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Scott D. Miller

THE PREEMPTIVE EFFECT OF ERISA ON THE PREVAILING WAGE ACT

SCOTT D. MILLER*

INTRODUCTION

Questions remain whether the Prevailing Wage Act[1] (PWA) is enforceable in light of *Construction and General Laborers' District Council of Chicago and Vicinity v. McHugh Construction Co.*[2] The PWA is the Illinois statute that requires contractors and subcontractors to pay laborers, workers and mechanics employed on public works projects, no less than the general prevailing rate of wages (consisting of hourly cash wages plus fringe benefits)[3] for work of a similar character in the locality where the work is performed.[4] The Illinois Department of Labor (IDOL) administers and enforces the Act[5] by investigating, determining and enforcing

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* Scott D. Miller is legal counsel for the Illinois Department of Labor. He earned his B.S. from the State University of New York at Oswego in 1981 and his J.D. in 1990 from Hamline University School of Law (cum laude), where he was an editor of the Hamline Journal of Public Law and Policy.

The views expressed in this Article are the author's and do not necessarily represent those of the Illinois Department of Labor.

1. 820 ILCS 130/0.01-12 (1994).

2. 596 N.E.2d 19 (Ill. App. Ct.), *appeal denied*, 602 N.E.2d 449 (Ill. 1992).

3. 820 ILCS 130/2 (1994).

4. *See* Law of June 26, 1941, § 1, 1941 Ill. Laws 703 (requiring payment of the prevailing wage to laborers on all public works); Bradley v. Casey, 114 N.E.2d 681, 683 (Ill. 1953) (addressing the 1941 Act as a serious policy statement).

One purpose of the PWA was to "assure that people working on public works projects receive a decent wage in order to secure . . . 'the advantage to the state of having the work performed under conditions which give some assurance that the work will be completed without interruptions or delay by workmen of average skill.'" Hayen v. County of Ogle, 463 N.E.2d 123, 128 (Ill. 1984) (quoting *Bradley*, 114 N.E.2d at 686 (quoting Long Island R.R. Co. v. Department of Labor, 177 N.E. 17, 22 (N.Y. 1931))). Further, the Illinois Legislature intended the Act to protect both local workers and contractors "who have to compete with out-of-state cheap, itinerant labor for public works contracts." H.B. 568, 86th Ill. Gen. Assembly, House Debates, 65th Leg. Day, 22 (June 27, 1989) (statement of Rep. Homer discussing "a fundamental policy that the legislature adopted when it adopted the Prevailing Wage Rate Act."). *See also* Bernardi v. Highland Park, 520 N.E.2d 316, 320 (Ill. 1988) (explaining that the PWA "remov[es] the incentive to import less expensive labor from areas outside the locality in which the work is being performed.").

5. 820 ILCS 130/6 (1994). In construing the PWA, IDOL relies on both the historical origins and evolving political history of the Act, thus supporting the rule of law by countering the impact of current politics on its decisions. *See* People v.

the minimum wage rates that an employer must pay on public works contracts.[6] The PWA further provides workers with a private cause of action for the collection of the general prevailing wage for their services rendered on public works projects.[7]

In *McHugh*, the Laborers' Council filed a private PWA action to recover a subcontractor's delinquent welfare and pension contributions (fringe benefits) to an employee benefit plan.[8] The Illinois Appellate Court, First District, held that the Laborers' PWA claim was preempted by the Employee Retirement Income Security Act of 1974[9] (ERISA), the federal statute that regulates employee

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Easley, 519 N.E.2d 914, 916 (Ill. 1988) (explaining that Illinois courts examine the evolving history of a statute to ascertain its legislative intent); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 237-38 (Harvard University Press) (1990) (proposing interpretive principles for the regulatory state); Peter L. Strauss, *When the Judge is not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 321 (1990) (examining agencies' interpretation and use of legislative history); *see generally* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1381-96 (1993) (examining the NLRA's origins and statutory scheme by drawing from archival materials and oral history).

IDOL's role in the administration and enforcement of the Act has evolved significantly over the past 54 years. A chronological list of legislation delineating IDOL's role is as follows: Law of June 26, 1941, § 5, 1941 Ill. Laws 703, 705 (granting IDOL authority to inspect the records of contractors and subcontractors); Law of July 11, 1957, §§ 4, 6-9, 1957 Ill. Laws 2662, 2663-66 (authorizing IDOL to ascertain the prevailing wage rates upon the public body's request; requiring IDOL to investigate and prosecute violations of the Act); Law of Sept. 2, 1983, § 9, 1983 Ill. Laws 1763, 1763-65 (requiring IDOL to ascertain the prevailing wage rates when the public body does not investigate and ascertain the rates pursuant to the previous paragraph); Law of Sept. 23, 1983, § 11, 1983 Ill. Laws 4261, 4261-62 (empowering IDOL to take assignments and collect underpayments of wages); Law of Sept. 24, 1983, § 11a, 1983 Ill. Laws 3779 (authorizing IDOL to debar contractors and subcontractors); Law of Jan. 5, 1984, § 11, 1984 Ill. Laws 7160, 7161 (amending IDOL's powers to enjoin the awarding of contracts or the continuation of work); Law of Sept. 7, 1989, §§ 4, 11, 11a, 1989 Ill. Laws 4208, 4209-12 (requiring all contracts to reflect IDOL's revised rates; authorizing IDOL to collect wage underpayment penalties and to convene debarment hearings); Law of Jan. 1, 1983, § 11a, 1989 Ill. Laws 3779 (requiring IDOL to publish a list of debarred contractors or subcontractors on a quarterly basis); Law of Aug. 16, 1993, § 16, 1993 Ill. Laws 2772, 2772-73 (charging IDOL with the duty to investigate whistleblower claims and "make whole" such employees or employee representatives).

6. The PWA provides a minimum wage rate on public works projects. *See* 820 ILCS 130/1 (1994) (declaring the policy that laborers, mechanics and workers on public projects shall be paid "a wage of no less than the general prevailing hourly rate"); 820 ILCS 130/7 (1994) (stating that the PWA does not prohibit employers from paying "more than the prevailing rate"); Bernardi v. Roofing Sys., Inc., 463 N.E.2d 123, 124 (Ill. 1984) (quoting *Hayen*, 463 N.E.2d at 128 (stating that the legislative scheme embodies the "legislature's decision to stabilize labor conditions on public works projects by creating a prevailing wage base")).

7. 820 ILCS 130/11 (1994).

8. *McHugh*, 596 N.E.2d at 20.

9. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88

benefit plans.[10]

The purpose of this article is to demonstrate that the PWA, and IDOL's enforcement thereof, are not preempted by ERISA relative to IDOL ascertaining the prevailing rate of wages and collecting employees' prevailing wages. The principles underlying the ERISA preemption doctrine are reviewed, followed by a discussion of case law from other jurisdictions that illustrate the current trend of ERISA's preemptive effect on state prevailing wage statutes. Additionally, the definition of "prevailing rate of wages" under the PWA is examined. The discourse concludes with an application of the current trend in ERISA preemption analysis to the PWA and its enforcement by IDOL.

I. THE PRINCIPLES UNDERLYING ERISA PREEMPTION OF STATE LAW

Statutes which Congress establishes pursuant to the Constitution are "the supreme Law of the Land."[11] In effect, the Constitution "gives Congress the power to preempt state law."[12]

Ascertaining Congress' intent in enacting a particular law is essential in determining whether a federal act preempts a state statute.[13] Federal preemption of state law "may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'"[14]

ERISA is an act of Congress "made in pursuance"[15] of the U.S. Constitution.[16] Thus, ERISA is the "supreme Law of the

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Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1145 (1994)).

10. *McHugh*, 596 N.E.2d at 23-24.

11. U.S. CONST. art. VI, § 2. In pertinent part, the Supremacy Clause states:

> [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

12. Tolton v. American Biodyne, Inc., 854 F. Supp. 505, 509 (N.D. Ohio 1993) (quoting Mowery v. Mercury Marine Div. of Brunswick Corp., 773 F. Supp. 1012, 1013 (N.D. Ohio 1991) (finding that ERISA preempts state law claims against a welfare benefit plan arising from a mental patient's suicide)), *aff'd*, 48 F.3d 937 (6th Cir. 1995).

13. *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983) (holding that ERISA preempted New York's Human Rights Law).

14. Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982) (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

15. U.S. CONST. art. VI, § 2.

16. *See, e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 8-13 (1983) (discussing ERISA's preemptive effect over a state action to levy taxes on funds held by a welfare benefit trust).

Land" and any state statute that ERISA preempts violates the Constitution.[17]

The purpose of ERISA is to safeguard workers (and their beneficiaries) from abuse and mismanagement of funds accumulated to finance employee benefit plans.[18] The statute defines the phrase "employee benefit plan" to include both pension and welfare plans.[19] Under the act, a pension plan provides income deferral or retirement income.[20] A welfare plan furnishes "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. . . ."[21]

ERISA comprehensively regulates employee benefit plans relating to participation, funding, vesting, reporting, disclosure and fiduciary responsibilities.[22] ERISA does not regulate the substantive content of welfare-benefit plans.[23]

The preemptive effect of ERISA on state law is deliberately expansive.[24] The statute contains three provisions defining "the extent to which state law is preempted with regard to employee benefit plans."[25] The "preemptive clause" states that:

> [e]xcept as provided in subsection (b) of this section [the savings clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .[26]

The "savings clause" provides that:

> [e]xcept as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, bank-

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17. *See, e.g.*, Williams v. Ashland Eng'g Co., Inc., 45 F.3d 588, 593-94 (1st Cir. 1995) (finding that ERISA preempted a Massachusetts statute requiring general contractors working on public works projects to furnish a bond to secure payment of any sums due to trustees for health and welfare plans: "when the Supremacy Clause is implicated, federal law trumps state law, not vice versa"), *petition for cert. filed*, 63 U.S.L.W. 3819 (U.S. May 2, 1995) (No. 94-1804).

18. ERISA § 4(a)(1), 29 U.S.C. § 1003(a)(1); Fort Halifax Packing Co., Inc., v. Coyne, 482 U.S. 1, 15 (quoting ERISA's House sponsor at 120 CONG. REC. 29197 (1974)).

19. ERISA § 3(3), 29 U.S.C. § 1002(3).

20. ERISA § 3(2), 29 U.S.C. § 1002(2).

21. ERISA § 3(1), 29 U.S.C. § 1002(1).

22. Metropolitan Life Ins. Co. v. Travelers Ins. Co., 471 U.S. 724, 732 (1985).

23. *Shaw*, 463 U.S. at 91.

24. *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137-38 (1990) (discussing ERISA's design and holding that ERISA preempted a Texas common-law wrongful discharge action alleging that an employer terminated an employee to avoid making pension fund contributions).

25. *Tolton*, 854 F. Supp. at 509.

26. ERISA § 514(a), 29 U.S.C. § 1144(a).

ing, or securities.[27]

The "deemer clause" explains that:

> [n]either an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.[28]

The Supreme Court summarized the "pure mechanics of the [three] provisions" as follows:

> [i]f a state law "relate[s] to . . . employee benefit plan[s]," it is preempted. § 514 (a). The saving clause excepts from the preemption clause laws that "regulat[e] insurance." § 514(b)(2)(A). The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company. § 514(b)(2)(B).[29]

Note that ERISA defines "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law. . . ."[30] In addition, the Supreme Court determined that Congress intended to use the words "relate to" in their "broad sense," rejecting language that would limit preemption "to state laws relating to the specific subjects covered by ERISA."[31]

There are, however, limits to ERISA's preemptive scope. In *Fort Halifax Packing Co. v. Coyne*,[32] the Supreme Court held that a Maine statute requiring businesses to make lump-sum severance payments to employees (who were not covered by an express severance pay agreement) when they close plants in the State did not "relate to" an ERISA plan.[33] The Court reasoned that the law did not require an employer to establish or maintain a plan to coordinate and control periodic demands on its assets.[34]

Additionally, in *Massachusetts v. Morash*,[35] the Supreme Court held that "payroll practices" that include the payment of unused vacation benefits from an employer's "general assets" rather than from a trust fund are not employee welfare benefit

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27. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A).

28. ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B).

29. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987) (holding that ERISA preempted a Mississippi common-law action alleging that an employer improperly processed a claim for benefits under an ERISA-regulated benefit plan).

30. ERISA § 514(c)(1), 29 U.S.C. § 1144(c)(1).

31. *Shaw*, 463 U.S. at 98.

32. 482 U.S. 1 (1987).

33. *Id.* at 22.

34. *Id.* at 19, 23.

35. 490 U.S. 107 (1989).

plans under ERISA.[36] The Court explained that "[t]he States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of government authority preserved in our federalist system.'"[37]

Relying on *Morash*, the New York Supreme Court, Appellate Division, in *Tap Electronic Contracting Service, Inc. v. Hartnett*,[38] held that ERISA did not preempt the New York Department of Labor's regulation of an employer's vacation and holiday supplement payments under New York Labor Code § 220 (Public Works).[39] The evidence indicated that the employer provided its employees the supplements through its general assets, not from a trust fund.[40]

In addition, the U.S. District Court, Northern District of California (also relying on *Morash*) held in *Czechowski v. Tandy Corp.*[41] that an employer's unfunded vacation benefits trust was not an ERISA welfare benefit plan.[42] The court reasoned that the trust did not "implicate any concerns over mismanagement since no funds [were] accumulated in it."[43] The trust at issue distributed one million dollars in vacation pay, but never maintained more than one thousand dollars in its account.[44] As a result, the employer was subject to the provisions of California Labor Code § 227.3 prohibiting the company from effecting a forfeiture of a separated employee's earned vacation time.[45]

Finally, the California Court of Appeals held in *Millan v. Restaurant Enterprise Group, Inc.*[46] that the California Division of Labor Standards Enforcement could subpoena vacation trust fund records to determine whether the trust was a *Czechowski* type subterfuge, thus subjecting the employer to the requirements of California Labor Code § 227.3.[47] The state agency in *Millan* sought information evidencing a company's payment of accrued vacation pay to separated employees.[48] The company argued that the subpoena was excessive because ERISA only required it to

36. *Id.* at 119-20.
37. *Id.* at 119 (quoting *Fort Halifax*, 482 U.S. at 19).
38. 549 N.Y.S.2d 118 (N.Y. App. Div. 1989).
39. *Id.* at 120.
40. *Id.*
41. 731 F. Supp. 406 (N.D. Cal. 1990).
42. *Id.* at 408.
43. *Id.*
44. *Id.*
45. *Id.*
46. 18 Cal. Rptr. 2d 198 (Cal. Ct. App. 1993).
47. *Id.* at 204-05.
48. *Id.* at 208.

file, rather than maintain, such records.[49] The court determined that the subpoena was not unreasonable because an administrative agency has the authority to conduct an investigation to determine whether an entity is subject to its jurisdiction and whether there has been a violation of a law that it is charged to enforce.[50]

Note that the holding in *Millan* is analogous to Illinois case law addressing an administrative agency's authority to investigate employers. For example, in *Vissering Mercantile Co. v. Annunzio*,[51] the Illinois Supreme Court found that IDOL could investigate an employer's books and records to determine the business' compliance with the Wages of Women and Minors Act.[52] The Act empowers IDOL to ascertain and enforce minimum wage rates per trade or occupation for women and minors.[53]

II. TRENDS IN ERISA PREEMPTION OF STATE PREVAILING WAGE STATUTES

Current case law indicates a trend in which courts are becoming increasingly reluctant to find that ERISA preempts state prevailing wage statutes. Part of this trend is a recognition that ERISA does not expressly preempt state prevailing wage statutes that include benefit payments (rather than contributions to benefit plans) within the total amount of prevailing wages that a contractor must pay its workers engaged in a public works project.[54] Thus, at issue, is whether a state prevailing wage law, and/or the enforcement thereof, is preempted by implication because it "relates to" an ERISA plan.[55]

States apply one of three methods to determine whether a contractor or subcontractor has made the requisite cash payments and benefits contributions to comply with the applicable prevail-

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49. *Id.* at 207.

50. *Id.* at 205 (citing Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 215-17 (1946) (permitting the USDOL to subpoena documents in a FLSA investigation)).

51. 115 N.E.2d 306 (Ill. 1953).

52. 820 ILCS 125/0.01-17 (1994).

53. *Annunzio*, 115 N.E.2d at 311-12 (citing *Oklahoma Press Pub. Co.*, 327 U.S. at 215-17).

54. *See* Minn. Chapter of Assoc. Builders and Contractors, Inc., v. Minn. Dep't of Labor and Indus., 47 F.3d 975, 978 (8th Cir. 1995) (holding that "although ERISA preempts a state law which explicitly refers to a benefit plan regulated by ERISA, . . . this preemption applies only to references to benefit plans, and not references to benefits"); WSB Elec., Inc. v. Curry, 2 Wage & Hour Cas. 2d (BNA) 508, 514 (N.D. Cal. 1994) (citing *Fort Halifax* for the proposition that the "language 'related to any employee benefit plan' is intended to distinguish between relating to a benefit plan and otherwise relating to benefits.").

55. *See, e.g., Minn. Chapter of Assoc. Builders and Contractors, Inc.*, 47 F.3d at 977 (inquiring whether the PWA is implicitly preempted by ERISA).

ing wage statute. The first procedure is the "line by line" method. Under this system, an enforcement agency:

> determine[s] the prevailing rate of cash wages and of each specific benefit included in the statute; the total of all of these [i]s considered the "prevailing wage." To comply with the prevailing wage laws, a contractor [may] either pay at least the total amount of the prevailing [hourly] wages in cash wages, or pay a combination of at least the prevailing cash [hourly] wages plus countable benefit contributions added up to at least the total amount of prevailing wages. However, for each specified fringe benefit, only contributions up to the prevailing rates for that benefit [ar]e countable. Thus contractors [ar]e not entitled to any credit for benefits which [ar]e not prevailing benefits in the area or for benefit payment in excess of the prevailing rate for that benefit.[56]

The second procedure is the "two tier system." Under this method, a contractor pays the total amount of the general prevailing wage in cash or:

> pay[s] a combination of at least the prevailing cash [hourly] wages, plus benefit contributions adding up to at least the total amount of the prevailing wages. The difference from the "line by line" scheme is that legitimate statutory benefits contributions are countable even if they exceed the prevailing rates for that specific benefit or are for different benefits than the prevailing benefits. . . . However, as with the "line by line" system, a contractor is still required to pay the prevailing cash [hourly] wages; it is not entitled to a credit against the prevailing cash wages for benefit payments in excess of the prevailing rate for benefits.[57]

The third scheme is the "total package (Davis-Bacon)" method.[58] Under this scheme, a contractor may pay any combination of cash wages and benefits contributions (prevailing and/or non-prevailing benefits) that add up to the total prevailing wage.[59]

A. The "Line by Line" Method

Courts have uniformly found that the "line by line" method is preempted by ERISA. A divided panel of the Second Circuit Court of Appeals, in *General Electric Co. v. New York Department of Labor*,[60] decided that ERISA preempted New York Labor Law § 220 (Public Work).[61] Section 220 required employers on public works to pay "supplements" in accordance with local prevailing

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56. *Curry*, 2 Wage & Hour Cas. 2d at 510.
57. *Id.*
58. *Id.*
59. *Id.*
60. 891 F.2d 25 (2d Cir. 1989), *cert. denied*, 496 U.S. 912 (1990).
61. *Id.* at 29.

practices.[62] The statute defined the term "supplements" to include "health, welfare, nonoccupational disability, retirement, vacation benefits, holiday pay and life insurance."[63]

Specifically, the New York State Commissioner of Labor prohibited General Electric from substituting a supplement that the Commissioner deemed a "prevailing benefit" for another form of supplement (for example, a pension or welfare plan required by the company's collective bargaining agreement).[64] The Commissioner's position was in accordance with the New York Supreme Court, Appellate Division decision in *A.L. Blades & Sons, Inc. v. Roberts*,[65] which held that "the statute indicates that the legislature intended that the Commissioner of Labor, not the contractor, determine the supplements to be provided and that the employee receive either the listed benefits or equivalent cash (or a combination of both)."[66]

As a result, the Second Circuit determined that Section 220 "intrude[d]" in the primary administrative functions of an employee benefit plan (e.g., the statute proscribed the type and amount of an employer's contribution to a plan, the rules under which the plan operates, and the nature and amount of the benefits provided by the plan).[67] As a result, the Court held that Section 220 "related to" employee benefit plans and was therefore preempted by ERISA.[68]

B. The "Two Tier" Method

California abandoned its "line by line" enforcement of the California Labor Code for the "two tier" method when a federal district court held that the former procedure was preempted by ERISA.[69] Under Section 1773.1 of the Code, the general prevailing rate of per diem wages includes an employer's payments "for health and welfare, pension, vacation, travel time and subsistence pay."[70]

Nonetheless, the U.S. District Court for the Northern District

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62. *Id.*

63. N.Y. LAB. LAW § 220(5)(b) (Consol. 1994).

64. *General Elec.*, 891 F.2d at 27.

65. 524 N.Y.S.2d 912 (N.Y. App. Div.) (mem.), *appeal denied*, 72 N.Y.2d 803 (N.Y. 1988).

66. *Id.* at 914.

67. *General Elec.*, 891 F.2d at 29.

68. *Id.*

69. *Curry*, 2 Wage & Hour Cas. 2d at 508-09.

70. CAL. LAB. CODE § 1773.1 (West 1994). *See also* CAL. CODE REGS. tit. 8, §§ 16000, 16200 (1994) (including within the General Prevailing Rate of Per Diem Wages, an employer's payments for medical and hospital care, retirement plan benefits, vacation and holidays, compensation for injuries, insurance and unemployment, among other payments).

of California, in *Associated Builders v. Baca*,[71] held that the ordinances of two cities and one county requiring the payment of prevailing wages (as established under the California Labor Code) on private projects was preempted by ERISA.[72] The *Baca* court noted that ERISA preemption would not have been implicated if the administrative scheme necessitated only the payment of cash wages.[73]

The court reasoned that the definition of "per diem wages" causes the reference to, and calculation of, an employer's contributions to benefit plans.[74] Thus, unlike the Maine severance pay statute discussed in *Fort Halifax*,[75] the prevailing wage ordinances at issue obligated an employer to create an administrative system to process periodic benefit payments.[76] The *Baca* court buttressed its holding by asserting that the "two tier" method discouraged employers from contributing in excess of the prevailing benefit amounts because they would not be credited for such payment by being able to compensate workers below the base wage level.[77]

The U.S. District Court for the Northern District of California later upheld the "two tier" method in *WSB Electric, Inc. v. Curry*.[78] Relying on *Morash* and *Fort Halifax*, the *Curry* court noted that "payment of prevailing cash wages out of an employer's general assets without credit for higher than prevailing benefit contributions does not constitute a benefit plan within the meaning of ERISA."[79]

The *Curry* court applied the Ninth Circuit's ERISA preemption test to answer the threshold question, "whether the state law 'relates to' an employee welfare benefit plan, i.e. 'has a connection with or reference to such a plan.'"[80] Specifically, the test asked:

> is the state telling employers how to write their ERISA plans, or conditioning some requirement on how they write their ERISA plans? Or is it telling them that regardless of how they write their ERISA plans, they must do something else outside and independently of the ERISA plans? If the latter, as here, there is no preemption.[81]

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71. 769 F. Supp. 1537 (N.D. Cal. 1991).
72. *Id.* at 1547.
73. *Id.*
74. *Id.*
75. See *supra* notes 32-34 and accompanying text for a discussion of *Fort Halifax*.
76. *Baca*, 769 F. Supp. at 1547.
77. *Id.* at 1548.
78. 2 Wage & Hour Cas. 2d (BNA) 508, 511 (N.D. Cal. 1994).
79. *Id.* at 510.
80. *Id.* (quoting *Shaw*, 463 U.S. at 97).
81. *Id.* at 511 (quoting Employee Staffing Serv. Inc. v. Aubry, 20 F.3d 1038,

The *Curry* court held that California is telling employers "that regardless of how they write their ERISA plans, or even whether they have ERISA plans, they must pay prevailing cash wages and prevailing total compensation. Accordingly, there is no preemption."[82]

The court noted that minimum wage laws (*e.g.*, the FLSA and its state counterparts) and the "total package" scheme (both of which the plaintiff properly acknowledged were not preempted by ERISA) are neither logically nor legally distinguishable from the "two tier" enforcement method.[83] Minimum wage laws set a floor for cash wages, thus arguably discouraging the payment of benefits "exceeding the difference between the total prevailing wage and the minimum wage. The challenged second tier of the instant statute merely raises that minimum wage higher than the cash wages Plaintiffs wish to pay."[84] Finally, the court found *Baca* distinguishable on the basis that the ordinances affected private construction, and thus fell outside the "important factor of the state's traditional exercise of the authority to set wages for state-funded projects."[85]

The Third Circuit Court of Appeals in *Keystone Chapter, Associate Builders and Contractors v. Foley*[86] upheld the Pennsylvania Prevailing Wage Act and the regulations thereunder.[87] The Third Circuit first addressed a declaratory order of the Pennsylvania Prevailing Wage Review Board.[88] Pursuant to the order, ERISA benefits were "*per se bona fide*."[89] The Board must approve all other contributions.[90] Further, ERISA benefit contributions would count towards the benefits minimum, however, non-ERISA contributions would count only if they were in one of the predetermined benefit categories.[91] The Court concluded that the order was a state law[92] preempted by ERISA because it "single[d] out [ERISA] plans for special treatment."[93]

1041 (9th Cir. 1994)).

82. *Id.*

83. 2 Wage & Hour Cas. 2d (BNA) 508, 511 (N.D. Cal. 1994).

84. *Id.* at 511-12.

85. *Id.* at 513.

86. 37 F.3d 945 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1393 (1995).

87. *Id.*

88. *Id.* at 955.

89. *Id.* (emphasis added).

90. *Id.*

91. *Id.*

92. See *supra* note 29 and accompanying text for a discussion stating that ERISA § 514(c)(1) defines "state laws" to include "all laws, decisions, rules, regulations, or other State action having the effect of law."

93. *Keystone*, 37 F.3d at 956 (quoting United Wire, Etc. v. Morristown Mem. Hosp., 995 F.2d 1179, 1192 (3d Cir.), *cert. denied*, 114 S. Ct. 382, 382-83 (1993)).

The *Keystone* court did not invalidate the statute and regulations upon finding the Board's "line by line" analysis preempted by ERISA. Rather, the Court held that the act and regulations were not preempted by ERISA because there was at least one reasonable interpretation of the legislation and rules (that the agency was free to adopt) that was not preempted.[94]

The regulations clarified that the prevailing minimum wage had two separate components: a cash wage and a level of benefits contributions. Contractors and subcontractors must pay "[n]ot less than the general prevailing minimum wage rates."[95] If a company does not contribute toward employee benefits "which the Secretary has determined to be included in the general prevailing minimum wage rate," that employer may pay "the monetary equivalent thereof."[96] In addition, the regulations defined contributions for employee benefits as "[f]ringe benefits' paid or to be paid, including payment made whether directly or indirectly, to the workmen for sick, disability, death, other than Workmen's Compensation, medical, surgical, hospital, vacation, travel expense, retirement and pension benefits."[97]

The Third Circuit found that the statute and regulations:

> merely require that the Secretary set a prevailing wage that consists of a cash component and may include a benefits component. Employers must pay the cash component of the wage in cash, but they may pay the benefits compensation either in benefits or cash. Any benefits they provide, regardless of type, would count toward the benefits component. Under this interpretation, the Prevailing Wage Act and the regulations do not control benefits, but rather require certain wages to be paid.[98]

Thus, the court determined that the state statute did not directly relate to ERISA plans. The statute could operate in the absence of any ERISA plans because the Secretary's measurement of prevailing benefits contributions may be satisfied by benefits "payable on a regular basis from the general assets of the employer,"[99] and would "create[] no need for an ongoing administrative program for processing claims and paying benefits."[100]

The Third Circuit further determined that the Pennsylvania Prevailing Wage Act was not indirectly related to ERISA plans. Addressing the cash component, the court found that a minimum cash payment requirement did not restrict an employer's choice of

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94. *Id.*
95. 34 PA. CODE § 9.106 (1994).
96. *Id.*
97. 34 PA. CODE § 9.102 (1994).
98. *Keystone*, 37 F.3d at 956.
99. *Id.* at 957-58 (quoting *Morash*, 490 U.S. at 116).
100. *Id.* at 958 (quoting *Fort Halifax*, 482 U.S. at 12).

plan benefits and structures.[101] Following *Morash* (vacation benefits) and *Fort Halifax* (a one time severance payment), the court concluded that "[a] state law does not dictate or restrict the choices of ERISA plans by having nothing to do with employee benefits."[102] The fact that an employer must adjust its operations according to the locality is a reality that arises out of a federalist system of government.[103]

Addressing the benefits component, the Third Circuit found that the statute relates to ERISA only when an employer decides to satisfy the requisite level of benefits contributions through contributions to an ERISA plan, rather than cash payment or contributions to non-ERISA benefits.[104] Relying on the U.S. Supreme Court's decision in *Shaw v. Delta Air Lines, Inc.*,[105] the Third Circuit concluded that:

> where a legal requirement may be easily satisfied through means unconnected to ERISA plans, and only relates to ERISA plans at the election of an employer, it 'affect[s] employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.'"[106] The Third Circuit further concluded that the statute's records and reporting requirements did not impede the ability of plans to operate nationally.[107]

Finally, the U.S. District Court for the Eastern District of Michigan, in *Associated Builders and Contractors, Saginaw Valley Area v. Perry*,[108] held that the Michigan Prevailing Wage Act was preempted by ERISA.[109] Relying on *Baca*, the court found that the Michigan Department of Labor's "two tier" enforcement method "related to" ERISA plans because it discouraged employers from contributing in excess of the prevailing benefit amounts.[110] Furthermore, the court found the Third Circuit's reasoning in *Keystone* unpersuasive.[111] Emphasizing that the phrase "relates to" should be broadly construed, the *Perry* court chastised the Third Circuit for engrafting:

> a two-step analysis onto a one-step statute, first finding that the benefits component of the prevailing wage act had "some connection" to (*i.e.*, was related to) employee benefit plans, then finding no

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101. *Id.*
102. *Id.* at 959.
103. *Keystone*, 37 F.3d at 960.
104. *Id.*
105. 463 U.S. 85 (1983) (finding that ERISA did not preempt a N.Y. law requiring paid sick-leave benefits for employees unable to work because of pregnancy).
106. *Keystone*, 37 F.3d at 960 (quoting *Shaw*, 463 U.S. at 100 n.21).
107. *Id.* at 963.
108. 869 F. Supp. 1239 (E.D. Mich. 1994).
109. *Id.* at 1245.
110. *Id.*
111. *Id.* at 1246.

> preemption because employers could comply with the law by not paying any benefits if they paid a sufficiently high cash wages.[112]

The District Court also followed the *Baca* court's findings that a two-tier prevailing wage scheme required an ongoing administrative system. As a result, the court concluded that the Michigan statute was directly related to an ERISA plan and was therefore preempted by ERISA.[113]

Perry is unconvincing and easily distinguishable. First, the District Court relied heavily on the analysis in *Baca*. The decision in *Baca* discussed local ordinances affecting wage rates on private construction, and was thus a poor choice for a doctrinal foundation to analyze a state statute dealing with wage rates for public works projects. As pointed out in *Curry* (distinguishing *Baca*) the ordinances at issue fell outside the traditional exercise of state powers that courts are otherwise reluctant to preempt by implication. The Michigan statute, however, fit within the traditional boundaries of state regulatory authority. Thus, the *Perry* court failed to apply the proper ERISA preemption analysis when it examined the Michigan statute.

Second, the *Perry* court's attack on *Keystone* was mistaken. *Keystone* did not effect a "two-step analysis," but rather, adhered to the precedent providing deference to traditional exercises of state authority, unless preemption is unavoidable.

C. "Total Package (Davis-Bacon)" Method

The Eighth Circuit Court of Appeals in *Minnesota Chapter of Associate Builders and Contractors v. Department of Labor and Industry*,[114] held that ERISA did not expressly or implicitly preempt the Minnesota Prevailing Wage Law.[115] The statute defines the prevailing wage rate as "[t]he hourly basic rate of pay plus the contribution for health and welfare benefits, vacation benefits, pension benefits, and any other economic benefit."[116] An employer may comply with the law by dividing the wage rate "between wages and benefits as it chooses, so long as the combined total meets or exceeds the prevailing wage rate."[117] The court noted that the Minnesota law was less restrictive than the New York and Pennsylvania statutes.[118] Under the Minnesota law:

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112. *Id.*
113. *Perry*, 869 F. Supp. at 1246.
114. 47 F.3d 975 (8th Cir. 1994).
115. *Id.* at 979.
116. MINN. STAT. § 177.42(6) (1994).
117. *Minn. Chapter of Assoc. Builders and Contractors, Inc.*, 47 F.3d at 977.
118. *Id.* at 979.

> economic benefits are interchangeable for other economic benefits or for wages, thus eliminating governmental control over benefits provided or compensated for in the form of supplements, as well as creating only a minimal administrative burden [requiring payroll data on public works projects — information that the State would require even if benefits were excluded from the scheme].[119]

III. DEFINING "PREVAILING RATE OF WAGES" UNDER THE PREVAILING WAGE ACT

Section 2 of the PWA defines the phrase "prevailing rate of wages" as "the hourly cash wages plus fringe benefits for health and welfare, insurance, vacation and pensions generally."[120] This provision is similar to the definition of prevailing wages used by the California, Minnesota, New York and Pennsylvania prevailing wage statutes.[121] As a rule, when "construing an Illinois statute, decisions of other States construing similar laws are entitled to respect and consideration."[122] Thus, the California, Minnesota, New York and Pennsylvania case law interpreting the statutory phrase "prevailing rate of wages," (while not binding) provides excellent guidance in the construction of the phrase in the PWA.

As evidenced by a 1993 Attorney General Opinion,[123] IDOL has historically enforced the PWA in accordance with a "line by line" approach, analogous to the method struck down in *General Electric*.[124] Specifically, the Attorney General's opinion stated that:

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119. *Id.* at 977.

120. 820 ILCS 130/2 (1994).

121. *See supra* notes 63, 73, 95-96, 116 and accompanying text.

122. Urban v. Loham, 592 N.E.2d 292, 295 (Ill. App. Ct. 1992) (quoting *In re* Marriage of Hunt, 397 N.E.2d 511, 517 (Ill. App. Ct. 1979). *See also* 2B NORMAN J. SINGER, SUTHERLAND STAT. CONSTR. § 52.03 (5th ed. 1992) ("[T]he phraseology and language of similar legislation in other jurisdictions is deserving of special consideration not only in the interests of uniformity, but also for the purpose of determining the general policy and objectives of a particular course of legislation."); Bradley v. Casey, 114 N.E.2d 681, 685 (1953) (referencing N.Y. case law to buttress the conclusion that the phrase "prevailing wage" provided an adequate standard for ascertaining wage rates, thus overcoming due process concerns); *McHugh*, 596 N.E.2d at 22-24 (canvassing the case law of other jurisdictions to ascertain when a state law "relates to" an ERISA plan). *See also* Golden Bear Family Restaurants, Inc. v. Murray, 494 N.E.2d 581, 589 (Ill. App. Ct.) (buttressing the construction of IWPCA § 5 (pro-rated vesting of vacation pay) by agreeing with the California Supreme Court's interpretation of a similar provision (Section 227) of the California Labor Code), *appeal denied*, 112 Ill. 2d 574 (1986).

123. Op. Ill. Att'y Gen. No. 93-009 (Mar. 29, 1993).

124. See *supra* notes 60-68 and accompanying text for a discussion of *General Elec.*

> the Department interprets the requirement that workers be paid no less than the prevailing rate of wages to mean that the worker must be paid at least or above the prevailing rate for each category of benefits; the prevailing wage requirement cannot be satisfied by paying any combination of cash and fringe benefit hourly rates the sum of which equals the sum total of the rates determined by the Department, even though cash equivalents may be paid to workers for fringe benefits in lieu of providing the fringe benefits.[125]

The opinion further recognized that there were two other possible interpretations of the phrase "prevailing rate of wages," one comparable to the "two-tier" computation method, and the other one analogous to the "total package (Davis-Bacon)" method.[126]

The Attorney General supported IDOL's interpretation. As stated earlier in this article, one of the purposes of the PWA was to protect local workers and contractors from competing with cheap, out-of-state itinerant labor.[127] Under this rubric, an enforcement policy that required a minimum cash wage payment and did not provide a credit for benefit contributions would be consistent with the legislative intent of the act.

This interpretation has a significant impact on the calculations of an employee's overtime hourly wages. If an employer was permitted credit on its cash wage payments for higher than prevailing benefit contributions, a worker could perceivably receive a smaller overtime rate per hour than if the company had to pay overtime based on a minimum cash wage.[128]

To buttress his opinion, the Attorney General argued that an interpretation allowing "shifts of wages from cash to fringe benefits would . . . weaken the degree to which the Act may be enforced" in light of *McHugh*.[129] The Attorney General's opinion on this issue is out-of-step with the current trend in ERISA preemption. Courts uniformly find that ERISA preempts the "line by line" enforcement method of state prevailing wage statues.[130] In addition, the trend indicates that the "two tier" and the "total package (Davis-Bacon)" methods of statutory enforcement are not preempted by ERISA.[131]

Furthermore, *McHugh* is a case with a narrow scope and holding. At issue was a union's attempt to use the PWA as a tool

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125. Op. Ill. Att'y Gen. No. 93-009 at 3-4.

126. *Id.* at 5.

127. See *supra* notes 4 and 6 for a discussion of the PWA's legislative intent.

128. Op. Ill. Att'y Gen. No. 93-009 at 6.

129. *Id.* at 7-8.

130. See *supra* notes 60-68, 69, 89-91 and accompanying text for a discussion of New York, California and Pennsylvania case law, respectively.

131. See *supra* notes 78-107, 114-19 and accompanying text for a discussion of California, Pennsylvania and Minnesota case law respectively.

to collect fringe benefit contributions owed to an employee benefit fund.

The Illinois Appellate Court, First District's analysis evidenced its reluctance to invalidate the PWA. The court was interested in distinguishing "between State laws that 'relate to' employee benefit plans and those that have only a 'tenuous, remote, or peripheral' impact" on ERISA plans.[132] After canvassing ERISA case law (in particular, the decisions reconciling ERISA with the Illinois Wage Payment and Collection Act), the Court concluded that "ERISA preemption is triggered by not just any indirect effect on administrative procedures, but rather by an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit."[133]

The court also recognized that "the regulation of labor costs in public works projects is surely a valid exercise of a State's traditional regulatory authority, and as such should not be superseded by ERISA 'unless this conclusion is unavoidable.'"[134] Thus, under an analysis comparable to the holdings in *Curry* and *Keystone*,[135] the First Appellate District found that, rather than invalidating the act, the union's application of the PWA was preempted.[136]

IV. APPLYING THE CURRENT TREND IN ERISA PREEMPTION TO IDOL'S ENFORCEMENT OF THE PREVAILING WAGE ACT

ERISA does not preempt the PWA. The State of Illinois engages in a valid exercise of traditional police powers when it regulates labor costs in public works projects. Thus, at issue is whether IDOL's enforcement of the act (IDOL's interpretation is a state law for purpose of ERISA) has an indirect effect on a primary administrative function of an employee benefit plan (e.g., participation, funding, vesting, reporting, disclosure and fiduciary responsibilities) preempted by ERISA.

The case law indicates that IDOL's "line by line" enforcement of the PWA is preempted by ERISA. IDOL should thus respectfully decline the Attorney General's 1993 opinion[137] on this

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132. Construction and Gen. Laborers' Dist. Council of Chicago v. James McHuch Const. Co., 596 N.E.2d 19, 23 (Ill. App. Ct. 1992).

133. *Id.*

134. *Id.* at 24.

135. *Compare McHugh*, 596 N.E.2d at 22-24 *with Curry*, 2 Wage & Hour Cas. 2d at 510-13 *and Keystone*, 37 F.3d at 955-63.

136. *McHugh*, 596 N.E.2d at 22-24.

137. A precedent exists for not adhering to Attorney General opinions interpreting the PWA. *See* Sparks & Wiewel Constr. Co. v. Martin, 620 N.E.2d 533, 541 (Ill. App. Ct. 1993) (noting that well reasoned AG opinions are persuasive but do not

discrete issue, follow the *Curry* and *Keystone* courts' lead, and adopt an interpretation of the PWA that has only a "'tenuous, remote, or peripheral' impact" to ERISA plans.

There are two reasonable interpretations of the PWA (that IDOL is free to adopt)[138] that are not preempted by ERISA. The first interpretation is the "two tier" method. This construction of the PWA is closest to IDOL's administration and enforcement of the act because it requires a minimum cash wage payment. The second scheme is the "total package (Davis-Bacon)" method. This construction is less restrictive on employee/employer negotiations over compensation packages than the "two tier" method.

IDOL's collection of wages under either interpretation will require a *Tap Electronic*[139] style review of an employer's books and records to ascertain whether the company made contributions to ERISA plans and/or provided non-ERISA benefits to satisfy the benefits component of the prevailing wage. Such an investigation may compel IDOL to subpoena trust fund records in a manner similar to *Millan*[140] in order to determine whether the trust was

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have the force and effect of law); *see also* Zickuhr v. Bowling, 423 N.E.2d 257, 260-61 (Ill. App. Ct. 1981) (disagreeing with an AG opinion defining the phrase "public use").

138. The Illinois Administrative Procedure Act (IAPA) provides, "Each rule that implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power. The standards shall be stated as precisely and clearly as practicable under the conditions to inform fully those persons affected." 5 ILCS 100/5-20 (1994).

An agency may comply with IAPA § 5-20 through rule making, case-by-case adjudication, or by simply announcing its new principles or policies in a press release. *See, e.g.*, Boffa v. Ill. Dep't of Pub. Aid, 522 N.E.2d 644, 648-49 (Ill. App. Ct. 1988). *See also* Illinois Dep't of Transp. v. First Galesburg Nat'l Bank and Trust Co., 545 N.E.2d 770, 773 (Ill. App. Ct. 1989) (permitting an agency to refuse to adopt specific standards for a myriad of different situations), *rev'd on different grounds*, 566 N.E.2d 254 (Ill. 1990); Escalona v. Board of Trustees, 469 N.E.2d 297, 300-01 (Ill. App. Ct. 1984) (balancing the practicality of precise standards for every possible situation with the necessity of an agency to retain flexibility in its decision making process).

The PWA empowers IDOL with the discretionary power "to inquire diligently as to any violation of this Act, shall institute actions for penalties herein proscribed, and shall enforce generally the provisions of this Act." 820 ILCS 130/6 (1994). IDOL's rule making authority under the PWA is limited to promulgating regulations governing the hearings procedure for debarring a contractor or subcontractor from contracting for public works for a two year period. *See* 820 ILCS 130/11a (1994). *See also* ILL. ADMIN. CODE tit. 56, §§ 100.5 - 100.120 (1994). Thus, IDOL may adopt one of the two interpretations through either case-by-case adjudication or by announcing the enforcement policy in a press release. IDOL would most likely achieve greater compliance in this matter from contractors and subcontractors by publicizing its interpretation of the act through speaking engagements and articles.

139. *See supra* notes 38-40 and accompanying text.

140. *See supra* notes 46-50 and accompanying text.

funded or was possibly an attempted subterfuge of the Act. Under this approach, IDOL's collection of wages would equal the difference between the prevailing cash wage and the cash wages the employer paid its subject employees (particularly under the "two tier" method), and the cash equivalent of the difference between the benefits component of the prevailing wage and any contributions the agency's investigation disclosed that the employer made to either ERISA or non-ERISA benefits.

CONCLUSION

ERISA preempts state laws that directly or indirectly effect the participation, funding, vesting, reporting, disclosure and fiduciary responsibilities of an employee benefit plan. Under the current trend in ERISA preemption case law, however, courts are reluctant to find that ERISA preempts state prevailing wages statutes. This trend indicates that IDOL's interpretation of the PWA is preempted by ERISA. Notwithstanding, the PWA is subject to two reasonable interpretations (that IDOL is free to adopt) that are not preempted under ERISA. IDOL's collection of wages under either interpretation will require in depth investigations to ascertain whether an employer is in compliance with the PWA.