

**Testimony Before the Labor and Public Employees Committee  
Connecticut State Legislature  
Presented by Fred Feinstein  
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My name is Fred Feinstein and I am currently a Senior Fellow and Visiting Professor at the University of Maryland, School of Public Affairs in College Park Maryland. For nearly six years, from 1994 through 1999 I served as General Counsel of the National Labor Relations Board, with the responsibility of overseeing the prosecution of cases brought under the National Labor Relations Act. As General Counsel, I often had occasion to consider whether the National Labor Relations Act preempted state actions.

The legislation under consideration today would protect an employee from economic sanction if an employee chooses not to listen to an employer's political or religious views. Political views are defined to include views about the decision to join a political, social or community group or activity, including the exercise of the rights to join or not to join a labor union. Because the legislation would protect an employee who declines to participate in an a meeting called by an employer to express anti-union views, I have been asked to comment on whether the legislation is preempted by federal labor law. I believe the legislation would not be preempted.

Under the Garmon preemption doctrine, the National Labor Relations Act has been held to prohibit states from regulating "activity that the NLRA protects, prohibits, or arguably protects or prohibits." Golden State Transit v. City of Los Angeles, 475 U.S. 608 613-14. But a state can regulate such activity if it touches "upon interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act".

The Supreme Court has found state laws regarding violence or trespass to address deeply rooted local concerns. In addition, Linn v. Plant Guard Workers, 383 U.S. 53 (1966), held that workplace related defamation claims were not completely preempted. In Farmer v. Carpenters Local 24, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), the Court held that emotional distress claims were not preempted. Courts have regularly applied Linn and Farmer to uphold state laws governing employer conduct against claims of preemption. For example, Radcliffe v. Rainbow Construction, 254 F.3d 772 (CA 9 2001) held that false arrest, false imprisonment and malicious prosecution claims against an employer are not preempted. In Malquist v. Foley, 714 P.2d 995 (Mont. 1986) a state statute prohibiting employer blacklisting was held not to be preempted. In Moore v. City of NY & Bell Atlantic, 219 F. Supp. 2d 335 (EDNY 2002), a union

strikers' false arrest and emotional distress claims against employer were held not to be preempted.

The proposed legislation is not inconsistent with the National Labor Relations Act. Section 8(c) of the Act provides that it is not an unfair labor practice for an employer to express a view about unionization, which could include giving a speech in opposition to unionization. 8(c) does not however grant employers the right to require that employees listen to such views. Nothing in the proposed legislation limits what employers can say or where an employer can say it. Rather the legislation would make it unlawful for an employer to force an employee, through the threat of physical or economic restraint, to listen to employer views on the subject of unionization or other political issues.

In conclusion, I believe a state is not preempted from providing protection to employees who choose not to listen to an employer's views on unionization. Protecting employees from being compelled to listen to political speech, including views about unionization, falls within the language of Garmon that permits state regulation of activity touching upon "deeply rooted local concerns". In my view a court asked to consider the question would hold that the legislation is not preempted.

Thank you.