Demystifying Federal Labor and Employment Law Preemption

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I. Introduction

Federal preemption is an increasingly important area of expertise for labor and employment lawyers. As the sheer volume of laws and cases governing the workplace continues to multiply, so does the need to accommodate the respective spheres of federal and state regulation. For both employee and employer representatives, an understanding of federal preemption law is crucial for navigating the current maze of multiple claims and forums.

However, federal preemption also is a topic that strikes fear into the hearts of even seasoned labor and employment attorneys. Predicting the potential ouster of state law claims is no easy task. The federal preemption landscape consists of a complex web of rules and precedent, and courts often appear to decide cases on the basis of highly technical distinctions. In short, many perceive the topic of federal preemption as a great mystery to be avoided if at all possible. The frequency with which preemption issues now arise, however, makes avoidance of the topic impossible.

It is often said that getting to know one's fears is the most important step in conquering them. The same is true of federal preemption. Once labor and employment attorneys become familiar with three basic principles of federal preemption law, the seemingly incomprehensible nature of federal preemption can be demystified.

First, federal preemption is not a single body of law but rather an umbrella term that encompasses a number of distinct bodies of law. This principle flows from the fact that federal preemption is only permissive in nature. The Supremacy Clause of the United States Constitution authorizes, but does not compel, Congress to preempt state law.[1] Preemption analysis, therefore, depends upon congressional intent and varies with each federal law. Congressional intent sometimes is stated explicitly, but often it is not. In the absence of an expressed intention to preempt state law, courts will "sustain [a] local regulation . . . unless it conflicts with federal law or would

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1. U.S. CONST. art. VI.

frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States."[2]

For labor and employment law purposes, federal preemption most significantly arises from seven federal statutes. These statutes, in turn, give rise to five separate "strands" or bodies pf preemption law:

—"Garmon" preemption under the National Labor Relations Act;
—"Machinists" preemption under the National Labor Relations Act;
—Section 301, Labor Management Relations Act preemption;
—ERISA preemption; and
—preemption under federal antidiscrimination statutes.

Second, each of these strands of federal preemption has it own test for preemption. Some of these tests, such as that used with respect to federal antidiscrimination statutes, are quite narrow. Other strands, like that arising from ERISA, have a broad preemptive scope. A key principle in federal preemption analysis, accordingly, is that state laws and claims regulating the workplace must be tested against each of these five standards for preemption.

Third, each preemption test is grounded in a theoretical foundation that reflects the unique attributes of the federal law in question. In other words, each of the five standards for federal labor and employment law preemption is designed to further the particular objectives of the federal statute or statutes from which that strand arises. Federal preemption, when viewed in this light, serves the very practical role of shielding federal law objectives from being frustrated by state law.

Thus, the key to demystifying the topic of federal preemption, is to ascertain the unique test and theoretical foundation for each separate strand of labor and employment law preemption. As illustrated below, the application of federal preemption law becomes much more comprehensible once these basic principles are understood.

II. National Labor Relations Act Preemption

The National Labor Relations Act (NLRA)[3] governs labor-management relations in the private sector. The NLRA, itself, is silent on the issue of preemption. Nonetheless, the courts have interpreted the NLRA and congressional intent as giving rise to two separate strands of preemption premised on different, but complementary, theories.

A. *Garmon Preemption*

The United States Supreme Court long has recognized that an actual conflict between the NLRA and state law "leads to easy judicial exclu-

2. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).
3. 29 U.S.C. §§ 151-169 (1994).

sion of state action."[4] In *San Diego Building Trades Council Local 2620 v. Garmon*,[5] however, the Supreme Court announced a much more expansive test for preemption.

1. The Test

The *Garmon* Court stated that the NLRA also preempts states from regulating conduct that is arguably either protected or prohibited by the NLRA.[6] The "arguably protected or prohibited" test broadly excludes state laws and claims without regard to the substance of the state regulation. Thus, the NLRA preempts state regulation even where the substantive terms of a state law are wholly consistent with that of the NLRA.[7]

2. The Theoretical Foundation

The broad sweep of the *Garmon* test protects the primary jurisdiction of the National Labor Relations Board (NLRB) to decide labor issues. The ultimate aim of the *Garmon* test is to produce a uniform federal law governing labor relations under the auspices of a single regulatory body.[8] As the Supreme Court has noted, Congress did not merely lay down a substantive set of rules in enacting the NLRA, it also "went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal."[9]

3. The Application

The application of the *Garmon* test requires an understanding of what the NLRA either protects or prohibits. Broadly speaking, the NLRA protects three types of employee conduct: 1) the right to organize or join a labor union; 2) the right to bargain collectively through a representative of the employee's own choosing; and 3) the right to engage in concerted activity such as strikes and picketing.[10] The NLRA also protects an employee's right to refrain from engaging in these activities.[11] Thus, under the *Garmon* test, a state generally may not

4. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480 (1955).
5. 359 U.S. 236 (1959).
6. *Garmon*, 359 U.S. at 245.
7. *See, e.g.*, Wisconsin Dep't. of Indus. Labor and Human Relations v. Gould, Inc., 475 U.S. 282 (1986) (state law barring persons or firms found to have violated NLRA on three or more occasions in the preceding five-year period from doing business with the state preempted).
8. *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613 (1986) ("The Garmon rule is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA").
9. Garner v. Teamsters Local Union No. 776, 346 U.S. 485, 490 (1953).
10. 29 U.S.C. § 157 (1994).
11. *Id.*

impinge upon these areas of protected conduct either by statutory regulation or by permitting the assertion of state court jurisdiction.[12]

The NLRA also prohibits various "unfair labor practices" committed by either employers or labor unions. With respect to employers, the NLRA generally bans conduct that interferes with employees' rights to organize, bargain collectively or engage in protected concerted activities.[13] The NLRA also bans certain union activities such as coercing employees to join a union or engaging in unlawful concerted acts such as a secondary boycott.[14] Thus, the *Garmon* test further preempts state regulation of conduct that arguably falls within the NLRA's unfair labor practice proscription.[15]

While the "arguably protected or prohibited" standard establishes a broad preemptive sweep, the *Garmon* Court recognized that federal labor preemption should not extend to matters either deeply rooted in local feeling or of mere peripheral concern to the federal scheme.[16] The *Garmon* Court explained that state jurisdiction should not be ousted with respect to compelling state interests, such as the maintenance of domestic peace, in the absence of clearly expressed congressional direction.[17] The "compelling local interests" exception has been recognized primarily with respect to picketing, violence or other situations involving some type of injury to the person.[18] Even here, however, preemption will result if state regulation significantly affects NLRA rights or procedures. Accordingly, a state law aimed at a matter of local concern may be preempted if it bans conduct permitted by the NLRA,[19] or poses a risk of interference with the NLRB's jurisdiction.[20]

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12. *See, e.g.*, Local 24, Int'l Teamsters v. Oliver, 358 U.S. 283 (1959) (state antitrust law preempted to the extent that it prohibited collective negotiations concerning mandatory bargaining topic under NLRA); Youngdahl v. Rainfair Inc., 355 U.S. 131 (1957) (state court preempted from enjoining peaceful picketing protected under the NLRA).

13. 29 U.S.C. § 158(a) (1994).

14. 29 U.S.C. § 158(b) (1994).

15. *See, e.g.*, Amalgamated Ass'n of Street Employees v. Lockridge, 403 U.S. 274 (1971) (state court breach of contract action against union for its role in securing the discharge of an employee because of delinquent payment of union dues preempted because such conduct is arguably prohibited by NLRA); *Garmon*, 359 U.S. 236 (state court action by employer seeking damages from union for picketing to pressure employer to establish a union shop preempted because such conduct is arguably prohibited by NLRA).

16. *Garmon*, 359 U.S. at 243-44.

17. *Id.* at 247.

18. *See, e.g.*, Farmer v. United Bhd. of Carpenters, Local 25, 430 U.S. 290 (1977) (state action for intentional infliction of emotional distress brought against union for alleged outrageous conduct not preempted); International Union v. Russell, 356 U.S. 634 (1958) (state regulation of mass picketing and threats of violence not preempted).

19. Youngdahl v. Rainfair Inc., 355 U.S. 131 (1957) (state court may enjoin violence on a picket line, but is preempted from enjoining peaceful picketing which is protected under the NLRA).

20. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (state court trespass action to enjoin picketing on private property may be preempted where NLRB has potential jurisdiction to decide unfair labor practice issue concerning whether the content of the picketing is arguably protected by the NLRA).

The second exception recognized by the *Garmon* Court concerns matters that are peripheral to the NLRA scheme. State regulation of activity that does not go to the heart of the purposes served by the NLRA is not preempted.[21] Thus, the Supreme Court has upheld employment-related state statutes that do not directly impact the collective bargaining process.[22]

B. *Machinists Preemption*

1. The Test

The second area of NLRA preemption prohibits state interference with conduct that Congress intended to be left unregulated. In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*,[23] the Supreme Court held that a state may not regulate conduct, even if it is neither protected nor prohibited by the NLRA, that is within the zone of activity that Congress meant to be left to the free play of economic forces.[24]

2. The Theoretical Foundation

The test for *Machinists*' preemption is essentially an articulation of its theoretical foundation as well. This strand of federal labor preemption preserves the "intentional balance" struck by Congress between the power of management and labor to further their respective interests.[25] This balance, in turn, ensures that the outcome of the collective bargaining process will be determined by the parties themselves rather than by a state's notion of an ideal method of resolving labor disputes.[26]

3. The Application

The principal application of *Machinists* preemption has been with respect to state regulation of economic weapons used by parties involved in a labor dispute. If a particular pressure tactic is neither expressly protected nor prohibited by the NLRA, state regulation that restricts a party's use of that weapon will be preempted. Thus, courts have invoked *Machinists* preemption to strike down state regulation of work slowdowns,[27]

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21. *Garmon*, 359 U.S. at 243-44.

22. *See, e.g.*, Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1 (1987) (Maine statute requiring a one-time severance payment to employees in the event of a plant closing not preempted because collective bargaining process not infringed); Baker v. General Motors Corp., 478 U.S. 621 (1986) (Michigan statute restricting unemployment compensation insurance not preempted because statute did not directly affect the collective bargaining process).

23. 427 U.S. 132 (1976).

24. *Machinists,* 427 U.S. at 149-51.

25. Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614 (1986).

26. *Machinists*, 427 U.S. at 149-50.

27. *Machinists*, 427 U.S. 132 (1976) (state agency ban on employees' concerted refusal to work overtime preempted).

the hiring of permanent replacement workers[28] and a party's refusal to agree to bargaining demands.[29]

The *Machinists* doctrine, however, does not preempt all state statutes relating to economic weapons. The Supreme Court has upheld various state statutes that only indirectly impact the collective bargaining process by imposing minimum state labor standards.[30] The Court also has ruled recently that local government action that impacts the balance of power between labor and management is lawful when the action is taken by the governmental entity in its capacity as a proprietor as opposed to that of a regulator.[31]

III. Section 301 Preemption

A. *The Test*

Section 301 of the Labor Management Relations Act makes private sector collective bargaining agreements enforceable in federal court.[32] The question posed by section 301 preemption analysis is whether the availability of an arbitration remedy under a collective agreement operates to extinguish a unionized employee's ability to pursue various state-created employment rights. Although section 301 itself is silent on the issue of preemption, the Supreme Court has long recognized that "the subject matter of § 301 'is peculiarly one that calls for uniform [federal] law.' "[33]

The standard for section 301 preemption was established by the Supreme Court in *Lingle v. Norge Division of Magic Chef, Inc.*[34] In

28. *See* Employers Ass'n, Inc. v. United Steelworkers, 32 F.3d 1297 (8th Cir. 1994); Midwest Motor Express, Inc. v. Teamsters, Local 120, 512 N.W.2d 881 (Minn. 1994). Both decisions ruled that a Minnesota law prohibiting the hiring of permanent replacements to fill positions vacated by lawful strikers was preempted.

29. *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986) (city council resolution basing eligibility for taxi company franchise renewal on end of strike and adoption of labor agreement preempted).

30. *See, e.g.*, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (Massachusetts statute requiring certain minimum mental health benefits in health insurance plans, including those established by collective bargaining, not preempted); New York Tel. Co. v. New York State Dep't. of Labor, 440 U.S. 519 (1979) (New York statute providing for payment of unemployment benefits to strikers not preempted).

31. *See* Building & Construction Trades Council v. Associated Builders & Contractors Massachusetts/Rhode Island, Inc., 507 U.S. 218 (1993) (NLRA does not preempt enforcement of a prehire agreement by a state agency acting as the owner of a construction project).

32. Section 301 provides that:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1994).

33. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962) (quoting Pennsylvania Ry. Co. v. Public Serv. Comm'n, 250 U.S. 566, 569 (1919)).

34. 486 U.S. 399 (1988).

Lingle, an employee brought a state law tort claim alleging that she had been discharged in retaliation for filing a workers' compensation claim. The Seventh Circuit had found that the retaliatory discharge claim was preempted because the facts underlying that claim were the same as those applicable to a grievance under the just cause provision of the collective bargaining agreement.[35] The Supreme Court reversed, holding that section 301 preemption occurs only if the resolution of a state law claim requires the interpretation of a collective bargaining agreement.[36] The Court explained that:

> even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.[37]

Since the resolution of the retaliatory discharge claim in *Lingle* did not necessitate a construction of the collective bargaining agreement, it was not preempted.

B. *The Theoretical Foundation*

The theoretical foundation for section 301 preemption rests primarily on considerations of process rather than substance. The broad scope of section 301 preemption reflects the favored role of arbitration in our "system of industrial self-government."[38] The *Lingle* test is designed to preserve the effectiveness of arbitration by vesting authority in arbitrators, and not the courts, to interpret labor contracts in the first instance.[39] This preference for arbitration further ensures that federal rather than state law will govern the construction of labor contracts.[40]

On the other hand, the *Lingle* test is unconcerned with the substantive nature of rights created by state law. The mere fact that a labor contract may provide a remedy for conduct that also violates state law does not, by itself, result in preemption.[41] If it did, unionized workers would possess significantly fewer state law rights than their non-unionized counterparts. In order to avoid such a result, the *Lingle* test limits section 301 preemption only to situations in which the determina-

35. Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987).
36. *Lingle*, 486 U.S. at 413.
37. *Id.* at 409-10.
38. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960). *See also* Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 571, 624-25 (1992) (discussing the favored status of arbitration for resolving disputes arising under collective bargaining agreements).
39. *Lingle*, 486 U.S. at 411; Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 219-20 (1985).
40. *Lingle*, 486 U.S. at 409; *Allis-Chalmers Corp.*, 471 U.S. at 211.
41. *Lingle*, 486 U.S. at 412-13.

tion of a state law claim will require a court to intrude upon the interpretative domain reserved for the arbitration process.[42]

C. *The Application*

Although the *Lingle* test requires a case-by-case determination, certain types of claims generally are preempted because they require the interpretation of collective bargaining agreements. This is particularly the case with respect to claims asserting contract-based rights. Claims that typically are preempted by section 301 include the following:

a. Claims concerning benefits provided under the terms of a collective bargaining agreement;[43]
b. Contract claims alleging that the employer breached a promise to an employee covered by a collective bargaining agreement;[44]
c. Tort claims alleging a failure of a union to fulfill duties under a collective bargaining agreement to maintain a safe working environment;[45] and
d. Claims alleging a breach of an implied covenant of good faith and fair dealing.[46]

On the other hand, section 301 does not preempt state law claims that do not necessitate a construction of the collective bargaining agreement. This is particularly the case with respect to claims alleging intentional or tortious conduct on the part of an employer. The following types of claims are typical of those not preempted under section 301:

a. Discrimination claims based upon state antidiscrimination statutes;[47]
b. Public policy tort claims alleging retaliatory discharge for exercising a statutory right;[48]

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42. *Id.* at 409-10.

43. *See, e.g.*, Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (tort claim for bad faith handling of health insurance benefits preempted); Perugini v. Safeway Stores, Inc., 935 F.2d 1083 (9th Cir. 1991) (state law claim challenging unrequested medical leave preempted because claim required interpretation of collective bargaining agreement).

44. *See, e.g.*, Fox v. Parker Hannifin Corp., 914 F.2d 795 (6th Cir. 1990) (contract claim alleging breach of promise to investigate harassment preempted); Dougherty v. AT & T, 902 F.2d 201 (2d Cir. 1990) (contract claim alleging breach of promise of job security preempted).

45. *See, e.g.*, United Steelworkers v. Rawson, 495 U.S. 362 (1990) (fraud and negligence claims against union arising out of safety inspections authorized by collective bargaining agreement preempted); IBEW v. Hechler, 481 U.S. 851 (1987) (third party beneficiary suit against union for tortious breach of contract in failing to provide a safe workplace preempted).

46. *See, e.g.*, Fox v. Parker Hannifin Corp., 914 F.2d 795 (6th Cir. 1990); Newberry v. Pacific Racing Ass'n, 854 F.2d 1142 (9th Cir. 1988).

47. *See, e.g.*, Cook v. Lindsay Olive Growers, 911 F.2d 233 (9th Cir. 1990) (religious discrimination claim not preempted); Ackerman v. Western Elec. Co., 860 F.2d 1514 (9th Cir. 1988) (disability discrimination claim not preempted).

48. *See, e.g.*, Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) (claim of retaliatory discharge for filing workers' compensation claim not preempted).

c. Whistleblower claims, in which an employee alleges retaliatory discharge for reporting an employer's violation of state or federal law;[49]
d. Contract claims alleging a breach of a promise made by an employer to an employee who was not then in a bargaining unit or covered by a collective bargaining agreement;[50] and
e. Most often, claims for intentional infliction of emotional distress.[51]

IV. ERISA Preemption

A. *The Test*

Although commonly thought of as a law relating to pensions, the Employee Retirement Income Security Act (ERISA)[52] also regulates other types of employee benefit plans. ERISA establishes procedural requirements with respect to the reporting, disclosure and fiduciary responsibilities for both pension and welfare benefit plans. Unlike its coverage of pension plans, however, ERISA does not regulate substantively the content of welfare benefit plans. Instead, the principal impact of ERISA on the employment law landscape is a broad preemptive exclusion of state regulation.

ERISA expressly "supercede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[53] An "employee benefit plan" for the purposes of ERISA encompasses both pension plans and what are known as "employee welfare benefit plans."[54] ERISA defines an "employee welfare benefit plan" as

> any plan, fund, or program . . . established or maintained by an employer or by an employee organization . . . for the purpose of providing . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vaca-

49. *See, e.g.*, Brevik v. Kite Painting, Inc., 416 N.W.2d 714 (Minn. 1987) (claim alleging retaliatory discharge for filing complaint under the Minnesota Occupational Safety and Health Act not preempted).

50. *See, e.g.*, Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) (individual employment contracts made prior to entry into bargaining unit not preempted); Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987) (breach of contract and misrepresentation claims alleging that employer promised newly-hired employees that they would not be bumped by other employees on preferential hiring list not preempted).

51. *See, e.g.*, Hanks v. General Motors Corp., 906 F.2d 341 (8th Cir. 1990) (state law claims of outrageous conduct, wrongful discharge, prima facie tort and intentional infliction of emotional distress not preempted). *But see* Douglas v. American Info. Technologies Corp., 877 F.2d 565 (7th Cir. 1989) (intentional infliction of emotional distress claim preempted because it was necessary to analyze the collective bargaining agreement to determine whether employer's conduct was authorized by the agreement).

52. 29 U.S.C. §§ 1001-1461 (1994).

53. 29 U.S.C. § 1144(a) (1994).

54. 29 U.S.C. § 1002(3) (1994).

tion benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.[55]

The Supreme Court has stated that a state law or claim relates to an employee benefit plan "if it has a connection with or reference to such a plan."[56]

B. *The Theoretical Foundation*

Congress, in enacting ERISA, was concerned primarily with controlling the "mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds."[57] ERISA's "relate to" preemption standard provides for a "deliberately expansive" scope of preemption that is intended to preserve the uniformity and integrity of ERISA's comprehensive civil enforcement scheme.[58] A core objective of ERISA's broad scope of preemption is to relieve employers from the burden that would be imposed by a patchwork of state regulation.[59] Thus, ERISA preemption occurs even if the state regulation only indirectly affects an ERISA plan,[60] and even if the state law or claim is consistent with ERISA's substantive requirements.[61]

C. *The Application*

Courts have applied the "relate to" standard so as to preempt a wide variety of state laws and claims. The Supreme Court has held that ERISA preempted a wrongful discharge tort action in which an employee claimed that his employer fired him to avoid making contributions to a pension fund.[62] The Supreme Court also has ruled that ERISA preempted state contract and tort claims that alleged improper processing of a disability benefit claim.[63] Lower courts have followed suit in numerous decisions. For example, the Eighth Circuit Court of Appeals has held that ERISA preempted state law claims alleging improper administration of an ERISA plan[64] as well as a contract claim alleging an oral promise to provide benefits in excess of those stated in an ERISA plan.[65]

Recent Supreme Court decisions appear to signal somewhat of a retreat from this expansive scope of preemption. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance*

55. 29 U.S.C. § 1002(1) (1994).
56. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).
57. Massachusetts v. Morash, 490 U.S. 107, 115 (1989).
58. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46, 54-55 (1987).
59. Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 9, 11 (1987).
60. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990).
61. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).
62. *Ingersoll-Rand Co.*, 498 U.S. at 140.
63. *Pilot Life Ins.*, 481 U.S. at 57.
64. Consolidated Beef Indus., Inc. v. New York Life Ins. Co., 949 F.2d 960 (8th Cir. 1991).
65. Anderson v. John Morrell & Co., 830 F.2d 872 (8th Cir. 1987). *See also* McLean v. Carlson Cos., Inc., 777 F. Supp. 1480 (D.Minn. 1991) (ERISA preempts claim under Minnesota's whistleblower statute alleging discharge in retaliation for reporting suspected ERISA violations).

Co.,[66] the Court explained that ERISA's "relate to" language should not be read as modifying the usual starting point for preemption analysis—the "presumption that Congress does not intend to supplant state law."[67] In determining whether this presumption has been overcome in a particular case, the Court stated that it must go beyond the unhelpful "relate to" text and "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."[68] The Court has invoked this modified standard in two subsequent cases so as to sustain state laws of general application that impose only slight burdens on the administration of ERISA plans.[69]

The reach of ERISA preemption is tempered further by three limitations. First, the Supreme Court made clear in two decisions that ERISA preemption depends upon the existence of a "plan" and not merely upon the availability of benefits. In *Fort Halifax Packing Co., Inc. v. Coyne*,[70] the Supreme Court held that a one-time, lump-sum severance payment required by a Maine statute in the event of a plant closing did not constitute an employee benefit plan.[71] The Court concluded that ERISA preemption is triggered only with respect to "a plan [that] embodies a set of administrative practices," but not a one-time payment.[72] The Supreme Court also concluded in *Massachusetts v. Morash*[73] that an employer's practice of paying discharged employees for unused vacation time did not constitute an employee benefit plan.[74] The Court explained that while ERISA applies to vacation benefits that accumulate in a separate fund, it does not cover vacation benefits payable in a manner similar to wages from the general assets of the employer.[75]

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66. 514 U.S. 645 (1995).

67. *Travelers*, 514 U.S. at 655.

68. *Id.* at 656. Justices Scalia and Ginsberg would go even further in altering the test for ERISA preemption. In a 1997 decision, they filed a concurring opinion in which they urged the Court to acknowledge that its "first take" on the scope of ERISA preemption was wrong and to adopt, instead, a "field" preemption standard. California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., _____ U.S. _____, 117 S. Ct. 832, 842 (1997) (Scalia, J. concurring). Under this approach, ERISA preemption would extend to the field of laws and claims regulating employee benefit plans but not more broadly to encompass additionally those laws and claims only indirectly related to an employee benefit plan.

69. *See* De Buono v. NYSA-ILA Med. and Clinical Serv. Fund, _____ U.S. _____, 117 S. Ct. 1747 (1997) (state tax on gross receipts of health care facilities not preempted); *Dillingham Constr., N.A., Inc.*, _____ U.S. _____, 117 S. Ct. 832 (1997) (state regulation of apprenticeship programs under state prevailing wage law not preempted).

70. 482 U.S. 1 (1987).

71. *See id.* at 14-15.

72. *Coyne*, 482 U.S. at 11-12. *Cf.* Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986) (ERISA preempted state law claims to recover severance benefits due under an established severance pay plan).

73. 490 U.S. 107 (1989).

74. *Morash*, 490 U.S. at 117-18.

75. *Id.* at 114, 116. *See also* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 4-5, n.2 (1983) (ERISA applies to a multiemployer fund that accumulates vacation benefits for union members who work for various employers).

Second, ERISA does not preempt state antidiscrimination statutes that are consistent with the provisions of federal antidiscrimination laws.[76] This exception follows from the combined effect of ERISA's disclaimer of any impairment of federal law[77] and the fact that federal antidiscrimination statutes such as Title VII expressly preserve nonconflicting state law.[78] Accordingly, the Supreme Court has ruled that ERISA preempted the New York Human Rights Law's prohibition on pregnancy discrimination in employee benefit plans only to the extent that the state law banned practices permitted under federal law.[79]

Third, ERISA's preemptive reach also is qualified by the "savings clause" which preserves state laws that "regulate insurance, banking or securities."[80] The savings clause is qualified, in turn, by what is known as the "deemer clause." This latter provision limits the application of the savings clause by providing that an employee benefit plan governed by ERISA may not itself be deemed to be an insurer subject to the savings clause exception.[81]

The Supreme Court has interpreted these two clauses as providing for a different scope of preemption with respect to plans that purchase insurance as opposed to self-insured plans. In *Metropolitan Life Insurance Co. v. Massachusetts*,[82] the Court was asked to decide whether ERISA preempted a Massachusetts statute requiring that health care plans provide certain minimum mental health care benefits. The Court held that the statute was not preempted to the extent that it applied to insurance contracts purchased for ERISA plans.[83] The state law's application to these purchased contracts concerned the regulation of insurance permitted by the savings clause. On the other hand, the Court explained that plans that are self-funded by employers are exempted from the insurance exception by virtue of the deemer clause.[84] Thus, ERISA preempted the statute's application to these "non-insurance" plans.

V. Preemption by Federal Antidiscrimination Statutes

A. *The Test*

Unlike the preemption strands discussed above, federal employment antidiscrimination statutes have a very limited preemptive impact. Ti-

76. *See* Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983).
77. 29 U.S.C. § 1144(d) (1994).
78. 42 U.S.C. § 2000e-7 (1994).
79. *Shaw*, 463 U.S. 85 (1983).
80. 29 U.S.C. § 1144(b)(2)(A) (1994).
81. 29 U.S.C. § 1144(b)(2)(B) (1994).
82. 471 U.S. 724 (1985).
83. *Metropolitan Life*, 471 U.S. at 746.
84. *See id.* at 747.

tle VII,[85] the Age Discrimination in Employment Act (ADEA)[86] and the Americans with Disabilities Act (ADA)[87] each expressly disclaims any intent to occupy the field of employment discrimination law or to oust state regulation in the absence of an actual conflict between federal and state law. In the language of Title VII, the preemptive effect of these statutes is limited to state law "which purports to require or permit the doing of any act which would be an unlawful employment practice" under federal law.[88] In other words, federal antidiscrimination statutes do not preempt state law that is either consistent with or expands upon the rights conferred to employees by federal law.[89]

B. *Theoretical Foundation*

The Supreme Court has described Title VII's core purpose as "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."[90] The narrow scope of preemption under federal antidiscrimination statutes "reflects the importance Congress attached to state antidiscrimination laws in achieving . . . [this] goal of equal employment opportunity."[91] State antidiscrimination law, from this perspective, is an allied force in the battle to eradicate workplace discrimination. Indeed, even state law that goes beyond federal law in terms of the scope of prohibited discrimination is not inconsistent with the ultimate goal of equal opportunity.[92] Federal antidiscrimination law, accordingly, precludes only state regulation that would permit conduct that federal law prohibits.

C. *The Application*

The Supreme Court in *California Federal Savings & Loan Association v. Guerra*[93] ruled that Title VII only preempts less protective state

85. 42 U.S.C. § 2000e-7 ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.")

86. 29 U.S.C. § 633 ("Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age").

87. 42 U.S.C. § 12201(b) ("Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter").

88. 42 U.S.C. § 2000e-7.

89. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

90. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

91. *Guerra*, 479 U.S. at 282-83.

92. *Id.* at 285.

93. 479 U.S. 272 (1987).

statutes that create a clear and actual conflict with federal law.[94] In *Guerra*, the employer argued that a California statute requiring a minimum of four months of unpaid pregnancy leave violated Title VII because the statute did not mandate that male employees receive similar leaves for physical disabilities. The Court rejected this argument explaining that Title VII does not preclude states from providing greater protection against discrimination than that provided by Title VII.[95] In addition, the Court reasoned that the statute did not compel unequal treatment since employers voluntarily could provide the same amount of leave to physically disabled men.[96]

The ADEA differs from Title VII and the ADA in one significant respect. The ADEA states "that upon commencement of an action under this chapter such action shall supersede any State action."[97] This language would appear to require state agencies to relinquish jurisdiction upon the filing of any federal suit under ADEA.[98] In contrast, parallel federal and state actions are not prohibited by either Title VII or the ADA.

The potential for parallel federal and state law claims necessarily presents questions of res judicata and collateral estoppel. The Supreme Court has held that a claimant is precluded from bringing a Title VII claim in federal court if a state court has reviewed and affirmed a state agency's dismissal of a similar claim previously brought under state law.[99] The Court based its conclusion on the terms of 28 U.S.C. Section 1738 which requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in state courts.[100] Since the state court's ruling on the state discrimination claim was binding on state courts, the Supreme Court reasoned that it also precluded relitigation under Title VII in federal court.[101]

In contrast, the Court has held that an unreviewed but fully completed state administrative determination does not bar a subsequent Title VII claim.[102] In that case, the state administrative body held a hearing to adjudicate an employee's claim of racial discrimination under the state human rights statute. The employee, after losing before the state agency, filed a Title VII claim in federal court rather than appealing the decision in state court. The Court held that the unreviewed state agency decision did not bar readjudication of the same issue in

94. *Guerra*, 479 U.S. at 292.
95. *Id.* at 285.
96. *See id.* at 290-91.
97. 29 U.S.C. § 633 (1994).
98. *See* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW § 6.38 (1988).
99. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982).
100. *Kremer*, 456 U.S. at 466-67.
101. *Id.* at 485.
102. University of Tennessee v. Elliott, 478 U.S. 788 (1986).

federal court.[103] Thus, only state court determinations, and not state agency determinations, have a preclusive effect on subsequent federal antidiscrimination actions.

VI. Conclusion

Much of the apparent mystery surrounding the federal labor and employment law preemption topic stems from the fact that the field actually consists of five separate subtopics. Each of these strands of preemption has its own unique test grounded in the theory and purpose of the statute or statutes that it was designed to serve. Once these principles are understood, the admittedly complex field of federal labor and employment law preemption becomes less mysterious and more comprehensible.

103. *Elliot,* 478 U.S. at 795-96.