

Alienage Suit In NY Presages New Wave Of Employment Claims

By **Pete Brush**

Law360, New York (July 14, 2014, 7:50 PM ET) -- A New York federal class action claiming Northwestern Mutual Life Insurance Co. Inc. discriminated against a Mexican national enjoying protection from deportation marks a cagey attempt to leverage a Civil War-era ban on race bias in contracts and will leave many businesses vulnerable to so-called alienage suits if it succeeds, lawyers say.

The complaint brought by Ruben Juarez, a graduate student at Fordham University, claims the Milwaukee-based life insurance giant **refused to offer him a contract for an internship** because of his impermanent protected status under the federal government's Deferred Action for Childhood Arrivals program.

"I think this definitely is a case of first impression," said Fitapelli & Schaffer LLP partner Brian S. Schaffer, an employment and discrimination plaintiffs attorney.

The purpose of the program, authorized by President Barack Obama in 2012, is to stop expelling talented young people who were raised as Americans and wish to be part of the U.S. economy and society, when other immigration cases are more pressing.

Where federal courts have long held that there is no viable path for an alienage discrimination claim under the far more widely known Civil Rights Act and its Title VII anti-discrimination provisions, courts have not weighed in on similar claims brought under 42 U.S. Code Section 1981. First enacted in 1866 and last updated by Congress in 1991, that law prohibits racial discrimination in denying contracts such as the internship agreement denied to Juarez by the insurer in December 2013, allegedly because he neither is a U.S. citizen nor has a green card.

"The right to contracts free of irrational bias and discrimination is a bedrock principle of American law," said Thomas A. Saenz, president and general counsel of the Mexican American Legal Defense and Education Fund, whose lawyers are joined by employment plaintiffs firm Outten & Golden LLP in representing Juarez and a potential class.

The suit asserts that the insurer intentionally snubbed Juarez — and potentially thousands like him in a universe of at least 500,000 people protected by deferred action status — causing him money loss as well as humiliation. It seeks punitive damages as well as other monetary relief and an order forcing it to change its policies.

"I give them tons of credit for doing this. They're trying to push the envelope under Section 1981," Schaffer said. "I believe companies should be prohibited from discrimination on the basis of alienage, especially in situations like this, where the plaintiff was lawfully in this country and had obtained a Social Security number."

The exact reason for targeting an insurer was not known, but lawyers said claims like the one in

Juarez's suit could be brought against any number of industries that rely on skilled contractors, including those in accounting, media and engineering. Any industry that hires through contracting could be vulnerable, said Axinn Veltrop & Harkrider LLP litigator Thomas G. Rohback.

To get to a successful result, however, there are many hurdles the plaintiffs would have to cross, said Rohback, who has represented many corporate class-action defendants. For starters, though the complaint suggests "there are thousands of people who despite having work authorization do not meet Northwestern Mutual's immigration status and residency requirements," Rohback wondered how many people like Juarez there really might be.

"I doubt that there are that many people in this situation who have applied to Northwestern Mutual," he said. "They're going to have problems with numerosity. They're going to have problems with typicality."

More generally, Rohback said, the lawsuit seems to be overplaying the named plaintiff's hand, since his deferred action status doesn't confer any rights to him other than a promise, for the moment, that federal officials will use their discretion to bring actions against aliens who are lawbreakers.

"It's very clear that this is not a path to citizenship and doesn't make you a permanent resident," he said. "The complaint, I think, overstates things a little bit."

The plaintiff also was seeking an internship and that might have given the insurer pause, since it would be seeking potential candidates for long-term employment in selecting interns, he said.

"In most internships the idea is to bring in workers to train them for long-term employment," Rohback said. "It would be a logical business decision not to bring on someone who is saying, 'I may not be here beyond two years.'"

That could be asserted as a defense against the allegation that the discrimination was based on the plaintiff's status as an alien, Rohback said.

Schaffer countered that the question of numbers would be one best hashed out in discovery, and contested the notion that internship applicants are seen as locks for long-term jobs.

"In the realities of today's marketplace, it's common for someone with an entry-level job to leave after a year or two," he said. "I'd like to see the statistics from Northwestern Mutual of the people who join as interns out of college and are still there years later."

He also noted that the Outten firm had won class certification in other cases that **could have been construed as long shots**, saying they shouldn't be counted out too quickly.

"It's a great issue. If this is successful, I am sure the floodgates will open and the plaintiffs' bar will start to look for these kinds of cases," Schaffer said.

For its part, the insurer flatly denied that it discriminates in hiring, saying it welcomes candidates of all backgrounds to its field offices across the country including for some 2,500 internships for college students like the plaintiff had been at the time.

"We are reviewing the lawsuit and are not yet able to comment on the specific allegations. Regardless, we are committed to a full review and proper investigation of Mr. Juarez's concerns," spokeswoman Jean Towell said Monday.

Juarez is represented by Adam T. Klein, Ossai Miazad, Lewis M. Steel, Michael N. Litrownik and Olivia J. Quinto of Outten & Golden LLP; and Thomas A. Saenz, Victor Viramontes and Maribel Hernandez Rivera of the Mexican American Legal Defense and Education Fund.

Counsel information for the insurer was not available.

Juarez v. Northwestern Mutual Life Insurance Co. Inc., case number 1:14-cv-05107, in the U.S. District Court for the Southern District of New York.

--Editing by Elizabeth Bowen and Edrienne Su.

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