1889, moreover, employer groups appear more confident that the Ninth Circuit will rule in their favor.

73. Unions point out that Section 8(c) does not protect employers’ free speech rights, but merely states that noncoercive speech cannot be used as evidence of an unfair labor practice. Employers have a First Amendment free speech right, not an NLRA free speech right. Thus, unions argue, if laws prohibiting state-subsidy of anti-union activities do not violate the First Amendment, they do not violate the NLRA’s provisions on employer communications.

In 2001, in a parallel effort, the SEIU, the largest health care union in the nation, selected six states as venues for “Healthcare Funds for Healthcare Only” bills—limited neutrality legislation that would apply only to the health care industry. Pro-union lawmakers introduced the bills in Florida, Maryland, Massachusetts, Maine, Connecticut, and West Virginia, states in which SEIU has a strong organizing program and political influence in the state legislature. The union excluded California and New York because they were already in the process of passing their neutrality bills. Although the California and New York laws were broader, the “Healthcare Only” bills were more ambitious in one respect: they sought not only to prevent the misappropriation of health care funds but also to limit employer conduct. Under these bills, managers and supervisors would be prohibited from carrying out anti-union activities during work hours among employees who care for Medicare beneficiaries.

Florida is the only state that has thus far passed “Healthcare Only” legislation. Signed by Governor Jeb Bush in May 2002, the bill restricts the use of state funds to promote or deter unionization *only* in nursing homes. Pro-union legislators won passage by limiting the bill to nursing homes and agreeing to delete a private right of action provision from the original bill. This omission may render the law ineffectual, as state officials often lack the resources, expertise, and will to enforce such laws. Still, the State Labor Federation has welcomed it as a “major win” for nursing home workers and residents.⁷⁴ Elsewhere, however, the SEIU has suspended its “Healthcare Only” legislative strategy until the litigation in California and New York is resolved.⁷⁵

LABOR PEACE AGREEMENTS

In addition to neutrality bills at the state level, in recent years several cities and counties have adopted so-called labor peace agreements, which can be either “across-the-board” ordinances or project-specific measures.⁷⁶ Over the past decade at least a dozen cities and counties around the nation have enacted labor peace agreements, including San Francisco, Pittsburgh, Milwaukee County, and, most recently, Washington, D.C.⁷⁷ Labor peace agreements are increasingly common in

74. FL ST 400.334; Florida AFL-CIO 2002, 21.

75. Employer groups in California used a letter from the Maryland attorney general that stated that federal law preempted the “Healthcare Only” bill as additional evidence against the law’s legality. The AFL-CIO argued that the letter was “poorly reasoned and should be disregarded.” Jonathan Hiatt, Craig Becker, and Stephen P. Berzon (for AFL-CIO and California Labor Federation), letter to Arthur F. Rosenfeld (general counsel, NLRB), 28 June 2002, NLRB.

76. In general, the courts have looked more favorably upon labor peace agreements actions that are project-specific, rather than across the board.

77. In addition, at least six of the eighty-plus living wage ordinances around the country have incorporated some type of labor peace provision.

certain sectors of private industry, and several city and county agreements now incorporate practices pioneered by unions and employers in the private sector during the past decade.

Under these measures, in return for financial assistance in the form of grants, loans, contracts, or rent, or as part of a procurement policy, the governmental entity requires that employers sign a labor peace agreement with any union that requests it, thereby protecting the government's proprietary interest by minimizing the probability of labor disruptions. Although labor peace agreements vary considerably, in most cases employers must grant workplace access, provide employee information (names, job titles, contact information, etc.) early in the organizing campaign, and refrain from making disparaging statements about the union. Some, but not all, of these agreements also require that employers assent to card check recognition and neutrality. The union, in return, often must agree to forego strikes, boycotts, or other disruptive organizing tactics and (more controversially) must consent to the arbitration of disputes during the lifetime of the agreement.

The hotel industry has been the principal target for several recent agreements. Cities and counties often invest in hotel projects, which are particularly vulnerable to labor disruptions in the early stages of development. Although the explicit rationale for these agreements is the desire to protect the financial investment of public agencies, employer groups have claimed that this justification is simply a subterfuge for policies that are basically political payoffs to unions. Hotel industry groups have been the most vocal opponents, but these agreements have faced opposition from a broad coalition of employer groups.

California has played a leading role in the development of labor peace agreements. San Francisco was the site of the first agreement in the country that involved a public contract. In 1980 the San Francisco Redevelopment Agency sought a private sector partner for a luxury hotel development on city land. It favored the Marriott Corporation, but the Hotel and Restaurant Employees International Union (HERE) Local 2 opposed granting the contract to the company, citing a history of hostility to unionization. In return for HERE withdrawing its opposition, Marriott agreed to card check recognition and neutrality during organizing campaigns. After the union and company had reached agreement, the Redevelopment Agency awarded the development contract to the Marriott Corporation. Marriott later broke the neutrality agreement and Local 2 sued for enforcement. Although the city did not formally require the hotel to sign a labor peace agreement, the hotel subsequently contended that the agency had effectively (and illegally) forced it to do so. In 1993 the U.S. District Court for the Northern District of California rejected Marriott's argument. The court ruled that, even if the Redevelopment Agency had forced Marriott to agree to card check and neutrality, the agency held a significant proprietary interest in the hotel development project and thus could require an

agreement intended to minimize the probability of labor disruption that might threaten its investment.⁷⁸

In 1998 San Francisco adopted a formal labor peace ordinance that requires the hotels and restaurants in which the city has a proprietary interest to agree to recognize unions on the basis of a majority of signed authorization cards; the ordinance applies to hotels and restaurants with fifty or more employees.⁷⁹ An employer lawsuit challenging the legality of the ordinance was withdrawn prior to any court ruling, and the San Francisco Hotel Ordinance has become a widely emulated model for city and county labor peace legislation.

The development of the ordinance took over a year and involved twenty-seven drafts. Before its enactment, city officials met with representatives of both labor and industry organizations, accepted testimony from expert witnesses and industry representatives, and incorporated several exemptions covering situations where the city did not claim a strong proprietary interest. The criteria for establishing proprietary interest incorporate a case-by-case determination of whether the ordinance applies to any individual project. The San Francisco Hotel Ordinance has the greatest record of success of any labor peace agreement in the nation. To date, at least a half-dozen new recognitions have taken place under the terms of the law, and its effects have probably extended beyond projects in which the city has a direct proprietary interest. Since the enactment of the ordinance, the union has increased its market share in the San Francisco hotel industry from 65 to 80 percent.

In February 2000 San Francisco adopted a third labor peace agreement. Under this “labor peace/card check rule,” the San Francisco Airport Commission required all its contractors and subcontractors to sign a document recognizing unions’ right to organize employees through a card check. The rule stipulated that parties had thirty days to reach a private agreement after a union requested the check. If the parties failed to reach an agreement, the airport commission would impose a model labor peace agreement, in which employers were required to provide full employee information, allow reasonable workplace access during non-working time, agree to card check recognition, and submit disputes to binding arbitration. The airport agreement affected between 6,000 and 8,000 concessionaire, airline services, and rental car employees in approximately seventy firms. One employer, Aeroground, challenged the airport ordinance in federal court. In 2001, stating that the plaintiff had demonstrated a probability that the courts would find the agreement to be preempted by the NLRA, the U.S. District Court for the Northern District of California granted a preliminary injunction against enforcement in cases not involving a direct contractual relationship between the airport and airline service firms.⁸⁰ The court ruled that the airport

78. *Hotel Employees Local 2 v. Marriott Corp.*, 1993 WL 341286 (N.D. Cal. 1993). For a full account of the case, see Kronland 2003.

79. City of San Francisco Ordinance 97-97-62 (16 January 1998).

80. *Aeroground, Inc. v. City and County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001). The labor peace rule covered a broad range of contracts, including leases, subleases, and permits of

commission was not acting as a market participant because the agreement operated “essentially as a licensing scheme” and was not project specific. Unions enjoyed significant political support on the airport commission when the agreement was enacted, and many observers thought that it was drafted too hurriedly and included too few exemptions for situations in which the city did not possess a strong proprietary interest.

Labor Peace Agreements in Other States

All three San Francisco labor peace agreements are related to city redevelopment projects. A second, less common, form of labor peace agreement is related to city or county procurement policy. In September 2000 Milwaukee County passed an ordinance that covers contractors that conduct more than \$250,000 in business in the areas of social and mental health services and transportation services for the elderly and disabled. The ordinance does not mandate employer neutrality during organizing campaigns, but it requires employers to provide unions with complete and accurate information on bargaining unit employees, refrain from distributing to employees “false or misleading information” on unionization, and grant union organizers “timely and reasonable” workplace access, providing that they do not interfere with the employer’s business. The ordinance also forbids unions from “misrepresenting to employees the facts and circumstances surrounding their employment,” and from striking or picketing during organizing campaigns. In June 2001 SEIU won the first organizing campaign conducted under terms of the Milwaukee labor peace ordinance.

The Metropolitan Milwaukee Association of Commerce (MMAC) challenged the ordinance on grounds that it violated employers’ free speech rights and was preempted by federal law. The case was dismissed in district court. The MMAC appealed, and the appellate court sent back the case to the lower court, saying that it was “ripe for review.”⁸¹ The district court’s forthcoming decision will likely become the leading decision on the status of labor peace agreements.

As a result of the growing popularity of labor peace agreements, employer groups have promoted bills preventing local legislators from linking city or county contracts or financial assistance to employers’ willingness to sign labor peace agreements. In 2001, for example, the Louisiana legislature passed a bill that prohibits city or council lawmakers from requiring employers to sign labor peace agreements

airport property and contacts to provide services at the airport. The court later determined that Areoground fell under the jurisdiction of the Railway Labor Act, not the NLRA (and thus was not affected by the labor peace/card check rule), and the *Areoground* case became moot. The airport has continued to apply the labor peace rule in cases in which it has a direct contractual relationship with airline service firms.

81. *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 7th Circuit, No. 02-2292, 8 April 2003. For more, see *Daily Labor Report* 2000b, 2000c, 2003a.

in return for contracts, grants, or other forms of financial assistance.⁸² In several other southern states, employer groups are promoting legislation that will restrict the ability of city and country lawmakers to enact labor peace agreements or living wage ordinances. Although these laws will likely face the same kind of legal challenges faced by the bills they are intended to prohibit, they are likely to increase in popularity with anti-union legislators.⁸³

CONCLUSION

Neutrality laws and labor peace agreements have raised passions in part because they continue the familiar debates that have dominated labor law reform campaigns since the 1970s. Organized labor views these laws as a way to curb the problem of public subsidy of anti-union campaigns, while businesses see them as an attempt to restrict employer prerogatives.

Employer groups have grown increasingly strident in their opposition to these laws. Paradoxically, the growing popularity of state neutrality bills and labor peace agreements has produced calls for more assertive federal regulation of labor-management relations from business sources that are normally hostile to any such intervention. The pro-management *Employee Relations Law Journal* (2002, 2) recently questioned whether it is “time for a ‘New Deal’ for employers”—that is, time for the federal government to reassert its supremacy in the field of employment relations, as it did in the 1930s.

Traditionally, employers have resisted further federal legislation on the basis that regulation of the employment relationship should be left to the states, in part because the states were perceived as more understanding of the interests of employers. Recently, however, some employers have begun to rethink this assumption.

Faced with a slew of pro-worker state and local labor laws and confident of the pro-employer stance of the administration in Washington, many business representatives are starting to ask “whether the time has come for employers to advocate an exclusive role for the federal government” in labor-management relations (*Employee Relations Law Journal* 2002, 2).

The LPA—an organization not known for its love of either federal regulation or

82. House Bill 1740; see Louisiana Legislative Update, 19 June 2001. Arizona and Tennessee have enacted similar legislation prohibiting cities and counties from enacting living wage ordinances. See McCracken 2003.

83. Most observers believe that unions would benefit from local and state control of labor peace and neutrality legislation, even if this decentralization of labor policy produced hostile legislation in conservative regions of the country, as unions are already very weak in most such areas.

the NLRB⁸⁴—has pleaded with the board to reassert strong federal control over labor policy. Announcing that it was “time to stop the balkanization of American labor law,” LPA Vice President Daniel Yager insisted that the NLRB seize the initiative during this “critical period in history.” The board’s response (or lack thereof) to state neutrality and labor peace legislation, Yager (2003) argued, would determine

whether we continue to have the centralized scheme envisioned by Congress . . . or a patchwork quilt of individual requirements and prohibitions. The resulting balkanization of labor laws is neither what was intended nor would it best serve the interests of the affected parties. . . . It is up to General Counsel Arthur Rosenfeld . . . to halt this trend.

Prior to the NLRB’s decision to file an amicus brief against AB 1889 in May 2003, the LPA appeared impatient with the board’s apparent reluctance to act decisively to “protect the national interest” by invoking a Nash-Finch injunction or by filing an amicus brief. Asserting that the NLRB’s general counsel has power of “awesome dimensions,” Yager accused the board of dereliction of its duty to intervene against AB 1889. As a result of the board’s disinclination to “assert itself,” Yager feared that the country was already sliding inexorably towards a “*de facto* Canadian system” of industrial relations, in which state legislatures, rather than the federal government, would assume primary responsibility for establishing and enforcing labor policy.⁸⁵ If the board failed to intervene, he argued, its inaction would create the appearance that business groups seeking to overturn the legislation were simply pursuing their “own selfish interests” (Yager 2003). Firm action from the NLRB would “remind” state and local lawmakers that they do not possess the authority to regulate such matters and would “prevent perversion of the centralized administration” of labor policy that Congress had intended.⁸⁶ The present period, Yager concluded, is one of those “rare occasions” when the NLRB must act to “protect the integrity” of federal labor law.

The LPA is not alone in calling for stronger federal intervention against “anti-business” legislation at the state and local levels. The National Chamber Litigation Center lamented that the NLRB had failed to “move quickly” against AB 1889, despite several requests for intervention, and bemoaned the fact that California employers had sustained “continued liability” as a result of its inaction (Business Advocate 2002). The Business Council of New York State warned the NLRB that state neutrality laws would severely undermine the “laboratory conditions” in representation campaigns that it had “arduously created and steadfastly defended” over

84. In 1997, for example, the LPA argued that Congress should consider abolishing the NLRB and transfer its functions to the federal courts. See Yager 1997.

85. Labor policy in Canada is largely a provincial, rather than a federal, matter. Federal law covers only about 10 percent of Canadian employees.

86. Yager to Lieber, 28 June 2002.

the previous half century.⁸⁷ Likewise, the coalition of health care and social service employers that challenged New York's neutrality law insisted that it "impermissibly infringes upon and conflicts" with the NLRA and added that, in the interests of "national uniformity," the NLRB must intervene to ensure that employers were not subjected to "varied restrictions from state to state."⁸⁸

The success of lawmakers in California and New York has also spurred pro-union lawmakers in other states to attempt to replicate their achievements. Pro-union legislators in Oregon, Washington, and several other states have recently introduced state neutrality bills on the assumption that the current financial crisis provides the ideal political environment for legislation designed to protect the integrity of public funds. They believe that bills prohibiting the misappropriation of state tax dollars will get a friendly reception even from some lawmakers who would normally oppose labor-supported legislation. The haste to introduce neutrality bills, even in states where they have little chance of political success, suggests that, for some lawmakers, they may simply be the "flavor of the month."

The rush in state and local legislatures to enact neutrality laws and labor peace agreements raises the critical question of whether this legislation represents the best use of labor's political capital, which is limited even in states such as California and cities such as San Francisco. Even if the California and New York bills withstand legal challenge, their ability to counteract intensive anti-unionism remains largely unproven. Without the benefit of a reasonable period of enforcement, it is difficult to gauge their impact. Of all the labor peace ordinances on the statute books, only the San Francisco hotel ordinance has been enforced long enough to claim any real success in practice. This would not be the first time that organized labor has gone to considerable lengths to promote legislation that may not assist greatly with its principal goal of organizing the unorganized, and it is probably not the first time that the business community has vigorously resisted legislation that may not fundamentally lessen its ability to fight unionization. State and local policy innovations that raise no preemption or constitutional issues (such as responsible contractor legislation or legislation expanding collective bargaining coverage) attract less intense opposition, stand more chance of surviving legal challenges, and may prove more effective at circumventing aggressive anti-union campaigns.

Nevertheless, the appeal of neutrality laws is easy to understand. First and foremost, labor law reform is currently off the agenda in Washington. For the foreseeable future, the bills most likely to find their way to the floor of the Congress are those supported by labor's opponents, such as the recent Norwood bill outlawing card check recognition.⁸⁹ Legislation limiting the public subsidy of aggressive anti-

87. Daniel B. Walsh (president and CEO, Business Council of New York State, Inc.), letter to Arthur F. Rosenfeld (general counsel, NLRB), 31 December 2002, NLRB.

88. Sherrin to Rosenfeld, 30 December 2002.

89. In May 2002 House member Charles Norwood (R-Georgia) introduced the so-called Workers' Bill of Rights (H.R. 4636), which is designed to ensure that secret ballot elections are the exclusive route to union certification.

unionism will need to come from state and local lawmakers. The attraction of state neutrality is not limited to practical political considerations, however; it is also linked to the longer-term case for NLRA reform. Part of the failure of organized labor's campaign to reform the NLRA has been its inability to articulate a simple, popular message to the general public. Issues such as card check recognition and outlawing permanent replacements are of obvious importance to most within the labor community, but, thus far, organized labor has largely failed to explain to non-unionists why these measures are essential for workplace democracy.

Some evidence does suggest that the principle behind state neutrality legislation is popular with the public. Most non-union workers believe that employers have the right to hold anti-union views and to convey their views to employees, but they generally oppose the state's subsidy of anti-union campaigns. Few think that state funds for patient care should be used to pay management consultants \$200 to \$300 per hour to oppose unionization among low-paid immigrant employees in nursing homes, or that state grant money disbursed for biomedical research should be used to pay employees to attend mandatory anti-union meetings, or that funds intended for vocational training for employees should be spent on anti-union literature, videos, and web pages. A fuller understanding of state neutrality laws and labor peace ordinances might persuade the wider public that they have a direct stake in restricting aggressive anti-unionism. Organized labor has an issue—preventing the misuse of state funds—that enjoys widespread support, yet thus far it has not mounted high-profile public campaigns on the issue.

As a result of the precarious legal status of neutrality bills, unions have studiously avoided public campaigns to support them, working instead through their allies in state and local legislatures. Neutrality and labor peace laws have been passed with little fanfare. And, for good reasons, state and local politicians have steered clear of basing their defense of these bills on the need to restrict aggressive anti-union campaigns.⁹⁰ The purpose of the legislation is to safeguard public money, they insist, not to lower the considerable barriers to organization. Employer groups, who undoubtedly understand the widespread appeal of the principle underlying these laws, have been much more vociferous in opposition to these bills than unions have been in their support. Employers, moreover, have a clear message: they have repeatedly argued that neutrality laws impose crippling accounting procedures and “muzzle” employers while allowing free rein to organizers, thereby effectively imposing unionization on reluctant employees. If the courts strike the laws down, labor's political capital will have been largely depleted without advancing the case for labor law reform with the public.

Although the legal status of the California and New York bills remains tenuous, two recent rulings in federal court may give their cases a boost. The D.C. Circuit

90. Business opponents of the California and New York neutrality laws have repeatedly cited speeches by labor officials and their political allies legislation as evidence that its true purpose is to enhance unionization, not to protect the integrity of public money.

Court ruled against unions twice in the past year, but in doing so it delineated the limits of employers' free speech under the NLRA and limited the doctrine of federal preemption in cases where government has a proprietary interest.⁹¹ These rulings, together with the Ninth Circuit Court's decision to consider the legality of AB 1889, may provide the basis for a robust defense of neutrality laws.⁹²

Alternatively, the federal courts may well decide that employers have a legal right to spend state tax money allocated to health care or job training on union suppression. If the challenges to neutrality laws reach the Supreme Court, pro-union legislators will at least receive additional guidance on the best areas for future policy innovation. A final ruling against state neutrality laws and labor peace agreements might consign them to a footnote in the history of federal labor law. Or perhaps defeat in the courts will galvanize the supporters of workers' right to organize, impelling them to invent new and even more imaginative ways to secure governmental neutrality in labor disputes. In any event, organized labor will doubtless continue to face robust opposition from business to any legislation that limits employers' ability to finance and implement aggressive anti-union campaigns.

91. *Building and Construction Trades Department, AFL-CIO, et al., v. Joe Allbaugh, et al.*, 295 F.3d 28 (D.C. Cir. July 12, 2002); *UAW-Labor Employment and Training Corp. v. Chao*, 2003 WL 1906339 (D.C. Cir. Apr. 22, 2003). The *Chao* decision upholds a Presidential Executive Order that requires employers that receive federal contracts to post notices informing employees of their so-called Beck rights. The court stated that employers' "free speech rights" under Section 8(c) of the NLRA are strictly limited and are essentially no greater than those provided by the First Amendment; thus, the requirement that federal contractors post Beck notices in no way interferes with these rights. In *Allbaugh* the district court rejected a challenge by the Building Trades to overturn a Presidential Executive Order that prohibits the use of project labor agreements on federally funded construction projects. The court ruled that the preemption provision of NLRA can be implemented only when the government acts as a regulator; the provision does not come into play when the government acts as a proprietor, interacting with private participants in the marketplace. Paradoxically, unions won the *Garmon* and *Machinist* cases; these rulings were responsible for creating the doctrine of broad federal preemption that has generally prevented the enactment of pro-union laws at the state and local levels.

92. At the present time, only one Supreme Court decision, the 1993 "Boston Harbor" ruling, explains in any detail the nature and extent of the so-called proprietary exemption to the doctrine of federal preemption in labor relations. *Building & Construction Trades Council v. Associated Builders & Contractors* ("Boston Harbor"), 507 U.S. 218 (1993).

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APPENDIX. Summary of State Neutrality Bills

| <i>State</i> | <i>Bill</i> | <i>Purpose</i> | <i>Fate</i> |
|--------------|-------------------|---|---|
| Arizona | HB 2503 | To restrict the use of state funds by state contractors | Died in committee, January 2001 |
| Arizona | HB 2548 | To restrict the use of state funds by state contractors | Died in committee, 2002 |
| California | AB 442 | To restrict the use of state funds by private and public employers for anti-union activities | Passed by legislature, 1999 Vetoed |
| California | AB 1889 | To restrict the use of state funds by private and public employers for pro- or anti-union activities | Passed by legislature, August 2000 Signed into law, September 2000 |
| Colorado | SB 130 | To restrict the use of state funds by state contractors | Passed by senate, April 2002 Died in house committee |
| Connecticut | HB 6936 | To restrict the use of state funds by health care facility providers | Passed by house, June 2001 Died in senate committee |
| Connecticut | SB 763 | To restrict the use of state funds by state contractors | Died in committee, 2001 |
| Florida | HB 957 SB 1042 | To restrict the use of state funds by health care facility providers | Passed by house Died in senate committee, May 2001 |
| Florida | HB 767 SB 1378 | To restrict the use of state funds by nursing home facilities | Passed by legislature Signed into law, May 2002 |
| Georgia | SB 271 | To restrict the use of state funds by employers (specifies prohibited activities) | Died in senate, March 1999 |
| Hawaii | | “Bill to Provide for State Neutrality in Union Organizing” | Died in committee, March 2003 |
| Illinois | HB 726 | To prohibit the recipients of state funds from using those funds to promote, assist, or deter unionization | Died in committee, March 2001 |
| Illinois | HB 3395 | To prohibit the use of state funds by employers that had reimbursement agreement with state; to require that unions be given equal access to employees and prohibit captive meetings during working hours | Died in committee, April 2001 |
| Illinois | HB 3011 | To restrict the use of state funds by health care facility providers | Died in committee, April 2001 |
| Illinois | HB 3395 | To prohibit the use of state funds by employers that had reimbursement agreement with state; to require that unions be given equal access to employees and prohibit captive meetings during working hours | Passed by senate, April 2003 Died in house committee, June 2003 |

APPENDIX. (Continued)

| <i>State</i> | <i>Bill</i> | <i>Purpose</i> | <i>Fate</i> |
|---------------|----------------------|---|---|
| Indiana | Bill 1980 | To prohibit any employer with a reimbursement agreement with state from using state funds to support or oppose unionization | Passed by house Died in senate committee, March 2001 |
| Iowa | HJ 215/256 HF 126 | To prohibit the use of state funds by employer that was reimbursed by the state, received grants from the state, had contracts with state, or participated in state programs | Died in committee, February 2001 |
| Louisiana | SB 1078 | To prohibit employers from using state funds to assist, promote, or deter unionization | Died in committee, July 2001 |
| Maine | LD 1394 HP 1037 | To restrict the use of state funds by health care facility providers | Passed by legislature Vetoed, June 2001 |
| Maryland | HB 1246 | To restrict the use of state funds by health care facility providers | Died in committee, March 2001 |
| Massachusetts | | To restrict the use of state funds by health care facility providers | |
| Massachusetts | HB 630 | “An Act to Ensure Proper Expenditure of and Accounting for State Funds” | Pending |
| Missouri | HB 1816 | To prohibit employers from using state funds to assist, promote, or deter unionization | Died in house, February 2000 |
| Missouri | HB 2209 | To prohibit employers from using state funds to assist, promote, or deter unionization | Died in committee, 2002 |
| Missouri | HB 308 | “An Act Relating to Union Organizations Limitations on Private Employer Use of State Funds” | Pending |
| New Hampshire | SB 162 | To limit the use of state funds by private contractors (specifies prohibited activities, including using state funds to “defend against unfair labor practice charges”) | Died in committee, 2002 |
| New Jersey | Executive Order 20 | To require card check and neutrality from state contractors that provide uniforms for state employees (may be modified in near future) | Signed into law, June 2002 |
| New Jersey | AB 2958 | To prohibit the use of state funds to pay consultants, train supervisors, or pay salaries of other employees whose primary responsibility is union avoidance (similar to New York neutrality law) | Pending |

APPENDIX. (Continued)

| <i>State</i> | <i>Bill</i> | <i>Purpose</i> | <i>Fate</i> |
|---------------|----------------------|---|---|
| New York | SB 6328 | To prohibit the use of state funds to “train managers, supervisors, or other administrative personnel regarding methods to discourage union organization” | Passed by legislature, April 1998 Signed into law |
| New York | AB 8568 SB 4385 | To prohibit the use of state funds to pay consultants, train supervisors, or pay salaries of other employees whose primary responsibility is union avoidance | Passed by legislature, July 2002 Signed into law, September 2002 |
| North Dakota | SB 2434 | To provide limits on the use of state funds for union organizing | Died in committee, February 2001 |
| Oregon | HB 3645 S 778/776 | To prohibit the use of state funds to encourage or discourage unionization (similar to AB 1889) | Died in committee, 2001 |
| Oregon | SB 494-A | To prohibit the use of state funds to oppose or support union organizing efforts by workers employed by public agencies, organizations that receive state grants, and contractors for services who receive 50 percent or more of their funds from the state | Passed by senate, June 2003 Pending in house |
| Pennsylvania | HB 1531/ 1659 | To restrict the use of state funds by state contractors | Died in committee, May 2001 |
| Tennessee | HB 20 SB 413 | To provide for state neutrality in labor organizing | Pending |
| Washington | HB 2016 | To prohibit the use of state funds to encourage or discourage unionization (similar to AB 1889) | Died in house committee, March 2003 |
| West Virginia | HB 2920 SB 534 | To prohibit nursing home facilities and home health care providers from using state funds to deter unionization; prohibit anti-union meetings during work shifts in which employees care for Medicaid patients | Died in committee, 2001 |

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