The Art Of Using Preemption To Defend Wage-And-Hour Cases

By **Michael Giambona** (April 12, 2019, 11:30 AM EDT)

Michael Giambona

Preemption technically means situations where federal law displaces state law: a function of the supremacy clause of the U.S. Constitution. Often, lawyers speak of preemption even where it is one federal law displacing another or one state law displacing another. When statutory laws abut or overlap like tectonic plates, which should apply?

As large-scale cases proliferate under federal and state wage-and-hour laws, there is more and more reason to study plate tectonics for potential defenses. Thinking about preemption requires looking beyond the intricacies of the case at hand to broader issues of public policy; applying preemption as a defense requires thinking about more than the statute alleged in the complaint.

Finding preemption, like throwing the Eephus pitch, is an arcane but game-winning skill.

Where Are Your Operations?

Be conscious of the statutory frameworks applicable to your workforce. Counsel for Parker Drilling (one of my colleagues, Ron Holland) did just that; he argued that because his client operated on the Outer Continental Shelf, California's Labor Code was preempted by the Outer Continental Shelf Lands Act, or OCSLA. Parker Drilling Management Services Ltd. v. Brian Newton is now pending before the U.S. Supreme Court.

OCSLA provides for exclusive federal domain over the Outer Continental Shelf. Yet, recognizing that federal law might be inadequate to cope with the full range of potential legal problems, OCSLA also provides for the selective incorporation of state law as "surrogate federal law." The statutory language confirms that any such incorporation must be selective, allowing only state law "not inconsistent … with other Federal laws."[1] But, isn't the California Labor Code "inconsistent" with the Fair Labor Standards Act (e.g., overtime after eight hours in California but only after 40 under the FLSA)?

Is This a Regulated Industry?

If the federal government regulates the industry, those regulations may preempt state wage-and-hour laws. Trucking is a case in point, littered with both failures and potential successes in the preemption of state wage-and-hour claims.

There is, of course, a statutory preemption provision under the Federal Aviation Administration Authorization Act forbidding state laws "related to a price, route, or service of any motor carrier…"[2] Its invocation has repeatedly failed to salvage regulated employers from state wage-and-hour lawsuits.[3]

Conversely, there is more promise in federal regulations that expressly permit allocation of business expenses, like fuel, maintenance and other expenses, in written agreements between motor carriers and owner-operators (whether employees or independent contractors).[4] Those regulations may preempt California's Labor Code §2802, which assigns all business expenses to the employer.[5]

Additionally, although its validity has yet to be decided by the U.S. Court of Appeals for the Ninth Circuit, the Federal Motor Carrier Safety Administration issued an opinion on Dec. 21, 2018, determining that California's meal and rest break laws were preempted with respect to commercial drivers covered by the U.S. Department of Transportation's hours of service regulations.[6]

Which State's Law Applies Here?

Sometimes, preemption analysis resembles a conflicts of law final exam. Does New Jersey law apply to the wage-and-hour claims of a citizen of New Jersey who lives there but crosses the river every morning to work in New York City? What about the employee who is a resident of Montana but is sent to the annual widget convention in Atlanta to work for a week at that trade show for his Bozeman-based company?[7]

What about a flight attendant who spends time in multiple states during a single week: Does compliance with laws of multiple jurisdictions excessively burden interstate commerce in that situation? In Hirst v. Skywest Inc the airline responded to a flight crew's claims for violation of state laws (minimum wage, wage-timing and wage-statement laws) by arguing that the dormant commerce clause preempts those state regulations.[8] The district court agreed, but the U.S. Court of Appeals for the Seventh Circuit did not; now, the U.S. Supreme Court has been invited to weigh in.

Meanwhile, cases against other airlines are now percolating before the California Supreme Court on certified questions from the Ninth Circuit as choice-of-law issues rather than as constitutional issues. There too, the issue is whether California law applies to employees who work part of a pay period in California. But these choice-of-law style of preemption questions apply beyond the airline industry and beyond California. These are fair questions to ask whenever workers are peripatetic and work in multiple states in a single pay period.

Is Your Workforce Unionized?

For union employers, Section 301 preemption sometimes provides another option. The basis is simple to state but sometimes prolix in application. Claims requiring interpretation or application of a collective bargaining agreement are governed solely by federal labor law. This is called Section 301 preemption because it emanates from 29 U.S.C. §301.

Courts use a two-step inquiry:

1. Is the claim rooted in the CBA or a statute?

2. If a statute is implicated, is resolution of the statutory claim "substantially dependent" on analysis of the CBA?

Curtis v. Irwin Industries Inc.[8] — another case which my colleagues are litigating for the employer — illustrates the lateral thinking required for preemption. There, an employee brought an overtime claim under California law alleging the employer did not pay required overtime rates for hours spent off-duty. Yet, California's Labor Code exempts employees covered by a valid CBA. Carl Curtis was so covered. Thus, his state law claim was barred by that state law exemption, rendering any right to overtime solely a result of the CBA and, thus, preempted.

Some claims (like Curtis') fail on that first step. But if a claim reaches step two (a statute is implicated), it may still be preempted if it is "substantially dependent" on analysis of the

CBA. But not all claims that touch on a CBA provision will necessarily require analysis. That is why this preemption defense invites self-help: i.e., employers can draft CBAs with an eye toward optimizing Section 301 preemption.

Sampling cases can serve as guideposts for planning successful 301 preemption:

State Law Claim	**CBA Analysis Not Required**
Unpaid additional wages per local minimum wage ordinance in *McCray v. Marriott Hotel Servs., Inc.*, 902 F.3d 1005 (9th Cir. 2018)	The right to be paid a minimum wage per local ordinance stemmed from statute; its interpretation did not require CBA analysis despite the CBA's opt-out provision regarding same.
Failure to pay wages per California Labor Code Section 201 in *Livadas v. Bradshaw*, 512 U.S. 107 (1994).	Determining an individual's hourly wage to compute a penalty only required a "look to" the CBA; resolution was not substantially dependent upon analysis of the CBA.
State Law Claim	**CBA Analysis Required**
Section 201 claim for failure to pay final wages in *Melendez v. San Francisco Baseball Assocs.*, 16 Cal. App. 5th 339 (2017) *pet. for rev. granted*, 408 P.3d 407 (Jan. 10, 2018).	Section 301 preempted claim for failure to pay final wages because whether employee was actually "discharged" when not called to work for certain time period depended on interpretation of overall terms and conditions of employment in CBA.

Where CBA provisions require analysis, there is still work to do to avoid admitting away preemption. In Alaska Airlines v. Schurke,[10] the employee brought a claim under a Washington state law that allowed for personal leave to be used for family medical emergencies. In contrast, the CBA held that vacation days were only to be used on days selected at the beginning of the year. It was undisputed that the employee had seven days of banked vacation. This allowed the court to conclude that "the meaning of every relevant provision in the CBA was agreed upon." That apparent agreement forfeited the employer's preemption defense.[11]

Conclusion

With this multifaceted issue, the possibilities for creative arguments "preempt" any attempt at an exhaustive list of preemption in wage-and-hour litigation. Rather, in the spirit of Rip

Sewell who had the courage to develop the ultra-unconventional Eephus pitch and Francis Bacon who rightly recognized that "a prudent question is one half of wisdom," just try asking the same four questions framing this article when evaluating possible preemption defenses to wage-and-hour litigation.

There is much to be leveraged with a few questions to ferret out preemption issues.

Michael Giambona is an associate at McDermott Will & Emery LLP.

Disclosure: McDermott represents Parker Drilling in Parker Drilling Management Services Ltd. v. Brian Newton and Irwin Industries in Curtis v. Irwin Industries Inc. Giambona is not involved in either case.

[1] 43 U.S.C. §1333(a)(2)(A)

[2] 49 U.S.C. §14501(c)(1)

[3] Dilts v. Penske Logistics, LLC, 769 F.3d 637 (9th Cir. 2014) (holding that FAAAA did not preempt California meal and rest break laws for employees of motor carriers)

[4] 49 C.F.R. § 376.12(e)-(j).

[5] Valadez v. CSX Intermodal Terminals, Inc., 2017 WL 1416883, at *1 (N.D. Cal. April 10, 2017) ("where the TIL Regulations explicitly permit a particular arrangement, state laws cannot prohibit parties from negotiating that arrangement"); but see, Goyal v. CSX Intermodal Terminals, Inc., 2018 U.S. Dist. LEXIS 164643 (N.D. Cal. Sept. 25, 2018)(rejecting preemption by ignoring "free play" doctrine of preemption).

[6] Docket No. FMCSA–2018-0304

[7] See,Sullivan v. Oracle Corp, 51 Cal. 4th1911 (2011) (applying California Labor Code to employees temporarily in California)

[8] Hirst v. Skywest, Inc., 910 F.3d 961 (7th Cir. 2018)

[9] 913 F.3d 1146, 1153 (9th Cir. 2019)

[10] 898 F. 3d 904 (9th Cir. 2018), cert. denied, 2019 WL 1428944 (April 1, 2019)

[11] Id. at 9