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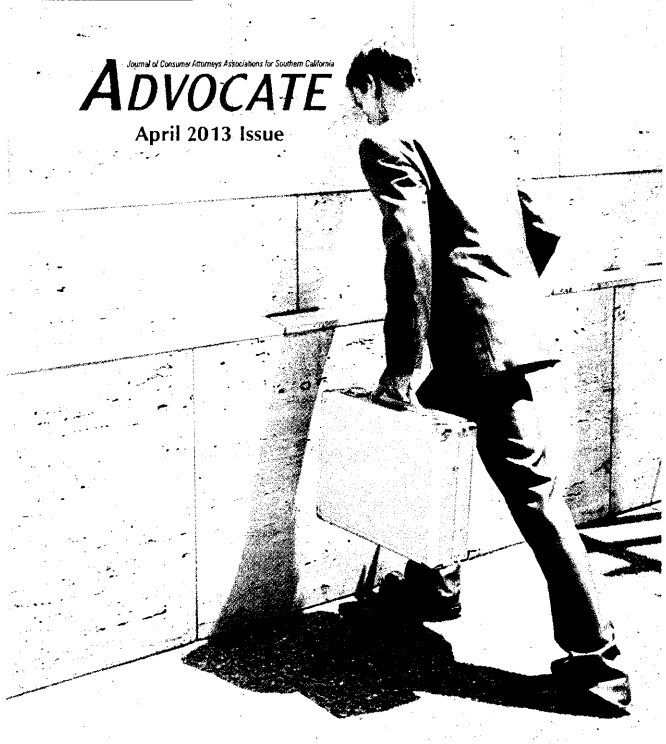

Pre-emption, limits on damages and other industry-specific burdens to plaintiffs' employment claims

The National Bank Act, ERISA and NLRA are but a few of the statutory and regulatory quagmires

Employees working in certain industries, or bringing certain claims may be subject to laws or regulations that place added burdens on them before they can pursue litigation against their employers, or may provide the employers with defenses beyond those normally asserted in employment cases. For example, some types of state-court actions are pre-empted and can only be brought in federal court. Some are pre-empted and must be brought in an administrative forum, and cannot be pursued in court at all. Some are subject to mandatory arbitration. Some may be subject to limitations on remedies. While these types of statutes are numerous, there are some that are more common and which are more likely to arise. This article discusses some of the more prevalent industry-specific and claim-specific hurdles of which employment practitioners should be aware.

Representing bank officers

The National Bank Act was enacted in 1864 to facilitate a national banking system. Section 24 of the Act grants a national bank the power to dismiss certain officers "at pleasure" and to appoint others to fill their places. (12 U.S.C. § 24, Fifth.) The issue that arises in employment cases is whether the National Bank Act pre-empts wrongful termination claims.

When representing a bank employee who is alleging an unlawful termination, the first question is whether the bank is a "national bank" subject to the provisions of the National Bank Act. A "national bank" is a financial institution chartered and regulated by the Office of the Comptroller of the Currency. The pre-emption provisions of the National Bank Act also extend to subsidiaries of national banks. (*Watters v. Wachovia Bank, N.A.* (2007) 550 U.S. 1, 21.) The Comptroller of the Currency maintains a Web site on which one can search to see if a particular bank is either a national bank or a subsidiary thereof, subject to the provisions of the National Bank Act. (See http://www.occ.gov/topics/licensing/national-bank-lists/index-active-bank-lists.html.)

Once it has been determined that the employer is a national bank, the next question is to determine whether the aggrieved employee is an "officer." The title bestowed by the bank on a particular employee is not dispositive of whether he or she qualifies as an officer under the Act. Rather, it is the employee's duties that are dispositive. In *Ramanathan v. Bank of America*, the Court rejected Bank of America's position that the plaintiff, a computer programmer who had been given the title of vice president, was an officer for purposes of determining applicability of the National Bank Act. (*Ramanathan v. Bank of America* (2007) 155 Cal.App.4th 1017, 1031.)

Among the factors that the court deemed relevant were whether the employee had authority to bind the bank in its transactions with borrowers, depositors, customers or other third parties by executing contracts or other legal instruments on the bank's behalf, and whether the employee's decision making authority related to fundamental banking operations. (*Id.* at 1026-1027.) In *Ramanathan*, the court found that the employee's duties as a computer programmer did not relate to any fundamental banking operations, and thus the National Bank Act did not apply to pre-empt his claims. (*Id.* at 1031 n. 1.)

In analyzing a client's claims and the potential applicability of the National Bank Act, counsel must look beyond the client's title and examine his or her duties to see if the client is, in fact, an officer for National Bank Act purposes.

Even if the aggrieved employee is properly deemed an officer, the Act only applies if the bank's board of directors

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ratified the employee's termination. (12 U.S.C. § 24, Fifth.) Although this is a fact that may not be known until discovery commences, it is an argument to be aware of in crafting discovery requests and opposing the employer's claim of pre-emption.

If the employee is an officer of a national bank, was terminated, and the termination was ratified by the board of directors, the question becomes the extent of pre-emption. More specifically, is a statutory discrimination case brought under FEHA pre-empted by the National Bank Act's empowering of banks to terminate officers "at pleasure"? It appears to be settled that claims brought under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), and the Age Discrimination in Employment Act ("ADEA") are not pre-empted. (*Kroske v. U.S. Bank Corp.* (9th Cir. 2006) 432 F.3d 976, 986.) With respect to claims brought under the Fair Employment and Housing Act ("FEHA"), the answer is not entirely clear.

The California Supreme Court had occasion to consider this question in *Peatros v. Bank of America* (2000) 22 Cal.4th 147. In *Peatros*, a vice president of Bank of America alleged she had been terminated because of her race and age, in violation of FEHA and other state laws. The trial court granted summary judgment, agreeing with the bank that section 24 of the National Bank Act empowered it to terminate the plaintiff for any reason, and that the National Bank Act completely pre-empted the employee's state law claims. The appellate court affirmed, and the Supreme Court granted review.

There was no majority opinion. Three justices found that section 24 of the National Bank Act has been impliedly amended by Title VII and the ADEA and that a national bank's power to dismiss a bank officer at pleasure does not extend to terminations based on race, color, religion, sex, national origin or age. (*Id.* at 168-169.) The same three justices further found that section 24 of the National Bank Act pre-empts FEHA only to the extent FEHA conflicts with Title VII or the ADEA. (*Id.* at 172-173.) To the extent that FEHA does not conflict with Title VII and the ADEA, it is not pre-empted. (*Id.*) One justice concurred in the result, but on grounds unrelated to pre-emption. (*Id.* at 180.) She joined the remaining three dissenting justices, however, in her opinion that the National Bank Act fully pre-empts all bank officer claims against national banks. (*Id.* at 183 n.1.)

The California Court of Appeal recently grappled with the issue of whether a plaintiff's disability discrimination claim under FEHA is pre-empted by section 24 of the National Bank Act. (*Quinn v. U.S. Bank, N.A.* (2011) 196 Cal.App.4th 168.) After analyzing *Peatros* and authority in various circuits, the court concluded that "to the extent FEHA is not inconsistent with section 24 as impliedly amended by the ADA, it is not pre-empted." (*Id.* at 186.)

Thus, the prevailing case authority establishes that disability discrimination claims brought under FEHA are not pre-empted, at least to the extent that FEHA and the ADA are consistent, but with respect to claims of discrimination based on race, color, religion, sex, national origin or age, they are likely not pre-empted to the extent that FEHA is not inconsistent with Title VII and the ADEA. This is not, however, fully established. When faced with a discrimination claim based on race, color, religion, sex, national origin or age against a national bank, the more risk-averse employment practitioner may want to allege federal claims under Title VII and the ADEA, as well as state law FEHA claims so that if the FEHA claims are found to be pre-empted, the federal claims will nevertheless remain viable.

Representing employees working in the securities industry

Counsel representing a person employed in the securities industry must be aware of the Financial Industry Regulatory Authority ("FINRA"). FINRA is the largest independent regulator for all securities firms doing business in the United States. FINRA rules mandate that any dispute between a broker and its brokerage firm must arbitrate its claims at FINRA. (FINRA Rule 13200(a).) An exception exists for discrimination claims: arbitration of any employment discrimination claim or sexual harassment claim is not mandatory unless the parties have signed either a pre-dispute or post-dispute agreement to arbitrate. (FINRA Rule 13201(c).) There is a good chance, however, that an employee in the securities industry who seeks to file a discrimination or harassment claim has signed a pre-dispute arbitration agreement during the hiring process. As arbitration through FINRA could affect the value of the potential action, counsel should determine early on in the representation whether an arbitration agreement exists.

Representing employees arguably engaged in concerted activity

Where a plaintiff contends that he or she was terminated for engaging in union or concerted activity, the plaintiff's claim may be pre-empted by the National Labor Relations Act ("NLRA"). (*Henry v. Intercontinental Radio, Inc.* (1984) 155 Cal.App.3d 707, 715.) The NLRA makes it an unlawful employment practice for an employer to interfere with, restrain or coerce non-supervisory employees in the exercise of their rights to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protections." (29 U.S.C. §§ 157 & 158(a)(1).) The NLRA also prohibits employers from discriminating against an employee who chooses to join a labor organization or who exercises his or her rights under the NLRA. (29 U.S.C. §§ 158(3) & (4).) Although the NLRA, by its terms, only protects non-supervisory employees, case law has extended NLRA protection to supervisory employees who refuse to commit unfair labor practices. (*Parker-Robb Chevrolet, Inc.* (1982) 262 N.L.R.B. 402; *Balog v. LRJV, Inc.* (1988) 204 Cal.App.3d 1295, 1302.)

When an employee alleges that an employer violated the NLRA, state law claims are pre-empted. Unlike cases involving the National Bank Act and ERISA (discussed *infra*), when a claim is pre-empted by the NLRA, the case is not subject to removal to federal court. Rather, the employee's exclusive remedy

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is to file an unfair labor practice charge with the National Labor Relations Board ("NLRB"), which has exclusive jurisdiction. (*San Diego Building Trade Council v. Garmon* (1959) 359 U.S. 236, 244-245.)

Thus, when faced with a client whose wrongful termination claim is arguably based on concerted activity, the employment practitioner must determine whether the claim may be pre-empted. For example, where an employee contends that he or she was terminated in retaliation for his or her refusal to participate in the defendant's unlawful anti-union harassment campaign, his or her wrongful termination claim will be pre-empted. (*Kelecheva v. MultiVision Cable T.V. Corp.* (1993) 18 Cal.App.4th 521, 528.) Similarly, when an employee is terminated for attempting to increase the wages of a group of employees and improve their working conditions, the employee's claim is pre-empted. (*Henry v. Intercontinental Radio, Inc., supra,* 155 Cal.App.3d at 711, 715.)

There are several exceptions to NLRA pre-emption. For example, contract claims, as opposed to tort claims for wrongful termination, may not be pre-empted, as the underlying issue is whether a contract existed and whether that contract was breached. The contract claim does not require a showing of unlawful motive. (*Kelecheva v. Multi-Vision Cable TV Corp., supra,* 18 Cal.App.4th at 531.)

Moreover, there may not be pre-emption of a wrongful termination action where there were mixed motives for the termination. (*Balog v. LRJV, Inc., supra,* 204 Cal.App.3d at 1311.) In *Balog*, the employee alleged he was terminated in part because of his continuous protests about safety regulations and in part for his refusal to terminate an employee in order to prevent him from becoming a member of a union. The court found that the plaintiff's claims were not pre-empted to the extent his discharge was motivated by any illegal reason other than an unfair labor practice. (*Id.* at 1309-1310.) Thus, if an employee believes he or she was terminated both because of actions that could be considered concerted activity and conduct unrelated to any alleged unfair labor practice, the wrongful termination case should be allowed to proceed in state court.

Another exception to NLRA pre-emption involves federal claims. Where the NLRA potentially conflicts with another federal statute, as opposed to a state statute, the *Garmon* pre-emption analysis does not apply. (See, e.g., *Smith v. National Steel & Shipbuilding Co.* (9th Cir. 1997) 125 F.3d 751, 757 (ADA claims not pre-empted, even to the extent the plaintiff's ADA claims encompass conduct arguably covered by the NLRA); *Britt v. Grocers Supply Co., Inc.* (5th Cir. 1992) 978 F.2d 1441, 1447, *cert. denied,* 508 U.S. 960 (1993) (because traditional pre-emption analysis does not apply when two federal statutes conflict, the Age Discrimination in Employment Act was not pre-empted by the NLRA).)

Representing employees who seek to compel the payment of employee benefits

The Employee Retirement Income Security Act of 1974 ("ERISA") regulates the operation of pension plans, health-benefit plans and other employee-benefit plans. (29 U.S.C. §§ 1001-1461). ERISA pre-empts all state laws that relate to any employee benefit plans. (29 U.S.C. § 1144(a).) Where an employee seeks to file suit in state court to compel the payment of employee benefits, the employee's action may be pre-empted and require an ERISA action to be filed in federal court. (*Ingersoll-Rand Co. v. McClendon* (1990) 498 U.S. 133, 138.)

Thus, where an employee brought a wrongful termination claim based on allegations that he was terminated so that the employer could avoid making contributions to his pension fund, the employee's claims were held to be pre-empted. (*Ingersoll-Rand Co., supra,* 498 U.S. at 140. See also, *Johnson v. Trans World Airlines, Inc.* (1983) 149 Cal.App.3d 518, 528 (state law claims pre-empted by ERISA to the extent plaintiff alleged he was terminated to avoid paying him covered employee benefits, including vacation pay, sick leave, medical and dental benefits, life insurance, disability and retirement).) Similarly, where an employee alleged that he was terminated after contracting lung cancer so that the employer would not have to pay his medical insurance benefits, the court found the action to be pre-empted. (*Felton v. Unisource Corp.* (9th Cir. 1991) 940 F.2d 503, 507.)

Counsel must therefore be careful about alleging that an employer terminated an employee in order to deprive that employee of benefits. ERISA does not, however, pre-empt a state court action where a loss of employee benefits is "a mere consequence of, but not a motivating factor behind" the termination. (*Campbell v. The Aerospace Corp.* (9th Cir. 1997) 123 F.3d 1308, 1313. See also, *Ethridge v. Harbor House Restaurant* (9th Cir. 1988) 861 F.2d 1389, 1405.) Thus, where a state court lawsuit merely alleges that the employee lost income and benefits as a result of wrongful conduct by the employer unrelated to any employee benefit plan, the action should not be subject to pre-emption.

Representing undocumented workers

Employees living and working in the United States illegally may face additional hurdles when trying to enforce their legal rights. The United States Supreme Court held in 2002 that the Immigration Reform and Control Act of 1986 ("IRCA") – enacted to prohibit the employment of undocumented aliens in the United States – prevents the NLRB from awarding back pay to undocumented workers, even when their terminations constituted an unfair labor practice under the NLRA. (*Hoffman Plastics Compounds, Inc. v. National Labor Relations Board* (2002) 535 U.S. 137, 151-152.)

Subsequent to *Hoffman Plastics*, the California legislature, as part of Senate Bill 1818, amended several statutes to clarify that immigration status is irrelevant to the enforcement of state labor, employment and civil rights laws. (*Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, 1073, *cert. denied,* 544 U.S. 905.) One such statute, California Labor Code section 1171.5, states as follows:

The Legislature finds and declares the following:

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(a) All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.
(b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that [this/the] inquiry is necessary in order to comply with federal immigration law.
(c) The provisions of this section are declaratory of existing law.

(Lab. Code, § 1171.5). Civil Code section 3339 and Government Code section 7285, enacted at the same time, contain identical language with the exception that in subdivision (b), they both apply the protections for the additional purpose of enforcing civil rights and employee housing laws.
(Civ. Code, § 3339; Gov.Code, § 7285.)

Immigration status is therefore irrelevant in enforcement of California's labor, employment, civil rights, and employee housing laws. Thus, "if an employer hires an undocumented worker, the employer will also bear the burden of complying with this state's wage, hour and workers' compensation laws." (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 460, *disapproved on another ground in People v. Freeman* (2010) 47 Cal.4th 993.)

Employers can be expected to argue that these state laws are pre-empted by the IRCA. Several cases have rejected that argument, finding that California state law placing illegal immigrants on equal footing with other employees is not pre-empted by the IRCA. (See, e.g., *Incalza v. Fendi North America, Inc.* (9th Cir. 2007) 479 F.3d 1005, 1010-1013; *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, 616 (IRCA does not pre-empt California's prevailing wage law, such that undocumented workers have the same rights as documented workers to enforce California's wage and hour laws).)

An undocumented worker's ability to recover back wages in FEHA cases was touched on by the Ninth Circuit Court of Appeal in *Rivera*, a federal action brought under both Title VII and FEHA. There, the court looked to Civil Code section 3339(a), Government Code section 7285(a) and Labor Code section 1171.5(a) and acknowledged that in California, immigration status is irrelevant to enforcement of state labor, employment and civil rights laws. (*Rivera, supra,* 364 F.3d at 1073.) The court did not believe it needed to engage in a pre-emption analysis, but did acknowledge the potential for a conflict between the IRCA and California law. (*Id.* at 1073.) Although it appears, based on analogous cases and the discussion in *Rivera,* that an undocumented worker successful in pursuing a claim under FEHA should be entitled to recover back wages, the law currently remains unsettled.

The recovery of back wages by an undocumented worker is more likely permissible in an action brought under Title VII. In *Rivera,* a magistrate judge issued a protective order barring the defendant-employer from conducting discovery regarding the immigration status of each plaintiff. The Court of Appeal upheld the protective order, finding that allowing discovery into a plaintiff's immigration status would likely deter meritorious civil rights claims. (*Rivera, supra,* 364 F.3d at 1064.)

The defendant in *Rivera* argued that *Hoffman Plastics* forecloses any award of back pay to undocumented workers, and that immigration status was thus a proper matter for discovery. The Court of Appeal disagreed, expressing serious doubt that *Hoffman Plastics* applies to Title VII cases, based on fundamental differences between the NLRA and Title VII. (*Id.* at 1067). The Court explained that, "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of back wages to unlawful immigrants in Title VII cases." (*Id.* at 1069.) (See also, *EEOC v. Tortilleria La Mejor* (E.D. Cal. 1991) 758 F. Supp. 585, 593-594 (IRCA does not amend or repeal the protections of Title VII accorded to undocumented aliens).)

The IRCA has also been held not to limit remedies for unpaid wages available to undocumented workers under the federal Fair Labor Standards Act. (*Patel v. Quality Inn South* (11th Cir. 1988) 846 F.2d 700, 704.)

Like the defendant in *Rivera,* employers often seek to conduct discovery about immigration status when they suspect that a plaintiff is undocumented. In addition to arguing about the propriety of awarding back wages to such a plaintiff, employers also try to argue that immigration status is relevant to their potential defenses of after-acquired evidence and unclean hands, and therefore subject to discovery. (See, e.g., *Murillo v. Rite Stuff Foods, Inc.* (1988) 65 Cal.App.4th 833.) Counsel should object to such discovery, based on Labor Code section 1171.5(b).

A more difficult question is whether the after-acquired evidence doctrine and unclean hands defense bar an undocumented alien's FEHA claims. This issue is currently pending before the California Supreme Court in *Salas v. Sierra Chemical Co.*, Case No. S196568 (review granted 9/9/11, 133 Cal.Rptr.2d 392.) The question to be considered by the court is whether the trial court erred in dismissing the plaintiff's FEHA claims on grounds of after-acquired evidence and unclean hands, based on plaintiff's alleged use of false documentation to obtain employment in the first instance, and whether Senate Bill 1818 – which added, among others, Labor Code section 1171.5, Civil Code section 3339 and Government Code sections 7285, *et seq.* – precludes application of those doctrines. The briefing before the California Supreme Court has been fully completed, but no oral argument date has yet been set.

Conclusion

While it is not possible to give an exhaustive dissertation of each of the laws and regulations applicable to

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employees working in certain industries or claims involving special considerations, by being aware that special hurdles exist, counsel can fully research the requirements and limitations early on in the representation, in order to prepare for the challenges ahead.

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