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NY Judge Halts State Ag Law's Anti-Union Speech Restriction

By **Beverly Banks**

Law360 (February 22, 2024, 4:03 PM EST) -- A New York federal judge paused enforcement of a section of a state agricultural labor law that would make it an unfair labor practice to discourage unionization, saying claims from a farming group that the provision violates the First Amendment have a chance of success.

U.S. District Judge John L. Sinatra Jr. **partly granted** on Wednesday a preliminary injunction motion from the New York State Vegetable Growers Association Inc. and five family owned farms to halt the enforcement of a part of the New York's Farm Laborers Fair Labor Practices Act, which amended the State Employment Relations Act. Judge Sinatra said the plaintiffs could bring only constitutional claims on behalf of farm employers and not farmworkers.

The state must stop enforcement of SERA Section 704-b(2)(c), the judge said, which makes it an unfair labor practice for agricultural employers to discourage union organizing or workers' participation in a unionization campaign.

"Because plaintiffs are likely to succeed on the merits of their claim that SERA Section 704-b(2)(c) constitutes impermissible viewpoint discrimination, the court presumes irreparable harm to plaintiffs absent an injunction on that provision," Judge Sinatra wrote.

The judge sided with the plaintiffs' argument that Section 704-b(2)(c) discriminated based on a viewpoint, which is "presumptively unconstitutional" under the First Amendment.

Citing the U.S. Supreme Court's 2015 decision in Reed v. Town of Gilbert, Judge Sinatra said the defendants — the New York attorney general and officials within the Public Employment Relations Board — hadn't shown how the state law provision is "narrowly tailored to meet compelling state interests."

In Reed, the high court said a town's ordinance about signs included content-based restrictions that violate the First Amendment.

As part of their **preliminary injunction bid**, the plaintiffs alleged other facets of the state law violated due process rights and the Equal Protection Clause. The NYSVGA and farms also claimed the statute may pose problems with federal immigration law compliance because farms have to bargain with a union that represents workers on H-2A visas. According to the U.S. Citizenship and Immigration Services website, employers "who meet specific regulatory requirements" under the H-2A program can "bring foreign nationals to the United States to fill temporary agricultural jobs."

Judge Sinatra said the plaintiffs' equal protection claim based on a class-of-one theory related to the act's compulsory impasse arbitration provisions is "not constitutionally ripe."

The judge also found that NYSVGA and the farms aren't "likely to succeed on the merits" of their due process claims over the impasse arbitration part of the statute or their other equal protection claim linked to the arbitration provision.

Judge Sinatra determined that the plaintiffs' claims of potential harm related to federal immigration law compliance and H-2A workers "is too remote at this time."

"Several steps remain in the statutory process before plaintiffs would be subject to the proposed term regarding H-2A workers — if they ever will be," Judge Sinatra said. "In sum, there is no irreparable harm currently facing plaintiffs regarding their purportedly conflicting obligations related to H-2A workers."

Last week, Judge Sinatra **denied a request** from the United Farm Workers to intervene in this dispute. The UFW argued that state officials may not fully represent the union's interests.

Mario Martínez, who represents the UFW, said in a statement to Law360 on Thursday that the judge rightly tossed "almost all the frivolous and meritless claims the growers were making to deny farmworkers their right to join a union."

"While we are disappointed the judge found a small provision of the law to be overbroad, UFW is eager to continue the work of helping farmworkers join a union and win improvements through collective bargaining agreements now that the temporary stay has been lifted," Martínez said.

In a statement, NYSVGA President Brian Reeves said that "while progress was made, our efforts to protect farmworkers' rights have been delayed."

"Farmworkers deserve the same rights as everyone else," Reeves said. "By making the amendments and improvements to the FLFLPA that New York's agriculture community is seeking, farmworkers will finally have the same collective bargaining right as all other private sector workers."

Michael Marsh, who is president and CEO of the National Council of Agricultural Employers, which **filed an amicus brief** supporting the injunction, told Law360 on Thursday that the judge's ruling was disappointing.

"Under this ruling by the court … if the employer is required to bring back the unionized H-2A worker, which is what the union is telling them they have to, then that displaces the American worker from getting that job," Marsh said. "It's not a good decision."

Christopher J. Schulte, who represents the NCAE, said in a statement to Law360 on Thursday that the association is happy the court blocked the "unconstitutional restriction on the free speech rights" of the farms, but "there are still serious concerns about the other constitutional violations included in the state's enforcement of FLFLPA that we hope the court will address as the case moves forward."

Hannah Gordon, counsel for the Worker Justice Center of New York and Workers' Center of Central New York, which filed an amicus brief against the injunction, told Law360 Thursday in a statement that they were "heartened that the court was not persuaded to grant a preliminary injunction on the vast majority of claims, especially on plaintiffs' novel standing theory."

"Such an unfounded theory cuts against the long-established, common-sense principle that employers do not have standing to assert labor law claims on behalf of their employees," Gordon said.

In a statement to Law360 on Thursday, Olivia Post Rich, who is a WJCNY labor and employment attorney, said the plaintiffs' claims for a preliminary injunction "were brought without a solid legal basis in order to slow down the process of farmworker union organizing and was an abuse of the legal process."

The Western Growers Association, the National Council of Farmer Cooperatives, the International Fresh Produce Association and the U.S. Apple Association also backed the plaintiffs' preliminary injunction motion in an amicus brief. The New York State AFL-CIO filed a separate amicus brief to oppose the preliminary injunction.

David Schwarz, who represents the Western Growers Association, National Council of Farmer Cooperatives, the International Fresh Produce Association and the U.S. Apple Association, said in a statement to Law360 on Thursday that the "FLFLPA infringes the right of agricultural employers to speak and the right of farmworkers to receive information necessary to make an informed choice about union representation."

"The district court correctly concluded that the ban on employer speech is a blatant form of viewpoint discrimination that violates the First Amendment rights of both farmers and farmworkers," Schwarz said.

International Fresh Produce Association spokesperson Siobhan May declined to comment.

Representatives of the attorney general's office and the PERB did not immediately respond to a request for comment.

The NYSVGA and the farms are represented by Joshua H. Viau and Boris W. Gautier of Fisher Phillips and by Scott S. Allen Jr. of Lippes Mathias LLP.

New York officials are represented by Karen Cacace, Anielka Sanchez Godinez and Abigail Ramos of the New York attorney general's office.

The United Farm Workers is represented by Robert McCreanor of the Law Office of Robert D. McCreanor PLLC and by Mario Martínez of Martinez Aguilasocho Law Inc.

The Western Growers Association, National Council of Farmer Cooperatives, International Fresh Produce Association and U.S. Apple Association, as amici, are represented by Barbara E. Taylor and David Schwarz of Sheppard Mullin Richter & Hampton LLP.

The National Council of Agricultural Employers, as an amicus, is represented by Christopher J. Schulte of Smith Gambrell & Russell LLP.

The New York State AFL-CIO is represented by Michael D. Bosso of Colleran O'Hara & Mills LLP.

The Worker Justice Center of New York and Workers' Center of Central New York are represented by Hannah Gordon and Alaina Varvaloucas of the Legal Aid Society of Mid-New York Inc.

The case is New York State Vegetable Growers Association Inc. et al. v. Hochul et al., case number 1:23-cv-01044, in the U.S. District Court for the Western District of New York.

--Editing by Nick Petruncio.
