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Julius G. Getman

PUBLIC POLICY IMPLICATIONS OF ERISA

JULIUS G. GETMAN*

It is my function to generalize after listening to the commentary of the experts on the Employee Retirement Income Security Act ("ERISA").[1] Because I am not a scholar in this field I can offer a different perspective on what we have heard.

The speakers are in agreement about several points. First, there is the importance of ERISA, which stems from the amounts of money involved and the impact on pensions and people's lives.[2] This aspect of the statute influences the way it is applied and the manner in which the law develops. Second, ERISA is in the process of change. This is best illustrated through a comparison of ERISA to basic labor law, a subject that I teach.[3] Congress enacts statutory amendments to the National Labor Relations Act every twelve to fifteen years.[4] With ERISA, however, statutory changes

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* Professor of Law, University of Texas.

1 Employee Retirement Income Security Act of 1974, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)).

2 *See* 29 U.S.C. § 1001(a) (1988). Congress has declared that benefit plans "substantially affect the revenues of the United States because they are afforded preferential federal tax treatment." *Id.* Furthermore, it found that "despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." *Id.*

> The following statistics exemplify the economic importance of pension plans: In 1975, the first full calendar year in which ERISA was on the books, there were approximately 340,000 total retirement plans, covering over 44.5 million participants and beneficiaries. These plans had assets of over $543 billion. By the end of 1983, the number of private pension plans had more than doubled, totaling more than 775,000 and covering almost 67 million participants, and their assets were approximately $900 billion.

Francis X. Lilly, *The Employee Retirement Income Security Act*, 35 LAB. L.J. 603, 604 (1984). It is estimated that pension plan assets will total three trillion dollars by 1995. *Id.*; *see* Julianne J. Knox, Comment, Nieto v. Ecker: *Incorporation of Nonfiduciary Liability Under ERISA*, 73 MINN. L. REV. 1303, 1303 n.2 (1989) (explaining increase in pension plan assets since ERISA's enactment).

3 Of course the term "labor law" has become somewhat of a misnomer. The subject is actually labor union management relations.

4 Congress enacted the National Labor Relations Act in 1935. Section 152 of the Act is comparable to § 1002 of ERISA as they are both general definition sections. Yet this section has only been amended three times since enactment. 29 U.S.C. § 152 (1935), *amended by* 29 U.S.C. § 152 (Supp. V 1946), *amended by* 29 U.S.C. § 152(2), (14) (Supp. IV 1974), *amended by* 29 U.S.C. § 152(1) (Supp. II 1978).

occur on a far more frequent basis.[5] It is an area of the law that is evolving at a rapid pace.

Third, ERISA is a politically sensitive subject. This is exemplified by the different congressional committees that have claimed credit for ERISA's passage or have exercised jurisdiction over it,[6] as well as by the power of the political groups involved in making and changing the law.[7]

All of these themes lead to a major conclusion: ERISA is a highly technical, complicated area of the law.

One reason for its complexity is the size of the statute itself.[8] A statute comprising over four hundred sections will inevitably lead to a great deal of complexity. Another cause of ERISA's complexity is its overlap with other statutes, such as the Americans with Disabilities Act ("ADA")[9] and bankruptcy law.[10] This causes not only complexity but conflict as well. Moreover, there are con-

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[5] *See supra* note 3 and accompanying text.

[6] The fact that ERISA is affected by different congressional groups is most vividly illustrated in the statute itself. Section 1132(h) states:

> A copy of the complaint in any action under this subchapter [relating to civil enforcement] by a participant, beneficiary, or fiduciary . . . shall be served upon the Secretary [of Labor] and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action . . . .

29 U.S.C. § 1132(h) (1988).

The statute emerged from a joint effort of four committees: the House Ways and Means Committee, the Senate Finance Committee, the House Education and Labor Committee, and the Senate Labor and Public Welfare Committee. General Motors Corp. v. Buha, 623 F.2d 455, 461 (6th Cir. 1980).

Furthermore, as it relates to fiduciary matters, ERISA grants exclusive jurisdiction to the Department of Labor. 29 U.S.C. § 1132(h) (1988); Note, *Fiduciary Responsibility: Prudent Investments Under ERISA*, 14 SUFFOLK U. L. REV. 1066, 1067 n.11 (1980).

For a discussion of ERISA and how it relates to securities law see Douglas A. Love, *ERISA: The Law Versus Economics*, 25 GA. L. REV. 135, 136-39 (1990).

[7] For example, consumer advocate organizations and employer groups are influential in changing and affecting ERISA law. *See Pension Reforms in Trade Bill Represent Employer Victory, Aide Says*, Pens. & Ben. Rep. (BNA) No. 39, at 1847 (Oct. 3, 1994); *Special Report—Committee Battles Over Claims Foreshadow Bigger ERISA*, HEALTH LEGIS. & REG., June 8, 1994, sec. no. 23, vol. 20. These two politically influential groups are often working for opposite results. *Id.*

[8] The mere number of sections in the statute itself exemplifies this point. 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993).

[9] *See generally* Kathlynn L. Butler, *Securing Employee Health Benefits Through ERISA and the ADA*, 42 EMORY L.J. 1197, 1235-42 (1993). The author suggests that "the EEOC, under the ADA rather than ERISA, is attempting to address ERISA's flaws by claiming that disability-based distinctions in health plans are prohibited unless the employer can prove that distinctions are, in fact, not discriminatory or that a legitimate business justification is the basis for such distinction." *Id.* at 1240.

flicting policies within the statute itself, which is to be expected because of the complicated statutory regulation of pensions.

Because of the amount of money involved and because the technical aspects of the law make it so difficult to understand and control, a case can be made for more regulation. For example, the misuse of pension funds is one of the greatest areas of union corruption, largely due to the amount of money involved.[11] The billions of dollars at stake[12] have made it tempting for people to try to control the use of pension funds and have led to a series of abuses.[13] Such opportunities for abuse are equally available to employers.[14] Employers can save an enormous amount of money if they delay making contributions to pension funds for a period of time. This provides a great temptation to use the funds for purposes other than those specified in the pension plans. To prevent the misuse of funds, a more complex statutory scheme is necessary. Yet greater complexity means additional problems.

The more complex a law is, the more likely it is that it will be violated. Mr. Sirkin pointed out that there are thousands of inadvertent, and probably thousands of intentional, violations of the law.[15] ERISA's complexity makes it easy to make a mistake and

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[10] *See, e.g.*, Note, *Exemption of ERISA Benefits Under Section 552(b)(2)(A) Of The Bankruptcy Code*, 83 MICH. L. REV. 214 (1984).

[11] *But see OIG's View of DOL Enforcement Problems Is "Overblown," Borzi Tells Conference*, Pens. & Ben. Rep. (BNA) No. 22, at 983 (June 4, 1990) (explaining one person's view that private pension system should not be compared to savings and loan crisis).

[12] *See supra* note 2 and accompanying text.

[13] *See* 29 U.S.C. § 1001(b) (1988).

[14] The abuses of many pensions spurred the development of the ERISA statute and guided its inclusion of the trustee and fiduciary aspects of the law. *See* Knox, *supra* note 2, at 1311-22.

Specifically stated, "[b]efore ERISA, trustee abuse and corruption through self-dealing, imprudent investments, and misappropriations of employee benefit plan funds prevented many participants from receiving their benefits." Knox, *supra* note 2, at 1306; *see also Testimony on ERISA Enforcement Before The House Government Operations Subcommittee on Employment and Housing*, Daily Lab. Rep. (BNA) No. 148, at D-1 (Aug. 3, 1989) [hereinafter *Testimony*].

[15] *See Testimony*, *supra* note 17. This report relates the findings of a study conducted by the Department of Labor's Inspector General on 168 private pension plans during the period of July 1986 through July 1987. *Id.* The Inspector General found:

> $18.7 million in misused assets . . . either were not found, or not disclosed during routine independent audits. This is a rate of 0.3% in misused assets—not an alarming proportion unless the samples is [sic] projected to the total dollars in private pensions. If the 0.3% violation rate holds for all plans, we may be talking about more than $4 billion in misused assets.

Id.

tempting to intentionally violate the law under the guise of mistake. Therefore, the law will be routinely violated.

Complex statutes are inevitably difficult to enforce.[16] Enforcement of a statute of this magnitude and complexity requires a major bureaucracy. The need for this type of bureaucracy, however, is arising at a time when public opinion is strongly opposed to governmental expansion. Furthermore, the President's plan to "re-invent" government really amounts to reducing the number of federal employees.[17] It would be difficult to reconcile today's hostility toward increasing bureaucracy[18] with the need for the expanded bureaucracy required to enforce ERISA. Enforcing the statute selectively would create more complexity, confusion, and political resentment.

The good news for academics such as myself, David Gregory, and the members of the *St. John's Law Review* is that all of this complexity, confusion, and conflicting policies make this a ripe area for study. In fact, even after a great deal of litigation on the subject,[19] this remains an area about which we know very little. What we do know is that ERISA is as important as it is complicated.

We need to learn more by investigating the workings of ERISA. In fact, one of the themes expressed throughout the symposium is that this is an area that requires not just an analysis of case law, but a careful and critical examination of what is evolving in the various practice areas that have been discussed. Although the point is easy to make, it proves to be enormously difficult to accomplish.

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16 *See generally New Task Force on ERISA Enforcement Established to Examine Problem Areas*, Daily Lab. Rep. (BNA) No. 172, at A-3 (Sept. 5, 1985); Pensions, *Pension Dispute Resolution Proposal Seen As Potentially Valuable Enforcement Tool*, Daily Rep. (BNA) No. 180, at A-2 (Sept. 17, 1991).

17 *See* Elizabeth Schwinn, *Re-Invented Government to Pay Crime Bill's Tab*, SAN DIEGO UNION-TRIB., Aug. 28, 1994, at A14 ("The re-inventing government proposal designed by Vice President Gore is targeted to cut the 2.1-million-person federal work force by about 221,000 by 1999.").

18 *See Bureaucracy in America*, THE ECONOMIST, Sept. 11, 1993, at 16 ("Americans say they hate government, and many mean it."); David E. Rosenbaum, *Remaking Government: Few Disagree with Clinton's Overall Goal, but History Shows the Obstacles Ahead*, N.Y. TIMES, Sept. 8, 1993, at A1 ("The bureaucracy is bloated, wasteful and inefficient.").

19 *See* Monica Gallagher, *Recent Developments in Concepts Relating to Fiduciary Liability*, 16 FORUM 753, 753 (1981) ("During those few years [1974-1979] there have been more than 3000 lawsuits filed under Title I . . . .").

Some of the questions that need to be explored are: Is there too much regulation?[20] Should ERISA be market driven? Should the fiduciary obligation be market driven? Should states be given greater power? Where should the regulatory power be located?[21] Finally, we must address questions related to harmonizing ERISA with other laws.[22] One of the things I think this symposium has done is to identify questions that should have been raised long ago. I hope our discussion today will lead to more in-depth research in many of these different areas.

I had another more idiosyncratic response to this symposium, peculiar to a person who remains academically interested in labor management relations and the role of unions. Most of my scholarship has dealt with unions,[23] but few of the speakers today have even used the term union. Professor Stein mentioned it, but that was in regard to something that took place twenty years ago when unions were powerful and important.

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20 *See* Richard C. Reuben, *The Pension Law Squeeze: As Companies Reconsider Retirement Plans, ERISA Lawyers Have Less Work*, A.B.A. J., Oct. 1994, at 12 ("Congress and the IRS have 'cut back on the tax benefits and increased the burden of compliance to the point where many employers today are saying it's just not worth it' . . . .") (quoting Kirk F. Maldonado, employee benefits lawyer with Riordan & McKinzie, Costa Mesa, Cal.).

21 In regard to the self-funded employee benefit plans, those governed by ERISA afford employers less protection than those governed by state regulations. *See* Swedback, *supra* note 12, at 788-93.

22 *See, e.g.*, Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 744 n.21 (1985) ("Thus application of the McCarran-Ferguson Act lends further support to our ruling that Congress did not intend mandated-benefit laws to be pre-empted by ERISA."); *see also* Helene Yvette Spielman Sherman, Note, *ERISA Benefits Under Bankruptcy Code and a New York Debtor's Rights*, 58 BROOK. L. REV. 177, 178-83 (1992) (discussing issue of whether ERISA plans are included in debtor's estate for purposes of Bankruptcy Code); Whitman F. Manley, Note, *Civil Actions Under ERISA Section 502(a): When Should Courts Require That Claimants Exhaust Arbitral or Intrafund Remedies?*, 71 CORNELL L. REV. 952, 954-56 (1986) (discussing ERISA claims which arise out of Labor Management Relations Act of 1947); John M. Walker, Note, *The Employee Retirement Income Security Act of 1974: An Overview of ERISA Pre-Emption*, 17 AM. J. TRIAL ADVOC. 529 (1993) (discussing ERISA preemption of state laws).

23 Julius G. Getman, *The Courts and Collective Bargaining*, 59 CHI.-KENT L. REV. 969 (1983) [hereinafter Getman, *Collective Bargaining*]; Julius G. Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 MD. L. REV. 4 (1984); Julius G. Getman, *The Changing Role of Courts and the Potential Role of Unions in Overcoming Employment Discrimination*, 64 TUL. L. REV. 1477 (1990); Julius G. Getman, *Ruminations on Union Organizing in the Private Sector*, 53 U. CHI. L. REV. 45 (1986); Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803 (1993); Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415 (1983).

In considering the connections between unions and ERISA, I think of my father who was only ten years old when he began as a garment worker in the early 1900s. At the time, there was a great deal of discrimination against senior employees, who were often replaced simply because someone younger was willing to work at lower wages. There was no health care and no pensions. The lives of senior workers were characterized by feelings of insecurity, fear, and anxiety.

Collective bargaining was the first method used to address such issues. The unions fostered the concept of seniority, by which employees, over time, developed a legally recognizable interest in the job, a form of ownership which offered job protection to older employees.[24] A senior employee could not so easily be replaced. Although the concept of seniority has developed a bad reputation,[25] at the time it was first developed in collective bargaining the idea that workers owned a piece of their job was revolutionary.[26] Courts have slowly adopted the notion, but the process would probably have taken another fifty years without the efforts of the unions. Unions, of course, also pioneered the negotiation of health and pension plans for employees.[27]

Today legal regulations and government mandates are taking the place of the union. This increasing governmental role can be interpreted in two very contradictory ways. One fairly common point of view is that unions are no longer needed because the government is now doing their job. I take the opposite view. I believe that if we lose an institution which has played such a major a role

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24 *See* Getman, *Collective Bargaining*, *supra* note 28, at 969 ("The widespread use of seniority as a result of collective bargaining and the almost automatic limitation on the employer's right to discharge have helped to establish the idea that employees, through their work, develop a legally enforceable claim to their jobs . . . .").

25 *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 133 (1984) ("There are obvious costs of seniority, such as possible reductions in efficiency as workers find merit to be less well rewarded . . . .").

26 *But see* MORGAN O. REYNOLDS, POWER AND PRIVILEGE: LABOR UNIONS IN AMERICA 253-54 (1984) ("Regarding jobs as property rights is not progressive. It is a return to the restrictions of two centuries ago when workers could not freely contract for mutually profitable employment. It is a mild form of slavery, with employers prosecuted as law breakers when they seek to terminate or revise an employee's service. Over the long run, it is just another complication in the bewildering maze of restrictions on productive activities, with losses spread over all income earners and consumers in the economy.").

27 FREEMAN & MEDOFF, *supra* note 30, at 62. "[U]nions have a sizable positive impact on the provision of fringe programs and on the dollars spent on fringes, with the percentage increase in fringe spending attributable to unionism exceeding the percentage increase in wages attributable to unionism." *Id.*

in developing the concept of dignity for employees,[28] we risk losing innovations similar to pensions, health care, and seniority.[29] Society would suffer a great loss. ERISA serves as a reminder of what society stands to lose should the union movement in the United States continue to disintegrate.

I am aware that organized labor bears a considerable amount of the blame for its own demise.[30] Yet, we should bear in mind the achievements of labor unions long ago[31] when they were much more vital institutions.[32] If unions do not become revitalized, it will be a loss to society. On that note I will end. I enjoyed listening to everyone today. I believe that this panel has taught me something about the law and has given me a greater appreciation of the importance of ERISA, for which I thank you.

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[28] *See* REYNOLDS, *supra* note 31, at 246.

> Labor unions give 'workers' (presumably the 'little people') a sense of place, a sense of belonging in an otherwise rootless, changing industrial-technical society. As a source of traditional authority, unions are valuable for their reactionary guildlike nature. Tribal organizations confer 'dignity' and status on individuals and lift them out of a role as depersonalized cogs in an immense machine.

Id.

[29] *But see* REYNOLDS, *supra* note 31, at 38. ("These services [insurance and retirement programs] . . . are valuable, but unions, particularly adversarial unions, are not needed to perform them. And many nonunion enterprises today are demonstrating this.").

[30] Unions have brought about their own demise through "the insulation of union leaders from their members, discriminatory, [sic] denial of membership and unfair discipline, and non-democratic selection of officers." Julius G. Getman, *Dedication: Clyde Summers*, 138 U. PA. L. REV. 621, 621 (1990). Other commentators have attributed the demise to ideological changes—"the abandonment of the early social unionism of the CIO in favor of a modern version of business unionism," or "a shift from a collectivist, egalitarian ethic to an individual one." KIM MOODY, AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM xvi (1988).

[31] *See, e.g.*, MOODY, *supra* note 35, at 1-2 (recalling 116-day steel strike of 1959, which resulted in steel workers gaining wage increases, pension and health insurance improvements, and cost of living allowances).

[32] Union membership has been declining since 1979. MOODY, *supra* note 35, at 4. The percentage of U.S. workers in unions has been declining since 1954. MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE U.S. xiv (1987).

> [U]nions today are on the defensive and reeling from repeated defeats. Concessions to companies in recent contract bargaining; loss of any national political influence; employer-led union busting; failures in new organizing; and the disintegration of decades long stable bargaining relations in many major industries, including construction, trucking, air, and coal mining . . . ."

Id.