

LEGAL SERVICES

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MEMORANDUM

February 15, 2012

SUBJECT: Union member - union representative communications privilege
(Work Order No. 27-LS1338\A)

TO: Representative Bob Lynn
Attn: Mike Sica

FROM: Dan Wayne 
Legislative Counsel

Enclosed is the bill draft you requested. There are two issues you should be aware of:

1. Under art. IV, sec. 15, Constitution of the State of Alaska, a legislative court rule change requires a two-thirds majority vote in each house. The court rule change language in the draft may not be necessary according to a 2007 Alaska Court of Appeals decision,¹ but I've included it here to be cautious, just in case the state Supreme Court were to decide the Court of Appeals was wrong. Let me know if you want the court rule provisions removed.
2. The enclosed draft includes private-sector and public employees. The National Labor Relations Act (NLRA) "occupies the field" of private-sector labor relations in a manner that often prohibits states from adopting private-sector labor laws, under the federal preemption doctrine;² however, the prohibition probably does not apply to adoption of an employee-union representative communications privilege because the privilege principally concerns the admissibility of evidence. The NLRA does not preempt a state law that regulates activity that is of "merely peripheral concern" to the Act.³

¹ *Valentine v. State*, 155 P.3d 331, 346 (Alaska Ct. App. 2007), rev'd on other grounds, 215 P.3d 319 (Alaska 2009).

² *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

³ *Id.* at 243.

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The Illinois statute cited in the legal opinion you provided is the only one of its kind adopted by any state, and it appears to apply to private-sector and public employees.⁴ The apparent inclusion of private-sector employees may be why, in a subsection that is not cited in the opinion you provided, the following language appears in the Illinois statute:

(c) In the event of a conflict between the application of this Section and any federal or State labor law to a specific situation, the provisions of the federal or State labor law shall control.

One effect of the language may be that it protects the Illinois statute from potential legal challenges based on NLRA preemption.

Please let me know if you would like a new draft that includes language similar to this subsection of the Illinois statute.

DCW:ljw
12-111.ljw

Enclosure

⁴ 735 Ill Comp. Stat. 5/8-803.5. This section appears, along with other statutory evidence privileges adopted by the State of Illinois, in the Illinois Code of Civil Procedure.