Labor and Employment Alert

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En Banc 9th Circuit: No Arbitration of State Claims by Unionized Employees, Unless Collective Bargaining Agreement Must Be Interpreted

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Key Points

- To compel a union employee's state law claim into arbitration based on RLA or LMRA preemption, an employer must prove that (1) the CBA is the "only source" of the right that the employee asserts and (2) litigating the state law claim does not require interpreting the CBA.
- An employer seeking to arbitrate union employees' state law claims should renegotiate CBAs to include language about those state laws so that litigating the state law claim requires interpretation of the CBA.

On August 1, 2018, in *Alaska Airlines Inc. v. Schurke*, --- F.3d ----, 2018 WL 3636431 (9th Cir. Aug. 1, 2018) (en banc), the 9th Circuit held that the Railway Labor Act (RLA) does not preempt a union employee's state claim asserting a right to reschedule her vacation time, even though the employee's Collective Bargaining Agreement (CBA) covers vacation leave. *Id.* at *15. Absent RLA preemption, the employer cannot compel the employee's state law claim into the CBA's "grievance and arbitration mechanism." *Id.* at *6. The court addresses how to decide whether a union employee's state law claim (e.g., vacation, overtime, work assignment, unfair discharge) involves a "minor dispute" that the parties must address through the CBA's grievance and arbitration mechanism, or is a question of state law that does not require "interpret[ing]" the CBA, and thus does not require arbitration. *Id.* at *8. The RLA preempts the former, but not the latter.

Background

Laura Masserant, a flight attendant, asked Alaska Airlines to permit her to reschedule her accrued vacation time to care for her sick son. Alaska Airlines denied Masserant's request because her CBA did not permit her to reschedule vacation days for family medical purposes.

Masserant filed a complaint with a Washington state agency alleging that Alaska Airlines violated the Washington Family Care Act (WFCA), which "entitle[s]" employees to "use any . . . paid time off" that they have "earned" in order "to care for . . . [a] child . . . with a health condition." Wash. Rev. Code § 49.12.270(1).

While the state agency proceeding was pending, Alaska Airlines, in federal court, sought to enjoin it as preempted under the RLA. Alaska Airlines argued that Masserant must arbitrate her dispute because it required interpreting the CBA. Masserant's union intervened to defend the state agency's jurisdiction, and the district court granted summary judgment for the union. Masserant also prevailed before the state agency, which fined Alaska Airlines for violating the WFCA.

A divided panel of the 9th Circuit reversed the district court, finding that the RLA preempts Masserant's WFCA claim because her state law right "is intertwined with . . . the [CBA]." 2018 WL 3636431, at *3. The 9th Circuit granted en banc review to resolve the RLA preemption question.

The En Banc Opinion

The en banc majority opinion, authored by Judge Berzon, holds that Masserant's WFCA claim before the state agency is a "minor dispute" not preempted by the RLA because the claim "does not arise entirely from the CBA" and "does not require construction of the CBA[.]" *Id.* at *12. The court also explained that its RLA preemption analysis applies with equal force to preemption under the Labor Management Relations Act (LMRA), which covers all unionized employees. *Id.* at *1.

The court conducts a "two-part inquiry into the nature of a [Masserant's] claim" to determine whether it is "grounded in the provisions of a labor contract," asking (1) "whether" Masserant's state law claim "seeks purely to vindicate a right or duty" for which "the CBA itself" is "the only source"; and (2) if not, "whether litigating the state law claim nonetheless requires interpretation of a CBA, such that resolving the entire claim in court threatens the proper role of grievance and arbitration." *Id.* at *7-8 (internal quotation marks and citations omitted).

The court concludes that Masserant's claim "does not arise entirely from the CBA" because it "invokes a state law right that applies to all workers, whether CBA-covered or not, and gives rise to a state law dispute, not a dispute concerning the meaning of the CBA." *Id.* at *12. Masserant's claim also "does not require construction of the CBA" because "there is no disagreement about the meaning or application of any relevant CBA-covered terms of employment." *Id.* Indeed, Alaska Airlines disputes only whether Masserant "earned" and was "entitled" to reschedule her vacation leave, both terms of which "are contained within the" WFCA, not the CBA. *Id.*

More generally, the court reasons that Masserant litigating her WFCA state law claim in a state forum is consistent with "[t]he purpose of RLA minor dispute preemption," which "is to reduce commercial disruption by facilitat[ing] collective bargaining and . . . achiev[ing] industrial peace, not to reduce burdens on an employer by federalizing all of labor and employment law so as to preempt independent state law rights." *Id.* at *7 (internal quotation marks omitted).

The dissenting opinion, authored by Judge Ikuta, would have "consider[ed] the nature and scope of [Masserant's] state cause of action" and found that, "to plead a WFCA

claim, employees must show they are entitled to sick leave or other paid time off under the terms of their [CBA].” *Id.* at *15, 22. Because that question “requires interpretation and application of the CBA,” the dissent found that Masserant’s claim “is a quintessential minor dispute that must be channeled through the RLA’s mandatory arbitral mechanism.” *Id.* at *23.

Implications for Future Cases

The 9th Circuit’s en banc opinion raises the bar for employers seeking to send the state law claims of unionized employees to arbitration based on RLA or LMRA preemption. To prove that an employee’s state law claim is a “minor dispute” subject to RLA or LMRA preemption and thus arbitration, an employer will need to prove that the CBA is the “only source” for the right that the employee asserts in the state law claim. *Id.* at *7. It is insufficient that an employee’s state law claim “respect[s or] implicate[s] CBA provisions, make[s] reference to a CBA-defined right, or” is “factually ‘parallel’ to a grievable claim[.]” *Id.*

Employers will have difficulty so proving. Even where, as here, there is disagreement about whether state law creates a right beyond the CBA, the court holds that state courts must resolve that disagreement in the first instance. To “use the RLA to enjoin the state agency from interpreting and applying state law” would “allow[] a federal court effectively to police the development of substantive state law, and inhibit[] the state from creating precedent on the meaning of its own statutes through the ordinary process of state court appeals.” *Id.* at *13.

Unionized employers seeking to arbitrate employee state law claims will have to think creatively about how to renegotiate CBAs with reference to those state laws so that “litigating the state law claim . . . requires interpretation of [the] CBA.” *Id.* at *8.