Prevention and Defense of Wrongful Discharge Suits in the Corporate Sector

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I. INTRODUCTION

The United States is one of the few western industrial nations that does not limit the power of the employer to make arbitrary discharges.[1] Until recently, employers could dismiss employees "for good cause, for no cause or even a cause morally wrong, without thereby being guilty of legal wrong."[2] This "employment-at-will" rule emerged in an atmosphere of rapid industrial growth. The absolute power to discharge an employee was considered necessary to preserve the exercise of managerial discretion in the work place and the freedom of the parties to make their own contract.[3] The doctrine was first formally articulated in a treatise on the law of master and servant:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at-will, and if the servant seeks to make it a yearly hiring, the burden is upon him to establish it by proof
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> [I]t is an indefinite hiring and is determinable at the will of either party [4]

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1. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 508-19 (1976); St. Antoine, *"You're fired!"*, 10 HUMAN RIGHTS L. REV. 32, 33 (1982).

2. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 107 COLUM. L. REV. 1404, 1405 (1961) (quoting Payne v. Western and Allegheny R.R. Co., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W 134 (1915)).

3. *See* Note, *Protecting Employees At-Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1933 (1983); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 (1980).

4. H. G. WOOD, *Law of Master and Servant* § 134 at 273 (1877). This rule has been severely criticized as not being supported by the authority upon which it relies. *See* Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 886-90 (Mich. 1980); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-45 (1974).

This formulation became the generally accepted rule governing termination of employees.[5]

Recently, commentators have proposed that managerial discretion be replaced by a rule of law requiring only "just cause" terminations. These commentators argue that: (1) the freedom of contract underpinnings of the at-will rule are outdated; (2) individual employees in the modern work force do not have the bargaining power to negotiate security for the jobs on which they have grown to rely; and (3) much arbitrary and capricious employer action is outside the proscriptions of the labor and discrimination laws.[6] The courts of various states have responded by limiting or modifying the at-will rule, but have been generally unwilling to adopt a substantive rule of law requiring just cause dismissal.[7] The courts have nonetheless permitted recovery based on various contract[8] and tort[9] theories. At present, almost every discharge constitutes a potential lawsuit.[10]

The purpose of this Article is to provide a framework for preventing "employment-at-will" lawsuits. The Article begins with an outline of the various legal theories upon which such lawsuits are primarily premised, and then discusses some of the measures available to employers to curtail litigation. Finally, a method is proposed by which an employer might insulate management decisions from judicial review through the implementation of voluntary internal grievance procedures and/or a benefit plan governed by ERISA.

II. MODIFICATION OF THE AT-WILL RULE

The courts have utilized several theories to modify the at-will rule. Many courts have applied contractual theories giving employees binding

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5. *See* Krauskopf, *Employment Discharge: Survey and Critique of the Modern Employment At-Will Rule*, 51 UMKC L. REV. 189 (1983).

6. *See generally*, Blades, *Employment At-Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404-06 (1967); Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 8-10 (1979).

7. *See, e.g.*, Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980); Run v. Hawaiian Airlines, Inc., 162 Ga. App. 474, 291 S.E.2d 779 (1982); Parnar v. Americana Hotels, Inc., 652 P.2d 625 (Hawaii 1982); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Washington 1984); Mers v. Dispatch Printing Company, 19 Ohio St. 3d 100 (1986).

8. *See infra* text accompanying notes 14-33.

9. *See infra* text accompanying notes 59-90.

10. One commentator has stated that "many employment settings are rife with potentially actionable 'promises' " Lopatka, *The Emerging Law of Wrongful Discharge*, 40 BUS. LAW. 1, 17 (1984).

job security rights.[11] A second theory of recovery is predicated on the implied covenant of good faith and fair dealing, which imposes liability for many discharges not motivated by "just cause."[12] Third, the tort of wrongful discharge protects employees from employer action impeding the operation of a public policy.[13]

A. *Contractual Theories*

A significant number of courts recognize that the common law at-will rule is merely a rebuttable presumption and not a rule of substantive law limiting the freedom of the parties to provide for job security These courts state that, unless otherwise agreed, an employment contract of indefinite duration is presumed to be terminable at the will of either party.[14] Thus, these decisions center on the existence and necessity of mutual assent and consideration in the particular case.[15]

Contractual analysis is readily applicable when the hiring agent, seeking to procure the prospective employee's services, makes representations concerning job security at a prehiring interview or at the time of hiring. In such circumstances, the employee's commencing work functions as both acceptance of and consideration for the employer's promise of secure employment.[16] However, employees do not typically "bargain for" or inquire about job security at the hiring stage. Rather, the employer usually promulgates a policy manual or handbook covering such subjects as vacation, sick leave, holiday pay, severance pay, and disciplinary procedures.[17]

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11. *See, e.g.*, Toussaint v. Blue Cross and Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); *Wooley v. Hoffman-LaRoche*, 99 N.J. 284, *modified on other grounds*, 101 N.J. 10 (1985).

12. *See, e.g.*, Koehrer v. Superior Court, 181 Cal. 3d 1155, 226 Cal. Rptr. 820 (1986); Gates v. Life of Mont. Ins. Co., 39 Mont. 16, 638 P.2d 1063 (1982); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal Rptr. 722 (1980); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1971).

13. *See, e.g.*, Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980); Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 (1980); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).

14. *See, e.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622, 628 (Minn. 1983); Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1036 (Ariz. 1985).

15. For example, the New Jersey Supreme Court in *Wooly v. Hoffman-LaRoche*, a leading case in the field, interpreted "the common law of contracts in the light of sound policy applicable to this modern setting" to find statements in an employment manual binding on an employer even though the employee may not have relied upon those statements. 99 N.J. 297, *modified on other grounds*, 101 N.J. 10 (1985).

16. *See, e.g.*, Toussaint v. Blue Cross and Blue Shield of Mich., 292 N.W.2d 880, 890-91 (1980); Cowdry v. A. T. Transport, 367 N.W.2d 433 (Mich. App. 1985).

17. There are a plethora of cases dealing with the enforceability of representations concerning vacation and sick leave, holiday and severance pay. *See* DeGuisseppe, *Effect of the Employment At-Will Rule on Employee Rights to Job Security and Fringe*

Some courts have found policy manuals or handbooks merely informational or instructional and not binding. These courts reason that manuals cannot constitute a binding promise since such manuals are unilaterally promulgated by the employer and are not the result of a "bargained-for" exchange. Thus, definite mutual consent is lacking.[18] Even under these strict requirements, employment manuals can give rise to contractual rights when the particular manual is expressly bargained for,[19] or when the manual is expressly made part of an employment agreement between the parties.[20] Also, definite mutual assent may be inferred where the employees are required to read, accept, or acknowledge that they understand an employment manual which provides for job security before they begin or continue employment.[21]

Many jurisdictions treat a unilaterally adopted employment manual as an offer to a unilateral contract.[22] An employee accepts the offer by beginning or retaining employment with knowledge of the manual's provisions.[23] The employee, although furnishing consideration for both the provisions of the manual and compensation by continuing on the job, is free to quit.[24] Courts have limited the employer's discretion to discharge even though the manual in question did not expressly provide for job security Modifications of the at-will relationship have been

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Benefits, 10 FORD. URBAN L.J. 1, 3-4 (1981). The focus of this Article is on representations of job security.

18. *See, e.g.*, Rouse v. People's Natural Gas Co., 605 F Supp. 230 (D. Kan. 1985); Johnson v. National Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Satterfield v. Lockheed Missle and Space Co., Inc., 617 F Supp. 1359 (D. S.C. 1985); Ferraro v. Koelsch, 119 Wis. 2d 407, 350 N.W.2d 735 (Wis. App. 1984); Heideck v. Kent General Hosp., Inc., 446 A.2d 1095 (Del. Supr. 1982); Sargent v. Illinois Inst. of Technology, 78 Ill. App. 3d 117, 33 Ill. Dec. 937, 397 N.E.2d 443 (1979). Other courts have expressed concern that allowing policy statements to be imported into contractual relations between the employer and employee would produce uncertainty in business relationships. *See, e.g.*, Caster v. Hennessey, 727 F.2d 1075, 1077 (11th Cir. 1984); Muller v. Stramberg Carlson Corp., 427 So.2d 266, 270 (Fla. Dist. Ct. App. 1983).

19. *See* Weiner v. McGraw Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1982).

20. *See* Pupinsky v. Miller Brewing Co., 627 F Supp. 1181, 1188 (W.D. Pa. 1986); Walker v. Westinghouse Electric Corp., 335 S.E.2d 79, 83-84 (N.C. App. 1985).

21. *See, e.g.*, Leikvold v. Valleyview Community Hospital, 141 Ariz. 544, 688 P.2d 170 (Ariz. 1984); Watson v. Idaho Falls Consolidated Hosp., Inc., 720 P.2d 632 (Idaho 1986); Thompson v. American Motor Inns, Inc., 623 F Supp. 409 (D.C. Va. 1985).

22. *See, e.g.*, Findley v. Aetna Life and Casualty Co., 5 Conn. 394, 499 A.2d 64 (1985); Staggs v. Blue Cross of Md., Inc., 61 Md. App. 381, 486 A.2d 798 (1985); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

23. *See, e.g.*, Pine River State Bank v. Metille, 333 N.W.2d 622, 626 (Minn. 1983); Staggs v. Blue Cross of Md., 61 Md. App. 381, 486 A.2d 798, 803 (1985); Wooley v. Hoffman-LaRoche, 99 N.J. 284, 297, 491 A.2d 1257, 1264, *modified on other grounds*, 101 N.J. 10 (1985).

24. *See, e.g.*, Wooley v. Hoffman-LaRoche, 99 N.J. 284, 303-04, 491 A.2d 1257, 1267-68, *modified on other grounds*, 101 N.J. 10 (1985); Pine River State Bank v. Mettille, 333 N.W.2d 622, 627 (Minn. 1983); Staggs v. Blue Cross of Md., 61 Md. App. 381, 486 A.2d 798, 803 (1985).

inferred from manuals which provide that oral or written notice will be given before adverse employment action is taken,[25] a list of prohibited conduct carrying the sanction of discharge,[26] or a probationary period to new employees.[27] Some courts scrutinize the manual to determine whether the statements contained are sufficiently definite to bind the employer contractually,[28] while others find that the very existence of a manual arguably implying job security creates a question of fact for the jury as to whether an implied-in-fact contract exists.[29]

Even under a relaxed unilateral contract analysis, not every statement of policy will give rise to a contractual obligation. "An employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer."[30] Thus, an invitation to consider a job as a "career situation" was found not to constitute an offer, even though such statement was communicated directly to the individual employee involved rather than through an employment manual.[31]

An employment contract can exist even in the absence of oral representations or policy manuals. Some courts recognize that an employer's conduct and other pertinent circumstances may establish an unwritten "common law" providing the equivalent of a just cause termination policy.[32] In one case the court found that an employer's grant of a disciplinary probationary period and references to plaintiff's good work prior to probation "established a policy pertaining to [the employee] by conduct and words to terminate only for just cause upon which she

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25. *See* Enyeart v. Shelter Mut. Ins. Co., 693 S.W.2d 120 (Mo. App. 1985); Staggs v. Blue Cross of Md., 61 Md. App. 381, 486 A.2d 798 (1985); Thompson v. American Motor Inns, Inc., 623 F. Supp. 409 (D.C. Va. 1985).

26. Watson v. Idaho Falls Cons. Hosps., Inc., 111 Idaho 44, 720 P.2d 632 (1986); Cook v. Heck's, Inc., 342 S.E.2d 453 (W Va. 1986).

27. Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378, 386 (6th Cir. 1983).

28. *See* Cotter v. Lincoln Nat'l Life Ins. Co., 794 F.2d 352 (8th Cir. 1986) (statement that an immediate investigation would be undertaken when the company became aware of any instance of apparent dishonesty was not specific enough to create an obligation to fire only for just cause); Hopes v. Flack Hills Power and Light Co., 386 N.W.2d 490 (S.D. 1986) (performance appraisal procedure did not change the employer's right to terminate employee at-will).

29. *See, e.g.*, Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 548, 688 P.2d 170, 174 (1984); Finley v. Aetna Life and Casualty Co., 5 Conn. App. 394, 499 A.2d 64, 73 (1985); Cook v. Heck's, Inc., 342 S.E.2d 453, 459 (W Va. 1986).

30. Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn. 1983). *See also*, Ruch v. Strawbridge and Clothier, Inc., 567 F Supp. 1078, 1081 (E.D. Pa. 1983) ("[n]o unilateral contract arises merely by the fact that [the employer] has alerted its employees that certain conduct may form the basis of a discharge.").

31. Degen v. Investors Diversified Servs., Inc., 260 Minn. 424, 110 N.W.2d 863 (1961); Hillesland v. Federal Land Bank Ass'n., 407 N.W.2d 206 (N.D. 1987).

32. *See, e.g.*, Schwartz v. Michigan Sugar Co., 308 N.W.2d 459 (Mich. App. 1981); Brewster v. Martin Marietta Aluminum Sales, Inc., 145 Mich. App. 641, 378 N.W.2d 558 (1985); Wiskotonis v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983).

could rely "[33] Thus, an employer's custom and practice of dealing with employees fairly may give rise to a reasonable expectation of job security which is enforceable in contract.

B. *The Covenant of Good Faith and Fair Dealing*

A second theory of recovery is predicated upon an implied covenant of good faith and fair dealing. The essence of this implied covenant is that neither party will do anything to deprive the other party of the benefits of the agreement.[34] The Restatement (Second) of Contracts states that "good faith performance or enforcement emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party "[35] Thus, it has been argued that good faith in the termination of an at-will employment relationship requires that all discharges be "for cause."[36]

The implied covenant of good faith has not generally been adopted as a substantive limitation on the employer's right to discharge.[37] The courts reject such a blanket restriction on the ground that it would infringe on the legitimate exercise of management discretion.[38] If a duty to terminate in good faith was implied into each employment contract, each discharge would be subject "to judicial incursions into the amorphous concept of bad faith."[39] Indeed, to imply such a right from the existence of an at-will relationship, which, by its terms has no restrictions, is internally inconsistent.[40]

An interpretation of the covenant of good faith and fair dealing limiting an employer's discretion to discharge only for just cause "would

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33. Brewster v. Martin Marietta Aluminum Sales, Inc., 145 Mich. App. 641, 378 N.W.2d 558 (1985).

34. Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 36 Cal. 3d 752, 768, 686 P.2d 1158, 1166, 206 Cal. Rptr. 354, 362 (1984); Fortune v. National Cash Register Co., 373 Mass. 96, 104, 364 N.E.2d 1251, 1257 (1977).

35. Restatement (Second) of Contracts 205, comment a (1979).

36. *See* Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1454-56 (1975).

37. *See, e.g.*, Daniel v. Magma Copper Co., 127 Ariz. 320, 620 P.2d 699 (Ct. App. 1980); Murphy v. American Home Prods. Corp., 448 N.E.2d 293, 461 N.Y.S.2d 232 (1982); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); Brockmeyer v. Dunn and Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). However, both Montana and the U.S. Virgin Islands have enacted statutes requiring only "good cause" termination. The Wrongful Discharge From Employment Act as entacted by HB 241, L. 1987, eff. July 1, 1987. V.I. CODE ANN. T. 24, Ch. 3, §§ 76-79 (1987); Wrongful Discharge, Supp. 11 Lab. Rel. Rep. (BNA) (Indiv. Emp. Rights Man.) 588:1 (Dec. 29, 1986).

38. *See, e.g.*, Brockmeyer v. Dunn and Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983); Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985).

39. Parnar v. Americana Hotels, Inc., 65 Hawaii 370, 377, 652 P.2d 625, 629 (1982).

40. Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

tread perilously close to abolishing completely the at-will doctrine and establishing by judicial fiat the benefits which employees can and should get only through collective bargaining agreements or tenure provisions."[41] Since blanket imposition of a "just cause" requirement fails to accord consideration to the complexities of the particular employment involved, adoption and definition of the covenant is best left to the legislature.[42]

Despite the covenant's rejection as a substantive limitation on the at-will rule, several theories of recovery fall under its rubric. In *Koehrer v. Superior Court*,[43] plaintiffs entered into a written contract with Oak Capital to manage certain apartment buildings for one year. Oak Capital terminated their employment four months later claiming they had done a poor job managing the apartments.[44] The court held that an employer may incur tort liability when the existence of good cause for discharge is asserted "without a good faith belief that good cause for discharge in fact exists "[45] In such case, the employer has "attempted to deprive the employee of the benefits of the agreement."[46]

The *Koehrer* court relied upon *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, wherein the California Supreme Court stated: "It is sufficient to recognize that a party to a contract may incur tort remedies when, *in addition to breaching the contract*, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists."[47] Thus, in order to sustain a claim on this theory, a plaintiff must first show a breach of a valid existing contract.[48]

In *Rulon-Miller v. IBM Corp.*,[49] the California Court of Appeals applied the covenant of good faith when the employee asserted rights based on a company policy. Rulon-Miller had been dating an employee of a competitor. Her supervisor characterized this as a conflict of interest and brought it to her attention. Rulon-Miller insisted on her rights under

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41. Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 385, 710 P.2d 1025, 1040 (1985). "To hold otherwise would render the court a bargaining agent for every employee not protected by statute or collective bargaining agreement, including employees whom Congress has specifically excluded from the protection of the National Labor Relations Act, such as those in management positions." Magnan v. Anaconda Industries, 193 Conn. 558, 571, 479 A.2d 781, 788 (1984). Indeed, a blanket "just cause" requirement would wipe out job security as an incentive to unionize and possibly accord unionized employees less protection than their unorganized counterparts.

42. *See, e.g.*, Magnan v. Anaconda Indus., 193 Conn. 558, 572, 479 A.2d 781, 788 (1985); Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

43. 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986).

44. *Id.* at 1161-62.

45. *Id.* at 1171.

46. *Id.*

47. 36 Cal. 3d 752, 769, 206 Cal. Rptr. 354, 363, 686 P.2d 1158, 1167 (1984).

48. *See* Malmstrom v. Kaiser Aluminum and Chem. Corp., 231 Cal. Rptr. 820, 832 (Ct. App. 1986); Koehrer v. Superior Court, 181 Ca. App. 3d 1155, 1171 (1986).

49. 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984).

a written IBM policy which gave her the right to privacy and a job at IBM even though her "off the job" behavior might not meet the approval of the employee's manager.[50] The supervisor countered with a discharge asserting a conflict of interest.[51] The court found that sufficient evidence existed to support the jury's finding that the employer, in fact, had no belief that a conflict of interest existed.[52] Thus, *Rulon-Miller* may be read to allow an action for "stonewalling" based upon intentional disregard of a unilaterally implemented company policy which ripened into a contractual right, rather than a bargained-for contract as in *Koehrer*.[53]

Although a number of factors are relied upon in finding a breach of the covenant, courts struggle to define the meaning of "good faith and fair dealing" in the context of employment.[54] Some courts apply the covenant of good faith and fair dealing when the employer terminates the plaintiff's employment without good cause and for the purpose of retaining valuable benefits based on the employee's past service.[55] This theory has been applied when the employer fired a salesperson without good cause in order to deprive the employee of commissions on a previous sale.[56] In most of the decisions applying this theory, the discharge not only lacked "cause", but was motivated by a desire to deprive the employee of compensation attributable to past services.[57] The Massachusetts Supreme Court recognized such a claim when an employee was discharged without good cause in the absence of any improper motive, yet was nonetheless deprived of ascertainable future financial benefits related to past services.[58]

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50. *Id.* at 246 n.3, 208 Cal. Rptr. at 528 n.3.

51. *Id.*

52. *Id.* at 253.

53. In *Rulon-Miller* the court expressly found that the plaintiff's "right to be free of inquiries concerning her personal life was based on substantive contract rights she had flowing to her from IBM policies." 162 Cal. App. 3d 241, 251, 208 Cal. Rptr. 524, 532 (1984).

54. *See* Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 478, 499 Cal. Rptr. 613, 619 (1984); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 328-29, 171 Cal. Rptr. 917, 927 (1981); Gray v. Superior Court, 181 Cal. App. 3d 813, 820-21 (1986).

55. *See, e.g.*, K Mart Corp. v. Ponsock, 2 Lab. Rel. Rep. (BNA) (2 Indiv. Emp. Rights Cas.) 56 (Feb. 24, 1987) (discharge motivated by desire to deprive employee of pension); Maddaloni v. Western Mass. Buslines, Inc., 386 Mass. 877, 438 N.E.2d 351 (1982), *aff'g* 422 N.E.2d 1379 (Mass. App. 1981); Khanna v. Micro Data Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985).

56. Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1971). *See also* Khanna v. Micro Data Corp., 170 Cal. App. 250, 215 Cal. Rptr. 860 (1985).

57. *See, e.g.*, Khanna v. Micro Data Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985); Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1971); Maddaloni v. Western Mass. Buslines, Inc., 386 Mass. 877, 438 N.E.2d 351 (1982), *aff'g* 12 Mass. App. 236, 422 N.E.2d 1379 (1981).

58. Gram v. Liberty Mut. Ins. Co., 429 N.E.2d 21 (Mass. 1981); Cort v. Bristol Meyers Co., 385 Mass. 300, 303-04, 431 N.E.2d 908, 910 (1982).

C. *Public Policy Exception*

A majority of courts recognize the public policy exception to the employment at-will rule.[59] Under this exception, a discharge which frustrates a clear mandate of public policy gives rise to tort liability.[60] Unlike the theories of recovery discussed above, application of the public policy exception does not depend on express or implied representations of job security, "but rather reflects a duty imposed by law upon all employers in order to implement fundamental public policies ..."[61] Employees who have been accorded protection under this exception are generally discharged for: (1) refusing to commit an act prohibited by public policy;[62] (2) doing an act encouraged by public policy;[63] or (3) asserting or exercising a well established right.[64] Many courts nonetheless refuse to recognize the public policy exception. These courts reason that such a radical change in existing law should be left to the legislature which is in the best position to anticipate the impact of such change and delineate its scope.[65]

Courts have been most willing to apply the public policy exception in situations in which the employee is discharged for refusing to commit an unlawful or wrongful act. In *Peterman v International Brotherhood of Teamsters*,[66] the plaintiff refused his employer's request to commit perjury before a legislative committee. The court found that to permit discharge in such situations would seriously impair California's public policy embodied in the state criminal code prohibition of perjury and subordination of perjury.[67]

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59. States that either adopted or expressed a willingness to adopt a public policy exception to the at-will rule include Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, Washington, West Virginia, and Wisconsin. Note, Sides v. Duke Hospital: *A Public Policy Exception To The Employment-At-Will Rule*, 64 N.C.L. REV. 840 n.5 (1986); Note, *Employment-At-Will*, 16 ST. MARY'S L.J. 457, 461-62 n.25 (1985).

60. *See, e.g.*, Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980); Sheets v. Teddy's Frosted Foods, 179 Conn. 471, 427 A.2d 385 (1980).

61. Koehrer v. Superior Court, 181 Cal. App. 3d 1154, 1165, 226 Cal. Rptr. 820, 825 (1986).

62. *See infra* text accompanying notes 66-71.

63. *See infra* text accompanying notes 72-75.

64. *See infra* text accompanying notes 76-79.

65. *See, e.g.*, Hinrichs v. Traquilare Hosp., 352 So. 2d 1130, 1131 (Ala. 1977); Maus v. National Living Centers, Inc., 633 S.W.2d 674 (Tex. App. 1982); Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983).

66. 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

67. *Id.* at 189, 844 P.2d at 29. *See also*, Parnar v. Americana Hotels, Inc., 652 P.2d 625 (Hawaii 1982); Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378 (6th Cir. 1983).

In *Tameny v Atlantic Richfield*,[68] a sales representative was discharged because he refused to put pressure on local service station dealers to cut gasoline prices in furtherance of the company's scheme to regulate prices. The Supreme Court of California held that the sales representative had a cause of action in tort which would "implement the fundamental policies embodied [in California's] penal statutes."[69] Similarly, in *Harless v First National Bank of Fairmont*,[70] an office manager reported violations of the West Virginia Consumer Credit and Protection Act to his superiors. Shortly thereafter, the bank attempted to discard the files containing information concerning the illegal practices. The plaintiff was discharged after he prevented destruction of the files and delivered them to the bank's auditors. The court found that these facts stated a cause of action in furtherance of the state's public policy [71]

The public policy exception has also been applied when the employee is discharged for activity encouraged by public policy Thus, wrongful discharge actions have been sustained when employees were discharged for serving on juries.[72] In *Palmateer v International Harvester Company*,[73] the Supreme Court of Illinois held that, while no statute required citizens to report criminal activity, public policy favors citizens who discover and report crime. Thus, an employee discharged because he reported illegal activity by a fellow employee to a law enforcement agency was held to have stated a cause of action.[74] Similarly, a discharge motivated by a corporate president's threat to expose bribery and tax fraud was found to contravene policies embodied in the federal tax statutes.[75]

The public policy exception has been applied in cases where the employee is discharged for exercising a right recognized as well established public policy Discharges that are reactions to an employee's

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68. 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980).

69. *Id.* at 176, 610 P.2d at 1335, 164 Cal. Rptr. at 844. *See also* Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569 (Minn. 1987) (wrongful discharge motivated by a refusal to pump leaded gasoline into a vehicle designed for only unleaded gasoline, in violation of Federal law).

70. 246 S.E.2d 270 (W Va. 1978).

71. *Id.* at 276.

72. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975); Ruether v. Fowler & Williams, Inc. 255 Pa. 28, 386 A.2d 119 (1978). *See also* Johnson v. Appliance & T.V Center, Inc., 2 Lab. Rel. Rep. (BNA) (2 Indiv. Emp. Rights Cas.) 481 (May 7, 1987) (wrongful discharge in violation of 28 U.S.C. § 1875, providing statutory protection to federal jurors).

73. 85 Ill. 2d 125, 421 N.E.2d 876 (1981).

74. *Id.* at 133, 421 N.E.2d at 880. *See also* Brown v. Physicians Mut. Ins. Co., 679 S.W.2d 836 (Ky. App. 1984) (report to state insurance department); Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984) (report to state health officials).

75. Adler v. American Standard Corp., 538 F Supp. 572 (D. Md. 1982). *See also* Petrik v. Monarch Printing Corp., 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982).

compensation claim[76] or union activity[77] are held to be wrongful. Under this rationale, the whole panoply of constitutional rights can be invoked to protect an employee from discharge. For example, in *Novosel v Nationwide Insurance Company*,[78] the Third Circuit found an actionable expression of public policy in the first amendment of the United States Constitution and the analogous provision of the Pennsylvania State Constitution. Novosel refused to lobby the state legislature in support of Nationwide's position on no-fault insurance reform. The court held that a corporation could not condition employment upon political subordination. The court side-stepped the requirement of state action and stated that the political process would be irremediably distorted if a corporation could control the political activities of the employees.[79]

An issue typically arising in "whistle-blower" cases is the requirement that the activity complained of must in fact be unlawful or improper.[80] Several states have enacted whistle-blower statutes to protect private sector employees who disclose information concerning employer wrongdoing.[81] These statutes generally protect those entertaining a reasonable belief that the reported activity is illegal and deny protection to those knowingly making false statements.[82] Some whistle-blowing statutes also require the employee to first report the alleged illegal activity to the employer and allow a reasonable time for rectification before reporting the matter to a public body [83]

In *Wagenseller v. Scottsdale Memorial Hospital*,[84] the plaintiff alleged that she was fired because she refused to "moon" the audience

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76. *See, e.g.*, Hrab v. Hayes-Albion Corp., 302 N.W.2d 606 (Mich. App. 1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978); Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973); Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984). Several states have specifically provided a cause of action by statute. *See, e.g.*, OHIO REV. CODE ANN. § 4123.90 (Page 1986); MD. ANN. CODE art. 101, 39A(a) (1979); N.Y WORKERS' COMP LAW § 120 (McKinney Supp. 1980).

77. *See* Glen v. Clearman's Golden Cock Inn, Inc., 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 (1961); Smith v. Baue Funeral Home, 370 S.W.2d 249 (Mo. 1963).

78. 721 F.2d 894 (3d Cir. 1983).

79. *Id.* at 900. *See also* Cort v. Bristol-Myers Co., 385 Mass. 300, 431 N.E.2d 908 (1982) (right to privacy); Slohoda v. United Parcel Serv., Inc., 193 N.J. Super. 586, 475 A.2d 618 (1984) (same). *But see* Grzyb v. Evans, 700 S.W.2d 399 (Ky. 1985) (first amendment applies only to state action and not to private employers).

80. Lopatka, *The Emerging Law of Wrongful Discharge - A Quadrennial Assessment of the Labor Law Issue of the 80's*, 40 BUS. LAW 1, 9-10 (1984).

81. *See, e.g.*, IND. CODE ANN. § 20-12-1-8 (West Supp. 1987); MICH. COMP. LAWS ANN.§§ 15.361-15.369 (West 1981) (Whistle Blowers Protection Act); ME. REV. STAT. ANN. tit. 26, § 833 (Supp. 1985); N.Y LABOR LAW § 740 (McKinneys Supp. 1987).

82. *See, e.g.*, CAL. GOV. CODE §§ 10540-46, 19683 (West 1986); CONN. GEN. STAT. ANN. §§ 31-51 (West 1986); Melchi v. Burns Int'l Security Servs., Inc., 597 F Supp. 575 (E.D. Mich. 1984) (Michigan Whistle Blowers Protection Act); ME. REV. STAT. ANN. tit. 26, § 833 (1986).

83. *See* ME. REV. STAT. ANN. tit. 26, § 833 (1986); N.Y. LABOR LAW § 740 (McKinney Supp. 1987).

84. 147 Ariz. 370, 710 P.2d 1025 (1985).

with her supervisor in a skit performed during a river rafting trip. The court found the requisite public policy in Arizona's indecent exposure statute even though such activity may not even have been a technical violation of that statute. The court held that the statute established a clear policy that public exposure of one's anus is contrary to public standards of morality Thus, even though there is no crime, it may be a violation of public policy to compel an employee "to do an act *ordinarily* proscribed by the law."[85]

Despite widespread acceptance of this tort, the courts have not formulated an adequate definition of "public policy" Most courts resort to the vague formulation: "a clear mandate of public policy."[86] The uncertainty engendered by the search for adequate sources of public policy has been described as the "Achilles Heel" of the public policy exception.[87] Indeed, application of the various constitutional provisions to private employers makes the protection available under the public policy exception quite expansive.[88]

Some courts recognize judicial decisions as a source of public policy [89] However, it has been stated that "courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject."[90] This caution is well founded since recognition of judicial decisions as the basis of public policy could swallow the at-will rule and allow courts to impose something close to a just cause standard on all discharges.

III. The Preemption of Employment-Related State Regulation and Common Law Actions by Federal Labor and Employee Benefits Laws

State authority to regulate the employment relationship and employment benefits is limited because many such regulations are preempted by the federal statutes governing labor relations and pension rights.[91]

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85. *Id.* at 380, 710 P.2d at 1035 (emphasis added).

86. *See, e.g.*, Parnar v. Americana Hotels, 65 Hawaii 370, 652 P.2d 625 (1982); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984).

87. Palmateer v. Int'l Harvestor Co., 85 Ill. 2d 124, 130, 52 Ill. Dec. 13, 15-16, 421 N.E.2d 876, 878 (1981).

88. *See supra* text accompanying note 79.

89. *See, e.g.*, Wagenseller v. Scottsdale Memorial Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); Palmateer v. International Harvester Co., 85 Ill. 2d 124, 130, 52 Ill. Dec. 13, 15, 421 N.E.2d 876, 878 (1981); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72, 47 A.2d 505, 542 (1980). At least one decision has relied upon foreign law as a source of public policy. Crossen v. Foremost-McKesson, Inc., 537 F Supp. 1076 (N.D. Cal. 1982) (Thai law).

90. Parnar v. Americana Hotels, 65 Hawaii 370, 380, 652 P.2d 625, 631 (1982).

91. Federal preemption of state laws is based on the supremacy clause of the United States Constitution: "This Constitution, and the laws of the United States which shall be

The National Labor Relations Act (NLRA)[92] and the Labor Management Relations Act (LMRA or Taft-Hartley Act)[93] are two federal statutes operating to preempt attempts by states to legislate or otherwise regulate various employment matters between employers and organized employees. The Employee Retirement Income Security Act of 1974 (ERISA)[94] establishes comprehensive federal regulations covering employee benefit plans, and preempts state laws relating to employee pension and benefits matters. This section briefly reviews the various doctrines and theories of preemption developed and applied under the federal labor laws and the interpretation and application of ERISA's preemption provisions. Particularly, this section focuses on the manner in which federal regulatory schemes reduce the availability of state statutory and common law wrongful discharge remedies.

A. *Labor Law Preemption*

The heading "Labor Law Preemption" is intrinsically misleading because the displacement of state regulatory power in the area of labor relations occurs under several different legal guises. Three distinct, sometimes overlapping sources of preemption in the field of industrial relations are: (1) Congress' intent to give the National Labor Relations Board ("NLRB" or "the Board") exclusive jurisdiction over specified areas; (2) Congress' intent to leave unregulated certain areas of labor relations; and (3) Congress' intent that the interpretation of Section 301 labor collective bargaining agreements be resolved under uniform federal law.

Each source or "theory" of preemption and its application to employee wrongful discharge cases is briefly reviewed below. The third source of preemption flowing from Section 301 of the LMRA[95] is the most relevant to the preclusion of wrongful discharge and other state-based actions regulating the employment relationship, and accordingly receives more extensive treatment.

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made and pursuant thereof shall be the supreme law of the land " U.S. Const. art. VI, Cl. 2, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1924). The supremacy clause provides that federal law preempts conflicting state laws. The doctrine of preemption is based on the critical inquiry whether Congress expressly or impliedly intends to preempt state law in a given area. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58 (1978); Shaw v. Delta Air Lines, 463 U.S. 85, 105 (1983).

92. 29 U.S.C. §§ 151-169 (1982).

93. *Id.* at § 185 (A) (1982 & Supp. I 1983). The Railway Labor Act, 45 U.S.C. §§ 151-188 (1985), governs employment disputes and industrial relations between carriers and employees and also preempts independent employee wrongful discharge actions.

94. 29 U.S.C. §§ 1001-1145, 1201-1242, 1301-1461 (1982).

95. *Id.* at § 185 (1982).

1. *The Three Theories of Preemption*

a. *NLRB Preemption*

The National Labor Relations Board is the administrative agency charged with the enforcement of the National Labor Relations Act (NLRA),[96] and principally responsible for the regulation of labor relations. The Board is vested with jurisdiction over disputes arising under the NLRA involving allegations of interference in the workplace, and activities of employees, employers, and labor organizations protected by federal labor law. Under Section 7 of the LMRA,[97] both organized and nonorganized employees may engage in protected concerted activity, such as for their mutual aid or protection, for which they may not be disciplined or discharged.[98] Section 8 of the Act defines unfair labor practices on the part of employers and unions.[99]

The NLRA vests the Board with exclusive jurisdiction over disputes involving conduct that is either clearly protected by Section 7 or conduct clearly prohibited by Section 8.[100] With respect to these matters, NLRB jurisdiction preempts the ability of a state court to enjoin or otherwise regulate this conduct unless state police functions are affected.[101] One approach used to decide whether the NLRB has jurisdiction to determine in the first instance if conduct is either protected or prohibited by the labor laws is to analyze whether the controversy or dispute is identical to the one that can be presented to the Board.[102] Therefore, when the interests of the Board and the federal labor laws and the state's interest in providing a remedy to its citizens for particular conduct are "discrete concerns," the state cause of action does not frustrate federal labor law policy and is therefore not preempted.

Under a labor law preemption doctrine established in *San Diego Building Trades Council v Garmon*,[103] the Board's preemptive jurisdiction also extends to include disputes over conduct and activities arguably protected by Section 7 or arguably prohibited by Section 8. The so-called *Garmon* preemption is not based on actual federal pro-

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96. *Id.* at §§ 151-168 (1982).
97. *Id.* at § 160(a).
98. NLRB v. Washington Aluminium Co., 370 U.S. 9 (1962).
99. 20 U.S.C. § 161 (1982).
100. San Diego Bldg. Trades Counsel v. Garmon, 359 U.S. 236 (1958).
101. In addition to the supremacy clause, the doctrine of primary jurisdiction provides a basis for federal labor law preemption. When a subject matter is considered beyond the experience of the courts and within the province of a specialized administrative body, the doctrine of primary jurisdiction establishes that the administrative agency will first hear a dispute. The Board initially reviews most disputes in the field of labor relations.
102. In *Belknap, Inc. v. Hale*, the Supreme Court held that an employer s promises of permanent employment to workers hired as replacements for striking union members could be enforced as a state court breach of contract action. 463 U.S. 491 (1983).
103. 359 U.S. 236 (1959).

tection of the conduct at issue,[104] but involves protecting the primary jurisdiction of the NLRB.[105]

Under *Garmon* preemption, a court must balance the implicated state and federal interests to determine if it must yield exclusive jurisdiction to the Board.[106] Case law interpreting this balancing recognizes several exceptions to *Garmon* preemption. These exceptions are: (1) when state action is of peripheral concern to federal labor laws and the jurisdiction of the Board; (2) when state action involves conduct in which the state has an overriding interest, and which is deeply rooted in local concerns; and (3) when minimal risk exists that state action will interfere with the effective administration of federal labor policy.[107] The *Garmon* preemption doctrine and its exceptions prevent application of certain state laws to conduct that, although not directly prohibited or protected by national law, could upset the balance of power between labor and management established by the NLRA.[108]

b. *"Balance of Power" or "*Machinists*" Preemption*

Preemption also occurs when states attempt to regulate an area in which Congress has determined regulation should not exist. In *Machinists v. Wisconsin Employment Relations Commission*,[109] the Supreme Court held that a state may not penalize a concerted refusal to work overtime. Neither prohibited nor protected under the NLRA, the union's acts nevertheless triggered an economic weapon unfettered by legislation and thus intended by Congress "to be controlled by the free play of economic forces."[110] In other words, no state can interfere with the right of employers and unions to engage in the deployment of their economic weapons when federal law contemplates the arsenal's use.[111] Under this *Machinists* preemption rule, even state rules of general application that alter the economic balance between labor and management are invalid, unless it can be demonstrated that Congress has decided to permit the state regulation at issue.[112]

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104. Brown v. Hotel & Restaurant Employees & Bartenders, 104 S. Ct. 3179, 3186 (1984).

105. Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 1912-13 n.9 (1985).

106. *Id.*, Metropolitan Life Ins. Co. v. Massachussets Travelers Ins. Co., 105 S. Ct. 2380, 2394 n.26 (1985).

107. Brown v. Hotel and Restaurant Employees, 104 S. Ct. 3179, 3186 (1984).

108. Teamsters Union v. Morton, 377 U.S. 252 (1964); Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 278 (1980).

109. 427 U.S. 132 (1976).

110. *Id.* at 140, quoting NLRB v. Nash-Finch Co., 404 U.S. 138 (1971); Metropolitan Life Ins. Co. v. Massachussets Travelers Ins. Co., 105 S. Ct. 2380, 2395 (1985).

111. Lodge 76 Int'l Assoc. of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976).

112. *See* New York Tel. Co. v. New York Labor Dep't, 440 U.S. 519, 539-40 (1979) (plurality opinion); *see also* Metropolitan Life Ins. Co. v. Massachussets Travelers Ins. Co., 105 S. Ct. 2380, 2394-95 nn.27-28.

The Supreme Court, in a recent analysis of the scope of *Machinists*-type preemption, emphasized that local or federal regulation establishing minimum terms of employment is not necessarily preempted if the purpose of the state legislation is not incompatible with the general goals of the NLRA. In *Metropolitan Life Insurance Co. v Massachussetts Travelers Insurance Co.*,[113] the Court reviewed a Massachussetts law mandating certain mental health benefits for union and nonunion employees alike. The Court concluded that the mandated benefit laws constituted minimum standards independent of the collective bargaining process minimally affecting interests implicated in the NLRA.[114] Expounding on this conclusion in *Fort Halifax Packing Company, Inc. v Coyne*,[115] the Court declined to preempt a state statute requiring employers, under certain circumstances, to provide a severance payment to employees. Acknowledging that "the Maine Statute gives employees something for which they otherwise might have to bargain,"[116] the Court upheld the state's right to establish employee rights to certain levels of severance pay

Construed broadly, the rule drawn from *Metropolitan Life* and *Fort Halifax* could have major reverberations: that minimum state labor standards designed to give specific minimum protections to both union and nonunion workers are enforceable if they do not *directly* affect the rights of self-organization or collective bargaining protected by the NLRA.[117]

c. *Section 301 Preemption*

Section 301 of the Taft-Hartley Act of 1947[118] gives federal and state courts the power to enforce collective bargaining agreements.[119] The substantive law applied under Section 301 is a federal law of labor which the courts fashion from the policies expressed in the national

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113. 105 S. Ct. 2380, 2395-98 (1985).

114. *Id.* at 2397.

115. 107 S. Ct. 2211, 2222 (1987).

116. *Id.* at 2222. Maine is not the only jurisdiction with a statutory severance provision. For example, Puerto Rico not only mandates severance pay but makes the statutory severance payment an exclusive remedy for "discharge[] without good cause." P.R. LAWS, ANN. tit. 29, § 185a-b (1986).

117. Although the Court recognized that under the *Machinists* preemption doctrine "analysis of the structure of the federal labor law is to determine whether certain conduct was meant to be unregulated," *id.* at 2394 n.27, it nevertheless appeared to concentrate its analysis on the absence of conflict between the Massachussets law and protected or prohibited conduct under the NLRA. *See id.* at 2398-99. This is curious, because to conclude that the conduct regulated by a state is not even arguably protected or prohibited by the NLRA is merely the first step in a *Machinists* preemption analysis. *Id.* at 2397-99.

118. 29 U.S.C. § 185 (1982).

119. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

labor laws.[120] Thus, although state courts share concurrent jurisdiction over Section 301 actions to enforce collective bargaining agreements, a suit alleging a violation of a labor contract provision must be brought under Section 301 and be resolved under the federal common law of labor.[121]

For all practical matters, a Section 301 action alleging the violation of a collective bargaining agreement will be resolved by deference to an arbitrator's decision. In substance, the federal common law that has developed under Section 301 provides that grievance and arbitration machinery incorporated in virtually every labor agreement preempt all but an extremely curtailed form of judicial scrutiny [122] Most collective bargaining agreements contain a grievance and arbitration procedure to resolve disputes over employment actions and contract interpretation. This process has been described as creating an industrial jurisprudence that referees (1) the respective employer and employee rights set forth in an agreement, and (2) the disputes arising over the meaning of the agreement's provisions.[123] The agreement by employees to submit their contractual disputes to grievance and arbitration processes is considered the quid pro quo of a no strike clause granted to the employer.[124] The level of deference paid to this exchange parlays the statutory policy favoring "the fullest use of collective bargaining in the arbitral process."[125]

Under Section 301, an arbitrator's decision is considered final on the merits as long as the award draws its essence from the collective bargaining agreement.[126] Employees may not resort to an independent civil lawsuit or contract claim in substitution for their rights under the grievance procedure in a collective bargaining agreement.[127] Thus, the law imposes on employees and employers alike the duty to exhaust their rights under the internal grievance process and arbitration scheme.

The court will set aside an arbitration award only under a limited set of circumstances. An award can be set aside if an arbitrator is without the discretion or the express authority to settle a dispute. Judicial

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120. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

121. Teamsters v. Lucas Flower Co., 369 U.S. 95 (1962); Allis Chalmers Corp. v. Lueck, 105 S. Ct. 1904, 1910-11 (1985).

122. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

123. Arbitration, in the vast majority of collective bargaining agreements, is the terminal stage in the private grievance process. Less expensive and time consuming than litigation, arbitration is seen as advancing the parties' cooperative efforts as a vehicle especially attuned to labor-management relations. Typically, the arbitrator interprets and applies provisions of the contract to a given dispute, applying knowledge about the custom and practice of the industry or even that particular workplace. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960).

124. Boys Markets, Inc. v. Retail Clerks' Local 770, 398 U.S. 235, 248 (1970).

125. Collyer Insulated Wire, 192 NLRB 837, 841 (1971).

126. *Id.* at 731-32.

127. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

scrutiny is limited to the question of whether or not the parties agreed to arbitrate the grievance.[128] The presumption is that an arbitration clause is all-inclusive, and an arbitration result is overturned only if an express provision excludes a particular grievance from arbitration. In sum, a party choosing not to pursue grievance procedures is preempted from bringing the Section 301 action, and an employment dispute culminating in binding arbitration similarly cannot be reviewed on the merits by a court.

In three cases, designated as the *Steelworkers* trilogy, the Supreme Court enunciated and established the now well-accepted presumption of arbitrability of labor disputes.[129] When confronted with a claim which on its face is governed by the contract, the courts must compel arbitration. Any doubts concerning arbitrability should be resolved in favor of arbitration, unless the arbitration clause is not susceptible to an interpretation covering the dispute.

For employees covered by a collective bargaining agreement containing an arbitration clause, the presumption of arbitrability and the deference to arbitration results seem to preclude the ability of employees to successfully assert state law wrongful discharge claims. However, federal and state courts have held that wrongful discharge actions based on public policy and based in tort are also available for employees covered by collective bargaining agreements. These categories of wrongful discharge actions surviving Section 301 preemption are reviewed below.[130]

2. *Preemption of State Wrongful Discharge, Tort and Other Employment-Related Actions*

The exceptions to the preemption doctrine recognized in *Garmon* and its progeny laid the foundation for the development of wrongful discharge

128. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

129. Gateway Coal Co. v. United Mine Workers, 94 S. Ct. 629, 637 (1974).

130. Various federal law exceptions have been carved into the requirement of exhaustion of contractual remedies. A union employee claiming discrimination under Title VII does not forfeit or waive the private cause of action. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). Similarly, employees can raise wage claims arising under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982). Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981). And, in *McDonald v. City of West Branch*, 104 S. Ct. 1799 (1984), the Supreme Court held that an arbitration award did not prevent an employee from bringing a Section 1983 civil rights action in a federal court. 42 U.S.C. § 1983 (1982).

These federal exceptions to the doctrine of exhaustion of contractual remedies and to the finality of awards are well-defined and narrow, representing a deference to specific and prominent national interests. In the recognition of these exceptions, national labor policy favoring collective bargaining agreements and arbitration is balanced against a competing national concern. Kenyon & Rohlik, *"Deflouring" Lucas Through Labored Characterizations: Tort Actions of Unionized Employees*, 30 ST. LOUIS U.L.J. 1, 44 (1985).

exceptions. In *Farmer v United Brotherhood of Carpenters, Local 25*,[131] a union member's right to bring a state tort cause of action against the union for the intentional infliction of emotional distress was upheld. In permitting the tort action, the Supreme Court balanced the state's interest in regulating the conduct against the potential for interference in the federal regulatory scheme.[132] The Court established that to survive the state tort must be either unrelated to the alleged discrimination by the union against the union member, or "a function of the particularly abusive *manner* in which the discrimination is accomplished or threatened."[133] The Court also emphasized that the California tort law permitting recovery for emotional distress required a showing of outrageous conduct.[134]

Thus, certain state causes of action sounding in tort are not preempted if: (1) the elements of the tort are different than the elements of an unfair labor practice charge; (2) different and alternative remedies are available in state court for the employee; and (3) the tort action can be resolved without an adjudication of the merits of the underlying labor dispute.[135] In the wake of *Farmer*, courts have held that the NLRA does not preempt union employees' claims of outrage or intentional infliction of emotional distress against their employers.[136] Some courts agree that the NLRA does not preempt a union employee's claim of retaliatory discharge for filing a worker's compensation claim.[137]

In these cases, however, and in *Farmer*, the enforcement of an arbitration clause in a collective bargaining agreement was not at issue. Even though courts have held that an action is not necessarily preempted by federal labor law, it may be preempted by the employee's failure to exhaust collective bargaining grievance procedures.[138] Generally, if the union employee's claim could be addressed by means of the collective

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131. 430 U.S. 290, 302 (1970).

132. *Id.* at 297.

133. *Id.* at 305 (emphasis supplied).

134. *Id.*

135. Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 283 (1980).

136. *See, e.g.*, Collins v. General Time Corp., 549 F. Supp. 733 (N.D. Ala. 1982); Sitek v. Forest City Enters., Inc., 587 F Supp. 1381 (E.D. Mich. 1984); Meuser v. Rocky Mountain Hosp., 685 P.2d 776 (Colo. App. 1984).

137. The retaliatory discharge cause of action for filing workers' compensation claims has been extended to union employees to provide a complete remedy to a victim of retaliation, and to enforce and protect the state's unquestioned interest in the proper operation of its workers' compensation scheme. *See, e.g.*, Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984); Daughtery v. Lucky Stores, Inc., 603 F Supp. 975 (C.D. Ill. 1985); Meyer v. Byron Jackson, Inc., 207 Cal. Rptr. 663 (Cal. App. Dist. 2 1984); Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir. 1981). *But see* Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985); Taylor v. Saint Regis Paper Co., 560 F. Supp. 546 (C.D. Cal. 1983).

138. *See* Pushing v. General Time Corp., 549 F Supp. 768 (N.D. Ala. 1982); Collins v. General Time Corp., 549 F. Supp. 733 (N.D. Ala. 1982).

bargaining grievance procedure, it will be barred if the employee has not exhausted that procedure.[139]

The Supreme Court has settled that a tort label is insufficient to avoid federal preemption under Section 301 of the LMRA if the issues involved are substantially contractual. The interaction of state tort actions and Section 301 preemption was explored in a recent Supreme Court decision, *Allis Chalmers Corp. v Lueck*.[140] In *Allis Chalmers*, the employee brought an action in state court for the bad faith handling of an insurance claim under a disability plan included in a collective bargaining agreement.[141] Because the employee did not grieve under the collective bargaining agreement, the Supreme Court of Wisconsin held that his claim was not breach of contract but a cause of action in tort arising from the manner in which the disability claim was handled.[142] The Supreme Court reversed, holding that the tort claim was preempted by Section 301. Reaffirming the preemptive effect of Section 301 to "extend beyond suits alleging contract violations,"[143] the Court outlined the following test:

> Our analysis must focus, then, on whether the [state] tort action confers non-negotiable state law rights on employers or employees independent of any rights established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with the consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is preempted.[144]

The policies underlying this rule include the promotion of uniformity in the interpretation of labor agreements, along with the need to preserve the parties' federal right to agree that their contract disputes will be resolved through arbitration.[145] The Court distinguished preemptable rights that do not exist independently of private agreements (and thus can be waived or altered by agreement) from substantive rights derived from a separate body of law [146] The Court, however, did not consider

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139. *See, e.g.*, Bertrand v. Quincy Market Cold Storage & Warehouse Co., 728 F.2d 568 (1st Cir. 1984) (implied covenant of good faith and fair dealing and breach of contract); Wynn v. Boeing Military Airplane Co., 595 F Supp. 72 (D. Kan. 1984) (implied covenant of good faith and fair dealing).

140. 471 U.S. 202 (1985).

141. *Id.* at 203-05.

142. Lueck v. Aetna Life Ins. Co., 342 N.W.2d 699, 702 (Wis. 1984).

143. *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985).

144. *Id.* at 213. "[T]he question of whether the [State] tort is sufficiently independent of federal contract interpretation to avoid preemption is, of course, a question of federal law." *Id.* at 214.

145. *Id.* at 210-11, 219-20.

146. *Id.* at 213 n.8.

"whether an independent, non-negotiable, state-imposed duty which does not create similar problems of contract interpretation would be preempted."[147]

In a decision handed down just this past term, the Supreme Court sidestepped this open question once again. In *International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*,[148] the Court reviewed an Eleventh Circuit decision holding that a union employee's lawsuit against the union for injuries she received at the workplace was a state common law tort action turning on basic negligence principles, and thus not preempted by the federal labor laws.[149] The Supreme Court reversed, observing that a court would have to review the collective bargaining agreement to determine if the union had assumed the duty of care it allegedly breached. As in *Allis Chalmers* it was necessary to interpret the contract before imposing tort liability.[150] The Court, rejecting Hechler's attempt to argue that the union was subject to a state-law duty of care independent of the collective bargaining agreement, held that Hechler's state-law theory was not properly presented to the courts below.[151] In *dicta* the Court continued that "[e]ven if such a state-law obligation, which would directly regulate the responsibility of a union in a workplace, could survive the pre-emptive power of federal labor law, we conclude that it is too late in the day for respondent to present to the Court this new-found legal theory."[152]

Following *Allis Chalmers*, lower courts have plunged into the process of deciding whether or not state law tort and contract claims brought by union employees are "intertwined" with the terms of employment covered by a collective bargaining contract.[153]

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147. *Id.* at 217 n.11.

148. 107 S. Ct. 2161 (1987).

149. Hechler v. International Brotherhood of Electrical Workers, AFL-CIO, 772 F.2d 788, 790-91, 794 (11th Cir. 1985).

150. IBEW v. Hechler, 107 S. Ct. 2161, 2166 (1987).

151. *Id.* at 2168 n.5.

152. *Id.* at 2169 n.5.

153. *See, e.g.*, Snow v. Bechtel Const. Inc., 123 LRRM 3245 (C.D. Cal. 1986) (state public policy claim preempted); Mann v. Georgia-Pacific Corp., No. 86-1008, slip op. (W.D. Ark. Aug. 27, 1986) (intentional infliction of emotional distress claim preempted); Cox v. United Technologies, Inc., 1 IER Cases 1254 (1987) (retaliatory discharge public policy claim preempted); Johnson v. Hussman Corp., 123 LRRM 3074 (8th Cir. 1986); Kirby v. Allegheny Beverage Corp., No. 86-3985 (slip op. 4th Cir. Feb. 9, 1987) (invasion of privacy claim for drug search preempted); Clarke v. Laborors, 123 LRRM 3173 (M.D. Fla. 1986) (negligence action against union preempted). Courts ruling that union employees' claims are not preempted include: Gonzalez v. Prestress Engineering Corp., 1 IER Cases 1242 (1987) (retaliatory discharge claim not preempted); Varnum v. Nu-Car Carriers, 123 LRRM 3068 (11th Cir. 1986) (state law fraud claim not preempted because it involved conduct before acceptance of employment).

B. *ERISA Preemption*

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to correct a mounting tide of employee pension plan abuse and mismanagement.[154] Congress perceived that state laws and regulations were not adequate safeguards against the mismanagement and fraud that jeopardized the distribution of private pension funds to its employee participants.[155] To correct these abuses, ERISA attempts to comprehensively regulate the establishment, operation and administration of two types of employee benefit plans: welfare plans and pension plans. "Employee welfare benefit plans" covers a wide variety of benefit programs: from medical, accident, death, disability and unemployment and vacation benefits to apprenticeship, and other non-pension fringe benefits such as training programs, day care centers, scholarship funds, and even prepaid legal services.[156] Welfare plans can also include any benefit described in Section 302(c) of the Labor Management Relations Act of 1947 (the "Taft-Hartley Act").[157] Pension plans provide retirement or deferred income to employees.[158] ERISA regulates participation, vesting, and funding of pension plans.[159] Both the welfare and the pension plans are subject to uniform reporting and disclosure requirements and fiduciary standards.[160] The substantive terms of welfare plans, however, are not regulated.[161]

Congress recognized that a comprehensive and uniform body of federal law was necessary to sufficiently protect employee benefit rights. The

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154. H.R. Rep. No. 464, 533, 93d Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Ad. News 4639 (Education and Labor Comm.) (1973).

155. 29 U.S.C. § 1001(a) (1982).

156. 29 U.S.C. § 1002(1) provides as follows:

> the terms "employee welfare benefits" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) 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, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Id.

157. *Id.* Under Taft-Hartley employers cannot make payments to union officials or union funds. Employer contributions to union welfare funds are permitted if the fund is administered jointly by the employer and the union. These funds are required to be in trust and may only be distributed for certain purposes, viz: pensions, health benefits, workers' compensation, unemployment benefits or accident and sickness benefits.

158. 29 U.S.C. § 1002(2) (1982).

159. *Id.* at §§ 1051-1086 (1982).

160. *Id.* at §§ 1021-1031, 1101-1114.

161. *See* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 91 (1983). However, some regulation of substantive welfare benefit provisions does occur through the Internal Revenue Code.

resulting legislation was intended to insure that: (1) workers and beneficiaries receive sufficient information about their benefit plans; (2) adequate standards of conduct control the administrators of employee benefit plans and plan funds; and (3) adequate funds are maintained to distribute promised benefits. Furthermore, under ERISA, no one, including the employer, the union, or any other person, may fire or otherwise discriminate against an employee in any way to prevent the individual from obtaining a pension or welfare benefit or exercising his/her rights under ERISA.[162]

1. *Employee's Remedies under ERISA*

To implement its objectives, ERISA requires benefit plans to establish "reasonable" procedures for the settlement of disputed claims.[163] The claimant must be given at least 60 days after the claim has been denied in which to request a review. If the denial is not reversed, the employee must exhaust all administrative procedures before bringing suit in a federal district court to enforce or clarify rights under a plan approved by ERISA.[164] Congress vested jurisdiction in the United States District Courts over such civil actions.[165] However, a court should overturn an administrator's decision only if the decision is arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law. If the administrator's decision is a reasonable interpretation of the plan's terms and made in good faith, it is not arbitrary or capricious. This standard of review embraces the philosophy that a court should defer to the administrator's reasonable resolutions of ambiguities in the language of a plan.[166]

ERISA requires exhaustion of the grievance process before resort to litigation of a claim, and then allows only a deferential standard of review of the decision. Therefore, to redress an administrator's adverse

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162. 29 U.S.C. § 1140 (1982). Section 1140 of ERISA provides as follows:

> [It is unlawful] for any person to discharge or discriminate against a participant or beneficiary for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act *Id.*

See West v. Butler, 621 F.2d 240, 244-46 (6th Cir. 1980); Zipf v. AT&T Co., 7 EBC 2289, 2291 (3d Cir. 1986).

163. Department of Labor regulations require employee benefit plans to describe these claims procedures in the "summary plan description." The procedures have to include giving participants and beneficiaries timely written notice of any time limits for filing claims. The claim procedures cannot interfere with an employee's rights under ERISA. If a claim for benefits is denied, ERISA requires an employee benefit plan (the "Plan") to give adequate notice in writing to the employee explaining the reasons for the denial and offer the employee a reasonable opportunity for a full and fair review of the decision. *See* 29 U.S.C. § 1133 (1982).

164. 29 U.S.C. § 1132 (1982).

165. *Id.* at § 1132(e).

166. Jung v. FMC Corp., 755 F.2d 708, 711-13 (9th Cir. 1985).

determination with respect to any benefit provided in an employee welfare benefit plan, the employee must exhaust administrative procedures prior to appealing to the courts.[167] Employers incorporating all potential ERISA-covered benefits in their welfare plan can take advantage of this exhaustion requirement and, if litigated, ensure that the court (not a jury) will scrutinize the decision under a favorable arbitrary and capricious standard of review for administrative decisions.[168]

2. *Preemption of State Laws*

To prevent states from enacting laws conflicting with or undermining ERISA's federal scheme for protecting private employee benefit rights, Congress inserted an express state law preemption clause in ERISA insuring its effectiveness.[169] In Section 1144, Congress broadly mandates that ERISA "supercede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" described under the Act.[170]

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167. Parties bringing an action under ERISA Section 1132(a)(1)(B) to enforce or clarify the terms of a benefit plan must exhaust administrative remedies. *See, e.g.*, Wolf v. National Shopmen, 728 F.2d 182, 185 (3rd Cir. 1984). There is a conflict between the circuits, however, on whether Congress intended to condition an employee's ability to redress all ERISA violations in federal court upon the exhaustion of internal remedies. Some courts have held, for example, that claims based on Section 510 of ERISA, 29 U.S.C. § 1140, which provides that employees cannot be discharged or discriminated against for the purpose of interfering with the employee's rights under the plan or under ERISA, do not require exhaustion. Kross v. Western Elec. Co., 701 F.2d 1238 (7th Cir. 1983); Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 863 (1986). Other courts have concluded that Section 503 of ERISA, 29 U.S.C. § 1133, refers only to procedures regarding claims for *benefits*, and that Congress intended that the remedy for Section 510 discrimination should be provided by the courts. Zipf v. AT&T Co., 7 EBC 2289, 2290-92 (3d Cir. 1986); Amaro v. Continental Can Co., 724 F.2d 747 (9th Cir. 1984).

168. Of course, this assumes that an employer first establishes an employee benefits plan, for the existence of a plan is a prerequisite to jurisdiction under ERISA. A mere allegation that an employer or employee organization ultimately decided to provide benefits is not enough to invoke ERISA's coverage and does not allege the "establishment" of a plan. Scott v. Gulf Oil Corp., 754 F.2d 1499, 1504 (9th Cir. 1985); *see* Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982).

169. 29 U.S.C. § 1144 (1982).

170. Section 1144(a) provides in full:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of chapter shall supercede any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this Title and not exempt under Section 1003(b) of this Title. This section shall take effect on January 1, 1975.
>
> The preemptive effect of Section 1144(a) is qualified by an "insurance savings clause" which states that: Except as provided in subparagraph (B), nothing in the subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.

Id. at 1144(b)(2)A. A specified exception to the savings clause appears in section 1144(b)(2)(B), the "deemer clause," providing that an employee benefit plan shall not be

The administration of plans requiring compliance with different laws in different states resulted in high costs, lower wages, and fewer benefits. Congress intended that uniformity and certainty as to controlling law would encourage employees to establish pension and welfare plans, and would make the administration of ERISA-covered employee benefit plans less costly and more efficient.[171] Section 1144 was enacted to minimize the conflicts between state laws that varied widely in their substantive and procedural requirements, and to "minimize interference with the administration of employee benefit plans."[172] Hailing it as the "crowning achievement of [the] legislation," Congress effectuated these purposes with the expansive provision to preempt state laws that "relate to" employee benefit plans covered by ERISA.[173] "State law" is defined to include "all laws, decisions, rules, regulations, or other state action having the effect of law, of any state."[174]

ERISA's preemption provision is explicit and broad. Supreme Court cases addressing the issue of preemption of state statutes by Section 1141 begin with the question of whether the challenged state statute "related to" employee benefit plans within the meaning of the preemption provision. The Supreme Court's first review of ERISA's preemption provision was in *Allessi v Raybestos-Manhattan, Inc.*[175] *Allessi* held that a New Jersey statute "related to" pension plans governed by ERISA because federal law permits a method of calculating pension benefits that the statute eliminated.[176] The Court concluded that "even indirect state action bearing on private pensions may encroach upon the area

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deemed to be an insurance company "for purposes of any law of any state purporting to regulate insurance companies " The deemer clause reinforces the strength of ERISA's preemption by scaling back the scope of the savings clause as a state's laws regulating insurance companies and other insurance matters are not exempted when they are applied directly to benefit plans. Recently, the Supreme Court has interpreted the savings and deemer clauses and concluded that the savings clause "appears to have been designed to preserve the McCarran-Ferguson Acts' [15 U.S.C. § 1012(a)] reservation of the business of insurance to the States." Metropolitan Life Ins. Co. v. Massachussetts Travelers Ins. Co., 105 S. Ct. 2380, 2392 n.21 (1985).

171. S. Rep. No. 383, U.S. Code Cong. & Ad. News 4999-5000 (Finance Committee) (1973).

172. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 105 n.25 (1983). Congress recognized that state based claims and jury awards for "lost pension benefits" that far exceed an employee/plaintiff's entitlement under a pension plan itself would not create "a favorable setting for the growth and development of private pension plans." 1974 U.S. Code Cong. & Ad. News 5166.

173. 120 Cong. Rec. 29,197 (1974) (Statement of Representative John Dent, Chairman of the Subcommittee on Labor of the House and Labor Education Committee).

174. 29 U.S.C. § 1144(c)(1).

175. 451 U.S. 504 (1981).

176. *Id.* at 524.

of exclusive federal concern."[177] In *Shaw v Delta Airlines*,[178] the Court again discussed the interpretation of Section 1141 and its scope and pronounced that "relate to" should be given its broadest common sense meaning to preempt all state laws having "a connection with or reference to such a plan." The Court determined that the preemption section displaces all state laws penetrating its sphere, even when they are consistent with ERISA's substantive requirements.[179]

In its most recent ERISA preemption decisions, the Court has reinforced the broad reading it gave to Section 1144 in *Shaw*.[180] In *Pilot Life Insurance Co. v Dedeaux*,[181] the Court ruled that an employee's common-law breach of contract and tort claims based on the improper processing of a claim for benefits under an ERISA-regulated plan fell under ERISA's preemption clause. The Court determined that the common law causes of action related to an employee benefits plan, and further held that Section 502(a),[182] the civil enforcement provisions of ERISA, are intended to be exclusive with the preemptive force of Section 301.[183] Therefore, state laws and regulations or state common law claims are preempted insofar as they indirectly or directly present

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177. *Id.* at 525.

178. 463 U.S. 85 (1983). The Court reviewed a New York law that requires employers to provide identical benefits for pregnancy that are provided for other disabilities. *Id.* at 89-90.

179. *Id.* at 98-99. In *Shaw*, the Supreme Court relied on Black's Law Dictionary 1158 (Fifth Edition 1979) for its common sense definition of "relate": "To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." 463 U.S. 85, 97 n.16 (1983). In the earliest versions of ERISA the general preemption clause displaced only those state laws that "relate to" benefit plans. Metropolitan Life Ins. Co. v. Massachusetts Travelers Ins. Co., 105 S. Ct. 2380, 2392 n.23 (1985); H.R. Conf. Rep. No. 93-1280, 383 (1974). 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent).

180. Metropolitan Life Ins. Co. v. Massachusetts Travelers Ins. Co., 105 S. Ct. 2380 (1985); Metropolitan Life Ins. Co. v. Taylor, 107 S. Ct. 1542 (1987); Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549 (1987). In *Metropolitan Life*, the Supreme Court concluded that although a Massachusetts statute mandating minimum mental health care benefits related to ERISA benefit plans, it determined that the legislation was exempted under the insurance savings clause, Section 1144(b)(2)(A).

181. 107 S. Ct. 1549 (1987).

182. 29 U.S.C. § 1132(a).

183. Pilot Life Ins. Co. v. Dedeaux, 107 S. Ct. 1549, 1553, 1555-58 (1987). The Court reviewed the deliberate parallel drawn by Congress between § 502(a) of ERISA and § 301 of the LMRA, and concluded that like § 301 preemption all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-regulated plans should be treated as federal questions governed by § 502(a). *Id.* at 1557. In *Metropolitan Life v. Taylor*, 107 S. Ct. 1542 (1987), the Court extended its holding in *Pilot Life* by holding that common law causes of action preempted by ERISA that come within the scope of § 502(a) are removable to federal court under 28 U.S.C. § 1441(b). This conclusion, that the "well-pleaded complaint" doctrine applies to recharacterize a state law complaint as an action arising under ERISA, also flowed from the obvious purpose of Congress to make § 502(a) suits federal questions in the same manner as § 301 of the LMRA. *Id.* at 1547

"a connection with or reference to" a particular employee benefit plan.

In the three Supreme Court decisions holding that Section 1144 preempted specific state laws, no standard has been enunciated defining the outer limits of the phrase "relate to." A suggestion describing parameters to the preemption provision appears in *Shaw* when the Court pronounced that "some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law relates to the plan."[184] Thus, to review a state law or claim a court must determine that the law's connection with or reference to the employee benefit plan is more "remote" than "indirect," but "tenuous" or "peripheral" to uphold the regulation as not preempted by ERISA.[185]

Some lower courts, however, have construed ERISA preemption more narrowly and require that a state regulation must have a closer relation to ERISA-covered benefit plans than a mere "connection with" or "reference to" such plans.[186] These courts limit the preemptive scope of ERISA in Section 1144 to those state laws and regulations that purport to directly or indirectly regulate the terms and conditions of employee benefit plans.[187] Under each of these standards of preemption, Section 1141 is applied to preempt a broad range of state laws. Of particular relevance to this discussion are the preemption decisions involving: (1) state laws and regulations impacting the terms or types of benefits in ERISA plans; and (2) state laws and common law rules providing remedies for abuses arising in the administration of an ERISA plan, including breach of contract, fraud, and discrimination claims based on determination of benefits.[188]

Both *Shaw* and *Metropolitan Life* are examples of state laws held preempted because they regulated substantive areas covered by ERISA, respectively, a requirement that employee benefit plans pay pregnancy benefits and an indirect requirement that plans provide mental health benefits.[189] Similar statutory requirements that employers provide specific

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184. 463 U.S. 85, 100 n.21 (1983).

185. *See* AT&T Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979).

186. *See* Martori Bros. Distribs. v. James-Massengale, 781 F.2d 1349 (9th Cir. 1986); Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985); Lane v. Goren, 743 F.2d 1337 (9th Cir. 1984); Rebaldo v. Cuomo, 749 F.2d 133 (2nd Cir. 1984), *cert. denied*, 105 S. Ct. 2702 (1985); Stone & Webster Engineering Corp., 690 F.2d 323 (2nd Cir. 1982), *aff'd sub. nom.*, Arcudi v. Stone & Webster Engineering Corp., 453 U.S. 1220 (1983).

187. UFCW Arizona Welfare Trust v. Pacyga, 7 EBC 2295, 2297 (9th Cir. 1986).

188. Other categories of laws that have been found preempted by Section 1144 are: (1) state laws that create or impede reporting, disclosure, funding or vesting requirements for ERISA plans; (2) state laws that attempt to govern the calculation of benefits to be paid under ERISA plans; and (3) state laws which indirectly or directly tax employee benefit plans. 29 U.S.C. § 1144(b)(5)(B)(i) (1982).

189. Shaw v. Delta Airlines, Inc., U.S. 85, 88-90 (1983); Metropolitan Life Ins. Co. v. Massachusetts Travelers Ins. Co., 105 S. Ct. 2380, 2389 (1985).

health and health-related benefits have been determined preempted.[190] These cases are not surprising, as Section 1002(1) explicitly lists a variety of health benefits that are included in the definition of "employee welfare benefit plan."

The most recent and interesting developments in the area of ERISA preemption involve benefits that are not so obviously listed in the definition of a welfare plan. Federal courts interpret severance pay as an ERISA-covered benefit.[191] In *Gilbert v Burlington Industries, Inc.*,[192] the Second Circuit concluded that severance pay is an "unemployment" benefit under Section 1002(1), and that the defendant's unfunded severance pay policy constituted an "employee welfare benefit plan."[193] The court's opinion recognized that severance benefits are not expressly enumerated in Section 1002(1)(A) and that the only mention of severance pay is the reference to pooled severance benefits in Section 186(c).[194] However, the court rested its conclusion on its interpretation that severance pay is necessarily a benefit in the event of unemployment and on "the reasonableness" of a Department of Labor regulation that construes Section 1002(1)(B) to include severance pay [195] The court also relied on similar decisions arriving at the conclusion that unfunded severance pay plans are covered under ERISA.[196] The *Gilbert* court further determined that the employee/plaintiff's statutory and common law claims for severance pay and wage supplements were preempted by ERISA.[197] The court ruled that "the state law claims seeking to enforce the severance pay policy would determine whether any benefits are paid, and directly affect the administration of benefits under the plan."[198] The court observed that the plaintiffs in the action were

190. *See, e.g.*, Children's Hosp. v. Whitcomb, 778 F.2d 240 (5th Cir. 1985) (mental health benefits); Standard Oil Co. v. Agsalud, 633 F.2d 760 (9th Cir. 1980), *aff'g*, 442 F Supp. 695 (N.D. Cal. 1977), *aff'd mem.*, 454 U.S. 801 (1981) (alcohol and drug abuse treatment benefits).

191. Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd.*, 106 S. Ct. 3267 (1986); Gilbert v. Burlington Indus., Inc., 765 F.2d 320 (2d Cir. 1985), *aff'd mem. sub. nom.*, Roberts v. Burlington Indus., 106 S. Ct. 3267 (1986); Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985). *See also* Adam v. Joy Mfg. Co., 651 F Supp. 1301 (D. N.H. 1987).

192. 765 F.2d 320 (2d Cir. 1985).

193. *Id.* at 325.

194. Section 1002(1)(B) includes within the definition of a welfare plan "any benefit" described in 29 U.S.C. § 186(c).

195. 765 F.2d 320, 325 (2d Cir. 1985); *see* 29 C.F.R. § 2510.3-1(a)(3) (1984); Blau v. Delmonte Corp., 748 F.2d 1348, 1352 (9th Cir. 1985).

196. *See, e.g.*, Scott v. Gulf Oil Corp., 754 F.2d 1499, 1502 (9th Cir. 1985); Dhayer v. Weirton Steel Division of Nat'l Steel Corp., 571 F Supp. 316, 329-30 (N.D. W Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 2387 (1984); Vatrella v. N.L. Industries, Inc., 529 F Supp. 1357 (D. N.J. 1982); Pinto v. Zenith Radio Corp., 480 F Supp. 361, 363 (N.D. Ill. 1979), *aff'd mem.*, 618 F.2d 110 (7th Cir. 1980); Donnelly v. Aetna Life Ins. Co., 468 F Supp. 696, 698 (E.D. Pa. 1979).

197. 765 F.2d 320, 327 (2d Cir. 1985).

198. *Id.*

employed in 16 different states and thus exemplified how the policy favoring national uniformity in the field of employee benefits strongly supported preemption.[199] Other courts disagree with the reasoning in *Gilbert*, concluding instead that Congress did not intend to preempt state laws concerning the availability of severance pay.[200]

The Supreme Court indirectly addresses this debate in a recent decision upholding a Maine severance pay statute. In *Fort Halifax Packing Co., Inc. v. Coyne*,[201] the Court ruled that the operation of a statute requiring an employer, in the event of a plant closing, to provide a one-time severance payment to employees was not preempted by ERISA when the employer had not established a welfare benefits plan with a severance provision.[202] Although the Maine law related to a "benefit", the Court reasoned that in the case before it the statute did not relate to a benefit "plan."[203] Responding to the accusation of the four dissenting justices that the majority was overruling *Gilbert* and other lower court decisions classifying plans paying severance benefits as ERISA plans,[204] the majority found those cases "completely consistent" with their analysis because the employers in the *Burlington* cases paid severance benefits under a bona fide "plan."[205]

Another controversial category of benefits is vacation benefits. Thus far, some courts have ruled traditional vacation pay arrangements paid out of an employer's general assets not preempted by ERISA and thus subject to state regulation.[206] However, vacation benefits not funded out of any employer's general assets can be another welfare benefits plan provision covered by ERISA.[207] Practically, employers may have to

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199. *Id.*, *but see* National Metal Crafters v. McNeil, 602 F Supp. 232 (N.D. Ill. 1985).

200. Blakeman v. Mead, 7 EBC 1036 (6th Cir. 1985).

201. 107 S. Ct. 2211 (1987).

202. *Id.* at 2215.

203. *Id.* at 2214-15.

204. *Id.* at 2224 (dissenting opinion).

205. *Id.* at 2220-21 (majority opinion).

206. *See, e.g.*, California Hosp. Ass'n v. Hennings, 770 F.2d 856 (9th Cir. 1985); National Metal Crafters v. McNeil, 602 F Supp. 232 (N.D. Ill. 1985), *rev'd on other grounds*, 784 F.2d 817 (7th Cir. 1986); Shea v. Wells Fargo Armored Serv. Corp., 8 EBC 1369 (2nd Cir. 1987) (sick leave and vacation wages are excluded payroll practices under ERISA). Although vacation benefits are expressly listed as ERISA employee welfare benefit plans in the ERISA statute, 29 U.S.C. § 1002(1)(A) (1982), some courts have followed a Department of Labor regulation that exempts "payroll practice" payments of employee compensation out of the general assets of an employer from employee welfare benefit plans under ERISA. 20 C.F.R. § 2510.3-1 (1985). *But see* Holland v. National Steel Corp., 791 F.2d 1132, 1134-36 (4th Cir. 1986) (West Virginia Statute requiring employers to pay vacation pay even though employer eliminated its vacation benefits program). Blakemen v. Mead Containers, 779 F.2d 1146, 1149 n.2 (6th Cir. 1985) (vacation provisions fall under ERISA).

207. California Hosp. Ass'n v. Hennings, 770 F.2d 856, 861 (9th Cir. 1985); Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust, 679 F.2d 1307, 1308-09 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 1 (1983).

comply with state laws regulating vacation pay, but ERISA, not state law, will govern how severance pay can be modified, denied, or eliminated by an employer.[208]

Numerous examples are documented in the case law of state law-based claims and common law causes of action based on the termination of benefits. These cases apply the "connection with" or "reference to" test enunciated in *Shaw*, and generally conclude that the state claims "relate to" employee benefit plans.[209] Among the causes of action preempted are: (1) employee/plaintiff's claims that denial of benefits is a breach of express or implied contract,[210] or a breach of an implied covenant of good faith and fair dealing; (2) employee/plaintiff's claim that denial of benefits constitutes various state tort claims;[211] or (3) employee/plaintiff's claims that discharge was discriminatory because based on employee's exercise of ERISA rights.[212] In an interesting case, the Sixth Circuit reviewed a Michigan wrongful discharge claim brought by a fiduciary who asserted that he was terminated for fulfilling his obligations under ERISA and that his discharge was in contravention of public policy.[213] The court determined that the wrongful discharge action related to the ERISA pension plan involved, and that the public policy invoked in the common law action was created by ERISA and therefore preempted. The court further concluded that because the action concerned the remedies available to a trustee of an ERISA pension plan who was terminated for performing his duties under ERISA, the case did not fall within the "peripheral and remote" exception to the preemption statute.[214] In another case, an employer's alleged oral agreement to provide a severance benefit was held to be an ERISA plan that preempted the employee/plaintiff's common law breach of

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208. Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427, 483 (1987) [hereinafter Gregory].

209. *See, e.g.*, McMahan v. McDowell, 7 EBC 1859 (3rd Cir. 1986); Central States Pension Fund v. Kraft Co., 7 EBC 2257 (6th Cir. 1986); Blakemen v. Mead Containers, 779 F.2d 1146, 1149 n.2 (6th Cir. 1985); Ellenberg v. Brockway, Inc., 763 F.2d 1091 (9th Cir. 1985).

210. *See, e.g.*, Jackson v. Martin-Marietta Corp., 7 EBC 2767 (11th Cir. 1986); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1983); Miner v. International Typographical Union Pension Plan, 601 F Supp. 1390 (D. Colo. 1985); King v. James River-Pepperell, Inc., 593 F Supp. 1344 (D. Mass. 1984); Folz v. Marriott Corp., 594 F Supp. 1007 (W.D. Mo. 1984); Kelly v. International Business Machines Corp., 573 F Supp. 366 (E.D. Pa. 1983).

211. *See, e.g.*, Dependahl v. Falstaff, 653 F.2d 1208 (8th Cir. 1981); Ogden v. Michigan Bell Tel. Co., 657 F Supp. 328 (E.D. Mich. 1987) (state board and misrepresentation claims preempted); Howard v. Parisian Inc., No. 86-7401, slip op. (N.D. Ala. 1987) (intentional infliction of emotional distress claim preempted); Sokol v. Bernstein, No. 85-6357, slip op. (C.D. Cal. 1986) (emotional distress damage claim dismissed).

212. Gordon v. Matthew Bender & Co., Inc., 562 F Supp. 1286 (E.D. Ill. 1983).

213. Authier v. Ginsberg, 757 F.2d 796, 800 (6th Cir. 1985).

214. *Id.* at 800 n.6.

contract action for the severance benefit.[215] The court acknowledged that it could entertain an ERISA cause of action for benefits under the "plan," but that the employee/plaintiff had solely pursued a breach of contract cause of action and could not adopt an ERISA theory on appeal.[216] In contrast, some state claims have been sustained and held not preempted by ERISA.[217]

IV PREVENTIVE PERSONNEL POLICIES AND PROCEDURES

Although the precise cause of action for wrongful discharge arises out of a termination of employment for reasons which violate state or federal public policy, modern wrongful discharge actions are creatures of contract.[218] Given this premise, an employer may choose either or both of two approaches to controlling wrongful discharge actions: (1) it may choose to disclaim the existence of any contract or representation

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215. Haigler v. J. F Jelenko & Co., 7 EBC 2376 (Miss. Ct. App. 1986). In contrast, a recent decision by the Eleventh Circuit, *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986), held that although federal courts can create federal common law under ERISA, because under ERISA oral modifications of employee benefit plans are not permissible the common law doctrine of estoppel permitting oral modifications of ERISA plans was not available. *Id.* at 959-61.

216. Haigler v. J. F Jelenko & Co., 7 EBC 2376, 2378 (Miss. Ct. App. 1986). Under 29 U.S.C. § 1132(e)(1) state courts have concurrent jurisdiction with the federal courts over an action for benefits.

217. *See* Kelly v. IBM Corp., 573 F Supp. 366 (E.D. Pa. 1983) (ERISA did not preempt employee's claim of intentional infliction of emotional distress); Babiarz v. Hartford Special, Inc., 480 A.2d 561 (Conn. App. 1984) (breach of contract action to enjoin termination of retirement benefits not preempted); Miner v. International Typographical Union Pension Plan, 601 F. Supp. 1390 (D. Colo. 1985) (court suggests common law claims proper in state if brought in state court). The Ninth Circuit held that a state fair employment agency's action against an ERISA covered fund based on charges of age and race discrimination by an employee of the fund itself were not preempted because the state law only prohibited employment discrimination and did not regulate the "terms and conditions" of employee benefit plans. Lane v. Goren, 743 F.2d 1337, 1338 (9th Cir. 1984).

218. *See, e.g.*, Pugh v. Sees Candies, Inc., 116 Cal. App. 3d 311 (1981) (discharge for supporting federal and state policies toward organized labor wrongful); Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3d Cir. 1977) (Pennsylvania Human Relations Act provides its own legal remedy; therefore, policies therein not basis for wrongful discharge action); Dadas v. Prescott, Ball & Turben, 529 F. Supp. 203 (N.D. Ohio 1981) (no basis for wrongful discharge in Ohio employment discrimination statute); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443 (1980) (employee alleging that implied contract prevents termination without cause demonstrates exception modifying employment at will and implies a contractual covenant that employer must act in good faith in carrying out implied contract); Mers v. Dispatch Printing Co., 19 Ohio St.-3d 100 (1985) (employer conditional promise to reinstate may create contractual modification of doctrine of employment at-will or may estop employer from relying on the doctrine); Hedrick v. Center for Comprehensive Alcoholism Treatment, 7 Ohio App. 3d 211 (Hamilton Cty. App. 1982) (allegations citing promises in employee handbook may show modification of employment at-will by contract or estoppel); Toussaint v. Blue Cross and Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980) (employer's written policies can give rise to contractual rights even without "mutuality" and specific contractual term of employment).

modifying the doctrine of employment at-will; and/or (2) it may choose to deal, within the four corners of the contract, with employee complaints of wrongful discharge.

A. *Protecting Employment At-Will in the Employee Handbook*

The most obvious opportunity for an employer to inadvertantly modify the employment at-will relationship is in an employee handbook or a well-published procedure manual. Both have become popular means of communicating employer personnel policies to employees. A number of jurisdictions have found binding contractual representations, or representations giving rise to promissory estoppel, in employee handbooks and manuals.[219]

Notwithstanding an employer's ability to modify the doctrine of employment at-will through an employee handbook or personnel manual, the same vehicle may be used to confirm that the employee *is* terminable at-will. In *Argento v A & I Weiss Brothers, Inc.*,[220] the employee's complaint was dismissed because the language of the employment contract provided for termination at-will. Similarly, where a handbook indicates within its four corners that it merely represents a *unilateral* statement of company rules, such a reservation may be sufficient in itself to prevent the handbook from creating a contract.[221] Thus, statements within a handbook or manual that the policies set forth are subject to unilateral change by the employer and that the policies are for the employer's convenience may well limit the contractual or estoppel effect of the policies on employment at-will status.

Several courts have held that prominently displayed disclaimers of contractual commitment, when appearing within a handbook or personnel manual, are sufficient to negate contractual or promissory estoppel claims. In *South v Toledo Edison Company*,[222] a disclaimer stating that pronouncements in the handbook and other written policy documents should not be construed as a promise of continued employment was sufficient to negate a contract. A similar disclaimer of contractual obligations within a handbook precluded an employee's claim for sev-

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219. *See generally*, Helle v. Landmark, Inc., 15 Ohio App. 3d 1, 472 N.E.2d 765 (Lucas Cty. App. 1984); Hedrick v. Center for Comprehensive Alcoholism Treatment, 7 Ohio App. 3d 211, n.1, 454 N.E.2d 1393 (1986); Toussaint v. Blue Cross and Blue Shield of Mich., 408 Mich. 579, n.1, 292 N.W.2d 880 (1980); Woolley v. Hoffman-LaRoche, Inc., 119 LRRM 2380 (1985).

220. Case No. 82CV-09-5266 (Franklin Cty. Ohio CP, Nov. 1982). *See also* Russell v. R & I Weiss Bros., Case No. 82-CV-09-5326 (Franklin Cty. Ohio CP Dec. 1982).

221. Wojciechowski v. Peoples Drug Stores, Inc., Case No. I-83-089 (Lucas Cty. Ohio App., July 1983); Isgro v. Deaconess Hosp., Case No. 41996 (Cuyahoga Cty. Ohio App., Nov. 1980).

222. Case No. L-85-083 (Lucas Cty. Ohio App., Mar. 1986). *See also* Procuniar v. General Motors Corp., Case No. 8427 (Montgomery Cty. Ohio App., Apr. 1984).

erance pay based upon a handbook provision.[223] In *Rachubka v St. Thomas Hospital Medical Center*,[224] the court dismissed the employee's contractual claim because the handbook contained the simple statement that all employees were terminable at-will, thus reaffirming, within the four corners of what the employee alleged was the agreement, the common law rule of employment at-will.

Most handbooks and personnel manuals begin with a brief introductory statement containing the philosophy of the employer and the purpose of the handbook or manual. One suggested method for reaffirming the at-will status of the employee and disclaiming any contractual obligations based upon the handbook would be to include a paragraph stating that the handbook procedures are: (1) subject to unilateral change by the employer; (2) not intended to give rise to any contract with any employee; (3) that such pronouncements are merely recommended procedures for use by supervisors; and (4) all employees are considered to be terminable at the will of the employer. This paragraph could be inserted at the end of the introductory philosophical statement.

B. *Affirmance of Employment At-Will in the Employment Application*

Since the application for employment is a separate document from any procedure manual or handbook and is normally the document triggering the employment relationship, contractual disclaimers are most effective if included within it. Indeed, at the end of most modern employment applications, the prospective employee is required to sign an acknowledgment that all statements made within the application are true. A prominent disclaimer of contract and a statement reaffirming employment at-will within such an acknowledgment could well be viewed as most persuasively reflecting the intent of the parties.

In *Batchelor v Sears, Roebuck & Company*,[225] an employment application advertised itself as the entire agreement between the parties. It further stated that any additional terms applicable to the "contract" between the employer and employee could be added only by a president or vice president of the company The terms in the application included the declaration that the relationship was "at-will." The district court held that both the "at-will" statement and the requirement that the contract could only be modified by an officer of the company were valid parts of the agreement, and that those terms protected the employer from the employee's assertions that the contract had been orally modified in the course of her employment to one of just cause for discharge. Further, when the employee claimed that she did not closely read the

223. White v. Picker Int'l, Case No. 49770 (Cuyahoga Cty. Ohio App., Dec. 1985).
224. Case No. 11596 (Summit Cty. Ohio App., Oct. 1984).
225. 574 F Supp. 1480 (D.C. Mich. 1983).

application and therefore could not be held bound by it, the court ruled that, if true, this constituted negligence and estopped the employee from avoiding the instrument.[226]

Ideally, the acknowledgment in the employee application would also state, in prominent, darkened lettering, that the employee serves at the will of the employer and that employment can be terminated at any time by either the employer or the employee. Additionally, it would include a similarly highlighted statement to the effect that a contract of employment can be made with an employee only by a primary officer of the company, that no other employee or agent of the company is empowered to make such a contract, and any such contract must be made in writing or the employer will not honor it. In any event, disclaimers of contract and assertions of "at-will" employment in the job application might well be rendered ineffective if the employee later receives from the employer a handbook, personnel manual, or other written document representing that the employee has certain rights to continued employment, to due process in termination, or to other progressive disciplinary measures prior to termination.[227] Thus, whatever disclaimers or assertions of "at-will" employment are contained in the job application, the same representations should be contained in any successive written personnel policy statements published to employees by the employer.

C. *Dispute Resolution Procedures Adopted by the Employer May Preclude Traditional Wrongful Discharge Suits*

As pointed out in previous sections of this Article, federal and state courts have long held that grievance machinery contained in collective bargaining agreements between employers and unions precludes individual wrongful discharge suits. With the exception of fair representation suits under Section 301 of the Labor Management Relations Act, an employer or an employee has only a right to appeal a contract arbitrator's decision, but no right to *de novo* review of the decision.[228] Federal

226. *See also* Summers v. Sears, Roebuck & Co., 549 F Supp. 1157 (D.C. Mich. 1982).

227. In Kochis v. Sears, Roebuck & Co., Case No. CA-2175 (Richland Cty. Ohio App., Feb. 1984), a jury verdict for an employee, based on contract, was upheld despite an application disclaimer because other evidence of employer representations tended to support a contract which modified the "at-will" relationship.

228. *See supra* text accompanying note 220. In a fair representation suit, the employee-union member *who has exhausted the contractual grievance procedure without resulting relief or proves that such exhaustion would have been futile* sues the union and the employer to demonstrate that inadequate representation by the union thwarted his otherwise meritorious contractual claim. The employee is entitled to a jury, and the full merits of the employee's underlying claim are often fully litigated. Vaca v. Sipes, 368 U.S. 171 (1969). This suit, however, is a creature of statute, and applies only where the contract in question is between the employer and the union. 29 U.S.C. § 185.

courts, without a jury, will only look at the collective bargaining agreement and the written determination of the final grievance step to determine if the decision draws its essence from the agreement. If so, it is summarily upheld.[229] When employees covered by collective bargaining agreements between a union and their employer attempt to circumvent the contractual grievance procedure to bring traditional wrongful discharge actions before courts with juries, the courts bar all such claims until the employee/plaintiff exhausts the contractual procedure or demonstrates that the use of the procedure would have been futile.[230]

Even after the doctrines of deferential review and exhaustion of contractual grievance procedures were well established, it was not clear that where a grievance mechanism in a contract culminated in anything less than a full blown hearing and decision by a neutral arbitrator these doctrines would still apply. In *Haynes v United States Pipe & Foundry Company*,[231] a collective bargaining agreement provided that a four-step grievance procedure's final review be conducted by the plant manager, not a neutral arbitrator. Further, the agreement stated that if the parties could not reach a settlement of the grievance, the union would be free to resort to an economic strike. Although the grievance was taken through the initial four steps of the procedure, the employees did not strike; therefore, the court held that judicial review of the merits of the dispute was precluded by the failure to exhaust contractual remedies, i.e., to strike.

Since the *Haynes* decision, courts have consistently held that, whether or not the contractual grievance procedure culminates in a full blown hearing with an arbitrator, exhaustion will be required as long as the procedure clearly states that it is designed to be final and that the parties will be bound by its outcome.[232] Under federal labor law, then, if a contractual grievance procedure is fair on its face and the employee

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229. *See supra* text accompanying notes 123-26, 128. *See also, e.g.*, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960).

230. *See supra* text accompanying notes 123-26, 128. Wrongful discharge suits, including other claims in tort such as infliction of emotional distress and defamation, were dismissed in favor of exhaustion of contractual remedies in *Truex v. Garrett Freightlines*, 121 LRRM 3065 (9th Cir. 1986), *Cone v. Union Oil Co.*, 129 Cal. App. 2d 558, 564, 277 P.2d 464 (1954), and *Braswell v. Lucas Metro. Housing Auth.*, 26 Ohio App. 3d 51, 498 N.E.2d 184 (Lucas Cty. 1985). Even when non-exhausting employees have raised the futility defense, in most cases they have failed to meet the futility burden of proof and exhaustion has still been required. *See generally*, LeBoutillard v. Airline Pilot's Ass'n, 121 LRRM 3383 (D.C. Cir. 1985); Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984).

231. 362 F.2d 414 (5th Cir. 1966); *accord* Huffman v. Westinghouse Elec. Corp., 752 F.2d 1221 (7th Cir. 1985).

232. *See generally*, Smith v. Kerrville Bus Co., 748 F.2d 1049 (5th Cir. 1984); S. J. Groves & Sons v. Int'l Brotherhood of Teamsters, 581 F.2d 1241 (7th Cir. 1978).

cannot produce substantial evidence that resort to it would be futile, the employee will be required to exhaust contractual remedies before bringing suit in court. In the event of such suit, the court will review the procedure as applied to the facts of the employee's case and the collective bargaining agreement. If the agreement procedure was fairly applied, the decision will be upheld.

Under similar reasoning to that employed by federal courts reviewing labor contract grievance procedures, there is virtually no practical reason why a voluntary employer-initiated grievance procedure which is not a part of a *collective* bargaining agreement but is included in an employer's handbook should not be governed by similar rules. In *McMillion v Appalachian Power Company*,[233] a non-union employer's handbook set forth a four-step grievance procedure. A discharged employee attempted to bring suit against the employer in federal court without exhausting the procedure in the handbook. The employee alleged causes of action for wrongful discharge, breach of express contract of employment, and breach of implied contract of employment. In granting the employer's motion for directed verdict, the court first found that the handbook, as well as the oral representations surrounding it, constituted a contract of employment between the parties. In other words, it found that the employee's allegations of contract were supported by the evidence. The court next found that both parties were bound by the terms and conditions of the contract made up of the handbook and the oral representations surrounding it. Since the voluntary grievance procedure was a term of the contract, the employee was not entitled to bring a court action enforcing the contract until that grievance procedure had been exhausted.

The court in *McMillion* found only that the *exhaustion* requirement was applicable to a non-union contract embodying an employer voluntary grievance procedure. It was not required, based on the posture of the case, to determine what standard of review of the outcome of the grievance procedure it would employ if the employee/plaintiff had first exhausted, were denied relief, and then resorted to the court. However, since the reasoning of the *McMillion* court so closely parallels that of federal courts in reviewing collective bargaining agreement procedures, it is not unlikely that it would also have accorded deference in reviewing the result of non-union procedure. This is particularly true since the gravamen of the employee's claim of wrongful discharge was grounded in proving the very contract that integrally contained the grievance procedures.

In *Hamby v Genesco, Inc.*,[234] a state appeals court did review the outcome of a voluntary grievance procedure, without a jury, and upheld

233. 115 LRRM 4294 (S.D. W Va. 1982).
234. 627 S.W.2d 373 (Tenn. App. 1981).

the outcome. Indeed, the policy reasons often stated by courts for the requirements of exhaustion of contractual grievance procedures and deferential review of the outcome of those procedures in collective bargaining agreements seem equally applicable in the context of a contract between an individual employee and the employer:

> A contrary rule which would permit an individual employee to completely side-step the available grievance procedures in favor of a lawsuit has little to commend it [I]t would deprive the employer and union of the ability to establish a uniform and exclusive method for the orderly settlement of employee grievances.[235]

In either the union or non-union context, judicial decisions favoring deference to contractual employee dispute procedures advance the policy of judicial economy, reduce court dockets, and encourage the parties to police their own agreements.

D. *Employer-Employee Contractual Dispute Resolution Procedures*

Interest in the voluntary adoption of grievance procedures has been increasing over the past few years. In addition to reducing the impact of erosion of the employment-at-will doctrine, employers are finding that voluntarily adopted grievance procedures enhance employee job satisfaction by providing many of the same elements of job security traditionally provided by unions and amplify the employee's sense of well-being by reducing feelings of powerlessness.[236] The employer instituting a voluntary grievance procedure will need a procedure which is sufficiently fair, both on its face and in its administration, to warrant deference from courts requiring exhaustion, as well as a system encouraging employees to use it.

Commentators generally agree that any voluntary grievance procedure requires a clear written description which: (1) clarifies management's interest in dealing with disputes as they arise; (2) informs employees as to how to complain and protest and to whom; (3) demonstrates where to make the first approach and a clear method of appeal if that approach is unsuccessful; and (4) employs reasonable time frames within which the employee's complaint will be answered. A policy embodying the above four criteria should be clearly stated, made known to all employees at the commencement of employment, and re-emphasized to both employees and their supervisors at regular intervals.[237] Finally, any grievance

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235. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965).

236. Balfour, *Five Types of Non-Union Grievance Systems*, PERSONNEL MAGAZINE, (Mar.-Apr. 1984).

237. Human Resources Management: "Personnel Practices," ch. 3015 (CCH).

system requires clear assurances that an employee who resorts to it will be protected from retaliation. In other words, the system and its administrators must ensure that in most cases the employee will prevail when appropriate, and that use will be free from unfair or onerous side effects.[238]

Two popular systems of voluntary grievance handling are the "open-door policy" and the corporate "ombudsman." The former merely gives an employee the freedom to bypass one or more levels of management and proceed directly to upper management or to personnel in the hope of obtaining a more open-minded attitude towards solving the problem. The latter usually involves a dispute resolution specialist within the company who has the expertise to act as an informal mediator between the employee and the managers whom the employee believes are responsible for the problem.[239] Because these methods of grievance handling are typically open-ended, lack specific procedures, and do not result in written findings of fact, it is unlikely that courts would be willing to defer to them in terms of requiring exhaustion, and even less likely to apply some form of deferential review.[240]

The forms of internal grievance procedures currently in use which would most likely result in court deference and in employee perceptions of fairness are outside arbitration and peer review. Both of these methods of internal dispute resolution permit the employee to take an active, confrontational part in the proceedings and normally result in written findings.[241] For the employer who does not want to bear the expense of outside arbitration, the best choice may be a well-structured peer review procedure. A peer review committee is made up of a group of the grieving employee's peers, a committee of supervisory and/or management employees not immediately involved in the grieving employee's problem, or some combination of co-employees and managers. One ingredient ensuring fairness might be to give the employee some voice in selecting members of the peer review committee.

The drawback to peer review is that the employer and employee should expect an occasional incorrect decision from the committee since the "peers" are not professional arbiters but are instead co-workers. On the other hand, the peer committee would have great familiarity with the workplace, therefore closely paralleling the kind of review obtained from a specialist arbitrator. Additionally, as equals or near equals of

238. Balfour, *supra* note 236.

239. *Id.*

240. *See* Le Boutillard v. Airline Pilot's Ass'n, 121 LRRM 3383 (D.C. Cir. 1985); Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (9th Cir. 1984).

241. Human Resources Management: "Personnel Practices," ch. 3015, 3045 (CCH); Individual Employment Rights, "Arbitration May Stem Suits by Non-union Employees" (BNA. 11/25/86).

the employee, they closely parallel the ideal jury found in state or federal court.[242]

If voluntary internal dispute resolution or grievance procedures are adopted by an employer, the general type of dispute resolution used is much less important than the specific written procedures and the actual fairness in administration of those procedures. The value of a clearly written and fair procedure was well illustrated in *Bowes v. Hyatt Hotel Corporation.*[243] In that case, an employee sought to litigate in court a claim that her employer had unfairly passed her over for promotion. Her allegations of unfairness were based upon certain guarantees in a handbook supplied by her employer. The court agreed with her that the employee handbook contained certain terms of an implied contract with which the employer should be required to comply, but it also held that the clear grievance procedure set forth in the same handbook as a method for adjudicating disputes had been ignored. Finding no reason to believe that those procedures would not have been fairly applied, it dismissed the case.

Because of the broad preemptive effect granted ERISA, an employer's decision to incorporate ERISA-covered benefits in an employee benefit plan can immunize those benefit decisions from state court review and from the requirements imposed by state statutes. Furthermore, employees seeking to challenge a plan administrator's benefits decision must pursue the appeal procedure contained in the plan, and can overturn an ultimate adverse decision by the plan only if the employee can demonstrate to a court that the plan's decision was arbitrary or capricious.[244] Therefore, an employer attempting to establish a truly uniform grievance procedure should consider incorporating the internal dispute resolution system in its ERISA plan.

On its face, a grievance procedure itself does not seem to be a fringe benefit or an employee welfare benefit plan to which ERISA applies. However, there is some basis for the position that an internal grievance program implicates ERISA's regulatory concerns and should operate without the interference of conflicting state regulations.

One justification for labeling a voluntary grievance procedure an ERISA-covered benefit could rest on the relationship between the outcome of the grievance procedure and the employer's commitment to provide benefits to employees. This proposal may even be viewed as an

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242. Courts have often reasoned that arbitrators' decisions are entitled to deference partly *because* they are better qualified than judges or juries by virtue of familiarity with work environments. *See generally* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

243. Civil District Court, State of Louisiana, Parish of Orleans Case No. 80-16758 (July 1, 1981).

244. *See supra* text accompanying notes 163-68.

extension of current accepted ERISA practices. Certain benefits determinations processed under ERISA plans necessarily analyze the circumstances surrounding an employee's termination of employment and establish the reasons for the discharge. For example, the Supreme Court only recently emphasized that an employer's commitment to pay severance benefits to employees through a detailed administrative scheme involving "matters such as eligibility" is a "plan" covered by ERISA.[245] If an employer requires discharged or laid-off employees to process any grievances they have over their termination in order to obtain severance benefits, or condition receipt of severance pay on factors relating to the reason for discharge, the employer can possibly describe the grievance mechanism as a systematic administrative scheme established to determine the eligibility of severance pay claimants.[246]

Another, broader justification for the characterization of an internal dispute resolution process as an ERISA benefit is by reference to the definition of employee "welfare plan." "Welfare plan" includes any program which provides benefits for contingencies such as illness, accident, disability, death, *or unemployment.*[247] Similarly, the ERISA regulations promulgated under this section state that the definition of "welfare plan" includes plans providing benefits which are similar to severance benefits "although not so characterized."[248] An employer's voluntary grievance procedures thus arguably come under the statute's definition of "welfare plan" as a program providing benefits for the contingency of unemployment, or as a plan providing a benefit similar to or in substance a severance-type benefit.

If an internal dispute resolution process can be characterized as a plan governed by ERISA, it should qualify for preemption protection. Given the status of wrongful discharge law in the fifty states, a regional or national employer could not establish and consistently enforce a "uniform administrative scheme which provides a set of standard procedures to guide processing of claims."[249] If falling under ERISA's preemption umbrella, companies could operate the grievance procedure

245. Fort Halifax Packing Co., Inc. v. Coyne, 107 S. Ct. 2211, 2215 n.5 (1987).

246. Other examples of benefits decisions reviewing an employer's basis for termination exist. In the course of determining if a beneficiary is entitled to elect "continuation coverage" of a group health plan under 26 U.S.C. § 162(k), the question whether or not an employee was terminated "other than by reason of gross misconduct" can be decided. 26 U.S.C. § 162(k)(3)(B). Also, the application of valid "bad boy" clauses or forfeiture provisions in employee welfare benefit plans or pension plans with excess or accelerated vesting schedules rests on determinations that the employee committed a wrongful act against the employer. 26 C.F.R. § 1.411(a)-4(c) example (1) (1986). *See, e.g.*, Gutting v. Falstaff Brewing Corp., 541 F Supp. 345 (E.D. Mo. 1982).

247. 29 U.S.C. § 1002(1) (1982).

248. *Id.* at § 2510.3-1(a)(3) (1986).

249. Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211, 2216 (1987).

system without being required to accommodate conflicting state regulatory schemes. The dispute-resolution process could be governed by a uniform set of administrative practices without exposure to "a patchwork scheme of regulation."[250] Employees in turn obtain the guarantee that the grievance system meets applicable uniform ERISA standards and is subject to ERISA's reporting, disclosure, and fiduciary requirements.

At first blush, it may seem remote to suggest that federal rather than state law could or should govern employees' ability to bring wrongful discharge actions without exhausting internal grievance procedures. However, the need and desire to implement an enforceable, internal dispute resolution process sheltered from the "balkanized patchwork"[251] of state statutory and common law regulation is rational, and responds to the diverse transformations in wrongful discharge law from what was, in effect, a uniform "federal" common law of employment at-will. Whether through ERISA or some other federal statutory framework, a legislative scheme permiting employers and employees to establish, rely upon and enforce a fair and full grievance procedure would protect each from the vagaries of both weak and strong state regulation.

V CONCLUSION

Management consultants and social scientists now estimate that at least a third of United States employers are using some kind of voluntary complaint system within their organizations.[252] Although the cost of such procedures, including adminstrative time implementing and administrating them, may be high, court dockets in several states are overflowing with wrongful discharge suits seeking remedies ranging from several hundred thousand to several million dollars. Private or contractual dispute resolution in a non-union employment setting, therefore, is an idea that employers and employees should embrace.

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250. *Id.* at 2217.

251. Gregory, *supra* note 208, at 484.

252. ROWE & BAKER, THE EXECUTIVE DILEMMA: "ARE YOU HEARING ENOUGH EMPLOYEE CONCERNS?" (1985). In the article "Non-union Grievance Procedures" appearing in the January 1985 edition of Personnel Magazine, the author reported on the results of a study which had been conducted among the magazine's readers approximately one year earlier. A hundred questionnaires were sent out and fifty-two companies responded. Of the fifty-two respondants to the "Personnel" study, 62% said they had a formal grievance procedure for non-unionized employees. 45% of the respondants to the study utilized a written multi-step procedure. 25% of these respondants' systems had been in effect for longer than ten years, and 37% had been in effect from one to ten years. The first two steps to all of these procedures involved the immediate and intermediate supervisors as representatives of management. The third step invariably employed some form of peer review normally called a "jury" or "hearing committee." These committees varied in size from three to five members, but the majority of committees had some members chosen by the employee.