UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 15-10116-RWZ

LABOR RELATIONS DIVISION OF CONSTRUCTION INDUSTRIES OF MASSACHUSETTS, *et al.*

v.

MAURA HEALEY, in her official capacity as ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM OF DECISION

July 9, 2015

ZOBEL, D.J.

When nearly 60% of Massachusetts voters approved the Earned Sick Time Law ("the Law") at the ballot box last fall, they adopted a series of labor reforms that guarantee workers the right to take time off from work to tend to their health. The Law awards Massachusetts employees one hour of sick time for every 30 hours they work, up to 40 hours of sick time a year. Employees can use this sick time at their discretion to care for their health or the health of their close family members without fear of reprisal from their employers. For many of these employees, the Law dictates that they be paid as if they were working when using their sick time—a key element of the Law that aims to make healthcare more accessible to the Commonwealth's workforce.

The voters authorized the Commonwealth's Attorney General to implement the Law's reforms. The Law allows the Attorney General to, among other things, levy civil sanctions, bring suit against recalcitrant employers, or authorize aggrieved employees to bring such suits themselves. And, to help shepherd the reforms from theory to practice, the Law authorizes the Attorney General to make rules to carry out its purpose. The Law took effect on July 1, 2015, and employees across the Commonwealth are now accruing sick time.

The particular question in this case is whether the Law's reforms apply to "employers [and employees] who are signatory [sic] to collective bargaining agreements." Docket # 7-1 at 6. Petitioners—individual contractors that have entered into collective bargaining agreements with building trade unions and employer associations comprised of such contractors—seek a declaratory judgment that the entire Law is preempted by Section 301 of the federal Labor Management Relations Act, 29 U.S.C. § 185, at least as it applies to them and other contractors (and possibly others—their petition is not a model of clarity). Petitioners ultimately want the court to strip the Attorney General of the power to enforce, or authorize enforcement of, the Law against employers who have signed collective bargaining agreements.

I. Background

A. The Earned Sick Time Law[1]

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[1] Facts in this and the following section are taken from the amended petition for declaratory relief, Docket # 7-1, and from official public documents of which the court may take notice, like the text of the Earned Sick Time Law. The court appreciates background facts about the Law's enactment from the helpful amicus curiae briefs, but, because this is a motion to dismiss and those facts stray beyond the pleadings, the court does not rely on them to resolve the pending motion.

Under the Earned Sick Time law, covered workers, which are all workers in the Commonwealth except for those employed by the federal government and certain cities and towns, earn sick leave at a rate of one hour for every 30 hours worked. Mass. Gen. Laws ch. 149, § 148C(a) & (d)(1). After they have been on the job for at least 90 days, id. § 148C(d)(1), workers can use up to 40 hours of accumulated sick time per year, id. § 148(d)(4), (6), in increments as small as one hour, id. § 148C(d)(7). Employees may use accumulated sick time for treatment, recuperation, or preventative care, id. § 148C(c), either for themselves or their "child, spouse, parent, or parent of a spouse," id. § 148C(c)(1), (3).

The Law also imposes certain duties on employers that are designed to make the sick leave reforms effective in practice. To address the retaliation problem, the Law provides that all covered workers may use their earned sick time without fear of adverse consequences. For example, it provides that employers may not "us[e] the taking of earned sick time . . . as a negative factor in any employment action such as evaluation, promotion, disciplinary action or termination." Id. § 148C(h). Likewise, it prohibits employers from "tak[ing] any adverse action against an employee because the employee opposes," by complaint to state authorities or by filing a civil action, "practices which the employee believes to be in violation of" the Law. Id. § 148C(i). Put simply, the Law effectively eliminates retaliation concerns for all employees within its scope.

To address the lost wages problem, the Law requires that employers with more than eleven employees pay their workers when they use earned sick time.[2] Id. § 148C(d)(4). The employee must be paid "at the same hourly rate as the employee earns from the employee's employment at the time the employee uses the paid sick time." Id. § 148C(a). The Law does not define "same hourly rate," but rather leaves it to the Attorney General to define by regulation.[3] See id. § 148C(n) ("The attorney general may adopt rules and regulations necessary to carry out the purpose and provisions of this section . . . ."). How an employer determines the "same hourly rate" in practice is central to this challenge.

B. Petitioners and Their Claims

Petitioners are two construction contractors and six "employer association[s] comprised of multiple members, all of whom are contractors in the construction industry and all of whom are signatory to various collective bargaining agreements with various

[2] Many fortunate employees throughout the Commonwealth already received this benefit (or a more extensive version of it), and the Law makes clear that it does not supplant those more generous contracts. For example, the Law explains that it "shall [not] be construed to discourage employers from adopting or retaining earned sick time policies more generous than policies that comply with the [Act's] requirements" or "to diminish or impair the obligation of an employer to comply with any contract, collective bargaining agreement, or any employment benefit program or plan in effect on [July 1, 2015]." Id. § 148C(j).

[3] The Attorney General's Office did just that on June 19, 2015, when it promulgated final regulations defining "same hourly rate" for several different types of wage earners (e.g., hourly employees, salaried employees, tipped employees). See 940 Mass. Code Regs. § 33.02. For example, the final regulations explain that "same hourly rate" means the regular hourly rate for employees compensated on an hourly basis. For employees who receive different pay rates for hourly work from the same employer (which I will call "mixed rate employees"), the "same hourly rate" means either the wages the employee would have been paid for the hours absent during use of earned sick time if the employee had worked or a blended rate, determined by taking the weighted average for all regular rates of pay over the previous pay period, month, quarter, or other established period of time the employer customarily uses to calculate blended rates for similar purposes. For such mixed-rate employees, the final regulations allow the employer to choose which method to use, as long as it does so in a consistent manner. The final regulations do not form the basis of petitioner's claims and are provided here only for context.

building trade unions," such as laborers, carpenters, pipefitters, and the like.[4] Docket # 7-1 ¶¶ 2-9 & n.1. The contractor petitioners and the petitioner associations' members collectively employ "thousands of workers" who are covered by these collective bargaining agreements, id. ¶ 18, and are now covered by the Earned Sick Time Law.

The workers' collective bargaining agreements allegedly include provisions about how to determine the workers' hourly rates. According to petitioners, the collective bargaining agreements make these hourly rates a function of job classification, equipment used, location, and time period of the work performed. Id. ¶ 20. Thus, to determine the "same hourly rate"—which employers must do to resolve any claim a worker brings for sick time pay—petitioners contend that they (or their members) will have to interpret the terms of the workers' collective bargaining agreements.

Therein lies the rub, according to the petitioners. Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempts all state law claims for which "resolution of [the] state-law claim depends upon the meaning of a collective bargaining agreement." Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 405-06 (1988). Because federal laws generally trump conflicting state laws, petitioners argue that the Earned Sick Time Law is invalid to the extent it brings parties to a collective bargaining agreement (either employers or employees) within its ambit. They raise both a facial challenge to the Law as wholly preempted by Section 301 with respect to parties to a

[4] Although not alleged in petitioners' pleadings, the court assumes that the petitioner contractors and at least some members of the associational petitioners employ eleven or more people, such that they are subject to the requirement to pay employees for sick time under § 148C(d)(4).

collective bargaining agreement and an as-applied challenge, contending that the Law would be preempted if applied to them. As a remedy, they seek an order precluding the Attorney General "from granting any and all employees, who are members of collective bargaining units, a private right of action" to enforce the terms of the Law and from directly "enforcing [the Law through] civil sanctions against employers who are signatory to collective bargaining agreements." Docket # 7-1 ¶¶ 26-27.

The Attorney General moved to dismiss for lack of subject matter jurisdiction, contending that the case is not ripe for adjudication, and for failure to state a claim upon which relief can be granted, since, in the Attorney General's view, Section 301 preempts only specific claims and not whole laws.[5] Petitioners opposed, but also sought leave to amend their petition for declaratory relief to assert a second preemption claim (specifically, preemption under ERISA, or the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.). The court denied that motion without prejudice, Docket # 45, and proceeded to hold a hearing on the motion to dismiss the Section 301 preemption claims. That motion is now before the court.

II. Legal Standard

The party seeking relief has the burden of establishing that the federal courts have subject matter jurisdiction over the underlying dispute. See McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936). In reviewing a motion to dismiss under Rule 12(b)(1), a court must credit the plaintiff's well-pleaded factual

[5] Exercising its statutory authority under 28 U.S.C. § 517, the United States submitted a statement of interest in support of the Attorney General's motion to dismiss petitioners' facial challenge under Section 301. Docket # 47.

allegations and draw all reasonable inferences in the plaintiff's favor. Merlonghi v. United States, 620 F.3d 50, 54 (1st Cir. 2010); Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995). Dismissal is only appropriate when the facts alleged in the petition, taken as true, do not support a finding of federal subject matter jurisdiction. Fothergill v. United States, 566 F.3d 248, 251 (1st Cir. 2009).

Likewise, to survive a motion to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6), a petition for declaratory relief must contain sufficient factual allegations to state a claim upon which relief can be granted. Cf. Ashcroft v. Iqbal, 556 U.S. 662 (2009). For purposes of a motion to dismiss, the court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in the plaintiff's favor. See Rodriguez-Reyes v. Molina-Rodriguez, 711 F.3d 49, 52-53 (1st Cir. 2013).

III. Analysis

A. Standing

Before turning to the merits of the Attorney General's motion to dismiss, I address petitioners' standing to challenge the Earned Sick Time Law. The court has an independent obligation to ensure that the party seeking relief has standing to pursue its claims. N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 12-13 (1st Cir. 1996). And, independent of that, the Attorney General has raised a specific standing question in this case, contending that the associational petitioners lack standing to pursue any challenge to the Law because they seek a remedy that extends to all employers that are signatories to a collective bargaining agreement, not just

contractors in the construction industry, like their members.

There are two breeds of standing requirements, one constitutional and the other prudential. To establish standing consistent with constitutional principles, a petitioner in a declaratory judgment action must allege that it has suffered or imminently will suffer an injury; that the injury is fairly traceable to the defendant's conduct; and that a favorable court decision is likely to redress the injury. See, e.g., Bennett v. Spear, 520 U.S. 154, 167 (1997). And, among the prudential requirements is the doctrine of particular concern in this case: that a party generally may assert only his or her own rights and cannot raise the claims of third parties not before the court. See, e.g., United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 551 (1996). Associational petitioners introduce a special twist into these standing requirements. They must demonstrate "(i) that individual members would have standing to sue in their own right; (ii) that the interests at stake are related to the organization's core purposes; and (iii) that both the asserted claim and the requested relief can be adjudicated without the participation of individual members as named plaintiffs." Maine People's All. & Nat'l Res. Def. Council v. Mallinckrodt, Inc., 471 F.3d 277, 283 (1st Cir. 2006). The first two elements are constitutional; the third is prudential. United Food, 517 U.S. at 555-57.

The Attorney General does not impugn petitioners' satisfaction of the constitutional standing requirements. And, having undertaken an independent analysis of this jurisdictional requirement, the court likewise finds no deficiency at this point. The contractor petitioners sufficiently allege injury (i.e., they or their members having to

provide sick time benefits to unionized employees), causation (i.e., because the Attorney General may impose sanctions or authorize private lawsuits if they do not), and redressability (i.e., unless this court enjoins the Attorney General from doing so). The associational petitioners also satisfy the constitutional standing requirements at this stage. They sufficiently allege that their members are similarly situated to the individual contractor petitioners, satisfying the first element, and that their purposes are to further the business interests of their members, satisfying the second element. All petitioners, therefore, satisfy the constitutional standing requirements.

Whether petitioners satisfy the prudential standing requirements presents a closer question. Under the law of this circuit, the bar for satisfying prudential standing requirements is at its lowest when petitioners challenge a state statute as preempted by federal law. Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 73 (1st Cir. 2001), aff'd sub nom. Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003). Yet, it is unclear whether all prudential standing requirements are relaxed in such cases—including the general rule against third-party standing—or whether only certain prudential standing requirements are relaxed.

In Concannon, a trade group comprised of pharmaceutical companies alleged that federal Medicaid laws preempted a state statute that essentially required its members to enter rebate agreements with the State of Maine. The State challenged whether the trade group could properly assert third-party standing on behalf of Medicaid recipients and whether the group was within the "zone of interest" of the Supremacy Clause, which is a separate prudential standing requirement. Citing

authority from other circuits that dealt only with the “zone of interest” requirement, the First Circuit announced a straightforward rule: “an entity does not need prudential standing to invoke the protection of the Supremacy Clause.” Id. As to the third-party standing question, the court concluded that “[g]iven that [the trade association] has prudential standing grounded in the Supremacy Clause, we think it may fairly assert the rights of Medicaid recipients for purposes of this action.” Id. at 74. This was so because “‘vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function.’” Id. (quoting Craig v. Boren, 429 U.S. 190, 195 (1976)). But the trade association in Concannon, like the associational petitioners here, was not itself a vendor (although it was comprised of vendors) and its operations were not restricted (its members’ were). Whether an associational petitioner asserting a preemption claim must meet traditional third-party standing requirements, lessened third-party standing requirements, or no third-party or prudential standing requirements at all is, therefore, an open question. See, e.g., Walsh, 538 U.S. at 683 (Thomas, J., concurring) (questioning, in passing, trade association’s standing in Concannon’s direct appeal); The Wilderness Soc’y v. Kane Cty., 632 F.3d 1162, 1170 (10th Cir. 2011) (interpreting Concannon to waive only the “zone of interest” requirement in preemption cases). Likewise, whether an associational petitioner asserting a preemption claim must satisfy the third prong of the associational standing inquiry (i.e., that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit) is unresolved.

But, having concluded that petitioners satisfy the constitutional standing requirements, the court need not yet venture into this prudential standing thicket. Although "[s]tanding is a 'threshold question in every federal case,'" N.H. Right to Life Political Action Comm., 99 F.3d at 12 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)), "[i]t is . . . permissible to reject a claim on the merits without having explicitly resolved the prudential standing issue." Fraternal Order of Police v. United States, 173 F.3d 898, 905 (D.C. Cir. 1999). As long as the constitutional standing requirements are satisfied, the court may evaluate the case's merits before resolving thorny prudential standing questions. Id.; see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 97 n.2 (1998) (noting that case law "allow[s] merits questions to be decided before statutory standing questions"). The court shall do that and move on to the merits.

B. Petitioners' Facial Challenge to the Earned Sick Time Law Fails Because Section 301 May Only Preempt Claims, Not Statutes

Petitioners base their challenge on preemption, contending that the Earned Sick Time Law encroaches on an area where federal law reigns alone. Under the Supremacy Clause of the United States Constitution, a federal law may expressly or impliedly preempt state law. U.S. Constitution. art. VI, cl. 2. The essence of a preemption argument is that a state law is interfering with federal goals. This interference may be direct, such that it is impossible to comply with both federal and state laws ("conflict preemption"), or indirect, such that the state law is an obstacle to federal goals ("obstacle preemption") or attempts to occupy a field that Congress has reserved solely for the federal government ("field preemption").

Section 301 of the Labor Management Relations Act, which is the relevant federal law for petitioners' preemption argument, is a jurisdictional statute. It provides that "[s]uits for violation of contracts between an employer and a labor organization," like a collective bargaining agreement, "may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a). But, even though Section 301 contains only a jurisdictional grant, the Supreme Court has interpreted it to "completely preempt" state law claims brought to enforce the terms of collective bargaining agreements. Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987); see also Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers, 390 U.S. 557, 560 (1968). Section 301's "complete preemption" of state law claims has had several consequences. First, it has required federal courts to fashion a uniform body of federal common law that applies to disputes about the meaning of collective bargaining agreements. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). Second, within its realm of application, this body of federal common law has displaced state contract law. Id. And third, this displacement has operated to transmogrify purported state claims into federal contract claims, enabling removal of such actions from state courts under 28 U.S.C. § 1441. Avco Corp., 390 U.S. at 560; Giles v. NYLCare Health Plans, Inc., 172 F.3d 332, 337 (5th Cir. 1999) (describing "transmogrifying" effect of complete preemption).

Because the parties disagree about where to place Section 301 within the conflict/obstacle/field preemption taxonomy described above, it is worth pausing to consider where "complete preemption" falls in this scheme. In many ways, the term is

"a misnomer" to the extent it suggests that complete preemption fits neatly within the ordinary preemption framework. Lehmann v. Brown, 230 F.3d 916, 919 (7th Cir. 2000). The ordinary types of preemption are generally viewed as defenses that let a party avoid the consequences of a state law because of a superseding federal law. See Cavallaro v. UMass Memorial Healthcare, Inc., 678 F.3d 1, 4 n.3 (1st Cir. 2012). Complete preemption is more than that. It is "not . . . a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather [is] a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action." Schmeling v. NORDAM, 97 F.3d 1336, 1342 (10th Cir. 1996). It is both a preemption defense and jurisdictional doctrine rolled into one. Their multidimensional nature of complete preemption does not, of course, shed light on the size of its preemptive footprint.

"Congress did not state explicitly whether and to what extent it intended § 301 of the LMRA to pre-empt state law." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985). What is clear, however, is that Section 301 does not preempt the full field of labor relations law. Although "[c]ongressional power to legislate in the area of labor relations . . . is long established," id. (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 (1937)), "Congress . . . has never exercised authority to occupy the entire field[,]" id. at 208.[6] Rather, the Court has generally treated Section 301 preemption

[6] Petitioners cite Wisconsin Central, Ltd. v. Shannon, 539 F.3d 751 (7th Cir. 2008), for the proposition that Section 301 preemption is field preemption. The Wisconsin Central case, however, cannot fairly be read to support that conclusion. Wisconsin Central involved a state minimum wage law

claims on a case-by-case basis, examining whether a specific state law claim, as applied in the context of a particular collective bargaining agreement, would "frustrate the federal labor-contract scheme established in § 301." Id. at 209.

Because the Section 301 preemption inquiry is individual and claim-specific, "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301." Id. at 211. As described above, Section 301 certainly reaches claims brought to enforce the terms of a collective bargaining agreement. But it extends farther, bringing suits that are "substantially dependent on the terms of [a collective bargaining agreement]" into its ambit. Id. at 220. Yet, despite Section 301's "powerful" preemptive force, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 23 (1983), "the bare fact that a collective bargaining agreement will be consulted in the course of state-law litigation plainly does not require [preemption]." Livadas v. Bradshaw, 512 U.S. 107, 124 (1994). A state law claim is only preempted when resolution of the claim "requires the interpretation of a collective-bargaining agreement," Lingle, 486 U.S. at 405-06 (emphasis added), or is "inextricably intertwined with consideration of the terms of the labor contract." Lueck, 471 U.S. at 213.

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that purported to apply to railroad employees. The Seventh Circuit agreed that the law was preempted because of the "long history of pervasive congressional regulation over the railway industry," id. at 762, including some statutes with express preemption clauses, id. at 763. Neither that "pervasive . . . regulation" nor express preemption applies in the general labor law context, where the Supreme Court has cautioned that courts must not usurp the States' "broad authority under their police powers to regulate the employment relationship to protect workers within the State," Metro. Life Ins. Co., 471 U.S. at 756 (quoting DeCanas v. Bica, 424 U.S. 351, 356 (1976)). That the Wisconsin Central court found field preemption on a different issue and in a different industry is not dispositive of this case, particularly where the Supreme Court has directly spoken on the issue here and held that field preemption does not apply. See Lueck, 471 U.S. at 208.

Petitioners bring a facial preemption challenge against the Earned Sick Time Law. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). The question for the court is therefore whether all claims to benefits under the Earned Sick Time Law will run into Section 301, or whether there is some space, however small, in which Section 301 and the Law can coexist.

Such space not only exists but is vast and wide. Petitioners have conjured up many hypothetical unionized workers whose pay changes by the hour, making a determination of their "normal hourly rate" under the Earned Sick Time Law a matter of collective bargaining agreement interpretation. But petitioners have not alleged that all or even most unionized workers fall into this category. In fact, they implicitly conceded at the hearing that some do not. See Docket # 49 at 18:16-19 ("[W]e believe that there will be many, many more cases where the state claim is preempted than there will not be as it pertains to people with collective bargaining agreements."). For workers whose jobs earn them a uniform hourly wage, the extent to which a state court applying the Earned Sick Time Law would need to consult the worker's collective bargaining agreement is simply to find that number. Merely looking up information in an agreement, like a federal court finding a sentencing guideline range given an offense level and criminal history category, does not rise to "interpreting" the collective bargaining agreement in a way that would trigger Section 301 preemption. This alone defeats petitioners' facial challenge.

Petitioners fare no better with respect to claims brought by their hypothetical mixed-rate workers because such claims do not necessarily require interpretation of collective bargaining agreements. For example, if the amount of wages owed is undisputed, there is no need for a court to look to the collective bargaining agreement that sets the wage rate. See, e.g., Livadas, 512 U.S. at 125 (holding that "the simple need to refer to bargained for wages in computing the penalty" does not invoke Section 301's preemption principles). Likewise, if an arbitrator has previously interpreted a disputed wage terms in a collective bargaining agreement, a court could rely on that interpretation without having to construe the collective bargaining agreement itself. See, e.g., Lydon v. Boston Sand & Gravel Co., 175 F.3d 6, 11 (1st Cir. 1999) (concluding Section 301 did not preempt a state law claim because the federal court could rely on an arbitrator's previous interpretation of the collective bargaining agreement). And, if an employee brings a retaliation claim under the Earned Sick Time Law that does not seek a determination of wages, any collective bargaining agreement governing the employee's terms of employment would not be implicated. Cf. Lingle, 486 U.S. at 407 (concluding that retaliatory discharge claims present "purely factual questions pertain[ing] to the conduct of the employee and the conduct and motivation of the employer [that do not] require[] a court to interpret any term of a collective-bargaining agreement"). Similar reasoning applies to enforcement actions brought by the Attorney General for non-compliance with the Law's procedural requirements, like those requiring employers to post notices of employees' rights under the Law, Mass. Gen. Laws ch. 149, § 148C(o), allowing an employee to use sick time to care for

authorized family members, id. § 148C(c)(1), or permitting employees to use sick time in increments of one hour, id. § 148C(c)(7).

In response, petitioners suggest that all of these possible claims are, at their core, intertwined with the employees' collective bargaining agreements. This is so, in their view, because the collective bargaining agreements all "contain a vehicle by which to resolve disputes arising between the employer and employee for any misunderstanding about the interpretation of the agreement itself"—i.e., arbitration provisions. Docket # 39 at 10. They cite the First Circuit's opinion in Cavallaro v. UMass Memorial Healthcare, Inc., 678 F.3d 1 (1st Cir. 2012), contending that it requires Section 301 preemption of any state regulatory law in the economic area if a collective bargaining agreement includes an arbitration procedure to resolve disputes about its interpretation. This reading Cavallaro is unduly expansive. Cavallaro held that "state regulatory claims in the economic area as preempted where they were intertwined with the [collective bargaining agreement] and more than mere consultation of the [collective bargaining agreement] is required" to resolve them. Id. at 7. It drew a line, however, between claims for which "no dispute exist[s] about the amount of wages owed," id., and claims for which "an employee must, among other things, prove there are wages owed," id. at 8. The former are not preempted, see, e.g., Livadas, 512 U.S. at 124-25 (finding no preemption where no dispute existed about the amount of wages owed, but only about whether, contrary to state law, wages had been paid too late), but the latter are, see Cavallaro, 678 F.3d at 8 (finding claim under Massachusetts Weekly Wage Act, Mass. Gen. Laws ch. 149, § 148, which requires an employer to pay wages

owed to an employee within a fixed period, preempted because, to succeed, an employee must prove that wages are owed). Cavallaro thus left an entire class of non-wage-related state regulatory claims in the economic area unpreempted. Many of the Earned Sick Time Law claims discussed in the previous paragraph fall into this class, so Cavallaro provides no help to petitioners in showing—as they must to sustain a facial challenge—"that no set of circumstances exists under which the [law] would be valid."[7] Salerno, 481 U.S. at 745. Their facial preemption challenge fails as a matter of law, and the Attorney General's motion to dismiss this theory for failure to state a claim is allowed.

C. Petitioners As-Applied Challenge to the Earned Sick Time Law Fails Because Their Petition for Declaratory Relief Does Not Present an Actual Case or Controversy

This leaves petitioners with only an as-applied challenge, contending that Section 301 preempts the Earned Sick Time Law as it applies to them. But petitioners now face an uphill battle to make their case because as of the time they brought their claims, the Law had not been applied to anyone. To be entitled to relief, petitioners must show that their as-applied claim presents a case or controversy that is ripe for review under Article III of the United States Constitution.

The Declaratory Judgment Act, which provides the basis for this action, allows federal courts to "declare the rights and other legal relations of any interested party

[7] The district court cases that petitioners cite merely apply the holding of Cavallaro, so they likewise do not advance petitioners' cause. See Clee v. MVM, Inc., No. 13-11829-MLW, 2015 WL 1055820, at *7-8 (D. Mass. Mar. 10, 2015) (claim under Massachusetts Wage Act preempted under Cavallaro rationale); Reyes v. S.J. Servs., Inc., No. CIV.A. 12-11715-DPW, 2014 WL 5485943, at *12 (D. Mass. Sept. 22, 2014) (same); Arnstein v. MVM, Inc., No. 12-10666-RWZ, 2012 WL 4863043, at *3 (D. Mass. Oct. 12, 2012) (same).

seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201. But the Declaratory Judgment Act only provides an avenue for relief when there is "a case of actual controversy," id.—it does not provide an independent source of subject matter jurisdiction. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). Indeed, "the phrase 'case of actual controversy' in the Act refers to the type of 'Cases' and 'Controversies' that are justiciable under Article III." MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007).

To determine whether a court has subject matter jurisdiction over a declaratory judgment action, it must look to "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. (internal quotation marks omitted). This inquiry, focused on the combination of immediacy and reality, involves no bright-line test. See id. Rather, it requires the court to decide whether the case looks more like a "real and substantial" dispute that "admit[s] of specific relief through a decree of a conclusive character" or a suit that calls for "an opinion advising what the law would be upon a hypothetical state of facts." Id. (internal quotation marks omitted). "[A]n 'actual controversy' must exist not only at the time the [declaratory judgment petition] is filed, but through all stages of the litigation." Already, LLC v. Nike, Inc., 133 S. Ct. 721, 726 (2013) (internal quotation marks omitted).

Since this case was filed, the purported application of the Earned Sick Time Law to petitioners has been—at best—hypothetical. No employee has brought or

threatened to bring a claim against any of the petitioners or their members. Neither has the Attorney General. And, even if they had, it is unclear what such a claim might have looked like. The Attorney General did not promulgate its final rules implementing the Earned Sick Time Law until about five months after petitioners filed this case. So, at the time petitioners brought this "as-applied" challenge, they did not know what would actually be applied to them. For example, they did not know that they would be able to choose from two methods to calculate the compensation owed to a mixed-rate employee who uses sick time. See 940 Mass. Code Regs. § 33.01 (definition of same hourly rate). They did not know what actions might constitute retaliation. Id. § 33.08. And they did not even know whether they or some of their members would qualify as having enough employees to trigger the Law's payment requirements. Id. § 33.04.

If petitioners' assumptions about how the Law will be implemented and applied transport us from the factual to the hypothetical, then their scant allegations about the agreements with which it will conflict carry us on to the fantastical. The extent of petitioners' allegations is that they are parties to collective bargaining agreements that "[a]ll . . . contain different hourly rates of pay that can vary depending upon: job classification, equipment used, location and time period of work performed." Docket # 7-1 ¶ 20. Petitioners attempt to put meat on this skeleton in their opposition, attaching numerous examples of their collective bargaining agreements as exhibits and discussing the agreements' terms (and how they might conflict with the Law). But, because these documents are not central to petitioners' claims and were not properly incorporated by reference in their declaratory judgment petition, they are beyond the

scope of the motion-to-dismiss records and cannot be considered. See, e.g., Freeman v. Town of Hudson, 714 F.3d 29, 36 (1st Cir. 2013). The court is therefore left guessing not only about what specific claims one of petitioners' employees might someday bring and what specific rules might govern that claim, but also about what specific agreement those claims might conflict with and what the specific terms of that agreement (which allegedly require interpretation) are. Petitioners' claims are quintessentially hypothetical; an actual "controversy" that "admits of specific relief" is nowhere to be found.

Petitioners' hypothetical as-applied claims do not present a case or controversy that is justiciable under Article III. With respect to the as-applied challenge, the Attorney General's motion to dismiss for lack of subject matter jurisdiction is allowed.

IV. Conclusion

The Attorney General's motion to dismiss the amended petition for declaratory relief (Docket # 11) is ALLOWED, as is the Coalition for Social Justice-Education Fund, Inc.'s motion for leave to file an amicus curiae brief (Docket # 36). Judgment dismissing this case shall not enter, however, until two weeks from the date of this order.

In mid-May, petitioners moved to amend their petition again to assert preemption of the Earned Sick Time Law under the Employee Retirement and Income Security Act, 29 U.S.C. § 1144. The court denied the motion without prejudice on June 4, 2015 (Docket # 45), concluding that the interest of justice required resolution of the fully briefed motion to dismiss the Section 301 claim before considering additional grounds

of relief. Petitioner may again move to amend within the next two weeks.[8] In default thereof, judgment will enter dismissing the complaint.

July 9, 2015
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE

[8] Because the court was able to allow this motion to dismiss on the merits, it did not need to address the difficult prudential standing questions discussed above. But, if this case goes forward, those questions will likely resurface. If petitioners file another amended petition, they should consider and, to the extent possible, address any standing deficiencies.