What New Captive Audience Law Means For Conn. Employers

By **Rauchell Beckford-Anderson, Sarah Boxer and Kelsey Scarlett** (August 5, 2022)

Effective July 1, employees in Connecticut now have the option to opt out of so-called captive audience meetings.

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Public Act No. 22-24 protects employees who choose to opt out of listening to or attending employer-sponsored meetings in which the employer shares its position regarding religious or political matters. As a result, Connecticut employers are now required to accommodate a new and substantial expansion of their employees' free speech rights in the workplace.

Employers — including their designees and agents — are prohibited from requiring employees' attendance and participation in employer-sponsored meetings concerning their views on political and religious matters.

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Because Connecticut appears to only be the second state with such legislation currently in effect, it will serve as a test state for this type of legislation moving forward.

Accordingly, it is critical to understand what this law means for employers and the ripple effect it may have on Connecticut and the nation's legal landscape.

Oregon is the only other state that appears to have a similar law currently in effect. Similar to Oregon's 2009 legislation,[1] Connecticut law now prohibits employers from discharging or disciplining, or threatening to discharge or discipline, employees who refuse to attend employer-sponsored meetings for which the purpose is to communicate the employer's opinion regarding religious or political matters.

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Employer-sponsored meetings include meetings with the employer or its agent, representative or a designee.

Connecticut's law also creates a private right of action for employees to enforce their rights under the new law. Should an employer be found in violation of this law, employees will now be entitled to the full amount of their gross loss of wages or compensation, with costs and reasonable attorney fees.

While principally concerned with mandatory employer anti-union presentations, the text of the law reaches far beyond those limited circumstances.

The Connecticut law broadly defines prohibited religious matters as matters "relating to religious affiliation and practice and the decision to join or support any religious organization or association."

The statute's definition of "political matters" is similarly inclusive. While the definition of political matters includes more obvious categories like "elections for political office, political parties, ... legislation, ... regulation and the decision to join or support any political party or political ... organization," the law also incorporates expansive categories like labor and

community organizations as prohibited topics in mandatory meetings.

Absent any further clarification, employers are left to wonder what discussions of legislation or regulation look like in the context of employer-sponsored meetings.

An employer may now have to consider whether discussions involving its position on matters of public importance, such as public health measures, abortion access, and COVID-19 vaccine mandates, fall within the definition of legislation, regulation or political matters.

Another emerging and common topic of conversation in the workplace is diversity, equity and inclusion. Like public health discussions, an employer may now have to consider whether DEI discussions and trainings fall within the undefined scope of an employer-sponsored meeting with the primary purpose of communicating the employer's position on political matters.

Under this law, employees could theoretically refuse to participate in employer-sponsored DEI discussions and trainings, claiming that these meetings involve the employer's views on religious or political matters.

Without precise definitions or the benefit of learning from the application of similar laws in other states, it remains very unclear where employees' First Amendment rights begin and end.

While the law provides protections to employees, it also carves out several exceptions to its general rule. Notably, the employer is not prohibited from:

- Communicating information to employees that the employer is required by law to communicate;
- Communicating information to employees that is necessary for employees to perform their job duties;
- Engaging in communications from higher education agents or representatives to employees that is a part of coursework or other academic programming; and
- Allowing casual conversations between employees or between an employee and the employer or its agent.[2]

Given the history of debate surrounding possible federal preemption of similar laws, the life of this law may be uncertain.

While no longer in effect, in 2010 Wisconsin passed similar captive audience legislation.[3] That same year, in Metropolitan Milwaukee Association of Commerce v. Doyle, business groups sued the state of Wisconsin in the U.S. District Court for the Eastern District of Wisconsin,[4] claiming that the National Labor Relations Act preempted the Wisconsin

statue and arguing that the NLRA allowed captive audience meetings that the Wisconsin statute banned.

Despite the unsettled questions surrounding NLRA preemption, Wisconsin ultimately entered into an agreement with the business groups and agreed that the NLRA preempted the state captive audience statute such that Wisconsin would no longer enforce the law to the extent it prohibited captive audience speeches or meetings.

More recently, in 2020 the National Labor Relations Board sued the state of Oregon[5] in the U.S. District Court for the District of Oregon, seeking a declaratory judgment to invalidate its captive audience law.[6]

In its complaint, the NLRB argued that the Oregon statute was preempted because it conflicted with the NLRB's exclusive control over union election proceedings.

Most recently, NLRB v. Oregon was dismissed in 2021[7] by the court, which ruled that the NLRB lacked standing to challenge the law based on a lack of concrete injury.

In Connecticut, versions of this law have been debated for years,[8] and like the arguments made in both the Oregon and Wisconsin lawsuits, individuals have claimed that such a statute would be preempted by the NLRA.

Although Connecticut Attorney General William Tong has taken the position[9] that such a law would not be preempted by federal law, a similar legal challenge may be seen in Connecticut.

While these captive audience laws have resulted in robust disputes relating to federal preemption, NLRB general counsel Jennifer Abruzzo has reiterated that such conduct remains within the purview of the NLRB and remains under the board's enforcement authority.

In April, Abruzzo issued a memorandum[10] announcing that she will ask the NLRB to find "mandatory meetings in which employees are forced to listen to employer speech concerning the exercise of their statutory labor rights," including captive audience, meetings, unlawful.

While Abruzzo's focus seems to be on employer speech urging employees to reject union representation, it is unclear whether her position will extend to political and religious matters more broadly.

In her memo, Abruzzo further states that she will urge the board to require employers to inform employees that their attendance at these captive audience meetings are purely voluntary.

If adopted, this will be very similar to the Connecticut law and provides additional protection to employees. As a result, employers should be cognizant of these impending changes, in addition to the new Connecticut law.

Although the implications of this new legislation remain unclear, Connecticut employers subject to the new law can take steps to reduce their risk of liability.

First, employers can review their policies regarding mandatory meetings and trainings, particularly to ensure that those policies do not require employee attendance or

participation in meetings that may fall within the scope of this law.

Second, employers can ensure managers, supervisors, agents and designees are educated on the law's prohibitions. Although the law provides a carveout for informal conversations between an employer and an employee, anyone acting on behalf of the employer in holding such meetings, including lower-level supervisors, team leaders or managers, may run afoul of the law's prohibition, and thus should be educated on impermissible topics of mandatory meetings.

Finally, employers should generally be more mindful of their communications with employees moving forward, particularly on hot-button political or religious matters.

Because the law provides a private right of action for individual employees to enforce their rights under the law, employers of all scales and sizes are at risk for litigation under this law.

For now, Connecticut employers should monitor compliance with the law despite the likely preemption, interpretation and applicability challenges forthcoming.

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[1] https://oregon.public.law/statutes/ors_659.785.

[2] It is also important to note that this new law does not apply to a religious corporation, entity, association, educational institution or society that is exempt from the requirements of Title VII, Conn. Gen. Stat. Sec. 46a-60a, 46a-81a, and 46a-81o pursuant to section 46a-81p.

[3] https://docs.legis.wisconsin.gov/2009/related/acts/290.

[4] This claim was brought by the Metropolitan Milwaukee Association of Commerce and the Wisconsin Manufacturers & Commerce in the Eastern District Court of Wisconsin against James E. Doyle, in his official capacity as Governor of the State of Wisconsin, and Roberta Gassman, in her official capacity as Secretary of the Wisconsin Department of Workforce Development. See Metropolitan Milwaukee Association of Commerce, and Wisconsin Manufacturers & Commerce, v. James E. DOYLE, 2010 WL 4209852 (E.D.Wis.).

[5] https://www.natlawreview.com/article/nlrb-sues-oregon-seeking-to-invalidate-state-law-prohibiting-captive-audience.

[6] The suit highlights, among other things a filing involving the Teamsters and an Oregon employer regarding representation. "On June 14, 2019, the International Brotherhood of Teamsters Local 206 ("Local 206") filed a Representation Petition with the NLRB's Region 19 seeking to represent a unit of the employer's workforce in Portland, Oregon. DS Services of America, Inc. and IBT, Local 206, Case No. 19-RC-243327. [Exhibit 2]." Nat'l Labor

Relations Bd. v. Oregon, 2020 WL 624975 (D.Or.).

[7] Nat'l Labor Relations Bd. v. Oregon, No. 6:20-CV-00203-MK, 2021 WL 4433161, at *4, appeal dismissed, No. 21-35988, 2022 WL 1720939 (D.Or.).

[8] https://www.ctemploymentlawblog.com/2022/05/articles/captive-audience-bill-passes-general-assembly-will-it-pass-legal-scrutiny/.

[9] https://portal.ct.gov/-/media/AG/Opinions/2019/2019-03_Sen_Fasano.pdf.

[10] https://apps.nlrb.gov/link/document.aspx/09031d458372316b.