SOVEREIGN IMMUNITY AND YOU:
HOW NEW YORK STATE EMPLOYEES CAN ENFORCE THEIR FEDERAL EMPLOYMENT RIGHTS

Brent Landau, Associate, Cohen, Milstein, Hausfeld & Toll, PLLC
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Recent decisions by the United States Supreme Court have limited the ability of state employees to enforce certain federal employment laws. Today, because of a doctrine known as sovereign immunity, state employers are immune from lawsuits brought by their employees under the Fair Labor Standards Act (FLSA), Age Discrimination in Employment Act (ADEA), and Americans with Disabilities Act (ADA). In addition, states may be immune from suits to enforce certain provisions of the Family and Medical Leave Act (FMLA). This paper briefly outlines how the doctrine of sovereign immunity affects these laws, and sets out several alternatives and strategies for state employees to enforce their federal employment rights.

At the outset, however, it should be noted that New York state employees are in a much better position than most others. New York has waived its immunity for suits to enforce the federal employment laws that are filed in the Court of Claims and it has a comprehensive Human Rights law that, at least in some cases, may be broader than its federal counterparts. Still, the denial of an opportunity to New York State employees to enforce their rights, in a federal court with all procedural and substantive elements contemplated by the federal employment laws, remains a significant issue.

State Sovereign Immunity

State sovereign immunity comes from two main sources. First, under English common law, no suit could be brought against the king; in our federal system of government, the states retain some measure of this sovereignty. Second, the Eleventh Amendment to the Constitution provides that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by
Citizens or Subjects of any Foreign State.”

For over 100 years, the Supreme Court has understood the Eleventh Amendment to give states immunity from lawsuits seeking money damages brought in federal courts.

Until recently, however, Congress could abrogate this immunity pursuant to its powers under Article I of the Constitution, which empowers Congress to pass laws regulating commerce.

This changed in 1996, when the Supreme Court held in Seminole Tribe of Florida v. Florida that “Article I cannot be used to circumvent constitutional limits placed on federal jurisdiction.”

Thus, the only remaining way for Congress to allow states to be sued for money damages under federal law without their consent is under Section 5 of the Fourteenth Amendment, which allows Congress to “enforce, by appropriate legislation,” the Amendment’s guarantees of due process and equal protection. Yet Congress’s power under Section 5 is not unlimited. As the Supreme Court held in 1997, to be “appropriate legislation” under that section, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” For this reason, when the Supreme Court has analyzed whether various federal employment laws validly abrogate state sovereign immunity, an important question has been whether the law is congruent and proportional.

**Federal Employment Laws Affected by State Sovereign Immunity**

1. *Fair Labor Standards Act*. The FLSA, among other things, sets a minimum wage (currently $5.15 per hour) and requires extra compensation for overtime work in certain circumstances. Because the FLSA was enacted pursuant to Congress’s Article I powers, states have immunity from federal lawsuits by their employees for violation of that statute. In *Alden v. Maine*, decided in 1999, the Supreme Court went a step further and held that even though the FLSA allowed for enforcement in state as well as federal courts, state employees could not sue their employers in state court either. Thus, while states remain technically obligated to follow the FLSA (because it is valid Article I legislation that applies to states), absent a waiver they are immune from lawsuits brought by their employees to enforce it (because of state sovereign immunity).

2. *Age Discrimination in Employment Act*. The ADEA prohibits employers from discriminating against employees who are over forty years old on the basis of age, except when age is a bona fide occupational qualification. In the 2000 case of *Kimel v. Florida Board of Regents*, the Supreme Court held that state employees could not seek damages from their employers for violations of the ADEA, because that statute did not satisfy the “congruence and proportionality” test to be able to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment. According to the Supreme Court, because age is not a “suspect classification under the Equal Protection Clause” (which would require heightened scrutiny) and because “Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation,” the ADEA was not congruent and proportional legislation, and states retained their immunity.

3. *Americans with Disabilities Act*. Title I of the ADA bars disability discrimination in employment and requires employers to make reasonable accommodations necessary for qualified employees with disabilities to perform their jobs. In 2001, the Supreme Court decided *Board of Trustees of the*
University of Alabama v. Garrett, and held in that case that state employees cannot sue their employers for violations of Title I of the ADA. As with age, disability is not a suspect classification under the Equal Protection Clause, and the Court found the reasonable accommodation requirement in particular out of proportion to constitutional requirements. In addition, although Congress had considered numerous examples of disability discrimination, the Court held that “these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.”

4. Family and Medical Leave Act. The FMLA provides up to twelve weeks of unpaid leave for eligible employees because of the birth of a son or daughter, placement of a child for adoption or foster care, or a serious health condition of the employee or of an immediate family member; during the leave period, the employee’s benefits must be maintained and at the conclusion of the leave, the employee must be restored to an equivalent position. In Nevada Department of Human Resources v. Hibbs, decided in 2003, the Supreme Court held that the family leave provisions of the FMLA (e.g., leave due to the birth of a child or illness of a family member) were enforceable against state employers, because they were designed to redress discrimination on the basis of sex, which triggers “heightened” scrutiny under the Equal Protection Clause. States probably retain their immunity, however, from suits to enforce the medical leave provisions of that statute (e.g., leave due to the employee’s own illness).

5. Other Statutes. Despite the Supreme Court’s sovereign immunity jurisprudence, state employees still can sue to enforce Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin, and which is valid Section 5 legislation that abrogates state sovereign immunity. Similarly, although the Supreme Court has not specifically addressed the issue, other courts have held that the Equal Pay Act, which bars wage discrimination on the basis of sex, is also congruent and proportional under Section 5.

Alternatives and Strategies for State Employees

1. Filing in State Court. As discussed above, the Supreme Court in Alden held that states have immunity from suits filed in state as well as federal court. New York, however, has waived its sovereign immunity for cases filed in the Court of Claims. State courts have concurrent jurisdiction over cases filed to enforce the FLSA, ADEA, ADA, and FMLA, and as a result of New York’s waiver, such cases can be filed in that court. Nevertheless, the Court of Claims does not have jury trials, which are guaranteed by all four federal statutes; cannot award injunctive relief, which can be especially important in employment cases; and requires claims to be filed within six months after they accrue.

2. State Employment Laws. State employees also are protected by state laws prohibiting age and disability discrimination and, in some states, regulating fair labor standards and medical leave, although these laws vary substantially from state to state. In New York, the Human Rights Law (“HRL”) bars age and disability discrimination, but does not offer all of the remedies found in its federal counterparts: for example, unlike the ADEA and ADA, the HRL does not allow recovery of attorneys’ fees, and unlike the ADEA, it does not permit liquidated damages for age discrimination claims. On the other hand, the HRL may offer better substantive protections in some cases: for example, the definition of disability is construed more broadly in the HRL than in the ADA. With respect to the FLSA and FMLA, New York’s Minimum Wage Act does not cover state employees, and no New York state statute provides for medical leave.

3. Federal Enforcement. While state sovereign
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immunity prevents state employees from suing to enforce their federal employment rights, it does not stop the federal government from doing so on their behalf. Yet the federal government, by itself, cannot handle the large volume of cases state employees would otherwise bring against their employers directly. Of 3,396 FLSA cases filed in federal court in 2004, only 148 (or 4.4 percent) were brought by the United States; of 18,650 employment civil rights cases filed that year in federal court, the United States brought only 425 (or 2.3 percent). In addition, federal enforcement might not be as efficient or effective as private lawsuits brought by the aggrieved employees themselves.

4. State Waivers of Immunity. States can waive their immunity, thereby allowing suits by state employees to enforce federal employment laws, although such waivers must be “altogether voluntary on the part of the sovereignty.” Although New York has waived its immunity for cases brought in the Court of Claims, it remains immune from suit in federal court. There are several options for obtaining state waivers of immunity, including the use of the Congressional spending power, collective bargaining, and unilateral waivers by states.

- Congressional Spending Power. Congress may “further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.” As the Supreme Court has explained, “Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.” Any conditions attached to federal funds must (1) further the general welfare; (2) be unambiguous; (3) be related to the federal interest in particular national projects or programs; and (4) not themselves be unconstitutional. The federal government gives a significant amount of money to states to support federal employment programs and to fund the hiring or training of federal employees, among many other allocations. Congress could provide that states that refused to waive their immunity from suits under federal employment laws would forfeit a portion of the funds from the federal grant or grants at issue. Such bills have been proposed in Congress, but none has become law.

- Collective Bargaining. State employees in some states, including in New York, are guaranteed some form of collective bargaining, although they do not always have the same tools available to them as can be used by private union members. These employees could attempt to include an immunity waiver in their collective bargaining agreements. Alternatively, a collective bargaining agreement could incorporate the federal employment laws, allowing employees to enforce those statutes through the grievance arbitration process. Arbitrators, however, are not bound to follow prior judicial decisions, and do not follow the same rules of procedure and evidence as courts.

- Unilateral Waivers. Finally, states could be persuaded, through the political process, to waive their sovereign immunity unilaterally. Given that every state already prohibits age and disability discrimination, and that many states already regulate fair labor standards and provide for medical leave, some states may not be opposed to allowing their employees to file suits against them in federal court for federal law violations as well. Indeed, at least fourteen states opposed the Supreme Court’s Garrett decision, arguing against the position that state officials “miraculously were not subject to the same cultural biases and irrational fears about individuals with disabilities” as private employers. Illinois, Minnesota, and North Carolina already have enacted such waivers by statute, and this may be the most promising strategy for state employees to enforce their federal employment rights. Especially for New York State, which has a comprehensive Human Rights Law and allows federal employment cases to be brought in the Court of Claims, such a waiver seems appropriate and achievable.
See Alden v. Maine, 527 U.S. 706, 715 (1999). The Supreme Court has explained that “[a]ny doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of that national power.” Id. at 713-14. The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.” U.S. Const. amend. X.

3 U.S. Const. amend. XI.

4 See Hans v. Louisiana, 134 U.S. 1, 15 (1890).


7 U.S. Const. amend. XIV.


10 See Close v. New York, 125 F.3d 31 (2d Cir. 1997).


15 Id. at 83.

16 See 42 U.S.C. §§ 12101-12213.


18 Id. at 365, 372.

19 Id. at 370. In Tennessee v. Lane, 541 U.S. 509 (2004), the Supreme Court held that Title II of the ADA, which prohibits disability discrimination by public entities, validly abrogates state sovereign immunity as applied to the right of access to judicial services. See id. at 531. Although some courts have held that Title II encompasses claims of employment discrimination, see, e.g., Transport Workers Union of Am. v. N.Y. City Transit Auth., 342 F. Supp. 2d 160, 175 (S.D.N.Y. 2004), the reasoning of Lane strongly suggests that Title II cannot abrogate state sovereign immunity as applied to employment.

Several other, less promising, alternatives and strategies are discussed in Landau, supra note 1. These include suits for injunctive relief, suits against state officials in their individual capacities, and Congressional amendment to validly abrogate state sovereign immunity or to provide for *qui tam* suits by state employees.


See N.Y. Ct. Cl. Act § 8; see, e.g., Alston v. New York, 97 N.Y.2d 159 (2001) (noting that New York has waived its immunity from FLSA suits brought in the Court of Claims so long as the plaintiff complies with that court’s rules).


See generally N.Y. Ct. Cl. Act. This final requirement may be difficult for suits under the ADEA, which forbids commencement of a lawsuit until 60 days after a charge is filed with an appropriate enforcement agency, see 29 U.S.C. § 626(d), and may be impossible for suits under the ADA, which requires a 180-day wait, see 42 U.S.C. § 2000e-5(f)(1). The Court of Claims Act, however, does allow filing of “a written notice of intention to file a claim” within six months, with the claim itself filed within two years of accrual. N.Y. Ct. Cl. Act § 10(4). In addition, the court has discretion to allow late-filed claims. See id. § 10(6).

See N.Y. Exec. Law §§ 290-301.

Compare N.Y. Exec. Law § 297(4)(c) with 29 U.S.C. § 626(a)-(b) & 42 U.S.C. § 1981a(a)(2). Although the HRL does not allow punitive damages for disability discrimination, neither does the ADA where state employers are concerned. See 42 U.S.C. § 1981a(b)(1). Significantly, New York State employees can sue under the HRL in the state Supreme Court, see Koerner v. New York, 62 N.Y.2d 442, 449 (1984), and are therefore not relegated only to the Court of Claims.


See N.Y. Lab. Law § 651(5)(n). New York State does require, through regulation, overtime pay for employees covered by the FLSA. See N.Y. Comp. Codes R. & Regs. tit. 12, § 1422.2. In addition, salaries and overtime pay for certain state employees are governed by the Civil Service Law. See N.Y. Civ. Serv. Law §§ 130, 134.


Section 504 of the Rehabilitation Act provides that “no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 29 U.S.C. § 794(a). While some courts have held that states waived their immunity from suits under Section 504 by accepting federal funds, the Second Circuit, which includes New York, has rejected this argument. Compare Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn, 280 F.3d 98, 114-15 (2d Cir. 2001), with Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 288 (6th Cir. 2005).


See Dole, 483 U.S. at 207-08.

In 2002, the Supreme Court held that “whether a particular set of state laws, rules, or activities amounts to a waiver of the State’s Eleventh Amendment immunity is a question of federal law,” thereby overruling a 1945 case that made such an inquiry a subject of state law. Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613, 623 (2002) (overruling Ford Motor Co. v. Dep’t of Treas. of Ind., 323 U.S. 459 (1945)). Now, states should not be able to argue that immunity waivers can be authorized only by a state statute expressly waiving immunity, as opposed to acceptance of contingent funds.

See, e.g., S. 2088, Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, 108th Cong. § 404 (2004) (providing that “[a] State’s receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the 11th amendment to the Constitution or otherwise, to a suit brought by an employee of that program or activity under [the ADEA]”); id. § 714 (same for FLSA).

See, e.g., N.Y. Civ. Serv. Law § 210 (prohibiting strikes by public employees).
Such an approach has been advocated by the American Federation of State, County, and Municipal Employees. See Supreme Court vs. State Employees, Collective Bargaining Reporter (2000), http://www.afscme.org/workplace/cbr100%5F2.htm.


See 745 Ill. Comp. Stat. 5/1.5; Minn. Stat. § 1.05; N.C. Gen. Stat. § 143-300.35.

On May 18, 2005, the New York State Assembly passed a bill, A02159, which would waive the state’s immunity from suits under the ADA. It currently is pending in the state Senate.