LRBb1220

2001 DRAFTING REQUEST

Senate Amendment (SA-SSA1-SB55)

Received: **06/15/2001**

Received By: **mdsida**

Wanted: **As time permits**

Identical to LRB:

For: **Senate Democratic Caucus**

By/Representing: **Keckhaver**

This file may be shown to any legislator: **NO**

Drafter: **mdsida**

May Contact:

Addl. Drafters:

Subject: **Health - long-term care**
Public Assistance - med. assist.
Employ Priv - miscellaneous

Extra Copies: **dak**
rac

Submit via email: **NO**

Requester's email:

Pre Topic:

SDC:.....Keckhaver - CN1505,

Topic:

Nursing home MA funds used in connection with union activities

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Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	mdsida 06/18/2001	csicilia 06/18/2001		_____ _____			
/1			rschluet 06/18/2001	_____ _____	lrb_docadmin 06/18/2001		

FE Sent For:

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Nursing home MA funds used in connection with union activities

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Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	mdsida						

6-18?

FE Sent For:

<END>

34/35

Representative Coggs

HEALTH AND FAMILY SERVICES – MEDICAL ASSISTANCE

Prohibit Use of State Funds For Support of Union or Anti-Union Activities

Labor or Ill. 32(G) 5.02 (P2) Failed 8-8

Motion:

Move to prohibit the use of state funds, including medical assistance (MA) payments provided to nursing home providers, from being used to assist, promote, deter or discourage union organizing. Specify that a nursing home provider that receives MA funds, may not engage in activities to assist, promote, deter or discourage an employee, who provides services directly or indirectly to MA beneficiaries, from union organizing during a time when the employee is regularly scheduled to provide services. Direct the Department of Health and Family Services to accept any complaints from an individual who believes that a provider is expending funds in violation of this provision, and require the Department to notify the provider within one week after receiving the complaint that it must provide records sufficient to show that no state funds were used in violation of the statute within 10 days.

Authorize the Attorney General or any taxpayer to bring a civil action for a violation of this provision for injunctive relief, damages, civil penalties and other appropriate equitable relief. Require that all damages and civil penalties collected be paid to the State Treasury. Require that a taxpayer who wishes to file a civil suit, to first provide written notice to the Attorney General of the alleged violation and his/her intent to bring suit. Specify that such notice cannot be given until 20 days after a complaint is filed with the Department and the notice must include a copy of the complaint filed with the Department and its disposition, if any. Prohibit a taxpayer from bringing a civil action if the Attorney General commences a civil action for the same alleged violation within 60 days of receiving the notice. Allow a taxpayer to intervene as a plaintiff in any civil action. Specify that a prevailing plaintiff would be entitled to recover reasonable attorney's fees and costs. Specify that a prevailing taxpayer intervenor who makes a substantial contribution to an action would be entitled to recover reasonable attorney's fees and costs.

Specify that a provider who uses state funds for union or anti-union activities is liable to the state for the amount of such funds used, plus a civil penalty equal to twice the amount of those funds. Specify that for a nursing home that receives both MA funds and other revenue violates these provisions, the nursing home would be liable for the proportion of the cost of the campaign which represents the proportion of the nursing home's revenues from MA in the fiscal year of the campaign and the civil penalty would not apply. Specify that any individual who knowingly authorizes the use of state funds in violation of the provision would be liable to the state for the amount of those funds. Specify that any individual who knowingly violates the prohibition would be personally liable to the state in the amount of $1,000 per violation.

Specify that any expense, including legal and consulting fees and salaries of supervisors and employees, incurred for research for, or preparation, planning or coordination of, or carrying out, an activity to assist, promote, or deter union organizing shall be treated as paid or incurred for that activity. The prohibition in this motion would not apply to an activity performed, or to an expense incurred, in connection with any of the following: (1) addressing a grievance or negotiating or administering a collective bargaining agreement; or (2) performing an activity required by federal or state law or by a collective bargaining agreement.

Exempt expenditures made prior to January 1, 2002, or a grant or contract awarded prior to January 1, 2002, unless the grant or contract is modified, extended or renewed after January 1, 2002. Specify that these requirements would not require employers to maintain records in any particular form.

Prohibit any person subject to the provisions from discharging, demoting, threatening or otherwise discriminating against any person or employee with respect to compensation, terms, conditions, or privileges of employment as a reprisal because the person or employer (or any person acting pursuant to the request of the employee) provided or attempted to provide information to the Department or to the Attorney General or his or her designee regarding possible violations. Permit any person or former employee who believes that he or she has been discharged or discriminated against to file a civil action within three years of the date of such discharge or discrimination. Specify that if a court finds by a preponderance of the evidence that a violation of this protection has occurred, the court may grant such relief as it may deem appropriate, including: (a) reinstatement to the employee's former position; (b) compensatory damages, costs and reasonable attorneys fees; and (c) other relief to remedy past discrimination. Exclude from these protections any employee or person who: (a) deliberately causes or participates in the alleged violation or regulation; or (b) knowingly or recklessly provides substantially false information to the division.

Specify that the provisions of this motion are severable. If any one provision is held invalid, in whole or in part, that invalidity shall not affect any other provision that can be given effect.

NO MA moneys [or other terminology that describes MA funds] may be used by any person to influence the decision of an individual to support or oppose a labor organization that represents or seeks to represent the individual or to become a member of a labor organization. This section [or appropriate statutory unit] shall not prohibit a person, if otherwise permitted by law, to use MA moneys [or appropriate term] to negotiate or administer a collective bargaining agreement or to perform any action that is required by law or the terms of a collective bargaining agreement.

Nelson, Robert P.

From: Dsida, Michael
Sent: Thursday, June 14, 2001 1:38 PM
To: Nelson, Robert P.
Subject: FW: nursing homes

-----Original Message-----
From: Kennedy, Debora
Sent: Thursday, June 14, 2001 8:37 AM
To: Dsida, Michael
Subject: RE: nursing homes

Excellent question; no, all sorts of providers receive MA money. Therefore, you should use a definition; the appropriate ones are of "facility" and "nursing home" in 49.45 (6m) (a) 3. and 5.; however, just to make it more complicated, now that I look at the definition of "facility", it doesn't exactly work (there are two c-brfs in the state that provide nursing home care, and when the definition was created, they were the only c-brfs certified to provide MA--now, however, c-brfs are certified to provide MA under the long-term care community options program as well, which is not the same kind of care as that provided in a nursing home). Therefore, the definition of "facility" should be "a nursing home or a community-based residential faxcility that is licensed under s. 50.03 and that is certified by the department to provide medical assistance services equivalent to those provided by a nursing home".

-----Original Message-----
From: Dsida, Michael
Sent: Wednesday, June 13, 2001 4:49 PM
To: Kennedy, Debora
Subject: nursing homes

If a person is receiving money under those appropriations, does that automatically mean the person is a nursing home? Or does the amdt need to specify that it applies only to nursing homes? If it's the latter, is there a defn that we shoudl use?

thjanks

Nelson, Robert P.

From: Dsida, Michael
Sent: Thursday, June 14, 2001 2:21 PM
To: Burnett, Douglas
Cc: Nelson, Robert P.
Subject: nursing homes and union-related activity

Based on our discussion yesterday, we are planning to draft this to cover all nursing homes that receive MA money, even if the MA money isn't used to promote or discourage union organizing. In view of that change, under what circumstances will an individual be liable under this amendment? The text of the motion (beginning 3 lines from the bottom of p. 1) refers to individuals authorizing the use of state funds "in violation of this provision." But based on our change, it is not the expenditure that violates the prohibition.; it's the pro- or anti-union activity, once it has received MA money. One alternative is to have the individual penalties apply if a person authorizes the use of MA money in connection with a violation.

I am also not sure who would be covered by the forfeiture. Should it be the same people (i.e., persons who authorize the use of MA money in connection with a violation)?

TEXT OF GOVERNOR'S VETO MESSAGE

July 5, 1991

To the Honorable Members of the Senate:

I am vetoing Senate Bill 75 in its entirety. This bill statutorily increases the state minimum wage to a rate equal to the current federal minimum wage and in 1992 to a rate beyond the federal minimum.

SB 75 increases the state minimum wage for most employees from $3.80 per hour to $4.25 per hour effective April 1, 1991 and to $4.65 per hour on April 1, 1992. While periodic increases in the minimum wage are important to ensure that it is not eroded by inflation, my administration increased the rate as recently as April 1, 1990 to $3.80 per hour. This was the third increase by administrative rule since 1987 and represents a rate 17 percent greater than the $3.25 rate in place when I took office. I believe that further increases at this time of economic uncertainty would be detrimental to individuals seeking employment.

Further, although the subject of much discussion, the adequacy of the current minimum wage has never been studied. We have no concrete evidence of whether the minimum wage increases employment or hinders it, particularly among first-time job seekers. Because of this the Department of Industry, Labor and Human Relations has established a Minimum Wage Task Force to analyze the effect of the minimum wage on employes, on jobs, and as a tool to reduce poverty. The task force will be reporting its recommendations regarding the minimum wage on September 1, 1991.

Until we have the benefit of this independent study to determine the impact of the minimum wage, I believe it would be inappropriate to make changes to the current minimum wage law. Once the Task Force issues its report and we have an opportunity to review its findings, my administration will move to administratively increase the minimum wage as appropriate.

Sincerely,

TOMMY G. THOMPSON
Governor

1991 Senate Bill 182: Hiring Permanent Replacement Employes During a Labor Dispute

On June 4, 1991, the senate passed Senate Bill 182 [as amended by Senate Amendment 1] by a vote of 18 to 15, S.J. 6/4/91, p. 283.

On June 12, 1991, the assembly adopted Assembly Amendment 1 to Senate Bill 182 on a voice vote, A.J. 6/12/91, p. 290. On June 13, 1991, the assembly concurred in Senate Bill 182 as amended by a vote of 59 to 37 with 2 paired, A.J. 6/13/91, p. 293.

On June 27, 1991, the senate concurred in Assembly Amendment 1 to Senate Bill 182 on a voice vote, S.J. 6/27/91, p. 334.

On July 15, 1991, the governor vetoed Senate Bill 182, S.J. 7/17/91, p. 364.

TEXT OF GOVERNOR'S VETO MESSAGE

July 15, 1991

To the Honorable Members of the Senate:

I am vetoing Senate Bill 182 in its entirety. This bill prohibits employers from permanently employing individuals who replace employes involved in labor disputes. It also prohibits employers from granting a preference to replacement employees over the employe involved in such a dispute.

Pursuant to the Commerce Clause of the United States Constitution, Article I, sec. 8, Congress enacted the National Labor Relations and Management Act (NLRA), 29 U.S.C. §1 et seq. (1935), later amended by the Taft-Hartley Act, 29 U.S.C. §141 et seq. (1947). The Commerce Clause both allows Congress to regulate interstate commerce, as well as serves to preempt states from enacting legislation in certain situations where Congress has exercised its powers.

When Congress enacted the NLRA, the ability of states to enact legislation dealing with labor law was severely curtailed. One such area of legislation was state's rights to regulate the hiring of permanent or temporary replacement workers during a strike. Three years after the enactment of the NLRA, the United States Supreme Court held that employers have the right under the NLRA to hire temporary or permanent replacement workers during a strike. N.L.R.B. v. MacKay Radio & Telegraph, 304 U.S. 333, 345 (1938). In doing so, the Supreme Court was not creating a new right under the NLRA, but rather was confirming an existing right. In addition, the court held that an employer is not bound by the NLRA to discharge replacement workers after the strike in order to rehire striking workers. MacKay, at 345-346. MacKay has been consistently reaffirmed by later courts. See TWA, Inc. v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989); Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976).

The rationale under MacKay, as explained by the later courts, was that the economic actors in a strike situation may not be deprived of their right to self-help remedies. For the employe, it is the right to strike. For the employer, it is the fundamental right to hire replacement workers in order to continue his or her business in the face of a strike. Belknap, Inc. v. Hale, 463 U.S. 491 (1938).

While MacKay does not explicitly hold that states are strictly preempted from passing legislation to prevent the hiring of replacement workers, that is the effect. This became clear in Machinists. Machinists annunciated two separate areas where states may be preempted from acting: first, states may not regulate where Congress has expressly acted; or, second, where it can be discerned that Congress intended an area to remain unregulated. While ruling on a different issue, the Machinists court held in dictum that the ability of employers to hire replacement workers fits squarely within the second category. Machinists, at 153. The court reasoned, "Although many of our past decisions concerning conduct left by Congress to the free play of economic forces address the question in the context of union and employe activities, self-help is of course also the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable." Machinists, at 147.

Other Courts have confirmed the holdings of MacKay and Machinists, and have gone even further in holding that states are preempted in this area. In striking down the Illinois Strikebreakers Act, the federal court held that, "...[i]t must be concluded, upon careful analysis, that the general subject of conditions for replacement strikers, or locked-out employes, in an industry affecting interstate commerce, is a matter which has been delegated to the National Labor Relations Board by federal law." Illinois v. Midland Co., n.o.r., 110 L.R.R.M. (BNA) 3320 [Dist.Ct.,C.D. Ill.] (1982). The Illinois act struck down by the federal court was very similar to SB 182. Other courts have also expressly held that states are preempted from prohibiting employers from hiring replacement workers. See, e.g., Alton Box Board Co. v. Alton, n.o.r., 77 L.R.R.M. (BNA) 2123 [Dist.Ct., S.D.Ill.] (1971); Amalgamated Transit Union v. Greyhound, 561 N.Y.S. 2d 118 (Sup. 1990); City of Columbus v. Guay, n.o.r., 132 L.R.R.M. (BNA) 3046 [Franklin Co. Ct. App., Ohio] (1989). Moreover, based upon the same law and rationale, the governors of Maine and Minnesota have vetoed legislation having the same effect as SB 182.

For these reasons, I believe that SB 182 is preempted by federal law and is therefore unconstitutional.

The authors of the bill, however, opine that it falls within the "public peace, safety and order" exception to federal law — otherwise known as the "local interest exception." Although exceptions do exist under federal preemption law, such is not the case here, and this argument will not save SB 182 from its taint of unconstitutionality.

"The local interest exception only applies to local laws proscribing actual violence, threats of violence, or mass picketing. It does not apply where there is merely a potential for violence." City of Columbus, at 3048, [citing Garner, Central Storage Co. v. Teamsters, 346 U.S. 485 (1953)]. Unconstitutional labor regulation which is cloaked under the local interest exception will not otherwise be held constitutional. SB 182, while perhaps indirectly affecting safety, seeks to regulate labor activity. As the Amalgamated court noted while analyzing similar legislation and the possible public interest exception, "There is simply no basis to hold that the impact of the anti-strike breaker law provision directed against the employer is tangential to a labor dispute or that pre-emption may be otherwise avoided." Amalgamated, at 11. This was so because there was no actual or threat of violence being regulated. Instead, only the "policing of actual or threatened violence to persons or destruction of property has been held most clearly a matter for the States." Machinists, at 136. For example, see Automobile Workers v. Russell, 356 U.S. 634 (1958), (upheld state-court jurisdiction of common-law tort of malicious interference with occupation of mass picketing and threats of violence); Automobile Workers v. Wisconsin Emp. Rel. Board, 351 U.S. 266 (1956), (sustained state authority to vest jurisdiction in a state labor relations board to enjoin violent union conduct); Allen-Bradley Local v. Wisconsin Emp. Rel. Board, 315 U.S. 740, 749 (1942), (state court may hear tort action based upon threats of violence); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957), (sustained state court power to enjoin striking employes from threatening or provoking violence).

Under the NLRA, employers may hire replacement workers during a strike, and there is little doubt that states are preempted by federal law from regulating in this area. States may only do so by regulating specifically against actual or threats of violence to persons or property, or by using similar police power measures. SB 182 is not such a measure.

Any change in this area must come at the federal level. I understand that on Wednesday of this week, the House of Representatives is scheduled to take up legislation (HR 5) designed to protect striking workers from being permanently replaced by their employers. Only through this type of congressional action, and not through state legislation like the bill before me, can the law be changed.

For these reasons I am vetoing Senate Bill 182.

Sincerely,

TOMMY G. THOMPSON
Governor

the hiring of permanent replacement workers fell into neither exception. These exceptions are 1) conduct that is a merely peripheral concern of the NLRA; and 2) conduct, such as violence, that is a local interest. The Maine supreme court held that the Maine permanent replacement statute was not a mere peripheral concern of the NLRA, but rather went right to the core of the collective bargaining process. The Maine supreme court further held that the Maine permanent replacement statute was not on its face an anti-violence measure and that any effect that the Maine permanent replacement statute might have had on violence is remote compared to its direct consequence of shifting the economic balance in a labor dispute.

In conclusion, the hiring of permanent replacement workers is an economic weapon that congress currently intends to leave unregulated. Because only congress, and not the states, may change the intent of congress, state regulation of the practice of hiring permanent replacement workers is preempted by the NLRA. For an excellent discussion of the law of federal preemption of state labor regulations, I refer you to the text of the governor's veto message of 1991 SB-182, a copy of which is attached.

GMM:ks

Gordon M. Malaise

Enclosure

[M91Porter09/30]

The State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

100 NORTH HAMILTON STREET
P.O. BOX 2037
MADISON, WIS. 53701-2037

PHONE: AREA 608
L: 266-3561
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266-5648

DR. H. RUPERT THEOBALD
CHIEF

U.S. Sup. Ct. Gould Case

September 30, 1991

MORANDUM

Representative Cloyd Porter

m: Gordon M. Malaise, Legislative Attorney

ject: Federal Preemption of Striker Replacement Legislation

You have requested that I analyze Opinion of the Justices, 571 A. 2d 805 (Me. 9) which held that a statute that would delay the hiring of permanent replacet workers until the 45th day after a strike begins is preempted by federal or law.

In that opinion, the Maine supreme court stated that there are 2 principles er which state regulation of the collective bargaining process is preempted by eral labor law. These principles are as follows:

1. When the state regulation concerns conduct that is expressly or arguably er prohibited or protected by the national labor relations act (NLRA).

2. When the state regulation concerns conduct that congress intends to leave stricted from most forms of regulation by either the national labor relations d (NLRB) or the states.

Based on the 2nd of these principles, the Maine supreme court held that the e statute affecting the hiring of replacement workers was preempted in that it the intent of congress to leave the hiring of replacement workers unregulated. nacting the NLRA, congress set up a framework for collective bargaining by h employers and employes are each prohibited from using certain weapons of omic pressure while other weapons are left "unregulated and to be controlled the free play of economic forces." Machinists v. WERC, 427 U.S. 132 (1976). hiring of replacement workers is one of the economic weapons that congress ently intends to leave unregulated. Therefore, it is up to congress, not the vidual states, to change that intent and determine that the hiring of acement workers should be regulated.

In reaching its decision, the Maine supreme court cited NLRB v. Mackay Radio, U.S. 333 (1938), for the proposition that an employer whose employes have gone economic strike has a right to hire permanent replacement workers to protect continue his business. The Maine supreme court also reiterated that this established principle is still good law today by citing Trans World Airlines, v. Flight Attendants, 489 U.S. 426 (1989).

Finally, the Maine supreme court noted that there are 2 limited exceptions to ule of federal preemption of labor law, but that the Maine statute affecting

orter09/30]

Nelson, Robert P.

From: Dsida, Michael
Sent: Thursday, June 14, 2001 3:29 PM
To: Burnett, Douglas
Cc: Nelson, Robert P.
Subject: FW: nursing homes and union-related activity

Don't spend any time on the attached e-mail for now. We may have some problems under federal law with the broader approach, so my questions may be moot. I'll let you know later if I still need these questions answered.

-----Original Message-----
From: Dsida, Michael
Sent: Thursday, June 14, 2001 2:21 PM
To: Burnett, Douglas
Cc: Nelson, Robert P.
Subject: nursing homes and union-related activity

Based on our discussion yesterday, we are planning to draft this to cover all nursing homes that receive MA money, even if the MA money isn't used to promote or discourage union organizing. In view of that change, under what circumstances will an individual be liable under this amendment? The text of the motion (beginning 3 lines from the bottom of p. 1) refers to individuals authorizing the use of state funds "in violation of this provision." But based on our change, it is not the expenditure that violates the prohibition.; it's the pro- or anti-union activity, once it has received MA money. One alternative is to have the individual penalties apply if a person authorizes the use of MA money in connection with a violation.

I am also not sure who would be covered by the forfeiture. Should it be the same people (i.e., persons who authorize the use of MA money in connection with a violation)?

Dsida, Michael

From: Burnett, Douglas
Sent: Friday, June 15, 2001 6:10 PM
To: Dsida, Michael
Cc: Nelson, Robert P.
Subject: RE: nursing homes and union-related activity

Have the individual penalties apply if a person authorizes the use of ma money in connection with a violation, and have it apply to the same person who authorized the sue of ma money.

-----Original Message-----
From: **Dsida, Michael**
Sent: Thursday, June 14, 2001 2:21 PM
To: Burnett, Douglas
Cc: Nelson, Robert P.
Subject: nursing homes and union-related activity

Based on our discussion yesterday, we are planning to draft this to cover all nursing homes that receive MA money, even if the MA money isn't used to promote or discourage union organizing. In view of that change, under what circumstances will an individual be liable under this amendment? The text of the motion (beginning 3 lines from the bottom of p. 1) refers to individuals authorizing the use of state funds "in violation of this provision." But based on our change, it is not the expenditure that violates the prohibition.; it's the pro- or anti-union activity, once it has received MA money. One alternative is to have the individual penalties apply if a person authorizes the use of MA money in connection with a violation.

I am also not sure who would be covered by the forfeiture. Should it be the same people (i.e., persons who authorize the use of MA money in connection with a violation)?

Dsida, Michael

From: Megna, Richard
Sent: Sunday, June 17, 2001 5:34 PM
To: Dsida, Michael
Subject: RE: MA funds - union organizing

The materials that I received did not provide for that exception.

-----Original Message-----
From: Dsida, Michael
Sent: Friday, June 15, 2001 4:15 PM
To: Megna, Richard
Subject: MA funds - union organizing

Would the requirement that DHFS notify the nursing facility of a complaint apply even if the department believes that the complaint is not a bona fide one?

State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-3435/?
MGD, RPN, &RAC:...:...

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

AN ACT ...; **relating to:** use of medical assistance funds by nursing homes and organizing and providing a penalty.

Analysis by the Legislative Reference Bureau
This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 49.45 (6n) of the statutes is created to read:

49.45 **(6n)** USE OF FUNDS BY CERTAIN FACILITIES IN CONNECTION WITH UNION ORGANIZING. (a) In this subsection:

1. "Labor organization" means any employee organization in which employees participate and which exists primarily for the purpose of engaging in collective bargaining with any employer concerning grievances, labor disputes, wages, hours or conditions of employment, or the promotion and advancement of the professional or occupational standards and the welfare of its members and families and any

organization established for the same purposes composed of individuals or affiliates of any such employee organization.

2. "Nursing facility" means a nursing home, as defined in s. 50.01 (3), or a community–based residential facility that is licensed under s. 50.03 and that is certified by the department of health and family services to provide medical assistance services equivalent to those provided by a nursing home.

(b) No person who has received money that is appropriated under s. 20.435 (4) (b), (o), or (w) for the operation of a nursing facility may use any of that money to influence the decision of any individual to support or oppose a labor organization that represents or seeks to represent the individual or to become a member of a labor organization. This paragraph does not prohibit a person, if otherwise permitted by law, to negotiate or administer a collective bargaining agreement or to perform any action that is required by law or the terms of a collective bargaining agreement. This paragraph does not apply to any moneys received before January 1, 2002.

(c) 1. The department shall accept complaints from any individual who alleges that a person is violating par. (b). The department shall notify the person that is the subject of the complaint within 7 days after receiving it and shall order the person to provide records to show that the person did not violate par. (b).

2. Notwithstanding subd. 1., the department may not require a nursing facility to maintain records relating to this subsection in any particular form.

(d) The attorney general may bring an action to enforce par. (b). If the court determines that a person has violated par. (b), the court shall order the person to repay to the state an amount equal to the amount that the person received under s. 20.435 (4) (b), (o), or (w) and spent in connection with the person's violation. The person shall also forfeit an amount equal to twice the total amount that the person

spent in connection with the person's violation. The court may also order injunctive relief and any other equitable relief that is appropriate.

(e) 1. Any person other than the attorney general may bring an action to enforce par. (b), but only if all of the following apply:

a. The person filed with the department a written complaint under par. (c) alleging a violation of par. (b).

b. No earlier than 20 days after filing the complaint under par. (c) the person filed with the attorney general a copy of that complaint, a written description of the disposition of the complaint, and a written notice that the person intended to bring an enforcement action under this paragraph.

c. At least 60 days have elapsed since the person complied with subd. 1. b.

d. The attorney general did not bring an action to enforce par. (b) before the expiration of the time period specified in subd. 1. c.

2. If a person brings an action under this paragraph and the court determines that the alleged violation of par. (b) did occur, the court shall impose a penalty and order any relief that would have been permitted if the action had been brought under par. (d). Any forfeiture ordered under this subdivision shall be paid to the state.

(f) Notwithstanding s. 803.09 (1), any person may intervene in an action brought under par. (d) or (e).

(g) If the court determines that a person violated par. (b) in a case brought under par. (d) or (e), the court shall order the violator to pay the plaintiff's reasonable litigation costs, including a reasonable attorney's fee, notwithstanding s. 814.04 (1). If a person has intervened in such a case under par. (f), the court shall order the violator to pay the intervenor's reasonable litigation costs, including a reasonable attorney's fee, notwithstanding s. 814.04 (1), if the court determines that the

intervenor made a substantial contribution to the plaintiffs in prosecuting the action.

(h) 1. If an operator or owner of a nursing facility discharges, demotes, threatens, or otherwise discriminates against an individual regarding compensation or terms, conditions, or privileges of employment because the individual or anyone acting at the request of the individual provided or attempted to provide information to the department or the attorney general regarding possible violations of par. (b), the individual may bring a civil action for any damages resulting from that discharge, demotion, threat, or discrimination. The action shall be commenced within 3 years after the discharge, demotion, threat, or discrimination or be barred. If the plaintiff proves by a preponderance of the evidence that the discharge, demotion, threat, or discrimination occurred, the court may grant any appropriate relief, including the following:

a. Reinstatement of the individual to his or her former position.

b. Compensatory damages.

c. Costs, and not withstanding s. 814.04 (1), reasonable attorney fees.

d. Other relief to remedy past discrimination.

(2) An individual may not bring an action under subd. 1. if he or she did any of the following:

a. Deliberately caused or participated in the violation of par. (b).

b. Knowingly or recklessly provided substantially false information to the department regarding a violation of par. (b).

(i) Any individual who knowingly authorizes the use of funds received under s. 20.435 (4) (b), (o), or (w) in conjunction with a violation of par. (b) shall forfeit all of the following:

1. $1,000 for each violation.

2. The amount spent to influence the decision of any individual to support or oppose a labor organization that represents or seeks to represent the individual or to become a member of a labor organization.

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3435/?dn
MGD, RPN, &RAC:....:...

Please note that the behavior prohibited in this draft relating to union organizing is based on California law.

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Wisconsin courts do not appear to have addressed the question of when an intervenor may be awarded attorney's fees. Under a recent court of appeals case, an intervening plaintiff has the same status as any other plaintiff in the case. *Kohler Co. v. Sogen International Fund, Inc.*, 2000 WI App 60, 233 Wis. 2d 592, 608 N.W.2d 746, ¶ 11. That case, however, does not address attorney's fees. Therefore, this amendment uses language from the JCF motion to specify the circumstances under which a prevailing intervenor is entitled to attorney's fees.

(Eds— please do not delete the ¶ symbol in the preceding para. that is the proper cite form.)

In enacting the national labor relations act, congress intended to preempt the states from regulating the use by labor and management in the private sector of peaceful means of putting economic pressure on each other. See *Lodge 76, IAM v. WERC*, 427

U.S. 132, 96 S.Ct. 2548 (1976). Accordingly, a court might hold that part or all of this draft is preempted by the national labor relations act.

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3435/?dn
MGD, RPN, &RAC:.....
WLJ

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(Eds— please do not delete the ¶ symbol in the preceding para. That is the proper cite form.)

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6. The fungibility of money may make it difficult to prove a violation if a nursing facility receives both MA funds and other revenue. The facility may argue that it spent only other revenue on its union–related activities.

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State of Wisconsin
2001 – 2002 LEGISLATURE

LRB–3435/4 P1
MGD&RAC:...:...
WLJ

D-Note

+RPN

~~PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION~~ STET

~~Soon~~ today (for SDC)

AN ACT ...; **relating to:** use of medical assistance funds by nursing homes ~~and~~ in connection with union organizing and providing a penalty.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 49.45 (6n) of the statutes is created to read:

49.45 **(6n)** USE OF FUNDS BY CERTAIN FACILITIES IN CONNECTION WITH UNION ORGANIZING. (a) In this subsection: (a) NURSING

1. "Labor organization" means any employee organization in which employees participate and ~~which~~ that exists primarily for the purpose of engaging in collective bargaining with any employer concerning grievances, labor disputes, wages, hours or conditions of employment, or the promotion and advancement of the professional or occupational standards and the welfare of its members and families and any

organization established for the same purposes composed of individuals or affiliates of any such employee organization.

2. "Nursing facility" means a nursing home, as defined in s. 50.01 (3), or a community–based residential facility that is licensed under s. 50.03 and that is certified by the department of health and family services to provide medical assistance services equivalent to those provided by a nursing home.

(b) No ~~person who~~ nursing facility that has received money that is appropriated under s. 20.435 (4) (b), (o), or (w) ~~for the operation of a nursing facility~~ may use any of that money to influence the decision of any individual to support or oppose a labor organization that represents or seeks to represent the individual or to become a member of a labor organization. This paragraph does not prohibit a person, if otherwise permitted by law, to negotiate or administer a collective bargaining agreement or to perform any action that is required by law or the terms of a collective bargaining agreement. This paragraph does not apply to any moneys received before January 1, 2002.

(c) 1. The department shall accept complaints from any individual who alleges that a nursing facility ~~person~~ is violating par. (b). The department shall notify the ~~person~~ that is the subject of the complaint within 7 days after receiving it and shall direct ~~order~~ the ~~person~~ the department to provide records showing it within 10 days after the department notifies it of the complaint to show that the ~~person~~ did not violate par. (b).

2. Notwithstanding subd. 1., the department may not require a nursing facility to maintain records relating to this subsection in any particular form.

(d) The attorney general may bring an action to enforce par. (b). If the court determines that a ~~person~~ has violated par. (b), the court shall order the ~~person~~ to repay to the state an amount equal to the amount that the ~~person~~ received under s. 20.435 (4) (b), (o), or (w) and spent in connection with the ~~person's~~ violation. The ~~person~~ shall also forfeit an amount equal to twice the total amount that the ~~person~~

spent in connection with the person's violation. The court may also order injunctive relief and any other equitable relief that is appropriate.

(e) 1. Any person other than the attorney general may bring an action to enforce par. (b), but only if all of the following apply:

a. The person filed with the department a written complaint under par. (c) alleging a violation of par. (b).

b. No earlier than 20 days after filing the complaint under par. (c) the person filed with the attorney general a copy of that complaint, a written description of the disposition of the complaint, and a written notice that the person intended to bring an enforcement action under this paragraph.

c. At least 60 days have elapsed since the person complied with subd. 1. b.

d. The attorney general did not bring an action to enforce par. (b) before the expiration of the time period specified in subd. 1. c.

2. If a person brings an action under this paragraph and the court determines that the alleged violation of par. (b) did occur, the court shall impose a penalty and may order any relief that would have been permitted if the action had been brought under par. (d). Any forfeiture ordered under this subdivision shall be paid to the state.

(f) Notwithstanding s. 803.09 (1), any person may intervene in an action brought under par. (d) or (e).

(g) If the court determines that a person violated par. (b) in a case brought under par. (d) or (e), the court shall order the violator to pay the plaintiff's reasonable litigation costs, including a reasonable attorney's fee, notwithstanding s. 814.04 (1). If a person has intervened in such a case under par. (f), the court shall order the violator to pay the intervenor's reasonable litigation costs, including a reasonable attorney's fee, notwithstanding s. 814.04 (1), if the court determines that the

intervenor made a substantial contribution to the plaintiffs in prosecuting the action.

(h) 1. If an operator or owner of a nursing facility discharges, demotes, threatens, or otherwise discriminates against an individual regarding compensation or terms, conditions, or privileges of employment because the individual or anyone acting at the request of the individual provided or attempted to provide information to the department or the attorney general regarding possible violations of par. (b), the individual may bring a civil action for any damages resulting from that discharge, demotion, threat, or discrimination. The action shall be commenced within 3 years after the discharge, demotion, threat, or discrimination or be barred. If the plaintiff proves by a preponderance of the evidence that the discharge, demotion, threat, or discrimination occurred, the court may grant any appropriate relief, including the following:

a. Reinstatement of the individual to his or her former position.

b. Compensatory damages.

c. Costs, and not withstanding s. 814.04 (1), reasonable attorney fees.

d. Other relief to remedy past discrimination.

(2) An individual may not bring an action under subd. 1. if he or she did any of the following:

a. Deliberately caused or participated in the violation of par. (b).

b. Knowingly or recklessly provided substantially false information to the department regarding a violation of par. (b).

(i) Any individual who knowingly authorizes the use of ~~funds~~ money received under s. 20.435 (4) (b), (o), or (w) in conjunction with a violation of par. (b) shall forfeit all of the following:

1. $1,000 for each violation.

2. The amount spent to influence the decision of any individual to support or oppose a labor organization that represents or seeks to represent the individual or to become a member of a labor organization.

(END)

of money that the person authorized to be used under sub. (1) (intro.).

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3435/P1dn
MGD&RPN&RAC:wlj:rs

June 18, 2001

1. Please note that the behavior prohibited in this draft relating to union organizing is based on California law.

2. It is unclear whether a district attorney may enforce the prohibition contained in this amendment.

3. The JCF motion states that the attorney general or a private party may obtain damages and civil penalties in enforcement actions, but it does not specify what those damages are in cases brought on behalf of the state or how they are to be calculated. Therefore, this amendment does not include any provision for damages in actions brought on behalf of the state. It does, however, require the violator to return to the state money expended in violation of the prohibition in s. 49.45 (6n) (b) and provides a forfeiture based on the total amount unlawfully expended on union-related activity. It also permits a private person who is harmed as a result of a violation to obtain damages and specifies what those damages are.

4. Wisconsin courts do not appear to have addressed the question of when an intervenor may be awarded attorney fees. Under a recent court of appeals case, an intervening plaintiff has the same status as any other plaintiff in the case. *Kohler Co. v. Sogen International Fund, Inc.*, 2000 WI App. 60, 233 Wis. 2d 592, 608 N.W.2d 746, ¶ 11. That case, however, does not address attorney fees. Therefore, this amendment uses language from the JCF motion to specify the circumstances under which a prevailing intervenor is entitled to attorney fees.

5. In enacting the national Labor Relations Act, congress intended to preempt the states from regulating the use by labor and management in the private sector of peaceful means of putting economic pressure on each other. See *Lodge 76, IAM v. WERC*, 427 U.S. 132, 96 S. Ct. 2548 (1976). The second point contained in each of the first and third paragraphs of the motion are particularly problematic from that standpoint. In view of preliminary instructions from Doug Burnett regarding ensuring that the amendment does not conflict with federal law, this draft does not address those two points. Even with those changes, however, a court might hold that part or all of this draft is preempted by the national Labor Relations Act.

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2001 Date (time) needed Soon

LRB b 1220/1

AMDT TO BUDGET SUB AMDT

mgd : cjs :

See form **AMENDMENTS — COMPONENTS & ITEMS.**

D-Note

SENATE AMENDMENT
~~**TO SENATE AMENDMENT _____,**~~
TO SENATE SUBSTITUTE AMENDMENT 1,
TO 2001 SENATE BILL 55

At the locations indicated, amend the substitute amendment ~~[amendment]~~ as follows:

#. Page 622, line 21: after that line insert:

#. Page . . . . , line . . . . :

#. Page . . . . , line . . . . :

#. Page . . . . , line . . . . :

#. Page . . . . , line . . . . :

#. Page . . . . , line . . . . :

D-Note

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

AN ACT *to create* 49.45 (6n) of the statutes; **relating to:** use of medical assistance funds by nursing homes in connection with union organizing and providing a penalty.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 49.45 (6n) of the statutes is created to read:

49.45 **(6n)** USE OF FUNDS BY NURSING FACILITIES IN CONNECTION WITH UNION ORGANIZING. (a) In this subsection:

1. "Labor organization" means any employee organization in which employees participate and that exists primarily for the purpose of engaging in collective bargaining with any employer concerning grievances, labor disputes, wages, hours or conditions of employment, or the promotion and advancement of the professional

or occupational standards and the welfare of its members and families and any organization established for the same purposes composed of individuals or affiliates of any such employee organization.

2. "Nursing facility" means a nursing home, as defined in s. 50.01 (3), or a community–based residential facility that is licensed under s. 50.03 and that is certified by the department of health and family services to provide medical assistance services equivalent to those provided by a nursing home.

(b) No nursing facility that has received money that is appropriated under s. 20.435 (4) (b), (o), or (w) may use any of that money to influence the decision of any individual to support or oppose a labor organization that represents or seeks to represent the individual or to become a member of a labor organization. This paragraph does not prohibit a person, if otherwise permitted by law, to negotiate or administer a collective bargaining agreement or to perform any action that is required by law or the terms of a collective bargaining agreement. This paragraph does not apply to any money received before January 1, 2002.

(c) 1. The department shall accept complaints from any individual who alleges that a nursing facility is violating par. (b). The department shall notify the nursing facility that is the subject of the complaint within 7 days after receiving it and shall direct the nursing facility to provide the department, within 10 days after the department notifies it of the complaint, records showing that it did not violate par. (b).

2. Notwithstanding subd. 1., the department may not require a nursing facility to maintain records relating to this subsection in any particular form.

(d) The attorney general may bring an action to enforce par. (b). If the court determines that a nursing facility has violated par. (b), the court shall order the

nursing facility to repay to the state an amount equal to the amount that the nursing facility received under s. 20.435 (4) (b), (o), or (w) and spent in connection with the nursing facility's violation. The nursing facility shall also forfeit an amount equal to twice the total amount that the nursing facility spent in connection with the nursing facility's violation. The court may also order injunctive relief and any other equitable relief that is appropriate.

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c. At least 60 days have elapsed since the person complied with subd. 1. b.

d. The attorney general did not bring an action to enforce par. (b) against the subject of the complaint filed under subd. 1. a. before the expiration of the time period specified in subd. 1. c.

e. The complaint that the person files in his or her action is substantially based on the complaint that the person filed under subd. 1. a.

2. If, in an action brought under this paragraph, the court determines that a nursing facility violated par. (b), the court shall impose any penalty that would have been required and may order any relief that would have been permitted if the action had been brought under par. (d). Any forfeiture ordered under this subdivision shall be paid to the state.

(f) Notwithstanding s. 803.09 (1), any person may intervene in an action brought under par. (d) or (e).

(g) If the court determines that a nursing facility violated par. (b) in a case brought under par. (d) or (e), the court shall order the nursing facility to pay the plaintiff's reasonable litigation costs, including a reasonable attorney fee, notwithstanding s. 814.04 (1). If a person has intervened in a case under par. (f), the court shall order the nursing facility or to pay the intervenor's reasonable litigation costs, including a reasonable attorney fee, notwithstanding s. 814.04 (1), if the court determines that the intervenor made a substantial contribution to the plaintiffs in prosecuting the action.

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1. $1,000 for each violation.

2. The amount of money that the person authorized to be used under sub. (1) (intro.).

(END)

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FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–3435/P1dn
MGD&RPN&RAC:wlj:

June 18, 2001

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DRAFTER'S NOTE LRBb1220/1dn
FROM THE MGD&RPN&RAC:wlj:rs
LEGISLATIVE REFERENCE BUREAU

June 18, 2001

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SDC:.....Keckhaver – CN1505, Nursing home MA funds used in connection with union activities

FOR 2001–03 BUDGET — NOT READY FOR INTRODUCTION

CAUCUS SENATE AMENDMENT

TO SENATE SUBSTITUTE AMENDMENT 1,

TO 2001 SENATE BILL 55

At the locations indicated, amend the substitute amendment as follows:

1. Page 622, line 21: after that line insert:

"**SECTION 1770q.** 49.45 (6n) of the statutes is created to read:

49.45 **(6n)** USE OF FUNDS BY NURSING FACILITIES IN CONNECTION WITH UNION ORGANIZING. (a) In this subsection:

1. "Labor organization" means any employee organization in which employees participate and that exists primarily for the purpose of engaging in collective bargaining with any employer concerning grievances, labor disputes, wages, hours or conditions of employment, or the promotion and advancement of the professional or occupational standards and the welfare of its members and families and any

organization established for the same purposes composed of individuals or affiliates of any such employee organization.

2. "Nursing facility" means a nursing home, as defined in s. 50.01 (3), or a community–based residential facility that is licensed under s. 50.03 and that is certified by the department of health and family services to provide medical assistance services equivalent to those provided by a nursing home.

(b) No nursing facility that has received money that is appropriated under s. 20.435 (4) (b), (o), or (w) may use any of that money to influence the decision of any individual to support or oppose a labor organization that represents or seeks to represent the individual or to become a member of a labor organization. This paragraph does not prohibit a person, if otherwise permitted by law, to negotiate or administer a collective bargaining agreement or to perform any action that is required by law or the terms of a collective bargaining agreement. This paragraph does not apply to any money received before January 1, 2002.

(c) 1. The department shall accept complaints from any individual who alleges that a nursing facility is violating par. (b). The department shall notify the nursing facility that is the subject of the complaint within 7 days after receiving it and shall direct the nursing facility to provide the department, within 10 days after the department notifies it of the complaint, records showing that it did not violate par. (b).

2. Notwithstanding subd. 1., the department may not require a nursing facility to maintain records relating to this subsection in any particular form.

(d) The attorney general may bring an action to enforce par. (b). If the court determines that a nursing facility has violated par. (b), the court shall order the nursing facility to repay to the state an amount equal to the amount that the nursing

facility received under s. 20.435 (4) (b), (o), or (w) and spent in connection with the nursing facility's violation. The nursing facility shall also forfeit an amount equal to twice the total amount that the nursing facility spent in connection with the nursing facility's violation. The court may also order injunctive relief and any other equitable relief that is appropriate.

(e) 1. Any person other than the attorney general may bring an action to enforce par. (b), but only if all of the following apply:

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b. No earlier than 20 days after filing the complaint under par. (c) the person filed with the attorney general a copy of that complaint, a written description of the disposition of the complaint, and a written notice that the person intended to bring an enforcement action under this paragraph.

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2. If, in an action brought under this paragraph, the court determines that a nursing facility violated par. (b), the court shall impose any penalty that would have been required and may order any relief that would have been permitted if the action had been brought under par. (d). Any forfeiture ordered under this subdivision shall be paid to the state.

(f) Notwithstanding s. 803.09 (1), any person may intervene in an action brought under par. (d) or (e).

(g) If the court determines that a nursing facility violated par. (b) in a case brought under par. (d) or (e), the court shall order the nursing facility to pay the plaintiff's reasonable litigation costs, including a reasonable attorney fee, notwithstanding s. 814.04 (1). If a person has intervened in a case under par. (f), the court shall order the nursing facility or to pay the intervenor's reasonable litigation costs, including a reasonable attorney fee, notwithstanding s. 814.04 (1), if the court determines that the intervenor made a substantial contribution to the plaintiffs in prosecuting the action.

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a. Reinstatement of the individual to his or her former position.

b. Compensatory damages.

c. Costs, and not withstanding s. 814.04 (1), reasonable attorney fees.

d. Other relief to remedy past discrimination.

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a. Deliberately caused or participated in the violation of par. (b).

b. Knowingly or recklessly provided substantially false information to the department regarding a violation of par. (b).

(i) Any individual who knowingly authorizes the use of money received under s. 20.435 (4) (b), (o), or (w) in conjunction with a violation of par. (b) shall forfeit all of the following:

1. $1,000 for each violation.

2. The amount of money that the person authorized to be used under sub. (1) (intro.).".

(END)