Labor & Employment Issues
In Focus

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For Clients and Friends
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SCOTUS LIMITS FEDERAL JURISDICTION OVER FAA ARBITRATION

In an 8:1 decision narrowly construing the Federal Arbitration Act ("FAA"), the U.S. Supreme Court held that federal district courts lack jurisdiction to confirm or vacate arbitration awards where a federal claim or diversity does not appear on the face of the application. *Badgerow v. Walters et al*, U.S. No. 20-1143 (March 31, 2022).

The Supreme Court has long held that the FAA does not create federal jurisdiction which must be supplied by diversity or a substantive federal question. In assessing whether to compel arbitration under FAA § 4, federal precedent allows the courts to "look through" the petition to the "underlying substantive controversy" which, if federal in nature, provides jurisdiction regardless of the petition's pleading. However, the courts have split on whether they can similarly "look through" on applications to confirm or vacate awards under the FAA.

Justice Kagan, for the overwhelming majority, ruled that federal courts are limited to the petition pleadings and may not "look through" to the underlying dispute to discover a federal question in applications to confirm or vacate awards under FAA §§ 9 or 10. If the petition reveals neither diversity nor a federal question on its face, the district court lacks jurisdiction to confirm or vacate, she wrote. Justice Kagan justified the distinction on the grounds that while FAA § 4 refers to district court jurisdiction, FAA §§ 9 and 10 do not. Moreover, a petition with no diversity nor federal question on its face raises only a state claim on contract – the agreement to arbitrate – and so should be decided in state court. Justice Breyer dissented, stressing the confusion and inefficiencies of two different jurisdictional standards for the same statute, but Justice Kagan waived the objection aside. "The result," she explained, "... is to give state courts a significant role in implementing the FAA. But we have long recognized that feature of the statute ... Congress chose to respect the capacity of state courts to properly enforce arbitral awards. In our turn, we must respect that evident congressional choice."

The ruling may not substantially impact actions to confirm or vacate arbitration awards issued under a collective bargaining agreement because Section 301 of the Labor Management Relations Act ("LMRA") creates a federal question and jurisdiction over such actions. Moreover, the U.S. Court of Appeals for the Second Circuit and its district courts have generally looked to the FAA only for reference, not jurisdiction or procedure in LMRA arbitration, though other Circuit Courts of Appeals, like the Third Circuit, have relied on the FAA. Parties seeking to evade federal court jurisprudence may try to apply *Badgero*w in such a dodge, especially in the context of individual employment contracts.

FEDERAL COURT DENIES NYC HOTEL INDUSTRY'S
CHALLENGE TO NYC HOTEL WORKERS SEVERANCE LAW

On March 30, 2022, U.S. District Court Judge J. Paul Oetken of the Southern District of New York denied the applications of the Hotel Association of New York City, Inc. ("Association") and RHC Operating, LLC ("RHC") for a preliminary injunction enjoining enforcement of New York City Severance Law, Int. No. 2397-2021 ("Severance Law"). The Court rejected the Association and RHC's arguments that the Severance Law was preempted by federal pension, employment and labor relations laws, as well as New York State's unemployment law, and found their constitutional claims regarding the Severance Law equally meritless.

New York City passed the Severance Law in October 2021 to address the devastating employment loss suffered by New York City hotel workers as a result of the effects of the Covid-19 pandemic on the New York City hospitality industry. The Severance Law requires hotels in New York City with at least 100 rooms to pay their employees who had been laid off since March 2020, a weekly severance payment of $500 if the hotel had not recalled at least 25 percent of their staff and re-opened to the public by October 11, 2021. Such weekly severance payments would continue for 30 weeks or until a hotel re-opened to the public and met their 25 percent recall threshold. Not surprisingly, shortly after the passage of the Severance Law, a number of hotels which had been shuttered since March 2020 re-opened their doors and re-called at least 25 percent of their staff in order to avoid having to make the mandated weekly severance payments. Additional hotels which remained closed began making the $500 weekly severance payments required under the Severance Law.

Yet the Association, on behalf of its over 100 member New York City hotels, and RHC, the owner of the closed Roosevelt Hotel, filed suit in October 2021, and November 2021, respectively, in federal court seeking a preliminary injunction enjoining enforcement of the Severance Law. The plaintiffs' primary arguments were that the law was invalid because it was preempted by the National Labor Relations Act ("NLRA"), the Employee Retirement Income Security Act ("ERISA") and New York State's unemployment law. They also claimed that the Severance Law violated the Contracts Clause, the Due Process Clause and the Equal Protections Clause of the United States Constitution. The plaintiffs and the City of New York were afforded the opportunity to submit pleadings and briefs in support of their respective positions and the Court heard oral argument regarding the same in January 2022. United State District Court Judge Oetken, in a 32- page Opinion and Order, comprehensively examined each of the preemption and constitutional claims raised by the Association and RHC and found them all to be without merit.

The Court found that the Severance Law was not preempted under the NLRA as it neither interfered with workers federal labor rights (*Garmon* preemption) nor did it interfere with the free play of economic forces by private employers or labor unions (*Machinists* preemption). The Court opined that the Severance Law was a type of minimum labor or employment standard, like minimum wage laws, which federal courts

have consistently held are within a state's traditional "police powers' and do not run afoul of federal preemption.

The Court also devoted a great deal of its analysis in ruling that the Severance Law was not preempted by ERISA since it was neither an employee benefit plan which is regulated by ERISA nor did the Severance Law require a hotel to create an ongoing administrative program to pay the weekly severance. In reaching such a conclusion, the Court examined in depth the various factors that are part of a test previously established by the Second Circuit of Appeals in determining whether a state or local law created an ongoing administrative program preempted by ERISA. The Court found that the Severance Law was a requirement to pay severance for a limited duration and that no employee would have an expectation that they would receive a benefit from a plan for years. The Court further found that the Severance Law did not require hotels to exercise discretion or make individualized assessments regarding an employee's eligibility for severance under the law, nor did it place an administrative burden on hotels as eligibility determination was simply clerical in nature.

The Court gave short shrift to the plaintiffs' home rule challenge to the Severance Law, as well as their claim that it was preempted by New York State unemployment law. The Court found no evidence that New York State unemployment preempted the entire employment field regarding the paying of severance.

The Court also rejected the Association and RHC's constitutional claims finding that they produced no evidence that the Severance Law substantially impaired their contracts or denied them substantive due process or equal protection under the law. In making such a finding, the Court described in detail the legitimate public purpose for the passing of the law and how it was reasonably tailored to such purpose. Judge Oetken took notice of how vital the hotel industry was to New York City's economy and how much its workforce had suffered through the Covid-19 pandemic and was still suffering with an employment rate much higher than any other industry in New York City. In short, he recognized the City's legitimate purpose in encouraging and spurring on the opening of hotels since the industry, unlike other industries in New York City, was still struggling to recover from the pandemic.

While the federal district court's denial of the Association and RHC's applications for a preliminary injunction does not formally close the case, the court's denial based upon its finding that the plaintiffs are not likely to succeed on the merits of their case essentially leaves their cases dead in the water at the district court level. While either plaintiff may appeal the district court's decision to the Second Circuit, they and any hotel that pinned their hopes on the challenge to the Severance Law, run the risk of being liable under the Severance Law for all unpaid severance payments, plus 100% liquidated damages and attorneys' fees, should the Second Circuit Court of Appeals refuse to overturn Judge Oetken's well-reasoned and thorough opinion and order.

ORGANIZING CAMPAIGNS GAIN STEAM WITH SUCCESSES IN UNIONIZING CORPORATE GIANTS

Late last week, word came from the National Labor Relations Board ("NLRB") that the union organizing campaign at the Amazon distribution center in Staten Island, known as JFK8, was successful after initial vote tallying demonstrated that the workers at that location voted in favor of the unaffiliated Amazon Labor Union ("ALU"). Out of the approximately 2,700 ballots counted, 57% of the votes cast were in favor of the ALU. The NLRB, earlier this week, indicated that it will certify these election results, despite Amazon's indication of its' intent to challenge the outcome, as the number of disputed ballots did not appear to approach the large vote differential.

According to the President of the ALU, Christian Smalls, who was at the center of a workplace safety dispute involving Amazon during the nascent stages of the COVID-19 pandemic in March 2020, this successful campaign was the result of grassroots, old fashioned organizing, such as interacting with prospective voters at the bus stop outside the facility, speaking out during "captive audience" meetings run by Amazon, and sponsoring barbeques for employees. Up next for the small but emerging ALU is an organizing election at the Amazon warehouse in Staten Island, known as LDJ5, which is located across the street from JFK8, where an election will be held on April 25, 2022.

This latest victory in organizing workplaces which have traditionally been difficult to unionize coincides with recent inroads made at other corporate behemoths, such as Starbucks, which has seen ten of its corporate-owned stores throughout the United States successfully organize. Most recently, the Starbucks store in Chelsea voted 46-36 to be represented by Workers United NY/NJ. Further, there are currently approximately 180 Starbucks stores with petitions to conduct elections pending before the NLRB, including a Starbucks store on Astor Place, which will conduct an election on Friday, April 8. In addition, a group of investors in Starbucks has asked the company to adopt a neutral policy toward unionization and to stop sending anti-union communications to employees.

However, not all the news out of recent union elections involving Amazon was positive; the re-run election of workers at the Amazon fulfillment center in Bessemer, Alabama appears to be headed to a familiar outcome. The preliminary vote tally shows 53% of workers at this location voting against the Retail, Wholesale and Department Store Union ("RWDSU"). There remain 416 challenged ballots and the results of these challenges could sway the election. If the vote tally continues its current trajectory, the RWSDU has indicated that it will dispute these results again, as it did successfully after last year's lost race, claiming that Amazon improperly interfered with a free and fair election by posting anti-union campaign materials in employee bathrooms and offering pay increases.

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