GPP eNews
Office of Global Public Policy
ICSC Legislative News, Events & Resources

May 10, 2013

U.S. Senate Passes the Marketplace Fairness Act

On May 6 the U.S. Senate voted 69-27 in favor of S. 743, the Marketplace Fairness Act of 2013. Of the 69 Senators who voted in favor of the bill, 21 were Republicans, 46 were Democrats and 2 were independents. To see how your Senators voted, **please click here.**

With strong bipartisan momentum behind us, we turn our attention to the House of Representatives. Currently, there are 65 bipartisan cosponsors on the House version of the bill, H.R. 684, and that number is expected to continue growing. Key groups, such as Let Freedom Ring and the American Conservative Union, joined the increasing number of conservative voices that support the legislation. ICSC looks forward to working with members of the House Judiciary Committee to strengthen the bill.

For those Senators who voted in favor of the Marketplace Fairness Act, please remember to thank them for their support. **To send an email those offices, please click here.**

Federal Court Rejects NLRB Poster Mandate
On May 7 the U.S. District Court of Appeals for Washington, DC ruled that the National Labor Relations Board (NLRB) rule requiring nearly 6 million businesses to post notices to advise employees of their rights to join a union is invalid. [Nat'l Ass'n of Mfrs. v. NLRB, Case No. 12-5068 (DC Cir. May 7, 2013).] This ruling comes less than four months after President Obama's recess appointments of three members to the Board were rejected by the same court.

Background: On August 30, 2011, the NLRB promulgated a Final Rule entitled "Notification of Employee Rights under the National Labor Relations Act," (76 Fed. Reg. 54,006) (Aug. 30, 2011) (the Final Rule).

Subpart A of the Final Rule required all employers subject to the National Labor Relations Act (NLRA) to "post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures." 29 CFR § 104.202(a). The notice requirements were very specific and called for an 11x17-inch poster with the NLRB seal prominently displayed on the top left corner of the poster, and the phrase, "This is an official Government Notice..." printed in bold typeface along the bottom margin. The Notice required that each employer describe the NLRA in detail and inform employees of their right to join or organize a union and to strike, among other things.

Subpart B laid out the methods by which the NLRB would enforce the notice posting provisions of the Final Rule. Enforcement would begin when an individual files an unfair labor practice charge alleging that the employer failed to post the notice. After an investigation and an attempt to persuade the employer to comply, a formal complaint could be issued, triggering a hearing before an administrative law judge and an adjudication process governed by the Board's customary procedures. If the Board found that the employer failed to post the notice, the employer would be ordered to cease and desist from the unlawful conduct and to post the required notice, as well as a remedial notice.

Subpart B also set forth two additional ways in which other Board proceedings might be affected by an employer's failure to post the notice. First, the Board could find it appropriate to toll the statutory six-month statute of limitations for an employee to file an unfair labor practice charge. Second, the Board could consider an employer's "knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue," even if the case was unrelated to the posting of the notice.

The National Association of Manufacturers (NAM) and others brought separate actions against the NLRB, alleging that the Final Rule exceeded the Board's authority and that the Notice provision violated the Plaintiffs' First Amendment Rights and other portions of the NLRA. The U.S. District Court for the District of Columbia held that the Board lawfully promulgated Subpart A of the Final Rule, which requires employers to post a notice of employee rights, but exceeded the authority granted to it by Congress under the NLRA by promulgating the two provisions under Subpart B that permit the Board to deem failure to post an unfair labor practice and to toll the statute of limitations for claims brought by employees against employers who failed to post the notice. [Nat'l Ass'n of Mfrs. v. NLRB, 846 F. Supp. 2d 34, 63 (DDC 2012).]

Both the NLRB and the Plaintiffs appealed the District Court's decision to the U.S. Court of Appeals for the DC Circuit. The Court of Appeals affirmed the District Court's conclusion that the enforcement mechanisms of Subpart B were contrary to the NLRA. The Court primarily relied upon § 8(c) of the NLRA, which essentially provides that both employers and labor unions have the right to express their views about labor unions, and about the benefits and drawbacks of union membership. The Court held the Final Rule violates § 8(c) because it makes an employer's failure to post the Board's notice an unfair labor practice, and because it treats such a failure as evidence of anti-union animus. The Court reasoned that requiring an employer to post the notice violated § 8(c) because it required speech that may contradict an employer's views on labor unions.

The lower Court to reversed the District Court in upholding the validity of Subpart A. The Court concluded that because the Final Rule's enforcement mechanisms violated the NLRA, the Final Rule itself must be invalid as well. The Court held that Subpart A could not be severed from Subpart B. As such, it vacated the Final Rule.

Labor law experts note that since the Court did not comment on whether the Board had the authority to promulgate such a rule in the first place there may well be another version of the rule and a new proposed notice in the future. ICSC expects there may be further litigation.

CA: Anti-Development Bill Moves Forward

S.B. 673 is a bill that would erode local governments' ability to make land use decisions and move forward with infrastructure and development projects that receive over $1 million in subsidies without a state-mandated economic impact report. S.B. 673 passed the Senate Local Government Committee on a party line 4-2 vote. It has also moved through the Senate Appropriations Committee without a hearing, because it was deemed to have no impact on the State Budget.

Under the current, broad definitions of the bill almost any publicly-funded component of a larger project can be considered a "subsidy," including brownfield redevelopments, stormwater runoff controls, etc. Mandating an economic impact report is seen as an additional weapon for anti-development advocates who can use it to slow down -- and potentially kill -- projects.

Under current law, local governments already can seek advice from a broad range of other government agencies and consultants, and regularly require cost-benefit analysis of proposed projects. The bill will next be considered by the Senate Appropriations committee.

CA: Big Box Ban Bill Goes to Appropriations Committee
A.B. 667, commonly referred to as the “Big Box Ban Bill,” would create yet another layer of bureaucracy for local governments by requiring projects defined as “Superstores” to obtain redundant economic impact and community impact reports before receiving approval.

Significant analysis is already required by state law, which also provides for extensive public input and local decision-making. This bill has the potential to create significant delays in the local planning and approval process, tying-up local government resources and delaying job creation at projects desired by communities.

In 2011, Governor Jerry Brown (D) vetoed a similar bill, stating "While I recognize that the merits of large-scale projects need to be carefully considered, plenty of laws are already on the books that enable, and in some cases require, cities and counties to carefully assess whether these projects are in the community's best interest. This bill would add yet another layer of review to an already cumbersome process."

The bill passed the Assembly Local Government Committee on a 5-4 vote with one Democrat voting “no” with the three Republicans. The bill next moves to the Appropriations Committee.

CO: Legislative Session Ends
May 8 was the last day of the Colorado legislative session. ICSC fared well this year from an industry standpoint, especially considering the not-so-business-friendly environment at the state capitol. H.B. 1295, which puts a structure in place for Colorado to implement the Marketplace Fairness Act once it is passed by Congress, made its way through both chambers in the final days of the session and is awaiting transmittal to the Governor. The construction/development communities avoided an overreaching retainange/prompt pay bill early in the year, and managed to stave off introduction of any bills that would adversely affect urban renewal redevelopment.

ME: Sales Tax Increase and Expansion Proposed by “Gang of 11”
Last week in Augusta the joint Taxation Committee announced that a public hearing on the bi-partisan taxation overhaul proposal, known as Legislative Document 1496, will be held May 10. LD 1469 seeks to expand the items and services taxed using the state’s sales tax while increasing the sales tax rate from 5% to 6%. The proposal also seeks to lower Maine's income and corporate taxes while making changes to the property tax rules. As part of LD 1496 the meals, lodging, property transfer, tobacco, wine and beer taxes are all slated for increases.

Overall the proposal is billed as a dramatic overhaul of Maine's tax code in an effort to "re-balance" the code and to promote "fairness" in how taxes are collected. This package is not expected to be revenue neutral, but is reported to provide the revenue needed to restore a number of services proposed for cuts in Governor Paul LePage’s (R) budget recommendations. LD 1496 is co-sponsored by a bi-partisan group of legislators know in Augusta as the “Gang of 11.” The Gang of 11 contains five Republicans, five Democrats and one Independent legislator -- four Senators and seven members of the House. The bill’s prime sponsor is Representative L. Gary Knight (R).

MA: Upcoming Bill Hearings
On May 14 the Joint Committee on Revenue will hear three bills relative to the state sales tax. H.B. 2548 establishes a permanent annual sales tax holiday. H.B. 2674 establishes a sales tax exemption for any retail purchase made within ten miles of the New Hampshire border. S.B.1449 establishes an annual tax holiday in August, returns the state sales tax back to 5% and regulates the state sales tax for small purchases.

NY: ICSC Holds Annual Lobby Day in Albany
On April 30 ICSC held its annual Lobby Day in Albany. The day began with an organizational breakfast, followed by a full day of meetings with key legislators including the chairs of both houses Environmental Conservation Committees, the Republican Conference Leader, and the Independent Democratic Conference Leader. Members also met with Governor Andrew Cuomo's (D) senior policy team for economic development and the environment. The main focus of the day was to advocate for an extension of the brownfield tax credit program and to educate legislators and policymakers on ICSC and industry issues. Overall, the day was a very positive experience and we would like to thank everyone who participated for the incredible team effort.

PR: Legislative Leaders propose to Tax Rents and Business Services
Early last week in Puerto Rico, the Speaker of the House, Jaime Perelló Borrás (PPD), filed H.B. 1073, also known as the Tax Burden Adjustment and Redistribution Act. H.B. 1073 seeks numerous tax increases and changes to increase revenue in an effort fill in the projected fiscal year's budget deficit. As part of the tax code changes, the Speaker's plan seeks to expand the sales tax to a number of previously exempt transactions. The plan seeks to include business-to-business transactions, service charges provided by financial institutions to businesses, leasing of motor vehicles and the leasing of commercial real estate as taxable via the sales tax.

A companion bill, S. 544, sponsored by Senate President Eduardo Bhatia Gautier (PPD) was filed on the same date in the Senate. S. 544 has been referred to the Senate Finance and Public Finance Committee. H.B. 1073 has had at least five public hearings in the House Finance and Public Finance Committee and is expected to move through the legislative process. These significant proposed changes to the Puerto Rico tax code will create a very different tax landscape for the development of retail real estate on the island.

Upcoming State GR Events

- **CA Commercial Real Estate Summit & CBPA Annual Meeting**: 11-12 June, 2013; Sacramento, CA

For more information about participation in the ICSC Days at the State Capitols please contact Lorin Alusic, State and Local Government Relations, at lalusic@icsc.org.

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