

In This Issue:

September 2009

The Eighth Circuit's ruling in *Williams v. National Football League* that state statutory claims existing independently from labor agreement provisions are not preempted by federal labor law reminds employers that attention must be paid to state employee protection laws during collective bargaining over negotiated personnel policies.

Minnesota Law Applies to Union-Negotiated Drug Testing Policies, Says Eighth Circuit

By Dale L. Deitchler

Negotiated Policies Not a Safe Harbor

Minnesota drug testing laws and other statutes apply to a drug testing policy negotiated between a union and a unionized employer according to the U.S. Court of Appeals for the Eighth Circuit in *Williams v. National Football League* (8th Cir. Sept. 11, 2009). In *Williams*, the NFL unsuccessfully argued that claims under the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA)¹ and the Minnesota Lawful Consumable Products Act (CPA)² are preempted by federal labor law. The case highlights that organized employers must consult state workplace drug testing laws—along with any other potentially applicable statutes—when negotiating testing policies.

The NFL's Negotiated Testing Program and Players' Positive Test Results

The dispute in *Williams* centered on the NFL member clubs' and the Players Association's negotiated labor agreement (CBA), which incorporated a Policy on Anabolic Steroids and Related Substances banning use of and requiring testing for, "prohibited substances," including "masking" agents (e.g., diuretics). The Policy imposed strict liability on players, stating that, "a positive test result will not be excused because a player was unaware he was taking a prohibited substance."

The Policy subjected players testing positive to discipline, including a four-game suspension for a first-time positive. Players are permitted to appeal such discipline to an arbitrator (the NFL Commissioner or his designee), whose decision is final. A Joint NFL-Union Letter on supplements also warns that players with positive test results would be suspended because, "you and you alone are responsible for what goes in your body."

In 2008, the NFL conducted random steroids testing. Among other NFL players, Minnesota Vikings players Kevin Williams and Pat Williams tested positive for bumetanide, a prescription diuretic and steroid-masking agent banned by the Policy. The players claimed they had had ingested bumetanide when consuming "StarCaps," a dietary supplement containing the substance. The NFL suspended the players, per the Policy, for four games.

The Players' State Law Claims

After losing arbitral appeals, the Minnesota players sued in Minnesota state court asserting various common law claims. After removing the case to federal court under federal labor laws providing a cause of action for labor agreement violations,³ the NFL argued, among other things, that the players' state law statutory claims⁴ were preempted because the claims require interpretation of the CBA, which includes the Policy. The federal district court denied the NFL's dismissal motion on the players' statutory claims, rejecting the NFL's preemption argument, and finding instead that the claims existed independent of the CBA/Policy. The NFL appealed.

State Law Claims Not Preempted

The Eighth Circuit rejected the NFL's preemption arguments. In doing so, the court first identified the essential elements for federal labor law preemption to apply, as well as the statutory framework for DATWA and CPA claims. The court first outlined the fundamental principle that state law claims must be substantially dependent on analysis of a labor agreement in order to be preempted. Noting that federal labor law does not preempt state law claims merely because the parties involved are subject to a labor agreement and the events underlying the claim occurred on the job, the court reiterated that to determine if a claim is sufficiently independent to survive preemption it must determine if the claim is "dependent on" analysis of the CBA.

The DATWA Claims Were Not Preempted.

The Minnesota Drug and Alcohol Testing in the Workplace Act imposes minimum standards and requirements for employee protection with regard to an employer's drug and alcohol testing policies (e.g., policy content requirements, testing laboratory criteria, written notice of rights to explain a positive test and request copy of the test result). The DATWA also addresses labor agreements, providing that it does not limit the bargaining parties from agreeing to a testing policy that meets or exceeds and does not conflict with DATWA standards. In *Williams*, it was not clear which DATWA standards the players alleged were violated, other than the NFL's conceded failure to use certified laboratories.

The NFL argued that the players' DATWA claims were preempted because: (1) the claims required analysis of the Policy to decide if the DATWA requirements were met and if the NFL was an "employer" under the DATWA; and (2) nationwide uniformity in Policy interpretation is necessary to preserve testing policy integrity. The court rejected these arguments, determining that the players' DATWA claims were predicated on Minnesota law, not the CBA or the Policy and analysis of the Policy was not required to resolve those claims. Moreover, the court concluded, the DATWA establishes non-negotiable rights.

To resolve the DATWA claims, the court reasoned, a court need only compare an employer's actual testing procedures with DATWA's requirements. The court also held that it needed only to consult, not interpret, the CBA to determine whether the NFL was a DATWA employer. Because CBA interpretation was not required, federal labor preemption did not apply.

The court also rejected the NFL's claim that subjecting the Policy to divergent state laws would compromise its integrity by making uniform enforcement impossible. The court found no congressional intent that labor agreements have the force of federal law, or to permit parties to authorize conduct illegal under state law. To accord negotiating parties that ability would extend preemptive effect beyond labor agreement breaches to claims independent of a labor contract.

The CPA Claims Were Not Preempted.

The Minnesota Consumable Products Act prohibits employers from disciplining an employee because the employee uses lawful consumable products if the use takes place away from work during nonworking hours. Employers may restrict such consumption only if the restrictions relate to a bona fide occupational requirement (BFOQs) and are reasonably related to employment activities or necessary to avoid conflicts with employees' responsibilities.

The Eighth Circuit held that the CPA claims also were not preempted by federal labor law. Specifically, the court was unwilling to accept the NFL's arguments that the CPA claims were preempted because: (1) the court would have to interpret the Policy to determine whether

CPA defenses applied (e.g., that the bumetanide ban was a BFOQ or necessary to avoid conflicts) and whether the players' use had occurred away from work, during non-working hours; and (2) the players had waived CPA rights when the union became a party to the Policy.

First, the court narrowly construed preemption standards to find that defenses to state law liability were irrelevant - because the CPA claim on the merits was grounded in state law, and not the CBA, the claim was not preempted. Second, the court then rejected the NFL's claim that the CBA/Policy had to be interpreted to resolve the CPA claim, as CPA claims apply only to lawful substance use "off the premises of an employer" and "during non-working hours." No CBA/Policy interpretation was required because, significantly, neither document defined these terms in relation to the time frame (training camp) in which the players tested positive. Finally, the court rejected the NFL's claim that the players, through their union, waived their CPA rights, because while state law rights that do not exist independently of labor agreements can be waived, claims, such as CPA claims, that create rights independent of a CBA, may not.

Compliance and Negotiation Strategies

For all employers, and especially unionized employers and those with a multi-state presence, there is no substitute for reviewing personnel policies on a state-by-state basis to ensure they are in compliance with employment laws such as the DATWA and the CPA. At the same time, the *Williams* decision reflects a potential narrow window of opportunity in the negotiation process to bolster preemption arguments by negotiating policy language upon which statutory rights may rest.

On the one hand, after *Williams*, there will be few, if any, affirmative acts an employer may take in policy administration to assure preemption where state law provides so much detail regarding compliance requirements that a reviewing court would need merely to compare employer action to those requirements. CBAs, in other words, will add little in the way of interpretation except, possibly, with respect to mandatory statutory requirements for a written policy's content.

On the other hand, other statutes might be more amenable to preemption arguments if negotiated policies define discretionary terms like those at issue in *Williams* such as "off the premises of an employer" and "during non-working hours." In effect, organized employers' negotiated policies could contain enough detail to require interpretation without which some state law claims could not be decided. Looking for those opportunities and threading the preemption needle requires careful and creative bargaining preparation.

.....
Dale L. Deitchler is a Shareholder in Littler Mendelson's Minneapolis office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Deitchler at ddeitchler@littler.com.

¹ Minn. Stat. §§ 181.950-957.

² Minn. Stat. § 181.938.

³ 29 U.S.C. § 185.

⁴ The players initially asserted common law claims and, following the removal, added claims under the DATWA and CPA.