HOUSE BILL REPORT
HB 1528

As Reported by House Committee On:
Commerce & Labor

Title: An act relating to prohibiting certain employer communications about political or religious matters.

Brief Description: Prohibiting certain employer communications about political or religious matters.

Sponsors: Representatives Sells, Conway, Green, Kenney, Hasegawa, Miloscia, Morrell, Van De Wege, Cody, Appleton, Dickerson, O'Brien, Simpson, Chase, Williams, Moeller, Goodman, Ormsby, Nelson, Eddy, Hunt, Dunshee, Roberts, McCoy, Blake, Kirby, Jacks, Hurst, Wood, Takko, Ericks, Campbell, Seaquist, Kagi, Haigh, White, Flannigan, Rolfes, Wallace, Quall, Sullivan, Darneille, Orwall, Finn, Morris, Hudgins and Santos.

Brief History:
Committee Activity:
Commerce & Labor: 2/3/09, 2/20/09 [DPS].

Brief Summary of Substitute Bill

- Prohibits an employer from requiring an employee to attend a meeting, or listen to, respond to, or participate in any communication relating to political or religious matters.

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

Minority Report: Do not pass. Signed by 3 members: Representatives Condotta, Ranking Minority Member; Chandler and Crouse.

Staff: Alison Hellberg (786-7152)

Background:

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Employers are not generally prohibited from requiring employees to attend meetings during which the employer communicates his or her positions on issues.

One exception involves certain communications about labor relations. Both the National Labor Relations Board (Board), in administering private sector collective bargaining under the National Labor Relations Act, and the Washington Public Employment Relations Commission (PERC), in administering most public sector collective bargaining in Washington, apply a doctrine generally known as the "captive audience" doctrine. This doctrine determines when an employer may be prohibited from requiring employees to attend employer-called meetings about unionization and when union representation election activities by labor organizations may be curtailed.

Briefly, under the Board and federal court cases, employers do not commit unfair labor practices by requiring employees to attend speeches about unionization on the employer's premises during working hours as long as the speech is not coercive. Whether speech is coercive generally depends on the content of the speech in the context of the employer-employee relationship. The courts have, for example, prohibited employer statements that threaten retaliation, while allowing the employer to make predictions about the effect of unionization based on objective facts.

The Board, however, has set additional limits for representation elections. Employers (and unions) are prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time of an election when employee attendance is mandatory. Outside this limit, and subject to the "coercive speech" prohibition, the employer is not prohibited from using captive audiences to make election speeches.

The PERC has adopted a similar rule that prohibits election speeches on the employer's time to massed assemblies of employees beginning when ballots are issued and continuing until the ballots are tallied.

Summary of Substitute Bill:

The Legislature intends that:

- Employees in Washington have a First Amendment right to not attend a meeting, or listen to, or respond to, or participate in communication by their employer on political or religious matters.
- Employers in Washington have a First Amendment right to express their views to their employees on political and religious matters in any usual and customary ways. For example, employers may conduct employee meetings, disseminate literature, or send electronic mail to employees regarding their political and religious views but may not require employees to attend these meetings, or listen to, or respond to, or participate in this communication.

An employer may not require an employee to attend a meeting, or listen to, respond to, or participate in any communication relating to political or religious matters. "Political matters" means matters directly related to candidates, elected officials, ballot propositions, legislation,

election campaigns, political parties, and political, social, community, and labor or other mutual aid organizations. "Religious matters" means all aspects of religious observance and practice, as well as belief.

Employers are further prohibited from taking an adverse employment action against an employee because the employee:

- refuses to attend a meeting, listen to, otherwise respond to, or participate in any communication that would violate, or the employee reasonably believes would violate, the prohibition;
- challenges or opposes any practice or action that would violate, or the employee reasonably believes would violate, the prohibition; or
- makes a claim, files suit, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing involving any practice or action that would violate, or the employee reasonably believes would violate, the prohibition.

An "adverse employment action" means discharge, discipline, or any adverse change in the status or the terms and conditions of the employee's employment.

This prohibition does not:

- apply to any requirement related to meetings or any other communications about religious matters by an employer that is a religious organization, corporation, association, educational institution, or society; or
- prohibit any employer from requiring its employees to attend a meeting, listen or otherwise respond to, or participate in, any other communications that are reasonably necessary to the performance of actions by the employee that are lawfully required, and related to the normal operation of the employer's business or enterprise.

An employee aggrieved by a violation of this prohibition may bring a civil action in superior court. The court must award a prevailing employee an additional 100 percent of back pay as liquidated damages to compensate for harms caused by the delay in payment, together with reasonable attorneys' fees and costs. The court may award a prevailing employee:

- injunctive relief;
- rehiring or reinstatement of the employee to the employee's former position or equivalent position;
- restoration of any other terms and conditions of employment to which the employee would otherwise have been eligible if the violation had not occurred;
- damages for any reasonably foreseeable losses sustained by the employee as a result of such a violation; and
- any other appropriate relief as deemed necessary by the court to make the employee whole and to restrain violations of this prohibition.

Employers must post a notice of employee rights under these provisions in a conspicuous place accessible to the employees at the employer's place of business.

Substitute Bill Compared to Original Bill:

The prohibition is modified so that employers may not require an employee to attend a meeting, or listen to, respond to, or participate in any communication relating to political or religious matters. Language is removed from the prohibition related to the purpose of the

requirement being to ensure that employees receive communications about political or religious matters, or to influence the employee's beliefs, opinions, or actions about political or religious matters.

Intent language is added, declaring that:

- Employees in Washington have a First Amendment right to not attend a meeting, or listen to, or respond to, or participate in communication by their employer on political or religious matters.
- Employers in Washington have a First Amendment right to express their views to their employees on political and religious matters in any usual and customary ways. For example, employers may conduct employee meetings, disseminate literature, or send electronic mail to employees regarding their political and religious views but may not require employees to attend these meetings, or listen to, or respond to, or participate in this communication.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Free speech is not a one-way street. The right to not be required to listen especially in political and religious matters is very important. Coercive listening is contrary to our free society. This legislation does not prohibit employers from expressing opinions; it simply prohibits them from requiring employees to listen.

The Worker Privacy Act is a simple yet profound piece of legislation. In a simple manner it extends free speech rights to the workplace on issues of individual conscience, including labor organizing, charitable contributions, politics, and religious matters. There is protection under state and federal law to prevent religious discrimination, but this is limited. The bill does contain some penalty provisions, but they are not punitive and are in line with the federal Fair Labor Standards Act.

Business will argue that this bill violates employer free speech rights, is preempted because of *Chamber of Commerce v. Brown*, or it can be somehow equated with the federal Employee Free Choice Act. This bill does not prohibit employers from expressing views or communicating with employees – it just does not allow them to force employees to listen.

This bill protects a fundamental freedom for all Americans – the freedom of speech, specifically political free speech. At home people choose where to get political information. This should not be checked at the door when working. There is a difference between a captive meeting and an employer handing out literature or sharing information. Businesses hold meetings telling employees that if a certain candidate is elected they will lose their job.

An employee should not feel that his or her job is threatened based on his or her political beliefs.

Discussions of faith are fine, but it is a problem when the discussion is mandated or if an employee feels forced into a meeting or communication. Freedom of religion is fundamental in this country. Religious organizations are exempt from this bill where some level of religious indoctrination and prayer are normal. This bill also does not prohibit an employer from starting a meeting with prayer. It also does not prevent charitable giving, just mandated giving.

When workers express interest in a union the employer hires union avoidance consultants 90 percent of the time. A standard strategy in union avoidance is captive meetings where employees are required to attend and are threatened with job loss, plant closure, or firing. Employees frequently experience retaliation if they express political or labor opinions. These meetings are bad for productivity and create animosity between the employer and employees. Under this bill employers may still hold these meetings, they just can't require employees to attend them. If an employer threatens to leave the state based on this bill, that employer would have left anyway.

The Washington Supreme Court has long emphasized the state's long and proud history of being a pioneer in protecting worker rights. For example, a minimum wage and an eight-hour work day were established in Washington long before they were in federal law. Every time Washington establishes something new there is always an argument that it is preempted by federal law. This bill is likely not preempted and likely not unconstitutional. These are complicated issues and change based on the administration and the members of the National Labor Relations Board. Employers are entitled to express their opinions on political or religious matters. Any prohibition on that would likely be preempted. An example of this is the California law that effectively prohibited employers from expressing opinions. The key here is "captive" audience meetings. There is nothing here to prohibit an employer from inviting employees to listen. There is nothing in the National Labor Relations Act that precludes the state from regulating in its area of authority and interest. There is nothing about the federal scheme that places a value on captive audience meetings.

(Neutral with concerns) There are concerns about restricting an employer's speech, especially in the most protected area – political speech. This bill will likely lead to a costly legal battle funded by tax payers. Employers should be able to tell employees if unionization would cause them to lose their jobs. Another issue with this bill is that it would be up to the employee to determine whether a meeting communication was required or not. If ending coercion in the workplace is the goal, one of the best ways to get there would be to pass a right-to-work law.

(Opposed) These are extraordinary economic times and jobs are evaporating from the state. Businesses are suffering. The focus should be on keeping and growing jobs. This is a time business and labor should be working together. This is the most divisive and anti-employer bill that the committee has heard in decades. It sends a message that the committee does not trust employers. It demonizes employers in a time when the state needs more jobs. This bill is not about indoctrination, but is to get at a very specific issue related to union organizing.

The bill is both preempted under the National Labor Relations Act and violates the First Amendment. It will not survive a legal challenge. Employers have a clearly established right under the National Labor Relations Act to openly express non-coercive speech. It has been described by the United States Supreme Court (Court) as an employer's free speech rights. The Court invalidated a California law in *Chamber of Commerce v. Brown* last year. The Court held that the National Labor Relations Act preempted that law. The Worker Privacy Act would meet an identical fate in the Court. It is also vulnerable to challenge under the First Amendment. Any First Amendment restriction must be narrowly tailored. Washington cannot risk passing bad law that is unconstitutional and in direct conflict with federal law. Litigation will be costly and time consuming.

The bill is unworkable and it would be impossible to know how to advise employers. This would especially be a concern when advising them on issues related to diversity, particularly sexual orientation. The ambiguities will invite litigation. The definitions for political and religious matters are vague. The costs due to litigation will be high for employers.

The legislation is not geared towards special meetings; it is geared towards all of them. The inherent assumption is that any communication from an employer to an employee is coercive. This is not the view of the National Labor Relations Board. There are already remedies against coercive meetings that will be enforced more vigorously with the new Obama administration. Unionization has increased in this country and the trends show that these meetings are not having the effect of discouraging unionization.

Washington would be the first state to enact a bill like this. The underlying message of this bill is that Washington is unfriendly to business. It will discourage investment and business in the state. This will set Washington apart. It will discourage new job creation and might force employers to locate jobs elsewhere.

Many companies do a fair amount of work in terms of community and charitable work. Employers could be held liable for bringing this up during a meeting.

Persons Testifying: (In support) Representative Sells, prime sponsor; Rick Bender, Washington State Labor Council; Diane Zahn, United Food and Commercial Workers Union Local 21; Tom Wrobleski, International Association of Machinists and Aerospace Workers Local 751; Paul Benz; Dan Joy, United Food and Commercial Workers Union Local 1439; Mike Cooper, Communications Workers of America; Jim Gower and Christian Dube, International Union of Operating Engineers Local 286; Daniel Prater, International Association of Machinists Local 751; and Dmitri Iglitzin, Schwerin Campbell Barnard Iglitzin and Lavitt, LLP.

(Neutral with concerns) Scott Dilley, Evergreen Freedom Foundation.

(Opposed) Charlie Brown, Fred Meyer; Kris Tefft, Association of Washington Business; Tim O'Connell, Stoel Rives LLP; Trent House and Joan Clarke, Boeing; Nancy Hiteshue, Washington Roundtable; Troy Nichols, National Federation of Independent Business; and Mark Johnson, Washington Retail Association.

Persons Signed In To Testify But Not Testifying: None.