

Traditional Labor Law for Attorneys Representing Individual Employees

I. NLRA Preemption of Individual Employee Claims

Q. Does NLRA preemption apply only to union activities by employees?

A. No. Section 7 of the NLRA guarantees employees the right to engage (or not engage) in certain protected concerted activities. These activities include the right to join and form unions. But Section 7 guarantees the right to combine for mutual aid and protection for the purpose of discussing and protesting work conditions even in the absence of a union: circulating a petition protesting an employer action and a group's refusal to attend voluntary meetings. The NLRA also identifies a series of unfair labor practices by employers and unions, for example discriminating against an employee for the exercise of a Section 7 right.

The USSC has long interpreted the NLRA as preempting all state claims involving actions that are either arguably protected or prohibited by the NLRA, known as “*Garmon*” preemption. For example, the exclusive remedy for an employee discharged for arranging an after-work off-site employee meeting to discuss an employer's new shift schedule is an ULP charge filed with the NLRA, even if that employee was expressly or impliedly promised that she would not be fired except for cause, and even if there is a similar state statute protecting such activities.

II. Section 301 Pre-emption of Claims Involving Collective Bargaining Agreements

Q. Can I Bring Suit on Behalf of an Employee Covered by a CBA?

A. Not if the claim requires the interpretation or application of terms of the CBA. Congress adopted Section 301 of the Labor Management Relations Act [“LMRA”] in 1947 (29 USC Section 185) authorizing unions and employers to bring suit in federal court for breach of collective bargaining agreements. The USSC decided, in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), that a federal labor law would be recognized for breach of these CBAs, rather than subject union and management to disparate state contract laws.

As a corollary to this principle, the USSC has recognized that this federal law preempts state law claims that rely upon language in a CBA or would require an interpretation of the CBA. As such, employees may not sue for breach of a CBA, or bring state law claims that rely on a CBA clause or require an interpretation of a CBA clause. For example, a discharged employee may not sue for breach of a “just cause for discharge” provision in the CBA, but must rely upon the union to enforce that promise. Moreover, Section 301 preemption bars an “implied contract” claim based on a manager's promise to a unionized employee that he

has a guaranteed job. Such a promise would be subsumed within the terms of the CBA, if actionable at all.

As such, plaintiff's counsel should carefully consider the sweep of Section 301 preemption when considering a contract or quasi-contract claim against the employer. Many tort claims relying on CBA terms will also be considered preempted, for example some defamation and negligent infliction of emotional distress claims. (See, e.g., *Hadley v. Pacific Gas and Electric, Inc.*, 933 F.2d 1014 (9th Cir. 1991))

Q. What about claims for violation of Federal/state statutes protecting employees?

A. Courts have not treated Federal and state statutory claims as preempted when they address specific statutory rights applicable to all employees. Title VII, FMLA, ADA and whistleblower claims, and similar state statutory claims, are not preempted by Section 301.

While unions may be able to waive or modify certain kinds of state statutory rights (overtime), other rights (non-discrimination statutes) have been considered "nonnegotiable state-law rights" and therefore not subject to waiver by the union. The distinction is not always a clear one. (See, e.g. *Cramer v. Consolidated Freightways, Inc.*, 255 F.3d 683 (9th Cir. 2001), Section 301 does not preempt California statutory privacy claim based on employer's secret taping of employee restrooms.)

Q. If the Union refuses to Arbitrate the Employee's CBA Claim, can she bring suit?

A. No, unless the union breached its duty to fairly represent the employee and the claim was meritorious. The vast majority of CBAs require that the union and management arbitrate all disputes involving the interpretation or application of the CBA. The right to invoke arbitration is vested solely in the union or employer. Individual employees may file grievances, but may not demand arbitration.

Employees aggrieved by the union's refusal to file a grievance on their behalf or arbitrate the grievance if filed, or disappointed with the union's settlement of a grievance, do not have the right to compel arbitration.

Nonetheless, unions have a duty to fairly represent bargaining unit employees (including non-members), and may not act arbitrarily, discriminatorily or in bad faith when deciding not to arbitrate a grievance. (*Vaca v. Sipes*, 386 U.S. 171 (1967))

Employees may file an NLRB unfair labor practice charge or file a lawsuit in federal court asserting a breach of this duty once they exhaust their contractual remedies. To prevail, the employee must prove that the grievance was meritorious (that the employer breached the CBA) and that the union breached its DFR. Employees bringing DFR claims usually sue their employer as well, but

can recover damages against their employer only if they prove the union also breached its DFR.

Both the NLRB and courts give considerable discretion to the union's decision not to arbitrate. Negligence in that decision making process or in the processing of a grievance, is not a breach of the DFR. The DFR does not require that unions use attorneys to arbitrate grievances; many unions use business representatives for that purpose. If union attorneys do handle the arbitration, their client is the union and not the aggrieved employee.

Q. Can the union member be forced to arbitrate statutory claims as well?

A. Maybe. A recent decision by the USSC holds that unions and management are free to negotiate arbitration clauses that require union employees submit state and federal discrimination claims to the arbitration procedure of the CBA. (*Penn Plaza LCC v. Pyett*, 129 S.Ct. 1456 (2009)). While lower courts have not yet fleshed out the protections that must be afforded the employee in such a claim, it seems clear that the employee must have an independent right to demand arbitration and that the full range of statutory remedies be available. We have seen very few CBAs adopt "Penn Plaza" arbitration provisions.

III. Negotiating a Settlement of a Separate Discrimination/Statutory Claim

Q. What should I look for if asked to review a union-management settlement agreement that the employee is asked to sign?

A. Plaintiff's counsel may be asked to review settlement agreements of arbitration claims brought by the union against the employer, when the employer seeks a broad release of all claims from both the union and the affected employee. Unions may have a difficult time avoiding such waivers, especially when the employee has been discharged and the employer is willing to offer additional consideration to the employee for the broad waiver. The union has the right to reject the employer's demand for a waiver by the employee, but may receive a far inferior settlement offer without the waiver.

IV. Reasonable Accommodation in the Union Setting

Q. Does a CBA affect the employer's duty to reasonably accommodate a disability?

A. The ADA and similar state statutes require that an employer reasonably accommodate employees with disabilities when the employees are able to perform the essential functions of the job with or without those reasonable accommodations. Unions are also subject to the ADA and many similar state statutes, and may not discriminate against the employees they represent by

unreasonably interfering with the extension of a reasonable accommodation to an employee.

A union's role in the interactive process of accommodation can become complicated when the employee seeks to be exempted from CBA provisions, especially the operation of seniority provisions of a CBA that guarantee favorable jobs, shifts or assignments to the most senior employee. This issue was resolved, in large part, by the USSC's *US Airways v. Barnett* decision, holding that an employer's seniority system will usually trump the ADA's duty to reasonably accommodate, for example when the employee with a disability seeks to displace a senior employee in his current position. (535 U.S. 391 (2002)) This principle applies to the seniority provisions in a CBA as well.