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Displaced Building Service Workers Protection Act

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It now has been about three and a half years since Mayor Michael Bloomberg signed the Displaced Building Service Workers Protection Act (DBSWPA or the act) (§22-505 of the Administrative Code of New York City) into law in November 2002.

Upon its passage, many people voiced concerns about whether the act was pre-empted by the National Labor Relations Act (NLRA), or if it was an unconstitutional intrusion by the City Council into an area within the sole province of the state legislature. At deadline for this article, however, only a single court case, *Alcantara v. Allied Properties, LLC*, 334 FSupp2d 336 (EDNY 2004), has explored the legality of the DBSWPA—and it resulted in a predominantly favorable decision for the act.

What the Act Does

Enacted at a time of uncertainty for many of the city's building employees—just over one year after the tragedy of Sept. 11—the act protects building employee job security by requiring successor building owners, managers or contractors to offer employment to its predecessor's incumbent employees for a 90-day period, subject to termination fo%r cause or a decision to operate with fewer employees. To assist the successor employer with its obligations, the DBSWPA requires predecessor employers to provide the successor with a detailed list of employees 15 days before the successor assumes controls of the operations. Employees terminated in violation of the act have a private right of action and can seek injunctive and monetary relief, including back pay, benefits, attorney's fees and costs. The DBSWPA, however, contains an opt-out provision completely exempting employers who are, or are willing to become, subject to a collective bargaining agreement that contains provisions regarding the discharge or layoff of building service employees.

Unions, such as Local 32BJ, Service Employees International Union (SEIU), continue to strongly monitor employer compliance with the act. This monitoring is due, in part, to the fact that the opt-out provision strongly encourages employers to sign appropriate collective bargaining agreements, and the retention requirements greatly enhance the continued viability of a bargaining unit under federal labor law's "successorship" doctrine. The intricacies of the law and continued monitoring of compliance by unions, make it essential for counsel (particularly employment and real estate practitioners) to be keenly aware of the DBSWPA's requirements. Counsel should factor compliance with the act into any discussion regarding a deal involving the transfer of building workers to a new employer.

Despite the prior articulated concerns concerning the legality of the DBSWPA, it did not face any legal challenge for more than a year and a half after its enactment. The fact that other statutes have been aggressively challenged under federal labor law's pre-emption doctrine makes the lack of challenges to the DBSWPA

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somewhat surprising. For example, New York State's employer neutrality law, which prohibited the use of state funds to encourage or discourage unionization, was challenged only four months after the statute's enactment. In *Healthcare Assoc. of New York State, Inc., v. Pataki,* 388 FSupp2d 6 (NDNY 2005), the U.S. District Court for the Northern District of New York found that the National Labor Relations Act (NLRA) pre-empted the New York neutrality law. California's neutrality law prohibiting employers from using state funds to "assist, promote or deter union organizing" precipitated a legal battle that resulted in six individual companies and seven employer organizations, including the U.S. Chamber of Commerce, filing a lawsuit within 18 months of its enactment. The lawsuit resulted in a state court finding the statute to be pre-empted—a decision the U.S. Court of Appeals for the Ninth Circuit affirmed twice, only to vacate its decision this past January to ensure that the full court can consider the issue. *Chamber of Commerce, et. al. v. Lockyer,* 422 F3d 973 (9th Cir. 2005) vacated No. 03-55166, 2006 U.S. App. LEXIS 1029 (9th Cir. Jan. 17, 2006).

The 'Alcantara' Case in 2004

Unlike the flurry of activities regarding these other statutes, DBSWPA faced its first and, at deadline, only legal challenge in the summer of 2004. In *Alcantara,* a group of employees represented by Local 32BJ's general counsel alleged defendant Allied violated the DBSWPA by failing to retain them upon purchasing the building in which they were employed and moved for a preliminary injunction seeking instatement in New York State Supreme Court. Defendants removed the claim to federal court asserting that the act was pre-empted by the NLRA. The U.S. District Court for the Eastern District of New York upheld the majority of the act. In its opinion, the court noted, "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." Still, the court expressed concern over the legality over opt-out provisions, as they "suggest that the code requirements may impinge on national labor relations' pre-emptive laws and regulations" by requiring "application of a collective bargaining agreement that would be subject to the NLRA." Nevertheless, the court remanded the case to state court.

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On Dec. 3, 2004, the state Supreme Court, Queens County, rejected plaintiffs' motion for a preliminary injunction on the grounds, among others, that there was no compelling need for an injunction because the 90-day transition period set forth in the act had expired. Days prior to the court's decision, plaintiffs moved for summary judgment and sought injunctive relief. On May 23, 2005, the Supreme Court Judge held that the defendant's federal preemption and constitutional defenses had no merit and, thus, it violated the DBSWPA by failing to retain plaintiffs. The judge, however, again declined to issue an injunction, finding there to be no irreparable harm because the 90-day transition period had already expired. Plaintiffs have filed an appeal of the Supreme Court's ruling arguing that the act authorizes a court to award the remedy of instatement where the defendant employer failed to retain the predecessor's employees even though the 90-day transition period has already elapsed. The appeal has not been decided as of the writing of this article.

Victory for Proponents

This first real test for the DBSWPA, constitutes a victory for its proponents in that it enforced the substantive provisions of the act. Despite the lower court's denial of injunctive relief, *Alcantara* highlights the fact that New York City building employees will remain protected under the act's provisions. While there likely will be additional legal battles in the future, after about three and a half years since its enactment, the DBSWPA has become an integral aspect of practicing law in the New York real estate industry.