SENATE BILL REPORT
SB 5446

As Reported by Senate Committee On:
Labor, Commerce & Consumer Protection, February 23, 2009

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: Senators Prentice, Kohl-Welles, Keiser, McDermott, Fairley, Franklin, Kline, Murray, Ranker, Tom, Shin, Regala, Hobbs, Kauffman, Pridemore, McAuliffe, Kastama, Hatfield, Oemig, Fraser and Jacobsen.

Brief History:
Committee Activity: Labor, Commerce & Consumer Protection: 2/03/09, 2/23/09 [DPS, DNP].

SENATE COMMITTEE ON LABOR, COMMERCE & CONSUMER PROTECTION

Majority Report: That Substitute Senate Bill No. 5446 be substituted therefor, and the substitute bill do pass.
Signed by Senators Kohl-Welles, Chair; Keiser, Vice Chair; Franklin and Kline.

Minority Report: Do not pass.
Signed by Senators Holmquist, Ranking Minority Member; Honeyford and King.

Staff: Ingrid Mungia (786-7423)

Background: 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

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employer-called meetings about unionization and when union representation election activities by labor organizations may be curtailed.

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.

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 Bill (Recommended Substitute): It is unlawful for a public or private employer to require its employee to attend a meeting, or listen to, or respond to, or participate in, any communication relating to political or religious matters. "Political matters" is defined as matters directly related to candidates, elected officials, ballot propositions, legislation, election on campaigns, political parties, and political, community, and labor or other mutual aid organizations.

This prohibition does not apply to communications that are related to meetings or any other communications that are:

- about religious matters by an employer that is a religious organization, corporation, association, educational institution or society; or
- reasonably necessary to the performance of actions by the employees that may be lawfully required and related to the normal operation of the employer's business or enterprise.

An employer may not take or threaten to take an adverse employment action against an employee because the employee:

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

An employee aggrieved by a violation of these requirements may bring a civil action in Superior Court for liquidated damages, reasonable attorneys' fees and costs, and any other appropriate relief, including reinstatement and back pay.

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

EFFECT OF CHANGES MADE BY LABOR, COMMERCE & CONSUMER PROTECTION COMMITTEE (Recommended Substitute):

- Modifies the prohibition 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.

- Removes language from the prohibition that a purpose of the requirement is to ensure that employees receive communications related to political or religious matters or influence the employee's beliefs, opinions, or actions about political or religious matters.

- Removes the reference to "social organizations" in the definition of "political matters."

- Adds intent language declaring that:
    - employees in Washington State 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 State 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 e-mails to employees regarding their political and religious views but must not be able to require employees to attend these meetings, or listen to, or respond to, or participate in this communication.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: PRO: The Worker Protection Act (WPA) is a simple but profound piece of legislation. Workers are forced to abandon their First Amendment rights at work. This bill doesn't limit the employers speech. WPA is long overdue and recognizes that freedom of speech is a two-way street. This gives workers the right to choose to not to listen to or participate in unwanted communication, including politics, religion, and charitable giving. When an employer can force you to participate or listen to non-work related speech, this creates a powerful point of compulsion. Workers are forced to forgo their First Amendments rights and forced to listen to speech against their conscious. There are exceptions to job performance or work-related issues. The penalties

are not punitive and aligned with the Fair labor Standards Act and have no record keeping requirements and no cost to the state. People should not be required to check their First Amendment freedom at their workplace door.

Under current law, employers can and do hold mandatory meetings in which they make it clear that certain ways of voting are preferred or better. We are interested in protecting peoples fundamental right to say no and not fear their job or promotion is at risk. Religious organizations are exempt from this bill. This bill doesn't prevent an employer from beginning or closing a meeting with a prayer. Charitable giving loses its charitable aspect when it is mandated or coerced. Workers should feel safe and not have to submit their constitutional rights at the factory gate.

We know from experience and government studies that when workers express a desire for a union or file for union representation election, over 90 percent of employers hire union avoidance consultants. Standard procedures is to herd workers into meeting rooms to threaten and intimidate employees. Washington has long been a leader among the state in protecting employee rights. This bill is not pre-empted by the NLRA. The NLRA recognizes it is not intended to displace state law, particularly state law that establishes minimum employee standards. The Supreme Court case *Chambers v. Brown* was about a total prohibition. The bill specifically exempts employer diversity training that is lawfully required and part of the employers normal operating proceedings.

CON: This bill is much broader in its prohibitions than a similar law that the Supreme Court struck down earlier this year. In light of this Supreme Court ruling, we don't understand what we are doing here. This bill sends the message that we are willing to believe the business community employers routinely coerce and intimidate their employees. The Legislature is willing to take away a federally-protected right that has been in place for 60 years with respect to unions to make Washington the only state in the country to adopt this rule. We believe the National Labor Relations Act clearly allows employers to discuss labor issues with employees on matters of union organizing and contract negotiations and the like.

If Washington passes this bill, Washington will be the first state in the country to restrict employers communication with their employees. This bill will most likely not survive a legal challenge. This statute is over reaching and pre-empted by federal law. Federal labor law explicitly recognizes an employers right to free speech. This bill does not provide an opt-out provisions; it indicates that employers have violated a law if they require an employee to attend a meeting. This bill is unworkable because of the breadth of the definition of religious, political, community, and labor organizing matters. This bill sends an anti-business sentiment and discourages employers looking to start a business in Washington State. We believe this law will meet the same conclusion as *Chambers v. Brown* and the law will be pre-empted by federal law. The assumption in this bill is that all communication by employers is coercive is simply wrong. The true purpose of this bill is to prevent employers from speaking out.

OTHER: Placing restrictions on an employer's political speech will face the highest level of constitutional scrutiny in court. Please keep the tax payers in mind before taking any action on controversial legislation. Please consider ways to foster trust in the workplace, not more barriers. Please consider a right-to-work law.

Persons Testifying: PRO: Rick Bender, WSLC; Diana Zahn, UFCW 21; Rev. Paul Benz, Lutheran Public Policy Faith Labor Alliance; Tom Wroblewski, IAM; Mike Cooper, Michael Cooper, CWA 7800; Martey Garfinkel, Dan Joy, Jim Gover, Daniel Brader, citizens.

CON: Kris Tefft, AWB; Trent House, Joan Clarke, Boeing Company; Tim O'Connell, Stoel Rives LLP; Nancy Hiteshue, Washington Roundtable; Cindi Noski, small business owner; Troy Nichols, NFIB; James Curry, Association Builders & Contractors.

OTHER: Scott Diller, Evergreen Freedom Foundation.