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PERSPECTIVE

NLRA may preempt AB 5 under the Garmon doctrine

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Can Garmon be argued to apply to all workers who are covered by the NLRA or subject to the NLRB's jurisdiction merely because they are covered by federal law and/or within the agency's jurisdiction, in which case Dynamex and AB 5 may be rendered unenforceable?

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The *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal. 4th 903 (2018), decision and its adoption of the highly restrictive ABC test seemingly closed the door once and for all on the issue of whether and when a California worker may properly be classified as an independent contractor under California law. However, there was absolutely no statutory basis for the court's new ABC test. The state's Legislature recently filled that legislative void with the passage of Assembly Bill 5, codifying *Dynamex* and making the ABC test an integral part of the state's Labor Code.

While AB 5 may answer classification issues arising under state law, the new law's possible application in National Labor Relations Board proceedings poses a substantial question as to whether the new law is unconstitutional because it is preempted by the National Labor Relations Act under the *Garmon* doctrine. In B*uilding Trades v. Garmon*, 359 U.S. 236 (1959), the U.S. Supreme Court declared that the states are constitutionally barred by the U.S Constitution's supremacy clause from regulating conduct that is arguably protected by Section 7 or prohibited by Section 8 of the NLRA because such conduct is exclusively controlled by the NLRA and within the exclusive jurisdiction of the NLRB. *Garmon* preemption exists to protect the NLRB's primary jurisdiction and to preclude a state's interference with its interpretation and enforcement of the integrated regulatory scheme that is the NLRA. Indeed, Congress delegated exclusive regulatory authority to the NLRB because it sought to establish a single, uniform national labor policy that would be unaffected by the vagaries of state law or shaped by local attitudes or prejudices. *Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953). Because of the NLRA's potential reach and the need for uniform enforcement of the law, states are precluded from performing or duplicating the plenary functions of the NLRB or regulating labor-related conduct that may be controlled by the NLRA.

A party asserting *Garmon* preemption must show that the conduct a state seeks to regulate is either arguably protected or prohibited by the act. This means that a party claiming Garmon preemption must advance an interpretation of the NLRA that is not plainly contrary to its language and one that has not been authoritatively rejected by the NLRB or the court. Thus, they are required to show that their case is one that the NLRB could legally decide in their favor. *U.S. Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018), citing ILA v. Davis, 476 U.S. 380, 394 (1986). A party opposing the application of AB 5 in an NLRB proceeding could sustain this burden, for AB 5 operates in direct contravention to the NLRA's Section 2(3) and encroaches on the NLRB's administration of the act's Section 7 and its enforcement of Section 8.

AB 5's purpose is to accord putative contractors the statutory status of "employees" so they may avail themselves of the full protections of both state and federal labor and employment law including the NLRA Section 7's rights to self-organize, to form and join labor unions, and to select bargaining representatives of their own choosing. See Gov. Gavin Newsom's Sept. 18 signing message, wherein he described the passage of AB 5 as an important first step with the "next step [being to create] pathways for more workers to form a union, collectively bargain to earn more and have a stronger voice at work."

AB 5 conflicts with NLRA Section 2(3) because it purports to give statutory employee status under the NLRA to those who, in fact, otherwise qualify as independent contractors under common law. The current text of Section 2(3) is an amendment made to the NLRA in 1947 as part of the Labor Management Relations Act, also known as the Taft Hartley Act, for the purpose of overturning earlier NLRB precedent in which the NLRB, with Supreme Court approval (and like California's Legislature), found and treated common law independent contractors as "employees" covered by the act. *NLRB v. Hearst Publications*, 322 U.S. 111 (1944). In answer to these earlier cases and with the goal of overturning and drawing a bright line between statutory "employees" who were covered and protected by the act and independent contractors who weren't, Congress rewrote Section 2(3) to exclude "any individual having the status of an independent contractor" from statutory coverage. The obvious purpose of this amendment was to have the NLRB and the courts apply [common law] general agency principles when distinguishing between employees and independent contractors under the ct without regard to economic or policy considerations in the labor field and to exempt independent contractors from coverage by the law. *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968). AB 5 — its use of the ABC test instead of common law agency principles and its reliance on economic and policy considerations for the purpose of granting workers who may be common law contractors presumptive employee status — creates an irreconcilable conflict between the new state law and what Congress intended when it amended the NLRA to exclude

independent contractors from its coverage.

This conflict will likely manifest itself in diverse NLRA settings. Where a union petitions for an election to represent AB 5 employees who the NLRB deems to be common law independent contractors, *Garmon* preemption will clearly arise and result in the petition's dismissal. Likewise, unfair labor practice charges under NLRA Sections 8(a)(1) and (3) based on the treatment of AB 5 employee who too are common law contractors will trigger Garmon issues and end with dismissal of the charge because the putative employees have been misclassified and are not entitled to the protections of the Labor Act.

Further, where a union pickets to obtain an employer's recognition of the union as the bargaining representative of its non-employees or without filing a timely petition, a union's reliance on AB 5 is likely to trigger unfair labor practices in violation of NLRA Sections 8(b)(4)(A) and 8(b)(7)(C). 8(b)(4)(A) prohibits unions from picketing a person or inducing a strike where in either case an object thereof is to force or require a self-employed or independent person to join the union. Union picketing or a strike intended to compel AB 5 employees who are, in fact, common law contractors would likely violate this section. Likewise NLRA Section 8(b)(7)(C), which prohibits recognitional picketing for an unreasonable period not to exceed 30 days without the filing of an election petition. Where a union engages in recognitional picketing with respect to AB 5 employees who also qualify as common law contractors, such picketing may be unlawful at its outset and, in any event, a union would not likely file an election petition with the NLRB knowing that that petition to represent non-employees would probably be dismissed. For this reason as well, AB 5's misclassification of common law contractors as employees is likely to be preempted.

A party asserting *Garmon* preemption must also present evidence to enable a court to find that the NLRB could uphold a claim based on their interpretation of the act. *U.S. Chamber of Commerce v. City of Seattle*. Here that proof would be no problem because, unlike AB 5's presumptive preference for employee status and its palpable antipathy towards independent contractor relationships, the NLRA contemplates and the NLRB has affirmatively sanctioned hiring businesses who establish and maintain an independent contractor relationship (instead of a traditional employment relationship) with its workers — notwithstanding the fact that those workers are not engaged in an independently established trade, occupation or business and even though they and the hiring company are engaged in the same line of work or the workers render services that are a part of the hiring company's regular business. A perfect example of this is the NLRB's recent decision in a representation election case, *Supershuttle DFW, Inc*, 367 NLRB No. 75, decided Jan. 25, 2019, where the NLRB staked out a position on the independent contractor issue that is antithetical to California's new law, applying the common law agency test and holding that airport shuttle drivers rendering services to a van operator at the Dallas Fort Worth Airport were independent contractors because the drivers' leasing or ownership of the work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the drivers significant opportunity for economic gain. Accordingly, the NLRB dismissed a union's petition seeking a representation election to be held among Supershuttle DFW's van drivers and for it to be certified as the driver's exclusive bargaining representative. Under AB 5, the DFW Supershuttle van drivers would be employees. However, according to the NLRB and for the purposes of the NLRA, those same van drivers are statutorily exempt independent contractors, notwithstanding their failure to satisfy the requirements of the ABC test. *See also* NLRB General Counsel's Advice Memorandum re: *Uber Technologies, Inc.*, dated April 16, 2019, in Case Nos. 13-CA- 163062, 14-CA-158833 and 29-CA-177483, where the NLRB's general counsel dismissed unfair labor practice charges filed against Uber based on its treatment of drivers providing personal transportation services using their putative Employer's app-based ride-share platform, applying common law agency principle without regard to the ABC test and finding the drivers to be independent contractors unprotected by the NLRA even though they worked as part of the putative employer's regular business of transporting passengers. Because the NLRB has spoken on this issue and insofar as AB 5 can be read or is applied to contradict the NLRA or to invade the exclusive province of the NLRB, AB 5 is preempted under the *Garmon* doctrine. In view of these recent NLRB decisions, a party asserting *Garmon* preemption would have no trouble presenting proof that the NLRB could uphold its preemption claim based on their interpretation of the act.

Based on this analysis and insofar as AB 5 is applied to matters governed by the NLRA or within the primary jurisdiction of the NLRB, it is probably preempted under the *Garmon* doctrine. How far that preemptive effect may reach remains to be seen. But as the Supreme Court observed long ago, "when federal power constitutionally is exerted for the protection of the public or private interests or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded." *Garner*, 346 U.S. at 500-01. AB 5 operates to create a private right that conflicts with the NLRA. So can *Garmon* be argued to apply to all workers who are covered by the NLRA or subject to the NLRB's jurisdiction merely because they are covered by federal law and/or within the agency's jurisdiction, in which case *Dynamex* and AB 5 may be rendered unenforceable? The jury remains out on that one. But in any event, the effect of *Garmon* and other preemptive laws to say nothing of the Constitution's commerce clause on the enforceability of AB 5 may explain why the drafters of AB 5 saw fit to write Section 2750.3(a)(3) into the Labor Code which contemplates the unenforceability of the ABC test and provides that "if a court of law rules that the [ABC test] cannot be applied in a particular context ... then the determination of employee or independent contractor status in that context shall be governed by the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, (1989) 48 Cal. 3d 341 *(Borello)*." ■

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