CONNECTICUT HOSPITAL ASSOCIATION

TESTIMONY OF
JOHN G. ZANDY, PARTNER – WIGGIN AND DANA
ON BEHALF OF
CONNECTICUT HOSPITAL ASSOCIATION
BEFORE THE
LABOR AND PUBLIC EMPLOYEES COMMITTEE
Tuesday, February 14, 2006

HB 5032, An Act Concerning Neutrality Agreements And The Use Of State Financial Assistance For Certain Labor Organizing Activities

Good afternoon Senator Prague, Representative Ryan, and members of the Committee. My name is John Zandy, and I am a partner at the law firm of Wiggin and Dana. I am appearing here on behalf of the Connecticut Hospital Association and I appreciate the opportunity to testify on **HB 5032, An Act Concerning Neutrality Agreements And The Use Of State Financial Assistance For Certain Labor Organizing Activities.**

HB 5032 would require an employer that is receiving loans, grants, guarantees or tax abatements from the state or any of its agencies to sign a "neutrality agreement" prohibiting the organization from engaging in certain forms of activities that might deter union organizing (i.e. "(A) interfering in labor organizing and education campaigns, (B) interfering with or participating in the activities of labor organizations, (C) discriminating in hiring based on past labor organizing activity or to encourage or discourage membership in a labor organization, (D) persuading employees to support or oppose labor organizing activity, (E) harassing employees engaged in labor organizing activity, (F) preparing and distributing materials that advocate for or against labor organizing, and (G) hiring or consulting legal counsel or other consultants to advise the nonprofit organization on how to assist, promote or deter labor organizing or how to impede a labor organization that represents the nonprofit organization's employees from fulfilling its representational responsibilities".) We do not believe HB 5032 should be enacted for the following reasons.

First, HB 5032 is preempted by federal law. The preemption doctrine is anchored to the Supremacy Clause of the United States Constitution and confirms that it is within the power of Congress to legislate in the areas of labor relations and to exclude any concurrent power in the states. It was pursuant to that power that Congress created the National Labor Relations Board ("NLRB") as the independent federal agency entrusted to hold and regulate conduct relating to secret ballot elections in which employees vote for or against union representation. State laws that intrude into the province of the NLRB or federal labor relations policy are preempted and therefore invalid. The NLRB has gone on record that states are not free to use their spending power to pressure employers to adopt neutrality agreements, and that the assumption that has served as the basis for neutrality legislation, i.e. that partisan employer free speech interferes with free choice, "is contrary to the federal policy, expressed in NLRA Section 8(c), to insure both to employers and labor organizations full freedom to express their views to employees on labor matters." Section 8(c) of the NLRA protects "[t] the expressing of any views, argument, or opinion" by an employer so long as it does not contain a "threat of reprisal or force or promise of benefit."

By allowing unions to campaign freely but prohibiting employers from being able to talk to their employees and present them with relevant facts and information to make an informed decision, HB 5032 would upset the balance of forces protected by the NLRA. As the NLRB has argued before the Ninth Circuit Court of Appeals in the case of Chamber of Commerce vs. Lockyer, employees benefit from open communications and "[a]mong the possible disadvantages of unionization that an employer might want to convey is that the particular union seeking to represent the employees may have a record of corruption, racial discrimination, violence, bribery, or misrepresentation. Even labor organizations, in their capacity as employers, have recognized such dangers and the importance of speaking out when, in their view, their employees may be about to make an unwise choice of bargaining representative." Under HB 5032, such relevant and vital information would likely never be brought forward and employees would be short-changed as a result.

Moreover, HB 5032 is substantively indistinguishable from the New York law struck down by a federal district court in July 2005 in the case of Healthcare Association of New York State v. Pataki, and a Wisconsin law stuck down by the Seventh Circuit Court of Appeals in the case of Metropolitan Milwaukee Association of Commerce v. Milwaukee County.

Second, HB 5032 threatens to abrogate an employer's fundamental right to resort to lawful self-help by prohibiting employers from seeking advice from professionals, including legal counsel, concerning union organizing activities, while not imposing a similar ban on unions. In addition to altering the balance of power so carefully protected by the NLRA, this threatened prohibition also raises serious questions about an employer's right to counsel particularly because HB 5032 may force an employer to waive the attorney client privilege to prove compliance with the statute. Moreover, these concerns are not limited to use of counsel; for example, query whether a legislator would be a "consultant" under HB 5032 when he/she answers a healthcare employer's question about reimbursement rates if the employer presents this information to its employees while organizing is taking place? The list goes on.

Third, HB 5032 runs against what Americans want their government to do. According to a Zogby poll released in July 2005, 59% of those interviewed favored allowing management to provide information about potential negative impacts of unionizing to their employees, and opposed government "neutrality agreements" that would bar firms that contract with the government from distributing such information.

Critics of the NLRA believe the law needs to be amended to better facilitate union organizing. If so, this is a job for Congress to take up. It is simply a bad idea for the State of Connecticut to send the message that it is so anti-business that it is willing to pass laws even when two federal courts – one district and one appellate – have found almost identical legislation to be preempted. To say the least, an anti-business climate will inhibit job growth, and, as we know all to well, will most likely lead to an actual loss of jobs.

Thank you for your consideration of our position.