DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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Senator Carpenter:

It is possible that this draft, if enacted, would be found unconstitutional by a court because it is preempted by the National Labor Relations Act (NLRA) and therefore is repugnant to the supremacy clause (Article VI) of the U.S. Constitution.

Specifically, the U.S. Supreme Court has developed the following 2 principles under which state regulation of the collective bargaining process is preempted by federal labor law:

1. When the state regulation concerns conduct that is expressly or arguably either prohibited or protected by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

2. When the state regulation concerns conduct that Congress intends to leave unrestricted from regulation by either the National Labor Relations Board (NLRB) or the states.

Based on the second of these principles, the Maine Supreme Court in *Opinion of the Justices*, 571 A. 2d 805 (Me. 1989), held that a Maine statute affecting the hiring of replacement workers was preempted in that it is the intent of Congress to leave the hiring of replacement workers unregulated. In enacting the NLRA, Congress set up a framework for collective bargaining by which employers and employees are each prohibited from using certain weapons of economic pressure while other weapons are left "unregulated and to be controlled by the free play of economic forces." *Machinists v. WERC*, 427 U.S. 132 (1976). The hiring of replacement workers is one of the economic weapons that Congress currently intends to leave unregulated. Therefore, it is up to Congress, not the individual states, to change that intent and determine that the hiring of replacement workers should be regulated.

In reaching its decision, the Maine Supreme Court cited *NLRB v. Mackay Radio*, 304 U.S. 333 (1938), for the proposition that an employer whose employees have gone on economic strike has a right to hire replacement workers to protect and continue the employer's business. The Maine Supreme Court also reiterated that this well–established principle is still good law today by citing *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989).

Finally, the Maine Supreme Court noted that there are two limited exceptions to the rule of federal preemption of labor law, but that the Maine statute affecting 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 worker 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 worker statute was not on its face an anti–violence measure and that any effect that the Maine permanent replacement worker 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 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, it is possible that a court would hold that a state law prohibiting the hiring of replacement workers would be preempted by the NLRA, unless the state law directly addresses a local concern such as violence.

If you have any questions about the draft or about this drafter's note, please do not hesitate to contact me directly at the phone number or e–mail address listed below.

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