



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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March 20, 2015

FILE NO. 15-001

LABOR:

Authority of Counties and
Municipalities to Adopt
Right-to-Work Ordinances

The Honorable Gary Forby
Chair, Senate Labor Committee
State Senator, 59th District
903 West Washington, Suite 5
Benton, Illinois 62812

The Honorable Jay C. Hoffman
Chair, House Labor & Commerce Committee
State Representative, 113th District
312 South High Street
Belleville, Illinois 62220

Dear Senator Forby and Representative Hoffman:

I have your letters inquiring whether, under current Illinois law, Illinois counties and municipalities, either home rule or non-home-rule, may adopt "right-to-work" ordinances,¹ or

¹The term "right-to-work ordinances" refers to ordinances that provide that a person's right to work may not be denied or abridged on account of his or her membership or non-membership in a labor union or labor organization, or be conditioned upon payments thereto.

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whether voters may authorize, by referendum, "right to work" zones within a particular governmental entity's corporate boundaries. For the reasons stated below, it is my opinion that, with one exception, section 8(a)(3) of the National Labor Relations Act (the NLRA) (29 U.S.C. §158(a)(3) (2012)) preempts the regulation of union security agreements² in all instances that impact interstate commerce. The single exception to the otherwise exclusive Federal regulation of union security agreements under section 8(a)(3) is in section 14(b) of the NLRA (29 U.S.C. §164(b) (2012)), which permits only states (and territories of the United States) to enact statewide (or territory-wide) "right-to-work" laws. Consequently, counties and municipalities (whether home rule or non-home-rule), as well as all other political subdivisions, units of local government, and school districts of this State, are precluded by Federal law from enacting ordinances or resolutions that limit or restrict the use of union security agreements. Further, current law does not authorize the creation, through the passage of a referendum, of "right to work" zones or local areas wherein union security agreements will not be recognized.

²The phrase "union security agreement" commonly refers to a contractual agreement between a labor union and an employer requiring workers providing services to make certain payments to the union which represents them in collective bargaining as a condition of obtaining or retaining a job.

There are various forms of union security agreements, including union shop and agency shop agreements. A "union shop" agreement mandates that employees will not be hired unless they agree to join the existing union within a short period of time. *Oil, Chemical and Atomic Workers, International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409 n.1, 96 S. Ct. 2140, 2141 n.1 (1976). An "agency shop" agreement typically provides that, although employees do not have to join the union, they must pay the union their proportionate share of the costs of the collective bargaining process, contract administration, and the union's work on matters affecting their wages, hours, and conditions of employment. *Oil, Chemical and Atomic Workers*, 426 U.S. at 409 n.1, 96 S. Ct. at 2141 n.1.

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BACKGROUND

The commerce clause of the United States Constitution provides that "Congress shall have Power * * * [t]o regulate Commerce * * * among the several States[.]" U.S. Const., art. I, §8. In 1935, in an effort "to eliminate the causes of certain substantial obstructions to the free flow of commerce[.]" Congress enacted the NLRA (29 U.S.C. §151 *et seq.*) to "encourag[e] the practice and procedure of collective bargaining and * * * [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" for certain purposes (29 U.S.C. §151 (2012)).³ The NLRA requires employers and unions to bargain collectively regarding "conditions of employment." *See* 29 U.S.C. §§158(a)(5), (b)(3), (d), 159(a) (2012). Among the conditions of employment that may be the subject of collective bargaining are union security agreements.

Section 8(a)(3) of the NLRA addresses union security agreements and provides, in pertinent part:

It shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided, That **nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization*** (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) *to require as*

³The NLRA recognizes the following as impediments to interstate commerce: (1) employers' denial of the right of employees to organize and refusal to accept the procedure of collective bargaining; (2) the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers; and (3) strikes and other forms of industrial unrest. 29 U.S.C. §151 (2012).

a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.] (Italics in original.) (Emphasis added.)

Section 8(a)(3) thus permits, under certain conditions, a union and an employer to execute a union security agreement requiring employees to be members of a union, or to pay a proportionate share of the costs of the union's work on their behalf.⁴ *See also* 29 U.S.C. §157 (2012) (providing that employees shall have the right to refrain from collective bargaining

⁴Although section 8(a)(3) only specifically addresses agreements requiring membership in a union, courts have construed section 8(a)(3) to permit agreements under which employees who are not union members but who are represented by the union in collective bargaining pay to the union their proportionate share of the costs of the union's work on their behalf. *See, e.g., Davenport v. Washington Education Ass'n*, 551 U.S. 177, 190 n.3, 127 S. Ct. 2372, 2382 n.3 (2007) ("Under the [NLRA], it is generally not an unfair labor practice for private-sector employers to enter into agency-shop arrangements, see 29 U.S.C. §158(a)(3), but States retain the power under the Act to ban the execution or application of such agreements"); *National Labor Relations Board v. General Motors Corp.*, 373 U.S. 734, 743, 83 S. Ct. 1453, 1459 (1963) (concluding that an agency shop agreement "condition[s] employment upon the practical equivalent of union 'membership,' as Congress used that term in the proviso to §8(a)(3)").

activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title").

Section 14(b) of the NLRA (29 U.S.C. §164(b) (2012)) then carves out one exception to the exclusive Federal regulation of union security agreements. Section 14(b) provides:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Thus, pursuant to section 14(b) of the NLRA, states (and territories) are authorized to prohibit union security agreements on a statewide (or territory-wide) basis. To date, twenty-five states (and one territory of the United States) have enacted constitutional provisions or statutes limiting the use of union security agreements.⁵ Illinois does not have such a provision in its laws.⁶

⁵The following states have imposed union security agreement limitations through state constitutional amendments: Arizona, Arkansas, Florida, Kansas, Mississippi, Nebraska, Nevada, North Dakota, Oklahoma, and South Dakota. The remaining states-Alabama, Georgia, Idaho, Indiana, Iowa, Louisiana, Michigan, North Carolina, South Carolina, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming-enacted legislation prohibiting employers from discriminating against employees based on union membership. See National Conference of State Legislatures (NCSL), Right to Work Resources, *available at* <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx>.

⁶In fact, Illinois statutory provisions expressly authorize agency fee provisions in certain labor agreements. See, e.g., 5 ILCS 315/6(e) (West 2012) ("When a collective bargaining agreement is entered into with an exclusive representative, it may include in the agreement a provision requiring employees covered by the agreement who are not members of the organization to pay their proportionate share of the costs of the collective bargaining process, contract administration and pursuing matters affecting wages, hours and conditions of employment, as defined in Section 3(g), but not to exceed the amount of dues uniformly required of members"); 115 ILCS 5/11 (West 2012) ("When a collective bargaining agreement is entered into with an exclusive representative, it may include a provision requiring employees covered by the agreement who are not members of the organization to pay to the organization a fair share fee for services rendered").

ANALYSIS

When Congress legislates within the scope of its constitutionally granted powers, it has the power to preempt state and municipal authority in a particular field. *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 106 S. Ct. 2369 (1986). In determining whether Federal legislation preempts state and local law, the test is one of congressional intent. *Wardair*, 477 U.S. at 6, 106 S. Ct. at 2372. Where statutory language expressly prohibits states and municipalities from legislating in a particular area, preemption is manifest. *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152-53, 102 S. Ct. 3014, 3022 (1982). Otherwise, preemption may be inferred from the pervasiveness of the Federal scheme (*White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578 (1980)) or because state or municipal law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S. Ct. 1305, 1310 (1977).

There are no reported judicial decisions, either State or Federal, addressing the specific issue of whether the NLRA preempts counties and municipalities in Illinois from enacting ordinances that limit the use of union security agreements. Further, this office has not previously issued any opinions on this question. However, courts of other jurisdictions and other state Attorneys General that have examined the validity of local ordinances limiting or restricting union security agreements have uniformly concluded: (1) that the NLRA preempts the prohibition of union security agreements by units of local government in all instances relating to

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interstate commerce; and (2) that the exception to Federal preemption set out in section 14(b) authorizes only states and territories, and not their political subdivisions, to prohibit union security agreements.

Kentucky State AFL-CIO v. Puckett, 391 S.W.2d 360 (Ky. Ct. App. 1965), is among the first cases to address the issue of whether local ordinances may regulate union security agreements. *Puckett* involved a city ordinance providing that "the right of persons to work shall not be denied or abridged on account of membership or nonmembership in, or conditioned upon payments to, any labor union, or labor organization[.]" *Puckett*, 391 S.W.2d at 361. Labor organizations and some of their members and officers challenged the constitutionality of the city's ordinance. The Kentucky Court of Appeals, the highest court of the Commonwealth (now the Kentucky Supreme Court), examined whether "Congress has pre-empted the field of regulation of such union-security agreements to the extent that local political subdivisions of a state have no power to legislate in the field (as affects interstate commerce)." *Puckett*, 391 S.W.2d at 361-62.

The *Puckett* Court reviewed sections 8(a)(3) and 14(b) of the NLRA and noted that if Congress had not intended to preempt the field of union security agreements, then section 14(b) would be superfluous, and the words "State or Territory" in section 14(b) would, for all intents and purposes, be rendered meaningless. If, however, section 8(a)(3) was intended to preempt the field, then section 14(b) could be viewed as carving out a limited exception for state and territory-wide prohibitions of union security agreements. *Puckett*, 391 S.W.2d at 362. The

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Court concluded that the latter construction was correct, based in part on the decision in *Retail Clerks International Ass'n v. Schermerhorn*, 375 U.S. 96, 84 S. Ct. 219 (1963), in which the United States Supreme Court held that:

[E]ven if [a] union-security agreement clears all federal hurdles, the States by reason of Section 14(b) have the final say and may outlaw it. There is thus conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements. *Puckett*, 391 S.W.2d at 362, quoting *Schermerhorn*, 375 U.S. at 102, 84 S. Ct. at 222.

The Court in *Puckett* also reasoned that because section 14(b) constituted an exception to what would otherwise be full Federal preemption, the exception should be strictly and narrowly construed:

We think it is not reasonable to believe that Congress could have intended to waive other than to major policy-making units such as states and territories, the determination of policy in such a controversial area as that of union-security agreements. We believe Congress was willing to permit varying policies at the state level, but could not have intended to allow as many local policies as there are local political subdivisions in the nation.

It is our conclusion that Congress has pre-empted from cities the field undertaken to be entered by the [subject] ordinance. It is true that there may be a tiny area of purely intrastate activity to which the federal Act does not apply and to which the ordinance validly could apply [citation], but obviously the ordinance would not have been enacted to govern only that tiny area, so we think the ordinance must be held invalid in its entirety, as inseparable. *Puckett*, 391 S.W.2d at 362.

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The issue of the validity of local ordinances that prohibit union security agreements was again addressed in *New Mexico Federation of Labor v. City of Clovis*, 735 F. Supp. 999 (D.N.M. 1990). In *City of Clovis*, a group of affected labor organizations brought an action against the home rule city challenging an ordinance that purported to prohibit employers located within the city from requiring membership in a labor organization, or the payment of dues, assessments, or other charges to such an organization, as a condition of employment.⁷

Concerning preemption, the court found that:

The Congressional regulation of union security agreements is comprehensive and pervasive. [Citation.] Section 8(a)(3) of the NLRA provides for specific conditions which must be met in order for an agreement to be valid. Congress intended to prohibit non-federal laws which would allow agreements impermissible under the Act. [Citations.] This indicates * * * that Congress intended an exclusive regulatory system and that §8(a)(3) so thoroughly regulates the subject * * * so as to preempt the matter from state legislation except to the extent specifically permitted under §14(b) of the Act.

A myriad of local regulations would create obstacles to Congress' objectives under the NLRA. If the Ordinance is allowed to stand, other local governmental entities * * * could enact such ordinances, or different ordinances, concerning the same subject matter. The result would be a crazy-quilt of regulations within the various states. * * *

It is true that by enacting §14(b), Congress contemplated diversity of regulation throughout the country on the subject of union security agreements. [Citation.] However, the diversity that arises from different regulations among various of the 50 states and

⁷The New Mexico Constitution provides that a home rule municipality "may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const., art. X, §6(D).

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the federal enclaves within the 21 right-to-work states is qualitatively different from the diversity that would arise if cities, counties, and other local governmental entities throughout the country were free to enact their own regulations. * * * This result would * * * undermine the NLRA's purpose by discouraging rather than encouraging bargaining on "conditions of employment." *City of Clovis*, 735 F. Supp. at 1002-03.

The court specifically addressed whether the phrase "State or Territorial law" in section 14(b) could be interpreted to encompass local ordinances, and concluded that it could not:

No mention is made [in section 14(b)] of local ordinances or other means. "Congress is presumed to use words in their ordinary sense unless it expressly indicates the contrary." [Citations.] In ordinary usage, the words "State or Territorial law" would not include legislation enacted by political subdivisions of the state. [Citation.] Courts have held that as a matter of plain language, reference to a "state" does not include reference to subdivisions of the state. *City of Clovis*, 735 F. Supp. at 1004.

Because of its conclusion that units of local government are preempted by the NLRA from enacting local ordinances that regulate union security agreements, the court found it unnecessary to address the question of whether the city possessed the requisite authority to enact such an ordinance in the first instance. *City of Clovis*, 735 F. Supp. at 1004.⁸

In addition to the *Puckett* and *City of Clovis* decisions, three Attorney General opinions have addressed local ordinances that attempt to regulate union security agreements. In

⁸In 1998, the New Mexico District Court declined to extend its determination in *City of Clovis* to an ordinance enacted by the Pueblo of San Juan Indian tribe on the ground that, as a sovereign nation, an Indian tribe has inherent authority to regulate commerce within its territorial boundaries. *National Labor Relations Board v. Pueblo of San Juan*, 30 F. Supp. 2d 1348, 1354-55 (D.N.M. 1998), *aff'd*, 280 F.3d 1278 (10th Cir. 2000), *on reh'g en banc*, 276 F.3d 1186 (10th Cir. 2002).

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an opinion issued in 1986, former Missouri Attorney General William Webster was asked whether, "[i]n the absence of a state law or state authorization, * * * a local governmental body such as a county commission or city council [may] enact an ordinance prohibiting compulsory union membership or support by an employee?" *See* Mo. Att'y Gen. Op. No. 78-86, issued July 28, 1986. At the heart of the inquiry was the validity of the ordinances adopted by three Missouri municipalities and one county that attempted to regulate the use of union security agreements. The ordinances prohibited employee discrimination based on membership or support of a union. None of the units of local government were home rule units or charter entities under Missouri law.

Attorney General Webster concluded that the local ordinances were preempted by the NLRA to the extent that the employers engaged in interstate commerce. Addressing the authority of units of local government, generally, to enact ordinances regulating union security agreements, he stated:

Statutory-class cities and noncharter counties have only those powers expressly granted to them, those powers implied in or incidental to those expressly granted them, and those powers essential to the municipality. [Citations.] Because there is no state law authorizing statutory-class cities and noncharter counties to enact right-to-work ordinances, either expressly or impliedly, statutory-class cities and noncharter counties may not enact right-to-work ordinances. Mo. Att'y Gen. Op. No. 78-86 at 2.

The following year, Attorney General Webster was again asked to address the validity of local ordinances regulating union security agreements, this time in the context of

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charter or home rule counties or cities. Reviewing the applicable provisions of the Missouri State Constitution and Missouri case law relating to the powers and authority of charter cities and counties, Attorney General Webster concluded that:

Regardless of the "home rule" powers of a constitutionally chartered county or city to adopt an "anti-compulsory unionism" or "right to work" ordinance insofar as employment relationships with interstate commerce are concerned, we believe that the Congress of the United States has foreclosed all but statewide "right to work" legislation as a means to defeat the federal preemption of the regulation of union security agreements. Clearly there are few industries that come into the state that do not impact on interstate commerce. We do not think the attempted exercise of otherwise proper "home rule" power by a Missouri county or city can defeat the federal regulation of union security agreements within interstate commerce. (Emphasis added.) Mo. Att'y Gen. Op. No. 17-87, issued March 11, 1987, at 11.⁹

Most recently, the Office of Kentucky Attorney General Jack Conway similarly concluded that Kentucky's local governments may not enact ordinances prohibiting union security agreements because such ordinances are preempted by the NLRA. Ky. Att'y Gen. Op. No. 14-007, issued December 18, 2014. Opinion No. 14-007 also addressed the question of the authority of home rule units of local government to enact ordinances prohibiting union security agreements, and determined that "[t]he fact that [Kentucky] cities did not have home rule powers at the time of *Puckett* does not affect the preemption analysis, as the finding of [Federal]

⁹Mo. Att'y Gen. Op. No. 17-87 is technically a memorandum, rather than an official opinion, because the requester, Mr. Vic Downing, a state legislator at the time of the request, was no longer a member of the legislature when the opinion was issued.

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preemption forecloses any further analysis of a local government's authority to regulate an area."

Ky. Att'y Gen. Op. No. 14-007, at 4 n.3.¹⁰

Consistent with the judicial decisions and Attorney General opinions discussed above, it is my opinion that section 8(a)(3) of the NLRA preempts the regulation of union security agreements, subject only to the narrow exception set out in section 14(b) of the NLRA. Section 14(b) of the NLRA permits states and territories of the United States, but not their political subdivisions, to enact laws prohibiting union security agreements. Accordingly, counties and municipalities in Illinois are preempted from adopting local ordinances that regulate union security agreements, as are other political subdivisions of the State, units of local government, and school districts. In this regard, the status of a county or municipality as a home

¹⁰On January 13, 2015, the Fiscal Court of Hardin County, Kentucky enacted Ordinance No. 300. The ordinance provides, in pertinent part:

No person covered by the National Labor Relations Act shall be required as a condition of employment or continuation of employment:

* * *

(B) to become or remain a member of a labor organization; [or]

(C) to pay any dues, fees, assessments, or other charges of any kind or amount to a labor organization[.] Hardin County (KY) Ordinance No. 300, §4 (approved January 13, 2015).

On January 14, 2015, nine unions filed suit against Hardin County and various Hardin County officers challenging Ordinance No. 300 as being preempted under the NLRA. See *United Automobile, Aerospace and Agricultural Implement Workers Local 3047 v. Hardin County*, No. 3:15-cv-66-DJH (W.D. Ky 2015). The lawsuit is currently pending.

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rule or non-home-rule unit is irrelevant to the analysis.¹¹ The home rule authority granted to certain municipalities and to one county by Illinois law does not abrogate or otherwise affect the scope of the Federal preemption, which excepts only state and territory-wide laws prohibiting union security agreements.

Senator Forby also inquired whether, under current Illinois law, voters may authorize, by referendum, "right to work" zones that would be enforceable within a particular governmental entity's corporate boundaries. Article 28 of the Election Code (10 ILCS 5/28-1 *et seq.* (West 2012)) addresses the submission of public questions to the electors of the State, any political subdivision, district, or precinct. Section 28-1 of the Election Code (10 ILCS 5/28-1 (West 2012)) provides that "[q]uestions of public policy which have any legal effect shall be submitted to referendum only as authorized by a statute which so provides or by the Constitution." No constitutional or statutory provisions currently authorize local referenda relating to the creation of local areas wherein union security agreements will not be recognized.¹² Consequently, Illinois law does not authorize the submission of a binding referendum on matters related to the regulation of union security agreements. Further, even if such authority did exist, it

¹¹Non-home-rule units may exercise only those powers that have been expressly granted to them by the Constitution or by statute, together with those powers that are necessarily implied therefrom to effectuate the powers that have been expressly granted. Ill. Const. 1970, art. VII, §7; *Inland Land Appreciation Fund, L.P. v. County of Kane*, 344 Ill. App. 3d 720, 724 (2003). In contrast, article VII, section 6, of the Illinois Constitution of 1970 authorizes home rule units to "exercise any power and perform any function pertaining to its government and affairs[.]" except to the extent that home rule powers may be limited pursuant to section 6.

¹²In the absence of an express constitutional or statutory provision authorizing a referendum, propositions may be submitted to voters under section 28-6 of the Election Code (10 ILCS 5/28-6 (West 2012)). The results of questions of public policy submitted under section 28-6 are merely advisory and have no binding effect, however. *See* 1983 Ill. Att'y. Gen. Op. 39.

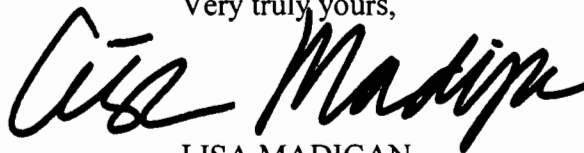
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would be preempted by the NLRA. Accordingly, it is my opinion that, under current law, local areas wherein union security agreements will not be recognized may not be created through the passage of a referendum.

CONCLUSION

It is my opinion that the National Labor Relations Act preempts counties and municipalities, as well as other political subdivisions of the State, units of local government, and school districts, from adopting local ordinances that regulate the use of union security agreements in all instances that impact interstate commerce. Further, even if not preempted by the National Labor Relations Act, it is my opinion that Illinois law does not authorize the creation, through the passage of a referendum, of local zones or areas wherein union security agreements will not be recognized.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is fluid and cursive, with the first name "Lisa" written in a larger, more prominent script than the last name "Madigan".

LISA MADIGAN
ATTORNEY GENERAL